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Letter from the Editor-in-Chief

Since 1955, the *Howard Law Journal* has published a myriad of ground-shaking legal articles, essays, book reviews, and student notes and comments in an effort to not only uphold, but also build upon the legacy of this historic institution. While we understand the issues of today are broader in reach and extend beyond the realms of racial discrimination and disparities, our commitment to social justice is nevertheless unwavering. In that spirit, we are pleased to present Issue 1 of Volume 57.

The *Journal* is especially proud to present this issue as it highlights a monumental moment in history. This year marks the 150th anniversary of the Emancipation Proclamation, and in true Houstonian fashion, the former part of this issue is dedicated to a special collection of work that explores and critiques this executive order in an effort to unveil its true underpinnings and effects on eradicating one of the most inhumane acts against mankind: the enslavement of African people. Therefore, we open this issue with a reprint of *Emancipation and the Proclamation: Of Contrabands, Congress, and Lincoln*, originally published in Issue 2 of Volume 49 of the *Howard Law Journal* and written by our very own Professor Robert Fabrikant. In the article, Professor Fabrikant asserts that Abraham Lincoln’s contributions to emancipation have historically been largely overstated, especially when compared to the emancipation efforts of Congress and the contributions of fugitive slaves. The next piece, also authored by Professor Fabrikant and entitled *Lincoln, a Reluctant, but Still Great Eman cipator: A Review of James Oakes, Freedom National: The Destruction of Slavery in the United States, 1861–1865*, provides a riveting critique of James Oakes’s argument that Lincoln was not reluctant in his emancipatory efforts. Excitingly enough, Professor James Oakes, a distinguished Civil War historian, follows and responds to Professor Fabrikant’s critique with his own piece entitled *When Did Lincoln Stop Beating His Wife? A Reply to Robert Fabrikant*. The next two pieces are essays written by former *Howard Law Journal* members. Former Editor-in-Chief Angela M. Porter’s *James Oakes’s Treatment of the First Confiscation Act in Freedom National: The Destruction of Slavery in the United States, 1861–1865* and former Executive Solicitations and Submissions Editor Nadine F. Mompremier’s *Emancipation and the Second Confiscation Act: Lincoln Had Other Ideas* explore two critical pieces of congressional legislation that preceded the Emancipation Proclamation and highlight Congress’s often overlooked efforts towards abolishing slavery.
Notwithstanding the importance of the Emancipation Proclamation anniversary, we are pleased to present a diverse group of articles in the remaining portion of this issue. Robert Bejesky leads with *An Albatross for the Government Legal Advisor Under MRPC Rule 8.4*, which provides a profound look into lawyers’ ethical obligations under the Model Rules of Professional Conduct when rendering biased legal advice to a government-client. In *A Shared Sovereignty Solution to the Conundrum of District of Columbia Congressional Representation*, federal government attorney James L. Craig, Jr. posits that longed-for congressional representation for the District of Columbia is possible if Congress would share sovereignty over the District of Columbia with another state. Jennifer L. Wright’s *Religious Law Schools and Democratic Society* examines the intersection of religion and law as it pertains to legal education and reveals the potential benefits that are birthed at such a juncture. Lastly, David A. Singleton authors a controversial article, *Kids, Cops, and Sex Offenders: Pushing the Limits of the Interest-Convergence Thesis*, which incorporates his experience as counsel for sex offenders in a thought-provoking discussion aimed towards converging sex offenders’ interests with child protection interests to advocate for the rights of this country’s “most despised people.”

This issue also includes pieces by two of our editors. First, Trisha Grant, a Senior Staff Editor, explores the use of intragovernmental litigation between federal agencies in *EPA’s Remedies for Federal Agency Compliance Under CERCLA: A Look at Judicial Enforcement*. Second, Cindy C. Unegbu, a Senior Notes and Comments Editor, argues in *National Security Surveillance on the Basis of Race, Ethnicity, and Religion: A Constitutional Misstep* that the overreaching surveillance authority vested in the United States government violates the Fourteenth Amendment’s Equal Protection Clause because of its high level of intrusiveness.

We are ever proud to present these varied pieces of legal scholarship. We are certain that they are a true reflection of the bold and audacious scholarship put forth time and again by this *Journal* and this institution. On behalf of the members of the *Howard Law Journal*, I thank you for your continued support and hope you will find Issue 1 of Volume 57 to be intellectually enriching.

Erika A. James  
Editor-in-Chief  
2013-2014
Emancipation and the Proclamation:
Of Contrabands, Congress, and Lincoln*

ROBERT FABRIKANT**

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also is the Director of the Academic Success Program and the Faculty Advisor to the National
Moot Court Team at Howard University School of Law. He wishes to thank Professor Michael
Duggan for sending him in the direction of the Emancipation Proclamation during a course on
the Civil War in the Liberal Studies Program at Georgetown University and for being a source of
encouragement and intellectual stimulation. He also wishes to thank Ms. LaNasha Houze of the
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The Civil War resulted in the abolition of slavery in the United States, and President Abraham Lincoln has generally been credited with having emancipated the slaves. In the midst of the War, Lincoln issued the Emancipation Proclamation and it is perhaps the principal source of his reputation as the “Great Emancipator.” This Paper concludes that Lincoln’s contribution to emancipation up to and including the issuance of the Emancipation Proclamation has been...
Of Contrabands, Congress, and Lincoln

vastly overstated, and that the contributions of the Civil War Congress,3 and especially that of “contrabands” and fugitive slaves,4 has been understated by historians.

My conclusions are based on a legal analysis of the responses by Lincoln and the Civil War Congress to the issue of emancipation, and the role played by fugitive slaves in forcing Lincoln and Congress to focus on emancipation as a means of winning the War. Moreover, from a legal standpoint, the Proclamation was redundant with legislation already enacted by Congress. Even more importantly, self-emancipation by fugitive slaves was widespread and irreversible well before the Proclamation was issued.5 One reason the contrabands may have been overlooked is that their contributions came in a legally unrecognizable form, sweat equity, and not approved in majestically sounding legal pronouncements. The title of this Paper reflects my view as to the order in which responsibility should be allocated among the contrabands Congress and Lincoln for bringing about emancipation.

This Article examines key legal arguments relied upon by Lincoln’s defenders and his detractors to support their views as to whether Lincoln deserves the accolade Great Emancipator. I conclude that Lincoln’s defenders have wrongly relied upon a number of legal arguments to bolster Lincoln’s reputation. Lincoln’s

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3. The 37th Congress.
4. “‘Contraband’ was a term used in the international law of warfare to designate certain goods of a neutral nation (such as munitions) that could not without risk of confiscation be supplied to a belligerent nation. General Benjamin F. Butler, stationed at Fortress Monroe in the spring of 1861, first applied the word to fugitive slaves entering arm lines. His argument that slaves put to military use by the enemy became sizeable as contrabands of war was endorsed by Secretary of War Simon Cameron and incorporated in the SCA.” DON E. FEHRENBACHER, THE SLAVERYHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT’S RELATIONS TO SLAVERY (Ward M. McAfee ed., 2001) [hereinafter SLAVEHOLDING REPUBLIC]. The term “contraband” was coined by Union General Benjamin Butler in May 1861 to provide a legal justification for not returning runaway slaves to their Confederate owners. See discussion infra pp. 46–51.
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. But the legal significance of the Proclamation was far outweighed by its practical effect and moral symbolism. In those two respects the Proclamation made an unmistakably important contribution to the destruction of slavery, though not to a greater extent than the cluster of emancipatory laws enacted by the Civil War Congress (sometimes referred to herein as the “Emancipatory Legislation” or “the Legislation”).

Prior to issuing the Proclamation, Lincoln’s contribution to emancipation was largely overshadowed by the Civil War Congress, and by Blacks themselves. Legal arguments employed by Lincoln’s supporters have clouded the significant emancipatory contribution made by the Civil War Congress, and most tragically have denigrated the herculean efforts made by Blacks to destroy slavery, principally by fleeing the South. A strong argument can be made that the Proclamation would not have been issued but for the significant, self-emancipation already achieved by Southern Blacks. Lincoln never acknowledged self-emancipation as one of the factors that motivated him. But by the time he issued the Proclamation, he understood that whether or not the War was won it would not be possible to re-enslave Blacks or to restore slavery. The bell of self-emancipation could not be unrung.

A central irony of the War was the Confederacy’s belief that secession was necessary to preserve slavery. In fact, the opposite was true. Slavery was etched in the Constitution. Its very existence had long depended upon the blessing and the strong hand of the federal

6. An important exception is WILLIAM K. KLINGAMAN, ABRAHAM LINCOLN AND THE ROAD TO EMANCIPATION, 1861-1865 (2001), which I believe sets forth the most even-handed, mistake-free analysis of Lincoln and his struggle with emancipation.

7. As one historian has rightfully put it, “From the outbreak of the war until July 1862, Lincoln’s public attitude on emancipation was to reprehend it.” GEORGE FORT MILTON, CONFLICT: THE AMERICAN CIVIL WAR 222 (1941).

8. See KLINGAMAN supra note 6.

9. Thus in his second annual message to Congress in December 1862, just one month before he issued the Final Proclamation, Lincoln stated that “it would be impracticable to return to bondage all slaves who shall have enjoyed actual freedom of the war . . . .” 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN 534, 535 (Roy P. Basler ed., Rutgers University Press 1953) [hereinafter COLLECTED WORKS].
government. Secession ripped away the federal protective veil and exposed slavery to destructive forces that would not otherwise have been unleashed. But just as secession fatally wounded the “peculiar institution,” slavery poisoned the Confederacy’s ability to win the War. It was Congress, not the President, however, that took the initiative in attacking the Confederacy’s reliance on slavery and assuring that Blacks would be a military asset for the North, not the South.

Part I discusses the constitutional background of slavery and whether the federal government had a constitutional obligation to return slaves to Confederate owners during the War. Part II describes how Congress responded to the irrepressible and ever-increasing flight of contrabands from the Confederacy, and to the Confederacy’s military use of slave labor. Part III sets out the manner that Lincoln and his generals dealt with the contraband, examines Lincoln’s attitude about slavery, and then summarizes the Proclamations. Part IV reviews recent literature that discusses whether Lincoln deserves to be called the Great Emancipator and analyzes the legal arguments advanced by Lincoln’s supporters and detractors.

Lincoln’s racial views undercut the argument that he acted for humanitarian reasons when he issued the Proclamation. Quite apart from his racialism, there are many other reasons for believing that Lincoln was not motivated by humanitarian considerations when he issued the Proclamation. Lincoln’s racial views and his lack of humanitarian motivation in issuing the Proclamation substantially detract from his claim to the title of Great Emancipator.

Before delving in here, the reader deserves a word of caution. The responsibility of the historian, including the legal historian, is to recount the facts accurately, to give credit where it is due, and to withhold where it is not. In plying his trade, the historian relies upon

10. SLAVEHOLDING REPUBLIC, supra note 4. Frederick Douglass correctly noted that when the war began, “[T]he South was fighting to take slavery out of the Union and the North [was] fighting to keep it in the Union . . . .” W. E. BURGHARDT DuBOIS, BLACK RECONSTRUCTION, AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860-1880 58 (1962) (quoting Douglass’ comments in Boston in 1865).

11. For an excellent development of this thesis, see WILLIAM W. FREEHLING, THE SOUTH VS. THE SOUTH: HOW ANTI-CONFEDERATE SOUtherners SHAPED THE COURSE OF THE CIVIL WAR (2001). Freehling argues that the existence of slavery created a significant division in the south between slave and non-slave-owners such that Whites in the latter category saw the war as one to preserve slavery and gradually came to oppose the war. Though this may largely be true, I do not think that Freehling gives sufficient weight to the perceived interest of White non-slave-owners in preserving slavery as a necessary means of race control.
the conduct of the key actors—their actions and their words. This is an especially precarious task in dealing with Lincoln. When speaking, he was always audience-specific, especially with respect to the issues of slavery and emancipation.12 And, he was exceedingly long on political will, but correspondingly short on candor.13 Lincoln was not reluctant to say whatever he thought necessary to achieve the one goal from which he never wavered, which was the unifying theme of his presidency: to preserve the Union.14 With this single exception, it is possible to find statements by Lincoln to support almost any proposition, including ones that are entirely contradictory. Certainly emancipation falls into this latter category.

Lincoln’s lack of consistency regarding emancipation reflected his view that emancipation was a means to preserve the Union, not an end in and of itself. Lincoln’s commitment to emancipation was entirely dependent on his moment-to-moment evaluation of whether and how it could serve the goal of preserving the Union. Lincoln’s fluid, and situational, view of emancipation encumbers the task of evaluating his contribution to emancipation.

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12. Thus, Professor Wills rightly observed that “Lincoln . . . calibrated what he had to say about slavery according to his audience.” Gary Wills, Lincoln at Gettysburg: The Words that Remade America 92 (1992). Almost fifty years earlier Professor Hofstadter had made a similar point. Richard Hofstadter, The American Political Tradition and the Men Who Made It 116 (1948).

13. Even a staunch Lincoln defender was compelled to note Lincoln’s propensity to indulge in “‘economies’ with the truth . . . .” Wills, supra note 12, at 286 n.8. It is important to distinguish between eloquence and authenticity. Lincoln’s lack of genuineness diminishes the content of his message and renders his words an unreliable canvas upon which to construct a portrait of him. But see Ronald C. White, The Eloquent President, A Portrait of Lincoln Through His Words (2005); Don E. Fehrenbacher, The Words of Lincoln, in Abraham Lincoln and the American Political Tradition (1986). There is no denying, however, that Lincoln’s use of words was truly exquisite, and supports entirely Professor White’s conclusion that Lincoln was our most eloquent president.

14. Thus, on August 22, 1862, just one month before issuing the Preliminary Proclamation, Lincoln wrote the following to Horace Greeley, editor of the New York Tribune:

The sooner the national authority can be restored; the nearer the Union will be “the Union as it was . . . .” My paramount object in this struggle is to save the Union, and is not either to save or to destroy slavery. . . . [If I could save [the Union] without freeing all the slaves, I would do it; and if I could save it by freeing some and leaving others alone I would also do that. What I do about slavery, and the colored race, I do because I believe it helps to save the Union; and what I forbear, I forbear because I do not believe it would help to save the Union.

See Collected Works, supra note 9, at 388–89 (emphasis in original).
I. THE CONSTITUTIONAL STATUS OF SLAVES AND THE
CONSTITUTIONAL DUTY TO RETURN SLAVES
DURING THE WAR

The onset of the Civil War raised two related, but distinct, legal
questions regarding slavery. First was the extent to which the Consti-
tution barred the federal government from interfering with slavery in
the states where it existed. Even assuming the Constitution mandated
non-interference, did this change as a result of the War? The second
question was whether the Union was obligated to comply with the
constitutional and statutory provisions requiring that fugitive slaves be
returned to their owners. The answer to both of these questions de-
depended upon whether the Confederate states and their citizens should
be treated as being part of the Union despite secession, and whether
the Constitution or the international law of war governed the
hostilities.

Lincoln and Congress believed that the Confederate states acted
illegally in seceding from the Union. Lincoln referred to them as the
“so-called seceded States.” Did this mean that they continued to
enjoy rights under the Constitution despite their repudiation of the
Constitution? And, did loyal citizens within the so-called seceded
States have the right to be protected by the Constitution even if their
rebel neighbors did not? Lincoln regarded these as difficult questions
and was admittedly puzzled by how to answer them.

The answer to these questions turned, in part, on whether the
War was a war or an insurrection. If the latter, then there were strong
arguments that the Constitution governed the hostilities; if, however,
the hostilities were a war, then the international law of war gov-
erned. International law gave the Union government considerably

15. See, e.g., Special Message to Congress, July 4, 1861, in 2 ABRAHAM LINCOLN SPEECHES
& WRITINGS, 1859-1865: SPEECHES, LETTERS, AND MISCELLANEOUS WRITINGS PRESIDENTIAL
MESSAGES AND PROCLAMATIONS 258 (Don E. Fehrenbacher ed., 1989). See generally Akhil
16. See infra note 120 and accompanying text.
17. After the war, the Supreme Court made clear that with respect to the seceded states and
their citizens, “[D]uring [the] condition of civil war, the rights of the State as a member, and of
her people as citizens of the Union, were suspended. The government and the citizens of the
[seceded] State, refusing to recognize their constitutional obligations, assumed the character of
enemies . . . .” Texas v. White, 74 U.S. 700, 727 (1868). In contrast, as to states which remained in
the Union, as was made clear in Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866), the Constitution
remains fully applicable during time of war. The Court rejected the argument that “necessity”
dictated the opposite result. Id. at 121–24. The Court found that “the government, within the
Constitution, has all the powers granted to it, which are necessary to preserve its existence.” Id.
at 120–21. But, during war, international law governs the manner in which belligerents conduct
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more power to wage war than the Constitution gave it to deal with an insurrection, but international law could apply only if the hostilities were between two sovereign nations.

Congress and Lincoln believed that the Confederate states lacked the power to secede. Moreover, the Union government did not want neutral countries such as Great Britain and France to recognize the Confederacy as a sovereign, thus implying legitimacy for the act of secession. Neutral countries eventually recognized the Confederacy as a sovereign entity, but Lincoln continued to refer to the hostilities as an insurrection,\(^\text{18}\) though he sometimes called it a war.\(^\text{19}\) But the choice of nomenclature was not, and indeed could not be, controlling for legal purposes.

As the Supreme Court said in the midst of the War, the Union had to meet the Confederate show of force “in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by [Lincoln] or [Congress] could change that fact.”\(^\text{20}\) The Court held that the Union could exercise belligerent power under the international law of war without conceding the sovereign status of the Confederacy. By endorsing a dual status approach, the Court relieved the Union government of the need to comply with the Constitution in dealing with the Confederacy and its citizens of the Confederacy. This was an important legal victory because the Constitution was a strait jacket for conducting war. Its limitations too easily converted it into a “suicide pact.”\(^\text{21}\)

hostilities against each other. International law does not override the Constitution. It simply provides another layer of legal norms to determine the propriety of belligerent conduct.

18. DAVID H. DONALD, LINCOLN 302 (1996). Donald, Lincoln’s foremost biographer, says Lincoln called the hostilities a “rebellion” over 400 times. \textit{Id.}

19. \textit{Id.} at 302. Lincoln’s frequent use of both of these words to describe the hostilities disproves Professor Gary Wills’ wordsmith approach to Lincoln and his concept of the War. WILLS, supra note 12, at 133–37. Although not commented upon by Wills, Lincoln used the word “war” to describe the War in the Gettysburg Address: “Now we are engaged in a great civil war . . . . We are met on a great battle-field of that war.” \textit{Id.} at 261, 263.

20. The Prize Cases, 67 U.S. (2 Black) 635, 669 (1862). In this case the Court upheld the Union blockade of Confederate ports, and held that the property of persons residing within the Confederacy was properly subject to capture as “enemy property.” Conversely, and correctly, after the War the Court held that the Confederacy exercised belligerent powers. Ford v. Surget, 97 U.S. 594 (1878) (holding that a Confederate officer was not liable for destroying cotton to avoid it coming into possession of Union army); see also New Orleans v. N.Y Mail S.S. Co., 87 U.S. (20 Wall.) 387 (1874); Hall v. Coppell, 74 U.S. (7 Wall.) 542 (1869); Mauran v. Alliance Ins. Co., 73 U.S. (6 Wall.) 1 (1867); In re Mrs. Alexander’s Cotton, 69 U.S. (2 Wall.) 404 (1864).

21. Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (“[I]f the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”). Justice Jackson was the first to warn of the dangers of interpreting the Constitution in a suicidal manner. See generally RICHARD A. POSNER, BREAK...
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Once the war began, two phenomena converged which made it impossible for the North to ignore the issues of slavery and emancipation, though many of its residents wished to do so. First, early in the war the North received the rude awakening that slavery was not a harmless, domestic institution of the South, but that slaves were being used by the Confederate army. Second, even before the fall of Fort Sumter, there was an irrepressible and ever growing flight of slaves from the Confederacy. These two developments eventually resulted in the enactment of the Emancipatory Legislation and in the issuance of the Proclamation. The collective weight of this Congressional and Executive action accelerated the flight of contrabands from the South. This caused a severe simultaneous deterioration of the South’s military capabilities and a corresponding substantial increase in the military might of the North. These were decisive factors in tipping the military balance in favor of the North.

The infusion of Blacks into the union military solved a growing manpower problem, which the Union government was having difficulty satisfying from its White population, and helped tip the military balance in favor of the North. By the end of the War, almost 200,000 Blacks were serving in the Union army and navy. Approximately one-half of these Blacks were from Confederate states. They constituted about 10% of the personnel in the Union military. The demise of slavery affected the War as much as, if not more than, the War affected slavery.

II. CONGRESS’S RESPONSE TO “CONTRABANDS” AND CONFEDERATE USE OF SLAVE LABOR

It has been reported that the Civil War Congress “passed twenty-six anti-slavery laws.” I have not been able to identify each of these

23. Silvana Siddali, From Person to Property: Slavery and the Confiscation Acts, 1861-1862, at 123 (2005); Phillip Shaw Paludan, The Presidency of Abraham Lincoln 132 (1994). A contemporary historian presents a laundry list of anti-slavery actions by Congress since the commencement of the war, which appears to greatly exceed twenty-six. See
laws. Here, I review six Congressional acts that demonstrate that the Emancipatory Legislation enacted by the Civil War Congress substantially outweighed the emancipatory value of Lincoln’s pronouncements up through and including the Final Proclamation.

Congress began its attack on slavery by enacting the First Confiscation Act (FCA) in August 1861. This statute provided that owners would forfeit their right to the labor of slaves who were engaged in hostile service against the Union. Next, Congress enacted an Additional Article of War, in March 1862. This prohibited the Union military from returning fugitive slaves to their owners. Then, in April 1862, Congress abolished slavery in the District of Columbia, with compensation to loyal owners. Two months later, in June 1862, Congress enacted legislation providing for uncompensated emancipation in the federal territories. Finally, on July 17, 1862, Congress enacted the Second Confiscation Act (SCA) and the Militia Act. The SCA emancipated escaped slaves of rebel owners. The Militia Act authorized using Blacks in the military and emancipating Blacks who joined the military. This cluster of legislation, the Emancipatory Legislation, constituted a frontal assault on the institution of slavery, preceded the Final Proclamation by five to seventeen months, and served notice that, despite Lincoln’s public utterances to the contrary, the War was not simply a war for Union, but also a war of liberation.

During the entire period that Congress enacted this body of revolutionary, anti-slavery legislation, Lincoln sometimes stood in the way. On the other hand, Congress sought to divest the Confederacy of slave labor, one of its most important military assets, and convert it for use by the Union’s military forces. Meanwhile, Lincoln largely confined himself to making public statements that the purpose of the War was to preserve the Union, not to free the slaves. Much of his time was spent attempting to convince the Border States to adopt


28. An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels, and for Other Purposes (Second Confiscation Act), ch. 195, 12 Stat. 589 (1862); Militia Act, ch. 201, 12 Stat. 597 (1862).
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gradual emancipation measures, proposing colonization schemes, and raising the specter of deportation to rid the country of Blacks. It was only after his overtures to the Border States were rebuffed, in mid-July 1862, that Lincoln expressed a commitment to emancipate slaves in the Confederacy. But Lincoln did not abandon his colonization schemes until he issued the Final Proclamation on January 1, 1863.

A. The First Confiscation Act

Congress’s opening salvo against slavery came in the form of a statute entitled “An Act to Confiscate Property Used for Insurrectionary Purposes.” Passed on August 6, 1861, this statute came to be known as the FCA, which was later followed by the SCA, passed by Congress almost a year later, on July 17, 1862. The FCA should have borne a title acknowledging that it contained not only confiscation of property provisions, but also a forfeiture of slave provision that was the functional equivalent of a narrowly drawn emancipation decree. Forfeiture was emancipation by a politically palatable name.29

The FCA was a watershed statute, and it was recognized as such when it was enacted.30 The legal and symbolic importance of FCA was not lost upon Border State Congressmen. The Congressional debates demonstrate in colorful detail the concerns of slave state representatives that enactment of the FCA represented a reversal of the seminal understanding that the federal government was constitutionally precluded from interfering with slavery in the slaveholding states. The FCA presaged the Final Proclamation in many important respects, and has justly been described as a “veritable emancipation” proclamation.31 In reality, however, the FCA reached into the confederacy in much the same manner as the Emancipation Proclamation purported to do so. That is to say, the FCA purported to penalize conduct within the Confederacy, which was perfectly legal there, putting slaves to hostile use against the Federal government. Moreover, forfeiture under the FCA was to occur within the Confederacy in the

29. Outright emancipation would have been politically unacceptable to the slaveholding Border States, and offensive to the many Whites in the other Union states who were hostile to blacks.

30. See Cong. Globe, 37th Cong., 1st Sess., 411–12 (1861). The validity of this view had been confirmed recently by the Supreme Court in Dred Scott, which also held that the federal government could not interfere with slavery in non-slaveholding areas as well. Scott v. Sanford, 60 U.S. (19 How.) 393 (1857). Insofar as it applied to non-seceded areas of the country, the FCA was unconstitutional under Dred Scott.

same manner that emancipation under the Final Proclamation was to occur within the Confederacy. Forfeiture and emancipation depended entirely upon the advance of the Union army.

The FCA was the first entirely anti-slavery federal legislation, the first federal pronouncement to treat slaves as persons, not property, and the first federal law, which had the purpose and effect of emancipating slaves. With the enactment of the FCA Congress took aim for the first time at the soft underbelly of the Confederacy: its large, disloyal slave population.

The FCA had four sections. The first three sections provided for the confiscation of property used, or intended to be used, to support the insurrection. Although slaves were widely considered to be “property,” a view infamously confirmed by the Supreme Court four years earlier in the Dred Scott decision, slaves were not subject to confiscation under the FCA. Rather, under section 4, slave-owners “forfeit[ed]” their rights to any slaves whom they “required or permitted . . . to take up arms against the United States, or . . . required or permitted . . . to work or to be employed in or upon any fort, navy yard, dock armory, ship, entrenchment, or in any military or naval service” against the United States. If a slave-owner sought to claim such a slave, “it shall be a full and sufficient answer to such claim that

32. See SIDDIALLI, supra note 23 (giving a recent and interesting development of this thesis); see also LOUIS S. GERTIES, FROM CONTRABAND TO FREEDMAN: FEDERAL POLICY TOWARD SOUTHERN BLACKS, 1861-1865 (1973). Although slaves were not treated as property under the FCA and the SCA, “[t]hey were . . . considered along with property in the argument which held that under the war power the government could seize property and destroy the master-slave relationship enjoyed by the rebels.” HERMAN BELZ, EMANCIPATION AND EQUAL RIGHTS, POLITICS AND CONSTITUTIONALISM IN THE CIVIL WAR ERA 34, n.23 (1978) (citing CONG. GLOBE, 37TH CONG., 2D SESS., App. 211 (1862) (remarks of Luther Hanchett)).

33. Slaves constituted approximately 40% of the total population of the Confederacy. Jefferson Davis estimated that when the Proclamation was issued, the White male population of the North was 13,690,364, versus 5,449,463 for the Confederacy. 2 JEFFERSON DAVIS, THE RISE AND FALL OF THE CONFEDERATE GOVERNMENT 187 (1958). He also estimated that the North had in excess of 1 million men in arms, versus less than 400,000 for the Confederacy. Id. at 187–88. He relied upon these figures in arguing that there was no military necessity to support the issuance of the Emancipation Proclamation. Id. at 179–88.

34. Section one of the FCA stated that “it shall be the duty of the President of the United States to cause . . . [all property subject to confiscation under the FCA to be] seized, confiscated, and condemned.” Act of Aug. 6, 1861, ch. 60, § 1, 12 Stat. 319. Section 3 authorized government attorneys to institute judicial proceedings to condemn confiscable property. Id. at § 3. Lincoln has been rightly criticized for not discharging these statutorily mandated duties. For a President who ostensibly placed so much weight in his Presidential oath to faithfully execute the laws, there is good reason for thinking Lincoln was quite selective about which laws he would enforce.


the [slave] . . . had been employed in hostile service against the Government of the United States . . . .”

The FCA purports to terminate the legal relationship between slave-owners and slaves employed in hostile service, but it does not describe the legal status of the forfeited slaves. Most importantly, the statute does not state that forfeited slaves are free. This omission reflects the considerable difference of opinion that existed at the time as to whether Congress had the power to emancipate slaves, and if so, whether emancipation was politically advantageous. Congress was ever mindful about enacting legislation, which might throw the slave holding Border States into the Confederate camp. It was one thing for Congress to say that slave-owners forfeited their rights to slaves used in a hostile service; it was quite another to say that those slaves were free. Nevertheless, at least as to fugitive slaves who came behind Union lines, the practical effect of the FCA was to emancipate them even though the statute did not expressly grant that right. Although the FCA did not say so, forfeiture was contingent upon the slaves making it behind Union lines.

The confiscation provisions of the FCA contemplated resort to judicial proceedings, and the Lincoln administration used federal courts to enforce those provisions of the statute.39 There is, however, no record of judicial proceedings involving forfeited slaves. Contrary to popular belief, including a statement to that effect by Lincoln, the absence of judicial proceedings involving slaves did not mean that no slaves were freed pursuant to the FCA. Rather, the lack of judicial proceedings reflected the fact that none were needed in order for forfeiture to occur. In contrast to the confiscation provisions, the forfeiture provision of the FCA was, at least on paper, self-executing. A slave need not be seized in order to be forfeited. Nor did forfeiture require a court order. Forfeiture was triggered simply by requiring or permitting a slave to be used in hostile service.

37. Id. The description of hostile service had been narrowed during the legislative debates to avoid freeing slaves who had been used in a non-military way that might assist the Confederate army, for example, to produce crops sold to the Confederate army. See Cong. Globe, supra note 30, at 411.


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The FCA’s forfeiture provisions were never tested in a court of law. There is little doubt, however, that if viewed as an exercise of Congress’s war powers, as surely it was, the FCA would have been upheld. When acting in time of war, Congress exercises the rights of a belligerent sovereign vis-à-vis the enemy and the propriety of its legislation is governed by the international law of war, not the Constitution. Although there was little precedent on point, emancipating the slaves of an enemy sovereign did not violate international law.

The FCA contained no geographical restrictions. It applied throughout the entire country. In particular, it applied to slave-owners in the Union Border States, many of whom were disloyal. As to slave-owners in those states, it would seem that the FCA would be adjudged under the Constitution, not under the international law of

- Its confiscation provisions were upheld in Miller v. United States, 78 U.S. (11 Wall.) 268 (1871).
- For an excellent discussion of international practices at the time of the Civil War regarding the treatment of enemy property, including slaves, see Henry Wheaton, Elements of International Law 369 n.8 (George Grafton Wilson ed., Claredon Press 1936) (1866). After Congress passed the FCA, a principal example of emancipation occurred during the Revolutionary War when the British offered that slaves of colonists would receive their freedom if they fought for the British. But this had a bitter-sweet quality. The colonists had strongly objected to it, and it became a major negotiation point in the post-war settlement. Americans had disputed the right of the British to emancipate their slaves, and John Quincy Adams, on behalf of the United States, took the position in post-war negotiations with the British that their actions were illegal and required compensation. Adams had mild success, but later he became a staunch abolitionist, and took the position that the federal government had the right to emancipate slaves in the South. Adams thought the federal government had that power in its capacity as a sovereign and certainly in its capacity as a belligerent in the event that the South attempted to secede. Moreover, the actions of the British were distinguishable from Congress’ enactment of the FCA. The British merely offered freedom in exchange for desertion. They did not enact legislation seeking to govern relationships within another sovereign. Such legislation would likely run afool of the rule against extraterritoriality. Yet, it seemed self-evident that if international law gave the Union the right to blockade the Confederacy, surely the Union had the right to emancipate the slaves of the Confederacy. As Secretary of War Cameron stated in justifying his instruction that fugitive slaves not be returned to Confederate owners: “Why deprive him of supplies by a blockade and voluntarily give him men to produce them?” 1 The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies No. 2 783 (Washington, Gov’t Prtg. Office 1894) [hereinafter Official Record] (quoting Secretary of War Simon Cameron’s December 6, 1861, Annual Report). It is well established under international law that no country may pass laws that purport to govern the legal relationships in another country. A forfeiture statute must in this important respect be distinguished from a statute authorizing confiscation of enemy property within the territory of the enemy sovereign. A confiscation statute is not self-executing. Its efficacy depends upon a seizure of property, whereas forfeiture and emancipation do not. In this respect Professor Paulsen errs when he states that the Final Proclamation “was, quite literally, the seizure and confiscation of enemy ‘property’ . . . .” Michael Stokes Paulsen, The Civil War as Constitutional Interpretation, 71 U. Chi. L. Rev. 691, 724 (2004). The Emancipation Proclamation did not contemplate, no less require, that slaves be seized in order to be emancipated.
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war. Citizens of states within the Union, even if disloyal, were not citizens of a belligerent enemy sovereign. Disloyal citizens of Union states were governed by the Constitution, not the laws of war.

There is much reason to doubt the constitutionality of the FCA’s forfeiture provision insofar as it applied to Union citizens. The widely accepted view at that time was that the Constitution did not empower Congress to enact laws governing slavery in the Southern states. That power was left to the individual states. The FCA forfeiture provision also appears to conflict with the Fugitive Slave Clause in so far as it precludes the return of a certain category of fugitive slaves to Border State citizens. Moreover, it appears to constitute a Bill of Attainder in so far as it punishes a certain category of persons by virtue of their status. Finally, the forfeiture of slaves resulted in a loss of property beyond the life of the slave-owner, thus violating the Constitutional prohibition on imposing “forfeiture except during the life” of the person convicted of treason. Under the FCA, disloyal Border State slave-owners could lose their slaves without being convicted of treason, yet they were subject to a penalty that exceeded the constitutionally dictated punishment for treason. To make matters worse, the conduct that could result in forfeiture under the FCA might fall well short of treason. Finally, the FCA did not require judicial hearings prior to forfeiture and would thus appear to violate the Due Process Clause.

42. By the term “Union citizens” I mean citizens of states who remained in the Union, and citizens of federal territories, including Washington, D.C. These citizens remain governed by the Constitution, not the international law of war, though there is language in Miller v. United States, 78 U.S. (11 Wall.) 268, 310–11 (1871), to the contrary. See discussion infra.

43. U.S. CONST. art. III, § 3, cl. 2. This issue was addressed in relation to the SCA, not the FCA, by Lincoln and the Supreme Court. Siddali argues that Lincoln preferred not to sign the FCA into law in order to avoid antagonizing the Border State and the South, but if he vetoed the bill, it would have been tantamount to saying the Confederacy should have the “full benefit of the slave population as a military force.” See Siddali, supra note 23, at 91. She goes on to say that “[h]ere is no evidence in any source indicating that Lincoln signed the First Confiscation Act without reluctance.” Id. at 91 n.29. The only “evidence” she cites supporting the view that Lincoln had reluctance is from James G. Blaine, 1 James G. Blaine, Twenty Years in Congress: From Lincoln to Garfield, with a Review of the Events Which Led to the Political Revolution of 1860, at 343 (Norwich, Henry Bill Publishing Co. 1884), who believed that Lincoln “wished Congress would wait on his recommendations.” Id. Fehrenbacher also asserts that Lincoln signed the FCA “reluctantly.” See Slaveholding Republic, supra note 4, at 313. I am aware of no recommendations by Lincoln regarding the FCA. This is in contrast to Lincoln’s forceful, if misguided, suggestions to Congress on the need to revise the SCA in order to avoid a veto.

44. Merely permitting one’s slaves to be used in hostile service might easily fall short of treason.

45. Interestingly, Lincoln expressed doubts regarding the constitutionality of the SCA based on many of the reasons cited here in connection with the FCA, but he never expressed
These arguments were raised by Congressional opponents of the FCA, but were rejected by the Supreme Court in Miller v. United States.\footnote{78 U.S. (11 Wall.) 268 (1871).} Miller involved a challenge to the confiscation of a Confederate rebel’s property pursuant to the FCA and the SCA. The Court held that these statutes had been passed as part of Congress’s war powers, not the power to punish crimes, including treason, under the Constitution.\footnote{Id. at 304.} The Court also stated in dicta that the confiscation would have been upheld without regard to the owner’s “personal guilt . . . [or] whether the owner be an alien or a friend, or even an citizen or subject” of the sovereign attempting to appropriate his property.\footnote{Id. at 305.} Under this broad rationale, it is likely the Court would have upheld the forfeiture provision of the FCA with respect to Confederate and disloyal Border State slave-owners.\footnote{The Court’s dicta is overly broad to the extent that it would permit confiscation or forfeiture of slaves of a loyal Border State slave-owner unless those slaves had been used against the Union. The FCA did not provide for the confiscation of slaves, but if it had, this would have been constitutionally permissible as applied to Border State slave-owners only if their slaves constituted enemy property or contraband. Otherwise, the owner would be entitled to compensation for the deprivation of his property under the Due Process Clause. It would seem that there should not be a different result simply because the mechanism used to deprive the owner of his property is forfeiture rather than confiscation. Forfeiture, or emancipation, without compensation to loyal Border State slave-owners could occur only through an amendment to the Constitution, not through a federal or state statute. For this same reason I believe that the Territories Act is constitutionally suspect. See discussion infra. Interestingly, though the Second Confiscation Act did not provide for confiscation of slaves, Lincoln construed it as causing title to slaves to escheat to the government, which would have decided in advance to emancipate, rather than own, the slave.} 

Enactment of the FCA represented a breakthrough in the stalemate between Congressional radicals and conservatives on the issue of emancipation. This resulted from the fact that Conservatives were surprised to learn that the Confederate army had used slaves at the first Bull Run battle.\footnote{For example, Senator Lyman Trumbull of Illinois stated in support of the bill: “I understand that negroes were in the fight which has recently occurred.” See Cong. Globe, supra note 30, at 219 (referring to the first battle of Bull Run). Similarly, Senator John Ten Eyck of New Jersey stated: ‘Mr. President, no longer ago than Saturday last I voted in the Judiciary Committee against [the forfeiture provision of the FCA], for two reasons: first, I did not believe that persons in rebellion against this Government would make use of such means as the employment of persons held to labor or service in their armies; secondly because I did not know what was to become of these poor wretches if they were discharged.”} The argument against slavery was no longer
moral and economic; it now assumed a distinctly military character. The Union’s prospect of winning the war was seen as depending, at least in part, on its ability to divest the Confederacy of the military value of its slaves.

The FCA raised the specter that the federal government would destroy slavery as a means of winning the War. The FCA showed that Congress was well ahead of the President in understanding the linkage between slavery and Confederate militarism, and in demonstrating a willingness to sever that link as a way of winning the War.

The FCA signaled for the first time that the federal government would not adhere strictly to Constitutional and statutory obligations to return fugitive slaves to their owners. The FCA significantly curtailed the operation of those obligations by forfeiting the claim of slave-owners to slaves who had been employed in hostile service. The Confederacy made considerable hostile use of its slaves. Thus, the FCA precluded the return of a large category of slaves who otherwise would have been subject to recapture under the 1850 Fugitive Slave Act (FSA).

The FCA also sent a message that Union lines would be a safe haven for fugitive slaves. But whether fugitive slaves were welcomed or rebuffed by the military depended on the Commander-in-Chief. Fugitive slaves did not have carte blanche to enter Union lines. They needed the co-operation of Union commanders, but too often fugitive slaves were not greeted with open arms.

The Union army often did not follow the letter or spirit of the FCA. Many Union commanders routinely returned fugitive slaves to their owners or barred their admission into Union army camps. They did this without regard to whether these fugitives had been “employed in hostile service,”

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Id.; See Siddall supra note 23, at 67–77.

51. The South believed that its slaves constituted an important military asset and would enable the Confederacy to free up a disproportionately large percentage of its White population to join the army. See Dubois, supra note 10, at 58 (discussing an article from the Alabama Advertiser in 1861).


53. See Official Record supra note 41, at 754 (referring to October 15, 1861); id. at 784–85 (referring to November 28, 1861); id. at 796 (referring to December 26, 1861). The prac-
taken by disloyal masters. Other commanders took a more sensible approach and refused to return fugitive slaves to their owners. Lincoln never resolved this difference in approach and did not insist upon a uniform approach to the treatment of fugitive slaves by Union commanders. Nor did he require that his generals adhere to the FCA.

A significant purpose of the FCA was to encourage flight by Confederate slaves by opening up the lines of the Union army. Paradoxically, the FCA may have had somewhat of the opposite effect on the Union military. Some Union commanders interpreted the FCA to require the return of fugitive slaves who had not been employed in hostile service. They also believed that the FCA required that the military make the determination as to whether the slave had been so employed. In order to avoid the inconvenience of making that determination, many commanders simply barred fugitive slaves from their camps. Thus, rather than opening up Union lines to receive fugitive slaves, the FCA may have sometimes had the perverse effect of partially closing those lines.

It was Congress, rather than the President, that stepped in to solve the problem. This was consistent with the fact that it had been Congress, not the President, that initially sent a message to Confederate slaves that they were welcome behind Union lines. Lincoln’s ongoing refusal to make good on the welcome mat Congress laid down for fugitive slaves caused Congress to enact legislation which took the issue out of the President’s hands.

B. An Additional Article of War

Slaves began crossing Union lines from the moment the War started. The first reported instance of fugitive slaves entering Union Army camps occurred in March 1861. This posed the questions of whether slaves should be admitted into Union camps or whether they should be returned to their Confederate owners. No statute ad-

54. Id. at 797–98 (referring to December 31, 1861).
55. Id. at 796 (referring to December 26, 1861); id. at 802 (referring to January 14, 1862). General Grant believed that “interpreting [the] Confiscation Acts by troops themselves, has a demoralizing effect, weakens them in exact proportion to the demoralization and makes open and armed enemies of many who, from opposite treatment would become friends or at worst non-combatants.” ULYSSES S. GRANT: MEMOIRS AND SELECTED LETTERS, PERSONAL MEMOIRS OF U. S. GRANT SELECTED LETTERS 1839-1865, at 979 (Mary Drake McFeely & William S. McFeely eds., 1990) (referring to General Orders No. 3 dated January 13, 1862).
56. OFFICIAL RECORD, supra note 41, at 750 (referring to March 18, 1861).
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dressed the question of whether fugitive slaves should or must be admitted into Union military camps or whether they should be returned to their masters.

The FSA established federal tribunals to adjudicate the return of fugitive slaves and defined the rights of slave-owners and the obligations of states into which slaves fled. Under the FSA, escaped slaves could be seized by their masters (or persons acting on their behalf), but seized slaves could not be directly brought back to the state from which they had fled. Rather, they had to be brought in front of federal tribunals in the state where they had been captured. It was these federal tribunals that would determine the fate of fugitive slaves. Seized slaves could not be returned to captivity unless a federal tribunal so determined. Slave-owners were not empowered to circumvent the FSA by bringing their slaves directly back to captivity.

The Union military was not legally barred from returning fugitive slaves to their masters. Indeed, because the 1850 FSA imposed criminal penalties upon anyone who hindered the arrest of fugitive slaves,\textsuperscript{57} it is arguable that the statute required the Union military to cooperate with slave-owners, even Confederate slave-owners. Indeed, with Lincoln’s imprimatur from the inception of the war, many, if not most, Union commanders returned fugitive slaves to Confederate slave-owners.\textsuperscript{58}

Though the military’s practice of returning fugitive slaves to rebel owners was legally supportable, there were compelling legal and military reasons for adopting a contrary policy. First, the military was aware that slave-owners were not complying with the FSA, but were instead directly returning their slaves to captivity. The military had no legal obligation to relinquish possession of slaves to owners who they knew were not going to comply with the FSA. Second, the Union military had no obligation to comply with a federal statute at the behest of slave-owners of states that had seceded from the Union. The FSA conferred rights upon slave-owners of states within the Union, not slave-owners of foreign countries, such as the Confederacy. Third, from a purely military perspective it was suicidal to return slaves to a

\textsuperscript{57} See Fugitive Slave Act, ch. 60, § 7, 9 Stat. 462.
\textsuperscript{58} Thus, for example, on the first reported instance of fugitive slaves entering a Union camp, they were returned to their owners. See also discussion infra.
belligerent that would use slaves to wage war against Union forces.\textsuperscript{59} Congress and Lincoln responded to the problem in totally different ways. Congress prohibited the practice while Lincoln ignored it and continued to do so even after Congress prohibited the practice.

Almost one month prior to passing the FCA, on July 9, 1861, Congress passed the Lovejoy Resolution, which stated that it was “no part of the duty of soldiers of the United States to capture and return fugitive slaves.”\textsuperscript{60} But this Resolution had no binding effect. It simply expressed the judgment of the House that Union army officers and soldiers should stop playing the role of “negro-catcher.”\textsuperscript{61} The Resolution did not address the issue of barring fugitive slaves altogether from army camps.

Eight months later, in March 1862, in the absence of corrective action by Lincoln, Congress took the further step of enacting an Additional Article of War (AAW).\textsuperscript{62} This statute barred Union military and naval personnel from returning fugitive slaves. The statute drew no distinction between slaves who had and had not worked for the Confederate military; nor did the statute distinguish between slaves of loyal or disloyal owners. The AAW did not expressly grant freedom to any slaves, but this was of little practical consequence. Once behind Union lines, fugitive slaves were free because they were beyond the reach of their masters. By barring the Union military from returning slaves, Congress made clear that the Union army was to be an army of liberation, not an army that supported slavery.

The AAW is a uniquely important statute, but it has received scant attention from Civil War scholars.\textsuperscript{63} It walled off fugitive slaves

\textsuperscript{59} In reliance on the second and third reasons cited in the text, some Union commanders, most notably Benjamin Butler, refrained from returning fugitive slaves to their masters. See discussion \textit{infra}.

\textsuperscript{60} \textit{Cong. Globe, supra} note 30, at 32. Lovejoy was Owen Lovejoy, a Congressman from Illinois.

\textsuperscript{61} The term “negro-catcher” was often used by Union military personnel to describe what they perceived to be the unseemly practice of dealing with and sorting out the status of fugitive slaves. Thus, for example, in ordering contrabands to be expelled from Fort Holt, Kentucky, General Grant said, “I do not want the Army used as negro-catchers, but still less do I want to see it used as a cloak to cover their escape.” \textit{Official Record, supra} note 41, at 794.

\textsuperscript{62} An Act to Make an Additional Article of War, ch. 40, 12 Stat. 354 (1862).

\textsuperscript{63} I can find only one reference to the Additional Article of War in the seminal legal history of the Civil War. \textit{James G. Randall, Constitutional Problems Under Lincoln} 356 (1951) [hereinafter \textit{Constitutional Problems}]; \textit{see also} Leron Bennett, \textit{Forced into Glory, Abraham Lincoln’s White Dream} 399 (2000) [hereinafter \textit{Forced into Glory}] (referencing once in his book); Donald’s magisterial biography contains no reference to the AAW. Professor James M. McPherson’s highly acclaimed single volume history of the War only has two references to the AAW. \textit{See James M. McPherson, Battle Cry of Freedom, The
from their masters and sent a message to Confederate slaves that the
lines of the Union military constituted a safe haven. The AAW sought
to take the military out of the slave recapture process, and to leave
that process entirely in the hands of the existing civil machinery that
implemented the Fugitive Slave Clause in the Constitution (FSC)\textsuperscript{64}
and the FSA. The AAW did not prelude the military from cooperat-
ing with civil remission authorities; it simply barred the military from
making remission decisions on their own. The military could turn fu-
gitive slaves over to civil recapture authorities, but could no longer
bypass civil authorities and return fugitive slaves directly to their
owners.\textsuperscript{65}

At least with respect to Confederate slave-owners, the civil recap-
ture process had ground to a halt with the onset of hostilities.\textsuperscript{66} As
General Sherman told a rebel friend in the midst of the War: “No U.S.
Court would allow you to sue for the recovery of a slave under the
Fugitive Slave Law unless you acknowledge allegiance [to the
Union].”\textsuperscript{67} Rebel masters knew that their only hope of recapturing
slaves depended on co-operation from the Union military. The AAW
deprived rebel masters of this critical source of co-operation, and thus
intercepted the return of fugitive slaves to the Confederacy. The
AAW signified for the second time that Congress, not the President,
was leading the way with regard to military’s treatment of fugitive
slaves, and Congress was not abdicating to the President its Constitu-
tional duty to set the “rules concerning captures on land and sea.”\textsuperscript{68}

The emancipatory impact of the AAW was critically undermined
by Lincoln and his generals. Many Union generals were pro-slavery

\textsuperscript{64} U.S. CONST. art. IV, § 2, cl. 3.
\textsuperscript{65} Section 7 of the 1850 FSA imposed criminal penalties on anyone who interfered
with the arrest of fugitive slaves by their masters or persons acting on behalf of masters. The AAW
had the effect of immunizing the Union military from such charges.
\textsuperscript{66} Apparently “loyal slave-owners within . . . [states which had remained in the Union]
were permitted to recover their [fugitive] slaves until late in the War . . .” CONSTITUTIONAL
PROBLEMS, supra note 63, at 357.
\textsuperscript{67} Letter from Maj. Genl. W. T. Sherman to Thomas Hunton, Esq., August 24, 1862, vol. 3,
General’s Office, Record Group 94, National Archives, reprinted at http://www.history.umd.edu/
Freedmen/shermn.htm [hereinafter Sherman Letter].
\textsuperscript{68} U.S. CONST. art I, § 8, cl. 11.
and they would rather put their soldiers in harm’s way than permit contrabands to enter or stay in Union camps. Some military commanders co-operated with slave-owners even after Congress passed the AAW. The army’s persistence in engaging in pro-slavery practices, particularly after the enactment of the AAW, and Lincoln’s acquiescence in those practices, is one of the most tragic episodes of the War.

In order to gauge the full emancipatory effect of the SCA and the AAW, it needs to be recalled that at the beginning of the War, the Union army conspicuously advertised itself as being pro-slavery and anti-Black. Thus, for example, according to one Union soldier, when fugitive slaves entered a Union camp at the outset of hostilities they “came to the fort entertaining the idea that [the Union army was placed there] to protect them and grant them their freedom. [W]e did what [we] could to teach them the contrary.” Many top Union field commanders went to great lengths to assure slave-owners that the Union army would not interfere with the institution of slavery, and to warn slaves that they would, on the contrary, crush any attempt at insurrection “with an iron hand.”

As late as August 1862 General Sherman reassured a Confederate childhood friend that the “action of all our leading military leaders, Halleck, McClellan, Buell, Grant & myself have been more conservative of slavery than the acts of your own men.” These pronouncements reflected Lincoln’s initial view of the War, and his view

69. For an example of a Union commander cooperating with slave-owners after the passage of the AAW, see OFFICIAL RECORD, supra note 41, at 816. On May 1, 1862 JNO Parke wrote to General Burnside: “The citizens of Beaufort are after me on the negro question. They want me to prevent the slaves coming within our lines. I tell them I can use no force to aid them in recovering their negroes; at the same time if they can prevail on the negroes to go home I am perfectly willing and satisfied.” Even after the passage of the SCA, General Sherman advised a Confederate friend that he would permit the friend’s slaves to return if the slaves so wished. See Sherman Letter, supra note 67 (referring to the letter dated August 24, 1862). It has also been reported that even after the Final Proclamation was issued, at least one Union general, Joseph Hooker, “granted plantation owners passes to enter [his army camp] to search for runaway slaves and, if they found any, to drag them away in chains and under the lash.” GEOFFREY PERRET, LINCOLN’S WAR 265 n.15 (2004) (citing Correspondence of Joseph Hopkins Twichell, March 26, 1863, Twichell Papers, Beinecke Library, Yale University).

70. OFFICIAL RECORD, supra note 41, at 750 (emphasis added) (referring to March 18, 1861 letter from Lt. Slemmer to Lieut. Col. Thomas dated March 18, 1861).

71. Id. at 753 (referring to the letter from General McClellan to “the Union Men of West Virginia” dated May 26, 1861).


73. At the outset, Lincoln made clear his belief that the War was to preserve the Union, not destroy slavery, and he worked hard to put slave-owners at ease from the very outset of his presidency. In his first inaugural speech he stated: “I have no purpose, directly or indirectly, to
of the role of the Union military. Fugitive slaves were barred from certain Union camps within the Department of Washington D.C. no later than July 1861. In November 1861, General Halleck issued his infamous General Orders No. 3, which barred fugitives from army camps in the Department of the Missouri. General Halleck’s Order No. 3 is of special interest because it states as its apparent justification that it is a necessary measure to “remedy . . . [the] evil” of fugitive slaves conveying militarily significant information to the enemy.

The rationale relied upon by General Halleck is wholly at odds with the undisputed, legendary role of fugitive slaves in providing the Union army with critical reconnaissance about the enemy and other important help. As one Union soldier put it in attempting to justify not excluding fugitive slaves from the camps:

The general is of the opinion that they bring much valuable information which cannot be obtained from any other source. They are acquainted with all the roads, paths, fords and other natural features of the country and they make excellent guides. They also know and frequently have exposed the haunts of secession spies and traitors and the existence of rebel organizations. They will not therefore be excluded.

In December 1861, Congress considered a resolution asking that the President instruct Halleck to withdraw General Orders No. 3, but the resolution was tabled. General Grant reiterated Halleck’s General Orders No. 3 on August 11, 1862, when he issued an order stating

interfere with the institution of slavery in the states where it exists. I believe I have no lawful right to do so.” COLLECTED WORKS, supra note 9, at 250. Shortly after his election he supported the Corwin Amendment which would have barred federal interference with slavery in any state where it existed. See MARK G. BRANDON, FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE 136–38 (1998).

74. See discussion infra regarding Lincoln’s order to interdict fugitive slaves from crossing the Potomac.
75. OFFICIAL RECORD, supra note 41, at 760 (General Orders No. 33, July 17, 1861).
76. Id. at 778 (referring to General Orders No. 3, November 20, 1861). This order was rescinded by Halleck at Lincoln’s request when Lincoln promoted him to General-in-Chief July 11, 1862. COLLECTED WORKS, supra note 9, at 312–13.
77. OFFICIAL RECORD, supra note 41, at 778 (referring to par. 1 of General Orders No. 3, November 20, 1861). “It has been represented that important information respecting the numbers and condition of our forces is conveyed to the enemy by means of fugitive slaves who are admitted within our lines. In order to remedy this evil it is directed that no such person be hereafter permitted to enter the lines of any camp or of any forces on the march and that any now within such lines be immediately excluded therefrom.” Id.
78. Id. at 815 (referring to April 6, 1862 letter to Lieut. Col. Shaul from Acting Assistant Adjutant-General Halsted). This message was sent in consequence of the passage of the AAW. Another example of useful information being provided by slaves is contained in TENNEY, supra note 23, at 152.
79. OFFICIAL RECORD, supra note 41, at 784 (referring to December 9, 1861).
that “officers and soldiers are positively prohibited from enticing Slaves to leave their masters.” 80

Congress later studied the question of whether contrabands had military value to the Union Army. They “collected evidence from military witnesses to show that escaped slaves furnished important information about the enemy, were excellent laborers, and would make good soldiers . . .” 81 I am aware of no information or reports to the contrary. Congress's report demonstrates the extent to which deep-seated racism severely compromised sound military decision-making. Lincoln’s acquiescence is inexplicable other than serving as a barometer of his antipathy towards Blacks 82 and his desire not to antagonize the Border States.

The Union army sacrificed a significant amount of useful reconnaissance and other help from fugitive slaves because of the pro-slavery and racist leanings of General Halleck. But Halleck was not alone among the top commanders who let such feelings weaken the army’s ability to fight. In December 1861, General Grant reprimanded a subordinate for not complying with his order to permit a slave-owner to recover his slaves in a Union camp. Grant fumed “I do not want the Army used as negro-catchers, but still less do I want to see it used as a cloak to cover their escape.” 83 The self-defeating persistence of the Union military in retarding the unraveling of slavery was perverse.

Against this backdrop of pro-slavery and racist intransigence in the Union military, enactment of the FCA and the AAW (and as will be seen later, the SCA), must be viewed as a courageous effort by the Civil War Congress to right a leaning ship. Congressional action was needed because the Commander-in-Chief refused to act.

C. The District of Columbia Emancipation Act

Slavery had been permitted in the District of Columbia from its inception. As a federal territory, Congress had the power to abolish

80. See H. Westbrook, Black Troops, White Commanders and Freedmen During the Civil War 23 (1992).
81. T. Harry Williams, Lincoln and the Radicals 168 (1941).
82. See discussion infra.
83. Official Record, supra note 41, at 794 (referring to letter of General Grant to Col. J. Cook dated December 25, 1861). The order issued that day by Grant’s subordinate in compliance with Grant’s order expelled fugitives without distinguishing between loyal and disloyal owners, and without regard to whether the slave had been used in hostile service. Id. at 795. For another example of a Union commander cooperating with slave-owners after the passage of the AAW, see Official Record, supra note 41, at 816, as discussed supra note 69 and accompanying text.
slavery in the District and had considered doing so on several occasions prior to the Civil War. One of those occasions coincided with the term that Lincoln served in Congress, from 1847 to 1849.

At that time, the District had several thousand slaves and a thriving slave trade. During Lincoln’s tenure in Congress, many measures were introduced into the House to ban slavery in the District. According to David Donald, Lincoln’s pre-eminent biographer, Lincoln “rarely participated” in the “angry discussion” of those measures. Despite his belief that the Constitution permitted Congress to abolish slavery in the District, Lincoln consistently expressed the view that Congress’s “power ought not to be exercised unless at the request of the people of said District.”

When it came time to vote, Lincoln opposed all measures calling for the abolition in the District. He proposed instead that abolition occur on a gradual basis, with compensation to the slave-owners, and only if agreed to in a referendum limited to “free white male citizens” of the District. Lincoln did not support a proposal that called for Blacks as well as Whites to vote in a plebiscite. Professor Fehrenbacher has labeled Lincoln’s proposal “not only hopeless but extraneous, containing no mention of the slave trade in the District.”

Lincoln’s position is noteworthy for the further reason that it is embarrassingly similar to the “popular sovereignty” position espoused by Stephen Douglas many years later, which Lincoln lambasted as being “morally repugnant.”

One year after the Civil War began, on April 16, 1862, the District of Columbia Emancipation Act became law. This statute granted immediate freedom to all slaves within the District of Columbia, and barred slavery there. Loyal slave-owners were given the right to seek compensation for their emancipated slaves. The Act contained a
procedure whereby emancipated slaves could receive a certificate of freedom.91

Three days before signing the bill Lincoln wrote to Horace Greeley that he was a little uneasy “about liberating the District’s slaves.”92 Lincoln delayed signing the bill to allow an “old friend [to] leave the city with his slaves.”93 Two days before signing the bill Lincoln is reported to have said that “[h]e regretted the [D.C. Emancipation] bill had been passed in its present form—that it should have been for gradual emancipation—that now families would at once be deprived of cooks, stable boys [sic] and they of their protectors without any provision for them.”94

On April 16, 1862, in affixing his signature to the D.C. Emancipation Act, Lincoln wrote:

I have never doubted the constitutional authority of Congress to abolish slavery in this district; and I have ever desired to see the national capital freed from the institution in some satisfactory way. Hence there has never been in my mind any question upon the subject except the one of expediency, arising in view of all the circumstances. I am gratified that the two principles of compensation and colonization are both recognized and practically applied in the Act.95

Lincoln’s statement is less than a wholehearted endorsement of the statute or of emancipation. He admits that his conduct is governed by expediency and he makes no mention of his moral concerns regarding slavery. The absence of any statement regarding the immorality of slavery is disturbing because Lincoln understood that Congress’s plenary power to abolish slavery in the District of Columbia subsumed that it could do so for moral reasons.96 The lack of a hu-

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92. SLAVEREPE, supra note 4, at 314 n.107. In late March 1862, Lincoln told Greeley that emancipation in the District of Columbia “should [be] urge[d] . . . persuasively, and not menacingly, upon the South.” KLINGAMAN, supra note 6, at 118 (emphasis in original) (quoting COLLECTED WORKS, supra note 9, at 169). One wonders whether this same approach guided Lincoln in adopting a two-step approach with respect to issuing the Final Proclamation.
93. FORCED INTO GLORY, supra note 63, at 399.
94. Id. at 400 (quoting The Diary of Orville H. Browning, 1850-1861 541 (Theodore Calvin Pease & James G. Randall eds, 1927); see also DON E. FEHRENBACKER & VIRGINIA FEHRENBACKER, RECOLLECTED WORDS OF ABRAHAM LINCOLN 63–64 (1996) [hereinafter RECOLLECTED WORDS].
96. This is in contrast to arguments by Lincoln apologists that Lincoln had to conceal his humanitarian/ethical motivations in issuing the Proclamation because he was constitutionally prohibited from proclaiming emancipation on any grounds other than military necessity.
manitarian component in April 1863 certainly diminishes, perhaps forecloses, the presence of humanitarian considerations by Lincoln eight months later when he issued the Proclamation.

The D.C. Emancipation Act was the first federal law, which granted immediate and unconditional freedom to any slave. It “provided slaves throughout the south with [a] convincing sign that the federal government was their friend, further encouraging flight to federal lines.” The statute was important in two additional respects. First, by denying compensation to rebel owners it “prefigured” the SCA. Second, it marked the first and last time that loyal slave-owners would receive a right to compensation from the federal government. In the future, this last vestige of legitimacy would be stripped from slave-owners.

D. The Territories Act

Congress first exercised jurisdiction over the issue of slavery in the federal territories in 1787, prior to the ratification of the Constitution. It did so again in 1816 and in 1850. Nevertheless, in the 1857 Dred Scott opinion, the Supreme Court stated that Congress was without authority to ban slavery in federal territories.

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97. DESTRUCTION OF SLAVERY, supra note 6, at 166.
98. Id.
99. In 1787, the final Congress meeting under the Articles of Confederation enacted the Northwest Ordinance, which barred slavery in the federal lands west of the Appalachian mountains. See 2 Federal and State Constitutions 957 (F. N. Thorpe ed., 1909) (referring to sec. 6 of the Northwest Ordinance). The Northwest Ordinance was later re-enacted by the first meeting of Congress under the Constitution. An Ordinance for the Government of the Territory of the United States North-West of the River Ohio (Northwest Ordinance), ch. 8, 1 Stat. 50, 51 (1789). This provision also contained a fugitive slave clause, though such a clause did not appear in the Articles of Confederation.
100. In 1816, Congress passed the Missouri Compromise, which barred slavery from federal territories north of 36°30′ latitude line (the southern boundary of Missouri), and in 1850, Congress passed the Kansas-Nebraska Act, which repealed that portion of the Missouri Compromise.
101. The Court also stated that neither Congress nor a State could prevent a slave-owner from taking his slaves into any state or federal territory, nor could Congress or a free state deprive a slave-owner of his slaves. By stating that the federal government had no power to restrict slavery in the territories, the Court, in effect, removed that all-important issue from the political sphere. The issue of slavery extension was, perhaps, the central issue dividing the country from 1855 through Lincoln’s election in 1860. By ruling definitively, and gratuitously, in favor of the slaveholding interests, anti-slavery forces were left without a political vehicle for preventing the extension of slavery. For those reasons, the Court’s opinion may have caused a further deterioration between the north and south regarding the issue of slavery, and thus helped tip the country towards war. See generally SLAVEHOLDING REPUBLIC, supra note 4; see also DON E. FEBRENBERGER, DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW & POLITICS (1978). The Dred Scott decision did not, however, foreclose newly formed states in those territories from barring slavery upon becoming states.
Two months after the D.C. Emancipation Act became law, on June 19, 1862, Congress passed and Lincoln signed into law the Territories Act, which barred slavery in the federal territories.\textsuperscript{102} No distinction was made between loyal and disloyal slave-owners. This statute was the first uncompensated emancipation measure passed by Congress.\textsuperscript{103}

Anti-slavery opposition to the Dred Scott opinion was intense and immediate. The onset of the War assured that the Court’s opinion would be, and indeed had to be, disregarded. Preserving slavery in federally controlled areas increasingly became entirely incompatible with the Union’s war aims, and with the measures Congress had adopted to win the war. If slavery provided sustenance to the enemy, it could not be tolerated within the Union anymore than was absolutely necessary.

Political and (to an increasingly lesser extent) legal considerations militated against the federal government interfering with slavery in the Border States, but the federal territories were quite another matter. Notwithstanding the Dred Scott opinion, Congress and Lincoln believed that the federal government was constitutionally empowered to abolish slavery in the territories.

E. The Second Confiscation Act

The SCA was enacted on July 17, 1862. It was intended to supplement and strengthen the confiscation and forfeiture provisions of the FCA. The SCA is perhaps the most important, and misunderstood, piece of emancipatory legislation enacted by the Civil War Congress.

The SCA contained fourteen sections, four of which dealt with emancipation. The other provisions dealt with confiscation and related issues. Two of the emancipation provisions mandated that the slaves of persons convicted of treason, section one, or of assisting the rebellion, section two, be freed. Section one called for a court order to be issued declaring the slaves of convicted persons “be . . . made

\textsuperscript{102} An Act to Secure Freedom to All Persons with the Territories of the United States, 12 Stat. 432 (1862).

\textsuperscript{103} Because none of the federal territories were fighting on the side of the Confederacy, they were governed by the Constitution and not the international law of war. The Territories Act is constitutionally suspect because of its failure to provide compensation to slave-owners for depriving them of their slaves.
free.” Section two provided that liberation of the convicted person’s slaves would occur as part of the punishment to be imposed. I am not aware of any slaves being emancipated pursuant to sections one and two of the SCA. The more significant emancipation provisions were contained in sections nine and ten.

Under section nine, slaves of rebels who came or were found behind the lines of the Union army were “deemed captives of war, and shall be forever free . . . .” This section differed from section four of the FCA in several important respects. First, emancipation depended upon the culpability of the slave-owner, whereas under the FCA “forfeiture” hinged on whether the slave had been employed in “hostile service.”

Second, section nine of the SCA expressly granted freedom, whereas the FCA spoke only in terms of “forfeiture.” The use of express language in the SCA granting freedom was symbolically important. The passage of eleven months of war meant that emancipation was not the taboo it once was and that Congress recognized the need to send a stronger message to rebels and their slaves. Third, under the SCA the act of emancipation occurred behind Union lines, whereas under the FCA the act of “forfeiture” could occur within unconquered areas of the Confederacy.

Section ten is not truly an emancipatory provision. Rather, it provided that slaves who flee to another state, territory, or the District of Columbia, shall not be returned to their owners unless the owner “shall first make oath that” he was not a rebel. This section also prohibited the Union military from deciding on the validity of the owner’s claim. This assured that the civil machinery established by the FSA would not be pre-empted by the Union military. This section in effect amended the FSA because it virtually eliminated the return of slaves who fled to another state, territory, or the District of Columbia.

104. An Act to Supress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate Property of Rebels, and for Other Purposes (Second Confiscation Act), ch. 195, 12 Stat. 589, 590 (1862).

105. Rebels were defined as “persons who shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States . . . or shall in any way give aid or comfort thereunto.” Id.

106. Id. at 591. It did not matter whether the slave escaped behind Union lines or came behind Union lines as a result of the advance of the Union army.

107. Because the FCA contained no geographical restrictions, the act of forfeiture occurred wherever the slave was put to hostile service. Conceivably this could occur within a Border State as well.

108. The FSA was not repealed until June 1864, but it is doubtful that it had any efficacy after the AAW and the SCA were enacted.
Section eleven of the SCA was not an emancipation provision but it, along with the Militia Act, had considerable emancipatory effect. Section 11 furnished Lincoln with the authority to employ Blacks in the Union military and to arm them. This represented a significant break with the past, and provided Blacks with perhaps the ultimate inducement to flee. The recruitment activities conducted in support of section eleven and the Militia Act had an extraordinarily corrosive effect on slavery in the Confederacy and in the Border States. Lincoln, however, was slow to exercise the authority granted to him under the SCA and the Militia Act to employ and arm Blacks.

Lincoln signed the SCA but only after Congress passed a joint resolution which construed the bill so as to meet concerns Lincoln had expressed. Lincoln’s objections are contained in an “Objection Letter,” which he drafted before he learned that Congress had passed the joint resolution, and which he insisted remain as part of the legislative record despite the fact that his objections were moot. Lincoln’s Objection Letter is an extraordinary document, but it has received little if any scholarly attention. From a political perspective it shows the great lengths to which he was willing to go to avoid antagonizing the Border States. From a legal perspective, it reveals a flawed view of the Constitution and an elastic, entirely pragmatic concept of the law. It demonstrates that Lincoln was prepared to bend the law to suit his perception of what politics and winning the War required.

Lincoln’s Objection Letter correctly interpreted the bill to mean, “slaves of persons convicted [of treason, or inciting or assisting rebel-
Of Contrabands, Congress, and Lincoln

lion] shall be free.”113 Lincoln objected to this construction on the following ground:

I think there is an unfortunate form of expression rather than a substantial objection to this. It is startling to say that Congress can free a slave within a state, and yet if it were said the ownership of the slave had first been transferred to the nation, and Congress had then liberated him, the difficulty would at once vanish. And this is the real case. The traitor against the General Government forfeits his slave at least as justly as he does any other property; and he forfeits both to the Government against which he offends. The Government, so far as there can be ownership, thus owns the forfeited slaves, and the question for Congress in regard to them is, “shall they be made free or sold to new masters?” I perceive no objection to Congress deciding in advance that they shall be free . . . Indeed, I do not believe it will be physically possible for the General Government to return persons so circumstanced to actual slavery. I believe there would be physical resistance to it, which could neither be turned aside by argument nor driven away by force.114

Lincoln’s statement that “[I]t is startling to say that Congress can free a slave within a state,” is difficult to comprehend. When Lincoln made this statement, the War was more than a year old. Almost a year earlier (August-September 1861) he had signed the FCA, and in justifying his decision to modify General Fremont’s emancipatory proclamation, had stated: “I do not say Congress might not with propriety pass a law . . . just as General Fremont proclaimed.”115 Fremont’s proclamation had freed the slaves of rebel owners in Missouri. As will be seen later, Lincoln modified Fremont’s proclamation on the ground that it exceeded the FCA. Lincoln’s belief that Congress had the power to enact legislation incorporating the Fremont proclamation and his signing the FCA, is wholly at odds with his statement one year later in connection with the SCA that Congress had no power to free slaves in any state.

Lincoln’s statement must also be interpreted in light of the fact that it was made just four days after he had confided to certain Cabinet members his decision to issue an emancipation proclamation.116

113. Id. at 329.
114. COLLECTED WORKS, supra note 9, at 329 (emphasis added).
115. The Fremont proclamation is discussed below.
116. It is difficult to know when Lincoln reached the view that he had the power to emancipate Confederate slaves. On July 13, 1862, on the way to the funeral of Secretary Edwin Stanton’s son, Lincoln confided to Seward and Welles that if the war did not end soon he was
At the very moment Lincoln admonished Congress that it did not have authority to emancipate slaves in the Confederacy, as he had apparently reached the view that this power lay with the Executive. Lincoln’s conclusion is inexplicable and represented an astonishing, unexplained about-face on his part regarding the respective power of Congress and the Executive.

Lincoln’s suggestion that Congress’s lack of power to emancipate could be cured by treating the SCA as working a forfeiture of slaves, as property to the government was undoubtedly intended to appease the Border States. Lincoln drafted his Objection Letter when the Border States were considering his proposal for gradual, compensated emancipation. Lincoln’s audience was the Border States, not Congress. Thus, his Objection Letter mentioned that Kentucky had become the owner of certain slaves through escheat, and that, to her “high honor,” she had “sold none” and “liberated all.”

If Lincoln believed Congress did not have the power directly to emancipate, what made him think it could do so indirectly through an escheat? Contrary to Lincoln, the SCA did not provide that slaves inclined to issue an emancipation proclamation. This occurred the day after Congress gave preliminary approval to the SCA. On that same day, July 12, 1862, Lincoln met with Border States representatives and pleaded with them to accept a plan for gradual, compensated emancipation. Doris Kearns Goodwin, Team of Rivals: The Political Genius of Abraham Lincoln 463 (2005). The SCA was first presented to Lincoln as a bill on July 14. He presented his first draft of the Proclamation to his cabinet on July 22. Lincoln apparently began drafting the Proclamation in late June or early July 1862. See David Homer Bates, Lincoln in the Telegraph Office 138–41 (1907). Lincoln’s first public statement indicating that he had the power to emancipate was contained in his August 22, 1862 letter to Greeley. There are reports that Lincoln began drafting the Preliminary Proclamation in early June 1862. Id. at 36.

On the other hand, it has been reported that on July 4, 1862, Lincoln confided to Sumner that he feared that a presidential decree announcing emancipation would accomplish nothing in the south, and stated that emancipation is “too big a lick.” Recollected Words, supra note 9, at 434–35. It is important to note that even after advising Congress that he intended to issue an emancipation proclamation he made numerous statements to the contrary. For example, in late July 1862 Lincoln advised a State Department agent that “Louisianans could still rejoin the Union upon the old term”—retaining slavery, at least temporarily, if they persisted in their rebellion . . .” Klingaman, supra note 6, at 166 (quoting Collected Works, supra note 9, at 345). In August 1862 Lincoln met with his close friend Leonard Swett to discuss the issue of emancipation. “Swett departed with the definite impression that Lincoln ‘will issue no proclamation emancipating negroes.’” Id. at 166.

As late as 1864, Lincoln reiterated the view that Congress did not have the power over slavery in the states. In vetoing the Wade Davis Bill, Lincoln explained that he was not prepared to “declare a constitutional competence in Congress to abolish slavery in the states.” Lincoln’s July 8, 1864 message regarding the Wade Davis Bill appears in 10 The Complete Works of Abraham Lincoln 153 (John G. Nicolay & John Hay eds., Lincoln Memorial University 1906) (1894) [hereinafter Complete Works].

117. Under an “escheat” title to property is taken or received by the state. It is similar to a confiscation in that the state either takes possession of, or is seen as the rightful owner of, the property. In contrast, emancipation does not result in the state taking title or possession of prop-
were being forfeited (or escheated) to the federal government. Though Lincoln protested that this was the real case, this was demonstrably untrue because the SCA provided that slaves would be free, not that title to them would be transferred to a sovereign who disowned them. By construing the statutory transaction as an escheat rather than emancipation, Lincoln created an artifice wholly at odds with the statutory language.

Resorting to a legal fiction enabled Lincoln to adopt arguments that Border State representatives had made in opposing the FCA and the SCA. First, the power to emancipate implied that slaves were persons, not property, whereas the escheat approach implied the opposite. Indeed, Lincoln expressly referred to slaves as property in his SCA statement. Second, Border State representatives were adamant that the federal government did not have the power to emancipate, but that “admit[ted] there might be a question as to what you will do with this property (slaves) if you make it only subject to confiscation . . . .”118

Perhaps most surprisingly, Lincoln’s SCA statement validates the self-emancipation theory. Lincoln apparently realized that events had overtaken law and politics. Fugitive slaves now had to be given their freedom, even if Congress did not have the power to emancipate, because it would be “physically [im]possible for the General Government to return [fugitive slaves] to actual slavery. . . . There would be physical resistance to it which could neither be turned aside by argument nor driven away by force.”119

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118. CONG. GLOBE, supra note 30, at 219 (quoting the remarks of Sen. Pearce at the FCA debates). In the context of the SCA debates Border State representatives made clear that their objection to the bill was not that owners were being deprived of their slaves, but that the deprivation occurred through emancipation rather than forfeiture or confiscation. CONG. GLOBE, supra note 30, at 2168 (referring to an exchange between Senators Clark and Davis). The Border State’s representatives rationalized the distinction on the ground that an owner who used his slaves to conduct war against the government should lose that property as he could lose any other property. The property would then be sold, with the proceeds going to the public treasury. This was justified on the theory that deprivation and sale of the property was necessary to help defray the costs of the war which the slave-owner had forced upon the federal government. The FCA contained forfeiture language, but did not provide for the sale of forfeited slaves. The SCA did not contain “forfeiture” language, and provided that slaves subject to the Act would be free. Thus, Lincoln’s escheat fiction did not mirror the underlying legislation.

119. Seven months prior to Lincoln’s epiphany, John Hay grasped that the War ineluctably would result in freedom for slaves:

The status of the contrabands and the disposition to be made of confiscated Negroes will . . . engage the most earnest attention of [Congress] . . . it is safe to assume. I think,
Lincoln’s Objection Letter also addressed the confiscation portions of the SCA. Lincoln found those provisions objectionable on the ground that they violated the Constitution by depriving persons of property beyond their lives. Lincoln’s argument is surprising because it applies the Constitution, not the international law of war, to rebels within the Confederacy.

Although not mentioned by Lincoln, his objections to the SCA are rooted in his view that the Confederate states had no power to secede. The upshot of this was the belief that the Confederate states and their citizens continued to be governed by the Constitution during the pendency of the War. This translated to the view that loyal citizens of the Confederacy could not have their slaves emancipated or confiscated, and that rebel citizens were entitled to be treated in a manner that did not violate the Bill of Attainder and treason provisions of the Constitution. Thus, the Objection Letter stated that Lincoln was pleased that the bill “touches neither person nor property of any loyal citizen, in which particular it is just and proper.” The implication that it would have been unjust or improper to penalize loyal persons is contrary to the law of war, and must be seen again as an effort to maintain loyalty from residents of the Confederacy and the Border States.

Lincoln later admitted to having been puzzled by the extent to which the Constitution protected loyal Confederate citizens. Lincoln’s Objection Letter makes clear that he was also puzzled by the extent to which the Constitution protected Confederate rebels. Furthermore, the Letter shows no appreciation for principle of “collective responsibility.” This doctrine, as part of the international law of war, permitted the Union to treat innocent, loyal citizens of the Confederacy in precisely the same manner as their rebel neighbors. The

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that the Government will never become a shareholder, and that all Negroes, once lawfully confiscated from the possession of their rebel owners, shall become free men...”

Lincoln’s Journalist, John Hay’s Anonymous Writings for the Press, 1860-1864 15 (November 29, 1861) (Michael Burlingame ed., Southern Illinois Press 1998) (1861). In his second Annual Message to Congress, on December 1, 1862, Lincoln again validated the self-emancipation theory: “I think it would be impracticable to return to bondage... all slaves who shall have enjoyed actual freedom by the chances of war.” Collected Works, supra note 9, at 534.

120. Collected Works, supra note 9, at 329.

121. Thus, Lincoln admitted that he “was puzzled, for a time as to denying the rights of those citizens [within the Confederacy] who remained individually innocent of treason or rebellion.” Abraham Lincoln, January 16, 1864 Letter to the Editor, 98 N. Am. R. 630 (1864). Thus, Wills is wrong to assert that Lincoln “never took” the position that “Southerners could not plead the slavery provisions in a document whose other terms they had rejected... For him, the Constitution was still in force throughout the nation.” Wills, supra note 12, at 139.
Of Contrabands, Congress, and Lincoln

prem Court specifically endorsed this view during and after the Civil War. If the Court had taken a contrary approach, this would have consigned the Constitution to a “suicide compact” by requiring the return of fugitive slaves, and prohibiting confiscation and emancipation from going forward. Lincoln adhered to his flawed view even after he should have realized that its suicidal tendencies could be fatal for the Union.

F. The Militia Act

The Militia Act of 1862 authorized Lincoln to enroll Blacks into the military and to arm them. Slaves who joined the military were granted emancipation, provided their owner was a rebel. The mothers, wives, or children of any such slave were also granted their freedom provided that their owner was a rebel. This provision, along with section eleven of the SCA, equipped Black slaves with the ultimate bait: emancipation and an opportunity to fight their masters.

Five days after the passage of the SCA and the Militia Act on July 17, 1862, Lincoln issued an implementing executive order, which authorized only that Blacks be employed by the military as non-fighting “laborers,” and just three weeks later Lincoln apparently declined an offer to take two “colored regiments” from Indiana soldiers.

III. THE RESPONSE BY LINCOLN AND HIS GENERALS TO “CONTRABANDS” AND CONFEDERATE USE OF SLAVE LABOR

While Congress wrestled with the issues of emancipation and fugitive slaves, the President and the Union military were forced to face...
these same issues. As we have seen, the military’s response to these issues was as varied as it was unpredictable. Many commanders saw depriving rebels of their slaves as a military necessity and welcomed them into Union camps. Some went so far as to issue proclamations of emancipation. But many others showed a cold shoulder to fugitive slaves. This reflected a widespread belief that the war was about preserving the Union, not liberating slaves, and that conduct by the military, which promoted the latter, would discourage the Confederates from laying down their arms and rejoining the Union. The military’s hostility to slaves also reflected widespread dislike of Blacks.

Up until he issued the Proclamation, Lincoln mostly sided with the pro-slavery, anti-Black elements of the military. This was consistent with his belief that retaining the loyalty of the slaveholding Border States was a prerequisite to winning the war, and with his historical views on race.

A. General Fremont’s Proclamation

On August 30, 1861, Union General John C. Fremont, issued an order proclaiming martial law in Missouri and freeing all slaves of disloyal owners in Missouri. Fremont’s order provided that all persons taken with arms in their hands would be tried by court martial, and if convicted, would be shot. The order further provided that real and personal property of all persons within Missouri “who shall take up arms against the United States, or who shall be directly proven to have taken an active part with their enemies in the field, is declared to be confiscated . . . and their slaves . . . are hereby declared free men.”125

Lincoln immediately communicated his displeasure to Fremont. In a September 2, 1861 letter, Lincoln ordered Fremont not to shoot any man under the proclamation without first receiving Lincoln’s approval.126 In a more conciliatory fashion, Lincoln expressed concern that the portion of Fremont’s proclamation dealing with “confiscation of property and the liberating slaves of traitorous owners, will alarm

126. COLLECTED WORKS, supra note 9, at 506-07.
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our Southern Union friends and turn them against us; perhaps ruin our rather fair prospect for [retaining] Kentucky [in the Union].”\(^{127}\)

In apparent recognition of Fremont’s political prominence,\(^{128}\) Lincoln asked Fremont, on his “own motion,” to modify the confiscation and emancipation portion of the proclamation “so as to conform” to the FCA, a copy of which Lincoln sent to Fremont along with the letter. Lincoln’s letter did not specify the manner in which the General’s proclamation did not conform to the FCA, leaving that task to Fremont. Lincoln closed the letter by assuring Fremont that he had written the letter “in a spirit of caution and not of censure.”\(^{129}\)

Lincoln’s overtures did not have their intended effect. Fremont declined to make the requested modification regarding the liberation of slaves. He asked Lincoln to “openly direct [him] to make the correction . . . . If I were to retract of my own accord, it would imply that I myself thought it wrong . . . .” Fremont also declined to comply with Lincoln’s order regarding shooting men who had taken up arms against the Union, insisting that Lincoln had misconstrued his proclamation.\(^{130}\)

Lincoln’s September 11 reply acquiesced regarding the shooting provision, but made the open order that Fremont requested regarding the confiscation and liberation paragraph.\(^{131}\) Lincoln’s September 11 reply did not enclose a revised version of Fremont’s Proclamation. Rather, his letter stated simply that the confiscation and liberation clause of Fremont’s Proclamation are “ordered . . . modified, held and construed as to conform with and not to transcend the provisions on the same subject contained in the [FCA], and that the [FCA] be published at length with this order.”

Several days later Lincoln explained his reasons for modifying Fremont’s proclamation. In a September 22, 1861 letter to Illinois Senator Orville Browning, Lincoln described Fremont’s proclamation

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127. \textit{Id}. At one point Lincoln supposedly said that he would “like to have God on his side but he must have Kentucky.” \textbf{Linda Przybyszewski}, \textit{The Republic According to John Marshall} \textit{Harlan} 34 (1999) (citing \textbf{James McPherson}, \textit{Abraham Lincoln and the Second American Revolution} 31 (1990)).

128. Fremont had been the Republican Party candidate who lost the 1856 presidential election to James Buchanan. His wife, Jessie, was the daughter of Thomas Hart Benton, formerly an influential Senator. She traveled from Missouri to meet Lincoln in the White House in an unsuccessful effort to negotiate a resolution of the disagreement between her husband and Lincoln.

129. \textit{Id}.

130. \textbf{Official Record}, supra note 41, at 768 (referring to the September 8, 1861 letter from General Fremont to President Lincoln).

as “simply ‘dictatorship’” because “[it] assumes that the general may do anything he pleases—confiscate the lands and free the slaves of loyal people, as well as of disloyal ones.” Lincoln stated that confiscation and liberation “must be settled according to laws made by law-makers, and not by military proclamations.” Lincoln protested further by asking whether “it can be pretended that . . . a General, or a President, may make permanent rules of property by proclamation?” Lincoln answered as follows: “I do not say Congress might not with propriety pass a law . . . just as General Fremont proclaimed . . . . What I object to, is, that I as President, shall expressly, or impliedly seize and exercise the permanent legislative functions of the government.”

Lincoln’s letter to Browning also adverted to policy reasons for modifying Fremont’s proclamation. These focused on Missouri’s pivotal status as a Border State and demonstrated Lincoln’s overarching sensitivity to the crucial role that the Border States played in preserving the Union. Lincoln emphasized the disastrous effect Fremont’s proclamation would have on Union sympathizers in other Border States, including Kentucky and Maryland, as well as Missouri itself. Lincoln believed that if Fremont’s proclamation was allowed to stand, the portions relating to emancipation would drive Border States out of the Union and require the Union to sue for peace.

Lincoln’s belief that Border States might exit the Union if Fremont’s proclamation remained intact was bolstered by a September 12, 1861 letter that he received from Joseph Holt, a Kentucky loyalist. Holt complained that Fremont’s Proclamation transgressed the FCA in two respects. First, the FCA only covered property and slaves “actually employed in the service of the rebellion with the knowledge and consent of [their] owners[,]” whereas the Proclamation was not so limited. Second, Fremont’s Proclamation provided that slaves “shall be at once manumitted,” whereas the FCA “left . . . [the slaves’] status to be determined either by the courts of the

132. Id. at 531–32.
133. Id. at 532.
134. Holt was the army’s judge advocate general under Lincoln. He had previously served as the secretary of war in the administration of President James Buchanan, Lincoln’s predecessor. See Guelzo, supra note 63, at 48.
135. Official Record, supra note 41, at 768 (referring to Sept. 12, 1861 letter from Fremont to J. Holt).
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United States or by subsequent legislation.”

It was this second point which seemed most important to Holt, and perhaps to Lincoln: [T]he loyal men of the border slave States... fear[ ] of any attempt on the part of the Government of the United States to liberate suddenly in their midst a population unprepared for freedom and whose presence could not fail to prove a painful apprehension if not terror to the homes and families of all.

Holt was correct in pointing out that Fremont’s proclamation emancipated slaves regardless of whether they had been used in hostile service. But standing alone this could not have been of overriding concern since the proclamation covered only traitorous slave-owners. Holt’s concern that rebel owners might lose their slaves even if they did not put them to hostile use mattered only because he believed that Fremont’s proclamation provided for immediate emancipation and that the FCA did not. Thus, it was Holt’s second point that must have left an indelible impression on Lincoln. But Holt’s concern reflected a misreading of the FCA. While the FCA did not address the legal status of slaves used in “hostile service,” the statute made clear that their owners had “forfeited” any claim to their labor. As a practical matter, these slaves were free and they were treated as being “free” by the Union authorities.

Lincoln’s reactions to Fremont’s proclamation are significant for several reasons. First, Lincoln affirmatively asserts that neither the President nor a general may act in these areas without Congressional authority, and that for the President or a general to do so would constitute “dictatorship.” Thus, at least at this early juncture in the war, Lincoln seems to believe that the President/Commander-in-Chief and

136. Id. at 768–69 (referring to September 12, 1861 letter from J. Holt to A. Lincoln). Lincoln responded to Holt’s letter on the day he received it. 137. OFFICIAL RECORD, supra note 41, at 768. 138. There is no indication as to whether Lincoln shared Holt’s views that slaves forfeited under the FCA were not free. 139. See, e.g., DESTRUCTION OF SLAVERY, supra note 5, at 425 (interpreting the FCA as requiring the release of slaves who were captured with rebels, and who were employed in hostile service against the United States, contrary to the provisions of the FCA, and making the slave “eo instanti free,” and ordering their release with need for applying to a court, stating that while the “FCA provides a mode of proceeding in all other cases of forfeiture... and declares how the property forfeited may be condemned -it makes no provision for the case of slaves whose services have been forfeited by reason of their being employed in hostile service against the Government”). Moreover, Union generals issued “certificates of freedom” to fugitive slaves what had been employed in support of the rebellion. Id. at 259 (reporting that one general issued “certificates on the basis of the FCA declaring fugitive slaves who had been used in support of the rebellion ‘forever emancipated’ and he authorized their removal from Arkansas to the North”).
his generals are subordinate to Congress in the areas of confiscation and emancipation. These statements are entirely consistent with Supreme Court pronouncements up to that point which made clear that the President, even when acting as Commander-in-Chief, was subordinate to Congress.\footnote{See discussion infra.} Lincoln’s issuance of the Proclamation radically changed the balance of power between the Executive and the Legislature in this important area.\footnote{It might be argued that Lincoln was talking here only about constitutional restraints on him acting in his capacity as President, not Commander-in-Chief. This is not a plausible interpretation of his letter to Browning. He asserts there that there are restrictions on “military proclamations,” but the Emancipation Proclamation was a “military proclamation.” If at this juncture Lincoln had wanted to distinguish between himself and his generals for these purposes he would have done so in precisely the way he did when he revoked Hunter’s proclamation. See discussion infra.}

Second, Lincoln’s expression of concern in his letter to Browning that “loyal” persons should not have their property confiscated or their slaves liberated reflects a misunderstanding of Fremont’s proclamation and the FCA. The General’s proclamation applied only to “traitorous” slave-owners, a fact which Lincoln had acknowledged in his September 2 letter to Fremont. In this all-important respect Fremont’s proclamation came well within the purview of the FCA.

Lincoln’s unspecific suggestion that Fremont’s proclamation did not “conform” to the FCA is dubious in other respects as well. There was indeed a lack of symmetry between the Proclamation and the FCA, but, on balance, Fremont’s proclamation was less sweeping than the FCA because it applied only to rebel slave-owners.\footnote{The legislative history of the FCA does not contain a discussion whether the statute was intended to apply to “loyal” as well as “disloyal” slave-owners. There are, however, references to “traitorous” slave-owners consenting to the use of their slaves against the federal government. See, e.g., Cong. Globe, supra note 30, at 219 (referring to remarks of Senator Trumbull on July 22, 1861). My belief that the FCA applies to “loyal” as well “disloyal” slave-owners rests on two points. First, the statute is directed primarily at the use to which a slave is put, rather than the culpability of the slave-owner. Second, the FCA provides for forfeiture where the slave-owner “required or permitted” the slave be put to the prohibited use. It would seem that such a slave-owner need not be shown to have been “traitorous,” i.e., guilty of treason, in order to be subject to forfeiture. In any event, Fremont’s proclamation provides for emancipation only where traitorous conduct has occurred, namely taking up arms against the United States Government.} On the other hand, it exceeded the FCA in so far as it emancipated slaves regardless of whether they had been employed in “hostile service.” It is difficult to believe Lincoln would insist Fremont modify his Proclamation in order to protect traitorous slave-owners who had not employed their slaves against the Union. His stated concern that the confiscation and slave liberation provisions in Fremont’s proclamation exceeded the SCA and appears to be pretextual.
Finally, and perhaps most interestingly, Lincoln’s statements to Fremont and Browning make no objection to the fact that Fremont had issued his proclamation without obtaining Lincoln’s prior consent. Surely Lincoln did not believe that his generals had the power to issue emancipation orders, even ones, which conformed to the FCA, without getting his prior approval. Yet, this is implicit in Lincoln’s letters to Fremont and Browning. Lincoln’s failure to mention this important point suggests that a primary concern, but one which he could not place on the record because of Fremont’s political prominence, was that Fremont had upstaged him. Though they belonged to the same political party, Lincoln regarded Fremont as a political rival. Lincoln’s reliance on constitutional and policy reasons concealed his pique at Fremont. The plausibility of this interpretation is underscored by Lincoln’s later repudiation of an emancipation order issued by another of his generals, Hunter—one who did not enjoy Fremont’s privileged (and threatening) position.143

Almost three years after he modified Fremont’s proclamation, Lincoln had occasion to revisit his decision. In April 1864, Lincoln wrote a letter to Albert G. Hodges, the editor of an important Kentucky newspaper (the “Hodges Letter”). Lincoln wrote the Hodges Letter to memorialize a self-described “little speech” that he gave a few days earlier to Hodges and other “fellow” Kentuckians who came to the White House to complain “about the dissatisfaction in their state over the enlistment of slaves as soldiers.”144 In the Hodges Letter, Lincoln explained that he “forbade” Fremont’s “military emancipation” on the ground that he “did not think it an indispensable necessity.”145 He made no mention of Fremont’s transgressing the SCA or of the need to appease the Border States. The failure to mention these two points is likely to be inconsequential, reflecting more the passage of time than a change of position on his part.

B. General Hunter’s Proclamation

On April 25, 1862, eight months after Lincoln modified Fremont’s proclamation, Union General David Hunter proclaimed martial law and emancipated all slaves in the three states under his
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authority: Georgia, Florida, and South Carolina.146 Hunter’s proclamation did not distinguish between slaves of loyal and disloyal owners. Rather, his proclamation stated that “[s]lavery and martial law in a free country are altogether incompatible . . . .” Hunter’s order went substantially beyond Fremont’s, which had limited emancipation to slaves of disloyal owners, though Hunter’s was confined to Confederate areas whereas Fremont’s applied to a Union state.

Lincoln’s response was swift and dispositive. He issued a May 19, 1862 proclamation, denying advance knowledge of Hunter’s intention to issue such an order, and declaring it “altogether void.”147 He went on to state:

I further make known that whether it be competent for me, as Commander-in-Chief of the Army and Navy, to declare the slaves of any State or States, free, and whether at any time, in any case it shall have become a necessity indispensable to the maintenance of the government, to exercise such supposed power, are question which, under my responsibility I reserve to myself, and which I cannot feel justified in leaving to the decision of commanders in the field. These are totally different questions from those of police regulations in armies and camps.148

Lincoln’s words in connection with General Hunter leave little doubt that his objection to Fremont’s Proclamation was as much a complaint about being upstaged as it was a concern about “policy” or “principle.”149

Lincoln’s communication revoking Hunter’s Order mentioned a joint resolution of Congress endorsing gradual, compensated emancipation. Lincoln opined reassuringly that the “changes” contemplated by the joint resolution “would come gently as the dew of Heaven, not rending or wrecking anything.”150 Lincoln implied that Hunter’s order was inconsistent with the joint resolution. Taken together with his stated objections to Fremont’s Proclamation, these communications suggest that Lincoln continued to believe that Congress, rather than

146. Collected Works, supra note 9, at 222. Hunter’s proclamation states that it was “done on the 25th day of April, 1862.”
147. Id. at 222–23. Lincoln’s May 19, 1862 order revoking Hunter’s proclamation refers to the latter as having appeared in the “public prints” on May 9, 1862. Id.
148. Id.
149. In the Hodges Letter, Lincoln describes his reasons for overturning Hunter’s Proclamation in virtually identical terms to his reasons for modifying Fremont’s Proclamation: “When . . . Gen. Hunter attempted military emancipation I again forbade it, because I did not yet think the indispensable necessity had come.” White, supra note 13, at 208.
150. Collected Works, supra note 9, at 223.
the Executive or the Commander in Chief, had primary power to dictate the manner and extent of emancipation in the South.

C. General Butler and the “Contrabands”

Southern slaves had been escaping to the North from a very early point in the life of the Republic. It was for that reason that the framers, at the instigation of Southern attendees at the Constitutional Convention, inserted the FSC in the Constitution. \(^{151}\) That Clause required all States to cooperate in remitting fugitive slaves to their owners. In 1793, Congress enacted legislation to implement the FSC, \(^{152}\) and in 1842 the Supreme Court conferred upon the federal government the primary responsibility to assure implementation of the FSC. \(^{153}\)

Prior to the Civil War, the process of remitting fugitive slaves had been an irritant in the relations between free and slave states. But the onset of the war required the North to consider whether its constitutional obligation to remit slaves remained intact during the pendency of hostilities. If the Union was constitutionally required to return fugitive slaves to Confederate masters, the constitution would be converted into the proverbial suicide compact. The Union would, in effect, be supplying (or re-supplying, as the case may be) the Confederacy with material to defeat the Union. \(^{154}\) This was one of the anvils upon which North hammered out its position on the constitutional relationship between the Federal and Confederate governments.

Lincoln eventually acknowledged that he had been “puzzle[d]” by these related issues, and implied that this had impaired his ability to deal with the issues of slavery and returning fugitive slaves during the war. Members of his inner circle realized at an early point that the War changed the constitutional calculus with respect to these issues. \(^{155}\)

\(^{151}\) U.S. Const. art. IV, § 2, cl. 3.

\(^{152}\) Congress passed two pieces of legislation to implement the FSC: the first, in 1793, 1 Stat. 302; the second in 1850, the FSA, see supra note 53.


\(^{154}\) Lincoln’s Secretary of War Cameron saw it in precisely those terms: “Why deprive him of supplies by blockade and voluntarily give him men to produce them.” Official Record, supra note 41, at 783 (referring to the Secretary of War’s Annual Report, December 6, 1861).

\(^{155}\) At least one of Lincoln’s staff members evinced sensitivity to change in the constitutional calculus wrought by the War just days before Butler acted. John Hay, one of Lincoln’s two secretaries, noted on May 10, 1861:

Carl Schurz [and I] spoke of the slaves and their ominous discontent. He agreed with me that the Commandants at Pickens and Monroe were unnecessarily squeamish in imprisoning and returning to their masters the fugitives who came to their gates begging to be employed. Their owners are in a state of open rebellion against the Government and nothing would bring them to their senses more readily than a gentle reminder that they are dependent upon the goodwill of the government for the security of their
But this realization came later to Lincoln than it did to Congress. The FCA was palpable proof. But at least one of Lincoln’s generals got the point even before Congress.

On May 24, 1861, at Fortress Monroe, Virginia, General Benjamin F. Butler met with a Confederate major under a truce flag. According to Butler:

[The southern major] desired to know if I did not feel myself bound by my constitutional obligations to deliver up fugitives under the Fugitive Slave Act. To this I replied that the Fugitive Slave Act did not affect a foreign country, which Virginia claimed to be, and that she must reckon it one of the infelicities of her position that, in so far at least, she was taken at her word.156 It was during this meeting that General Butler used for the first time the famous term “contrabands” to describe fugitive slaves and to justify his refusal to return them to Confederate owners.157

lives and property. The action would be entirely just and eminently practicable. What we could not have done in many lifetimes the madness and folly of the South has accomplished for us. Slavery offers itself more vulnerable to our attack than at any point in any century and the wild malignity of the South is excusing us, before, God, and the world.


A similar thought was later expressed by General Sherman in writing to a childhood friend who later became a Confederate slave-owner:

The Constitution of the United States is your only legal title to slavery. You have another title that of possession and force, but in law and logic your title to your Boys lay in the Constitution of the United States. You may say you are for the Constitution of the United States, as it was-You know it is unchanged, not a word not a syllable . . . . But your party have made another and have another force. How can you say that you would have the old, when you have a new. By the new if successful you inherit the Right of Slavery, but the new is not law till your Revolution is successful. Therefore we who contend for the old existing Law, contend that you by your own act take away your own title to all property save what is restricted by our constitution, your slave included.

Sherman Letter (August 24, 1862). Secretary Chase echoed these thoughts immediately after the Final Proclamation was issued: “This was a most wonderful history of an insanity of a class that the world had ever seen. If the slaveholders had stayed in the Union they might have kept the life in their institution for many years to come. That what no party and no public feeling in the North could ever have hoped to touch they had madly placed in the path of destruction.” DAVID DONALD, INSIDE LINCOLN’S CABINET, THE CIVIL WAR DIARIES OF SALMON P. CHASE 149 (1954).

156. 1 Private and Official Correspondence of General Benjamin F. Butler 104 (Jesse A. Marshall ed., 1917).

157.  See CONSTITUTIONAL PROBLEMS, supra note 65, at 355 n.29; see also GERTHEIS, supra note 32, at 11–16. One of Lincoln’s prodiggy secretaries suggests that the word “contraband” first appeared in a May 27, 1861 dispatch by the New York Tribune from Fort Monroe, and that it was used “casually.” 4 THE COMPLETE WORKS OF ABRAHAM LINCOLN 153 (John G. Nicolay & John Hay eds., Lincoln Memorial University 1906) (1894) [hereinafter COMPLETE WORKS at 388]. But whether credit for the coinage belongs to Ben Butler is not clear.” Id. at 37, n. 5. History has sided with Butler.
Secretary of War Cameron approved Butler’s policy, but “Lincoln made no official comment on Butler’s action, or on the decision of other commanders to exclude slave hunters from their camps.” In July 1861, Lincoln reportedly told Browning “that the government neither should, nor would send back to bondage such as came to our armies.” Lincoln’s purported statements were not matched by his actions. He failed to instruct his generals not to play “negro catcher,” and in December 1861 he prohibited Secretary of War Cameron from issuing a report espousing emancipation of slaves of disloyal owners, and the arming of slaves. Upon learning of Cameron’s remarks, Lincoln “ordered Cameron to recall the report and delete that paragraph.”

Even worse, in July 1861, the very month he assured Browning that fugitive slaves would not be returned to their masters, Lincoln ordered precisely the opposite. Lincoln instructed his generals to prohibit fugitive slaves to cross the Potomac, and to permit slave-owners to recover slaves who had already crossed, even those who had done so accompanied by Union troops. Lincoln’s inner circle explained that he believed his actions were necessary to avoid the appearance of permitting fugitives to escape into Washington, D.C., “directly as it were under the President’s eye . . . .” According to Lincoln’s two prodigy secretaries, Nicolay and Hay, Lincoln believed that providing

158. OFFICIAL RECORD, supra note 42, at 752–54.
159. LINCOLN, supra note 18, at 343.
160. Id. (quoting 1 THE DIARY OF ORVILLE HICKMAN BOWNING 477–78 (Theodore C. Pease & James G. Randall eds., 1927)). It appears, however, that Lincoln told Butler in February 1862, who was on his way to lead that assault on New Orleans, not “to interfere with the slavery question, as Fremont has done in St. Louis.” KLINGAMAN, supra note 6, at 104.
161. POLITICAL HISTORY, supra note 110, at 249 (referring to the Report of the Secretary of War, Dec. 1, 1861).
162. See, e.g., POLITICAL HISTORY, supra note 110, at 357. I have been unable to locate a copy of Lincoln’s order.
163. In a July 1, 1861 message Colonel Hamilton advised General McDowell that the general-in-chief [(McClellan, at that point)] desires me to communicate to you that he has received from the President of the United States a second note dated to-day on the subject of fugitive slaves in which he asks: ‘Would it not be well to allow owners to bring back those which crossed’ the Potomac with our troops? ’ The general earnestly invites our attention to this subject knowing that you with himself enter fully into His Excellency’s desire to carry out to the fullest all constitutional obligations. Of course it is the general’s wish the name of the President should not at this time be brought before the public in connection with this delicate subject.
OFFICIAL RECORD, supra note 41, at 760. On that same day, Assistant Adjutant-General Townsend sent a note to General Mansfield, advising that “The general-in-chief directs that you take stringent measures to prevent any fugitive slaves from passing over the river . . . .” Id. It has been said that the first message was “marked ‘secret.’” DUBois supra note 10, at 82, but no such designation appears in the official records.
164. COMPLETE WORKS, supra note 116, at 390.
fugitives a safe haven in Union camps could not be “justified upon any ‘contraband’ or confiscation theory.”\(^{165}\) And since Lincoln indicated in his first inaugural speech “that his oath bound him to execute the fugitive slave laws, he felt it incumbent on him to order that there should be no indirect violations of existing statutes by the army.”\(^{166}\) He also did not want Border State Congressmen to “accuse him of bad faith or of intentionally evading his constitutional obligations.”\(^{167}\)

Lincoln was influenced by politics, not principle, with respect to this important issue. He treated his order sealing off Washington D.C. from fugitive slaves as a local action. He did not mandate that it be adhered to by commanders in other military departments. It was left to their discretion as to how fugitives should be treated. According to Nicolay and Hay, Lincoln considered it to be a “matter of local determination to be governed by military necessity.”\(^{168}\)

The upshot was that the Union military had no uniform policy with respect to fugitive slaves. But the lack of uniformity did not deter the slaves. As the War progressed, they came in ever increasing numbers, and increasingly came into contact with the advancing Union Army.\(^{169}\) And in doing so, they forced the Union government to resolve a problem that many, including Lincoln, preferred to ignore. It is an understatement to say that contrabands, by their relentless flight, made “themselves an unavoidable military and political issue.”\(^{170}\)

Lincoln’s interceding on behalf of slave-owners and his unwillingness to impose a uniform policy permitting fleeing slaves to enter Union lines reflects poorly on him in several important respects. From a humanitarian standpoint, his conduct demonstrated callousness to slaves-in-distress. From a legal standpoint, Lincoln’s apparent belief that providing a safe haven to fugitive slaves violated the FSC and the FSA was ill-considered. The FSC and the FSA did not authorize, no less require, the military to bar fugitive slaves or remit slaves. Nor did the FSC or the FSA require fugitive slaves be turned

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\(^{165}\) Id. at 391.

\(^{166}\) Id.

\(^{167}\) Id.

\(^{168}\) Id.

\(^{169}\) As noted by a contemporary historian, advances by the Union army “brought the Federal forces into more immediate contact with the slaves, hence the questions relative to the political, civil, and social position of ‘colored persons of African descent,’ became more prominent during 1862 than in any previous period.” Tenney, supra note 23, at 152.

\(^{170}\) Harding, supra note 5, at 230.
over to Confederate slave-owners, when it was known that they would not bring their escaped slaves in front of the federal tribunals established by the FSA, but would instead directly return their slaves to captivity. The persistent willingness of the Union military to cooperate with Confederate slave-owners, with the blessing of the Commander-in-Chief, prompted Congress to enact the AAW.

But, an even more serious problem lurks beneath the surface. If Lincoln believed that providing a safe haven violated the FSC and the FSA, then his policy of non-uniformity manifested exceedingly selective enforcement of what Lincoln believed were bedrock Constitutional and statutory obligations which he had taken an oath to “faithfully execute . . . .”171 Lincoln never hesitated to deify his oath of office, and to attribute much of what he did as President to the fact that his oath compelled him to do so.172 But his conduct here belies the view that he exalted his oath of office above all else and that he was a paragon of Constitutionalism and the rule of law. To the contrary, it demonstrates that his reverence was for success and that he exalted ends over means. These may be important ingredients for effective leadership, but they do not yield a moral compass.

Notwithstanding Lincoln’s deep and longstanding antipathy towards Blacks, it is nevertheless inexcusable, if not entirely inexplicable, that he refrained from ordering his generals not to bar fugitive slaves from their camps and not to return them to their rebel masters.173 Lincoln’s failure to intercede came at a very heavy price, viz., every fugitive slave remitted to the South freed up a White soldier to pick up a gun aimed at Union soldiers, and the overall effect was to discourage other slaves to flee North. As was later noted: “In time, it became evident even to the most obtuse federal commanders that every slave who crossed into Union lines was a double gain: one subtracted from the confederacy, and one added to the Union."174 Surely

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171. U.S. CONST. art. II, § 1, cl. 8.
172. Thus, for example in his first inaugural speech, Lincoln stated: “You have no oath registered in Heaven to destroy the government, while I shall have the most solemn one to ‘preserve, protect and defend it.’” COLLECTED WORKS, supra note 9, at 262, 271. Lincoln frequently referenced his oath in that speech. At another point in that speech he stated: “I take the official oath to-day, with no mental reservations, and with no purpose to construe the Constitution or laws, by any hypercritical rules.” Id. at 264. Lincoln’s selective legal enforcement regarding fugitive slaves was certainly less than “hypercritical.”
173. Lincoln’s inaction did not end until July 1862 when Halleck was forced to withdraw his Generals Order No. 3 as part of the arrangement leading to his being appointed General-in-Chief.
Lincoln was not so “obtuse,” but he persisted in resolving doubts regarding fugitive slaves in favor of the Border States until Congress told him he could no longer do so. The Emancipatory Legislation, in particular the AAW and the SCA took the contraband issue out of Lincoln’s hands, and settled the matter once and for all in favor of emancipation and using slaves in the Union military.

D. Lincoln’s Pre-War Views on Race and Slavery

It would be a mistake, however, to interpret Lincoln’s conduct with respect to the Fremont and Hunter proclamations and his malfeasance with respect to the contrabands, as evidencing an underlying sympathy with slavery. Lincoln was a foe of slavery, but he was not a friend of the slaves. Lincoln always believed that the legal rights of slave-owners should be respected, including their right to keep and recapture slaves.

In Lincoln’s mind, Black slaves were subordinate to their masters. This attitude manifested itself in several unmistakable respects. First, Lincoln had been a staunch supporter of the 1850 FSA, and he justified his support for that measure by relying on a constitutional argument that borders on being frivolous. Lincoln apparently believed that Congressmen had a constitutional obligation to enact fugitive slave legislation.175

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175. See generally, ROBERT M. COVER, JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS (Yale Univ. Press 1975). Lincoln said that he supported the 1850 Fugitive Slave Law “because I do not understand that the constitution, which guarantees that right, can be supported without it.” 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 317 (Roy P. Basler ed., 1953) [hereinafter COLLECTED WORKS 3]. This statement suggests that Lincoln believed Congressmen had a constitutional obligation to enact fugitive slave legislation. In early 1860, Lincoln said of the FSL that: “It is ungodly; it is ungodly; no doubt it is ungodly! But it is the law of the land, and we must obey it as we find it.” RECOLLECTED WORDS, supra note 94, at 188. In late February 1861, he said that the FSC was the “organic law of the land” and that he would “execute it with more fidelity than any southern man they could possibly find . . .” Id. at 334. Professor Levinson also believes Lincoln thought he had a “constitutional duty to support [fugitive slave legislation], whatever one’s private views as to the evil of slavery. S. Levinson, The David C. Baum Memorial Lecture: Was the Emancipation Proclamation Constitutional? Do We/Should We care What the Answer Is? U. ILL. L. REV. 1135, 1146 (2001). Professor Levinson’s interpretation was based on the following argument Lincoln made in his famous 1858 debates with Senator Douglas: “Now on what ground would a member of Congress who is opposed to slavery in the abstract vote for a fugitive law, as I would deem it my duty to do so? Because there is a Constitutional right this needs legislation to enforce it. And although it is distasteful to me, I have sworn to support the Constitution and having so sworn I cannot conceive that I do support it if I withheld from that right any necessary legislation to make it practical.” Douglas Debates, in SPEECHES AND WRITINGS, 1832-1858 620 (Don E. Fehrenbacher ed., 1989) (referring to the debate of September 15, 1858).
It is difficult to fathom Lincoln’s purported belief that the Constitution required Congress to enact fugitive slave legislation. This was, to say the least, an extreme interpretation of the Constitution. One would expect Lincoln would have bent over backwards to resist an interpretation that would obligate him to vote for legislation directly supportive of an institution he considered immoral. Lincoln’s willingness to endorse that interpretation is all the more curious since the vitality and meaning of the Fugitive Slave Clause was widely debated in his day.

Lincoln was aware of many principled arguments that would have justified his refusal to support fugitive slave legislation. If Lincoln had wanted to strike a blow against slavery, and done so in a manner consistent with the Constitution, he could easily have done so. That he gravitated to a position which obligated him to support slavery demonstrates his willingness to subordinate morality to politics. Lincoln’s decision to support fugitive slave legislation more likely reflected his desire to mollify the slave holding interests than adherence to Constitutional dictates.  

Despite his words, it is unlikely that Lincoln’s willingness to support legislation implementing the Fugitive Slave Clause was based on legal rather than political considerations. By the time Lincoln spoke, there were numerous federal and state court opinions eviscerating the meaning of the FSC. And even though the Supreme Court had stated in 1842 that implementation of the FSC was a matter of federal responsibility, on the eve of the Civil War, the Court held, in Kentucky v. Kennison, that the federal judiciary could not compel a governor’s compliance with the federal fugitive slave laws. The delivering up of fugitive slaves had become largely a matter of comity, not constitutional compulsion. Thus, well before the commencement of the Civil War, the delivering up of fugitive slaves had become largely a matter of comity, not constitutional compulsion. Nevertheless, even

176. Professor Klingaman states that after “Congress abolished slavery in the District of Columbia and the territories, Representative George Julian submitted a bill to repeal the Fugitive Slave Act of 1793 and 1850, but the measure died when [Lincoln] refused to support it.” KLINGAMAN, supra note 6, at 145. See CONSTITUTIONAL PROBLEMS, supra note 63, at 351 n.21:

Lincoln . . . was not an ‘abolitionist.’ He did not favor the repeal of the fugitive slave law; he did not oppose the admission of slave states, for he felt that the states should make such constitutions as their people might see fit; he did not, as a senatorial candidate in 1858 [support] abolition of the slave trade between the states.

Id.

177. 24 How. 66 (1860).

178. See generally, COVER, supra note 175.
in the midst of war, Lincoln continued to resist repealing fugitive slave legislation.

Second, Lincoln’s willingness to protect the legal rights of slaveowners is embarrassingly evident from his tenure in private law practice. In 1847, Lincoln represented Matson, a slaveowner, who was seeking to recapture some of his fugitive slaves.\textsuperscript{179} It is difficult to reconcile Lincoln’s representation of Matson with his often expressed view that he believed slavery to be immoral. By representing Matson, Lincoln was vindicating Matson’s legal right to engage in an activity, which Lincoln apparently believed was immoral and injurious both to Matson and his slaves. Lincoln’s conduct here must be distinguished from that of a lawyer defending a guilty criminal defendant, or for example, defending the right of a group to march even though the group has views which are morally repugnant to the attorney. Defending the guilty criminal does not imply that defense counsel believed that his client had a right to engage in the underlying criminal conduct, but only that the criminal defendant has the right to counsel. Likewise, defending the right of Nazis to march does not imply that counsel agrees with his client’s political opinion, but signifies only that they have a right to express those views. In both of those instances the attorney is protecting a right, the exercise of which is not harmful to any third party. But in representing Matson, Lincoln directly sought to enable him to engage in conduct necessarily harmful to third parties, viz., Matson’s slaves.

Lincoln’s representation of Matson is more akin to a lawyer who conscientiously objects to capital punishment arguing at a sentence hearing in favor of the death penalty. Nowadays, the rules of ethics counsel against a lawyer continuing to represent a client whose conduct the lawyer “considers repugnant.”\textsuperscript{180}

More to the point, it is inexplicable that a lawyer who ethically objects to a client’s conduct would seek to vindicate the client’s right

\textsuperscript{179}. Guelzo defends Lincoln’s representation of Matson as being “within the law,” GUELZO, supra note 63, at 24, but notes that Lincoln and his wife shared in the proceeds when the Todd family slaves were sold. It has also been reported that, as a lawyer, “Lincoln advocated the delivery of a black woman and her child to a white man to satisfy a debt.” Phillip S. Paludan, \textit{Book Review of The Law Practice of Abraham Lincoln: The Complete Documentary Edition (DVD)}, 200 (Martha L. Benner and Cullom Davis, eds.), in \textit{88 J. AM. HIST.} 648 (Sept. 2001).

\textsuperscript{180}. \textit{See} Model Rules of Professional Conduct, Rule 1.16(b)(4); \textit{see also} Comment [1] to Model Rules of Professional Conduct, Rule 1.3, which requires a lawyer to “act with zeal in advocacy upon the client’s behalf.” Lincoln seemed to concur with the views expressed in the Model Rules. He once stated: “When [a lawyer] lack[s] interest in the case the job will very likely lack skill and diligence in the performance.” \textit{Collected Works} 2, supra note 86, at 82.
to engage in that conduct, particularly where that conduct is harmful to third parties whom the lawyer knows are incapable of preventing the injury. Lincoln said that Whites, no less than Blacks; and northerners, no less than southerners, were victims of slavery. At bottom, Lincoln’s elastic concept of morality enabled him to reap economic benefits (including the legal fees from Matson and proceeds from the sale of the Todd family slaves) from slavery and to advocate the recapture of fugitive slaves.

For similar reasons, I cannot agree with those who excuse Lincoln’s representation of Matson on the ground that he was not “squeamish about the social implication of the cases he argued . . . and his business was law, not morality.” For this latter reason it has been argued that Lincoln’s representation of Matson should [not] be taken as an indication of Lincoln’s view on slavery . . . . To the contrary, if in fact, Lincoln had deep moral objections to slavery it is difficult to see how as a matter of principle he could have reconciled that with a legal representation aimed at advancing the slave owning interests of a slave-owner. This is not to say Lincoln could not represent Matson simply because he was a slave-owner. Matson could have a range of legal interests unrelated to slavery, so that an attorney believing slavery was immoral might comfortably advocate on behalf of Matson. But Lincoln’s representation of Matson related directly to Matson’s slave interests, not to something collateral to slavery. Thus, Lincoln’s representation was not innocuous. It serves as a barometer of the depth and character of Lincoln’s views of slavery at that point in time.

It has often been commented on that Lincoln arrived late on the anti-slavery bandwagon and that his increasingly vociferous opposition to slavery seemed opportunistic from the standpoint of his political career. Indeed, Lincoln did not undertake cases as an anti-slavery leader, until after the enactment of the Kansas-Nebraska bill in

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181. See Paul G. Hasse1, Why Lawyers Behave as They Do (1998), which gives an excellent statement about why lawyers should not give service on behalf of an immoral objective. Cf. Public Utilities Commission v. Pollak, 343 U.S. 451, 466–67 (1952) (Frankfurter, J., recusal opinion) (explaining decision to recuse himself from deciding a case where judge cannot “think dispassionately and submerge private feelings on every aspect of a case . . . [o]n the whole judges do lay aside private views in discharging their judicial functions . . . [B]ut where [my] feelings are so strongly engaged as a victim of the practice in controversy than I had better not participate in judicial judgment upon it.”

182. Lincoln, supra note 18, at 103–04.

183. Id. at 104.
At that juncture, Lincoln said, “The slavery question often bothered me as far back as 1836-1840. I was troubled and grieved over it; but after the annexation of Texas I gave it up.”

Lincoln moved to favor emancipation well after the War commenced, but even then he had an antipathy for emancipation on any terms other than his own. Lincoln thought he knew better than Congress what the pace and manner of emancipation should be. And, as the war progressed, he wanted to reserve decisions about emancipation for himself and not simply exclude his commanders, but exclude Congress as well. In all of this, Lincoln was undoubtedly motivated by many considerations, including his long-standing aversion to Blacks and his desire to avoid antagonizing the slave holding Border States. Lincoln’s defenders often cite his “Border State” strategy to justify his failure to move earlier and more robustly against slavery, but insufficient attention has been paid to the fact that Lincoln’s dislike of Blacks was a prominent part of his approach to emancipation up until the very moment he issued the Final Proclamation.

Whether judged by contemporary or modern day standards, Lincoln’s view of blacks qualify him as a racist. He believed race affected human performance and that Blacks were inferior to Whites. Immediately prior to issuing the Preliminary Proclamation on September 22, 1862, Lincoln conducted perhaps the most jarring racist meetings ever held by a President at the White House. On August 14, 1862, just five weeks before he issued the Preliminary Proclamation, Lincoln met with an assemblage of free Negroes. He opened the meeting by stating that Congress had appropriated money for colonization of Blacks, and then posed questions to the group, viz., why Blacks should be colonized, and “why should they leave this country?” Lincoln answered his own questions as follows:

You and we are different races . . . your race suffers very greatly . . . by living among us, while ours suffer from your presence. . . . [O]n this broad continent, not a single man of your race is made the

184. According to Hofstadter, Lincoln did not publicly denounce slavery until his October 4, 1854 speech at Peoria, Illinois, when he was 45. Hofstadter, supra note 12, at 106.

185. Recollected Words, supra note 94, at 61.

186. See, e.g., Wills, supra note 12, at 90–99; Lincoln, supra note, at 18, at 633 n.221, reviewing the literature on Lincoln’s racist views, and concluding that it would “be a mistake to palliate Lincoln’s racial views by saying that he grew up in a racist society or that his ideas were shared by many of his contemporaries. After all, there were numerous Americans of his generation—notably, many of the abolitionists—who were committed to radical equality.”
equal of a single man of ours... It is better for us both, therefore, to be separated.187

Lincoln added insult to injury at the meeting by accusing Blacks of being responsible for the War by having permitted themselves to be enslaved. "But for your race among us there could not be war... Without the institution of slavery and the colored race as a basis, the war could not have had an existence."188 Lincoln concluded the meeting by inviting the group before him to volunteer to start a colony outside of the United States, and thus to set a good example for other Blacks.189

The meeting drew a sharp response from Frederick Douglass, who compared Lincoln's comments to "a horse thief pleading that the existence of the horse is the apology for his theft or a highway man contending that the money in the traveler's pocket is the sole first cause of his robbery..." Douglass believed that Lincoln's comments showed "his pride of race and blood," and his "contempt for Negroes."190

Lincoln reiterated his message of colonization one month later when he issued the Preliminary Proclamation, in which Lincoln promised to seek colonization legislation from Congress. He followed through on this promise in his December 1862 State of the Union Message in which he did, in fact, propose such legislation to Congress, along with gradual, voluntary, compensated emancipation. Lincoln went so far as to raise the specter of forced deportation. Thus, even after he issued the Preliminary Proclamation, and just days before playing his "last card," the Final Proclamation, Lincoln made clear that he was prepared to stop well short of abolition within the Confederacy.191

Lincoln’s defenders often point to the fact that he frequently invoked the Declaration of Independence to support the assertion that Blacks were created equal to Whites. But, while Lincoln believed Blacks had the right to enjoy the fruits of their labor as much as Whites, he opposed citizenship for Blacks. "How any man could be

188. Id. at 372.
189. See id. at 371–72.
190. 3 Frederick Douglass, The Life and Writing of Frederick Douglass 267–68 (Philip S. Foner ed., 1975).
expected to defend his right to enjoy the fruits of his labor without having the power to defend it through his vote, Lincoln did not say.”

Professor Voegeli perhaps put the best face on it for Lincoln when he said that Lincoln had “two seemingly discordant strands of thought—a sense of outrage at slavery and a belief in white superiority.” Whatever the depth of Lincoln’s outrage at slavery, Lincoln consistently subordinated that outrage to other considerations, some political, others more pedestrian. Moreover, Lincoln’s objections to slavery were many faceted, and it is not clear how high on the wrung humanitarian considerations were. In particular, many Republicans, including Lincoln believed that a slave labor system retarded the development of free labor, and thus prevented Whites from improving their economic and social condition. This economic-based objection to slavery, thus, had substantial racial overtones.

Lincoln’s opposition to the extension of slavery should not be confused with opposition to slavery itself. To the contrary, Lincoln opposed slavery being extended into the west not only because he thought slavery was anathema to a free market system, but also because he wished to block Black migration to the west. Lincoln once warned that if slavery were permitted to spread into the territories “every White laborer will have occasion to regret when he is elbowed from his plow or his anvil by slave niggers.”


1. The Preliminary Proclamation

On September 22, 1862, President Lincoln issued an executive order, which has come to be known as the Preliminary Emancipation

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192. HOFSTADTER, supra note 12, at 116 n.11.
196. COLLECTED WORKS 3, supra note 175, at 78.
197. On September 13, 1862, in a meeting with Christian ministers from Chicago, Lincoln rejected their demand that he issue an emancipation proclamation, stating: “What would a proclamation of emancipation from me do especially as we are now situated. I do not want to issue a document the whole world would see necessarily to be inoperative, like the Pope’s bull against the comet . . . . Would my words free the slaves when I cannot even enforce the Constitution in the rebel states?” COLLECTED WORKS, supra note 9, at 419.
Proclamation (Preliminary Proclamation). The Preliminary Proclamation stated that one hundred days later, on January 1, 1863, all slaves in states “in rebellion against the United States shall be . . . forever free.” This order did not grant freedom to any slave either contemporaneously or in the future. Rather, emancipation could occur only if some or all of the Confederate states were still in rebellion by January 1, 1863, and even then emancipation depended on the issuance of another executive order designating the states “and parts of states . . . then shall be in rebellion against the United States . . .” Importantly, it was contemplated that emancipation, if it should occur, would not extend to slaves in the Border and other Union states, or Union-occupied areas of the Confederacy. The Preliminary Proclamation also recited Lincoln’s intention to ask Congress to pass a compensated emancipation measure so as to encourage states to enact gradual emancipation legislation and to seek legislation promoting voluntary colonization of Blacks.

The Preliminary Proclamation was issued by Lincoln in his joint capacity as President and Commander-in-Chief of the Army and Navy. In issuing the Preliminary Proclamation, Lincoln did not explicitly rely upon any statutory authorization, though “attention [was] . . . called” to the AAW and to the sections nine and ten of the SCA. According to Indiana Congressman George W. Julian, Lincoln “very reluctantly issued the [Preliminary] Proclamation . . . [and] he wished

198. PRELIMINARY PROCLAMATION, usinfo.state.gov/usa/infousa/facts/fundocs-emanc.htm.
199. Id. This aspect of the Preliminary Proclamation is markedly different from the first draft of the emancipation proclamation that Lincoln showed to his Cabinet. On the back of the second page of the original draft Lincoln wrote: “Emancipation Proclamation as first sketched and shown to the Cabinet in July 1862.” COLLECTED WORKS, supra note 9, at 338 & n.3. This document, dated July 22, 1862, stated in unqualified terms that on January 1, 1863, “all persons held as slaves within any state or states, wherein the constitutional authority of the United States shall not then be practically recognized, submitted to, and maintained, shall then, thenceforward, and forever, be free.” Id. at 337. There is no record explaining why Lincoln modified the proclamation to make it a two-step rather than a one-step process.
200. Section nine of the SCA freed fugitive slaves owned by Confederate rebels. Section ten of the SCA prohibited the return of any slave who fled to a Union state or territory, including the District of Columbia, unless the person claiming the fugitive slave swore that he owned the slave and that the owner had not supported the rebellion. What is understood to be “the first draft” of the Preliminary Proclamation referenced section six, not sections nine and ten of the SCA in its opening paragraph. COLLECTED WORKS, supra note 9, at 337. Section six stated that the property of persons in rebellious states who did not cease to give aid to the rebellion within sixty days after the issuance of a Presidential proclamation giving them fair warning, would be liable to seizure. Section six did not, however, pertain to slaves. The original opening paragraph was later issued by Lincoln as the Proclamation of the Act to Suppress Insurrection, July 25, 1862. Id. at 341. Professor Basler speculates that Lincoln decided to make this change, and to issue the original opening paragraph as part of a proclamation because the Cabinet thought it was not timely for him to issue an emancipation proclamation. Id. at 337 n.1.
it distinctly understood that the deportation of slaves was in his mind inseparably connected with the policy."\textsuperscript{201} This suggests that the "emancipation" Lincoln had in mind if and when he issued the Preliminary Proclamation would be a substantially watered down version of "freedom."\textsuperscript{202} Indeed, even after he issued the Final Proclamation, Lincoln continued to espouse restraints on Blacks falling well short of "freedom."\textsuperscript{203} Thus, for example, in a January 8, 1863 letter to a General John A. McClernand, Lincoln said that Southern states could implement "systems of apprenticeship for the colored people, conforming substantially to the most approved plans of gradual emancipation."\textsuperscript{204}

It is somewhat of a misnomer to refer to Lincoln's September 22, 1862 Proclamation as the Preliminary Emancipation Proclamation. It did not emancipate, nor did it proclaim that emancipation would, in fact, occur at some future date. To the contrary, it created the specter that emancipation would not occur if the Confederate states returned to the Union within one hundred days. In truth, it was a "conditional-surrender proposal: if states returned to the Union in the next several months, they would retain their slaves."\textsuperscript{205}

Against the backdrop of Congress's barrage of emancipatory legislation, the Preliminary Proclamation seems a weak afterthought. It was not a promise to slaves that they would be set free in 100 days. Rather, it was a promise to Confederate slave-owners that if they returned to the Union within 100 days they could keep their slaves.\textsuperscript{206} Even if construed as a threat rather than a promise, the goal was not to end slavery in the South, but to bring the South back into the fold, and to end the war quickly. Keeping slavery intact was the necessary inducement, though this inducement was of doubtful legal validity or practical value.

Whether Southern slave-owners would have been able to retain their slaves if the Confederate states rejoined the Union prior to January 1, 1863, was not, of course, Lincoln's decision alone. Many of the

\textsuperscript{202.} Collected Works of Abraham Lincoln 48–49 (Roy P. Basler ed., 1953) [hereinafter Collected Works 6].
\textsuperscript{203.} See generally id.  
\textsuperscript{204.} Id. at 48–49.  
\textsuperscript{205.} Willis, supra note 12, at 183.  
\textsuperscript{206.} This was an approach Lincoln had favored in connection with the District of Columbia Emancipation Act.
South’s slaves were already entitled to their freedom under the FCA, SCA, or the Militia Act, and Lincoln had no legal power to divest any slave of freedom earned under a federal statute. From a practical standpoint, the inducement to keep slavery intact was of little value because of the large and ever-increasing number of slaves who had fled the Confederacy. It was unlikely that these slaves could be reenslaved by the time the Final Proclamation was issued. In any event, it was unsurprising that the South did not succumb to this inducement.

The Preliminary Proclamation did not bind Lincoln to issue a further Proclamation. He had the power, and the right, to decline further action if he believed circumstances warranted it. There was much apprehension that Lincoln would not issue a Final Proclamation, and those fears persisted until the very moment that Lincoln took the final step.

The skepticism about whether Lincoln would go forward was well founded. It appears that Lincoln wavered on the subject even after he issued the Preliminary Proclamation. In his December 1, 1862 annual message to Congress, Lincoln did not say that emancipation would happen one month later as set forth in the Preliminary Proclamation. Rather, he spoke about emancipation as something that would occur at an unspecified time in the future through a series of constitutional amendments. These amendments would offer gradual, compensated emancipation to those states that wished to accept them. He even hinted at the possibility of forced deportation of Blacks. Thus, just thirty days before he was scheduled to issue the Final Proclamation, Lincoln raised the specter that he might choose a course other than issuing the Final Proclamation. To no one’s surprise, the South declined Lincoln’s gambit, forcing Lincoln to play his “last card.”

207. See 2 J. G. RandALL, LINCOLN THE PRESIDENT, SPRINGFIELD TO GETTYSBURG 166–67 (1945). To quell concerns that emancipation might result in a substantial migration of blacks to northern states, Lincoln queried that “cannot the north decide for itself whether to receive them?” COLLECTED WORKS, supra note 9, at 535–36. This rhetorical question was premised on the (correct) assumption that at that point in time states had the power to enact legislation excluding blacks from the state. Many states, including “free” states such as Lincoln’s Illinois, had what were commonly known as Black Laws. Lincoln’s invitation to northern states to enact black Laws to foreclose black migration has been described as “the moral low point of Lincoln’s career.” Lind, supra note 195, at 208.

208. On several occasions Lincoln referred to the prospective issuance of an emancipation proclamation as “playing” his “last card.” See BlaDe, supra note 43, at 439–440 (quoting a letter from Lincoln to a loyal citizen in Louisiana, where Lincoln states: “You must not expect me to give up this government without playing my last card.”); see also RECOLLECTED WORDS, supra note 94, at 360 (“It is my last card, and I will play it and may win the trick.”). See C. SanDBuRG, The War Years 589 (1940) (displaying a Punch cartoon captioned: “Abe Lincoln’s
2. The Final Proclamation—Lincoln’s “Last Card”

True to his word, on January 1, 1863, Lincoln issued the Final Proclamation. Though it is more than 150 years old, the Emancipation Proclamation has not lost its luster through the passage of time. It is perhaps the most majestic sounding document in American history, yet among the most misunderstood. The Proclamation is considered the signature document of Lincoln’s tragically shortened presidency.

Lincoln himself stated that “as affairs have turned, it is the central act of my administration and the great event of the nineteenth century.” The Proclamation captured the popular imagination when it was issued, and continues to signify the end of legal, if not de facto, slavery in the United States.

As with the Preliminary Proclamation, Lincoln issued the Final Proclamation in his joint capacity as President and Commander-in-Chief. The Final Proclamation declared that all slaves within the states, and portions thereof, designated by Lincoln were free. It contained a list of the states covered by the Proclamation. The list included all of the states that had seceded in 1861, except Tennessee, Union controlled areas of Louisiana and Virginia, and the newly formed state of West Virginia. Thus, the Proclamation was geographically configured to keep slavery in place where Lincoln has the power.

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Last Card; or Rouge et Noir.” The cartoon references the Preliminary, not the Final proclamation.

209. The classic statement is that the Proclamation is “more often admired than read.” Randall, supra note 207, at 161.

210. One scholar has gone so far as to state that the Proclamation “may fairly be regarded as the greatest single act of an American President.” John P. Frank, Lincoln as Lawyer 147 (1961). Justice Douglas referred to it as being “like the Magna Carta.” William O. Douglas, Mr. Lincoln and the Negro—The Long Road to Equality vi (1963). Martin Luther King was so taken with the Proclamation that on its hundredth anniversary he sought to persuade President Kennedy to issue a second one. James M. McPherson, Lincoln’s Legacy for Our Time, in Lincoln Reshapes the Presidency 214 (Charles M. Hubbard ed., 2003).

211. Recollected Words, supra note 94, at 90.

212. As a legal matter slavery did not end until the Thirteenth Amendment was ratified in 1865.

213. The Proclamation is a ubiquitous document that has ongoing contemporary relevance among a wide audience. Thus, for example, during a 1990 game between the New York Yankees and the Chicago White Sox, Hall of Fame catcher Carlton Fisk, then 42, took umbrage because 22 year old Deion Sanders, who [had] etched a dollar sign in the dirt before batting, had not run hard to first on an infield pop-out. Before Sanders’ next at-bat, Fisk said he told the rookie Sanders, ‘Run.’ Fisk said Sanders told him that slavery had ended with the Emancipation Proclamation, so Fisk told Sanders that playing the game properly had nothing to do with skin color. The players wound up going nose-to-nose and both dugouts emptied, but the situation was quickly defused.

N.Y. Times, Nov. 9, 2003, § 8, at 10.
Of Contrabands, Congress, and Lincoln

to abolish it, and to abolish it online in those places where he had no such power.

The Final Proclamation also declared that former slaves could “be received into the armed service of the United States . . . .” Though Congress had authorized him to do so five and one-half months earlier in the SCA and the Militia Act, this marked the first time Lincoln committed to using Negro troops in combat. The Final Proclamation declared that it was “a fit and necessary measure” to suppress the rebellion, and that it was issued “upon military necessity.”

The Final Proclamation differed from the Preliminary Proclamation in several important respects. First, it made no reference to any of the Emancipatory Legislation. The terms of the Final Proclamation were, however, largely redundant with the Emancipatory Legislation already enacted by Congress. Second, it made no reference to colonization. Third, it did not provide compensation for loyal slave-owners.

Lincoln’s issuance of the Final Proclamation represented an evolution in his thinking on several important constitutional issues. First, prior to the War, Lincoln believed that the federal government was constitutionally prohibited from interfering with slavery in states where it existed. Slavery was considered a “domestic institution” amenable to state, not federal, control. Second, as evident from his writings in connection with Fremont proclamation, Lincoln initially believed that the Constitution gave Congress, not the Executive, power to modify slavery within the Confederacy. Third, Lincoln had long adhered to the view that the constitution protected loyal slave-owners within the Confederacy from having their slaves confiscated or emancipated.

There are substantial questions relating to the constitutionality of the Proclamations. These are important issues fully deserving of a separate paper. For purposes of the instant paper it suffices to note three constitutional concerns. First, the Final Proclamation appears to have exceeded the powers conferred upon Lincoln by any statute. The Preliminary Proclamation mentioned the SCA and the AAW, but

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214. As noted earlier, after the enactment of the Militia Act, Lincoln ordered the employment of Negroes as military laborers, but he refused to accept them as soldiers even though he was authorized to do so by the Militia Act. This was not cured until the issuance of the Final Proclamation.

215. Contemporaneous constitutional discussions of the Proclamation are discussed in Levinson, supra note 175.
neither of those statutes granted Lincoln the authority to emancipate slaves in the Confederacy or elsewhere. In contrast to the Preliminary Proclamation, the Final Proclamation did not purport to rely upon any statute. But the Final Proclamation appears to have exceeded by a small measure the scope of emancipation in the Confederacy which Congress had legislated. The FCA had emancipated non-escaped slaves in the Confederacy who had not been employed in hostile service. The Proclamation emancipated all non-escaped slaves in the Confederacy, without regard to whether they had been used in hostile service. In that very limited respect, Chief Justice Vinson was correct in stating that the Emancipation Proclamation was not authorized by Congress.

Second, though the Preliminary Proclamation received support in the House, the Final Proclamation was never ratified by Congress, despite several attempts by Lincoln’s administration. Third, the Final Proclamation likely exceeded Lincoln’s authority as Commander-in-Chief.

Most importantly, issuance of the Final Proclamation was at odds with long-standing Supreme Court precedent which had made clear that the President, even when acting as Commander-in-Chief, was subordinate to Congress. As early as 1804, the Court established the principle that in conducting military operations the President could not exceed Congressional directives. This was reaffirmed by the

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216. The Proclamation did not transgress the SCA because that statute applied only to escaped slaves of rebel, not “loyal,” owners within the Confederacy. The Proclamation did not address the status of escaped slaves.

217. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 685 (1952) (C. J. Vinson, dissenting). Chief Justice Vinson overstated the matter when he claimed the Proclamation was issued “wholly without statutory authority.” Id. (emphasis added). As discussed here, the Proclamation was substantially, though not entirely, within the purview of the Emancipatory Legislation.

218. Professor Voegeli notes that “on December 15, 1862, the house gave Lincoln an important vote of confidence by passing, largely along party lines, a resolution praising the September proclamation as a war measure.” Voegeli, supra note 195, at 74.


220. Issuance of the Proclamation appears to exceed the relatively narrow role of the Commander-in-Chief contemplated by the Fathers, and the narrow definition of the powers of the Commander-in-Chief expressed by the Supreme Court in 1850. See James Madison et al., The Federalist Papers, No. 69 396 (Penguin Books 1987); Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850) (limiting the Commander-in-Chief’s role to “purely military” matters).

221. In Little v. Barreme, 6 U.S. (2 Cranch.) 170 (1804), the Court held that the President could not authorize the seizure of ships going to/from French ports where Congress had authorized seizures only of ships going to/from said ports. The Court made clear that the President had to comply with this statutory limitation even if he could have seized such ships in the absence of
Court in 1814\textsuperscript{222} and 1850.\textsuperscript{223} Issuance of the Proclamation substantially, and irrevocably, altered the balance of power between the President and Congress in the area of conducting war, and ignited a trend, which continues to the present.

IV. LINCOLN AS THE “GREAT EMANCIPATOR”

A. Lerone Bennett

In Forced Into Glory,\textsuperscript{224} Lerone Bennett, an African American historian and journalist, takes aim at the conventional view that Lincoln was the Great Emancipator.\textsuperscript{225} Bennett’s thesis is that the Civil War Congress, rather than President, emancipated the slaves. Bennett asserts that Lincoln did not favor emancipation, and that he grudgingly issued the Proclamations only after being forced to do so as the result of political pressure and military necessity. Thus, according to Bennett, Lincoln does not deserve the glory of having freed the slaves. In support of his thesis, Bennett advances, among other things, a number of legal arguments. Bennett’s thesis is more correct than Lincoln’s many apologists are prepared to admit, but many of the legal grounds he relies upon are erroneous.\textsuperscript{226}

Bennett is correct in asserting that Lincoln lagged behind the Civil War Congress in promoting emancipation, and that the legislation enacted by the Civil War Congress was a more potent instrument of emancipation than the Proclamation. Bennett’s conclusion that the Civil War Congress, rather than Lincoln, deserves credit for having emancipated the slaves hinges mostly on the two confiscation acts. He understates, almost overlooks, the important emancipatory effects of the Additional Article of War and the Militia Act.

\begin{itemize}
\item It is noteworthy that the legislation discussed by the Court did not expressly prohibit the President from seizing ships going to/from French ports.
\item In Brown v. United States, 12 U.S. (8 Cranch.) 110 (1814), the Court held that the President could not seize enemy property found on United States land at commencement of war absent Congressional authority.
\item In Fleming v. Page, 50 U.S. (9 How.) 603 (1850), the Court held that the President, acting as Commander-in-Chief, could not, without Congressional authority, annex property to the United States taken through military conquest. Cf. Kendall v. United States, 37 U.S. (Pet.) 524 (1838), the Court held that Congress could require the Postmaster General to pay a government contractor, notwithstanding a presidential order forbidding him from doing so.
\end{itemize}
In justifying his condemnation of Lincoln, Bennett compared the Proclamations to the Confiscation Acts. In so doing, Bennett mischaracterizes both sets of documents. Bennett claims that the Preliminary Proclamation “effectively postponed or nullified the emancipating and confiscating required under the SCA,”227 and that the act “re-enslaved” African Americans who had been freed by the SCA.228 Both of these statements are incorrect. They reflect a legal and factual misunderstanding of the SCA, the Proclamations, and their interplay. Bennett wrongly implies, for example, that there is linkage between the SCA and the Proclamations. The SCA authorized the President to issue a warning that its confiscation, not its forfeiture provisions, would go into effect within sixty days. Lincoln issued such a notice on July 25, 1862, eight days after the SCA was enacted. The Preliminary Proclamation was issued on September 22, 1862, but its timing had nothing to do with the SCA.

The emancipation provisions of the SCA operated on their own accord, and, as a matter of law, an executive order could not postpone, modify, or nullify liberation obtained by operation of a federal statute. Thus, contrary to Bennett, the Proclamations could not have re-enslaved any persons who had been set free under the SCA. And, of course, neither of the Proclamations even purported to re-enslave any freedmen. Likewise, even if Lincoln had not issued the Final Proclamation, this would not have stripped freedom from slaves who had been emancipated under the Emancipatory Legislation.

As a legal matter, emancipated slaves could be remanded to slavery, if at all, only by Congress enacting legislation repealing the emancipating statutes and explicitly re-imposing the status of slavery on the freedmen. Furthermore, while Congress certainly has the power to repeal legislation, it is doubtful that Civil War Congress had the power or the inclination to pass legislation retroactively re-enslaving freedmen. The mere repeal of emancipatory legislation would result only in that legislation ceasing to have prospective effect, it would not cause a divestiture of any rights, such as liberty, which had already vested in freedmen. Such a divestiture could occur only through the enactment of legislation which specifically sought to re-enslave freedmen, but such (retroactive) legislation would likely violate the ex post facto clause. More importantly, there is no constitutional authority

227. *Id.* at 11.
228. *Id.* at 13.
for Congress to deprive anyone of their freedom solely on the basis of their status (as freedmen). Such legislation would, among other things, appear to violate the Bill of Attainder Clause. As a legal and practical matter, it is difficult to see how any legislation could have resulted in a de facto re-enslavement of freedmen.

Bennett overstates the emancipatory value of the Confiscation Acts and correspondingly diminishes the value of the Proclamations. For example, Bennett wrongly claims that the SCA “freed the slaves of all rebels,”229 when, in fact, it only freed fugitive slaves of rebels. Nevertheless, his basic point that the Proclamations did not go as far as the SCA has substantial validity.230 But Bennett badly exaggerates when he argues that Lincoln did not “intend for the emancipation proclamation to free a single negro . . . .”231 Bennett fails to distinguish between the Preliminary and the Final Proclamation. Such a statement arguably has validity with respect to the Preliminary Proclamation, but clearly not with respect to the Final Proclamation.232

The Preliminary Proclamation did not emancipate any slaves, nor did it purport to do so. The Final Proclamation, however, did purport to free slaves in areas controlled by the Confederacy, and there is no reason to doubt that Lincoln’s purpose when he issued the Final Proclamation was to wrest control of those areas from the Confederacy. Thus, Bennett’s assertion that the Proclamations “did not liberate African-American slaves” is contrary to the plain language of the Final Proclamation and to Lincoln’s equally plain purpose in issuing the Final Proclamation.233 Though Bennett wrongly infers Lincoln’s purpose, there are important legal reasons for thinking that the Final Proclamation did not have the force of law234 such that it could not have liberated any slaves. But such legal arguments miss the point that the Final Proclamation had an overriding emancipatory effect without regard to its legality. The true emancipatory significance of the Final Proclamation had everything to do with its practical effect, and nothing to do with its legal vitality.

229. *Id.* at 11.
230. *Id.*
231. *Id.* at 7.
232. *See discussions infra.*
234. *See discussion infra.*
B. Professors McPherson and Randall

Professor James McPherson, the distinguished and prolific Civil War scholar from Princeton University, has taken issue with virtually all of Bennett’s conclusions. McPherson advances numerous legal arguments to support the view that Lincoln justly deserves credit for having freed the slaves. McPherson based his key legal arguments on the writings of Professor James G. Randall, whom McPherson describes as “the foremost expert on Civil War constitutional issues.”

Many of their arguments are not legally supportable.

1. The Second Confiscation Act

In arguing that the Civil War Congress, rather than Lincoln, deserves credit for having emancipated the slaves, Bennett relies heavily on the SCA, which Congress enacted two months earlier than the Preliminary Proclamation and five and one-half months before the Final Proclamation was issued. McPherson dismisses the SCA as being ineffective on the ground that it “freed only slaves of ‘traitors’ whom a federal court determined, case by case, to have engaged in rebellion.”

McPherson’s description accurately reflects paragraphs one, freeing slaves of persons adjudged to have committed “treason,” and two, liberating slaves of persons convicted of engaging in rebellion or insurrection of the SCA, but does not account for paragraph nine of the SCA. Paragraph nine provides for the emancipation of certain categories of slaves owned by “persons who shall hereafter be engaged in rebellion.” But emancipation was not contingent upon a federal or state court ruling, a conviction of the owner as a “traitor,” or the fact that the owner participated in the rebellion. Rather, the SCA only required that the slaves or rebellious owners come into Union lines. For example, the SCA said, slaves coming into Union lines “shall be forever free of their servitude, and not again held as slaves.” Freedom was not dependent on the former slave receiving a court order. This is precisely how the SCA was interpreted by the Union military.

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237. See generally McPherson, supra note 235.
238. See Destruction of Slavery, supra note 5, at 403. In the summer of 1862 General Samuel R. Curtis who had been appointed to command the reconstituted department of the
Thus, contrary to Professor McPherson’s apparent interpretation, a federal court determination of “traitor” was not a predicate for emancipation under paragraph nine of the SCA.

In support of the conclusion that the SCA “freed only slaves of ‘traitors’ whom a federal court determined, case by case, to have been in rebellion,” McPherson correctly mentions that Professor Randall wrote: “It is hard to see by what process any particular slaves could have legally established that freedom which the SCA ‘declared.’” It appears, however, that Professor Randall overlooked SCA paragraph 14, which granted federal courts “full power to institute proceedings, to make orders and decrees, issue process, and do all other things necessary to carry the [SCA] into effect.” Moreover, Professor Randall wrongly incorporated into paragraph nine the judicial decree requirement contained in paragraphs one and two of the SCA. Professor Randall erred when he suggested that under the SCA it was necessary for a court to issue “a decree of emancipation for particularly designated slaves” in order to free a slave.

Professor Randall’s analysis is further flawed for the reason that he appears to believe that under the SCA a slave could not be emancipated without a judicial declaration divesting the owner of legal title to his slave. Professor Randall thus states that “some document suit-

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239. The interpretation of the SCA advanced here is in accord with the interpretation advanced by McPherson in at least two books: BATTLE CRY, supra note 64, at 500 (the SCA “freed [rebels’] slaves as ‘captive of war,’”) and in JAMES MCPHERSON, THE STRUGGLE FOR EQUALITY: ABOLITIONISTS AND THE NEGRO IN THE CIVIL WAR AND RECONSTRUCTION 72 (Princeton Univ. Press 1964) (the SCA “declared all slaves of rebel masters ‘forever free as soon as they came within Union lines.’”). It is curious that McPherson would adopt a contrary, obviously erroneous, approach in his review of Bennett’s book. When this conflict between the statutory interpretation proffered in his books versus the one contained in his review of Bennett’s book was brought to Professor McPherson’s attention he declined to address the issue. See Professor McPherson’s April 24, 2003 letter to the author (on file with the author).

240. McPherson, supra note 235.

241. CONSTITUTIONAL PROBLEMS, supra note 63, at 363.


243. CONSTITUTIONAL PROBLEMS, supra note 63, at 363.
able for legal record would have been necessary, divesting the title, as a realty deed conveying a piece of land or a decree of condemnation and sale in the case of forfeited goods. Since the SCA itself did not divest the title, the need of such a decree is evident. It appears that the United States courts did not consider such decrees of liberation proper, and there is no instance . . . of any such decree having been issued."244 Professor Randall’s observation is wrong in two important respects.

First, a judicial declaration divesting title would have been necessary if the SCA called for confiscation, rather than emancipation, of slaves. But the SCA envisioned the confiscation of property, not slaves. Paragraph one explicitly treats slaves differently than the other property of a convicted owner. Under paragraph one, any fine imposed on a convicted owner could be levied and collected against “any or all of the property, real and personal, [of the owner], excluding slaves . . . .”245 More importantly, whereas a judicial decree divesting title would be necessary to effectuate confiscation, no such decree would be necessary to effectuate emancipation. The essence of emancipation is to extinguish, not transfer, title in slaves.246

Professor Randall’s belief that the SCA did not divest title is misdirected for a second reason. His discussion relies almost exclusively on the statement by Senator Trumbull (the sponsor of the SCA) that the SCA “did not itself divest title to property, and that judicial action against the property . . . was necessary in order to complete the confiscation.”247 Senator Trumbull’s statement was addressed to the levy and collection language in paragraph one, but, as noted above, that language did not apply to slaves.

Professor Randall attributes the absence of any judicial decrees issued under the SCA to the lack of any “evidence of the actual enforcement of the emancipation clause of the act.”248 In support, Pro-

244. Id.
246. A judicial decree in aid of emancipation might have been necessary if it was contemplated that title to slaves would first pass to the federal government (through an escheat or otherwise), and then from the federal government to the slave himself or herself. In stating his objections to the SCA, Lincoln adverted to this procedure as a way to avoid what he considered to be the constitutional prohibition on the federal government abolishing slavery through legislation. While Congress adopted many of Lincoln’s objections to the SCA, they declined to pursue the mechanism of transferring title to slaves.
247. CONSTITUTIONAL PROBLEMS, supra note 63, at 362 (citing Cong. Globe, 37th Cong., 2d Sess., 1571 (1862)).
248. Id. at 363.
professor Randall states: “Lincoln said concerning the SCA ‘I cannot learn that that law has caused a single slave to come over to us.’”

But Lincoln’s statement was not a genuine complaint about the inadequacies of the SCA. It was a backhanded attempt to justify his unwillingness to issue an emancipation proclamation, i.e., since the SCA had not caused slaves to come over to the Union side, then issuing an emancipation proclamation would likewise be ineffectual.

Of course Lincoln’s statement was contrary to fact and contrary to numerous other statements he made. Lincoln was acutely aware of the number of slaves who fled North in response to either the FCA or the SCA. But it is a commonly accepted fact that hundreds of thousands of blacks fled North before the end of the War, and that the number of blacks who fled steadily increased as the War persisted. In February 1862, General Sherman estimated that there were 9,000 blacks “now on land in possession of our forces [in the Port Royal, South Carolina area] which is probably a low estimate.”

Even one of Lincoln’s staunchest defenders, Professor Guelzo, estimates that between 13,000 to 60,000 ‘contrabands’ had come behind Union lines by the end of 1862.” Other scholars have noted the causal connection between the Confiscation Act and flight by Southern slaves. “Slavery deteriorated under the impact of the SCA and colonies of runaway slaves formed near army posts, railway depots and larger towns.”

According to a North Carolinian historian of the Civil War, “Day by day, the influx of African Americans fleeing from bondage continued to grow within Union lines in coastal North Carolina. In October 1862 a Beaufort County slaveholder noted that ‘It is nothing uncommon for dozens of slaves to escape from one man in a day, or for a plantation to be effectually ruined in a few hours.’ In August 1862, one Confederate official estimated the monetary value of escaped slaves to be $1 million per week. Even if that figure might have been an exaggeration, the loss of revenue, nevertheless, was substantial when one considers that a young male field hand was worth as much as $1,000. Furthermore, the flight of thousands of slaves represented a considerable drop in the states labor force and a corresponding decline in income in a labor intensive agricultural economy.”

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Assuming the accuracy of these statements, when multiplied across the entirety of the Confederacy, they demonstrate the large numbers of slaves who fled prior to issuance of the Proclamation, and the extent to which self-emancipation sapped the South of its economic and military strength quite early in the War.

Lincoln’s statement is also contrary to other statements he made acknowledging that slaves had fled in response to the FCA. In his December 1861 Annual Message to Congress, Lincoln stated that the FCA had resulted in the forfeiture of slaves, and “numbers of [them] thus liberated are already dependent on the United States and must be provided for in some way. Furthermore, the flight of thousands of slaves represented a considerable drop in the states labor force and a corresponding decline in income in a labor intensive agricultural economy.”

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Lincoln’s September 13, 1862 comments are also contrary to statements contained in his objections to the SCA two months earlier that “it will be physically [im]possible for the General Government to return [fugitive slaves] to actual slavery. I believe there would be physical resistance to it which could neither be turned aside by argument nor driven away by force.” Lincoln’s SCA Objections Letter. On July 1, 1862, Lincoln had also told Browning that “No inducements are to be held out to them to come into our lines; for
aware that from the very outset of the war thousands, perhaps hundreds of thousands, of Blacks fled North. Their presence behind Union lines forced the question of whether they should be received with open arms or returned to their Southern masters, and resulted in the enactment of the Emancipatory Legislation.

Professor Randall’s inability to find “evidence of the actual enforcement of the emancipation clause of the [SCA]” reflected the fact that no enforcement of that clause was necessary; it was self-executing. Contrary to Lincoln and Randall, the absence of judicial decrees did not preclude the SCA from causing the emancipation of a significant number of slaves as the result of the advance of the Union army. If anything, the lack of judicial decrees underscores the emancipatory effects of the SCA because it demonstrates that rebel owners failed to seek judicial recourse to recover their forfeited slaves.

Professor McPherson’s misinterpretation of the SCA mirrors Professor’s Randall’s misunderstanding of that statute. This important statutory misconstruction has carried over for many generations and has contributed to the traditional overemphasizing of Lincoln’s

they come now faster than we can provide for them, and are becoming an embarrassment to the government. Recollected Words, supra note 94, at 64. In March 1862, Lincoln said: “It is impossible to prevent negroes from coming into our lines.” Id. at 346.

252. See Constitutional Problems, supra note 63.

253. This statutory misconstruction appears in the following important scholarly literature. For example: RANDALL AND LINCOLN, supra note 18, at 572 n.1; “In the confiscation act of 1862 no procedure was specified by which emancipation was to be effected, the confiscating sections of the act (providing for the “sale” of “property”) being obviously inapplicable to slaves who were to be freed. The emancipatory clause of the act was a bit of imperfect and ill-studied legislation which was not enforced. Constitutional Problems, supra note 63, at 357–364.

Professor Ackerman states that the SCA “failed to specify the court procedure through which disloyalty [of the slave-owner] could be adjudicated,” 2 Bruce Ackerman, We the People, Transformations 450 n.3 (1998) (citing Patricia Luce, Freedom and Federalism, ch. 2 (1986)); James McPherson, The Struggle for Equality 72, 111–12, 247 (1964); Constitutional Problems, supra note 63, at 357–63. Professor Ackerman asserts that “it is not clear whether a single slave gained freedom under this statute.” Id.

Professor Paludan goes so far as to say that “if individual slaves from the estimated 350,000 slave-owners in the south were to seek freedom under this act there would have to be one case for every owner. The courts would have been able to do nothing else for years. It is little wonder that Lincoln could say as late as September 13, 1862: ‘I cannot learn that that law has caused a single slave to come over to us.’” Paludan, supra note 23, at 146 n.17 (quoting Collected Works, supra note 9, at 420); see Farber, supra note 123, at 153 (the “two Confiscation Acts provid[ed] a mechanism to free the slaves of active rebels on a case-by-case basis.”) (footnote omitted); see also Michael Vorenberg, Final Freedom, The Civil War, The Abolition of Slavery, and the Thirteenth Amendment 24 (2001); Herman Belz, Abraham Lincoln, Constitutionalism, and Equal Rights in the Civil War Era 100–18 (1998); Doris Kearns Goodwin, Team Rivals, The Political Genius of Abraham Lincoln 460 (2005).
role, and a corresponding diminution of the role of Blacks and the Civil War Congress in the destruction of slavery.

2. The Geographic Scope of the Final Proclamation

Professor McPherson states that the Final Proclamation was geographically limited because the President issued it pursuant to his powers and “since Union-controlled areas were not at war with the United States, Lincoln had no constitutional power over slavery in those areas.”

McPherson’s statement is factually inaccurate and legally incorrect. From a factual standpoint, McPherson is incorrect in at least the following respects. The Final Proclamation omitted Tennessee, yet on January 1, 1863, significant portions of Tennessee were not under Union control and were at war with the United States. Lincoln’s decision to omit Tennessee reflected political, not constitutional, considerations.

Conversely, the Final Proclamation included the entire areas of eight Confederate states despite the fact that large areas within many of those states were “Union-controlled” and “were not at war with the United States False”

Professor McPherson’s quoted statement suggests that President Lincoln’s war powers applied only to areas of the Confederacy, which remained unconquered but did not apply to conquered areas, which were militarily occupied. This is contrary to comments by Lincoln, and contrary to the case law.

In his July 12, 1862 SCA Objection Letter, Lincoln stated: “Without any special act of Congress, I think our military commanders, when in military phrase, ‘they are within the enemy’s country,’ should in an orderly manner, seize and use whatever of real or personal property may be necessary or convenient for their commands.”

Like-

254. See McPherson, supra note 235.
255. Professor Wills makes a similar error when he states that Lincoln observed “constitutional scruple” by “limiting emancipation to his reach as commander-in-chief of the army and navy” by confining the Final Proclamation to “the theater of active insurrection.” Wills, supra note 12, at 144, 141.
256. A “Unionist coalition” in Tennessee had “lobbied for exemption from the Final Proclamation in order to enlist support among slaveholders.” Destruction of Slavery, supra note 5, at 267. “No satisfactory explanation exists for the exemption [actually, “omission”] of Tennessee from the . . . Emancipation Proclamation . . . The real reason is doubtless Lincoln’s desire to avoid giving offence to the Border slave states.” J. Patton, Unionism and Reconstruction in Tennessee, 1860-1869 124 n.2 (1966). A contemporary observer attributed Lincoln’s omission of Tennessee to a request from then military governor Andrew Johnson. See Blaine, supra note 43, at 446.
257. Collected Works, supra note 9, at 329.
wise, the case law flatly contradicts McPherson’s assertion that executive or congressional war powers are confined to areas at war with the United States. Supreme Court cases before,\textsuperscript{258} during,\textsuperscript{259} and after\textsuperscript{260} the Civil War confirm that the war power applies to occupied areas and permits private property to be seized in occupied areas.

Nine months after he issued the Final Proclamation, Lincoln declined a request from Secretary of the Treasury (and later Chief Justice) Salmon Chase to expand it to include the excluded areas within Virginia and Louisiana. Lincoln justified his refusal on the ground that the only Constitutional or legal justification for the Proclamation

\textsuperscript{258} Prior to the Civil War, in American Insurance Co. v. Canter, 1 Peters 511, 542 (1828), Chief Justice Marshall held that “the usage of the world [in connection with the law of war] is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation until its fate shall be determined at the treaty of peace.” Similarly, in Cross v. Harrison, 57 U.S. (16 How.) 164 (1853), the Court held that during the military possession of part of California during the war with Mexico, the President, as Commander-in-Chief, had the belligerent rights of a conqueror. Likewise, in Mitchell v. Harmony, 54 U.S. (13 How.) 115 (1851), the Court confirmed that it is an appropriate exercise of belligerent powers for American military authorities to seize private property in occupied areas. Such a taking may be justified in order to prevent the property from falling into the hands of the enemy or to convert the property to a public use. Conversely, the Court held that a portion of the United States conquered and occupied by a belligerent power must be treated as a foreign country for purposes of determining the applicability of our laws. United States v Rice, 17 U.S. (4 Wheat) 246 (1819).

\textsuperscript{259} During the Civil War, the Court accepted Lincoln’s view that the federal government was accorded “belligerent rights” against the Confederacy, and that the President, as Commander-in-Chief was vested with the full powers of a supreme military commander against the persons and property of the Confederacy. In the Prize Cases, 67 U.S. (2 Black) 635 (1863). The Court held that “after July 13, 1861, the eleven Confederate states were enemy territory in the meaning of international law.” \textit{Id.} The Court granted the President unprecedented power during time of war: “He must determine what degree of force the crisis demands,” and stated that the President’s decisions were virtually unreviewable because the Court “must be governed by the decisions and actions of the political department to which this power was entrusted.” \textit{Id.} at 670. The Court also confirmed that “All persons residing within the ‘belligerent power’ [i.e., the Confederacy] whose property may be used to increase the revenue of the hostile power are . . . liable to be treated as enemies . . . . Whether the property be liable to capture as ‘enemies property’ does not in any manner depend on the personal allegiance of the owner.” \textit{Id.} at 670, 674. Thus, the Court endorsed the concept of collective responsibility on the part of the enemy state and its inhabitants.

\textsuperscript{260} After the Civil War, the Court consistently upheld the exercise of belligerent powers by the federal government in connection with prosecuting the war, and specifically upheld the exercise of belligerent rights in occupied areas. In New Orleans v. N.Y. Mail S.S. Co., 87 U.S. (20 Wall.) 387 (1874), the Court made clear that the Constitution does not follow advancing troops into conquered territory. Persons in such territory are beyond the reach of the Constitution and are, instead, subject to the laws of war as interpreted and applied by the Congress and the President. In Ford v. Sturget, 6 Otto 176 (1877), Chief Justice Waite stated that the Prize Cases settled the proposition that all Confederate residents were liable to treatment as the enemy, without reference to individual sentiments. In Dow v. Johnson, 100 U.S. 158, 167 (1880), the Court held that “there could be no doubt of the right of the [occupying] army to appropriate any property [in occupied areas], although belonging to private individuals, which was necessary for its support or convenient for its use. This was a belligerent right, which was not extinguished by the occupation of the country . . . .” Miller v. United States, 78 U. S. (11 Wall.) 268 (1871) (emphasis added).
was “military necessity,” but that such “necessity” did not exist with respect to the excluded areas of Virginia and Louisiana. Although Lincoln couched in military terms his decision to issue the Final Proclamation, others have attributed his decision to political considerations.

The proximate and procuring cause of the Proclamation . . . is not far to seek. It was issued primarily and chiefly as a political necessity, and took on the character of a military necessity only because the President had been brought to believe that if he did not keep the radical portion of his party at his back he could not long be sure of keeping an army at the front.

Lincoln’s stated reliance on the existence of military necessity as the prerequisite for exercising his authority is difficult to credit. Lincoln seems to have articulated an excessively narrow legal test for determining the geographic reach of the Final Proclamation, and he did so because it suited his political needs, not because he believed himself to be constitutionally compelled to do so. This conclusion seems inescapable for several reasons.

First, the term military necessity had no accepted legal meaning and was included in the Final Proclamation as an afterthought by Lincoln. It did not appear in the Preliminary Proclamation or in the first draft of the Final Proclamation. Lincoln inserted it in the final version of the Final Proclamation as a modification to a paragraph proposed by Secretary Chase. Moreover “military necessity” is inherently a matter of subjective determination.

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261. In a draft September 2, 1863 letter, Lincoln explained to Secretary Chase that he could not accede to Chase’s request that the Final Proclamation “now be applied to certain parts of Virginia and Louisiana which were exempted from it last January 1.” Lincoln stated that “the exemptions were made because the military necessity did not apply to the exempted localities. Nor does that necessity apply to them now any more than it did then.” In discussing the letter with Chase, Lincoln apparently “remarked that the revocation [of the geographic restrictions in the Final Proclamation] at all events was not expedient at present, and should be deferred until after the Fall Elections.” S. Chase, Inside Lincoln’s Cabinet, The Civil War Diaries of Salmon P. Chase 199 (1970).


263. Voegeli, supra note 193, at 41.

264. See generally id.


266. Belz has argued that “military necessity” was a “legal fiction” used by Lincoln to justify emancipation. This is at odds with the facts. Indeed, the Proclamation was long overdue as a necessary measure to convert an important Confederate military asset into a significant Union
It is unlikely that any court would have reversed an executive determination of military necessity, or that Lincoln was concerned that a court or Congress would have overturned such a determination on his part. Though some have suggested otherwise, there is no reason to think that Lincoln was looking over his shoulder at the Supreme Court when he issued the Emancipation Proclamation and/or when declined to modify it. By the time he issued the Proclamation Lincoln had more than once acted in a manner, which he knew contradicted Chief Justice Taney’s view of the Constitution. For example, he signed bills that were clearly contrary to the Dred Scott decision, the FCA, the SCA, the Territories Act, and the D.C. Emancipation Act. Furthermore, he directly flouted Taney’s authority with respect to suspending habeas corpus.

Second, Lincoln’s professed interpretation of military necessity reflected an excessively narrow reading of his constitutional authority. His approach incorporated a rigidity completely at odds with his statement in the SCA Objection Letter that an occupying force may properly do that which is “necessary or convenient,” and with the case law. As early as 1820, the Supreme Court held that within the meaning of the Constitution the word “necessary . . . does not import an absolute physical necessity, so strong that one cannot exist without the other.” It is odd that Lincoln would purport to bind himself with a standard considerably more difficult to satisfy than what he apparently knew the Constitution actually required.

By the time he issued the Final Proclamation, Lincoln believed that the executive war power was plenary, and permitted “the property, both of friends and enemies . . . to be taken as needed.” Lincoln by then had reached the view that the Constitution did not prohibit him from taking any action that he deemed necessary or appropriate in furtherance of the war effort. Lincoln made many

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268. Id.
269. COLLECTED WORKS, supra note 9.
270. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1820). The Court’s definitional language underscores the flexibility of the concept of “necessary” within the meaning of the Constitution: “Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.” Id.
272. Any doubt on Lincoln’s part that his executive war powers were plenary would have been entirely relieved by the counsel he received from Department of War Solicitor William

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statements indicating his belief that his war powers were sufficiently encompassing to permit him to emancipate slaves in occupied territories if he believed it would advance the Union cause.273 It is therefore difficult to argue that Lincoln’s war powers did not extend to conquered areas, or that Lincoln believed he was so constrained, especially that he exercised his war powers in the territory of Union states.274

Lincoln had an exceedingly elastic approach to constitutional issues,275 particularly ones that involved supposed limitations on his own authority. It is difficult to believe that if Lincoln had wanted to emancipate slaves in areas excluded or omitted from the Final Proclamation that he would not have done so. Lincoln was a creative legal thinker and he was not adverse to the risk that Congress or the Supreme Court might seek to challenge his action on the ground that he had exceeded his constitutional authority.276 Surely Lincoln would have

Whiting. Whiting wrote a tome which argued that the executive war power knew no boundaries, geographic or otherwise. In *War Powers Under the Constitution of the United States*, (Rio Grande Press, 10th ed. 1971) (1862). Whiting claimed that the executive war powers had no “legal” or “moral control” except the usage of modern civilized belligerents, and that these powers had been exercised by military commanders to liberate slaves, even those owned by loyal citizens. *Id.* at 68, 82. Professor Randall was correct in noting that Whiting’s work “shows more legal learning than judgment.” *Constitutional Problems, supra* note 63, at 540.

273. I quote from only two of the many Lincoln statements which make this point: “’I think the Constitution invests its Commander-in-Chief with the law of war in time of war,’ and he added that the law of war gives the right to take property ‘whenever taking it helps us or hurts the enemy.’” *Constitutional Problems, supra* note 63, at 378 (quoting 9 *The Complete Works of Abraham Lincoln* 98 (John G. Nicolay & John Hay eds., Lincoln Memorial Univ. 1906)). Further, Lincoln’s reply to the address of the Chicago clergymen beseeching him to issue an emancipation proclamation: “I raise no objection against it on legal or constitutional grounds; for as commander in chief . . . in time of war, I suppose I have a right to take any measure which may best subdue the enemy.” *Collected Works, supra* note 9, at 419.

274. Thus, for example, Lincoln suspended habeas corpus in certain portions of the North. He also prohibited Union citizens from engaging in commercial intercourse with Confederates. 275. An example of Lincoln’s legal elasticity pertinent here is found in his December 1861 Annual Message to Congress, where he proposed that land be purchased to enable colonization of forfeited and free negroes. “If it be said that the only legitimate object of acquiring territory is to furnish homes for white men this measure effects that object; for the emigration of colored men leaves additional room for white men remaining or coming here.” Lincoln’s comment is consistent with the notion that Lincoln’s objection to slavery was based in part on his desire to free up land for Whites to emigrate to. *See Robinson, infra* note 299, at 17.

found it within his executive war powers to emancipate slaves in those areas if he believed it was politically or militarily expedient to have done so. In light of the case law and Lincoln’s other actions, Lincoln’s failure or refusal to include conquered areas and Tennessee within the Final Proclamation cannot be explained on the absence or inadequacy of the executive war powers.

Lincoln’s unwillingness to expand the Proclamation to include the occupied areas of the Confederacy is inexplicable for the further reason that slaves in those areas were largely free by virtue of the combined impact of the FCA and the SCA. In particular, the SCA freed slaves of rebel owners who came within or were found behind Union lines. Since occupied areas of the Confederacy were, by definition, behind Union lines, all slaves there were free under the SCA.

Moreover, though the Proclamation was expressly limited to certain areas, its practical effect could not be so confined. The emancipatory effect of the Proclamation ineluctably spilled over into areas adjacent to the areas which fell within the Proclamation. In particular, Blacks in many of the areas excluded or omitted from the Proclamation, but which were contiguous to covered areas, were unaware that the Proclamation did not apply to them, and began conducting themselves as free men. Federal military authorities did not observe the geographic line marked in the Final Proclamation. The enlistment of Blacks into military service pursuant to the Militia Act and Lincoln’s implementing Executive Order of July 25, 1862, occurred in exempted and excluded areas, and the military otherwise treated slaves within exempted areas as if they were free. And, of course, the slaves themselves did not comply with the territorial cleavage contained in the Proclamation.

considered having Taney arrested in connection with the Merryman matter. See H. HYMAN, A MORE PERFECT UNION 84 n.8 (1973).

277. Thus, for example, Port Royal, South Carolina was in Union hands, but Lincoln did not exempt it from the Proclamation. “It would scarcely have made any difference, one way or the other, emancipation had been in the air since the Hunter proclamation. Schools were thriving, and contrabands were conducting themselves as free men . . . Port Royal negroes were, indeed, already free on January 1, 1863.” JOHN HOPE FRANKLIN, THE EMANCIPATION PROCLAMATION 110 (1963).

278. See DESTRUCTION OF SLAVERY, supra note 5, at 265. This order authorized the seizure of property for military purposes and encouraged full scale employment of slaves as military laborers.

279. Id. at 188. In exempted parts of Louisiana “Federal military authorities effectively undermined [the exemption contained in the Final Proclamation] by reorganizing plantation labor on the basis of wage payments and interdicting the forcible apprehension of fugitive slaves.” Id.

280. Id. at 337. Though Maryland did not fall within the Final Proclamation, “that scarcely mattered to the slaves. At last they had from the highest authority what had seemed obvious to
Upon learning that thousands of Blacks in areas excluded from the Proclamation were rejoicing in their freedom, under the misunderstanding that the Proclamation applied to them, Lincoln reacted unhappily. He was concerned that the spillover effect of the Proclamation might antagonize the Border States. This is the difficulty: we want to keep all that we have of the Border States, those that have not seceded and the portions of those which we have occupied; and in order to do that it is necessary to omit those areas I have mentioned from the effect of this proclamation.\textsuperscript{281}

The military necessity Lincoln relied upon reflected a political determination, not an absence of constitutional authority.

3. The Comparative Emancipatory Value of the Final Proclamation vs. Congress’s Emancipatory Legislation

Professor McPherson states that “the old canard that the Emancipation Proclamation freed not a single slave, repeated by Bennett, could not be more wrong. From January 1, 1863, freedom would march southward with the Union Army, which became an army of liberation.”\textsuperscript{282} McPherson’s conclusion is factually and legally incorrect.

a. The “Old Canard” Is Not a Canard

Professor McPherson is wrong in labeling as a “canard” Bennett’s argument that the Emancipation Proclamation did not free any slaves. As a legal matter, Bennett was correct. The Proclamation declared slaves to be free within unoccupied areas of the Confederacy, but the Proclamation did not have the force of law within those portions of the Confederacy. Citizens of the Confederacy did not regard the Proclamation as having legal legitimacy and did not heed its terms.\textsuperscript{283}
It was universally recognized, within and without the Confederacy, that the Proclamation was, in Lincoln’s own words, a “paper bullet,” and that merely issuing it “would not make a single negro free beyond our military reach.” Thus, the Proclamation and the Emancipatory Legislation had undeniable common denominators: their efficacy was entirely reliant on the advance of the Union Army or the flight of slaves.

b. The Union Army Was an Army of Liberation Prior to the Final Proclamation

McPherson is also wrong in suggesting that the Proclamation was the legal or temporal source of the Union Army acting as an army of liberation. Contrary to McPherson, the Union Army became an army of liberation well before the Proclamation was issued on January 1, 1863.

The Union Army had acted as an army of liberation from the very commencement of the war, though it often did so in spite of itself and in spite of Lincoln. The liberating power of the Union Army originally had its source in the fact that slaves rightly saw it as a source of international law, the issuance of the Proclamation violated the cardinal rule of extraterritoriality.

284. Lincoln stated “we must make that Proclamation effective by victories over our enemies. It’s a paper bullet, after all, and of no account, except we can sustain it.” Recollected Words, supra note 94, at 364.

285. Id. at 129 (referring to November 13, 1862).

286. This is indeed how the Proclamation was treated by Southern state courts after the War. The issue of when slavery actually ended was litigated throughout the Confederate states after the War. “The question was important to slaveholders because of its bearing on contracts involving slave property that had been signed during the Civil War.” R. Campbell, The End of Slavery in Texas: A Research Note, in Law, the Constitution, and Slavery (P. Finkelman ed., 1989) (Garland Publishing, Inc., New York & London 1989) 21, 22. The Texas Supreme Court ruled that the Final Proclamation was a “war measure” that “did not operate presently upon the slaves” such that slaves continued in that status until January 1865, when notes were issued for the slaves in that case. The Emancipation Proclamation Cases, 31 Tex. 504, 505 (1868); see also Glory Mclaughlin, A Mixture of Race and Reform: The Memory of the Civil War in the Alabama Legal Mind, 56 Ala. L. Rev. 285 (2004) (discussing Alabama state cases discussing these issues). In McElvain v. Maud, 44 Ala. 48 (1870) the court held that the Final Proclamation was not enforceable until the Union had possession of Alabama. In Weaver v. Lapsley, 42 Ala. 601 (1868), the court held that the Final Proclamation did not have operational effect until carried out through the force of arms. Though the Supreme Court never ruled on the legality of the Proclamation, many of its scattered comments are consistent with the view that the efficacy of the Proclamation depended on the advance of the Union army. See, e.g., Rives v. Duke, 105 U.S. 132, 141 (1881) (suggesting that the Proclamation was not operative upon its issuance because the “authority of the national government was excluded by the rebel armies.” Slaves would be free only if the “national authority should be reestablished over the insurgent districts.”); Texas v. White, 74 U.S. 700, 728 (1868) (suggesting that freedom under the Proclamation awaited the “National Forces obtain[ing] control, [then] the slaves became freemen”).
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liberation and began fleeing to Union Army camps from the outset of the war.287 Throughout the war, fugitive slaves were drawn to the Union army as if it were a magnet. As General Burnside said in May 1862, “wherever the Union arms have made a lodgment they have lost the entire control of their slaves.”288

The Union military did not, however, consistently act in a liberating manner until Congress ordered them to do so, and Congress acted only because Lincoln declined to do so. The army’s legal power to liberate found its source in legislation enacted by Congress, not edicts issued by Lincoln. Indeed, Lincoln stifled the power of the Union Army to liberate initially, and it was not fully empowered to liberate until Congress cured the problem.

Congress gave the Union military the legal power to liberate by passing the FCA, and then by denying it the power to return fugitive slaves when it enacted the AAW. Lincoln’s prior inaction resulted in the self-defeating return of significant military assets to the South, and undoubtedly discouraged slaves from fleeing North. Although the AAW did not expressly confer the power to emancipate, it nonetheless acted to liberate slaves who came within Union lines because their owners had no other way to recapture them. Thus, with the enactment of the AAW, the Union army became an army of liberation by law six months before the Preliminary Proclamation was issued, and nine months prior to the Final Proclamation. Congress, literally, had to step in to fill a vacuum created by Lincoln’s unwillingness to act.

The SCA also added significantly to the power of the Union Army to liberate slaves. This statute granted freedom to virtually all slaves who came behind Union lines. Though the SCA limited emancipation to fugitive slaves of rebel owners, even Professor McPherson has indicated that it is reasonable to assume that most, if not all, Southern slave-owners supported the Confederacy289 such that their slaves fell within the purview of the SCA. As noted earlier, a contemporary legislator and historian described the sweeping emancipatory effect of the SCA as follows:

287. DESTRUCTION OF SLAVERY, supra note 5, at 12. The first reported fugitive slaves “presenting themselves at a Union garrison” was in Florida in March 1861. Id.

288. May 19, 1862 letter from General Burnside to Secretary of War Stanton, OFFICIAL RECORD, supra note 41, at 819.

289. J. McPherson, FOR CAUSE AND COMRADES 106–08(1997). It is unlikely that differences between slave-owners was observed by Union military authorities or others so as to deny freedom to slaves who came behind Union lines after the SCA was enacted.
Even if the war had ended without a formal and effective system of emancipation, it is believed that this statute would have so operated as to render the slave system practically valueless. When the war closed it is probable that not less than one-half of all the slaves of the rebel States had come within the scope of this statute, and had therefore been declared legally free by the legislative power of the United States.290

Finally, of course, the Militia Act authorized the President to recruit Blacks into the military, and it emancipated slaves who thus served, and in certain cases it emancipated members of their families. The Militia Act provided a further, powerful inducement for slaves to flee North and directly added to the Army’s power to liberate by dramatically expanding the manpower available for combat. As noted earlier, Lincoln was slow to exercise his statutory authority to recruit Blacks into the military.

It is clear that Congress, not Lincoln, legally empowered and otherwise enabled the Union army to be an army of liberation. Congress put an entirely different face on the Union Army, a friendly face, one that Lincoln had been unwilling to impose. It is safe to say that, as a legal matter, the Final Proclamation added no legal authority to the Union army beyond that which Congress conferred upon it. The Emancipatory Legislation was the original and sustaining source of the Union Army’s emancipating power, not the Proclamation.

c. The Final Proclamation Was Legally Redundant with, and of Lesser Legal Dignity Than the Emancipatory Legislation

It is highly unlikely that the Proclamation liberated many slaves who had not been, or would not be, liberated by virtue of the Legislation. When laid side by side it is clear that the Proclamation was, in most respects, legally redundant with the Legislation. Beyond that, the Legislation had broader emancipatory provisions and was of a higher legal dignity than the Final Proclamation.

The Proclamation purported to emancipate all slaves in designated areas of the Confederacy. It went beyond the FCA, because that statute emancipated only those slaves employed in hostile service.

290. 2 James G. Blaine, Twenty Years in Congress: From Lincoln to Garfield, with a Review of the Events Which Led to the Political Revolution of 1860, at 376 (Norwich, Henry Bill Publishing Co. 1884) [hereinafter 2 Blaine].
In this single respect, the Proclamation was broader than the Emancipatory Legislation.291

But in other important respects the Proclamation was considerably narrower than the Emancipatory Legislation. First, the Proclamation excised important parts of the Confederacy, whereas the FCA had no geographical restrictions.

Second, prior to the issuance of the Proclamations, considerable numbers of slaves escaped from the Confederacy and the Border States. The SCA emancipated these slaves if they had rebel owners, not the Proclamation. Third, the cumulative effect of the FCA and the SCA was to emancipate virtually every slave who was, or would have been, freed by the Emancipation Proclamation. There was hardly a slave in the South either employed in hostile service or whose owner was not a rebel. As a practical matter all such slaves would be freed under the FCA and the SCA once they came behind Union lines. Thus, most, if not all, Southern slaves would receive their freedom without regard to whether Lincoln issued the Emancipation Proclamation.

Third, of course, the Proclamation did not free slaves in the District of Columbia or the federal territories. The Emancipatory Legislation freed those slaves. Fourth, the Militia Act, not the Proclamation, freed slaves (and sometimes their families) who joined the Union military.

Fifth, the AAW resulted in the de facto freedom of many additional thousands, perhaps hundreds of thousands, of slaves, by preventing the military from returning them to their rebel owners. The AAW covered fugitive slaves regardless of whether they fled from the Confederate or Border States. As with the FCA and the SCA, the AAW did not suffer from the same geographical limitations as the Final Proclamation.

There is a principled argument that the emancipation granted under the Legislation was legally more durable than that granted under the Proclamation because the Congressional legislation is of a higher legal dignity than an Executive Order. Congress was legally capable of overruling the Proclamation,292 and could have sought to

291. Ironically, it is because the Proclamation went beyond the FCA in this respect that it might not pass constitutional muster.

292. I do not agree with Professor Farber that “[I]f Congress had countermanded [the] Proclamation, a difficult constitutional problem would have been presented.” FARBER, supra note 123, at 157. Farber argues that “Congress probably had concurrent power [with Lincoln] over
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divest former slaves of the freedom they had gained under the Proclamation. But Lincoln could not have revoked the Legislation. In the final analysis, however, it is difficult to see how a post-war repeal or withdrawal of the Legislation or the Proclamation could, as a practical matter, have either re-enslaved the hundreds of thousands of slaves who had already attained freedom (many of whom were armed) or re-installed slavery in the South.293

It is difficult, if not impossible, to know whether the Emancipatory Legislation or the Final Proclamation emancipated more slaves. Many scholars are of the view that the Emancipatory Legislation, particularly the SCA, was responsible for freeing more slaves than the Proclamation.294 It is nevertheless inaccurate to imply that emancipation was attributable only to the Final Proclamation rather than the Emancipatory Legislation. Surely, the Legislation simultaneously freed a substantial number of slaves free by the Proclamation.295 Moreover, there were hundreds of thousands of slaves in the regions carved out from the Proclamation who were, at least in theory, freed by the Emancipatory Legislation Acts alone. And, of course, there were countless thousands of Blacks who had been emancipated by the combined force of the Emancipatory Legislation and the advance of the Union Army even before Lincoln issued the Final Proclamation.

4. Comparative Effect of Emancipatory Legislation and Proclamation on Slave Flight and Insubordination

Just as it is difficult to know whether the Emancipatory Legislation or the Final Proclamation emancipated more slaves, it is also difficult to determine whether the Legislation or the Proclamation had a more significant impact on slave flight from the Confederacy. What seems to be true, however, is that the Proclamation received much more attention from slaves than the Legislation. Frederick Douglass

emancipation, either under its specific power to make rules for captures on land or under its general power to effectuate the conduct of war (implicit in the power to declare war).” Id. As argued throughout, Congress’ power was superior to, not simply concurrent with, Lincoln’s power regarding emancipation.

293. See 2 Blaine, supra note 290, at 376; see also Voegeli, supra note 193. “Proper construction and enforcement of [the AAW and the SCA] would result in a considerable amount of emancipation by act of congress.” Id. at 248

294. See, e.g., T. Harry Williams, Lincoln and the Radicals 166 (1941).

295. It seems reasonable to assume that most, if not all, Southern slave-owners supported the Confederacy and fell within the purview of section nine of the SCA. See, e.g., J. McPherson, For Cause and Comrades 106–08 (1997).
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perhaps put it best when he said that the Emancipation Proclamation had a “life and power beyond its letter.”

Word of the issuance of the Final Proclamation “travelled fast,” particularly in the South. In the slave community, the sheer “propaganda value” of the Proclamation vastly exceeded the emancipatory message conveyed in all of Congress’s earlier pronouncements. Many saw the words from Lincoln’s pen as coming from the “highest authority.” As noted by a contemporary historian, the Final Proclamation “awaken[ed] a great sympathy among the slaves for the Union cause . . . [and] it presented a strong stimulus to free Blacks to enter the army and fight for a cause which would give freedom to their race . . . .”

The Final Proclamation was taken by all as a more resounding and comprehensive statement of the North’s commitment to emancipation than anything which had been said before. With the issuance of the Final Proclamation, the North was seen as making an irreversible decision to destroy slavery, and Lincoln’s equivocation on the issue appeared to come to an end. This was so even though the Proclamation was limited to the unoccupied areas of the South, and that Lincoln continued to waver on the subject even after he issued the Proclamation.

C. Professor Guelzo

Professor Allen Guelzo, a noted Civil War scholar, has recently published a book entitled: Lincoln’s Emancipation Proclamation, The End of Slavery in America. The title’s implication that the Proclamation ended slavery in the United States is legally and factually wrong. Slavery de jure did not end until the passage of the Thirteenth Amendment. De facto slavery did not end until well after the Civil War, arguably not until sometime after the Civil Rights movement
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reached fruition more than a century after the Civil War came to an end.

Guelzo launches his defense of Lincoln with the observation that the “most salient feature to emerge from the sixteen months between his inauguration and his first presentation of the Proclamation to his cabinet on July 22, 1862, is the consistency with which Lincoln’s face was set toward the goal of emancipation from the day he first took the presidential oath.” This statement is belied by the facts.

Lincoln’s only unwavering goal was preservation of the Union. Emancipation was adopted belatedly solely as a means to achieve that goal. Indeed, immediately upon taking office Lincoln repeatedly made clear that emancipation clearly was not one of his goals. When military hostilities commenced, Lincoln reiterated that abolition was not one of the goals in waging a war against the Confederacy.

When Lincoln entered office he repeatedly gave assurance that his only two goals were to preserve the Union and to prevent the extension, not the abolition, of slavery. By way of seeking to preserve the Union, and to induce slave holding states not to secede, he stated repeatedly his long standing view that the federal government did not have the power to touch slavery in states where it existed. He went so far as to express support for a proposed constitutional amendment which would have confirmed this all important proposition.304

Even after the war started, Lincoln reiterated these assurances, first in an effort to persuade Virginia not to secede and then in order to convince other Border States, principally Kentucky and Missouri, not to secede. Though Lincoln presented a version of the Proclamation to his cabinet in July 1862, only a month later he stated in a highly publicized letter to Horace Greeley that his only goal was to preserve the Union, and that whatever action he took with respect to slavery was with that goal in mind alone.305 Lincoln repeated that theme numerous times thereafter.

304. In his First Inaugural Speech, Lincoln expressed support for a proposed amendment to the Constitution, the Corwin Amendment, which, according to Lincoln, would have precluded the federal government from “[ ]ever interfer [ing] with the domestic institutions of the States, including that of persons held to service . . . . I have no objection to its being made express and irrevocable.” COLLECTED WORKS 2, supra note 86, at 222; see SLAVEHOLDING REPUBLIC, supra note 9, at 300. Slave-owners were concerned that Congress might rely upon the Commerce Clause to abolish slavery or the interstate slave trade. Lincoln stated that he cared “but little about preserving this particular constitutional argument.” COLLECTED WORKS, supra note 9, at 183.

305. See supra notes 18, 93.
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On December 8, 1863, in his annual message to Congress, Lincoln stated that “according to our political system, as a matter of civil administration, the General Government had no lawful power to effect emancipation in any State, and for a long time it had been hoped that the rebellion could be suppressed without resorting to it as a military measure.” And of course, if Lincoln’s 1864 letter to Hodges is to be believed, Lincoln issued the Proclamation not because he wanted to, but because he felt “driven” to do so as a last resort. Lincoln used emancipation as an instrument of war, but it was not his weapon of choice.

Professor Guelzo claims that Lincoln disregarded the FCA and the SCA “because he was convinced (and with good reason) that none of these methods would survive challenges in a federal court.” It is true that Lincoln largely disregarded these two important pieces of anti-slavery legislation. But there is no evidence, and Guelzo cites none, to support the notion that Lincoln’s decisions were influenced by a concern that federal courts were looking over his shoulder.

306. TINNEY, supra note 24, at 490.  
307. Cite Hodges letter Guelzo attributes Lincoln’s delay in issuing the Proclamation to “prudence [which] demanded that he balance the integrity of the ends (the elimination of slavery) with the integrity of means (his oath to uphold the Constitution and his near religious reverence for the rule of law).” GUELZO, supra note 63, at 5. But Lincoln had no such reverence. Lincoln followed the law when it supported him, and he disregarded it when it did not. There is no other way to explain his suspension of habeas corpus, his disregarding orders issued by Chief Justice Taney, his threat to have Taney imprisoned, and his wholesale arrests of dissidents. Lincoln’s aversion to following the law when it did not suit him is also evident in his comments to Secretary Chase that “the rebels are violating the constitution to destroy the Union, I will violate the constitution, if necessary to save the Union, and I suspect . . . that our constitution is going to have a rough time of it before we get done with this now.” DONN PIATT, MEMORIES OF MEN WHO SAVED THE UNION 109 (1887). Of a less offensive, but still troublesome, nature was Lincoln’s view that the Dred Scott opinion did not bind Congress or the Legislature. In view of the fact that the doctrine of judicial review was quite well established by that point in time, Lincoln’s comments must be seen as an affront to a basic component of the rule of law as practiced in the United States.

308. GUELZO, supra note 63, at 6.  
309. Professor Vorenberg likewise claims, without support, that Lincoln “often observed . . . an unfriendly Congress or Supreme Court could indeed strike down the effects of wartime emancipation once the war was over.” VORENBERG, supra note 2, at 29. It was not until after he issued the Proclamation that Lincoln expressed concern about the permanency of the Proclamation, and the emancipation granted thereunder. It was a military measure which might be deemed to expire upon the termination of hostilities. See BATTLE CRY, supra note 63, at 706, 841–42. For that reason, as well as the fact that the Proclamation did not cover all slaves, Lincoln supported the Thirteenth Amendment as the “King’s Cure” to all issues relating to emancipation. 8 THE COLLECTED WORKS OF ABRAHAM LINCOLN 254–55 (Roy P. Basler ed., 1953). Neither Vorenberg nor Guelzo cite to any sources which support the proposition that prior to (or even after) issuing the Proclamation Lincoln was concerned about the possibility that the Supreme Court might overturn or modify it. Taney’s hostility to Lincoln prompted him to scold the President in Ex Parte Merryman, 17 Fed. Cas. 144 (No. 9487) (C.C.D. Md. 1861), regarding the President’s suspension of the writ of habeas corpus, and to draft an unused opinion to invali-
The existence of such concerns would be inconsistent with the fact that Lincoln signed these two laws. Moreover, because of Lincoln’s deep dislike for Chief Justice Taney, author of the Dred Scott decision (which Lincoln said he would not follow), Lincoln flouted the federal courts.310

Guelzo defends the Emancipation Proclamation against the criticism that it did not free any slaves because it only applied to areas not under Union control. Guelzo rejects this argument on the ground that Lincoln may not have had the power available to him to free every slave in the Confederacy, but he certainly had the authority, and in law, the authority is as good as the power. The proof is in the pudding. No slave declared free by the Proclamation was ever returned to slavery once he or she made it to the safety of Union-held territory.311

But Guelzo begs the question, and confuses success with legitimacy.

It is unlikely Lincoln had authority to issue the Proclamation.312 Congress neither authorized nor ratified it. While the law of war may have permitted the Union government to emancipate slaves within the Confederacy, the authority to do that most likely rests with Congress, not the President. That is a view Lincoln himself once entertained but later abandoned.313 Finally, issuing the Proclamation almost certainly exceeded Lincoln’s powers as Commander-in-Chief.314

Guelzo’s litmus test that slaves freed by the Proclamation were never returned to slavery after they made it into Union lines is misdirected. Virtually all of those slaves were entitled to their freedom under the FCA or the SCA, and did not need the Proclamation to gain their freedom. Guelzo minimizes the emancipatory effect of these

date a conscription statute enacted by Congress at the behest of Lincoln, but there is no similar report of his having drafted such an anticipatory opinion regarding the Proclamation. See DAVID M. SILVER, LINCOLN’S SUPREME COURT 127 n.17 (1956) (referencing Roger B. Taney, “Thoughts on the Conscription Law of the U. States, Rough Draft Requiring Revision,” copied from the unpublished manuscript in his own handwriting by M.L. York for George Bancroft, May 7, 1866, Taney MSS., N.Y. Pub. Lib). There is also no indication that Lincoln blinked when Taney issued his opinion in Ex Parte Merryman. To the contrary, see infra note 270.

310. GUELZO, supra note 63, at 6. Professor Guelzo does not amplify on “the good reason” Lincoln would have had to worry about the federal courts. Presumably Guelzo is referring to the fact that Chief Justice Taney remained as Chief Justice until his death in October of 1864.

311. Id. at 8.

312. See discussion at notes 228–231 and accompanying text.

313. Lincoln never explained why he changed his view to thinking that the President, not Congress had the power to emancipate slaves in the South.

314. Guelzo acknowledges this considerable chink in Lincoln’s armor. GUELZO, supra note 63, at 113–14, passim.
two statutes by claiming that the implementation of the bill of attainder and treason provisions of the Constitution were “less easy than it looked.”315 Implicit in Guelzo’s analysis are the mistaken assumptions that the Constitution, not the law of war, governed these statutes (a view adopted by the Supreme Court after the War), and that emancipation under these two statutes depended upon the issuance of court orders.316 Further, while concerns regarding the bill of attainder and treason provisions were discussed in the FCA and SCA Congressional debates, and in Lincoln’s SCA veto message, those concerns related primarily to the confiscation, not the emancipation, provisions of the two statutes.

Perhaps most egregious is Guelzo’s back-handed dismissal of the self-emancipation theory on the ground that “without the legal freedom conferred first by the Emancipation Proclamation, no runaway would have remained ‘self-emancipated.’ . . . Without the Proclamation, the Confederacy, even in defeat, would have retained legal title to its slaves.”317 Guelzo’s analysis totally ignores the FCA, SCA, the D.C. Emancipation Act, and the Territories Act, all of which conferred freedom on fugitive slaves prior to the issuance of the Proclamations. The FCA and the SCA deprived virtually all Confederates of their legal claim to slaves. A Confederate defeat would not have left Confederate slave-owners with title to their slaves, all or most of whom were behind Union lines by the end of the war.

Guelzo claims that the “crippling truth about” the FCA and the SCA “was that the sum total of Blacks who actually gained legal freedom would be pitifully small.”318 At one point Guelzo claims that by the end of 1862, 13,000 contrabands were in the possession of the Union Army.319 At another he claims it was 60,000.320 He does not cite any support for these figures.321 I note, however, that others have estimated that as many as 700,000 fugitive slaves had come behind

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315. Id. at 38.
316. Guelzo also claims mistakenly that the “SCA required the President to issue an enabling ‘proclamation’ before the Act could be put into effect.” GUELZO, supra note 63, at 118. The SCA has no such requirement.
317. Id. at 9.
318. Id. at 119.
319. Id. at 81.
320. Id. at 212.
321. Nor does Guelzo cite any support for the statement that the Proclamation “triggered a cascade of running away in 1863 . . . .” GUELZO, supra note 63, at 213. Guelzo admits that “[c]apturing a precise reckoning for the total number of slaves freed by the Proclamation is a daunting task.” GUELZO, supra note 63, at 309 n.13. In attempting to make a quantification, Guelzo ignores entirely the fact that many, if not most, of the slaves he credits with having been
Union lines prior to the issuance of the Preliminary Proclamation, and that it was the need to replenish the Union army with manpower, which prompted Lincoln to issue the Proclamation.\(^3\)\(^2\)\(^2\) The notion that a “pitifully small” number of Blacks were emancipated under these statutes flies in the face of the fact that by the end of the War virtually all slaves came behind Union lines and were thus freed by the FCA and the SCA no less so than by the Proclamation.

Guelzo attempts to bolster the Proclamation at the expense of the FCA and the SCA by claiming that prior to the Proclamation, “escape from bondage was temporary and could disappear the moment a master showed up with paperwork in his hand, demonstrating loyalty to the federal government and ownership of a slave . . . . The Emancipation Proclamation radically altered this situation. Union soldiers now had the power to declare emancipation, and not just to encourage flight, to slaves across the confederacy.”\(^3\)\(^2\)\(^3\)\(^3\) The SCA did permit loyal owners to recapture slaves by filing loyalty oaths with civil courts, but this applied only to slaves who escaped into another state, federal territory, or the District of Columbia.\(^3\)\(^2\)\(^4\) This procedure, however, did not apply to slaves who came behind Union lines, or slaves captured from or deserted by the rebels, or slaves who were found by the Union Army in places previously occupied by rebel forces.\(^3\)\(^2\)\(^5\) Given the rapid advance of the Union Army after the enactment of the SCA, it is likely that the vast majority of slaves fell under section nine rather than section ten.

Guelzo suggests that the legal status of fugitive slaves was precarious until Lincoln issued the Proclamation. It is certainly the case that the Proclamation was a more definitive document in that respect that the FCA and the SCA, but it is wrong to suggest that freedom freed by the Proclamation were also freed by the Emancipatory Legislation. \(^\text{Id.};\) see also supra note 226.

\(^3\)\(^2\)\(^2\) BLACK SOLDIERS IN BLUE, AFRICAN AMERICAN TROOPS IN THE CIVIL WAR ERA 23 (John David Smith ed., 2002).

\(^3\)\(^2\)\(^3\) GUELZO, supra note 63, at 213. Guelzo also addresses Hofstadter’s famous criticism of the Proclamation as having the “moral quality of a bill of lading.” See generally HOFSTADTER, supra note 12, by stating that a bill of lading was a “surprisingly important commercial document in the antebellum economy . . . . If this is what the Emancipation Proclamation was supposed to do, then Hofstadter was offering Lincoln more of a commitment than he intended.” Id. at 2. Guelzo is off the mark for two reasons: first Hofstadter was using hyperbole to convey the Proclamation’s lack of moral content and Lincoln’s lack of humanitarian motivation. Second, it is wrong for Guelzo to imply that the Proclamation was the functional equivalent of a bill of lading because Lincoln did not have custody of slaves, and was in no position to promise their safe delivery, and certainly not their safe delivery to freedom.

\(^3\)\(^2\)\(^4\) See supra note 29, at ch. 195, 12 Stat. at 591 (referring so sec. 9).

\(^3\)\(^2\)\(^5\) See id. (referring to sec. 10).
under those statutes was “temporary.” Even Lincoln understood that the freedom obtained under the FCA and SCA was not temporary. There are no reported cases indicating that the recapture provisions of the SCA were relied upon by slave-owners. Moreover, contrary to Guelzo, the Proclamation did not empower the Union Army to declare slaves free; the only reported instances of that were under the SCA. The SCA and AAW made clear that the Union military should leave emancipation decisions to the civil court process. The Proclamation was legally incapable of overriding that Congressional mandate.

Finally, Guelzo justifies Lincoln’s refusal to broaden the Proclamation to include conquered areas of the Confederacy on the ground that “federal civil law had now been restored there, and that war powers proclamations, like martial law, no longer had force in those districts.” This statement is entirely at odds with the many judicial cases confirming that the law of war applies to conquered areas.

D. Professor Striner

As this paper was about to go to press Professor Richard Striner’s book, entitled Father Abraham: Lincoln’s Relentless Struggle to End Slavery, was published. Professor Striner unabashedly believes that Lincoln deserves the title “Great Emancipator.” Building on Guelzo’s flawed premise that Lincoln’s “face was set toward the goal of emancipation from the day he first took the presidential oath,” Striner argues that Lincoln “relentless[ly] struggle[d] to end slavery.” Striner does not specify the date, or period, when Lincoln commenced this struggle. All we are told is that “[a]fter pondering the matter, Lincoln came to a decision in the closing days of 1861” to use the War as a means of ending slavery. Striner provides no support for this factually erroneous assertion.

326. See generally, Second Confiscation Act, supra note 29.
327. He stated at one point that he did “not believe it would be physically possible for the general government to return persons so circumstanced to actual slavery.” Guelzo, supra note 63, at 116. And, in commenting on the SCA, Lincoln stated, “I believe there would be physical resistance to it, which could neither be turned aside by argument or driven away by force.” Id. at 116 n.9 (quoting Chase’s diary entry for July 21, 1862).
328. Id. at 178.
330. Guelzo, supra note 63.
331. Striner, supra note 329, at 147.
Striner makes little mention of Congress’s legislation, and he gives no flavor that Congress was often forced to pass legislation because Lincoln failed to take appropriate curative measures as President or Commander-in Chief. Even more disappointing, Striner’s discussion of various legislation gives the misleading impression that Lincoln prodded Congress and not the other way around. For example, in discussing the SCA, Striner claims that Lincoln’s Objection Letter “made a number of important suggestions for strengthening the bill.” As discussed above, all of Lincoln’s comments were aimed at weakening, not strengthening, the emancipatory provisions of the bill, and were intended to pacify shareholders. Congress unhappily accepted many of Lincoln’s suggestions. They did so only to avoid a clash with the President, not because they believed his suggestions actually represented enhancements to the bill.

Striner’s pro-Lincoln bias is so strong that it prevents him from telling a straight story. For example, in discussing Lincoln’s decision to remove Secretary of War Cameron, he mentions that Cameron was a “problem” for Lincoln because of allegations of “financial and political impropriety,” and because Cameron had been “issuing statements on the slavery issue that were totally at odds with the statements of Lincoln.” The implication is that Cameron was removed because he was pro-slavery, but the opposite is true. Striner fails to mention that Cameron’s “statements” came in the form of an official report which called for emancipation and the induction into the Union army of slaves to be used in a fighting capacity. Cameron was sacked because Lincoln believed Cameron was too far in front on the issues of emancipation and arming of slaves, not because of alleged “financial and political” improprieties, or because Cameron opposed emancipation.

In the end, Striner’s attempt to bolster Lincoln’s contribution to emancipation falls woefully short. Lincoln’s reputation as the “Great Emancipator” cannot be defended without a careful review of the Emancipation Proclamation. It is the pivotal act in the story, yet Striner pays hardly any attention to it. Striner correctly describes the Preliminary Proclamation as giving a “warning” to the Confederacy,
Of Contrabands, Congress, and Lincoln

but spends no more than four paragraphs in his entire book discussing the Preliminary and Final Proclamations. 337 Perhaps most unhappily, Striner ignores entirely the role played by the contrabands in bringing about the Emancipatory Legislation and the Proclamations. The contrabands are truly the invisible partner in the epic story of emancipation.

CONCLUSION

The Proclamation may have been redundant with, and inferior to the Legislation from a purely legal standpoint, but it would be a mistake to think that the Proclamation and the Legislation were ultimately of the same value from an emancipatory standpoint. This is true even though it is likely that the Proclamation did not liberate a single slave who was not, or would not have been, liberated by the Legislation. The Proclamation had an impact that vastly exceeded its legal significance. This came in the form of accelerating the flight of Blacks northward and significantly weakening the slave system in the South. It is very likely that the Proclamation had a more corrosive effect on Southern slavery, both in the form of flight and insubordination, than the Legislation.

The view that the Proclamation had an impact beyond its words accounts for the fact that Lincoln and his Proclamation have garnered virtually all of the moral and legal glory associated with emancipation. And this, to the virtual exclusion of the Civil War Congress, its Emancipatory Legislation, and the hundreds of thousands of Blacks who risked it all to destroy slavery.

But it is wrong to evaluate the Proclamation as an instrument of emancipation by focusing on its effects on Black flight and insubordination. This presents a skewed picture and facilitates bootstrapping. This approach, favored by Lincoln apologists, 338 takes attention from the words Lincoln used and his motivation, and gives him full credit

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337. See STRINER, supra note 329, at 189 (2006). Striner claims that the Preliminary Proclamation was “labeled preliminary because it was framed as a warning.” Id. at 181. In fact, the document bore no “label.” It was entitled “A Proclamation,” as was the Final Proclamation. See COLLECTED WORKS, supra note 9, at 337.

338. Thus, for example, Professor LaWanda Cox, a noted Lincoln defender wrote an article staunchly defending Lincoln’s record on emancipation, which prompted an equally prominent historian to comment: “Still, as enlightening as her argument is, Professor Cox largely ignores the Emancipation Proclamation itself. As a consequence, she omits the central act in the story she is discussing.” Stephen B. Oates, A Momentous Decree: Commentary, in THE HISTORIAN’S LINCOLN, PSEUDO-HISTORY, PSYCHOHISTORY, AND HISTORY 177 (Gabor S. Boritt ed., 1996) (commenting on Professor Cox’s “Lincoln and Black Freedom,” which appears in the same vol-
for trends which had been set in motion much earlier by Blacks and by Congress. Though the Proclamation may have accelerated Black flight and insubordination, this is simply a way of saying that it sharpened patterns which had been put in place by others. And, in any event, the Emancipatory Legislation and the Proclamation created mostly inducements and opportunities. The perseverance of Blacks was needed to convert that into freedom.

Paradoxically, though the Proclamation is wholly devoid of moral content,\(^{339}\) it remains an article of faith in our national mythology that the Proclamation furnished the Union with a moral rallying point, which galvanized the war effort.\(^{340}\) Issuance of the Proclamation not only placed the North on a higher moral plane, it also consigned the Confederacy to a correspondingly lower position.\(^{341}\)

The delusion persists that but for the Proclamation, slaves would, and could, not have been emancipated by the advancing Union army. In fact, however, by virtue of the Emancipatory Legislation slaves would have been emancipated through the advance of the Union Army in precisely the same manner as if the Proclamation had never been issued. And, of course, many slaves were emancipated by the Legislation without the aid of the Union Army, and many of those slaves were not covered by the Proclamation.\(^{342}\)
In evaluating the emancipatory role of the Civil War Congress it is also important to recall that the Emancipatory Legislation was enacted during a period extending seventeen months prior to the Proclamation. It is surely the case that, contrary to the picture drawn by many historians, the Civil War had taken on a strongly emancipatory character well before the Final Proclamation was issued. By enacting the FCA, Congress set the wheels of emancipation rolling, and, along with Blacks, assured that those wheels never stopped. Congress quickened the pace of emancipation by enacting increasingly more extensive emancipatory legislation. Even those closest to Lincoln acknowledged that the “series of anti-slavery measures . . . perfected and enacted by [the Civil War Congress] amounted to a complete reversal of the policy of the General Government.”

During the eleven-month period from the enactment of the FCA to the SCA, Lincoln sought to slow down rather than accelerate the legislative process. When he finally issued the Final Proclamation seventeen months after the SCA, he admits that it was played as his “last card.” It was issued grudgingly, and only when Lincoln thought he had no other options. It is especially unjust for Lincoln to be portrayed as the Great Emancipator when “a de facto emancipation being initiated by the slaves themselves” was already in full

343. Collected Works, supra note 9, at 97.
344. Forced into Glory, supra note 63, at 437.
345. The best account of Lincoln’s decision to issue the Proclamation is contained in his April 2, 1864 letter to Hodges. In the Hodges Letter Lincoln states that he was “driven” to issuing the Proclamation because he faced the choice of either “surrendering the Union . . . or of laying strong hand upon the colored element. I chose the latter.” White, supra note 13, at 208. The letter makes clear that Lincoln felt “forced” to issue the Proclamation because all other options had been exhausted. Perhaps the most important option, which had been foreclosed was the refusal of the Border States to accept Lincoln’s voluntary, state-guided, gradual, compensated emancipation proposal. Elsewhere in the Hodges Letter there is other evidence of sense of surrender by Lincoln, not so much with respect to the issuance of the Proclamation, but with respect to events generally: “I claim not to have controlled events, but confess plainly that events have controlled me.” Though the Hodges letter offers perhaps the best support for Bennett’s principal thesis that Lincoln was “forced” to issue the Proclamation, I can find no reference to the letter in Forced into Glory. Additional support for the proposition that Lincoln felt pressured to issue the Proclamation comes from John Hay. He predicted that Lincoln would eventually “succeed” to pressure from the radicals after fighting against them “bravely and successfully” for the prior year. Lincoln’s Journalist, supra note 119, at 234 (referencing March 24, 1862).
346. Slaveholding Republic, supra note 5, at 313. In his letter to Hodges Lincoln admits to being “driven” to issuing the Proclamation, but the factors he mentions which drove him to do it do not include self-emancipation. Elsewhere, though, Lincoln implies that self-emancipation had gone too far to be reversed.
swing, and appears to have influenced his decision to issue the Proclamation.347

The accolade Great Emancipator rings hollow for the further reason that it glosses over the fact that Lincoln’s inveterate racialism was fully operational at the time he issued the Proclamations.348 There is no evidence that Lincoln’s decision to emancipate was based on a desire to improve the conditions of Blacks. By his own account, Lincoln was prompted by military, not humanitarian, considerations.349 Lincoln’s emancipation decision was based on a perception that emancipation was necessary to sustain the Union military cause and preserve the Union. It is thus wrong to conflate “military necessity” with “humanitarian” considerations.350

The Civil War Congress and the Emancipatory Legislation never captured the popular imagination or the respect of historians, but their powerful emancipatory effect should not be overlooked. Most importantly, the relentless efforts of Blacks to escape from and to destroy slavery, which were the impetus of the Emancipatory Legislation and the Proclamation, need to be acknowledged.

347. It has been argued that Lincoln may deserve the accolade “Great Emancipator” because “he insisted upon saving the Union when many abolitionists (Garrison, Phillips, Greeley) did not oppose secession.” KORNGOLD, supra note 31, at 179. At bottom, though, this argument credits Lincoln for having stayed the military course and winning the War. But his fortitude was based on a desire to preserve the Union, not to free the slaves. It is one thing to give Lincoln credit for having been on the winning side of the War, it is quite another to allow him to garner credit for an incidental (initially unintended) result of that fortuity, viz., emancipation.

348. It seems fair to say that “[I]n Lincoln’s martyrdom, his misgivings about blacks were forgotten as he became the Great Emancipator who made good on the promises of the Declaration [of Independence].” PRZYBYSZEWSKI, supra note 127, at 49.

349. That Lincoln did not act from humanitarian concerns in issuing the Proclamation is also evident from the fact that Lincoln did not reference such concerns in explaining why he issued the Proclamation. No discussion of humanitarian concerns appears in his Hodges Letter, nor in a letter Lincoln wrote in response “To the Working-Men of Manchester,” a mere three weeks after he issued the Final Proclamation. The Manchesterians had sent a letter to Lincoln on December 31, 1862, praising him for his “humane and righteous course” in issuing the Final Proclamation the following day. These letters appear in COURTLAND CANDY, LINCOLN AND THE CIVIL WAR, A PROFILE AND A HISTORY 281-85 (1960). Some of Lincoln’s apologists suggest that Lincoln was motivated by humanitarian considerations when he issued the Proclamation but concealed those motivations because he knew that his legal authority to act was based upon the exercise of executive war powers, and that these powers could be exercised only for military, not humanitarian reasons. Such a legal assessment is undoubtedly correct and it appears that Lincoln accepted this legal constraint. See supra note 145. It is nevertheless the case that there is no evidence to support the view that Lincoln in fact acted from humanitarian considerations when he issued the Proclamations. That Lincoln may have had legal reasons for concealing humanitarian considerations does not prove, or tend to show, that he was motivated by such considerations. All of the contemporaneous evidence is to the contrary, and all of that evidence is consistent with Lincoln’s long held views about race, slavery and emancipation.

350. See CONSTITUTIONAL PROBLEMS, supra note 63, at xiv, where J. G. Randall states that the “invoking of ‘military necessity’ for emancipation was for a humanitarian purpose.”
BOOK REVIEW


ROBERT FABRIKANT*

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INTRODUCTION

The American Civil War ended in August 1865, and it wrought one of the most monumental moments in American, perhaps world, history. The Union victory resulted in the emancipation of approximately four million African American slaves and the permanent abolition of slavery in the United States. But historians are not satisfied with wonderful victories; they want to know how and why everything happened. And especially in the case of emancipation and abolition, there has been limitless curiosity spanning more than 150 years. It has been said, no doubt truthfully, that more books have been written about Abraham Lincoln, who was President during most of the relevant period, than about anyone else other than Jesus Christ.

Two questions have held a special fascination for Civil War historians: who freed the slaves, and why did Lincoln delay issuing the Emancipation Proclamation until January 1, 1863, more than twenty months after the Civil War started in April 1861?

Professor James Oakes, a very distinguished Civil War historian, has recently published a book, *Freedom National*, which offers a com-

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1. From a political and military standpoint, the Civil War ended in August 1865, but as a legal matter, the War did not end until August 20, 1866, when President Andrew Johnson issued a proclamation. See Proclamation No. 4, 14 Stat. 814 (1866).
A Review of Freedom National

Oakes nicely dodges the first query about “who freed the slaves because, framed that way, it tempts scholars to specify a single agent in a process that had many agents.” He then proceeds to brush aside the question of why Lincoln delayed issuing the Emancipation Proclamation by claiming Lincoln and his administration started emancipating slaves on August 8, 1861, less than four months after the War started. For that reason, as well as others, Oakes rejects the oft-repeated claim that Lincoln was a “reluctant” emancipator. After all, how can we say Lincoln was “reluctant” to emancipate slaves when he began to do so at such an early point in the War?

Oakes’s conclusion, that August 8, 1861 is when the floodgates began to be opened by Lincoln and his administration, rests largely on a highly suspect analysis of an August 8, 1861 letter by Secretary of War Simon Cameron and of the First Confiscation Act (“FCA”). It is that analysis and the resulting conclusions that are a principal focus of this book review.

My ultimate conclusions are that federally mandated “emancipation,” meaning “liberating a slave from bondage and giving her freedom,” did not begin until the enactment of the District of Columbia Emancipation Act in April 1862, followed by the Second Confiscation Act (“SCA”) and the Militia Act, both enacted on July 17, 1862. Two earlier statutes, the FCA, enacted on August 6, 1861, and the Additional Article of War, enacted on March 13, 1862, were quite emancipatory in their effect, but neither statute purported to liberate slaves or give them their freedom.

I also conclude that the FCA (and Secretary Cameron’s correspondence) had substantial emancipatory effects, but did not, as a legal matter, result in the emancipation of any slaves. The FCA

4. See id. at 138–39 (citing the August 8, 1861 letter from General Major Butler to Secretary of War Simon Cameron).
5. BLACK’S LAW DICTIONARY 1118 (rev. 4th ed. 1968).
6. Militia Act, ch. 201, 12 Stat. 597 (1862); Second Confiscation Act, ch. 195, 12 Stat. 589 (1862); District of Columbia Emancipation Act, ch. 54, 12 Stat. 376 (1862). It is widely understood that the Act of June 19, 1862, ch. 11, 12 Stat. 432 (1862), entitled An Act to secure Freedom to all Persons within the Territories of the United States, emancipated slaves then held in the Federal Territories. In fact, the law prohibited slavery in those territories, but did not purport to liberate or free any slaves within those territories. In this respect, abolition and emancipation are quite different.
purported to break, but only during the pendency of the insurrection, the legal bond between slave owners and runaway slaves who had been used to support the Confederate military effort (“hostile service”), but did not call for those slaves to be freed. I also conclude that the Lincoln administration, consistent with the congressional purposes underlying the FCA, did not emancipate runaway slaves, but instead Lincoln contemplated that they would be put to work in the service of the Union military. Emancipation did not become the policy of the Lincoln administration until the Emancipation Proclamation was issued on January 1, 1863.

I also argue that Lincoln was indeed a “reluctant” emancipator, but that his “reluctance” was a virtue. Just as criticisms of Lincoln on the ground that he was “reluctant” are needless and erroneous, missing entirely the heroic and indispensable contributions he made to assure the destruction of slavery, so too are the arguments trying to demonstrate that he was not “reluctant.” They simply prove too much. Lincoln’s acolytes have no reason to be defensive about Lincoln’s “reluctance.”

I. GENERAL BUTLER, CONTRABANDS, THE FIRST CONFISCATION ACT, AND CORRESPONDENCE FROM AND TO GENERAL BUTLER

A. Background

Oakes’s bedrock claim is that Lincoln and his administration began emancipating slaves on August 8, 1861. This claim is based almost exclusively on a letter of that date sent by Secretary of War Simon Cameron to Union General Benjamin F. Butler, then commanding Fortress Monroe, in the tidewater area of Virginia. But neither Cameron’s letter nor the surrounding events come close to supporting Oakes’s conclusions. Indeed, they compel precisely the opposite conclusion.

The Civil War began on April 12, 1861, when South Carolina forces shelled Fort Sumter, a federally held installation in Charleston Harbor. Almost immediately, slaves in the American south began fleeing northward seeking freedom. The outbreak of armed hostilities dramatically intensified the flight of Southern slaves. Quite often, fleeing slaves crossed into territory controlled by the Union military,
expecting no doubt to be treated as free persons. But when the Civil War started, emancipating Southern slaves, even when they had crossed into Union lines, was emphatically not a goal of the federal government. Accordingly, at the outset of the War, Union forces had not been issued any orders on how to deal with fugitive slaves.

The absence of military orders dealing with the treatment of fugitive slaves did not reflect only that emancipation was not a War goal. Rather, at the inception of the War, the absence of orders reflected the conspicuously repeated intention of the federal government, including most notably President Lincoln, not to interfere with slavery in the seceding and other slave states.

The federal desire at the outset of the War not to interfere with slavery was the product of a number of factors, including racism, law, military strategy, and politics. Northern antipathy for blacks meant that even if emancipation was militarily useful, the fear that Southern blacks would resettle in the North weighed heavily against freeing them. Resistance to emancipation was also fed by the conventional view that the Constitution barred the federal government from touching slavery in states where it existed.

Even assuming Northern racism and the legal barrier could be overcome, Lincoln and many others believed that expressing their intention not to abolish slavery or emancipate slaves was the most likely way to quickly convince the seceding states to rejoin the Union. Lincoln believed that the Confederate states would rejoin only if they were convinced that the Union was prepared to allow them to return with their slaves and with slavery intact.8

It is against this backdrop that we must assess Professor Oakes’s claim that Lincoln and his administration began emancipating slaves on August 8, 1861.

B. General Butler and the Contrabands

From May to August 1861, at the outset of the War, General Butler commanded Fortress Monroe, a Union installation near the Chesapeake Bay in Virginia. On May 24, 1861, General Butler wrote a letter to Lieutenant General Winfield Scott describing an encounter Butler had had with a Confederate general. According to Butler, on

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May 24, Confederate General John Cary entered Fortress Monroe under a peace flag, stating that he was looking for rebel slaves he believed had escaped into Fortress Monroe. When Butler refused to return the slaves, Cary told Butler that he was in violation of the Fugitive Slave Clause in the Constitution and the federal Fugitive Slave Act. Butler responded that the Fugitive Slave Clause did not apply to Virginians because Virginia had seceded from the Union and was now a foreign country. Butler continued that if Cary wanted to retrieve fugitive slaves being held by Butler, he had to pledge his allegiance to the United States. Butler also reasoned that rebel slaves constituted “contraband” because they were the equivalent of military property being used to wage war against the Union by the Confederacy. From that point forward, fugitive slaves were often referred to as “contrabands,” or “contraband of war” (“runaways”).

Butler also explained to General Scott that the runaways whom Cary sought to retrieve “were very serviceable and I had great need of labor in my quartermaster’s department to avail myself of their services . . . .” Butler further explained his understanding that the runaways were to be taken by Cary “to Carolina for the purpose of aiding the secession forces there.” Thus, Butler did not simply deny the Confederates access to their slave labor; he put the runaways to work in the service of the Union cause.

Several days later, on May 27, Butler wrote another letter to Scott and received a response from Postmaster General Montgomery Blair on May 29 and a separate letter from Secretary of War Cameron on May 30. These exchanges will be treated in a moment. For now, however, we jump forward to the First Confiscation Act, and the ex-
change between Butler and Cameron, which yielded Cameron’s August 8 response—the letter so heavily relied upon by Oakes.

C. The First Confiscation Act and Correspondence Between Secretary of War Cameron and General Butler

As a direct result of General Butler’s decision not to return runaways to Confederates, Congress enacted, on August 6, 1861, the First Confiscation Act (“FCA”). The key provision of the FCA for our purposes is contained in its Section 4, and it provides that “during the present insurrection,” the owner of a slave used for “hostile service” against the Union “forfeit[ed]” his rights to the “labor” of the slave.

There is much that is notable about this provision that has gone unnoticed. First, this portion of the FCA is operative only for the duration of the War; it is by its terms only a temporary measure. Second, while the rights of certain slaveowners are “forfeit[ed],” no mention is made of the disposition of such a forfeited slave or the slave’s legal status. It would appear that the legal status of this category of slaves has been put in limbo “during the . . . insurrection.” Standing alone, the FCA is a very thin reed upon which to assert, as does Oakes, that it has inaugurated a policy of emancipation.\(^\text{15}\)

In interpreting the FCA, it is important to keep in mind that it was enacted in order to address two issues. First, to penalize slaveowners who allowed their slaves to be used in “hostile service” against the Union during the War. Second, to deprive the Confederacy of an important military asset: slave labor. The FCA was enacted on the heels of the devastating loss at Bull Run, where congressmen literally witnessed the widespread use of slaves on the battlefield in support of the Confederate military effort.\(^\text{16}\)

The FCA does not prescribe the use to which runaways could be put, but it was obvious that depriving the Confederates of slave labor could be improved upon by allowing the Union military to put the runaways to work. This came to be known as the “double gain;”\(^\text{17}\) military labor was simultaneously being subtracted from the Confederate and added to the Union war effort. Indeed, this was precisely what General Butler had been doing at Fortress Monroe. He was not only denying the Confederates access to slave labor, he was putting

\(^{15}\) OAKES, supra note 3, at 122. I treat the FCA in more detail below.

\(^{16}\) Contrabands, supra note 7, at 327; Cong. Globe, 37th Cong., 1st Sess. 218–19 (1861).

\(^{17}\) Contrabands, supra note 7, at 358 (citation omitted).
the slaves to work in the service of the Union military. Butler’s May 24 letter to Scott had asked not only for guidance on whether to retain the runaways, but also on his using them in support of the Union war effort. In this very important respect, Butler acted beyond—but not in conflict with—the FCA. The FCA permitted the retention of runaways, but it did not address the questions of whether, and how, they could be put to use by the Union military. And it is the latter questions that get lost in Professor Oakes’s analysis.

Two days after Congress passed the FCA on August 6, Lincoln signed the bill into law, and on that same date, Secretary Cameron wrote to Butler in response to Butler’s July 30 letter seeking guidance on what to do with the runaways at Fortress Monroe. Oakes claims that Cameron’s August 8 letter, which purported to interpret the FCA, resulted in the Lincoln administration’s very first emancipation of slaves. According to Oakes, as a result of Cameron’s August 8 letter, “the slaves of disloyal masters were emancipated.”18 But Cameron’s letter did not use the word “emancipate” or any synonymous word such as “free” or “liberate.”

Notwithstanding this important omission, Oakes relies upon the fact that Cameron’s letter used the phrase “and such persons shall be discharged therefrom” as the principal basis for claiming that the letter instructed Butler to “discharge,” hence emancipate, the runaways in his custody. But this is clearly not what Cameron intended, nor does his letter reasonably lead to that interpretation. Important parts of Cameron’s August 8 letter not discussed by Oakes make abundantly clear that the runaways were to be put to work, not set free. In the 19th Century parlance, “discharge from,” did not mean emancipate.

Cameron’s letter contained two distinctly important provisions:

The [FCA] declares that if persons held to service shall be employed in hostility to the United States the right to their services shall be forfeited and such persons shall be discharged therefrom. It follows of necessity that no claim can be recognized by the military authorities of the Union to the services of [slaves used in hostile service by Confederates] when fugitives.

... [Given the pendency of the War], it seems quite clear that [runaways from loyal and disloyal masters should be] receiv[ed] ... into the service of the United States and [be] employ[ed] ... under

18. OAKES, supra note 3, at 138 (citation omitted).
such organizations and in such occupations as circumstances may suggest or require. Of course a record should be kept showing the name and description of the [runaways] . . . and such facts as may be necessary to a correct understanding of the circumstances of each case after tranquility shall have been restored. Upon the return of peace Congress will doubtless properly provide for all the [runaways] received into the service of the Union and for just compensation to loyal masters.19

1. The First Excerpt from Cameron’s August 8 Letter

There are several important problems with Oakes’s interpretation of the first excerpt from Cameron’s letter set forth above. First, Cameron had misstated the language of the FCA. The emphasized language did not appear in the final version of the FCA. Nor did the word emancipate or synonymous words appear in the FCA. The emphasized phrase had appeared in various drafts of the FCA bill, but it was dropped out at the last minute.20 Notwithstanding the absence of the words “discharged” and “emancipation” in the FCA, Oakes claims that under the FCA “the slaves of disloyal masters were emancipated.”21

Likewise, the fact that Congress specifically dropped the emphasized language from the FCA does not deter Oakes from relying upon the fact that Cameron’s August 8 letter appeared to insert it into statute. Oakes claims that by adding back the emphasized language, Cameron had “restored the emancipation clause that Congress had removed, thus preserving the constitutionality of emancipation by maintaining its military character.”22 Oakes claims that Cameron did this “acting under the President’s authority as commander in chief . . . .”23

There was, however, no “emancipation clause” in the FCA or in any draft of the FCA.24 And even assuming there had been such a

21. OAKES, supra note 3, at 138 (citation omitted).
22. E-mail from James Oakes to Robert Fabrikant (June 17, 2012) (emphasis added) (on file with author).
23. Id.
24. Oakes argues that the congressional debates concerning the FCA demonstrate a desire by Congress to emancipate slaves, and that the reinsertion by Cameron of the word “discharge” was consistent, in particular, with the emancipatory intent of Senator Trumbull, the original
clause, it would be a curious doctrine indeed if a President (whether acting as Commander in Chief or otherwise) had the unilateral authority to amend a statute, especially to reinsert language specifically removed by Congress, and to do so in a letter from his Secretary of War, a letter which we do not even know the President saw. Such a doctrine would not only be “curious,” it would constitute a blatant unconstitutional invasion by the Chief Executive into the legislative function and thus violate the separation of powers principle that undergirds the Constitution. We have no such doctrine in this country.

Oakes does not acknowledge, nor does he address, the constitutional inefficacy of Cameron (or Lincoln, for that matter) attempting to unilaterally amend a statute. Rather, Oakes argues that by reinserting the language that Congress had deleted, Cameron was simply making the statute consistent with congressional intent. Even if this were factually accurate, which it is not, it would not supply a constitutionally sufficient justification for Cameron (or Lincoln) to unilaterally amend the FCA.

Second, Oakes’s conclusions cannot be squared with the language used in the FCA or with the language deleted by Congress. Even allowing for the underscored language, the FCA did not contain a statutory command or permission to emancipate runaway slaves.

The much larger problem for Oakes is that his interpretation of the FCA miscomprehends the very purposes of the FCA and the mindsets of Butler and Cameron when they exchanged their correspondence. The FCA quite plainly did not have the high-minded purposes attributed to it by Oakes, nor did Butler and Cameron. The sponsor of the bill. See, e.g., OAKES, supra note 3, at 122. This argument is entirely refuted by Ms. Porter’s review published in this issue. I deal with this issue in summary fashion below.

25. Oakes claims “[i]t was crucial the instructions [contained in Cameron’s letter] came from the War Department rather than the Attorney General. This was military emancipation; no judicial proceedings were required.” Id. at 138. Contrary to Oakes, the “instructions” would have been unconstitutional if they had come from the President; hence, no cabinet officer acting on behalf of the President could issue such “instructions.”

26. There is no, or little, reason to believe that Cameron acted at the request of Lincoln in writing the August 8 letter. Oakes does not point to any communications between them that would show that Cameron acted at the direction of Lincoln, and it is well known that Cameron was considerably more radical than Lincoln when it came to slavery issues. Indeed, in December 1861, Lincoln prohibited Secretary of War Cameron from issuing a report espousing emancipation of slaves of disloyal owners and the arming of slaves. Id. at 141. When Lincoln learned of Cameron’s remarks, he “ordered Cameron to recall the report and delete that paragraph.” CONTRABANDS, supra note 7, at 355 (citation omitted).

27. OAKES, supra note 3, at 138–39; E-mail from James Oakes to Robert Fabrikant (June 17, 2012) (on file with author).

28. I deal with this point below.
FCA was intended to penalize disloyal slaveholders and to deprive the Confederacy of slave labor being used for military purposes. It was not a humanitarian measure, and Butler’s nudging of Cameron to convert it into one was, as discussed below, simply ignored by Cameron.

2. The Second Excerpt from Cameron’s August 8 Letter

Remarkably, the second excerpt from Cameron’s letter is not discussed by Oakes. But that excerpt makes abundantly clear that Cameron’s purpose was that runaways be employed, not emancipated, and that he considered the legal status of runaways to be a matter which would await final disposition at the end of the War. This is not a matter of conjecture; it is simply what Cameron said. He was express in saying runaways should be received into the service of the Union and “employed.” He also said that “[u]pon the return of peace Congress will doubtless properly provide for all the [runaways] . . . .”29 It could not be clearer that Cameron contemplated that the runaways would be employed, and that their ultimate status would await “the return of peace,” when Congress would act.

The second excerpt from Cameron’s August 8 letter mirrored the instructions he had given Butler in a May 30 letter, which responded to a letter from Butler: “You will employ [runaways], . . . keeping an account of the labor by them performed, of the value of it and of the expense of their maintenance. The question of their final disposition will be reserved for future determination.”30 It could not be clearer, that the Lincoln administration wanted to keep its options open on the issue of emancipation during the summer of 1861.

Cameron’s two letters do not set out a policy of emancipation. We know this as well from the fact that in his May 30 letter, Cameron told Butler that “Your action in respect to the negroes who came in to your lines from the . . . rebels is approved.”31 At that point, Butler was employing, not emancipating, runaways.

There are many contemporaneous accounts that Butler’s runaways were put to work.32 Surely Butler was not emancipating them.
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His only reports were that he employed runaways; he never mentioned that he set them free. Had he done so, surely he would have put his superiors on notice and asked for permission to do so. On one occasion Butler did impliedly ask for permission. This came not in the form of a request for an approval of an existing policy of emancipation, but rather in the form of a rhetorical question asking whether the runaways were “free?” This request was contained in his July 30 letter, and went unanswered by Cameron in his August 8 letter.

Oakes’s characterization of Cameron’s August 8 letter as mandating a policy of emancipation is belied not only by what Cameron actually said in his letter, but perhaps even more importantly by what he did not say. Butler’s July 30 letter to which Cameron responded posed a series of questions, most of which went unanswered by Cameron. These were hard questions, the same type of probing questions we are now asking about the Lincoln administration’s position on how the Union military should treat runaway slaves.

When Butler wrote his July 30 letter, he had approximately 700 slaves in his custody and expected “many more coming in.” Butler had two sets of questions for Cameron, which Butler labeled “embarrassing.” It is not without coincidence that these same questions are at the bottom of my disagreement with Professor Oakes: “First. What shall be done with them? and, Second. What is their state and condition?” Butler was a lawyer, indeed he had been a criminal defense lawyer before the War, and he knew how to ask questions. He went from the very general, to the very specific, putting forward a series of highly particularized questions for Cameron. Butler said he wanted to know:

Are these [runaway] men, women and children, slaves? Are they free? Is their condition that of men, women, and children, or of property, or is it a mixed relation? What their status was under the Constitution and laws, we all know. What has been the effect of a rebellion and a state of war upon that status? When I adopted the theory of treating the able-bodied negro fit to work in the trenches as property liable to be used in aid of rebellion, and so

33. Letter from Benjamin F. Butler, Major Gen., to Simon Cameron, Sec’y of War (July 30, 1861) in 1 PRIVATE AND OFFICIAL CORRESPONDENCE OF GEN. BENJAMIN F. BUTLER DURING THE PERIOD OF THE CIVIL WAR 185, 186 (Jessie Ames Marshall ed., 1917).
34. Id.
35. Id.
contraband of war, that condition of things was in so far met, as I then and still believe, on a legal and constitutional basis. But now a new series of questions arise. Passing by women, the children certainly cannot be treated on that basis; if property, they must be considered the encumbrance rather than the auxiliary of an army, and of course, in no possible legal relation could be treated as contraband. Are they property? If they were so, they have been left by their masters and owners, deserted, thrown away, abandoned, like the wrecked vessel upon the ocean. . . . If property, do they not become the property of salvors? But we, their salvors, do not need and will not hold such property, and will assume no such ownership: has not, therefore, all proprietary relation ceased? Have they not become, thereupon, men, women and children? No longer under ownership of any kind, the fearful relicts of fugitive masters, have they not by their master’s acts, and the state of war, assumed the condition, which we hold to be the normal one, of those made in God’s image? Is not every constitutional, legal, and normal requirement, as well to the runaway master as their relinquished slaves, thus answered? I confess that my own mind is compelled by this reasoning to look upon them as men and women. If not free born, yet free, manumitted, sent forth from the hand that held them, never to be reclaimed.36

Cameron’s August 8 letter did not say, as noted above, whether the runaways were “free” or “slave.” This, Cameron said, was a matter to be sorted out by Congress when the war ended. Were they persons or “property?” Again, no response by Cameron. Likewise, Cameron did not address Butler’s concern that his initial legal basis underlying his “contraband of war” refusal to return the runaways depended upon their being considered property “fit to work . . . in aid of rebellion,” but that rationale could not sensibly apply to women and children. Again, no response by Cameron. And, treating them as if their masters had abandoned them, Butler wanted to know if “all proprietary relation ceased?” Again, no response by Cameron. And, finally, Cameron fails to respond to Butler’s deeply felt question: “Is not every constitutional, legal, and normal requirement, as well to the runaway master as their relinquished slaves, thus answered?” Professor Oakes would have us believe that Cameron’s letter constitutes the Lincoln administration’s anvil of emancipation, but how could that be the case if Cameron failed to answer any of Butler’s very well drawn questions?

36. Id. at 186–87.
It is also important to recall that throughout these exchanges, the runaways were seen as having military value to the Union, and that it was important to take advantage of that by putting them to work. One of Butler’s initial rationales for not turning over the runaways was because they were military assets, property that he deemed to be “contraband.” The term “contraband” describes property, not people. Property is not emancipated. And so it follows that it would have been a non sequitur for Cameron to have ordered the emancipation of the contraband in Butler’s possession. Had he sought to have done so, it would have been drowned out by a cacophony from the slave-holding Border States and their many allies in Congress. Not a peep!

This is not to say that Cameron’s August 8 letter did not have a significant emancipatory effect; it certainly did. By instructing Butler not to turn over the runaways to their former masters, the runaways gained a new element of freedom, but they were not free. The runaways were protected from the harsh treatment of rebel masters, but remained under the dominion (no doubt more humane) of the Union military. More importantly, by denying rebel masters their runaways, an important military asset was subtracted from the Confederate war machine and, simultaneously, added to the Union arsenal. From a purely military perspective, Cameron’s instructions conferred significant advantages on the Union war effort. And in that respect, Cameron’s August 8 letter had a positive effect on the eventual destruction of African American slavery, but it did not order or result in the immediate emancipation of any runaways.

To be fair, it is not clear whether Cameron, in his August 8 letter, was ordering Butler to employ the runaways or simply telling him it was permissible to do so. But, most importantly, Cameron did not instruct or authorize Butler to release the runaways. Indeed, his August 8 letter ignored Butler’s very specific question as to whether the runaways should be set free. And, it is that very telling omission, taken together with what Cameron did tell Butler, namely to “employ” the runaways, which precludes Oakes’s argument that the FCA and Cameron’s August 8 letter inaugurated a policy of emancipation and resulted in the emancipation of slaves beginning on August 8, 1861.

Given the fact that Cameron’s August 8 and May 30 letters did not order or suggest any changes in Butler’s practices, it is curious that Oakes would select August 8 as the date when the Lincoln administration began emancipating slaves. Whatever “emancipation” began oc-
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curring on August 8 was simply a continuation of Butler’s practices beginning in late May 1861 when he declined to return runaways to General Cary. Oakes should have given a nod to Butler, rather than to Cameron, as the person who initiated emancipation, if indeed Butler actually emancipated any runaways. Cameron’s letter seems to do no more than to tell Butler to continue with his present practices.

D. Postmaster General Blair’s Letter

In deciphering Cameron’s two letters, it is important to recall the atmosphere that existed throughout the Union at the time they were written. The Union was driven by racism, and steps taken by Congress and the Executive Branch regarding slaves were driven by a desire to gain a labor advantage, rather than to occupy a higher moral ground. Postmaster General Blair’s May 29, 1861 response to Butler made that quite plain. Blair applauded Butler for being “right when you declared secession niggers contraband of war. The Secessionists have used them to do all their fortifying . . . which . . . is the essence of their military operations.”37 Blair encouraged Butler to “improve the code by restricting its operations to working people, leaving the Secessionists to take care of the non-working classes of these people . . . . take your pick of the lot and let the rest go, so as not to be required to feed unproductive laborers, or indeed any that you do not require or cannot conveniently manage.”38 In closing, Blair reminded Butler that “the business you are sent upon . . . is war not emancipation.”39

Thus it was that the FCA spoke in terms of “forfeiture,” rather than “freedom.” If Congress had intended to use the FCA as a means of granting freedom to the runaways it well knew how to do that. Lord Dunsmore had issued a “freedom” proclamation during the Revolutionary War, and when it came time for Congress to do so in 1862, it had no trouble saying that slaves in the District of Columbia were “discharged and freed.”40 Congress then knew that using the word “discharge” was not sufficient to emancipate; there is simply no

38. Id. at 116–17.
39. Id. at 117.
reason to think Congress thought any differently when it enacted the FCA. Likewise, when Congress enacted the District of Columbia Emancipation Act, the Second Confiscation Act, and the Militia Act for the purpose of emancipating various categories of slaves, Congress used the word: “free.”41 But it didn’t do so in the 1861 FCA, and its failure to do so forecloses the argument that the FCA emancipated slaves, Professor Oakes to the contrary.42

II. GENERAL FREMONT’S PROCLAMATION AND LINCOLN’S MODIFICATION

Oakes’s interpretation of the FCA and Cameron’s August 8 letter is also at odds with contemporaneous interpretations of the FCA. This is perhaps best demonstrated by Lincoln’s modification of a proclamation issued by General John C. Fremont just three weeks after Cameron’s letter. Fremont, the Union military commander in Missouri, issued an order proclaiming martial law in that state and declaring “free” all slaves of disloyal owners in that state.43 Several days later, on September 11, Lincoln modified, among other things, the emancipation provision in Fremont’s proclamation on the ground that it exceeded the FCA. Lincoln did not specify the precise manner in which Hunter’s emancipation provision did not conform to the FCA.

In a September 22, 1861 letter to Senator Orville Browning, Lincoln explained that Fremont’s proclamation was an unconstitutional arrogation of power by the military, and that emancipation of slaves “must be settled according to laws made by law-makers, and not by military proclamations. . . . I do not say Congress might not with propriety pass a law . . . just as General Fremont proclaimed. . . . What I object to, is, that I as President, shall expressly, or impliedly seize and exercise the permanent legislative functions of the government.”44 Surely this makes clear that in September 1861, Lincoln did not consider that Congress had authorized the emancipation of any slaves, nor did he believe that he, as President, had the authority to do so without congressional authorization.

42. “[M]ilitary emancipation became official Union policy when Congress passed the First Confiscation Act.” OAKES, supra note 3, at 143.
43. The Fremont Proclamation and Lincoln’s response is discussed in more detail in CONTRA-
bands, supra note 7, passim.
44. Id. at 348 (citation omitted).
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Lincoln’s belief that neither the FCA nor any other legislation emancipated slaves, and that Fremont’s proclamation was out of order, was confirmed by a letter he received from Joseph Holt on September 11, 1861, in the midst of the Fremont imbroglio. Holt was a Kentucky lawyer, a loyalist, and a former secretary of war in the administration of James Buchanan, Lincoln’s predecessor. Holt went on to serve as Lincoln’s judge advocate general in the Union army. Holt correctly observed that the problem with Fremont’s proclamation was that it provided slaves “shall be at once manumitted,” whereas the FCA “‘left . . . [the slaves’] status to be determined either by the courts of the United States or by subsequent legislation.’”

III. THE CONGRESSIONAL DEBATES CONCERNING THE FCA

Professor Oakes argues that the original draft of the FCA contained an “emancipation clause,” and that Cameron’s re-insertion of the “discharged from” language merely caused the FCA to be interpreted in a manner most consistent with congressional intent. In addition to the constitutional problems with Oakes’s approach, the congressional debates also do not support Oakes’s interpretation.

The apparent congressional consensus was that the “discharged” language was redundant with “forfeiture.” Indeed, Senator Trumbull, the original sponsor of the bill (which included the word “discharged”) did not object to it being dropped from the final bill because, he said, “‘I think the section as we passed it [without the word “discharged”] meant substantially the same thing . . . but this makes it more definite.’” Trumbull’s easy acceptance of the suggestion that “discharge from” be dropped renders implausible Oakes’s claim that it represented a significant change (from emancipation) in the meaning of the FCA.

Oakes’s explanation of Trumbull’s acquiescence seems contradictory and at odds with his overall conclusion regarding the FCA and Cameron’s August 8 letter. On the one hand Oakes argues that Con-

45. Id. at 349 (citation omitted). Lincoln later concluded that he did, in fact, have the power to emancipate slaves, but his thinking in this regard did not crystallize until May 1862 when he revoked General David Hunter’s proclamation emancipating slaves in Georgia, Florida, and South Carolina. See id. at 352–53.
46. These issues are addressed more fully and more effectively in Ms. Porter’s Essay, which appears in this issue of the Howard Law Journal.
47. OAKES, supra note 3, at 138 (quoting CONG. GLOBE, 37th Cong., 1st Sess., 427, 431 (1861)).
gress accepted the amendment because it recognized “it could not emancipate slaves,” 48 but that “Trumbull and everyone else still believed it was an emancipation bill because they all assumed that the commander in chief would execute the law by ‘discharging’ the ‘forfeited’ slaves.” 49 But there is, literally, nothing in the portions of the Congressional Globe cited by Oakes (or anything else I can find) that contains a discussion about emancipation or about how any Senators or Representatives anticipated how Lincoln would or could implement the FCA. And certainly there is nothing in the Congressional Globe suggesting that senators or representatives thought Lincoln would emancipate any slaves “forfeited” or “discharged” by the FCA. So, in addition to being contradictory, Oakes has engaged in sheer speculation about congressional expectations about how Lincoln would execute the FCA.

Oakes claims that many Republicans believed that emancipation of runaway slaves could be justified under “military necessity,” such that it “had to be the work of the president” acting as commander in chief. 50 Since the Republicans believed emancipation was “strictly military,” Oakes claims they believed “it had to be done by the commander in chief. To alleviate such concerns the wording of Trumbull’s amendment was changed at the last minute.” 51 Suffice it to say that the record of the debate on and leading up to the amendment dropping the word “discharged” contains no discussion whatever on the issue of “military necessity.” The only reason offered for the change was that it mollified a Kentucky Representative (Charles A. Wickliffe, a Union Whig) who feared that as originally drafted, Section 4 of the FCA would jeopardize the ability of Union slaveholders to keep their slaves. 52 There is no support for the proposition that the word “discharged” was dropped because Congress believed it was synonymous with military emancipation, and that only Lincoln, as Commander in Chief could accomplish military emancipation.

48. Id.
49. Id. (citation omitted).
50. Id. at 137.
51. Id.
52. See Cong. Globe, 37th Cong., 1st Sess. 409–10, 431 (1861) (showing, among other things, lack of discussion about military necessity in congressional debates regarding the FCA).
IV. LINCOLN’S STANCE ON MILITARY EMANCIPATION

Oakes claims that Cameron’s supposed emancipation mandate in his August 8 letter reflected the fact that Lincoln had “embraced military emancipation from the earliest months of the War.” This too is false. Up until he signed the D.C. Emancipation Act in April 1862, Lincoln kept his options open with respect to emancipation and military emancipation. He was trapped in a pincer movement, squeezed on one side by the Radicals, and by the Border State representatives and their Democrat allies on the other. And we know from his modification of Fremont’s proclamation in September 1861 and his revocation of General David Hunter’s proclamation in May 1862, that Lincoln did not embrace military emancipation until more than a year after the War started.

The extent to which Lincoln was willing to bend to accommodate the Border States is perhaps best demonstrated by the fact that in the summer of 1861, Lincoln himself ordered a Union general not to bring runaways across the Potomac into Washington, D.C., that Lincoln did not countermand the order of his top military commander, General Halleck, prohibiting slaves from coming into his camps, Lincoln’s numerous statements projecting an unwillingness to antagonize the slave-holding Border States by facilitating the plight of runaways, and his oft-repeated assurances to the Confederate states that he had no desire or legal ability to touch slavery in those states. These statements reflected Lincoln’s belief that the Confederate states would not be willing to return to the Union peaceably unless they were permitted to bring their slaves with them, and his equally strong belief that communicating a pro-emancipation message to the Confederacy would assure a long, destructive war.

V. CONGRESS’S EMANCIPATORY LEGISLATION, THE PRELIMINARY EMANCIPATION PROCLAMATION AND THE EMANCIPATION PROCLAMATION

Oakes recognizes that the scope of federal emancipation broadened as the War progressed. But his presentation of many of the important emancipatory statutes, as well as the Preliminary Emancipation Proclamation and the Emancipation Proclamation, is

53. OAKES, supra note 3, at 283.
54. Contrabands, supra note 7, at 335–38.
55. Id. at 315; Act of Justice, supra note 8, at 377–78.
quite flawed. So, for the sake of coherency, it might be helpful to lay out the key provisions in these statutes and Proclamations.

A. The First Confiscation Act

The FCA, in Section 4, called for the forfeiture by masters (without regard to whether loyal or disloyal) of their claim to the service of any slave who they had required or permitted to be used in “hostile service” against the Union. As discussed above, the forfeiture was not intended to constitute emancipation, though that was its practical effect if the slave came behind Union lines. Such a runaway could not be recovered by his master (no distinction drawn between loyal and disloyal master) if it could be shown that the slave had been employed in “hostile service” against the Union.

An important feature of the FCA was that the statutory forfeiture was triggered by the slave being put to “hostile service” and did not require the slave to cross into Union lines. In this respect, the FCA had an arguable extraterritorial effect to the extent that it operated within a foreign country, viz., assuming for these purposes the Confederacy was a foreign country, a position later sustained in *The Prize Cases*.56

Oakes claims that “[i]n the [FCA], Congress declared the forfeiture of slaves used in rebellion, but it ceded to the president, as commander in chief, the power to emancipate forfeited slaves.”57 Contrary to Oakes, the FCA does not contain any provision ceding to the President the power to emancipate forfeited slaves. Emancipation simply was not addressed in the FCA.58

B. The Second Confiscation Act

The SCA contained two emancipatory sections: Section 1, which stated that the slaves of any person convicted of treason shall be “declared and made free”59 and Section 9, which stated that slaves of disloyal masters who came within Union lines “shall be deemed captives of war, and shall be forever free of their servitude, and not again held as slaves.”60 It is notable that the word “free” appears twice in the SCA, but not even once in the FCA, further reinforcing the point that

57. OAKES, supra note 3, at 225.
58. Id.
60. Id.
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the SCA was genuinely an emancipatory statute, but the FCA was not.

Oakes claims that the SCA had to “be activated by presidential proclamation[.]”61 This is simply not so. There is no such provision, and Oakes does not specifically cite such a section. The emancipatory provisions of the statute were triggered by a conviction for treason (Section 1) or by a slave owned by a rebel master coming behind Union lines (Section 9). Section 1 required a conviction; Section 9 was self-executing and required no presidential action whatsoever.

C. The Preliminary Emancipation Proclamation

On September 22, 1862, Lincoln issued a proclamation that has become known as the Preliminary Emancipation Proclamation (“PEP”). Oakes claims that the PEP was, in reality, “more than a ‘preliminary’ proclamation” because “[b]y expressly enjoining the army and navy to begin enforcing the emancipation clauses of the [SCA], Lincoln intended his [PEP] to be read as a military order, to implemented at once.”62 This is not so. True enough, Lincoln recited in the PEP certain provisions of the Additional Article of War (“AAW”), which prohibited Union military personnel from returning runaways to their masters (without regard to whether loyal or disloyal) and the SCA, which contained a provision (Section 10) quite similar to the AAW. And, it is also true that the PEP expressly ordered the Union military to “observe, obey and enforce” the cited portions of the AAW and the SCA, but the Union military was obligated to comply with those provisions without regard to receiving such an order from Lincoln. Congress imposed those obligations directly on the military by the very terms used in those statutes, and those statutes, contrary to Oakes, were not held in abeyance pending the issuance of a proclamation by Lincoln.

Notwithstanding Oakes, Lincoln's September 22, 1862 Emancipation Proclamation was truly “preliminary.” The only conduct it “ordered,” was conduct otherwise required under existing law. That portion of the PEP was entirely superfluous. The most important part of the PEP was the express announcement that if Confederate states did not return to the Union by January 1, 1863, Lincoln would issue a proclamation on that date declaring that slaves in specified portions of

61. OAKES, supra note 3, at 304.
62. Id. at 316–17.
the Confederacy “shall be then, thenceforward, and forever free.”
This can be construed either as a threat or a promise to emancipate, or
an invitation to rejoin the Union, but in either event, the Confederates
knew they had 100 days to decide their fate. And because the PEP
gave advance, or preliminary, notice of an act set to happen in the
future, it rightly came to be known as the Preliminary Emancipation
Proclamation.

Finally, Oakes asserts that “Lincoln's Preliminary Proclamation
had indeed made it clear that slaves coming within Union lines were
emancipated.”63 In fact, this had already been made clear by the SCA
with respect to the slaves of certain “disloyal” slave owners. In that
respect the PEP was entirely superfluous.

D. The Emancipation Proclamation

The Emancipation Proclamation (“EP”) was issued by Lincoln on
January 1, 1863. Most notably, the EP declared, as promised in the
PEP, that slaves in designated portions of the unoccupied Confeder-
acy “are, and henceforward shall be free.”

Oakes gives the impression the EP dramatically increased the
emancipatory effect of prior emancipatory legislation: prior to the EP,
Congress had emancipated slaves in Washington, D.C., “and had
emancipated rebel-owned slaves in the occupied areas of the seceded
states, areas that included perhaps two hundred thousand enslaved
blacks. If enticement worked, the [EP] could free millions.”64 Oakes
is incorrect on two important points: first, prior legislation, most nota-
bly the FCA resulted in the forfeiture of slaves put to hostile service,
but the provision was not limited to “slaves in occupied areas of the
seceded states.” Slaves put to hostile service were swept into the FCA
regardless of whether they were within the seceded states. And,
under the SCA, slaves of disloyal masters were emancipated, again
without regard to geographic region, though the SCA applied only to
slaves who came within Union lines. The EP, on the other hand, pur-
purported to confer freedom on slaves within designated parts of the
Confederacy instantaneously and did not require a slave to cross into
Union lines.

Oakes claims that the true significance of the EP was that it con-
tained two new policies—“enticement and black enlistment”—and

63. Id. at 323.
64. Id. at 344.
that this “transformed Union soldiers into an army of liberation in the seceded states.”\textsuperscript{65} Oakes is wrong on both counts. The revolutionary “enticement” purportedly identified by Oakes “was actually initiating a major shift in federal emancipation policy” as Lincoln was “inviting slaves to come within Union lines, by enticing them with the promise of freedom . . . .”\textsuperscript{66} In fact, the freedom offered in the EP was conferred regardless whether the slave crossed into Union lines. In this respect, the EP was more like the FCA (the forfeiture of service provision was not dependent on the slave crossing into Union lines), than the SCA (where the emancipation provision was contingent upon the slave crossing into Union lines).\textsuperscript{67}

Oakes’s reference to “black enlistment” is likewise puzzling because black enlistment had been specifically authorized by the SCA (Section 11) and the Militia Act (Section 12), both of which had been enacted on July 17, 1862, more than four months ahead of the EP.

VI. SOME MISCELLANEOUS POINTS

Oakes claims that the “basic criteria” for military emancipation was that “first, [there had to be] labor in service of the Union. Slaves who ran to Union lines and volunteered their services as wage laborers for the Union military, whether male or female, were entitled to their freedom. Having thus served the Union cause, black workers neither could nor would be returned to slavery.”\textsuperscript{68} “The second criterion was abandonment by their owners.”\textsuperscript{69} Neither of these statements is true. The FCA, the SCA and the EP contained no such requirements. Runaways could be “forfeited” under the FCA and emancipated under the SCA or the EP without volunteering for wage labor and without being abandoned by their owners. Oakes cites no authority to the contrary.

\textsuperscript{65} Id. 
\textsuperscript{66} Id. 
\textsuperscript{67} In this very important respect, the EP was quite different from the emancipation proclamations of the past, such as Lord Dunmore’s during the Revolutionary War. In contrast to the EP, Lord Dunmore’s proclamation offered freedom to rebel slaves who crossed into British lines (much like the SCA). 
\textsuperscript{68} OAKES, supra note 3, at 141. 
\textsuperscript{69} Id.
VII. LINCOLN’S DELAY IN ISSUING THE EMANCIPATION PROCLAMATION

One of Oakes’s central claims is that “Lincoln had embraced military emancipation from the earliest months of the war . . . .” 70 This conclusion relies heavily, almost exclusively, on Oakes’s belief that Lincoln heartily embraced Butler’s “contraband” approach to fugitive slaves. But, as noted earlier, Butler’s not so muted queries about emancipating runaways was not even acknowledged, no less granted, by Cameron. Rather, despite Oakes’s insistence to the contrary, Butler was told to put the runaways to work, not to liberate them. Moreover, though Oakes claims Lincoln endorsed Butler’s “contraband policy,” Lincoln’s most prominent biographer sees it differently: “Lincoln made no official comment on Butler’s action, or on the decision of other commanders to exclude slave hunters from their camps.” 71

Oakes acknowledges that the Union military did not have a uniform policy to deal with fugitive slaves. 72 Some commanders, like Butler, refused to return fugitive slaves. But many others took precisely the opposite approach; they not only refused to permit runaways to enter their camps, but also allowed slave catchers to retrieve runaways within their camps. 73 Lincoln was aware of the widespread existence of these conflicting practices within the military, but he allowed it to persist. Lincoln’s reticence on the matter resulted in Congress stepping in by enacting the Additional Article of War in March 1862, which prohibited military personnel from returning runaways to their masters. 74 If Lincoln had been nearly as energetic in supporting military emancipation as portrayed by Oakes, it would not have been necessary for Congress to do the job for him. 75

70. Id. at 283.
71. DAVID HERBERT DONALD, LINCOLN 343 (1995).
72. OAKES, supra note 3, at 316.
73. See Contrabands, supra note 7, at 328–29; see also Act of Justice, supra note 8, at 400.
74. OAKES, supra note 3, at 316.
75. Lincoln’s reluctance to impose a uniformly pro-emancipation policy on his commanders can also be seen in his decision to modify and revoke emancipation proclamations of two of his generals, John Fremont and David Hunter. Though Oakes argues that Lincoln’s actions here were simply intended to assure compliance with the FCA, it is much more likely that Lincoln acted out of a desire to avoid antagonizing the Border States and other slaveholding interests. See Contrabands, supra note 7, at 322–24. But see OAKES, supra note 3, at 214–16. It is ironic that Oakes on the one hand believes Lincoln, acting through Cameron, could (and should have) unilaterally expanded the FCA, but on the other hand argues that Lincoln correctly modified Fremont’s proclamation on the ground that it was illegal because it exceeded the FCA. In any event, even assuming Fremont’s proclamation did exceed the FCA, it did so only marginally and in a direction that enhanced rather than retarded emancipation. See Contrabands, supra note 7, at 351. Even Lincoln purported to believe that Fremont’s violation was quite modest.
A Review of Freedom National

True enough, Lincoln hated slavery and wished it be eradicated. But, for a host of reasons, the most important of which are not discussed by Oakes, Lincoln hesitated early in the War to wage a full-scale war on slavery within the Confederacy.

First, of course, he felt constrained by the conventional understanding that the Constitution did not permit the federal government to bar slavery in states where it existed.

Second, because of his belief that the seceded states had no right to secede, Lincoln persisted for much too long in the belief that their citizens, especially their “loyal” citizens, continued to enjoy rights under the Constitution even though their states had purported to secede.

Third, even after Lincoln gravitated to the view that the international law of war, rather than the Constitution, governed the relations between the Union and the Confederacy, he hesitated to penalize loyal citizens (including loyal slaveowners) simply because they had the misfortune of living in a seceded state. His reluctance was more political than legal. He did not want to discourage whites in the South from continuing to sympathize with and support the Union.

Fourth, Lincoln rightly believed that an early and conspicuous embrace of emancipation would antagonize disloyal Confederates and discourage them from peaceably and quickly re-joining the Union. He believed that an amicable resolution could occur only if the Confederates believed they could return to the Union with their slaves in tow. This was precisely the offer contained in the PEP: the Confederates had until January 1, 1863 to return to the Union with their slaves in tow or be subject to the issuance of a proclamation freeing their slaves. Though Lincoln assuredly did not believe the Confederates would accept this offer by the time he extended it in September 1862, he had entertained that hope for much of the time prior to issuing the PEP.76

Fifth, Lincoln’s failure to embrace emancipation early and conspicuously reflected his desire to avoid revolutionary social upheaval within the Confederacy. Though in retrospect Lincoln seems like a social revolutionary, he was not. And he said as much.77

76. See id. at 365.
77. In his December 3, 1861 annual message to Congress, President Lincoln stated:
In considering the policy adopted for suppressing the insurrection, I have been anxious and careful that the inevitable conflict for this purpose shall not degenerate into a violent and remorseless revolutionary struggle. I have there, in every case, thought it proper to keep the integrity of the Union prominent as the primary object of the con-
Sixth, an early and conspicuous embrace of military emancipation would have risked alienating the slaveholding Border States. Lincoln did not simply feel an overarching need to keep the Border States within the Union and to avoid their defection to the Confederacy because he feared losing their military support. He knew that if they (most importantly Kentucky) defected, it would be difficult for the Union to win the War. Border State defection meant a critical, undoubtedly insurmountable, shift in the geo-military balance of power between the Union and the Confederacy. But Lincoln shrewdly saw that the Border States gave him potential leverage over the Confederates in a distinctly non-military way: viz., if the Border States (voluntarily) emancipated their slaves this would signal that they would never join the Confederacy, and once the Confederates realized they would have to go it alone, Lincoln believed they would throw in the towel. This might have been wishful thinking on Lincoln's part, but perhaps more than anything else, it was this that caused him to stay his hand on the issue of military emancipation. It was not until the Border States rejected definitively his pleas for voluntary emancipation that he played his “last card” and issued the Emancipation Proclamation.

For all of these reasons, Lincoln may fairly be called the “reluctant emancipator,” reluctant not because he favored slavery, but reluctant because prematurely embracing (military) emancipation could sabotage the effort to preserve the Union, the latter being his constitutional duty, the former being (or becoming) a constitutionally permissible means of discharging that duty.

Lincoln’s judicious, belated embrace of (military) emancipation should not detract from the substantial credit he is owed for helping to bring about the destruction of African American slavery in the United States. Had he embraced it sooner, it might well have been counterproductive, as he feared it might have been. And, perhaps most importantly, once he embraced it through the issuance of the Emancipation Proclamation, he never faltered in his support of full scale, and

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5 The Collected Works of Abraham Lincoln 48–49 (Roy P. Basler ed. 1953). Thus, spoken in muted words was Lincoln’s explanation of why emancipation was not a War goal in this early stage of the work, viz., to avoid having the insurrection “degenerate into a violent and remorseless struggle.”

78. Act of Justice, supra note 8, at 395.
79. See id. at 381.
permanent emancipation. Despite considerable pressure to do otherwise, Lincoln enthusiastically and energetically supported passage of the Thirteenth Amendment so as to remove any doubt that the freedom conferred by the Emancipation Proclamation would not be subject to the vagaries of politics, the courts, or a potential resurgence of Southern power after the War ended. The Thirteenth Amendment made permanent the promise of the Emancipation Proclamation, and Lincoln deserves a considerable amount of the credit for that heroic accomplishment.

CONCLUSION

The documents relied upon by Oakes to support his conclusion that military emancipation began on August 8, 1861, actually compel the opposite conclusion. In August 1861, Congress and Lincoln were concerned with depriving the Confederacy of fugitive slave labor and using that labor for the benefit of the Union (though not in the form of slave labor). General Butler was told to put the runaways to work on behalf of the Union war effort, not to emancipate them.

The fact that Lincoln was not pushing emancipation in the summer of 1861 is incontestable. Lincoln’s “reluctance” to emancipate or impose military emancipation was based on many factors. The unifying theme in his thinking was that preserving the Union was his constitutional duty; emancipating the slaves was not. Lincoln’s judicious use of emancipation and the threat of emancipation were important components of his successful strategy to win the War and should not detract from the mythology that he was a great emancipator.

But for Lincoln, the War might not have been won, emancipation would not have occurred in 1865, and abolition would not have occurred in 1867. Lincoln’s legacy is truly prodigious, and can be fully defended on the basis of a faithful rendition of the facts and a correct reading of the law. Unfortunately, Freedom National comes up short in both of these essential areas. Eric Foner gives a glowing review of Freedom National, but his Fiery Trial offers a much better, indeed splendid, presentation of the destruction of African American slavery between 1861–1865 than Freedom National.
When Did Lincoln Stop Beating His Wife?
A Reply to Robert Fabrikant

JAMES OAKES*

Every American historian knows that the Constitution recognized and protected slavery in a number of different ways, even though the words “slave” and “slavery” appear nowhere in the document. The Three-Fifths Clause, for example, refers to slaves as “other persons.”1 Not even the clause regulating the slave trade mentions “slaves.”2 Another famous example is Article 4, Section 2, Clause 3:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour . . . .3

This is universally known as the Fugitive-Slave Clause, even though the slave is only referred to as a “Person held to Service or Labour”4 and the master as “the Party to whom such Service or Labour may be due.”5 Now pay close attention to what the Fugitive-Slave Clause actually did, or more accurately, prohibited: the “person held to service” in one state could not be “discharged from service” merely by escaping to a free state.6 Scholars have no trouble understanding any of this. “Free states were prohibited from emancipating

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1. U.S. Const. art. I, § 2, cl. 3.
3. U.S. Const. art. 4, § 2, cl. 3.
4. Id.
5. Id.
6. Id.
runaway slaves . . . ”

What the Constitution says is that a person held in service cannot not be discharged from service, but what it means is that a slave cannot be emancipated, merely by escaping to a state where slavery is not legal.

Compare the language of the Fugitive-Slave Clause with Senator Lyman Trumbull’s original Article 4 of the First Confiscation Act:

[W]henever any person claiming to be entitled to the service or labor of any other person, under the laws of any State, shall employ such person in aiding or promoting insurrection, or in resisting the laws of the United States, or shall permit or suffer him to be so employed, he shall forfeit all right to such service or labor, and the person whose labor or service is thus claimed shall be henceforth discharged therefrom.

As in the Constitution, the word “slave” does not appear anywhere. Yet despite this, Professor Fabrikant has no trouble recognizing that the “persons held to service or labour” were, in fact, slaves. And what, precisely, would Trumbull’s amendment do? Masters who allowed their slaves to be used in support of the rebellion would “forfeit” their claim to the slaves’ “service or labor,” and the “person[s] whose labor or service is thus claimed [the slaves] shall be henceforth discharged therefrom.”

Trumbull was using the constitutional language of the Fugitive-Slave Clause, except that where the Constitution declared that escaping slaves could not be “discharged” from service—emancipated—Trumbull’s amendment expressly declared that the person held in service—the slave—“shall be henceforth discharged” from service. As Eric Foner has noted, this “early version” of the First Confiscation Act “described confiscated slaves as ‘discharged from service’—that is, emancipated—but,” Foner adds, “this clause did not make it into the bill as passed.”

At the last minute, Trumbull changed the wording of his amendment. In the final version of the law, masters would still forfeit their claim to the slaves, but the slaves would not be “discharged” from

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8. U.S. Const. art. 4, § 2, cl. 3.
service.\textsuperscript{13} From both the tenor and the timing of Trumbull’s explanation for the change, it seems clear that he was responding to criticism. What might that criticism have been? It’s not possible to tell from the transcript of the debate itself, but it is possible to make an informed judgment. To do so, however, we will have to step further afield than Fabrikant is willing to do—to the wider history of wartime discussions among Republicans about the relative power of Congress and the President when it came to military emancipation.

Though his position shifted slightly over the course of the war, Lincoln always believed that emancipation had to be a two-step process. First the slaves were “confiscated” by the federal government, but once the government took ownership of the slaves it would then take the second step of emancipating them because, as Benjamin Butler aptly put it, the government did not need and would not hold slaves as property.\textsuperscript{14} Even though the second step happened simultaneously with the first, the two steps had to be legally distinct. In fact, Lincoln seems to have had serious doubts that Congress alone could free slaves outright. The only constitutionally legitimate form of emancipation was \textit{military} emancipation, the primary authority for which rested with the President, acting in his capacity as Commander in Chief. For Congress to free a slave amounted to \textit{legislative} emancipation, which was not sanctioned by the Constitution.

In September 1861, in a letter to Orville Browning, Lincoln indicated that it was up to Congress to specify which slaves would be confiscated, or “forfeited.”\textsuperscript{15} In the field, military officers could likewise exercise their prerogative to confiscate slaves as a “military necessity.”\textsuperscript{16} But only the President could actually emancipate a slave rendered “forfeit” by a congressional statute or confiscated by a Union officer in the field. “It is startling to say that Congress can free a slave within a state,” Lincoln wrote in mid-1862 in response to the Second Confiscation Act.\textsuperscript{17} Before emancipation could happen, he explained, “ownership of the slave had first been transferred to the nation”—

\begin{thebibliography}{9}
\bibitem{13} Act of Aug. 6, 1861, ch. 60, stat. 319 (1863).
\bibitem{16} \textit{Id.}
\end{thebibliography}
presumably by the Union Army or Navy—and only then could those slaves be “liberated” by Congress.” 18 By mid-1862 Lincoln seemed more willing to concede some emancipatory power to Congress, but he was still committed to the idea that emancipation had to be a two-step process tied to military necessity. Congressional Republicans accepted the same distinction. During the extended debates over the Second Confiscation Act, one of the most serious divisions among Republicans was whether Congress should require the President to issue an Emancipation Proclamation, or whether it should merely authorize him to do so. 19 In the end Republicans decided to authorize a proclamation on the grounds that requiring it would make emancipation seem legislative rather than military. 20

Here, then, is the most plausible explanation for Trumbull’s last-minute change in the wording of his amendment—by “discharging” slaves from service Congress risked making emancipation “legislative” rather than “military.” What makes this explanation still more plausible is what happened next. On August 8, two days after Lincoln signed the law, the secretary of war issued instructions for implementing the statute to General Benjamin Butler at Fortress Monroe in Virginia. Citing the First Confiscation Act as its authority, the War Department instructed Butler that masters who allowed their slaves to be “employed in hostility to the United States” would forfeit the services of those slaves “and such persons shall be discharged therefrom.” 21 To some extent this renders moot the entire question of why Trumbull changed the wording of Article 4. Whatever his motives, the fact remains that authority over military emancipation was effectively divided between the legislative and executive branches of government. Congress specified which slaves were “forfeited,” and the War Department “discharged” them from service.

Fabrikant’s entire critique rests on the implausible claim that when “persons held in service” were “discharged therefrom” they were not emancipated. One wonders what he thinks the Fugitive Slave Clause prohibited when it declared that “persons held in service” could not be “discharged” from service by escaping to a free state? Fabrikant wants to have it both ways. He is willing to accept that “persons held in service” actually meant “slaves” despite the ab-

19. OAKES, supra note 17, at 227.
20. Id. at 228.
21. Id. at 138.
sence of the word slaves, but he dismisses the possibility that “discharged” from service could have meant emancipation because the words “free” or “emancipate” were not actually used.

Fabrikant points to the fact that the Army employed the freed people as though it were evidence that the slaves had not been freed.22 He appears to believe that employment and emancipation were incompatible when, if anything, free labor ideology equated freedom with remunerative employment. He even claims that I ignore the way the Army used the labor of the freed people, when, in fact, I repeatedly highlight it, emphasizing how often Republican policymakers and Union officers cited the willingness of free people to work for the Union Army as one of the earliest justifications for their emancipation.23

Most disturbing of all is Fabrikant’s refusal to account for the substantial evidence I present demonstrating that congressional Republicans intended to begin freeing slaves with the First Confiscation Act, and that the law did what it was intended to do.24 Because historians have so often claimed that the law did nothing, I devoted an entire chapter to reconstructing the congressional debates of July 1861.25 The extensive evidence I present demonstrates not only that Republicans uniformly understood that Trumbull’s amendment was designed to free slaves but that critics of the bill just as uniformly denounced it as an emancipation statute. And contrary to what Fabrikant seems to believe, I disagree with the familiar claim that the last-minute change substantially altered the legislation. I went out of my way to quote Trumbull’s own claim that his change did not alter the intent of the law.26

I devote another entire chapter to demonstrating that the First Confiscation Act had the emancipatory effect it was intended to have—paying particular attention to the way the August 8 War Department instructions were disseminated through the Army as it occupied various positions along the southern Atlantic coast in the year between the passage of the First and Second Confiscation Acts.27 I cite evidence from August 9—the day after the War Department is-

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22. See Fabrikant, supra note 10.
25. See generally Oakes, supra note 17, at 106–44 (describing the congressional debates about emancipating slaves and Trumbull’s Amendment).
26. Id. at 138.
27. Id. at 192–223.
sued its instructions—that Butler was already ordering his subordinates to treat the blacks in nearby Hampton Village as “free.”\textsuperscript{28} I cite the defense of military emancipation published by Edward Pierce, the abolitionist Butler appointed to supervise the contrabands,\textsuperscript{29} but Fabrikant actually dismisses it on the grounds that Pierce was an abolitionist!\textsuperscript{30} That Butler had appointed an abolitionist to supervise the contrabands does not strike Fabrikant as in any way indicative of Union emancipation policy. He cites a private letter to Butler from the Postmaster General—who had no authority over the contrabands and whose conservative views were repudiated by the cabinet a few days later. Meanwhile, Fabrikant ignores Salmon P. Chase, the anti-slavery radical who as Treasury secretary assumed direct control over thousands of contrabands in the first year of the war. It was Chase who reappointed the same abolitionist, Pierce, to supervise the contrabands in the Sea Islands; it was Chase who told loyal Sea Island planters in early 1862 that their slaves were “free.”\textsuperscript{31} But the most compelling evidence of all comes directly from the man Fabrikant insists was reluctant to emancipate slaves: Abraham Lincoln. Here is what the President said in his message to Congress in early December 1861, shortly after Union forces had successfully taken control of the Sea Islands:

\begin{quote}
Under and by virtue of the act of Congress entitled ‘An act to confiscate property used for insurrectionary purposes,’ [the First Confiscation Act] approved August 6, 1861, the legal claims of certain persons to the labor and service of certain other persons have become forfeited; and numbers of the latter, \textit{thus liberated}, are already dependent on the United States, and must be provided for in some way.\textsuperscript{32}
\end{quote}

Can this possibly mean anything other than that slaves had been “liberated” under the terms of the First Confiscation Act? Fabrikant claims that the law had unintentional emancipatory “effects” but that the slaves “thus liberated” were not, in fact, \textit{legally} free.\textsuperscript{33} I take Lincoln to be a better judge of the legal status of those “forfeited” under the terms of the First Confiscation Act.

\begin{itemize}
\item \textsuperscript{28} \textit{Id.} at 139–40.
\item \textsuperscript{29} \textit{Id.} at 140.
\item \textsuperscript{30} \textit{See} Fabrikant, \textit{supra} note 10.
\item \textsuperscript{31} \textit{Oakes, supra} note 17, at 199–207.
\item \textsuperscript{32} \textit{Collected Works, supra} note 15, at 48 (emphasis added).
\item \textsuperscript{33} \textit{See} Fabrikant, \textit{supra} note 10.
\end{itemize}
Long before Congress passed a Second Confiscation Act in July 1862, thousands of former slaves in Union-occupied areas along the southern Atlantic coast were living as free people. They were working for wages. They were moving from employer to employer. They were getting married. Their children were going to school. They were legally free, thanks to the First Confiscation Act and the August 8 War Department instructions, just as Butler, Chase, Pierce, and Lincoln said they were.

Fabrikant claims that military emancipation began in earnest only with the passage of the Second Confiscation Act in July 1862. But it’s hard to see how he can understand what the second law changed after having so misjudged the first one. As I explain in Freedom National, the significance of Second Confiscation Act is that it made military emancipation universal. The First Confiscation Act had remained within the familiar contours of wartime precedents—including the War of Independence, the War of 1812, and the Seminole War. Those earlier military emancipations were never intended to undermine the institution of slavery, and the number of slaves liberated never reached beyond the thousands. The Second Confiscation Act and the Emancipation Proclamation broke with those precedents by radically extending the scope of military emancipation to millions of slaves, whether that meant all rebel-owned slaves as Congress decreed, or all slaves in areas in rebellion Lincoln proclaimed. For the first time in American history, military emancipation would be used as a means of abolishing slavery.

What accounts for this shift from limited to universal military emancipation? Fabrikant forecloses any possibility of addressing the question because of his stubborn denial that there was any emancipation prior to the middle of 1862. Unwilling to abandon the thesis that Lincoln was a “reluctant emancipator,” Fabrikant resorts to implausible linguistic contortions, illogical arguments, and an almost willful re-

34. OAKES, supra note 17, at 197–213.
35. Id.
36. Id.
37. Id.
38. Id.
39. Id.
40. See Fabrikant, supra note 10. By citing the Washington, D.C. abolition statute as the beginning of emancipation, Fabrikant confuses abolition with military emancipation, a point to which I will return.
41. OAKES, supra note 17, at 242.
42. See id. at 362.
fusal to account for the mountain of evidence contradicting him. Under ordinary circumstances, an author’s best response to criticism of this caliber is to urge readers to compare the critic’s review with the author’s book and make their own judgment. But Fabrikant also offers a vigorous reassertion of the reluctant emancipator thesis, and this raises important issues that go beyond the limits of his review—issues that are indeed worth addressing.

One of the things I tried to do in *Freedom National* was demonstrate that military emancipation was one of three distinct antislavery policies adopted by the Republicans during the Civil War. Up until the secession crisis, the primary goal of antislavery activists was to get the federal government to implement a series of policies designed to pressure the southern states into abolishing slavery on their own. Those policies included ending slavery in Washington, D.C., banning it from the western territories, suppressing it on the high seas, refusing to admit any new slave states into the Union, and preventing or inhibiting the federal government from enforcing the fugitive slave clause in the free states. Together these policies would surround the South with a “cordon of freedom” that would gradually weaken slavery to the point where the states themselves would abolish it. I spend a great deal of time in the book explaining the abolitionist origins of the cordon policy and the way the war allowed Lincoln and the Republicans to implement it far more aggressively than they could have done in peacetime—even though it was conceived as a peaceful path to abolition. The policy had undeniably important consequences. When the war began in 1861, no state had abolished slavery in more than half a century. Four years later, after the cordon policy had been fully implemented and the war finally ended, six states had abolished slavery.

Was Lincoln “reluctant” to implement this antislavery program? Did his administration sustain slavery on the high seas by refusing to negotiate a slave-trade treaty with Great Britain? Did he object to banning slavery in the western territories? Did he oppose the abolition of slavery in Washington, D.C.? Did he approve of the Fugitive

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43. See id. at xiv.
44. See id. at 33, 257.
45. See id. at 469.
Slave Act of 1850? Did he veto the bill requiring West Virginia to emancipate slaves as a condition of admission to the Union? More generally, did Lincoln reject the underlying premise of the cordon policy—the proposition that freedom was national and slavery merely local? Did he believe the Founders intended to protect slavery everywhere the Constitution was sovereign, or did he adopt the abolitionist argument that the Constitution protected slavery only in the states that created it while favoring freedom everywhere else?

Anyone claiming that Lincoln was “reluctant” to emancipate slaves ought to make some effort to address these questions. But Fabrikant sweeps them aside at the outset by narrowing his focus to certain aspects of the second antislavery policy adopted by Lincoln and the Republicans, military emancipation.46 This decision biases his entire critique, but it is an exemplary bias. All narratives positing Lincoln or the Republicans as “reluctant” emancipators focus exclusively on military emancipation while disregarding the concerted effort to abolish slavery by means of a cordon of freedom. In this sense, the reluctant emancipator thesis is intrinsically flawed. In principle, Lincoln could have been ardently committed to building the “cordon of freedom” first envisioned by radical abolitionists and at the same time skeptical about the effectiveness of military emancipation. If so, this alone would require substantial modification of the proposition that Lincoln was a “reluctant emancipator.”

Unlike the “cordon of freedom,” which was very much the product of the radical antislavery movement, military emancipation was a conventional idea. For millennia, belligerents offered freedom to their own and to enemy slaves as part of their larger efforts to win wars or suppress rebellions.47 During the American War of Independence both the British and the Patriots offered slaves freedom in return for military service, but neither thought of military emancipation as a step toward the abolition of slavery.48 When Lord Dunmore offered freedom to rebel-owned slaves in the Chesapeake, he was not acting on remotely abolitionist impulses and neither were several states when they responded to the British in kind by offering freedom to slaves willing to enlist in the Continental Army. Congress, too, was

46. See generally OAKES, supra note 17, at 106–44 (describing the congressional debates about emancipating slaves and Trumbull’s Amendment).
not trying to abolish slavery when it passed a resolution urging South Carolina to free three-thousand slaves in return for serving in the Continental Army for the duration of the war. Military emancipation was never an abolitionist program. It was certainly not the way slavery was being abolished in the northern states.

During the negotiations that led to the Treaty of Paris in 1783, the Jay Treaty in 1794, and the Treaty of Ghent in 1815, the Americans never asked for either restitution or compensation for slaves “carried off” to Canada or the Caribbean during the war.49 The disputes that arose between the British and the Americans concerned only the status of slaves still on the ground in American territory at the moment the war ended.50 Even those Americans demanding compensation almost always acknowledged that under the law of nations, Britain was fully entitled to emancipate slaves as a military necessity during wartime.51 In the late 1830s, U.S. army officers promised to recognize the emancipation of hundreds of runaways who had escaped into Florida and were living as free people among the Seminoles.52 But nobody pretended that any of these precedents for military emancipation were part of an abolitionist project.

Far from being central to the radical antislavery agenda, military emancipation was a thoroughly mainstream idea, a background assumption that nearly all Americans accepted as something belligerents did during wars and rebellions. Radicals and antislavery politicians were fully alert to these precedents.53 But they most often raised the specter of military emancipation as a reason the South would never secede from the Union.54 Along with everybody else, antislavery radicals accepted the legitimacy of military emancipation, but they were not counting on a war as a means of destroying slavery.55 Theirs was a peacetime program of state by state abolition.56

When they drew up lists of proposed federal policies aimed at destroying slavery, abolitionists never mentioned military emancipa-

50. Id.
51. Id.
52. Id.
53. Id.
54. Id.
55. Id.
56. Id.
tion.57 The same was true of Republicans in the 1850s.58 Local party caucuses often adopted resolutions calling for the abolition of slavery in Washington, D.C., a ban on slavery in the territories’ state rather than federal enforcement of the Fugitive-Slave Clause, and the withdrawal of federal support for slavery on the high seas.59 They did not endorse military emancipation nor did the Republican Party platforms of 1856 or 1860 advocate military emancipation,60 for that, too, would have suggested that they were planning for war.

And yet everybody seemed to be aware of the possibility of military emancipation. Lincoln certainly was. As early as 1845 he hinted that war or rebellion might negate the rules otherwise restricting federal interference with slavery in the states.61 It was “a paramount duty of us in the free states . . . to let the slavery of the other States alone” he wrote. But there was a crucial exception. “Of course,” he said, “I am not now considering what would be our duty in cases of insurrection among the slaves.”62 At various points in the late 1850s, he wondered aloud why the southern states would put slavery at risk by seceding from the Union, thereby forfeiting the protection afforded to slavery by the Constitution. There was nothing unorthodox, much less radical, about Lincoln’s implied threat of military emancipation. Indeed, it was precisely the familiarity of the threat that made it so easy for Republicans to respond to the secession crisis with a chorus of warnings that if the South persisted in its rebellion the Union would respond by freeing slaves. Nevertheless, when Lincoln and the Republicans were elected in November 1860 they were committed to abolishing slavery state by state, by means of a “cordon of freedom.” That was the danger Lincoln’s victory represented. The South did not secede because the Republicans were threatening military emancipation. It was the other way around. Republicans threatened military emancipation because the South seceded.

So another question that needs to be answered by anyone positioning the reluctant emancipator thesis—even when confined to the nar-

57. Id.
58. Id.
59. Id.
60. Id.
61. Id.
62. Abraham Lincoln, Letter from Abraham Lincoln to Williamson Durely, Oct. 3, 1845, in The Collected Works, supra note 15, at 277. Slave insurrection was the exception that had led John Quincy Adams to reject the federal consensus and argue that, under certain circumstances Congress could interfere with slavery in the states, even to the point of abolishing it if necessary.
row issue of military emancipation—is: Why would Lincoln, or any other Republican, repudiate the longstanding and well-established precedents for military emancipation, precedents deeply embedded in the mainstream of the nation’s history from the moment of its founding? Why, in the summer of 1861, would Republicans turn their backs on the familiar practice of freeing enemy slaves in wartime? Of all the major actors on the American political stage in 1861, the Republicans were least likely to be restrained by some initial reluctance to do what belligerents always did when slave societies went to war. It would be surprising if they had not begun freeing slaves in 1861.

Rather than grasp how ordinary military emancipation was, Fabrikant starts from the premise that it was a radical departure and that it took Lincoln twenty long months to get there. But Fabrikant is not the only one doing this. Virtually all proponents of the reluctance thesis proceed from the same premise. Consider the question from which the thesis begins: What took Lincoln so long? Among other things, this assumes that twenty months is such a terribly long time that we must explain the conspicuous delay. But watch what can happen if we reverse the premise and ask the opposite question: Why, after 250 years of slavery, did Lincoln adopt a policy of universal emancipation within a mere twenty months of taking office? Why did he go so fast? From the answers to this question, we may concoct a Hasty Emancipator Thesis, the mirror image of the Reluctant Emancipator Thesis. Just as there were people at the time who complained that Lincoln went too slow, we can line up a parade of witnesses ready to attest to the President’s “Black Republicanism,” his jacobinical determination to spill any amount of blood in the unwavering pursuit of his fanatical goal of abolishing slavery. The first witness for the prosecution might be Jefferson Davis, but there are plenty of others—each one anxious to pick through the historical record and produce viable scraps of evidence demonstrating that from the moment he was elected President, every move Lincoln took was driven by his foaming-at-the-mouth hatred of slavery.

The Hasty Emancipator Thesis is just as absurd and just as easy to “prove” as the Reluctant Emancipator Thesis, and for the same reason: both assume what they never bother to demonstrate. Fabrikant insists that Lincoln emancipated no slaves until January 1, asks what took him so long, and answers that he was held back by a deep-seated reluctance to emancipate. But Fabrikant doesn’t actually demonstrate reluctance; he infers it. He doesn’t cite any specific piece of
emancipatory legislation or policy that Lincoln opposed on the grounds that he was reluctant. He points to the famous incident in which Lincoln instructed General Frémont to modify his order to conform to the First Confiscation Act,63 but that posits reluctance only by assuming that “discharging” slaves from service was not emancipation. Fabrikant simply ignores Lincoln’s own explanation for his order to Frémont—that what the general had done was illegal, that generals can’t make policy. Rather than demonstrate reluctance, Fabrikant infers from the supposed fact that Lincoln did not free any slaves until January 1, 1863. From this supposition he proceeds to list about half a dozen reasons why Lincoln was reluctant—without ever bothering to prove that he was reluctant. The question Fabrikant spends most of his time answering—Why was Lincoln reluctant to free the slaves?—is thus the historiographical equivalent of asking when the man stopped beating his wife. It leaps over the question of whether the man ever beat his wife to begin with.64

Fabrikant can make this leap because, at its core, the reluctance thesis is profoundly teleological. It assumes that universal military emancipation is the standard by which we should measure Lincoln’s antislavery sentiment. Until Lincoln rose to that standard on January 1, 1863, he was by definition less than fully committed to slavery’s destruction. He was, ipso facto, reluctant. The Emancipation Proclamation functions as a kind of pre-determined conclusion, the point toward which all stories of slavery’s demise must eventually lead. Every presidential proclamation, military order, or congressional statute that falls short of its appointed destiny is thereby deemed evidence of “reluctance” to emancipate.

Among the many problems with this teleology is that not even the Emancipation Proclamation meets the standard of universal abolition. Not only did it exempt large numbers of slaves in the loyal states, in practice it freed only a fraction of the slaves it formally covered in the rebellious states. When the war ended, about fourteen

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63. See Fabrikant, supra note 10.
64. “When did you stop beating your wife?” or “Have you stopped beating your wife?” is a traditional example of a “loaded question” that unjustifiably presumes guilt. A logical fallacy, the question assumes certain facts are true and limits the replies to those that serve the questioner’s interests. Whether the respondent answers “yes” or “no” to the question, the respondent will essentially have admitted to having a wife, and to have beaten her at some point in the past. See Loaded Question, WIKIPEDIA, http://en.wikipedia.org/wiki/Loaded_question (last visited Oct. 10, 2013).
percent of the slaves had been freed. No one should scoff at that number. Fourteen percent of four million slaves is a very large figure—more than enough to overwhelm the resources of the Union Army. But is it a better record than the abolition of slavery in six states? Lincoln was always openly skeptical that a proclamation of universal emancipation was enough to destroy slavery, and he was right to be skeptical. Unlike Fabrikant, Lincoln was never sure whether the millions of slaves who were not “practically” freed by the war—the slaves who remained on their farms and plantations in most of the South—would be legally emancipated when the war was over. Here again, history was on Lincoln’s side. In 1783 and again in 1815, the British insisted on respecting the promise of freedom offered to all slaves who had come within their lines, but the Americans claimed that slaves who had not been physically removed from U.S. territory by the time the war ended had to be sent back to their owners, no matter what the British had promised them. So, too, nobody could be sure that when the Civil War ended the force of the Emancipation Proclamation would evaporate with the restoration of peace, leaving millions of African Americans still enslaved. They might even be reenslaved.

It was precisely because neither state abolition nor military emancipation had succeeded in destroying slavery that Republicans shifted in the first half of 1864 to a third policy, a constitutional amendment abolishing slavery everywhere. With this in mind, we might borrow from Fabrikant’s teleological toolbox and assume that any policy short of constitutionally mandated abolition, as embodied in the Thirteenth Amendment, demonstrates “reluctance” to emancipate.

There was no straight line from universal military emancipation to the Thirteenth Amendment, and nobody understood that better than Lincoln. The amendment may have fulfilled the promise of universal emancipation embodied in Lincoln’s proclamation, but it was driven as much by the proclamation’s failure as by its success. There’s a better case for linking Lincoln’s preferred policy of state abolition to the Thirteenth Amendment. After all, ratification depended on the proportion of free to slave states, not on the number of slaves emanci-
A Reply to Robert Fabrikant

pated. But, in fact, as I argue in *Freedom National*, the two policies had become intertwined by the middle of 1862 in a way that no Republican could have imagined a year or two earlier. There was nothing inevitable about the way slavery was abolished.

Slavery was not abolished merely because the Republicans intended to abolish it, but neither did abolition take so many years and cost so many lives because Republicans were reluctant to begin freeing slaves. They weren’t. They were committed all along to putting slavery on a course of ultimate extinction. But intentions don’t make outcomes inevitable. Nobody could have predicted that the familiar precedents for military emancipation would burst their historic limitations to become transformed, by mid-1862, into a policy of *universal* military emancipation. Nobody could have predicted the way military emancipation became an adjunct to the “cordon of freedom,” both an incentive and a threat to southern states to get on with the business of abolishing slavery on their own. And nobody, even as late as 1863, could have imagined that those two policies—universal military emancipation and state abolition, either alone or in conjunction—would not be enough to destroy slavery, that a third antislavery policy would have to be adopted to get the job done. Yet these are the wartime transformations that must be explained, and the explanations will never be simple. The unanticipated twists and unexpected turns in antislavery policy were driven by myriad forces—by the revolutionary behavior of the slaves and the counter-revolutionary behavior of their masters, by the surprising weakness of southern Unionism, by the failure of George McClellan on the Peninsula and the success of George Meade at Gettysburg, by the outcome of the elections in 1862 and 1864, by the inadequacy rather than the triumph of both military emancipation and state abolition, and by the abiding determination of Lincoln and the Republicans to put slavery on the road to extinction. Shopworn clichés portraying Lincoln as a “reluctant emancipator” do nothing to explain the wartime evolution of antislavery policy; they only get in the way.
ESSAY

James Oakes’s Treatment of the First Confiscation Act in *Freedom National: The Destruction of Slavery in the United States, 1861–1865*

ANGELA M. PORTER*

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INTRODUCTION

In his work, *Freedom National: The Destruction of Slavery in the United States, 1861–1865*, James Oakes provides an overview of several Civil War era legal instruments regarding enslavement in the United States. One of the statutes he examines is *An Act to Confiscate Property Used for Insurrectionary Purposes*, passed by the Thirty-Seventh Congress in August, 1861. This law, popularly known as the First Confiscation Act (FCA), is one of the several “Confiscation Acts” that contributed to the weakening of legal enslavement during the War. Fortunately, scholars have contextualized and deemphasized President Lincoln’s role as the “Great Emancipator” by examining the works of Congress during the War and by shifting focus to the actions of the enslaved, as they emancipated themselves by fleeing Confederate states. However, many scholars tend to mirror their treatment of Lincoln in the Confiscation Acts by either spreading historical falsehood or twisting the congressional narrative with hyperbole. Some historians overstate the intent and legal effect of the Confiscation Acts, and in *Freedom National*, Oakes is one of those historians.

The purpose of this Essay is to examine Oakes’s treatment of the First Confiscation Act through a review of congressional sources. After looking at the congressional debates and other evidence from the War, scholars must hold Lincoln and Civil War historians accountable for their statements; statements that can be misleading and damaging to desired historical accuracy. We are all attempting to uncover the truth about this oft-mentioned era of American history. In our highly-racialized society, where the history of enslavement in the United States remains deeply significant, close scrutiny of the historical narra-
Oakes’s Treatment of the First Confiscation Act

tive is necessary. It is for these reasons, that I respectfully offer this critique of Oakes’s narrative surrounding the FCA.

I. BACKGROUND: OVERVIEW OF THE FIRST CONFISCATION ACT

The popular name “First Confiscation Act” refers to a statute that was officially entitled “An Act to confiscate Property used for Insurrectionary Purposes.” The portion of the statute that is relevant for purposes of this Essay is Section 4, which addresses the confiscation of what I will call “slave property.” In its final form, Section 4 of the FCA is as follows:

Sec. 4. And be it further enacted, That whenever hereafter, during the present insurrection against the Government of the United States, any person claimed to be held to labor or service under the law of any State, shall be required or permitted by the person to whom such labor or service is claimed to be due, or by the lawful agent of such person, to take up arms against the United States, or shall be required or permitted by the person to whom such labor or service is claimed to be due, or his lawful agent, to work or to be employed in or upon any fort, navy yard, dock, armory, ship, entrenchment, or in any military or naval service whatsoever, against the Government and lawful authority of the United States, then, and in every such case, the person to whom such labor or service is claimed to be due shall forfeit his claim to such labor, any law of the state or of the United States to the contrary notwithstanding. And whenever thereafter the person claiming such labor or service shall seek to enforce his claim, it shall be a full and sufficient answer to such claim that the person whose service or labor is claimed had been employed in hostile service against the Government of the United States, contrary to the provisions of this act.

Approved, August 6, 1861.

A. Overview of the Act’s Passage

For readers unfamiliar with the details of the Act’s congressional treatment, it is necessary to review its timeline. On July 8, 1861, the House Journal indicates that it was resolved that “the Committee on the Judiciary be . . . instructed to prepare and report to this House a

2. An Act to Confiscate Property Used for Insurrectionary Purposes (First Confiscation Act) Ch. 60, 61 12 Stat. 319 (Aug. 6, 1861) (the section is labeled: “When claims to persons held in service and labor to be forfeited”).

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bill for a public act to confiscate the property of all persons . . . who
have taken up arms . . . against the government of the United States.”

On July 15, 1861, Senator Lyman Trumbull (R-Ill.) introduced “a
bill . . . to confiscate property used for insurrectionary purposes . . . [,]
and the bill was read and referred to the Committee on the Judiciary.
On July 20, 1861, Mr. Trumbull referred the bill (known as S. 25)
to confiscate property used for insurrectionary purposes to the House
and reported it with an amendment.

Then, on July 22, the Senate as a “Committee of the Whole” con-
sidered the bill. Mr. Trumbull, at this time, individually introduced
an additional section—Section 4, the section relevant to this Essay—
which sought to discharge the enslaved from service if they had been
used by rebels in the war and if they had crossed into Union lines.
The amendment read:

And be it further enacted, That whenever any person claiming to be
entitled to the service or labor of any other person, under the laws
of any State, shall employ such person in aiding or promoting any
insurrection, or in resisting the laws of the United States, or shall
permit him to be so employed, he shall forfeit all right to such ser-
vice or labor, and the person whose labor or service is thus claimed
shall be thenceforth discharged therefrom, any law to the contrary
notwithstanding.

4. S. JOURNAL, 37th Cong., 1st Sess. 42 (1861); see also CONG. GLOBE, 37TH CONG., 1ST
SESS. 120 (1861) (“Mr. Trumbull asked, and by unanimous consent obtained, leave to introduce a
bill (S. No. 25) to confiscate property used for insurrectionary purposes; which was read twice by
its title, referred to the Committee on the Judiciary, and ordered to be printed.”).
5. S. JOURNAL, 37th Cong., 1st Sess. 69 (1861).
6. Id. at 70.
7. Throughout this Essay, I, like many Africana scholars, employ the term “the enslaved”
rather than the word “slave.” Slave tends to dehumanize the subject and affirm the idea that
persons could be seen as less than human (i.e., property); whereas “the enslaved” emphasizes
that the subjects of the conversation were actually people—enslaved Africans and their descend-
ants—who found themselves in the horrific condition of enslavement. Additionally, “slave” has
come to connote desensitized images of specifically African American people, but “enslav-
ment” conjures a broader, international idea in our minds and fosters the realization that Ameri-
can enslavement is analogous to other instances of commonly-loathed enslavement in the world.
I acknowledge that the phrase can be grammatically cumbersome and passive in a stylistic sense;
however, I still prefer to use it in order to signify an effort to change the way we talk about
enslavement in the United States. I still use the term “slave-owner” in this essay, due to my own
current inexperience and, in turn, lack of a better term or phrase that addresses the aforemen-
tioned concerns. See, e.g., HAKI R. MADHUBUTI, BLACK MEN: OBSOLETE, SINGLE, DANGER-
OUS?—THE AFRIKAN AMERICAN FAMILY IN TRANSITION 73, 166, 207, 237, 263 (1991) (using the
term “enslaved” throughout).
8. S. JOURNAL, 37th Cong., 1st Sess. 70–71 (1861); see also CONG. GLOBE, 37th CONG., 1ST
SESS. 218–19 (1861) (stating that Mr. Trumbull introduced the bill individually).
The additional section was added by a vote of thirty-three yeas to six nays. After this, the bill passed in the Senate. The next day (July 23), the House reported that the Senate had passed the bill. Then, on August 3, an amended version of the bill passed in the House with sixty yeas to forty-eight nays. Section 4 was amended by the House to read:

Sec. 4. And be it further enacted, That whenever hereafter, during the present insurrection against the Government of the United States, any person claimed to be held to labor or service under the law of any State, shall be required or permitted by the person to whom such labor or service is claimed to be due, or by the lawful agent of such person, to take up arms against the United States, or shall be required or permitted by the person to whom such labor or service is claimed to be due, or its lawful agent, to work or to be employed in or upon any fort, navy-yard, dock, armory, ship, intrenchment [sic], or in any military or naval service whatsoever, against the Government and lawful authority of the United States; then, and in every such case, the person of whom such labor or service is claimed to be due shall forfeit his claim to such labor, any law of the State, or of the United States, to the contrary notwithstanding.

On August 5, the Senate considered the House’s version of the bill. Finally, on August 6, Mr. Bingham reported from the committee that they had examined the bill and found it duly enrolled. Thus, the Act to Confiscate Property Used for Insurrectionary Purposes was presented to the President and signed into law.

II. CRITIQUE OF JAMES OAKES’S TREATMENT OF THE FIRST CONFISCATION ACT

James Oakes provides a history of the FCA. He does a good job constructing a narrative that gives readers an idea of the key players in Congress, the points of congressional debate, and the chronology of that debate. However, Oakes also infuses the narrative with depic-
tions of the Republican psyche as intently oriented toward the goal of emancipating the enslaved and providing for their freedom. He expands these depictions into his assessment of the overall intent and effect of the Act. Because of this, a few aspects of his narrative are misleading.

A. Oakes Inaccurately Discusses the “Discharge” Language of the FCA and Mischaracterizes the Nature of the Debate Surrounding that Language

When Oakes discusses the version of the FCA that included the “discharge” language (i.e., Trumbull’s original amendment), he paraphrases to characterize the FCA draft’s “discharge” as “emancipation.” For example, in his book, Oakes writes: “[M]asters ‘forfeited’ their claim to the labor of ‘persons held in service,’ and those persons would be ‘discharged’ from any further obligation to their masters. They were emancipated.”17 While this is what the draft of the Act seems to say, Oakes really reads into this “discharge” language in the draft and gives it an inappropriate amount of attention.

It is important to contextualize the “discharge” portion of the FCA. Oakes seems to characterize the debates as a fight for the almighty “discharge” language to stay in the bill. In reality, changing the language was uneventful; the Committee on the Judiciary simply changed the entire Section 4 and little was said about the word “discharge” specifically.

On August 3, 1861, the House amended the bill to completely replace the section that Trumbull originally proposed (Section 4). The amendment (also provided above) was recorded in the debates as follows (and I emphasize the key areas):

The PRESIDENT pro tempore laid before the Senate the amendment of the House of Representatives to the bill (S. No. 25) to confiscate property used for insurrectionary purposes; which was to strike out the fourth section of the bill, and insert the following in lieu thereof:

Sec. 4. And be it further enacted, That whenever hereafter, during the present insurrection against the Government of the United States, any person claimed to be held to labor or service under the law of any State, shall be required or permitted by the person to whom such labor or service is claimed to be due, or by the lawful

agent of such person, to take up arms against the United States, or
shall be required or permitted by the person to whom such labor or
service is claimed to be due, or its lawful agent, to work or to be
employed in or upon any fort, navy-yard, dock, armory, ship, in-
trenchment [sic], or in any military or naval service whatsoever,
against the Government and lawful authority of the United States;
then, and in every such case, the person of whom such labor or ser-
vice is claimed to be due shall forfeit his claim to such labor, any law
of the State, or of the United States, to the contrary
notwithstanding.18

Notice that the word “discharge” has disappeared from the sec-
tion. If it was so important—if the crux of the bill was to emancipate
the enslaved (and not to prevent their return)—then losing that lan-
guage would likely have been a disappointment to those who favored
the bill for its emancipatory features, especially to Lyman Trumbull,
who introduced Section 4 individually. But this is not the case at all.
In fact, Senator Trumbull, who individually introduced Section 4,
urges the Senate to adopt the new version (sans the “discharge” lan-
guage).19 Moreover, he praises the House’s version and says that it
basically states the same thing as his original:

Mr. TRUMBULL. I move that the Senate concur in the House
amendment. It limits the bill which we passed, and confines it, in
this respect, to persons actually employed in military service. I
think the section as we passed it meant substantially the same thing,
but this makes it more definite.20

After his comment, the Senate tabled the discussion, and on Au-
gust 5, 1861, they took it up again. After having two days to examine
the House’s amendment and elimination of the word “discharge,”
Senator Trumbull was still eager for its adoption. In fact, he wanted
the Senate to simply hurry up and approve Section 4 as amended:
“[Several Senators:] Will it lead to debate? [Mr. TRUMBULL:] I
hope not. I trust the Senate will concur in the amendment of the
House of Representatives. It limits the fourth section of the bill so as
to avoid an objection which the Senator from Kentucky had.”21

Immediately following this conversation, the Senate voted and
concurred in the amendment; there was no substantive debate.22

19. Id.
20. Id. (emphasis added).
21. Id. at 434. I will discuss the “Senator from Kentucky[s]” concern shortly.
22. See id.
From this history, one could conclude that “discharge” was not the primary intended goal of the FCA; rather, “forfeiture” of the rebel slave-owner’s right to his or her slave property was the main concern. This idea is also reaffirmed by Congress’s later Confiscation Acts, which were more focused on emancipation; those Acts would not be necessary if the FCA was meant to ensure expansive emancipation. However, Oakes insists on examining the FCA in a vacuum and focusing on the “discharge” language in its drafts as a notion that its central purpose was emancipation. He does this further by explaining the omission of the “discharge” language—which in itself is a mischaracterization; the word “discharge” was not the only thing missing from the new Section 4—the entire section looked different after it had been revised.

Moreover, Oakes, with no authority23 depicts omission of the “discharge” language as some sort of recognition by “[a] number of Republicans” that only the President could actually discharge the enslaved from their service because “emancipation was strictly military.”24 He writes:

A number of Republicans believed that because it could be constitutionally justified only as a “military necessity,” emancipation had to be the work of the president, acting in his capacity as commander in chief. Congress could specify the “persons” whose labor would be “forfeited,” but once the federal government had taken control of the “persons” so forfeited, only the president could take the additional step of “discharging” slaves from any further service to their masters. If emancipation was strictly military, it had to be done by the commander in chief. To alleviate such concerns the wording of Trumbull’s amendment was changed at the last minute.

In the bill’s final form, masters would still “forfeit” their claim to the service of a slave. But instead of declaring that forfeited slaves were henceforth “discharged” from service, the revised version prohibited any master from reclaiming any slave who “had been employed in hostile service against the Government of the United States.”25

Oakes isn’t very clear about the inner workings of “military necessity” in this chapter, but he seems to pose it as a separation of powers issue. This narrative makes it seem as though the House’s

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23. Oakes does not cite to any source to bolster his theory that military necessity was discussed. See Oakes supra note 17, at 137 (2013).
24. Id.
25. Id. (emphasis added).
Oakes’s Treatment of the First Confiscation Act

amendment (specifically its omission of the word “discharge”) was carefully motivated by thoughts on “military emancipation,” and does not include anything about Trumbull’s thoughts that the amendment was a positive change and almost immaterial to the heart of the bill.

Furthermore, upon reading the House debate surrounding the amendment, there is no such evidence that the amendment was motivated by a military necessity theory.26 Rather, the debate reflects what Trumbull later summarized: that the bill was amended to address the concerns of the “Senator [really, the Representative] from Kentucky.” That Representative was Mr. Charles A. Wickliffe, a Union Whig from Kentucky who feared that Section 4 of the FCA would allow for a situation in which his own slave property could be taken; Wickliffe thought that the FCA, as then-drafted, would affect Union slave-owners’ right to their slave property in a scenario where an enslaved person had been kidnapped and forced into labor by the rebels.27 The answer was that both the original and amended Section 4 provided that only the rebel rights were affected by the bill. As an answer to this concern, Mr. Kellogg of Illinois, one of the drafters of the revised version, noted his own motivations in the revision, saying that he “endeavored by [his] amendment so to modify the bill that it shall be understood by the country as not affecting the institution of slavery in the States.”28

The only moment when the “discharge” language seems to have been specifically addressed in the House was during the August 2nd House debates when Kellogg proposed to strike out the following sentence in the bill: “And the persons whose labor or service is thus claimed shall be thenceforth discharged therefrom, any law to the contrary notwithstanding.”29 He advocated replacing that line with: “And such claim to service or labor shall be confiscated.”30 Yes, this replacement lacks the “discharge” language. Kellogg explicitly said that his replacement would amend only the original bill and not the newly

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26. See Cong. Globe, 37th Cong., 1st Sess. 409, 410, 431 (1861) (providing House debates on the bill and showing lack of mention for military necessity or deference to Executive power).

27. See id. at 410. “I desire to ask the chairman of the Committee on the Judiciary whether it is the design of this bill to confiscate the property of citizens in persons described where they may be found at labor of any description which can be connected with war, except the carrying of arms? Suppose my negroes—I being a national man and a Union man—are taken without my leave and against my consent, to drive teams and carry provender to the rebel army: are my negroes to be confiscated?” Id. (emphasis added).

28. Id. at 411.

29. Id. at 410.

30. Id.
revised version of Section 4 that was simultaneously being offered. However, at this point in the debate, as a point of parliamentary procedure, Kellogg could not make the amendment to the original bill until the House first voted on the question of adopting the larger revised version of Section 4. Thus, his amendment proposing to strike the “discharge” line and replace the “discharge” language was out of order.

The debates continued on the Committee on the Judiciary’s revised Section 4. Because the revised version was brought by the committee, we are unsure of their motives and rationale for presenting language lacking “discharge,” aside from Bingham’s statements and Trumbull’s summary regarding the reasons for the revision that I’ve already stated (i.e., that the language of the revised version was more exacting and clarified that the bill would only apply to the enslaved used in war by rebels and not the border states). Who knows the particular motives for deleting the “discharge” language in the revision? There is nothing—at least not in the debates—to indicate that the reason was deference to the Executive and “military necessity,” as Oakes posits.

To be fair, the House debate on revised Section 4 did continue and included the expression of other various views and points, such as (1) the belief that Congress could not legislate with regard to enslavement at all, (2) the belief that the amendment was useless because the enslaved ought to be treated just like other confiscated property anyway, (3) a discussion of the theory of forfeiture for treason as applied to slave property, (4) the application of the Constitution to the rebels, and (5) bill of attainder concerns implicated by the prospect of divesting title beyond someone’s lifetime. However, the debates contain only a little with regard to “military necessity” or deference to presidential/executive power.

A portion of the executive power discussion during the debate, for example, comes from Representative George H. Pendleton, who discussed the Warrant Clause and referred to the “[extant] provision in this bill which says it shall be the duty of the President to cause the property to be seized . . . .” He only says this as reference to the bill,

31. See id.
32. See id. at 411–13. The bill of attainder concerns were some of the same ones raised by President Lincoln in his Second Confiscation Act veto letter. The bill of attainder concerns were raised by Representative Crittendon from Kentucky.
33. Id. at 413.
not to make a point about executive power lacking in the bill. Pendleton’s main concern was that the FCA be clear in its application only to rebel states and that property in other states be properly seized only with a warrant. As a result, Pendleton presented an amendment to Section 3 of the bill, not Section 4, and in his proposal, he advocates for presidential appointment of officers to seize property in states where there are no tribunals, as opposed to private citizen seizure of property. While this is related to Section 4, it doesn’t explain a change to its language regarding “discharge” of the enslaved. And even if it did apply to Section 4, this is no reason for omitting “discharged,” as the concern would only be about who is discharging, not the act of discharging itself.

Republican Representative Diven answered Pendleton’s concern by pointing out how preposterous congressional confiscation efforts were:

Do you propose to send your marshals to the seceding States with process to seize and condemn the rifled cannon and munitions of war? Every man sees the absurdity of that proposition. These munitions of war, if taken at all, are to be taken by the force of war. War has its own laws . . . . We cannot affect them by any statutes we can pass.

Diven’s rebuttal does not comport with Oakes’s characterization—executive power and military necessity motives for changing the “discharge” language. Here, Diven, a Republican, is speaking out against the entire idea of confiscation, arguing that the laws of war in the past did not allow for confiscation at all. This is not the same as saying that confiscation can only be done by the President. Diven had an issue with the entire FCA, and with respect to the enslaved, he advocated for taking them as prisoners of war.

There was certainly talk about the laws of war, international law (citing Vattel) about not returning an oppressed people to their oppressor, military power, and even a philanthropic duty to rescue the

34. Id.
35. Democrat from Ohio.
36. Cong. Globe, 37th Cong., 1st Sess. 413 (1861) (“[I]n the States where the judicial tribunals are not in operation, where it may be said that warrants cannot be issued, the seizure shall only be made by officers appointed under the hand of the President and the seal of the United States . . . . I now offer the following amendment by way of a substitute for the third section of the bill.”).
37. Republican from New York.
39. Id. at 414.
oppressed during war; all of these issues were voiced by Radical Re-
publican Thaddeus Stevens during his speech during the August 2nd
House debates.\textsuperscript{40} However, this entire discussion was about the bill
and Section 4 as a whole, not the omission of the “discharge” lan-
guage. And it certainly was not about legislative restraint or defer-
ence to the Executive.

Oakes should provide a more detailed and clear explanation of
the “military necessity” discourse that was supposedly happening in
Congress during the FCA deliberations—either at the committee level
or during the larger assembly debates. He should also provide a pre-
cise citation for his proposition that the “discharge” language was
omitted because of military necessity or executive power concerns, be-
cause nothing in a thorough reading of the debates indicates its truth.
Oakes must be more exacting in telling his story about these debates
and specific reasons for amendments.

B. Oakes Overemphasizes the Goals and the Effect of the FCA

“This was not confiscation; it was emancipation—immediate and
uncompensated—of some but not all slaves.”\textsuperscript{41}

There are several things wrong with this assertion. First, Section
4 was viewed as confiscation, at least by some Republicans, regardless
of the fact that the confiscated property was slave property. Second,
while some Congressmen did believe that the FCA entitled the en-
slaved to their freedom, it is not clear whether that “emancipation”
was “immediate.” And finally, Oakes exaggerates the effect of the
FCA because he mischaracterizes the implementation of the statute. I
will discuss each of these problems in turn.

1. Contrary to Oakes's Depiction, Section 4 Was in Fact Viewed as
Confiscation, at Least by Some Republicans

Republican\textsuperscript{42} Representative from Illinois, William Kellogg,\textsuperscript{43}
drafted the House’s amendment to Section 4 (which became the final
version). His viewpoint certainly differed from Oakes's. Kellogg be-

\textsuperscript{40} Id.
\textsuperscript{41} OAKES, supra note 17, at 119.
\textsuperscript{42} BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774-2005, at 1367
(“KELLOGG, William, a Representative from Illinois . . . elected as a Republican to the . . .
Thirty-Seventh Congress[ ] . . .”) (emphasis added).
\textsuperscript{43} Not to be confused with William Pitt Kellogg.
lieved that Section 4 of the FCA was indeed confiscation, and he expressed this belief during the House debate on August 2, 1861:

If a citizen of the United States commits high treason, or any other great crime known to the law, it is competent for the United States Legislature . . . to provide for the forfeiture and confiscation of the offender’s property. And it is because he is a criminal before the law that I propose that his horses, his houses, his lands, his mules, his cannon, yea, his right to service in another, shall be confiscated . . . .  

Assuming arguendo that the FCA did not attempt confiscation of the enslaved, Oakes still misleads with his language, because the FCA’s “emancipation” was limited, and Oakes should qualify the term as such. The limited nature of the FCA’s emancipatory provisions was shown by Senator Pearce’s argument against the FCA draft, in which he characterized the FCA as “limited and qualified”:

[I]t will not be surprising to the Senate if those who come from the section of the country in which I reside should be a little sensitive at anything which proposes, as this amendment does, an act of emancipation, however limited and qualified.

Oakes even cites Pearce’s argument but does not cite the part of his speech referring to the “limited and qualified” nature of the FCA’s “emancipation” that occurred sentences before. Oakes’s work would benefit from his providing his definition of “freedom” and “emancipated.” Under the prevailing interpretation of those concepts, he at least needs to qualify what this purported “freedom” really looked like in the minds of the Congressmen.

2. Oakes Is Likely Too Eager in His Characterization of the FCA’s Purported “Emancipation” as “Immediate”

While some Congressmen did believe that the FCA entitled the enslaved to their freedom, it is not clear whether that “emancipation” was “immediate.” Rather, there seemed to be some sort of intermediate court process contemplated but never fully addressed by Congress in the FCA. Pearce, for example, contemplated a court process when lamenting the FCA’s lack of detail. He argued that the FCA was weak because there was no enforcement mechanism and no judicial

45. Id. at 219.
46. Oakes, supra note 17, at 126.
means for determining whether the southerners governed by it were loyal or rebel:

You have made no provision for the ascertainment of the facts by the courts, and the declaration of a legal sentence by any tribunal. You rest upon the general provision of the section that they shall be discharged from service and labor. Now, sir, where and by what court would you have that sentence declared, and by what authority enforced?\(^{47}\)

That “emancipation” was not “immediate” under the FCA is supported by the House debates on the bill in Congress, which contemplate that the formerly enslaved would be entitled to their freedom, but not immediately. Rather, some sort of court process seemed to be required:

Mr. BURNETT. The use of a slave, by authority of the owner, in any mode which will tend to aid or promote this insurrection, will entitle that slave to his freedom.

Mr. BINGHAM. Certainly it will.

Mr. BURNETT. Now we understand each other, I ask the gentleman whether this bill is not to be construed by the executive authorities of the Government?

Mr. BINGHAM. No, sir; I undertake to say that this provision is like many others now standing upon our statute-books subject to judicial decision. It is simply an act which may become the subject of adjudication in the courts as between the owner of a person so employed and the person so claimed.\(^{48}\)

While it is unclear whether this solely means judicial review was anticipated or whether claims would have to be settled in court before true freedom was granted to the enslaved, this conversation at least hints at some sort of court process. Arguably, it contemplates that after the war, a slave-owner may seek to adjudicate a claim to a formerly enslaved person in court, and the court could then decree that the formerly enslaved is entitled to his or her freedom. What should happen during the war is still left unanswered.

3. Oakes Overstates the FCA’s Implementation and Activities Occurring on the Ground After Its Passage

Oakes exaggerates the effect of the FCA because he mischaracterizes the implementation of the statute as if it really did pro-

\(^{47}\) CONG. GLOBE, 37th CONG., 1ST SESS. 219 (1861).

\(^{48}\) Id. at 410 (emphasis added).
vide for emancipation, when in fact, on the ground and by Cameron’s orders, the Act was implemented in a way that indicates the formerly enslaved were placed in some sort of status-limbo in Union camps. Oakes’s chapter treats the FCA on two levels: he conducts an analysis of the law itself and what it does in theory, and then he provides his assessment of what the law actually did in reality. Perhaps Oakes is correct that the FCA “emancipated” (not “forfeited” or “confiscated”) the enslaved in theory—based on its plain language and without regard to what many Congressmen said they intended the law to say. However, when looking at what the FCA did in practice, Oakes largely ignores what was actually happening on the ground: the military was mainly following its own agenda—keeping the enslaved around, utilizing them as aides, and resigning to determine their status at a later date.

Oakes writes that “[W]ithin a year of its passage, tens of thousands of slaves had been freed by the First Confiscation Act.”49 The problem here is that Oakes does not provide his definition of the word “free.” Rather, he seems to conflate the Generals and the Executive Branch’s stance in refusing to return the enslaved to slave-owners with the idea of freedom. Oakes’s full quote reads: “Slaves coming into [General George McClellan’s] lines were not returned to their owners, whether their owners happened to be loyal or not. Within a year of its passage, tens of thousands of slaves had been freed by the First Confiscation Act.”50

Just because there was no affirmative measure to return the “contrabands” to their owners doesn’t mean there was an affirmative measure to “free” those “contrabands.” Rather, there was likely a “limbo” between the two actions; the formerly enslaved who came to Union camps likely remained in those camps and worked for the Union.51 The Union could use them and then later determine their status.52 Their ties with southern rebels were severed, but their status in the Union was not expressly established by the FCA.

49. OAKES, supra note 17, at 143 (emphasis added).
50. Id. (emphasis added). Note that my critique only encompasses the credit Oakes gives to the FCA; Oakes’s phrasing here states what the FCA in fact did. My critique is not meant to ignore that many of the enslaved had achieved freedom on their own, not as “contrabands” fleeing to Union camps, but as enslaved peoples fleeing their condition to no place in particular. Other formerly enslaved people had freed themselves by simply running away, not to Union camps but elsewhere. This type of freedom cannot be accredited to Congress or the Executive; this was a freedom achieved by the enslaved themselves.
51. See discussion infra regarding the Serial Set.
52. See discussion infra about Cameron’s communication to army generals.
The FCA likely provided for the generals to keep the enslaved in their camps, not return them, and have them work for the Union. Furthermore, the formerly enslaved were likely not told to just go free in the Union; this was likely impractical for all parties involved (for both the formerly enslaved and for the Union generals). Furthermore, there was a fear of the formerly enslaved simply coming into the Union and living among the Northerners, as Republican Senator Ten Eyck once stated: “God knows we do not want [the newly freed persons] in our section of the Union.”

Additionally, the practice of keeping the formerly enslaved in the camps during the war and not simply releasing them in the Union is supported by (1) Cameron’s letter to General Butler and (2) reports from Generals as to what was happening on the ground: Oakes brings in Secretary Cameron’s instructions to General Butler about how to handle the contrabands, but he uses this for the wrong point. He focuses on Cameron’s emphasis that all coming into Union lines—not just those enslaved employed by disloyals—were subject to the FCA. Oakes then concludes that Cameron expanded the reach of the FCA and provided for general “emancipation.” The point he loses from the Cameron quote is its implicit description of the “emancipation” that Oakes so eagerly punctuates. That emancipation is limited because of Cameron’s conclusion that the Union would sort out the status of the formerly enslaved later on: “Upon the return of peace,” Cameron explained, ‘Congress will doubtless properly provide for all the persons thus received into the service of the Union and for just compensation to loyal masters.”

From this quote, one can first conclude that the formerly enslaved were “received into service,” not discharged from their reality of laboring for others. It appears that Cameron contemplated a reality wherein the formerly enslaved remained in Union camps to work, not to go live a free existence in the Union states. Second, Cameron seems to think that after the war, the legal status of these formerly enslaved persons could be ascertained and slave-owners could be compensated. This scheme would require the formerly enslaved to be readily located for determination of their status; it does not imply that...

53. For the formerly enslaved, recapture by slave-owners was a threat that could be solved by remaining in Union camps, and for the Union troops, it was often advantageous to use reasonable numbers of “contrabands” as labor in their camps and as scouts in the war.
54. CONG. GLOBE, 37th CONG., 1ST SESS. 219 (1861).
55. OAKES, supra note 17, at 139 (emphasis added).
they were allowed to freely move about the Union because at a later date, there would be loose ends to tie up with respect to their status. Thus, according to Cameron’s statement, if anything, the formerly enslaved were in some sort of legal limbo to be finalized at a later date. This was not the end of the story, and this was not the grand emancipation Oakes seems to envision.

There are also examples of what was really happening on the ground that suggest that the formerly enslaved were often put to work in the war effort, not released with their free papers. A good way to see what was happening on the ground during the war is to examine the *United States Congressional Serial Set*. Report No. 108 of the *Serial Set*, entitled *Conduct of War, Part III*, contains transcriptions of interviews about “returning slaves.” The interviews included here all took place months after passage of the FCA.

Several of these interviews provide a look into what was happening to the formerly enslaved who crossed into Union camps. For example, in an April 15, 1862 interview by Congressman John Covode with Lieutenant Joseph L. Palmer, Jr., Palmer explains that the people seeking refuge in his camp were being used as guides and scouts and were not returned to the slave-owners who visited his camp. Another interview was conducted around the same time with General Daniel E. Sickles on April 10, 1862. The interviewer states: “We have been directed by the House of Representatives to inquire into the treatment of contrabands coming within your lines. What has been the custom of dealing with them in your division, so far as you know and have observed?” The General explains that when he found the contrabands to be “intelligent and well behaved,” he kept them in his camp and used them as scouts and guides. He affirms that the contrabands were both useful and loyal to his regiment.

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57. See generally *id.* It is important to note that several of these interviews indicate that Generals were not following the FCA or another statute called the Additional Article of War because they were actually returning the formerly enslaved to their “masters.”
59. April 10, 1862.
60. S. REP. NO. 108, at 632 (1862).
61. *Id.*
62. *Id.*
63. See *id.* at 641. This portion of the interview addresses the concern that the slaves may be disloyal to the Union army. It also affirms the idea that the fugitive slaves had military value and were extremely useful to the Union, and shows that many soldiers were reluctant to follow orders requiring surrender of the fugitive slaves to their former owners.
also mentions that he declined to return slaves to claimants (slave-owners) who applied for their return.64

What can be usefully gleaned from all of this? At the very least, Oakes’s characterization that the FCA in fact “freed” many of the enslaved is misleading because their actual condition was not “freedom” as many readers would think of it; that type of freedom did not come until later, and it was not because of the implementation of the FCA.

C. Another Problem with Oakes’s Overall Treatment of the FCA: He Makes It Seems as Though Republicans Had Humanitarian Concerns in Mind

Throughout his chapter on the FCA, Oakes’s tone suggests that the civil war Republicans, in passing the FCA, had a humanitarian goal and sought to promote the enslaved from “property” to “person.” However, upon examining the debates, it seems that the impetus for the Act was to prevent rebels from using the enslaved as a military advantage.

Oakes writes that “[The Republicans] knew the slaves wanted to be free, and they knew the slaves needed the army to secure their freedom.”65 He also states that “Trumbull’s wording [of Section 4] was not accidental. At least since the Somerset case in the 1770s, the opponents of slavery insisted on the legal distinction between slaves as ‘property’ and slaves as ‘persons.’”66 Oakes’s statements here depict the FCA as an antislavery measure and not a strategic military response.

However, Trumbull’s speech introducing Section 4 (when he seeks to amend the Confiscation Bill on July 22, 1861 to add the relevant “emancipatory” portion to it), suggests that antislavery concerns

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Question. Do you know of any instance where [the contrabands] have been treacherous to the Union cause?
Answer. No, sir; not one. They exhibit the greatest alacrity and pleasure in showing us in any way in their power. They will submit any privation, perform any duty, incur any danger . . . . They gave us information of the position of the enemy's force . . . a service upon which it would be difficult to fix a price. These services rendered by these men are known to the soldiers, and contribute, I presume, largely to the sympathy which they feel for them, and to the strong . . . irrepressible disinclination they feel when called upon to witness their surrender.

Id. at 643.
64. Id. at 633.
65. OAKES, supra note 17, at 144.
66. Id. at 120.
were secondary to the main goal of preventing the return of the enslaved used in battle:

I am glad the yeas and nays are called to let us see who is willing to vote that the traitorous owner of a negro shall employ him to shoot down the Union men of the country, and yet insist upon restoring him to the traitor that owns him. I understand that negroes were in the fight which has recently occurred [Bull Run]. I take it that negroes who are used to destroy the Union, and to shoot down the Union men by the consent of traitorous masters, ought not to be restored to them. If the Senator from Kentucky is in favor of restoring them, let him vote against the amendment.67

This introductory speech shows that the main focus of the forfeiture of slave property provision of the FCA was to avoid having to give the enslaved back to the rebels who had used them in battle, and this concern had arisen from the Bull Run fiasco.

Senator Wilson also reaffirms avoiding returning the enslaved to the rebels as the main goal of adopting the section: “[I]f traitors use bondmen to destroy this country, my doctrine is that the Government shall at once convert those bondmen into men that cannot be used to destroy our country . . . .”68 As a final example of the emphasis on preventing rebel use of the enslaved over emancipation itself is a speech from Republican Senator John C. Ten Eyck, which reads:

Saturday last I voted in the Judiciary Committee against the amendment, for two reasons: first, I did not believe that persons in rebellion against this Government would make use of such means as the employment of persons held to labor or service in their armies; secondly, because I did not know what was to become of these poor wretches if they were discharged. God knows we do not want them in our section of the Union. But, sir, having learned and believing that these persons have been employed with arms in their hands to shed the blood of the Union-loving men of this country, I shall now vote in favor of that amendment with less regard to what may become of these people than I had on Saturday.69

Here, Mr. Ten Eyck, a Republican, explicitly tells us that his motives for wanting to adopt the bill are to ensure that the rebels cannot use the enslaved in battle. He is also explaining that he is disregarding what will be done with the enslaved after they are taken from the

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68. Id. at 219.
69. Id.
rebels in order to quickly address the exigent circumstance caused by Bull Run.

Notably absent from these conversations is any humanitarian bent or any express motive to view the formerly enslaved as “persons” above “property.” Really, the only Republican who spoke during debate who drove home humanitarian motives was Thaddeus Stevens.70

D. Oakes Draws Too Much from the Use of the Word “Person” Over “Property” in the FCA

As discussed above, Oakes makes it seem as though use of the word “person” was so purposeful as to create a paradigm shift that the enslaved were no longer seen as property of others. However, he gives this too much pause. His narrative is inconsistent because he cannot avoid the truth seeping out of his quotes from the time; the reality is that Republicans and Democrats alike still viewed the enslaved as property.

The following statement by Oakes contributes to his property-to-person narrative: “Trumbull was being scrupulous, not ironic, when he referred to slaves not as ‘property’ but as ‘persons held in service.’”71 Oakes also creates a debate in which slaves could not be considered both person and property: “The emancipation debate was not the only point at which the status of slaves as ‘persons’ rather than ‘property’ arose.”72 Finally, Oakes provides a jumbled legal analysis of the person/property dichotomy with this quote:

But to slavery’s opponents the dual character of slaves as “property” under state law but “persons” under the Constitution was crucial. Slave emancipation was contained within a “confiscation” bill because under state law slaves were property, but the bill itself treated slaves as “persons held in service” because that’s how slaves were recognized in the Constitution. In one sense the title of the law is misleading: it “confiscated” property, but it “emancipated” slaves.73

The way in which Oakes discusses this asserts a false dichotomy; it ignores the possibility that the enslaved were often thought of as both persons and property.

70. Id. at 414.
71. OAKES, supra note 17, at 120.
72. Id. at 121 (emphasis added).
73. Id. at 122 (emphasis added). Note that this paragraph is legally confusing in that it creates a difference in status of the enslaved depending on federal or state law. Oakes should expound upon this distinction.
While later debates in Congress may have teased at the property/person issue (e.g. the SCA debates), the FCA debates show that that issue—if it was an issue at all at the time—was not grappled with here. The debates do not indicate a paradigm shift or any attempt at creating one. Oakes seems to wish that attempts at that noble paradigm shift occurred earlier in congressional history when they simply did not.

Even President Lincoln did not experience this paradigm shift of viewing the enslaved as purely persons during the time of the FCA. In fact, the President even viewed the enslaved as property at a time later than the FCA, as is shown in his Second Confiscation veto letter\textsuperscript{74} in which he applied the property concept of escheat to the enslaved. As Nadine Mompremier described in her April 15, 2013 email message regarding Lincoln’s veto letter: “[Lincoln] didn’t believe that it was within Congress’s power to free slaves, but rather ownership should be transferred to the [government] (just like other property) and then Congress [could] later decide if they want[ed] to free them.”\textsuperscript{75} This is the concept of escheat, one that is strictly concerned with property and the question of who holds title to that property. Lincoln’s letter clearly states that:

> It is startling to say that Congress can free a slave within a state; and yet if it were said the ownership of the slave had first been transferred to the nation, and that Congress had then liberated him [i.e., escheat], the difficulty would at once vanish . . . . [As an example:] To the high honor of Kentucky, as I am informed, she has been the owner of some slaves by escheat, and that she sold none, but liberated all.\textsuperscript{76}

This shows that Lincoln viewed the enslaved as a form of property, even months after the FCA was passed.

The property-to-person paradigm shift did not occur within the Republican party during the FCA debates either, where it should have begun. This is shown by the fact that Representative Thaddeus Stevens, the foremost of the humanitarian-focused Radical Republicans, even frames the FCA as operating within a slaves-are-property frame-

\textsuperscript{74} See the discussion regarding Lincoln’s veto letter in Nadine Mompremier’s essay on the Second Confiscation Act.

\textsuperscript{75} E-mail from Nadine Mompremier, J.D., Howard University Sch. of Law, Class of 2013, to Robert Fabrikant, Professor, Howard University Sch. of Law, et al. (Apr. 15, 2013) (on file with author).

\textsuperscript{76} Letter from President Abraham Lincoln to Congress (July 17, 1862), available at http://www.presidency.ucsb.edu/ws/index.php?pid=49771.
work when he refers to the laws of war. Stevens says, “[I]f you were in a state of peace you could not confiscate the property of any citizen. You have no right to do it in time of peace, but in time of war you have the right to confiscate the property of a rebel.”

Furthermore, the very forfeiture theory upon which Section 4 of the FCA relies subsumes that the “persons held in service” are property. Their status as property is a necessary element in their forfeiture. As Representative William Kellogg of Illinois—a Republican and the drafter of the House’s amendment to Section 4 (which replaced the “discharged” language with a whole new Section)—explained during the House debate on the amendment on August 2, 1861:

If a citizen of the United States commits high treason, or any other great crime known to the law, it is competent for the United States Legislature . . . to provide for the forfeiture and confiscation of the offender’s property. And it is because he is a criminal before the law that I propose that his horses, his houses, his lands, his mules, his cannon, yea, his right to service in another, shall be confiscated . . . .

Kellogg’s juxtaposition of “persons” in this list emphasizes that those “persons held in service” were simply considered a form of property that could be confiscated. This contradicts Oakes’s assertion that “[i]n one sense the title of the law is misleading: it ‘confiscated’ property, but it ‘emancipated’ slaves.” No, at least according to Kellogg; the FCA and the amendment of Section 4 that he drafted indeed confiscated slaves, a type of property.

Oakes also neglects the context of the FCA. The word “person” was used in Section 4, which was added after several sections of the Act discussing property. “Person” could have been used as a word of clarity and precision to emphasize that the section sought to address “slave property” and not personal or real property. To this end, another Lincoln Scholar, John Syrett, in his book *The Civil War Confiscation Acts: Failing to Reconstruct the South*, states that Trumbull

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77. Oakes even acknowledges this on page 135 of his book by bringing in Stevens’s debate speeches.
78. Oakes, *supra* note 17, at 135 (emphasis added).
79. Not to be confused with William Pitt Kellogg.
82. Oakes, *supra* note 17, at 122.
added “persons” to the bill so that it was clear that slaves could be confiscated if used to further the insurrection. 83

Using the word “persons” for distinction and specificity purposes also occurred earlier in history with the Three-Fifths Compromise in the Constitution. 84 Thus, use of the word “person” is not a reliable indicator of any paradigm shift because of examples like the Three-Fifths Compromise, which uses the word “person” to refer to the enslaved while simultaneously affirming their status as sub-human (i.e., “three-fifths of a man”). The Three-Fifths Compromise reads:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. 85

In the Three-Fifths Compromise, “person” was likely used instead of “property” so that it was clear that states would only get representation in Congress based on their population of enslaved Africans, not based on the number of chickens or couches or houses in the state. “Property” would be too broad in this context and would result in unintended legal ramifications.

Similarly, this choice of language occurred with the Fugitive Slave Clause86 as a way of being precise. One could not use the word “property” in the Fugitive Slave Clause; it is too broad. The government did not intend to recapture all property (e.g., a vase) and ensure it was sent back to the southern owner after being lost in the north.

To conclude this property-to-person discussion, I issue a cautionary admonition: Historians should not be so quick to superimpose the lofty idea that a “property to person” paradigm shift happened suddenly and early in American history. That shift, at least in the legal realm, was likely not sudden, but gradual and erratic. By implying that this shift was occurring in Congress in 1861 during the FCA de-

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84. U.S. Const. art. I, § 2, cl. 3, repealed by U.S. Const. amend. XIV.
85. Id.
86. The Fugitive Slave Clause reads: “No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.” U.S. Const. art. IV, § 2, cl. 3, repealed by U.S. Const. amend. XIII (emphasis added).
bates, Oakes produces a narrative that, in its totality, is inconsistent and confusing.

E. Finally, Oakes’s Timing Argument Is Flawed: The Date of Emancipation He Establishes (August 8, 1861) Is Disputable

The flaw with Oakes’s backdating of when emancipation really began is that he draws upon Lincoln’s silence, saying the silence is a ratification of (someone’s) desire to emancipate. At one point, Oakes even affirmatively says that the Lincoln administration intended all along for thousands of slaves to be emancipated during the war:

[Thousands of s]laves who had refused to run with their masters had . . . voluntarily come into Union lines and were thereby emancipated . . . . There is no reason to doubt that this was the result the Lincoln Administration intended. Even before he was elected president, Lincoln had warned that if the slave states seceded, the federal government would stop enforcing the fugitive slave clause . . . .

First, no portion of this quote is cited. Second, Oakes’s inference seems to be based on the fact that (1) the War Department via Cameron directed General Butler not to return “contrabands” to enslavement, (2) Lincoln didn’t object to Cameron’s instructions, and (3) Lincoln had objected to Cameron’s actions on other occasions.

While Oakes capitalizes on this silence, he disappoints because he does not forecast to Lincoln’s future expressions of hesitation at emancipation. How does Oakes explain Lincoln’s alleged intent that thousands of slaves would be emancipated simply by crossing Union lines in light of his veto letter sent to Congress amid deliberation of the Second Confiscation Act (SCA)? Oakes needs to contextualize the FCA and Lincoln’s thoughts and implied “intent” with the SCA and his future express intent.

If the FCA was really an extensive measure to emancipate as Oakes seems to characterize it, and if Lincoln intended for the emancipation of thousands of slaves during the war by means of the FCA, why then does Lincoln later present so many objections to the SCA’s method of emancipation?

Nadine Mompremier, in her research of the several drafts of the SCA and Lincoln’s veto message, states that:

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87. OAKES, supra note 17, at 141.
[Lincoln] didn’t believe that it was within Congress’s power to free slaves, but rather ownership should be transferred to the [government] (just like other property) and then Congress can later decide if they want to free them. But then he also continues by saying that he has no objection with Congress deciding in advance that they want to free the slaves. He also believes that it would be physically impossible for the [government] to return the slaves “persons” to actual slavery [because] there would be resistance to it, “which could neither be turned aside by argument, nor driven away by force.”

Even if Lincoln is merely objecting to the method of emancipation and not to emancipation itself, as Ms. Mompremier concludes, his concerns apply to the FCA’s means as well. Under the escheat concerns he raises, the FCA still raises the same problem the SCA does. There is no real explanation for why Lincoln raised these concerns so much later, but in light of them, we cannot say—as Oakes does—that “there is no reason to doubt” that Lincoln intended for slaves to be emancipated in the way Oakes sees the FCA as having emancipated them. We cannot read contentment and hope into Lincoln’s silence when there are later indicia of his discontent with similar congressional emancipatory methods.

Is it baffling that Lincoln was not speaking up during the time of the FCA, under my theory? Yes, it is. It is nonsensical that he would speak up only later. However, there are many other plausible explanations equally if not more likely than Oakes’s. Maybe Lincoln was still developing a basis for his objections. Maybe his attention was elsewhere. Maybe other aspects of the war took priority, and the problem of emancipation was not at the forefront of his concern. Without any expression from Lincoln, any explanation is pure speculation. Oakes has not provided enough information to move the conclusions he draws from Lincoln’s silence out of the realm of speculation. His conclusions are on equal footing with those just presented. He should acknowledge the speculative nature of his conclusions and avoid writing them so assuredly.

CONCLUSION

The legal realm during the Civil War era was a confusing and complex one. Therefore, summarizing nineteenth century thoughts

88. E-mail from Nadine Mompremier, J.D., Howard University Sch. of Law, supra note 75.
and debates about ideas surrounding emancipation and property confiscation must be done carefully. Oakes must be given due credit for attempting to construct an accurate narrative about some of these concepts. However, there are several areas to be improved upon in his exploration. Hopefully, this review will help all emancipation scholars get a little closer to the truth.
INTRODUCTION

President Abraham Lincoln signed the Second Confiscation Act ("SCA"), titled An Act to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Property of Rebels, and for other Purposes, on July 17, 1862. Under the SCA, slaves owned by slaveholders convicted of rebellion or treason were to be emancipated.

* J.D., Howard University School of Law, Class of 2013. A special thank you to Professor Robert Fabrikant for awakening in me this interest in the Civil War, and in particular, Abraham Lincoln. I truly appreciate our conversations and discussions that made my last semester at Howard even more rewarding. A big thank you to my colleagues Angela Porter and Adrienne Ferrell for our insightful discussions and their continued assistance in formulating my thoughts for this Essay.

pated, and slaves whose owners had disappeared or were found in
places where Confederates once were, were also emancipated. The
final version of the SCA had four sections that dealt with emancipa-
tion—sections one, two, nine, and ten.

Section 1 declared that any slave of a person found guilty of trea-
son would be declared free.2 Section 2 declared that the slaves of any-
one engaged in the rebellion and found guilty of doing so would be
liberated.3 Section 9, here the most relevant section, indicated that
slaves of persons engaged in rebellion who took refuge within Union
army lines would be deemed captives of war and declared free.4 This
provision covered three classes of slaves: (1) slaves of persons who
would, at the time, still be engaged in rebellion and who escaped from
those persons and took refuge within Union lines; (2) all slaves cap-
tured from persons who were still in rebellion or were deserted by
them; and (3) all slaves of a rebel found within any place occupied by
rebel forces that were occupied by Union forces.5 Section 10 then in-
dicated that an escaping slave's freedom would not be questioned
once he escaped into Union territory unless he committed a crime.6
Other relevant sections include Section 6, which allowed the President
to punish the rebels of war if they did not stop their insurrections sixty
days after the President’s warning and proclamation; Section 11,
which authorized the President to use former slaves in the Union war
efforts; and Section 12, which authorized the President to make colo-
nization plans for the former slaves.7 Although these provisions lead
one to believe that Congress took a number of steps to emancipate
slaves through this piece of legislation, the final version enacted by
Congress was a watered-down version of “the emancipation” that
many members of Congress originally sought to achieve.

The congressional debates over the SCA, which lasted from De-
cember 1861 through May 1862, were much longer than debates over
the First Confiscation Act (“FCA”), with many of the debates and
disagreements focusing on the status of slaves in the rebel states. Did
the Constitution give Congress the power to emancipate slaves? If
not, could the President emancipate slaves on his own? Did the Con-
stitution apply to the seceded states? Should the object of the war

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2. Second Confiscation Act, § 1.
3. Id. § 2.
4. Id. § 9.
5. Id.
6. Id. § 10.
7. Id. §§ 11, 12.
Lincoln Had Other Ideas

change to make emancipation the goal? Republicans in both the House and the Senate believed that this Confiscation Bill and the goal of the war should place a larger emphasis on removing slaves from the hands of rebels, but the Democrats were reluctant to take responsibility for emancipating slaves. The debates reflect the commonly-known notion that slavery caused one of the largest divides in Congress as the war progressed, and everyone was far from the same page about what should happen with slavery as an establishment and how it would affect the war. Nevertheless, some authors tend to oversimplify the ideological diversity that took place in Congress; and there are historians who frequently impute consensus and collective purpose into a debate that was much more complicated, fragmented, and tentative.8

This Essay seeks to provide a more nuanced and brief legislative history of the SCA from an orientation of legal scholarship and discuss its relationship to the Emancipation Proclamation, which followed less than six months later. This Essay also seeks to emphasize (1) the importance of the SCA; and (2) Lincoln’s hesitation to emancipate in order to present a narrative different from the many that overemphasize the Emancipation Proclamation and Lincoln’s alleged emancipatory proclivities and underestimate congressional efforts. Ultimately, the goal of this conversation is to prove that emancipation, in fact, started with Congress; however, the main effort behind it is to accurately depict congressional emancipatory goals without romanticizing congressional discussions or inflating congressional intent.9

I. BACKGROUND: THE STORY OF THE SECOND CONFISCATION ACT—IN CONTEXT10

The FCA, known as An Act to confiscate Property used for Insurrectionary Purposes, which was signed on August 6, 1861, forfeited the

9. This is not to take away from the importance of the Emancipation Proclamation and how it eventually led to the Thirteenth Amendment. However, there are always two sides to a story, and this Essay looks to focus on the one that is rarely told.
10. In formulating this Essay, I could only focus on a small portion of the larger debates focusing on the SCA. There were almost nine months of debates, and the topics ranged from whether the Act was constitutional, whether Congress had the power to pass this bill, the difference between confiscation and emancipation, and more. In drafting this Essay and my critiques, I tried to keep this fact in mind, knowing that the debates go into so much more detail than I can fit here.
legal claims of certain persons to the labor and service of other persons if those other persons were considered “rebels” during the war who used their slaves “for insurrectionary purposes” (i.e., on the battlefield). After the Bill was passed, however, many congressmen believed that the Bill was too weak. For example, some thought it was too limited to accomplish anything because it only pertained to property that was specifically used in a military capacity, and it did not do enough to attack slave labor. The FCA left open many unanswered questions for both Congress and the President, and others thought that it did not do enough to punish the South for its rebellion. For example, Senator Lyman Trumbull believed that the Act did nothing to free slaves. Therefore, the second session of Congress opened in December 1861 with many wondering what more they could do, if anything, to push for confiscation and punishment of the rebels, as well as increase emancipation efforts following the expanded war efforts; thus any reasonable observer could see that there was no end to the war in sight.

Because of this, the first day of the second session of Congress on December 2, 1861 was extremely eventful. Congressmen proposed many resolutions pertaining to the war, but the executive branch was equally relevant that day. President Lincoln delivered a message to Congress, one that can be compared to a modern-day State of the Union address. In that message, he discussed a number of things, including the state of the Treasury, the Supreme Court vacancies, and the increased war efforts. As it pertained to the state of the war, he provided an update from the Secretary of War about the increased size of the army, and the state of insurrection.

In addition, he addressed some of the bills that Congress passed in the last session, including the FCA. In his discussion of the FCA, he first noted the status of slaves who were freed because of the Bill. He noted that because the Bill had liberated some slaves, they were now dependent on the United States, and that the country had to pro-

11. See An Act to confiscate Property used for Insurrectionary Purposes, ch. 60, 12 Stat. 319 (1861) [hereinafter First Confiscation Act].
13. See John Syrett, The Civil War Confiscation Acts: Failing to Reconstruct the South 62–63 (2011) (“In 1864 Trumbull had admitted in Congress that he believed no slave had been freed by the first act, which had only implied it would free slaves employed in Confederate military service.”).
15. See id.
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He anticipated that several states would pass similar bills liberating slaves, and that they would rely on Congress to assist them in their endeavors as “[they] would be thrown upon [Congress] for disposal.” For this reason, Lincoln suggested that Congress find a way to provide for these soon-to-be-free people, and when doing so, suggested that they should do it according to a valuation process that would be agreed upon with the states. Further, Lincoln suggested that once states received those persons and agreed on the plan, those persons should be deemed free and then colonized “in a climate congenial to them” according to a process Congress would create. In other words, Lincoln wanted Congress to agree with him that in order for emancipation to go smoothly, the formerly enslaved black people should be sent off to another country, a warm climate, a colony especially for them. Lincoln also suggested that the black people who were already free should also be included in the colonization plan. It was also apparent, because of his suggestions, that he did not question or doubt Congress’s power to colonize and acquire territorial land to colonize these black people.

Additionally, Lincoln voiced his opinion on the FCA itself. He mentioned that he as Commander-in-Chief and President had been careful not to diverge from the primary object of the war, which he thought was to keep the integrity of the Union prominent and leave all questions that were not of vital military importance to the deliberate action of the Legislature. That is why he said he adhered to the FCA, which confiscated property used for insurrectionary purposes, and why he would “duly [consider]” any subsequent bill proposed dealing on the same matter. In proposing for a stronger bill, he also noted, “The Union must be preserved; and hence, all indispensable means must be employed. We should not be in haste to determine that radical and extreme measures, which may reach the loyal as well as the

16. See id.
17. Id.
18. Id.
19. Id.
20. Id.
21. Id. (noting that because Congress used its territorial expansion power to move westward, this power could also be used for land outside the United States as well). This is interesting to note seeing as though many like to think that Lincoln wanted black people to prosper in this country. Rather, he seemed to be of the mindset that they did not belong in the United States and would be better off elsewhere.
22. Id.
23. Id.
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...disloyal, are indispensable."\textsuperscript{24} Indicating that although he was ready for Congress to do more to win the war, he was not ready to believe that extreme bills and resolutions should be used to achieve this goal. It is plausible that as a moderate Republican, he considered emancipating the slaves of the rebels an extreme measure, one that he could not fully support, despite supporting the FCA. Despite Lincoln’s message, there were members of Congress who came back to the second session anxious, ready and willing to do whatever it took to get the Union back together and punish the South, including emancipating slaves. But as the session started, however, it was clear that the congressmen were divided on this issue by party lines and even further by party factions. Democrats opposed all efforts to free the slaves and confiscate rebel property, and Republicans were split among those who wanted to attack the foundations of slavery and those that just wanted to see the South punished.\textsuperscript{25}

Representative Thomas Eliot (R-MA) was one congressman who wasted no time declaring his thoughts on emancipation. He introduced a resolution in the House of Representatives on the first day of the session that disclaimed any constitutional power to interfere with slavery in the Union, but could somehow free slaves in the rebel states.\textsuperscript{26} The next day, Representative John Bingham (R-OH) introduced a bill that would “forfeit the property and slaves of persons who [should] engage in or aid and abet rebellion against the United States.”\textsuperscript{27} Meanwhile, in the Senate there was also a desire to expand the discussion on confiscation and emancipation. Here, however, it seemed as though Republicans saw no need for a limit on emancipation.

On December 5, 1861, Senator Lyman Trumbull (R-III.) introduced his own bill that provided for confiscating the property of rebels, and giving freedom to persons held in slavery.\textsuperscript{28} Trumbull’s bill was very expansive, as it provided for the:

[A]bsolute and complete forfeiture forever to the United States of every species of property, real and personal, and wheresover situ-

\textsuperscript{24} Id. (emphasis added).
\textsuperscript{25} See Siddall, \textit{supra} note 12, at 123.
\textsuperscript{26} \textit{Cong. Globe}, 37th Cong., 2d Sess. 5 (Dec. 2, 1861); Oakes, \textit{supra} note 1, at 228–29. He was not the only one with a resolution that day. Rep. Thaddeas Stevens read his anti-slavery resolution on the floor, but asked for its consideration to be postponed until the following week. \textit{Cong. Globe}, 37th Cong., 2d Sess. 6 (Dec. 2, 1861).
\textsuperscript{27} \textit{Cong. Globe}, 37th Cong., 2d Sess. 7 (Dec. 5, 1861); Oakes, \textit{supra} note 1, at 229.
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ated within the United States, belonging to persons beyond the jurisdic-
tion of the United States, or beyond the reach of civil process in the
ordinary mode of judicial proceeding in consequence of the present
rebellion, who . . . shall take up arms against the United States.29

It would be hard to argue that this Bill was not an extreme measure, one that Lincoln was not ready to support. Trumbull wanted
slaves to be free, and like Lincoln, did not oppose colonization as a
means to do so, as the Bill designated power to the President to find a
tropical place to colonize them.30

Following Elliot’s and Trumbull’s proposals, various other sena-
tors and representatives introduced their own confiscation resolutions
and bills.31 In the Senate, as more confiscation bills and resolutions
were introduced, they were all referred to the Judiciary Committee,
which Trumbull chaired. On January 15, 1862, Trumbull reported
from the Judiciary Committee on the Confiscation Bills and presented
bill S. 151, an original bill from the judiciary committee, which would
confiscate property and free the slaves of rebels.32 However, it was
not until about February that the Senate seriously started considering
the Confiscation Bill, but after the discussion started, they were again
postponed. Even though congressional members provided their back-
and-forth remarks about emancipation and confiscation, the debate
on the confiscation bills did not come up again on the debate floor
until April 1862.

When the debates resumed, the feelings towards emancipation
and confiscation varied in both houses of Congress. In the House, the
debate focused on whether confiscation and emancipation should be
addressed in the same bill. It is also important to note that Congress
was not unified around the prospect of what confiscation and eman-
cipation meant and should be. Many, if not all, Democrats believed
that emancipation was not the route that the Union should take to
reach an end to the war, and some moderate Republicans agreed with

29. Id.
30. Id. Here the freemen would have the protection of the government and “be secured in
all the rights and privileges of freemen.” Id.
unanimous consent, introduced a joint resolution in reference to the confiscation of rebel prop-
introduced a bill to confiscate the property of rebels . . . . [and] to liberate their slaves . . . .”); see
also Cong. Globe, 37th Cong., 2d Sess. 36 (Dec. 9, 1861) (“[Rep. Hutchins] introduced a bill to
abolish slavery in the District of Columbia . . . .”).
them. Most of them voted against emancipation, and some Democrats favored confiscation but opposed emancipation. And other members wondered whether Congress had the power to pass an emancipation bill at all. On April 30, 1862, Representative Eliot introduced two bills.

The first was “[a] bill to confiscate the property of rebels for the payment of the expenses of the present rebellion, and for other purposes.” The second was “[a] bill to free from servitude the slaves of rebels engaged in abetting the existing rebellion against the government of the United States.”

On May 20, 1862, the House began debating Representative Eliot’s bills. Again, it was clear that the House was still divided on emancipation and confiscation. On May 26th, the House passed the confiscation bill, but they defeated the emancipation bill with a seventy-four to seventy-eight vote. The House sent the bill back to the committee with instructions on making the bill stronger. In particular, they asked the committee to (1) specify the classes of persons whose slaves could be confiscated, (2) restore the President’s discretion on emancipation, and (3) add the military character of emancipation by requiring a proclamation from the Commander-in-Chief in order for the law to take effect. Finally, on June 17th, the House passed the bill with a vote of eighty-two to fifty-four.

Meanwhile, in the Senate, debate revolved around whether and how much discretion they should give the President in the confiscation bill(s). Senator Jacob Collamer (R-Vt.) proposed a bill that would authorize the President, at his discretion, to free slaves in any state that was in rebellion for at least six months. Meanwhile, Senator Henry Wilson’s (R-Mass.) bill would require the President to proclaim the emancipation of slaves owned by rebels in any area that was still in

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33. See, e.g., Cong. Globe App., 37th Cong., 2d Sess. 29 (Dec. 17, 1861) (“I take the ground that this war should have nothing to do with the institution of slavery any more than with any other State institution. Let slavery alone, it will take care of itself.”).
34. See Siddally, supra note 12, at 142 (discussing Democrats’ and moderate Republicans’ feelings towards the confiscation bills and their conflicting goals and intentions of the war).
35. See id. at 137 (“The conservatives’ chief difficulty lay in wresting the power to control the war from the Republican majority in Congress; therefore, they attacked the confiscation bill by simply denying that Congress had the authority to control military action.”).
36. Oakes, supra note 1, at 229–30 (alterations in original); see also Cong. Globe App., 37th Cong., 2d Sess. 1886 (Apr. 30, 1862).
37. Oakes, supra note 1, at 227.
38. Id. at 230.
39. Id. at 230–31.
40. Id. at 231.
41. Id. at 226–27.
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a state of insurrection within thirty days of the bill’s passage. This, in a sense, took the emancipation decision away from the President. Senator Clark then created a special committee to resolve differences between these confiscation bills. On May 16th, the committee sided with Collamer and reported a bill that gave the President substantial discretion.

When the two House bills arrived in the Senate, they were quickly rejected because the Senate preferred the one bill that Clark’s committee reported as opposed to two separate bills for confiscation and emancipation. Then, on June 28th, the Senate approved its bill twenty-eight to thirteen. The House, however, felt very strongly about its bills, and when the Senate bill arrived in the House, it was rejected with a 124 to 8 vote. Because of the differences between the Senate and the House, the bills were sent to a conference committee made up of both House and Senate members so that the committee members could discuss and reconcile the bill(s).

On July 11th, Representative Eliot conceded to the conference committee and the committee reported the Senate version. The House voted to accept this report eighty-two to forty-two. On July 12th, the Senate approved the bill twenty-seven to twelve. Realizing, however, that Lincoln had some concerns about the Confiscation Bill in its final form, the Senate and House passed a joint resolution on July 16, 1862, to appease Lincoln’s concerns. This joint resolution pertained to the third clause of section 5 of the Act. This clause allowed the President to call for the seizure of property, including land, money, stocks, credits, and personal effects that could later be used to support the U.S. army. The resolution stated that: (1) the Act did not apply to act(s) done prior to the passage of the SCA; (2) the Act did not include members of the legislature and judges who did not swear allegiance to support the Confederate constitution; and (3) pun-

42. Id.
43. Id. at 227.
44. Id. This is only a brief synopsis of the debates that took place over April and May regarding the final confiscation bill. For a more in-depth analysis and look into the debates, the Library of Congress’s Congressional Globe and the Congressional Globe’s Appendix provides the full debate.
45. Id.
46. Id. at 231.
47. Id.
48. Id.
49. Id.
50. Id.
51. Second Confiscation Act, § 5.
ishment/proceedings of property only pertained to the forfeiture of property while the individual was alive. Ultimately, by limiting the extent of the bill and to whom it was applicable, the joint resolution weakened the bill even further and made it difficult to enforce the SCA. It was also a difficult bill to enforce because slaves were set free only after coming under military control; a federal court had to declare their owners as rebels; the bill did not indicate what happened to slaves of non-rebels (including Union slaves); and it did not outline a procedure to resolve a conflict that was sure to arise when a slave indicated that he was free, but the master insisted his loyalty to the Union. Nonetheless, on July 17th, Lincoln signed the final Bill, but with his signature, he presented his original objections to the Bill, a message that he prepared as a veto letter, a rare thing for a president to do, in a letter to Congress, oft-referred to in the Confiscation Acts context as the “Veto Letter” or “Objections Letter.”

II. LINCOLN’S OBJECTIONS AND REACTIONS TO EMANCIPATION

A. Lincoln’s Objections to the Second Confiscation Act

The veto letter listed several of Lincoln’s objections to the SCA, but in it, he first noted where he was pleased with the Bill. For example, he was pleased with the fact that the Bill did not affect loyal citizens. His objections were not with the first and second sections that provided for the conviction and punishment of persons who were found guilty of treason, and other rebels. He supported them because the rebels were being punished through “regular trials, in duly constituted courts, under the forms and all the substantial provisions of law, and of the Constitution” and especially because his pardoning power could be used along with amnesty. Nor did he oppose the third, fourth, and tenth sections. He also found the twelfth and thirteenth

52. See id. See generally SYRETT, supra note 13 (including a full version of the SCA and the Joint Resolution in his book).
53. See, e.g., SYRETT, supra note 13, at 53 (“The joint resolution allowed rebels to retain slaves even if they declared allegiance to the Union only a day before the bill became law.”).
54. See id. at 57.
55. Letter from Abraham Lincoln to Congress (July 17, 1862) [hereinafter Lincoln Veto Letter] (on file with author). This is also an interesting point because Lincoln’s Emancipation Proclamation freed slaves in both loyal and disloyal states. If Lincoln’s objective was to keep the border states content as the war continued, why would he free slaves in the entire country, and why did he not do it with the support of Congress through the SCA instead of through the Emancipation Proclamation?
56. Id.
sections, pertaining to colonization and pardoning, respectively, to be “better than unobjectionable.”

His objections focused on the slavery clauses. He raised concerns about the fact that slaves of persons convicted under those sections were automatically set free, namely because he did not believe it was within Congress’s powers to automatically emancipate people. He said that it was an:

[U]nfortunate form of expression, rather than a substantial objection in this. It is startling to say that Congress can free a slave within a state, and yet if it were said the ownership of the slave had first been transferred to the nation, and that Congress had then liberated him, the difficulty would at once vanish.

Therefore, Lincoln felt that there were more steps to emancipation than simply saying the slaves were suddenly free, and those steps had to adhere to traditional property law and its mandatory technicalities. He continued by providing an example: a traitor would forfeit his slave as he would any other property to the government; thus, the government would own the slave. Then Congress would have the authority to decide whether “they [should] be made free, or or [sic] be sold to new masters.” He said he “perceive[s] no objection to Congress deciding in advance that they shall be free.” He also believed that it would be physically impossible for the government to return the slaves to actual slavery because there would be resistance to it, “which could neither be turned aside by argument, nor driven away by force.” He also thought that there should be some clarification to determine whether a particular individual slave does or does not fall within the classes of slaves defined in that section—“but whether those conditions do, or do not pertain to him, no mode of ascertaining is provided—this could be easily supplied.”

Although Lincoln had no major objections to the fifth and sixth sections (applying to those within the Union inciting the rebels or ceasing to encourage or help them after presidential proclamation), he did feel that they would be very difficult, and to some extent, impossi-
As to the eleventh section, he said that even without the law, he would not hesitate to go as far as he deemed necessary. And he made it clear that he was now ready to say it is “proper for our military commanders to employ, as laborers, as many persons of African descent, as can be used to advantage.”

Lincoln’s other objections pertained to the first, second, seventh, and eighth sections, which would result in rebels divesting title forever because of confiscation. He believed that the provision was unconstitutional, but he suggested that it would not be hard to modify it so that it no longer was unconstitutional. He found that the provisions contradicted the Constitution:

For the causes of treason, and the ingredients of treason, not amounting to the full crime, it declares forfeiture, extending beyond the lives of the guilty parties; whereas the Constitution of the United States declares that “no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attained.” True, there is no formal attainder in this case; still I think the greater punishment can not [sic] be constitutionally inflicted, in a different form, for the same offence. With great respect, I am constrained to say I think this feature of the act is unconstitutional. It would not be difficult to modify it.

He believed that the Act forfeited property for treason without criminal convictions or a personal hearing, and, instead, the owner should be provided a reasonable time to appear and get a personal hearing. But yet, one has to ask, if Lincoln was for emancipatory measures, why so much trouble to try to prevent this bill from passing?

B. Lincoln Did Not Want Emancipation

It is interesting to see how Lincoln’s attitude toward the power of Congress had evolved since his message to Congress at the beginning of the session in December 1861. As noted above, after he discussed the FCA, he stated, “all indispensable means must be employed.” Yet, when Congress attempted to do just that in order to preserve the Union, he raised many doubts and was ready to veto the entire piece

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65. Id.
66. Id.
67. Id.
68. Id.
69. Id. (citations omitted).
70. See id.
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of legislation. In fact, Lincoln was not ready to use all indispensable means, which is evidenced by the Preliminary Proclamation that followed in September 1862. The Preliminary Proclamation reserved—rather threatened—emancipation for a later date, giving the rebel states an opportunity to keep the institution of slavery if they returned to the Union before that specified deadline.\textsuperscript{71} Whether the Preliminary Proclamation followed from the section of the SCA that gave discretion to the President to emancipate slaves or whether it was Lincoln’s intention to emancipate slaves himself, the Preliminary Proclamation did nothing of the sort except to warn the South that if they do not return to the Union, he would issue directives to emancipate slaves. Lincoln’s reluctance to interfere with rebels’ property rights,\textsuperscript{72} at least as it pertained to slaves, is one indication that Lincoln was not ready to emancipate slaves.

The SCA, when it was first introduced in December 1861, started as a comprehensive emancipative piece of legislation that was watered down by the time it was finally enacted and watered down even more by Lincoln’s hesitation to enforce the legislation. Over time, the importance of the SCA and the opinions of congressional members at the time have been lost as more emphasis was placed on Lincoln’s eventual Emancipation Proclamation. The debates show that many congressmen conceded to confiscation in order to get emancipation on the table. But in the process, they weakened the emancipation goals that they sought to achieve. Emancipation was not only weakened by the acquiescence of the congressmen, but it was further weakened by President Lincoln, who weakened those emancipation measures by: (1) increasing the length of the surrender from 60 days to 100 days in the Emancipation Proclamation; (2) making emancipation a criminal consequence; and (3) questioning entirely Congress’s ability to emancipate slaves.

Lincoln’s objections to emancipation, followed by his delay in implementing emancipation and bringing free blacks to fight as part of the Union army raise a number of questions as to whether Lincoln truly wanted emancipation. In his veto letter, Lincoln stressed his belief that Congress did not have the power to free the slaves. One can assume that his objection means that he thought that this power was one for the executive rather than the legislative branch of the govern-


ment. If this was so, and if his objections to emancipation were minor, as some scholars contend, why did he not start the emancipation process himself sooner rather than later?

It is also interesting to note that in the veto message, Lincoln said that he would not hesitate to go as far as necessary as it pertained to the prospective clause of the SCA, which left at his discretion how quickly emancipation could happen, stating that:

The eleventh section simply assumes to confer discretionary powers upon the executive. Without this law I have no hesitation to go as far in the direction indicated, as I may at any time deem expedient—And I am ready to say now I think it is proper for our military commanders to employ, as laborers, as many persons of African decent [sic], as can be used to advantage.74

But again, this poses the question: why wait? This point is disheartening, especially taking into account the debate in both houses of Congress as to how much power the Constitution gave Congress and the President to emancipate slaves and confiscate property, and how much discretion to give the President. Congress members were as ready and willing to emancipate slaves but hesitated, and at times conceded their points and desire to emancipate in order to make sure that the job remained with Lincoln as a point of military emancipation. In addition, the objections letter is a complicated piece of text. What point was Lincoln trying to make as it referred to emancipation? One might argue that if his ultimate goal was emancipation, he likely, on his own volition, would not have had presented so many technical objections to it. However, some people were aware that Lincoln opposed emancipation and would likely oppose emancipation if given the opportunity to object to it by Congress.75

73. See OAKES, supra note 1, at 233–34 (describing Lincoln’s reactions to the SCA).
74. Lincoln Veto Letter, supra note 55.
75. For example, early on in the debates, Representative Aaron Harding noted that Lincoln would not support an emancipation measure if Congress passed the bill because it would not help the Union win the war: “I believe he is himself ‘unchangeably ranged on the side of the Union.” Cong. Globe App., 37th Cong., 2d Sess. 29 (Dec. 17, 1861). In addition, he stated: In [Lincoln’s] inaugural address, and in his message to Congress at its extra session, every man will recollect that he took conservative ground. The ground taken was, that war was to be restored to only for the purpose of maintaining the Union and preserving the rights of the respective States...” In his message to the present Congress—after his inaugural address, after his conservative message at the last session, after the patriotic speech of Secretary Smith, in which he said that the President would respect the rights of slavery and protect it under the Government and the Constitution as much as any man in South Carolina—after all this, he declares in his late message at the present session of Congress that nothing had occurred “to add to or subtract from the policy heretofore recommended.”
One can also raise the point that Lincoln was vying for gradual emancipation evidenced by the proximity of his preliminary proclamation to the passage of the SCA and his request to Congress for funding for gradual emancipation in March 1862. Additionally, in some instances, Lincoln claimed that he was not opposed to emancipation, but rather he was worried about the “‘time and manner of doing it.’” He also wondered whether it was necessary to “‘move so quickly’” in emancipating slaves. This is a fair point, but it begs the question: Why not veto the entire SCA altogether rather than introduce the joint resolution to get him to sign it? As one scholar put it, “Yet there can be no doubt that the second act was a confused piece of legislation and that Lincoln, however much the act pushed him, showed no inclination to implement it as his intended veto message implied.” In addition, can one really describe the SCA’s call for emancipation as “moving quickly” when it came a year after the war started, when the country was still very much divided, and when there was no end to the war in sight? Better yet, how can Congress be “moving quickly” when they debated the bill for nine months and Congress had already emancipated slaves in Washington, D.C.?

Another important point to note is that Lincoln did not question Congress’s power to emancipate slaves after passing the FCA; yet he doubted Congress’s power after the SCA, after he told Congress at the beginning of the session that he would “duly consider” another bill where the questions were not of vital military importance. Unlike the FCA, which focused on slaves that were used to aid the rebels in the war, the SCA not only emancipated those slaves used to aid rebels, but any slaves found in Union lines or belonging to rebel masters. If this is the case, and Lincoln noted in his veto letter that he had “no objection[s] to Congress deciding in advance that [slaves] shall be free,” why did Lincoln weaken Congress’s attempts to emancipate slaves?

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76. See Syrett, supra note 13, at 51 (referring to emancipation in Washington, D.C.).
77. See id.
78. Id. at 56–57; see also id. at 60 (“But [Lincoln’s] public reply to Greely made it clear that he would not implement the second act for punishment or reconstruction; it would be used only if it could be seen to help win the war.”).
79. Lincoln Veto Letter, supra note 55.

Id.; see also Siddali, supra note 12, at 125 (“President Lincoln had already made it clear that he would not be rushed on his policies toward enemy civilians or toward slavery.”); Syrett, supra note 13, at 50 (“Congress knew that Lincoln favored less severe measures than the second act’s provisions to subdue the South and emancipate the slaves.”).
One can also question why Lincoln would hesitate to emancipate slaves and do all that was necessary to end the war since he blamed slavery as the cause for the war.\footnote{80} Did Lincoln want to reserve the pace and manner of emancipation for himself?\footnote{81} When the Preliminary Proclamation was issued in September 1862, it referred to sections nine and ten of the SCA as proof of military necessity, but it did not emancipate slaves. Rather, it was a warning to the Confederacy that emancipation was possible. If Lincoln wanted emancipation, would he have waited so long for this surrender to happen before freeing the slaves? An examination of the full context as well as logic and reason tell us: probably not.

CONCLUSION

While the country celebrates the 150th Anniversary of the Emancipation Proclamation this year, one would be remiss to overlook the importance and effect of the SCA and the debates preceding the bill in not only contributing to ultimate emancipation, but also as an accurate reflection of the country’s stance on emancipation. Yes, Lincoln proclaimed slaves free under the Emancipation Proclamation, but Congress enacted the SCA, dealing with the nation’s feelings about emancipation and pulling the conversation to the forefront; at the time, it led to a larger debate more so than the Emancipation Proclamation did and it had the potential to free more slaves. As one scholar put it, “The irony is that the law that attracted so much attention and produced so many hopes and fears about what it might accomplish was so poorly crafted and weakly implemented.”\footnote{82} It is unfortunate that when one now discusses emancipation, the SCA is a piece of legislation that is easily overlooked. It had the potential to cause the biggest shift in the war, and it called for the freedom of the thousands of slaves in both the Union and the Confederacy. So as we commemorate Lincoln and celebrate emancipation, we must also keep

\footnote{80. When meeting with free blacks in August 1862 to discuss colonization, he noted that blacks were responsible for the war because they allowed themselves to be enslaved: “‘But for your race among us there could not be war. . . . Without the institution of slavery and the colored race as a basis, the war could not have had an existence.’” Fabrikant, supra note 8, at 363 (citation omitted).}

\footnote{81. See id. at 362 (“Lincoln thought he knew better than Congress what the pace and manner of emancipation should be. And, as the war progressed, he wanted to reserve decisions about emancipation for himself and not simply exclude his commanders, but exclude Congress as well.”).}

\footnote{82. Syrett, supra note 13, at 57.}
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in mind the congressional efforts that began the country's journey towards emancipation and freedom.
An Albatross for the Government Legal Advisor Under MRPC Rule 8.4

ROBERT BEJESKY*

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INTRODUCTION

Rule 8.4 of the Model Rules of Professional Conduct (MRPC) requires lawyers to impart honest representations of the law and candid legal advice.1 Rebuke roused over this obligation due to advisory opinions furnished by Bush Administration attorneys that sanctioned illegal detentions, interrogations, and slighted human rights abuses on combatants, suspected terrorists, and innocent detainees.2 Referencing the imprint of one of the principal attorney-advisors of the Department of Justice Office of Legal Council (OLC), Professor Power wrote that “[a]s long as [John] Yoo could deliver OLC opinions supporting White House policy preferences . . . he was as good as a unanimous Supreme Court. . . . [E]ven an erroneous OLC opinion would probably enable those who had followed it to avoid liability.”3 Adam Liptak, Supreme Court correspondent for the New York Times, concluded that the OLC’s notorious memoranda “raise profound questions about the ethical and moral limits of what lawyers can and

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1. MODEL RULES OF PROF’L CONDUCT R. 8.4 (2013) [hereinafter MRPC]. It is true that MRPC R. 8.4 might be inapplicable to the context of John Yoo’s advice to the Bush White House, depending on considerations, such as how a court would interpret the legal advisor’s intent for the counsel, the attorney’s subjective belief about how the consultation (in good faith) addresses the government’s queries, and how national security would be weighed. I would like to express my appreciation to Professor Monroe Freedman of Hofstra University School of Law for his insightful reflections on these and other pertinent variables and for noting the probable division in a court on the applicability of MRPC R. 8.4 in such a context.

This Article’s analysis specifically appraises a government attorney’s obligation to “exercise independent and professional judgment and render candid advice” as a counselor (MRPC R. 2.1) and offers an interpretation of the responsibilities of the lawyer and government official-client when the outcome of legal advice can impact democratic policy-making, which involves some divergent characteristics in comparison to the more common circumstance of a confidential relationship between a single client and a private sector attorney.

2. See Treasa Dunworth, The Legal Adviser in International Organizations: Technician or Guardian?, 46 ALBERTA L. REV. 869, 882–83 (2009) (criticizing questionable legal opinions that authorized the war in Iraq and those relating to interrogation); Jordan J. Paust, Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees, 43 COLUM. J. TRANSNAT’L L. 811, 862 (2005) (“The role that several lawyers played . . . in a process of denial of protections under the laws of war is far more serious than the loss of honor and integrity to power. It can form the basis for a lawyer’s civil and criminal responsibility.”); David Weissbrodt & Amy Bergquist, Extraordinary Rendition and the Humanitarian Law of War and Occupation, 47 VA. J. INT’L L. 295, 356 (2007) (“[S]uch attorneys may be violating their professional obligations to make a good faith effort to determine the scope of the law . . . [and may be] complicit in the resulting criminal conduct.”).

3. Robert C. Power, Lawyers and the War, 34 J. LEGAL PROF. 39, 77 (2009); see also Stuart Streichler, Mad About Yoo, or, Why Worry About the Next Unconstitutional War?, 24 J.L. & POL. 93, 93 (2008) (“Exactly two weeks after September 11, [Yoo] completed a memorandum affirming the president’s ‘independent and plenary’ authority to ‘use military force abroad.’”) (citation omitted).
should do in advising their clients.”4 Jesselyn Radack, a former legal advisor in the Department of Justice’s Professional Responsibility Advisory Office, believes that “[t]he torture memoranda were more than just a perversion of the role of the government lawyer, they were a distortion of the rule of law itself.”5 Professor Milan Markovic argues that “lawyers are potentially complicit in war crimes when they ‘materially contribute’ to the commission of crimes like torture,” and violate prohibitions of the International Criminal Court or the Convention Against Torture.6

The U.S. Department of Justice Office of Professional Responsibility (OPR) initiated an investigation and concluded in July 2009 that John Yoo, then-Deputy Assistant Attorney General in the OLC, and Jay Bybee, then-Assistant Attorney General in the OLC, “engaged in professional misconduct by failing to provide ‘thorough, candid, and objective’ analysis in memoranda regarding the interrogation of detained terrorist suspects.”7 Yoo’s legal team retorted by punctuating that the OPR “does not contend that any of those techniques—including waterboarding—amount to torture under U.S. law.”8 The response continues: “The lawfulness of each technique has been confirmed by every subsequent OLC opinion on the issue, until the current administration took office and withdrew the relevant opinions

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5. Jesselyn Radack, Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism, 77 U. COLO. L. REV. 1, 35 (2006); see also Catherine Powell et al., Scholars’ Statement of Principles for the New President on U.S. Detention Policy: An Agenda for Change, 47 COLUM. J. TRANSNAT’L L. 339, 352 (2009) (“The new Administration should apply an internationally accepted and accurate understanding of international law, rather than the idiosyncratic and often inaccurate view of international law advanced by the Bush Administration’s Office of Legal Counsel . . . .” The ABA adopted a resolution condemning “any use of torture or other cruel, inhuman or degrading treatment or punishment upon persons within the custody or under the physical control of the United States government (including its contractors) and any approval or condoning of such measures by government lawyers, officials and agents.” ABA REPORT TO THE HOUSE OF DELEGATES, REVISED 10-B (Aug. 9, 2004), available at http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/torture/torturepolicy2004_10B.authcheckdam.pdf.


without offering any legal analysis demonstrating that the techniques are unlawful.” Associate Deputy Attorney General David Margolis overruled the OPR’s more condemnatory five-year investigation and determined that Jay Bybee and John Yoo did not bestow misleading advice, but exercised poor judgment and produced memos containing significant flaws. Senate Judiciary Committee Chairman Patrick Leahy was “deeply offended” by the decision to dismiss the investigation, and civil rights organizations advocated for a non-partisan investigation into the issuance of the torture memos. The developments have been polarizing and bred additional controversy for John Yoo.

A coalition sought to have Yoo and eleven other attorneys disbarred for their legal advice that disregarded proscriptions on torture, but Yoo’s attorneys countered that the Pennsylvania Bar has a four-year statute of limitations, which had already expired for the legal advice in question. Jose Padilla, an American initially charged with terrorism offenses but convicted on criminal charges, filed a civil lawsuit against Yoo for his involvement in authorizing sweeping detention and interrogation policies, which Padilla maintained subjected him to human rights abuses. In Padilla v. Yoo, the Northern District of California held that a detainee could civilly sue Yoo for providing legal advice that led to abuse, but in May 2012, the Court of Appeals for the Ninth Circuit dismissed the case without addressing the merits because the court found that Yoo was entitled to qualified immunity. Commentators advanced that Yoo and other advisors

9. *Id.*
11. *Id.*
17. Padilla v. Yoo, 678 F.3d 748, 768 (9th Cir. 2012); *see also* John Yoo, *Litigating for Terrorists*, WALL ST. J., May 3, 2012, http://www.aei.org/article/foreign-and-defense-policy/litigating-for-terrorists/ (complaining that the Obama Administration refused to defend him in the lawsuit even though the Ninth Circuit agreed that the lawsuit was frivolous). The word “frivolous” does not appear in the Ninth Circuit’s opinion. The Ninth Circuit stated: “Our conclusion that Yoo is entitled to qualified immunity does not address the propriety of Yoo’s performance of his duties
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should be criminally indicted. There was no criminal indictment in the U.S., but in March 2009, Spanish prosecutors brought criminal charges for war crimes against Yoo and five other Bush Administration legal advisors. The case is pending before the Spanish Supreme Court. Some have criticized UC-Berkley Law School for not dismissing Yoo or revoking his tenure.

This Article offers an alternative view of the legal advisor’s professional responsibility obligations by inquiring into the details of the relationship between the attorney and government-client and the intentions for the advice rendered. Consider two opposing précis and whether accountability for the lawyer should be equivalent. What if the government-client requisitioned an objective opinion and reasonably relied on the legal advisor’s consultation to construct a policy, but following the advice resulted in criminal activity? Alternatively, what if the government-client knowingly selected ideologically-inclined advisors, urged for consonant consultation that would rationalize a predetermined policy and would plausibly have implemented the particular action without the legal consultation, and did nothing to

at OLC otherwise.” Padilla, 678 F.3d at 768. A “frivolous lawsuit” is one in which the party or attorney knows is meritless because of lack of evidence or legal arguments to support the claims.

18. Claire Finkelstein & Michael Lewis, Debate, Should Bush Administration Lawyers Be Prosecuted for Authorizing Torture?, 158 U. PA. L. REV. PENNUMBRA 195, 197 (2010) (“[I]f the torture policy does represent a violation of federal law, and if the conditions of personal responsibility for that policy obtain with regard to the OLC attorneys, then restoration of the rule of law requires the imposition of criminal or administrative sanctions on those who knowingly and effectively encouraged others to break the law.”) (quoting Professor Claire Finkelstein).


22. See Power, supra note 3, at 60; see also Clifford M. Marks, Yoo Comes Under Fire (Again) at Berkeley Law, WALL ST. J., Aug. 17, 2010, http://blogs.wsj.com/law/2010/08/17/yoo-comes-under-fire-again-at-berkeley-law/ (noting that a protest was held and roughly seventy-five people gathered to call for Yoo’s ouster).

23. See Michael P. Scharf, International Law in Crisis: A Qualitative Empirical Contribution to the Compliance Debate, 31 CARDOZO L. REV. 45, 70 (2009) (“I don’t think it’s realistic to think Presidents are often going to refrain from the use of force on what they consider to be essential security grounds because of the views of the Legal Adviser.”) (citation omitted).
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apprise the public or other attorneys of the substance of opinions prior to the execution of the deprecated policy?

In the former case, the attorney transgressed professional responsibility obligations and might be substantially blameworthy for civil or criminal injustices deriving from the counsel, but in the latter case, the circumstances should not lead the regime to sensibly presume that the legal consultation was reasonably impartial. The more the latter or analogous considerations prevail, the more that the attorney-advisor resembles a scapegoat for the government-client’s own misdeeds. Many commentators believed that the latter occurrence unfolded—that the Bush Administration used chosen advisors and goaded predetermined advice based on a preferred goal. 24 Berkeley Law Dean Christopher Edley Jr., provides an astute summary of a similar position that focuses on choices in policy execution. He explained:

I do not know whether [Yoo] believes that the Department of Defense and CIA made political or moral mistakes in the way they exercised the discretion his memoranda purported to find available to them within the law. As critical as I am of his analyses, no argument about what he did or didn’t facilitate, or about his special obligations as an attorney, makes his conduct morally equivalent to that of his nominal clients, Secretary Rumsfeld, et al., or comparable to the conduct of interrogators distant in time, rank and place. Yes, it does matter that Yoo was an adviser, but President Bush and his national security appointees were the deciders. 25

In addressing this balance between the government-client’s culpability and the attorney-advisor’s obligations, Part I references foremost professional responsibility rules applicable to government attorneys and poses a series of questions to evaluate perceptions of the government-client at the time legal advice was requested. Using John Yoo’s advice to apply the queries, Part II maintains that an initial step to assessing government foreknowledge about the objectivity of

24. See Leila Nadya Sadat, Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law, 37 CASE W. RES. J. INT’L L. 309, 313–14 (2006) (opining that the Administration was relying upon lawyers to pen justifications for controversial government activities that derogated the law); see also M. Cherif Bassiouni, The Institutionalization of Torture Under the Bush Administration, 37 CASE W. RES. J. INT’L L. 389, 403 (2006) (questioning whether legal advisors who authorized torture could bring someone to justice) (“[H]ow much of a defense will their opinions be for the senior officials who solicited that advice and pressed for it, particularly if it was clear that this was the outcome they sought?”); Powell, supra note 5, at 347 (“[The Bush Administration’s] policy of minimal accountability on torture . . . led to widespread condemnation.”).

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the advice requires evaluating the government’s ostensible base of knowledge relevant to the selection of the legal advisor. Part III surveys a few of Yoo’s key opinions to indicate how the guidance was consistent with preexisting positions. Part IV addresses the balance of responsibility between the Bush Administration and John Yoo by considering the Administration’s request for advice and the reasonableness of the Administration’s reliance on that advice.

I. PROFESSIONAL OBLIGATIONS BETWEEN ADVISORS AND AN ADMINISTRATION

Depending on the department, position requirements, and contingencies at hand, government attorneys can have conflicting interests. Government attorneys must defend the United States government as an advocate in cases or controversies, enforce the law, and contribute legal advice upon request prior to the implementation of policy. Viewed on a spectrum, the first role is coterminous with the zealous advocate standard, the second may involve preferences, but also requires fairness and more neutrality, and the third mandates the most objectivity. Pertinent to the third role, the Model Rules of Professional Conduct and the ABA Model Code of Professional Responsibility state that lawyers should not furnish advice that is likely to lead to a violation of existing law or abet illegal or unethical conduct and should render uncompromised and “independent professional judgment.” Commentary to the Model Rules explains that the government lawyer has a responsibility “under applicable law to question such conduct [of agency officials] more extensively than...”

26. See Catherine J. Lanctot, The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions, 64 S. CAL. L. REV. 951, 999 n.202 (1991) (illustrating that in one anomaly, Solicitor General Archibald Cox argued both sides of a Supreme Court case); Note, Developments in the Law: Conflicts of Interest in the Legal Profession, 94 HARV. L. REV. 1244, 1414 (1981) (“A government lawyer serves the interests of many different entities: his supervisor in the department or agency, the agency itself, the statutory mission of the agency, the entire government of which that agency is a part, and the public interest.”).

27. See generally Douglas W. Kmiec, OLC’s Opinion Writing Function: The Legal Adhesive for a Unitary Executive, 15 CARDOZO L. REV. 337, 374 (1993) (examining whether an Attorney General should be an advocate for the President or an impartial judicial decisionmaker).

28. See MRPC R. 8.4 (2013) (“It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”); id. R. 3.1 (2013) (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous . . . ”).

29. Id. R. 2.1 (2013) (“[A] lawyer may refer . . . to [extralegal] considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”).
that of a lawyer for a private organization in similar circumstances.”  

The foremost view of the American Bar Association, scholars, government attorneys, and judges is that legal counsel for political offices are obliged to provide unprejudiced and independent legal advice to serve the public interest. The Restatement (Third) of the Law Governing Lawyers explains that the government lawyer “must seek to advance the public interest . . . and not merely the partisan or personal interests of the government entity or officer involved.”

The legal advisor should tender objective guidance, but the regime may expect to have a lawyer who will support the preferences of the administration. For this reason, a government is unlikely to appoint attorney-advisors with an explicit history of advocating legal positions that would adulterate partisan interests of that regime. If the government does have this preference, it is reasonable to also reflect on plausible differences in proclivities between lawyers in the White House and attorneys in the Department of Justice. The White House has partisan affections and executes law and policy, whereas the attorney general’s office is an institution with a foremost mandate to respect and enforce law. If institutional distinctions prevail, perhaps the White House legal advisor encounters more difficulty in balancing objectivity with the policy executor’s expectations due to routine interactions with and elevated allegiance to the Executive as the policymaker’s retained counsel. Likewise, there is a dearth of guid-

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30. Id. R. 1.13 cmt. 9 (2013); see also id. R. 1.13 cmt. 6 (“If the lawyer’s services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information.”).

31. Radack, supra note 5, at 10; see also In re Lindsey, 148 F.3d 1100, 1109 (D.C. Cir. 1998) (“It is to say that the lawyer’s employment requires him to observe in the performance of his professional responsibility the public interest sought to be served by the governmental organization of which he is a part.” (quoting Federal Bar Association Ethics Committee, The Government Client and Confidentiality: Opinion 73–1, 32 F ED. B.J. 71, 72 (1973)); Jones v. Heckler, 583 F. Supp. 1250, 1256 n.7 (N.D. Ill. 1984) (“[L]egal counsel for the United States ha[ve] a special responsibility to the justice system.”); MRPC R. 2.1 (2013) (“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.”); Lanctot, supra note 26, at 962 (“The Model Code also stresses [t]he professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties.”) (citation omitted); Power, supra note 3, at 72 (“[G]overnment attorneys must provide the most accurate and complete advice to government decisionmakers.”).

32. Restatement (Third) of the Law Governing Lawyers § 97 cmt. f (2000); Scharf, supra note 23, at 67 (“[T]he public interest is in the mind of . . . all lawyers that serve the public.”) (remark from Herb Hansel, a legal advisor from the Carter Administration).

33. Scharf, supra note 23, at 65.

34. See John W. Dean, III, Watergate: What Was It?, 51 Hastings L.J. 609, 620–22 (2000) As the former Watergate attorney, John Dean explains that Nixon’s staff generally stuck by him because of their loyalty to the President even though “Richard Nixon and his White House were
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ing ethical principles applicable to White House counsel, which may incline the President’s counsel to advocate for the President.35

Interest and fewer restrictions might shift the White House counsel’s professional balance away from being objective and neutral, relative to advisors outside the White House.36 The obligation to remain nonpartisan in the Department of Justice’s OLC is clearer, particularly with institutional obligations to serve as the foremost law enforcement office in the country. Legal counsel for the two institutions interact because the OLC may issue an advisory opinion and the White House counsel is apt to provide an additional screening device for the OLC consultation prior to the government’s decision-making and policy execution process related to the consultation. This further clarifies that there should be a heightened role of objectivity within the attorney general’s office as a practical consideration, which is also encountered in history and policy positions.

Pursuant to the Judiciary Act of 1789, the Attorney General can apprise the President and other heads of the Executive Branch on legal ramifications of government actions upon request.37 Legal consequences logically denote that the chief judicial officer will objectively observe the law, which makes the OLC an agent of the attorney general’s institutional mission.38 This mission is explicated in the OLC’s governing principle: “When providing legal advice to guide contemplated executive branch action, OLC should provide an accurate and corrupt, dishonest and venal.” Id.; see also Vanessa Blum, Culture of Yes: Signing Off on a Strategy, LEXISNEXIS, http://www.lexis.com/ (follow “Find a Source” hyperlink and search “The National Law Journal”; click on “The National Law Journal”; then click on “Natural Language” tab and search “Culture of Yes: Signing Off on a Strategy”) (noting that one reason government attorneys crafted loopholes was due to a strong loyalty to the President). Abe Sofaer, who was legal counsel for the Reagan and Bush Administrations, felt torn when asked to navigate inaccuracies and stonewalling, but ultimately believed that his foremost client was the President. See Scharf, supra note 23, at 65.


36. In condemning advice provided by Bush Administration attorneys, a “Lawyers’ Statement,” signed by 106 lawyers, stated that the White House legal advisor’s “ultimate client” is the American people. George C. Harris, The Rule of Law and the War on Terror: The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11, 1 J. NAT’L SEC. L. & POL’Y 409, 416–17 (2005). Many past government legal advisors agree that the American public is the client. See Scharf, supra note 23, at 66 (citing Edwin Williamson and Michael Matheson).


38. The OLC, as a delegate of the Attorney General for this advisory role, has been issuing opinions for legal guidance to the Executive since 1933. Rachael Ward Saltzman, Note, Executive Power and the Office of Legal Counsel, 28 YALE L. & POL’Y REV. 439, 441 (2010).
honest appraisal of applicable law . . . .” An OLC lawyer has a greater obligation than a private attorney to justly appraise opposing views of an issue when imparting legal guidance. OLC Assistant Attorney General Randolph Moss described that the advisor “should take the obligation neutrally to interpret the law as seriously as a court.” In historical instances in which the Attorney General issued opinions involving war powers, there was more diversity and objectivity in opinions and legal advisors did not always aggrandize executive power.

In a circumstance in which the legal advisor exhibits more allegiance to the Executive’s preference than to objectivity for the American public, a series of inquiries are proposed to assess relations between the government-client and the advisor, and to probe whether the legal advisor fulfilled professional obligations when furnishing highly controversial counsel or whether the government requesting an opinion should ostensibly be the focus of inquiry. First, did the legal advisor hold well-known preexisting positions related to the government’s request and would those positions be regarded as objective or questionable by a substantial majority of the legal community? The government-client may have selected predisposed substantive advice with the appointment of the particular attorney-advisor.

Second, does the legal guidance relate to contemplated government action on an essential policy issue? Third, does the legal advisor know whether the advice will be utilized by the Executive when implementing essential policy decisions or is it destined for initial cogitation? If the advice does not involve material policymaking, the attorney may not have forecasted every repercussion or exhausted alternatives and contingencies, particularly in conjunction with competing obligations. An attorney would not likely need to be inordinately thorough and assemble a copious response with opposing contingen-

40. See Frederick A.O. Schwartz Jr. & Aziz Z. Huq, Unchecked and Unbalanced: Presidential Power in a Time of Terror 190–91 (2007) (“In short, an OLC lawyer giving advice has [an] even greater responsibility than a private attorney to do justice to all sides of a question.”); see also David Luban, Legal Ethics and Human Dignity 198–99 (2007) (contending that OLC advisors should be objective and independent).
cies for relatively pedestrian situations. As the bearing of an issue intensifies (which is apt to be the case with advice relating to foreign policy with widespread applicability, constitutional principles, the use of force, and issues incorporating considerable and prolonged financial and institutional commitment), the due diligence of the attorney-advisor and the government should be correlative raised. It is probable that only the regime, as policy executor, would fully appreciate the import of the issues at stake and would incorporate intentions within the request for legal advice, and that the attorney would interpret the importance of legal issues based on those intentions.

Fourth, should the legal advisor or government reasonably believe that the opinion rendered is objective and would attain accord from a substantial portion of the legal community?43 Fifth, given that the American public should be viewed as the ultimate client of the legal advice, will execution of policies consistent with the advice lead to societal outrage or conceivably subject government officials to criminal prosecution or civil liability?44 The first and second questions will be addressed in Part II, the third and fourth queries in Part III, and the fifth question in Part IV.

II. SELECTING THE LEGAL ADVISOR

A. Preexisting Positions for Case Specific Advice

If a government appoints lawyers with distinct and prominent penchant and requests those selected attorney-advisors to provide consultation, there may be reason to affix attention for culpability on the appointing government for a later condemned policy, potentially derived from the legal advice, to the extent that an advisor’s preexisting position was well-known and garnered insignificant support from the legal profession. An attorney is free to hold and advocate peculiar postures, but if legal advice for a government has the potential to embody a responsibility buffer or otherwise diminish culpability, an ad-

43. See Scharf, supra note 23, at 45, 68 (noting that in a survey of ten legal advisors from previous administrations, well-established and unambiguous principles are more strongly advocated, but if legal rules are unclear, a tribunal could be implicated in issues at hand, and NGOs, foreign governments, international organizations, and scholars would be in opposition, so there should be elevated caution and caveats in legal advice).

44. See Bejesky, supra note 14, at 428–31 (stating that there have been very few top government leaders subjected to serious punishment for government acts). Consequently, based on historical example, if an administration does not believe that punishment will be forthcoming for controversial policies, requesting legal advice may be more of a routine to better manage political fallout.
administration could conceivably execute any contentious action without expectation of punishment, as long as there are attorneys who represent a spectrum of interpretation and policymakers select advisors based on those predispositions for core issues in question. The government was on notice, and it seems unreasonable to expect the legal advisor to abruptly or substantially abdicate his or her existing position and oppose what the Administration preferred in order to deliver a more objective opinion.

In the case at hand, the Bush White House was cognizant that John Yoo was a fecund academic who held a considerably predictable ideology that championed illimitable Executive dominion during crisis, an “imperial presidency power,” generous Vesting Clause authority for the Executive, expansive presidential war powers, and dualism in international law to strictly sunder international law from domestic law. The basis of Yoo’s inclusive perception of inherent Commander in Chief powers would have been conspicuous at the time Yoo entered the OLC and at the time he was asked to render advisory memos.

Scholars and Supreme Court Justices have consistently affirmed that “evidence of the original understanding of the Constitution is relevant to any discussion of the document’s meaning,” and that societal developments since constitutional ratification can be construed from the perspective of the Framer’s original meaning. Yoo held...
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positions on foundational constitutional principles that did not merely endeavor to interpret the Constitution in a modern-day light, but were quite controversial, and those penchants\textsuperscript{50} were considerably relevant to issues addressed in consultative memos. Broad underlying constitutional law interpretations and resulting contentious legal issues during the Bush Administration involved separation of powers conflict with Congress and the Judiciary.

First, Framer intent in allocating war powers authority is germane to congressional delegation of case-specific war powers to the President (which was the case with the September 2001 Authorization to Use Military Force (AUMF)) and the degree to which the Executive can exercise discretion after Congress grants war powers authority. Second, Framer allocation of power to the judiciary and the applicability of international law are pertinent to Yoo’s position on indefinitely imprisoning and denying habeas corpus to national security detainees. With respect to incorporating a secondary opinion, White House attorneys and other policymakers interpreting advisory opinions might suspect that specific advice could be consistent with Yoo’s basal constitutional interpretations.

B. “Inherent” Presidential Authority in War Powers

Yoo contended that there is evidence of Framer intent that other scholars have been missing,\textsuperscript{51} particularly with respect to alleged Framer desire to emulate the British executive model,\textsuperscript{52} which incidentally permitted the monarchy-executive to initiate hostilities,\textsuperscript{53} and


\textsuperscript{51} Yoo, supra note 48, at 144–52 (contending that some scholars have failed to fully focus on the constitutional text and structure and opining that it is advisable to not dwell on what any “particularly influential Framer” stated about war powers). However, no Framer provides a basis for Yoo’s opinion. See Louis Fisher, \textit{Lost Constitutional Moorings: Recovering the War Power}, 81 \textit{IND. L.J.} 1199, 1240 (2006) (“[Yoo’s model] is not an ideal embodied anywhere in the Constitution.”); Streichler, supra note 3, at 98–99 (criticizing Yoo’s interpretation of the Framers’ intent).

\textsuperscript{52} See Yoo, supra note 48, at 27 (“[W]e should not look exclusively at what a particularly influential Framer said about the [War Powers] provision in the Federal Convention. To better understand the historical context, we should look to the British [C]onstitution in the seventeenth and eighteenth centuries, state constitutions, and the Articles of Confederation.”).

\textsuperscript{53} See Fisher, supra note 51, at 1240–41 (citing Memorandum Opinion from John C. Yoo, Deputy Assist. Att’y Gen., Office of Legal Counsel, for the Deputy Counsel to the President, The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sept. 25, 2001), \textit{available at http://www.justice.gov/olc/warpowers925.htm} (“During the period leading up to the Constitution’s ratification, the power to initiate
on the position that Congress’s constitutional authority to declare War” has no legal effect. However, both of these interpretations are frail.

First, the Framers did assess the British system, the way in which the British Crown had been dictating orders to the Continental Congress, and the impact on existing law and common law in the event that a new constitutional framework would be adopted. History books, government records, and scholarship evince that the Framers abruptly discarded the British model on war powers. They considered an Executive without a check on authority a system that could lead to suppression because the Executive was intended to be an instrument of congressional will. Checks on war powers are also encountered in specific clauses of the Constitution.

The U.S. Constitution empowers Congress with the prerogative to “declare war,” “grant Letters of Marque and Reprisal,” which involve military force short of “war,” “make Rules for Government and Regulation of the land and naval Forces,” “organize, fund, and maintain the nation’s armed forces;” “make Rules concerning Captures on Land and Water,” “raise and support Armies,” and “provide and maintain a Navy.” The President, on the other hand, is endowed with one war power: to execute those powers commensurate with the title “Commander-in-Chief of the Army and Navy.” Numerical comparison of provisions and underlying policy intentions evince that Congress was intended to be the dominant branch in war powers.

hostilities and to control the escalation of conflict had long been understood to rest in the hands of the executive branch.”

54. See Streichler, supra note 3, at 95–96.
55. See United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 316 (1936) (stating that international powers were transmitted to the states from the Crown); Edward Keynes, Un-Declared War: Twilight Zone of Constitutional Power 25 (1982) (discussing the influence the British system had on the Framers).
57. Fisher, supra note 51, at 1201.
59. U.S. Const. art. I, § 8, cls. 11–14, 18. Of course, Letters of Marque are no longer used, but the clause is raised to depict Framer intent.
60. U.S. Const. art. II, § 2, cl. 1.
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Akin to the Articles of Confederation, which stated that Congress had the power to issue a “declaration of war,” the Framers vested exclusive war powers with the legislature, and permitted individual states to defend against border attacks.62 The Continental Congress was empowered to enact “rules for the government and the regulation of the said land and naval forces” and was given the plenary authority of “directing [those] operations.”63 The underlying difference between the Framer model and a pre-Convention system was that there could be no Commander in Chief unless Congress appointed one under the Articles of Confederation,64 but under the U.S. Constitution the Commander in Chief authority was part of the elected President’s authority.

Second, and possibly to dismiss the Framer intent with a selective portrayal of the factual record,65 Yoo contended that a congressional declaration of war only recognizes a state of affairs with another country66 and does not legally authorize action.67 However, the record ac-
tually indicates that the Presidency was intended to be the branch of government that was to “execute” congressional will. Moreover, prosecuting a war costs money, and Congress must allocate funding before the President deploys troops, which seems inconsistent with the presumption that the Executive unilaterally decides whether to go to battle and compels Congress to pay. To bolster his opinion, Yoo emphasized the word “declare” in “declare war” and noted that the Constitution could have instead said “make,” “begin,” or “authorize” war. But evidence demonstrates that the Framers used the words “make” and “declare” interchangeably, and that the intent underlying word usage was to ensure that Congress held plenary authority over whether U.S. military force would be deployed into hostilities, except in the case of the Executive’s unilateral prerogative and constitutional obligation to deploy force in exigent defense of the nation.

The underlying intent of endowing Congress with preeminent dominion over war powers and the right to parameterize the use of military force was to assure that the Executive would not evade popular will. Alexander Hamilton affirmed that the “power to declare war”

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68. Some Framers emphasized that the Executive was “nothing more than an institution for carrying the will of the Legislature into effect . . . .” 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 65 (Max Farrand ed., Yale University Press 1966) (1911) (citing Mr. Sherman). James Madison wrote that Congress is the “essential agency [that] gives validity to such determinations” and that the executive was “a convenient organ of preliminary communications with foreign governments, on the subjects of treaty or war.” Letters of Helvidius No. 1 (Aug. 11, 1793), in 6 THE WRITINGS OF JAMES MADISON, 1790–1802, at 146 (Gaillard Hunt ed. 1906).

69. See Streichler, supra note 3, at 121 (remarking that “no real war would occur” in a situation where Congress declares war but the President refuses to dispatch soldiers).

70. Id. at 96; see also id. at 96–98, 108 (appraising that Yoo does not cite to a Framer or anyone else from the founding period to support this argument but only to a dictionary definition for the word “declare”) (“[I]t is no wonder Yoo warns readers against paying attention to what [the Framers] said.”).

71. See Keynes, supra note 55, at 34–35 (affirming that this was the position in every draft of the Constitution and noting that the states voted eight to one to vest these duties entirely with Congress). For example, the use of force to defend the United States need not have an enemy at the American border. If there were missiles fired at the United States, the President certainly would not need to request congressional approval to attack the country that launched the missiles.

72. Alexander Hamilton wrote: “It is of the nature of war to increase the Executive at the expense of the Legislative authority.” THE FEDERALIST No. 8 (Alexander Hamilton). “War is . . . the true nurse of executive aggrandizement.” Letters of Helvidius No. 3 (Sept. 14, 1793), in 6 THE WRITINGS OF JAMES MADISON, supra note 68, at 174. Madison wrote that “[t]he constitution supposes, what the History of all [Governments] demonstrates, that the [Executive] is the branch of power most interested in war, [and] most prone to it. It has accordingly with studied
meant that Congress had the “exclusive province . . . to change that state into a state of war . . . .” In 1793, Thomas Jefferson “opposed the right of the President to declare anything future on the question, shall there or shall there not be war . . . [?]” James Madison also explained that “executive powers ex vi termini [by the force of the term], do not include the Rights of war & peace . . . .” Constitutional Convention delegate James Wilson emphasized: “This system . . . is calculated to guard against [war]. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large.” John Jay, the first Chief Justice of the Supreme Court, wrote that “absolute monarchs will often make war when their nations are to get nothing by it[,] but for purposes and objects merely personal . . . .”

Since the ratification of the Constitution, every president who was granted a declaration of war or an authorization to use force first went to Congress before engaging in hostilities and received an enactment in which Congress expressed conditions for the use of force. Congress has “declared war” five times: the War of 1812, the Mexican-American War, the Spanish-American War, World War I, and World

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War II.\textsuperscript{79} The other four authorizations to use force include the Gulf of Tonkin Resolution for the Vietnam War in 1964, the Gulf War to expel Iraqi soldiers from Kuwait in 1991, the response to September 11 terror attacks in 2001, and the approval to use force against Iraq in October 2002.\textsuperscript{80} Prior to the Korean War in 1950 (which did indeed involve President Truman deploying troops without congressional authorization), government officials, courts, and scholars concurred that the President must obtain authorization from Congress before ordering the use of military force in all hostilities other than self-defense.\textsuperscript{81}

Notwithstanding, there have also been recent instances involving limited uses of force that did not derive from a full congressional vote prior to the Executive taking action, such as with President Reagan dispatching troops to Grenada in 1983 and air strikes against Libya in 1986, President George H.W. Bush’s invasion of Panama in 1989, President Clinton’s strikes on Yugoslavia in 1999, and President Obama’s bombing of Libya in 2011.\textsuperscript{82} However, each of these actions did involve questions over adherence to formal notice to congressional leaders and time limit restrictions set by congressional preemption in the War Powers Resolution of 1973.\textsuperscript{83} Presidents have also consistently and overtly recognized that they could not use offensive military force without congressional assent\textsuperscript{84} even though Presidents may sometimes advance in public statements that they have unilateral authority for major military operations.\textsuperscript{85}

\textsuperscript{79} See Curtis A. Bradley & Jack L. Goldsmith, \textit{Congressional Authorization and the War on Terrorism}, 118 \textit{Harv. L. Rev.} 2047, 2063 (2005). There was also the “Quasi-War with France,” which was a limited and confined conflict. See Bas v. Tingy, 4 U.S. (4 Dall) 37, 40 (1800) (opinion of Washington, J.). Chief Justice Marshall held that Congress authorized the Quasi-War with France even without a formal declaration. See Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28 (1801); see also William Michael Treanor, \textit{Fame, the Founding, and the Power to Declare War}, 82 \textit{Cornell L. Rev.} 695, 724 (1997).


\textsuperscript{81} See Fisher, \textit{supra} note 51, at 1200; Barron & Lederman, \textit{supra} note 42, at 1098, 1106. There was a “well-established pedigree in the period before 1950” regarding war powers allocations, but presidents thereafter began to invoke more “preclusive executive war powers claims.” \textit{Id.} at 1097.

\textsuperscript{82} Robert Bejesky, \textit{Precedent Supporting the Constitutionality of Section 5(b) of the War Powers Resolution}, 49 \textit{Willamette L. Rev.} 1, 21 (2012) [hereinafter Bejesky, \textit{Section 5(b)}].

\textsuperscript{83} \textit{Id.} at 22–29.

\textsuperscript{84} See Bejesky, \textit{supra} note 58.

\textsuperscript{85} For example, George H. W. Bush contended that he solicited congressional support for the 1991 Gulf War but that the action did not require the assent from some “old goat . . . in Congress” because he had the “inherent” constitutional authority to carry out the Gulf War as Commander in Chief. Remarks Upon Receiving an Honorary Degree From Princeton University in Princeton, New Jersey, 1 \textit{Pub. Papers}, 497 (May 10, 1991); Remarks at the Texas State
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After Congress grants the President with war powers authority, the President has the right to execute those operations as Commander in Chief without substantial congressional interference. However, that does not mean that the President possesses carte blanche. The President must abide by the restrictions set forth in the authorization to use force. Chief Justice Marshall explained that because Congress possesses “[t]he whole powers of war[,] . . . [C]ongress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities . . .” Professor Lobel recently wrote: “Congress has regulated in minute detail the manner in which armed forces may be deployed, enacted detailed rules governing the conduct of those forces, set forth rules of engagement, authorized the President to conduct hostilities limited in geographic scope, time, and type and number of forces that could be used, and the objects and purposes for which force could be used.”

Despite this history, if the White House requested a legal advisor to interpret a congressional authorization to use force and assess the type and scope for derivative operations that could follow from that sanction, the disposition of the legal advisor could offer a restrictive or

Republican Convention in Dallas, Texas, 1 PUB. PAPERS, 995 (June 20, 1992). Secretary of State James A. Baker treated the power to declare war and formal resolutions as incidental as long as there was some form of consultation with Congress. Crisis in the Persian Gulf: Hearings and Markup Before the Comm. on Foreign Affairs, 101st Cong. 101–02 (1990). Bush also stated, “I don’t think I need [Congress’s assent] . . . . I feel that I have the authority to fully implement the United Nations resolutions.” The President’s News Conference on the Persian Gulf Crisis, 27 WEEKLY COMP. PRES. DOC. 25 (Jan. 9, 1991). Nonetheless, Bush did go to Congress to obtain a congressional authorization for the action, which was narrowly granted. See CHARLES TIEFER, THE SEMI-SOVEREIGN PRESIDENCY: THE BUSH ADMINISTRATION’S STRATEGY FOR GOVERNING WITHOUT CONGRESS 129–36 (1994) (describing the close vote in the Senate of 52 to 47).


87. See 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 4–6, at 665 (3d ed. 2000) (“[T]he President must respect any constitutionally legitimate restraints on the use of force that Congress has enacted.”); Saikrishna Bangalore Prakash, Exhuming the Seemingly Moribund Declaration of War, 77 GEO. WASH. L. REV. 89, 130 (2008) (“If Congress requires the President to wage war, the President must both wage the war that Congress declared and adhere to the restrictions on the use of military force contained in the declaration.”).

88. Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28 (1801); see also Miller v. United States, 78 U.S. (11 Wall.) 268, 305. (1870). Congress’s power to declare war includes “the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted.” Id.

expansive interpretation. An expansive interpretation could utilize language in an authorization to assume that there are no geographical limitations on conflict or significant restrictions on interpreting the identity of the enemy and that the President’s operational choices in executing the authorization were unreviewable by Congress and the courts.

C. The Power of the Judiciary over War Powers and International Law Questions

Pivotal to the assumption that the President has expansive Commander in Chief authority to detain “enemy combatants” without judicial interference, Yoo contended that federal courts “were to have no role at all” in war powers cases90 and pointed out that “[n]o [constitutional] provision explicitly authorizes the federal courts to intervene directly in war powers questions.”91 It is abundantly true that the Constitution does not specifically delineate that federal courts have jurisdiction over war powers disputes, but that is because Supreme Court jurisdiction extends to all cases or controversies arising out of every clause in the Constitution.92 War power authorities are located in the text of the Constitution and courts have adjudicated foreign affairs and war powers issues without interfering with the President’s powers.93

Some cases involving the allocation of war power between Congress and the President, many of which decidedly affirmed Congress’s superior authority over the use of military force, include Talbot,94 Bas,95 Charming Betsy,96 Little,97 Smith,98 Brown,99 Fleming,100

91. Yoo, supra note 90, at 176.
92. See U.S. Const. art. III, § 2, cl. 1 (“[J]udicial Power shall extend to all Cases . . . arising under . . . Treaties made, or which shall be made . . . .”).
93. See Zadvydas v. Davis, 533 U.S. 678, 700 (2001) (“[C]ourts can take appropriate account of such matters without abdicating their legal responsibility to review the lawfulness [of presidential action].”).
94. Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801).
96. Murray v. Schooner Charming Betsy, 6 U.S (2 Cranch) 64 (1804).
Miller,101 Ex parte Milligan,102 Swaim,103 Sweeney,104 Ex parte Quirin,105 and Youngstown.106 These decisions are consistent with the fact that the Supreme Court is the official interpreter of the text of the Constitution, can void unconstitutional acts,107 and frequently decides cases by assessing Framer intent.108 Alternatively, Yoo addressed precedent by citing Bas, Talbot, and Little and wrote: “To be sure, these decisions contain dicta that could support arguments for exclusive congressional power over war.”109

The assumption that courts are required to abstain from adjudicating war powers questions is particularly problematic when combined with positions that presume that international law does not restrain the President. Yoo and other appointed attorneys endorsed the Bush Administration’s detention and interrogation orders due to the assumption that the initiatives were parcel to an unreviewable Commander in Chief authority, but critics maintained that the Executive’s initiatives violated human rights agreements and the Geneva Conventions.110 The judiciary’s authority to ascertain the binding effect of international law is designated in the Constitution: “The judicial Power of the United States . . . extend[s] to . . . Treaties.”111 The Restatement (Third) of the Foreign Relations Law of the United States also affirms that “Courts in the United States have final authority to interpret an international agreement . . . but will give great weight to an interpretation made by the Executive Branch.”112

106. Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure), 343 U.S. 579 (1952).
107. Alexander Hamilton spoke of the role of the judiciary as the check for “declar[ing] all acts contrary to the manifest tenor of the Constitution void.” T HE FEDERALIST NO. 78 (Alexan-
109. Fisher, supra note 51, at 1237–38 (2005) (internal quotation marks omitted) (citing Yoo,
supra note 90, at 294 n.584).
110. For example, Hamdi was detained for nearly three years without formally being charged, was abused, and was denied due process as he was labeled an “enemy combatant.” Nagwa Ibrahim, The Origins of Muslim Racialization in U.S. Law, 7 UCLA J. ISLAMIC & NEAR E.L. 121, 121 (2008-2009).
112. R ESTATEMENT (T HIRD) OF THE  F OREIGN R ELATIONS L A W OF THE  U NITED S TATES § 326(2) (1987). The tussle with Congress and the restrictions under international law are epito-
Perhaps the most puissant force that marginalizes the effectiveness of international law and the ability of other branches to check the Commander in Chief is the asymmetric discourse and executive prerogative that can prevail during a security threat environment. If a legal advisor expansively interprets national security operations and the President promotes the perception of security peril to the American public via the news media, the agenda setting and conception of operational need can reduce domestic and international checks on the Executive. National security environments can undermine the judiciary’s explicit authority, negate domestic critics, and divert scrutiny from substantive issues by emphasizing national pride and implying that the president is championing interests of the domestic citizenry when violating international law, even when the text of the Constitution binds the President to adhere to international law and the polity prefers compliance with and ultimately opposes breaching international law on the particular action.

mixed by the Marshall Court, which affirmed three principles: 1) the President must adhere to congressional boundaries when acting, 2) the President is bound to adhere to international law as long as that is feasible, and 3) the President’s interpretation of Congress’s grant of authority is not given deference. Neil Kinkopf, *The Statutory Commander in Chief*, 81 Ind. L.J. 1169, 1190 (2005).


116. The Framers respected international law. John Jay wrote: “It is of high importance to the peace of America that she observe the laws of nations . . . .” *The Federalist No. 3* (John Jay); see also Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other construction remains . . . .”); Paust, * supra* note 2, at 857 (explaining that the laws of the United States did not include the law of nations, but stating that this is completely erroneous); id. at 857–58 (“Yoo and De-Lahunty engaged in complete fabrication when pretending that cases like *The Schooner Exchange v. McFaddon* or *Brown v. United States* had anything to do with a claim that the President can violate customary international law.”).

D. Examples of Support for Yoo’s Position

Historical evidence confirms that Presidents understood and respected congressional authority and did not transgress legislative restrictions on war powers,118 but there have been some use of force actions that did appear as if the Executive usurped legislative power119 or elevated and rationalized its own authority.120 Moreover, it should not be assumed that all of Yoo’s preexisting ideological stances on war powers were so eccentric that they did not summon patronage from the legal community. The legal community can be divided on constitutional interpretation in the same way that the American polity can be divided on political agendas.

For example, Yoo’s ideological preferences ostensibly share similarities with the Federalist Society. The Federalist Society was formed in 1982, developed chapters at law schools, and has been at the forefront of sponsoring a “Unitary Executive” model that champions expansive foreign affairs and war powers for the president.121 Other scholars may locate affinity with the ideological position of the Framer-Federalists who principally strove to guard the national interest by maintaining a unified and strong national government,122 which included having a strong national legislature. By contrast, the Anti-Federalists were principally concerned with favoring sub-national levels of government as their favored means of serving democracy and citizen loyalties.123

Likewise, other scholars might emphasize that Framer debates over the “unitary” Executive accentuated the strength of the national government relative to the states124 and the necessity of having a single or “unitary” Executive that would be responsible for the Executive apparatus to inhibit the Executive from shirking obligations and

118. See Barron & Lederman, supra note 42, at 948, 952.
119. See Bradley & Goldsmith, supra note 79, at 2051.
123. See Jackson Turner Main, The Anti-Federalists Critics of the Constitution 1781–1788, at 184 (1961) (stating that the Anti-Federalists would have emphasized local government and maintained a confederation of sovereign states).
responsibility.\textsuperscript{125} The President’s foremost obligation under Article II is to “take Care that the Laws be faithfully executed,”\textsuperscript{126} which includes directing and correcting actions of agents.\textsuperscript{127} This is a conception of the unitary executive\textsuperscript{128} that might even be inconsistent with the Executive Branch using scapegoats to dilute responsibility of top officials.

There was also disagreement among Supreme Court Justices over issues on which Yoo rendered advice. For example, in a dissenting opinion, Justices Scalia, Alito, and Thomas reasoned that the Court should not intervene in cases involving the detention of “unlawful combatants” because the President determined there was a state of war after 9/11, which meant that by addressing disputes ancillary to that state of war, the Court would be interfering in military affairs and “bring[ing] the Judicial Branch into direct conflict with the Executive in an area where the Executive’s competence is maximal and ours is virtually nonexistent.”\textsuperscript{129} Other scholars would interpret the issues differently.

Besides issue convergence, given that courts adjudicate individual rights, the President cannot declare war. The 2001 AUMF was limited to using “necessary and proper” authority to respond to abettors of 9/11.\textsuperscript{130} If the President employs the phrases “war on terror” for over seven years in speeches, this does not necessarily mean that there really is a global war on terror that implicates a Commander in Chief authority that is unchecked temporally, in scope, or geographically.\textsuperscript{131} In fact, substantial literature developed over whether fighting terrorism should instead be regarded as a response to criminal acts.\textsuperscript{132} Per-


\textsuperscript{126} U.S. CONST. art. II, § 3.


\textsuperscript{128} See Menitove, \textit{supra} note 72, at 778 (stating that the Founders’ understanding of “unitary” did not include initiating hostilities or expanding executive authority vis-à-vis the legislature).


\textsuperscript{131} Bejesky, \textit{CFP}, \textit{supra} note 113, at 8–15. Nonetheless, members of the United States District Court held the presence of United States soldiers in Afghanistan and their actions to detain al-Qaeda members were evidence of an undeclared war. See Padilla v. Rumsfeld, 352 F.3d 695, 699 (2d Cir. 2003), rev’d, 542 U.S. 426 (2004).

\textsuperscript{132} See Bejesky, \textit{CFP}, \textit{supra} note 113, at 10–11 (discussing debates on the issue).
haps the most consequential conundrum for the judiciary was that the Bush Administration did assume that there was a global war and com-
mingled lawful combatants, unlawful combatants, and suspected ter-
rorists, and assumed guilt in a Military Commissions process that was an abysmal violation of human rights.\textsuperscript{133}

E. Answering Questions One and Two

To summarize, a legal advisor’s ideological positions can span a
gamut of issues, and opinions will incorporate logical reasoning, con-
stitutional interpretation, and pragmatism for the issues at hand. The selection of legal advisors may set expectations for the substance of
the legal advice that a government is apt to receive. The more that the
government was cognizant that the selected legal advisor held strong
predispositions on the issues in question, that those inclinations would
favor the government’s desired policy action, that the legal advisor
would be required to reverse preferences to render a position in oppo-
sition to the regime’s preference, and that known inclinations were
consistent with the advice actually produced, the more the govern-
ment should be cautious and welcome alternative views prior to exe-
cuting operations dependent on that legal consultation. In this case,
responsibility for illegal and condemnable policy actions should drift
more toward the government and away from the legal advisor. The
following Part considers some of Yoo’s core advice, based on requests
from the Bush Administration.

III. LEGAL ADVICE

A. An Encompassing Presidential Authority to Use Force

Among the positions taken in about a dozen memos, Yoo empha-
sized a broadly-applicable theory of exigency for self-defense of na-
tion, which may obfuscate Executive prerogative by commingling
emergency powers and war powers and impart the impression that
once Congress grants authority to use military force, this situation be-
gets unchecked emergency powers.\textsuperscript{134} Domestically, because of the

\textsuperscript{133} See generally Robert Bejesky, Closing Gitmo Due to the Epiphany Approach to Habeas
Corpus During the Military Commissions Circus, 50 WILLAMETTE L. REV. (forthcoming fall 2013) (reflecting on the repercussions of the President’s detentions, denial of habeas corpus, and
guilt determinations).

\textsuperscript{134} See Yoo, supra note 48, at 71 (“[T]he president [was] seen as the representative and
protector of the people, and his sole command over the military without formal legislative con-
trol [was] crucial to the separation of powers and the public safety.”); John Yoo, Transferring
supposition of ongoing jeopardy, Yoo stated that the Fourth Amendment did not apply if the President wanted to arrest terror suspects inside the U.S., which was unsurprising because Yoo was one of the authors of the Patriot Act.

President Bush also issued a year-long “national emergency” following 9/11 and kept issuing annual emergencies in succeeding years. However, the factual basis for presuming ongoing peril as American society continued to function as usual was specious. The first terrorist attack on United States soil since 9/11 occurred at the 2013 Boston Marathon when two bombs exploded and killed three Americans and injured dozens more. Professor Ian Lustick reminds us that there has been no overwhelming evidence of “sleeper cells,” “attacks,” or “preparation for an attack.” Had there been additional attacks, it is also unclear how domestic dangers would have been linked to constitutional war powers authorized by Congress for carrying out war against Afghanistan and Iraq. If anything, the presumption of continuing threat probably had the foremost consequence of silencing domestic critics on the development of military operations in foreign countries that were altogether irrelevant to purported peril.

Terrorists, 79 Notre Dame L. Rev. 1183, 1235 (2004). Once a war is commenced, there is a “different set of rules—the laws of war—than those that apply to domestic, peacetime affairs.” Id.

135. See Tim Golden, After Terror, A Secret Rewriting of Military Law, N.Y. Times, Oct. 24, 2004, http://www.nytimes.com/2004/10/24/international/worldspecial2/24gitmo.html?pagewanted=print&r=0. If the President believed it was warranted, “the Fourth Amendment should be no more relevant than it would be in cases of invasion or insurrection.” Id. (internal quotation marks omitted).


139. Ian S. Lustick, Fractured Fairy Tale: The War on Terror and the Emperor’s New Clothes, 16 Minn. J. Int’l L. 335, 338 (2007); see also Bejesky, Rational Choice, supra note 114, at 37–44. A recent “independent, nonpartisan panel’s examination of the interrogation and detention programs” implemented by the Bush Administration found them in violation of international law and stated that there was “no firm or persuasive evidence” that they produced valuable information that could not have been obtained by other means.” The Editorial Board, Indisputable Torture, N.Y. Times, Apr. 16, 2013, http://www.nytimes.com/2013/04/17/opinion/indisputable-torture-of-prisoners.html; see also David Cole & Jules Lobel, Are We Safer?, L.A. Times, Nov. 18, 2007, at M4 (noting that the Justice Department claimed that there were 261 “terrorism and terrorism-related” convictions, but only two cases actually involved attempted terrorist activity).
inside the U.S. After all, terrorism is by definition an attack on civilians, and American civilians are not located in foreign war zones.

Indicative of assumptions regarding inherent authority, Yoo wrote that “the [post-9/11] Joint Resolution is somewhat narrower than the President’s constitutional authority.” The caption to the same memo states that “Congress has acknowledged this inherent executive power in both the War Powers Resolution and the Joint Resolution passed by Congress on September 14, 2001.” Actually, the War Powers Resolution of 1973 affirmatively preempts the President from engaging in unauthorized hostilities and affirms that the President does not have inherent authority. Nonetheless, the Bush Administration contended that the President had the constitutional right to ignore laws that supposedly infringed on Commander in Chief discretion. Under the Constitution, Congress vests the Executive with war power authority and defines the scope of the Commander in

140. U.N. Secretary-General, High-Level Panel on Threats, Challenges & Change, A More Secure World: Our Shared Responsibility: Rep. of the Secretary-General, ¶164, U.N. Doc. A/59/565 (Dec. 2, 2004) (“[Terrorism is any action] intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing an act.”) (internal quotation marks omitted).

141. Memorandum from John Yoo, supra note 53. Yoo acknowledges that the AUMF does not cover terrorist affiliations lacking a connection to 9/11, but contends that terrorist affiliations unconnected to 9/11 can still be targeted because of “the President’s broad constitutional power to use military force to defend the Nation.” Id. Quite clearly, the President has the inherent authority to use military force to thwart an imminent attack on the nation and to respond to an actual attack, but to contend that there is an inherent authority that extends to any conceivable group, state, or individual without tangible and verified danger to the U.S. and that the U.S. military can preemptively be ordered to thwart some uncertain threat, which would logically be located outside the United States, is foolish.

142. Memorandum from John Yoo, supra note 53.

143. See 50 U.S.C. § 1541 (2012) (“The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”). The War Powers Resolution (WPR) can permit the President to use a limited amount of force for a limited period with informal congressional assent. See generally Bejesky, Section 5(b), supra note 82 (addressing the constitutionality of Section 5(b)). Likewise, the WPR does reference a “national emergency,” but this authority is found in the Constitution. See U.S. CONST. pmbl. (providing “for the common defense”); id. art. II, § 2 (establishing that the President must “defend the Constitution of the United States”). The 9/11 attacks did not facilitate a “national emergency” that could permit the President to utilize the armed forces outside the U.S. because the attacks had ceased and it was unknown from where the attacks were planned. Congress empowered the President with the AUMF.

144. See Barron & Lederman, supra note 42, at 944 (“The Administration of George W. Bush has boldly argued that the President, in his capacity as Commander in Chief, has the constitutional authority to disregard many laws that impinge upon his discretion to prosecute armed conflicts in the manner he deems best.”).
Chief authority. The post-9/11 Authorization to Use Military Force (AUMF) only permitted the President to respond to individuals, states, or organizations involved in the 9/11 attacks, but that assent was broadly interpreted.

As a headlined conclusion, Yoo stated that the President’s constitutional authority meant that “[t]he President may deploy military force preemptively against terrorist organizations or the States that harbor or support them” even if the targets had no connection to 9/11. It is not clear if Bush relied on Yoo’s legal opinion because Yoo issued this opinion several days after the President announced publicly that every global terrorist group was the target, and that military action would not end until everyterrorist group was defeated. For the execution of that mission, Yoo opined that neither the War Powers Resolution nor the AUMF “can place any limits on the President’s determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under our Constitution, are for the President alone to make.” This sweeping conclusion is inconsistent with the U.S. Constitution, relevant precedent, and jurisprudence.

This position, in which the President assumed a continuing war power authority that Congress had no right to tamper with, prolonged. In late-April 2007, Congress passed a bill requiring U.S. troops to be completely withdrawn from Iraq within six months, but

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145. See Robert Bejesky, War Powers Pursuant to False Perceptions and Asymmetric Information in the “Zone of Twilight,” 44 ST. MARY’S L.J. 1, 12, 28–31 (2012); Lobel, supra note 89, at 445.
146. See Bejesky, CFP, supra note 113, at 9–15.
147. Memorandum from John Yoo, supra note 53.
148. President George Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), available at http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html (“Our enemy is a radical network of terrorists, and every government that supports them. Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.”).
149. Memorandum from John Yoo, supra note 53; see also Jennifer Van Bergen & Douglas Valentine, The Dangerous World of Indefinite Detentions: Vietnam to Abu Ghraib, 37 CASE W. RES. J. INT’L L. 449, 461 (2006) (“Through his Military Order, Bush granted himself extraordinary powers to identify al Qaeda members and those who harbor them . . . .”); see also Streichler, supra note 3, at 93–94 (finding that Yoo’s memorandum after 9/11 provided a legal foundation for the President to independently decide how to fight terrorists and interests that support them). Hamdan v. Rumsfeld curbed expansive interpretations of executive war power, but three Justices believed the President should have discretion to manage military tribunals without judicial intervention because of the AUMF and the alleged state of war after 9/11. Hamdan v. Rumsfeld, 548 U.S. 557, 676–78 (Scalia, J., dissenting). The President’s determination during a time of war should be granted a “heavy measure of deference.” Id. at 680 (Thomas, J., dissenting).
Bush vetoed the bill and stated that “this legislation is unconstitutional because it purports to direct the conduct of the operations of the war in a way that infringes upon the powers vested in the President by the Constitution, including as Commander in Chief of the Armed Forces.”\textsuperscript{150} This was ostensibly a misrepresentation of the separation of war powers\textsuperscript{151} and there are many reasons the President’s authority in Iraq should have been curtailed or even viewed as expired.\textsuperscript{152}

For example, it is not clear that the President ever possessed the requisite authority to even attack Iraq under the AUMF-Iraq because the conditions for the use of force were not met. Professors Ackerman and Hathaway correctly emphasized that the AUMF-Iraq was a limited authorization to use force conditioned on there being an actual imminent threat, which means that when the White House began offering additional rationalizations after the war, particularly of humanitarian intervention, “such talk was blatantly inconsistent with the plain language of the 2002 resolution.”\textsuperscript{153} Likewise, even if the AUMF was properly executed, Bush announced that the war was over in May 2003 when he stood on the deck of the USS Abraham Lincoln and stated: “In the battle of Iraq, the United States and our allies have prevailed,” which makes the termination of the Commander in Chief authority a decisive question.\textsuperscript{154} In this case, it does not appear that Yoo had anything to do with the President’s declaration that Congress was powerless to withdrawal troops in 2007. Yoo had already left the Attorney General’s office, but Bush’s veto message was consonant

\textsuperscript{150} See H.R. 1591, 110th Cong. § 1904(c), (e) (2007). But see H.R. Doc. No. 110–31 (Veto Message from the President) at 153 CONG. REC. H4315 (May 2, 2007).

\textsuperscript{151} Derek Jinks & David Sloss, \textit{Is the President Bound by the Geneva Conventions?}, 90 CORNELL L. REV. 97, 172 (2005) (“For the past eighty years, no scholar has undertaken an in-depth analysis of the proper line of demarcation between the Commander in Chief’s exclusive power over battlefield operations and the areas where Congress and the President share concurrent authority.”); Saikrishna Prakash, \textit{Regulating the Commander in Chief}, 81 IND. L.J. 1319, 1319–23 (2005) (stating that there was no official examination of Bush’s contention that Congress could not end the war).


\textsuperscript{154} Presidential Address to the Nation on Iraq from the USS Abraham Lincoln (May 1, 2003), 39 WEEKLY COMP. PRES. DOC. 516, 516 (May 5, 2003); Loyola Public Interest at 40–46 (providing additional reasons for the uncertain point at which the President’s war powers ended)
with an ideological preference for expansive Commander in Chief authority.

Returning to the influence of perception management on war powers, troubles compound with the President’s capability to employ informational dominance with agenda setting, newsmaker releases to the media, and control of the national security apparatus, all of which can enfeeble legislative checks. In a law review article, Professors Nzelibe and Yoo contended that because Congress does not have the access to information that the President can possess, the President “should have the constitutional authority to initiate war . . . [Regarding the AUMF-Iraq,] Congress brought no independent collection or analysis.” In some circumstances, this position might be compelling, but there is a latent jeopardy when the President has dominion over the national security apparatus, can classify and declassify information without difficulty, and can utilize agenda setting. The President could initiate a security crisis and potentially a war whenever there is a sufficiently formidable quantity of unverified, classified intelligence scuttlebutt, which was the case with Iraq. Had President Bush not urged Iraqi defectors to dispense their accounts of alleged weapons of mass destruction and Iraqi connections to terrorists, declassified baseless rumors, incessantly repeated dire peril to Americans for six months to frame the security crisis, and kept data that disproved the claims classified, the false information would not have deluded Congress and the American people. A more formidable peril than not reacting expeditiously to address an alleged (but ultimately nonexistent) danger, may exist in failing to validate the factual basis for danger in light of “executive manipulation of information to exaggerate a threat.”

155. This was a pivotal concern with the information sharing provisions in the War Powers Resolution of 1973. See 50 U.S.C. § 1541 (2012); Bejesky, Flow, supra note 114, at 403–10; Bejesky, Press Clause, supra note 113, at 348–56.


158. There was a lack of credible information. See Robert Bejesky, Intelligence Information and Judicial Evidentiary Standards, 44 CREIGHTON L. REV. 811, 875–82 (2011) [hereinafter Bejesky, Intelligence Information]; Bejesky, Poltico, supra note 117, at 70, 75–78.


160. Bejesky, Flow, supra note 114, at 408–20; Bejesky, CFP, supra note 113, at 5–7, 15–18; Bejesky, Intelligence Information, supra note 158, at 875–82.

B. Detention, Interrogation, and Torture

Yoo’s preexisting positions on the role of international law and the role of the judiciary in checking the President were consistent with the substance produced for advisory memos. In December 2001, Yoo was the coauthor of an opinion that maintained American courts lacked jurisdiction over foreign prisoners transported to Guantánamo Bay because the base was outside the territorial jurisdiction of the U.S., which meant that prisoners had no right to habeas corpus review.162 Yoo wrote a memo stating that the Geneva Conventions were inapplicable to captured Taliban or al-Qaeda prisoners, which became an abiding question for scholars.163 Prior to the Bush administration entering office, Congress needed to authorize “Extraordinary Renditions,” which can involve U.S. agents transgressing the sovereignty of a third-party state to apprehend an individual and rendering that individual to another third-party state that is known for using torture to obtain information via interrogation in violation of international law.164 Yoo opined that the decision to order Extraordinary Renditions was part of the Commander in Chief authority.165 The President could “dispose of the liberty of captured enemy personnel as he sees fit,” even though the purpose with most past extraordinary rendition cases was to deliver the accused to justice.166

The Washington Post recounted that Yoo’s guidance became so indispensable that he was being “summoned” to the White House to answer urgent inquiries from the CIA so that the agency would know

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162. Memorandum from Patrick F. Philbin and John C. Yoo, Deputy Assistant Att’y Gen. to Michael Haynes, Gen. Council, Dep’t of Def. on Possible Habeas Jurisdiction Over Aliens Held in Guantánamo Bay, Cuba (Dec. 28, 2001) (on file with George Washington University Library) (“[T]he great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at GBC.”).

163. See Memorandum from Jay S. Bybee, Assistant Att’y Gen. to Alberto Gonzales, Gen. Counsel to the President, and William J. Haynes, Gen. Counsel of the Dep’t of Def. on the Application of Treaties and Laws to Al Qaeda and Taliban Detainees (Jan. 22, 2002); Memorandum from John Yoo, Deputy Assistant Att’y Gen. and Robert J. Delahunty, Special Counsel to William J. Haynes II Gen. Counsel, Dep’t of Def. on Application of Treaties and Laws to Al Qaeda and Taliban Detainees, (Jan. 9, 2002); see also Robert Bejesky, How the Commander in Chief’s “Call for Papers” Veils a Path Dependent Result of Torture, 40(1) SYRACUSE J. INT’L L. & COM. (forthcoming fall 2013) (manuscript at 16–35) [hereinafter Bejesky, Call for Papers].

164. See Robert Bejesky, Sensibly Construing the “More Likely Than Not” Threshold for Extraordinary Rendition, 23 KAN. J.L. & PUB. POL’Y (forthcoming 2013) (manuscript at 1, 9–10, 12) [hereinafter Bejesky, Sensibly Construing].


166. Id. at 1407, 1413 (internal quotation marks omitted).
“what the legal limits of interrogation are.” 167 Additionally, he was the author, or at least one of the authors, of the notorious “torture memos.” 168 Yoo, however, did not formulate interrogation methods. The CIA spent over a decade researching psychological interrogation methods, wrote the Kubark Interrogation manual in 1963, emphasized how it was important to invoke phobias and fear, utilize humiliation and stress positions, impose self-inflicted pain, and used many interrogation methods that were quite akin to Bush Administration directives. 169

Yoo issued opinions about the amount of pain that could legally be inflicted by specified interrogation methods, and addressed whether that pain would be elevated to the level of “torture.” 170 Yoo enumerated a list of interrogation procedures that would be authorized tactics and contended that even if approaches would otherwise be crimes and torture, they would be legal interrogation tactics if the President authorized the methods in an effort to procure information from suspected terrorists. 171 The Geneva Conventions prohibit interrogation of captured combatants and that per se restriction is unrelated to levels of pain, 172 but, in fact, proscribes even subtle levels of coercion. Legality turned on classifying combatants even though


168. Saltzman, supra note 38, at 440 (stating that it was later reported that Yoo wrote this memo and Bybee approved it).


170. Fisher, supra note 51, at 1234.


172. “Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information. . . . No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.” Geneva Convention Relative to the Treatment of Prisoners of War art. 17, Aug. 12, 1949, 6 U.S.T. 3316. See generally Aaron E. Garfield, Note, Bridging a Gap in Human Rights Law: Prisoner of War Abuse as “War Tort,” 37 GEO. J. INT’L L. 725, 750 (2006) (explaining that the treatment of prisoners of war is primarily defined by The Third Geneva Convention of 1949).
some scholars maintain that distinctions cannot escape the obligation to provide humane treatment to all detainees.\textsuperscript{173}

For interrogator discretion and liability, Yoo explained that “[i]f a government defendant were to harm an enemy combatant during an interrogation in a manner that might arguably violate a criminal prohibition, he would be doing so to prevent further attacks on the United States by the al Qaeda terrorist network;” hence, interrogations would be conducted in self-defense, eliminating an interrogator’s potential criminal mens rea.\textsuperscript{174} Violations of Section 702 of the Restatement of the Foreign Relations Law include murder, gross violations of human rights, arbitrary or prolonged detention, degrading treatment or punishment, and torture.\textsuperscript{175} Yoo detailed why U.S. laws that proscribed maiming others were inapplicable to the President, and itemized examples that contended that during war, the President could legally dispense directives that might result in having a prisoner’s eyes poked out, having scalding water and corrosive acid poured on a prisoner, drugging detainees, or even disabling a tongue or limb.\textsuperscript{176} When asked in a public forum, Yoo agreed that the President could even grant the authority to government agents to crush the genitalia of a small child in front of the child’s parents if the President believes such an extreme could be necessary to coerce the parents into revealing vital terrorist information.\textsuperscript{177}

In defense of his opinions, Yoo maintained that he was being neutral and offering objective legal positions and retorted that previous administrations were adrift for not endorsing a more expansive vision of presidential power.\textsuperscript{178} The contents of these memos and Yoo’s advice surely did not always represent a common position of the legal profession, given the scorn that emerged from the legal community after many memos surfaced.\textsuperscript{179} Professor Harold Koh called the legal

\textsuperscript{173} See Bejesky, Call for Papers, supra note 163, at 28–35.
\textsuperscript{174} Yoo, supra note 171, at 80.
\textsuperscript{175} See Restatement (Third), supra note 112, at 702.
\textsuperscript{177} Scott Horton, Deconstructing John Yoo, Harpers (Jan. 23, 2008, 9:39 AM), http://harpers.org/blog/2008/01/fisking-john-yoo/ (“[John Yoo, who has been a] steady defender in public fora of waterboarding and crushing the genitalia of small children, feels he is being persecuted.”).
\textsuperscript{178} See Power, supra note 3, at 47.
memos “a disgrace, not only to that office, but the entire legal profession.”\textsuperscript{180} Over one hundred prominent lawyers, including judges, law professors, and seven former ABA presidents, signed a letter condemning the memorandum.\textsuperscript{181} The Supreme Court not only decided war power cases such as \textit{Hamdi v. Rumsfeld},\textsuperscript{182} \textit{Rasul v. Bush},\textsuperscript{183} \textit{Hamdan v. Rumsfeld},\textsuperscript{184} and \textit{Boumediene v. Bush},\textsuperscript{185} but also contradicted much of the substantive advice on detention and interrogation rendered by Bush Administration attorneys.\textsuperscript{186}

\section*{C. Answering Questions Three and Four}

Ultimately, it appears that John Yoo, as a Deputy Assistant Attorney General at the U.S. Attorney General’s office, sanctioned much of what an aggressive unilateralist administration would prefer.\textsuperscript{187} Or, another interpretation is that Yoo did not eagerly offer counsel suggesting that there were effectual legal restrictions on the President, which ultimately has the same outcome as sanctioning.

\begin{thebibliography}{188}
\bibitem{Bentham} Bentham of Oxford University spoke of “torture” on a mother in the case of “a Mother or Nurse seeing a child playing with a thing which he ought not to meddle with, and having forbidden him in vain pinches him till he lays it down.” Jeremy Waldron, \textit{Torture and Positive Law: Jurisprudence for the White House}, 105 \textit{Columbia L. Rev.} 1681, 1697–98 (2005) (internal quotation marks omitted) (quoting Bentham Manuscripts, University College London Collection, box 46, 63–70). Yoo’s position on the mental impact would assuredly go further.
\bibitem{Hamdi} Higham, supra note 179, at A04.
\bibitem{Rasul} Hamdi v. Rumsfeld, 542 U.S. 507, 507 (2004). In \textit{Hamdan}, the divided Court held that the Judiciary has the final authority to interpret war-related treaties, which means that the Court was asserting authority to curtail the President’s discretion as Commander in Chief. See Arend, supra note 111, at 730.
\bibitem{Rasul1} See \textit{Rasul v. Bush}, 542 U.S. 466, 466–79 (2004) (holding that non-citizen enemy combatants held outside United States jurisdiction had the right to attain habeas corpus relief over their detention).
\bibitem{Boumediene1} Likewise, when the \textit{Boumediene} decision was handed down, Ronald Dworkin wrote: “The Supreme Court has now declared that this shameful episode in our history must end.” Ronald Dworkin, \textit{Why It Was a Great Victory}, N.Y. Rev. Books (Aug. 14, 2008), http://www.nybooks.com/articles/archives/2008/aug/14/why-it-was-a-great-victory/?pagination=false.
\bibitem{Scharf} See Michael P. Scharf, \textit{Accountability for the Torture Memos: International Law and the Torture Memos, 42 Case W. Res. J. Intern. L. 321, 343 (2009); Scharf, supra note 23, at 82. In a survey of ten former government counsel who advised the Executive against taking certain actions, such as by advising against the use force on the Iranian embassy in Washington during the Iranian hostage crisis and against using force against Libya after a Libyan attack on airline passengers in Italian airports in 1985, policymakers heeded that advice, but “Yoo wrote opinion after opinion approving every aspect of the Bush Administration’s” use of force efforts. \textit{Id.}
\end{thebibliography}
There are nearly 40,000 lawyers employed in the federal government, but Yoo, as a comparatively less seasoned attorney-advisor based on years of experience, was appointed for a brief duration and penned memos for decisive foreign policy actions that an administration should have reasonably believed would have had protracted and far-reaching impact.

In addressing the third and fourth queries set forth in Part II, it appears that Yoo knew his advice would be implemented because he was repeatedly requested to issue opinions for fact-driven questions that were consistent with directives the Bush Administration implemented. Yoo contended that he was being objective, which was consistent with his general expansive view of presidential war powers, but the legal community disagreed with many advisory positions. Part IV considers a commonsense analysis.

IV. LEGITIMATE RELIANCE OR ENLISTING A SCAPEGOAT?

A. Balancing Responsibility

If the regime selects a legal advisor with noticeable penchants and that lawyer renders consultation consistent with those penchants, a fifth question for probing the factual context surrounding the advice and the relationship between the attorney and government is whether commonsense should reasonably suggest that implementing actions in accordance with the legal guidance could result in societal outrage or even criminal or civil liability. Professional obligations do require the OLC legal advisor to be objective, and even if like-thinking attor-

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188. Radack, supra note 5, at 4.
189. Id. at 39 (“Even though he was quite young, he exercised disproportionate authority because of his personality and his strong opinions.”) (remark from former Pentagon lawyer). Yoo served two years in the Bush Administration, and returned to his academic position. John Yoo Biography, Berkeley Law, http://www.law.berkeley.edu/faculty/yooj/ (last visited Oct. 3, 2013).
190. See Jay S. Bybee, Memorandum for Alberto R. Gonzales Counsel to the President, in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (noting that Yoo and Jay Bybee acknowledged that interrogators would be relying on their advice).
191. The potential consequence is that after action is taken without repercussion or a judicial or congressional check, events may build precedent for expansive executive power even if the premises underlying the controversial executive action were faulty and originally derived from controversial legal opinions.
192. See Radack, supra note 5, at 35 (encapsulating the professional responsibility rules in the context of what transpired during the Bush Administration). The government advisor is responsible to be a guardian of the rule of law and provide “complete information and even-
neys are appointed, it is not reasonable to assume that the legal advisor cannot isolate personal inclinations to render an objective and thorough analysis irrespective of an administration’s preferences. There have been historical instances in which the Attorney General’s office offered war powers opinions that were diverse and objective and did not seek to affirmatively burgeon into absolute Executive war power. An OLC legal advisor clearly has the option, if not obligation, to choose neutrality, but practice indicates that the OLC has also promoted deference to presidential authority.

With the potentiality that the lawyer can be torn between being objective and favoring positions that demonstrate excessive loyalty to an administration, at least some obligation to assess proclivity for bias should rest squarely on the government. Considerations that should contribute to a commonsense warning of bias include the political affiliations of the advisor (as balanced against the existing conditions that would promote the OLC’s institutional integrity), the terms of the government’s request for consultation, whether the government exercised due diligence by opening questions of the legality of policy actions to a broad spectrum of the legal community, and whether a reasonable person would adduce that the substantive advice was amiss.

First, from previous writings, Yoo’s ideological position on separation of war powers lucidly brandished disposition for expanding “in-
herent executive authority,” which would have been known to and favorable for a President who desired to exercise unchecked authority. This preference is also consistent with political philosophy; Republicans are more apt to countenance an inherent authority model that permits the Executive to implement military action without congressional interference, and Democrats are more likely to prefer adequate congressional advice and consent for military actions. Moreover, policymakers in the Bush Administration overtly acknowledged that they were deviating from precedent by advancing an excessively potent Commander in Chief authority, but they did so by invoking a false supposition—that there had been a degenerating Executive Branch that needed to be aggressive in upholding the institutional integrity of the presidency. In this case, expanding

197. See supra Part III(B).


199. The rendition of a weak presidency in American government is inaccurate; there was an expansion of executive authority beyond the constitutionally required balance of power between the Congress and the President long before Bush took office. See generally Michael J. Glennon, CONSTITUTIONAL DIPLOMACY 80–81 (1990) (“In recent decades, presidents have assumed the power to involve the armed forces in warfare.”); Louis Henkin, CONSTITUTIONALISM: DEMOCRACY, AND FOREIGN AFFAIRS 30, 41–43 (1990) (discussing the shift in focus from the President’s power to the power of Congress); Peter Irons, WAR POWERS: HOW THE IMPERIAL PRESIDENCY HJACKED THE CONSTITUTION 2 (2005) (“[P]residents from Theodore Roosevelt through George W. Bush have undermined the Constitution by usurping the power to ‘declare war’ that its Framers had placed in the hands of Congress.”); Arthur M. Schlesinger, Jr., The IMPERIAL PRESIDENCY viii–ix (1973) (detailing the gradual assumption of “war-making power” by the presidency throughout the twentieth century). See also William P. Marshall, The Limits on Congress’s Authority to Investigate the President, 2004 U. ILL. L. REV. 781, 782 (2005) (“The presidency is now indisputably the most powerful branch of the federal government.”); Harold Hongju Koh, Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair, 97 YALE L.J. 1255, 1256 (1988) (“[T]he flaws in the current decisionmaking system stem from a growing trend of executive initiative . . . .”); Ariel Meyerstein, The Law and Lawyers as Enemy Combatants, 18 U. FLA. J.L. & PUB. POL’Y 299, 303–04 (2007) (“This perversion of the rule of law [during the Bush Administration] has come hand in hand with a radical reinterpretation of the powers of the Executive, which is a continuation of a struggle . . . over the last two decades.”); J. Gregory Sidak, To Declare War, 41 DUKE L.J. 27, 36 (1991) (proclaiming the fear of legislative encroachment has diminished). But see Robert F. Turner, TRUMAN, KOREA, and the Constitution: Debunking the “Imperial President” Myth, 19 HARV. J.L. & PUB. POL’Y 533, 533 (1996) (“[M]odern American Presidents have usurped the constitutional authority of Congress to pass judgment upon decisions to send American soldiers to war.”); Robert J. Spitzer, Bush, the Post-Bush Presidency, and the Constitutional Order 8 (Sept. 3, 2009) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1450695 (“[Bush’s unitary power claims are] the fulfillment or realization of some long lost or misunderstood vision of the Constitution’s framers regarding executive power.”). Other activist Presidents, such as Franklin D. Roosevelt and Lyndon Johnson, expanded executive power but did it by “traditional persuasion, bargaining[,] and other political tools.” Id.
presidential power is cogently framed on the notion that distending executive authority is salutary to the institution of the presidency, the nation, and Americans; previous administrations imprudently weakened the Executive.  

Professor David Fontana explained that John Yoo and Jay Bybee, the OLC lawyers who wrote memos, had clear Republican credentials and affiliations, and all of the other officials who reviewed the memoranda were “Republican-appointed or at least Republican-affiliated officials, including by then-White House Counsel Alberto Gonzales.”  

Yoo overtly “defined himself as a partisan Republican[,]” devoted to the Republican Party and Bush.  

It is hypothetically possible that Yoo would not have been selected as a leading attorney in the OLC or been requested to produce the memos had he not positioned himself with those preexisting writings or exhibited partisan allegiance. Of all the thousands of attorneys in the Department of Justice, the same advisors kept being summoned to issue crucial memos.  

Yoo later candidly remarked: “I’ve defended the administration’s legal approach to the treatment of al-Qaeda [sic] suspects and detainees,” including harsh interrogation. 

If the approach the administration adopted was based on objective advice, this disposition seems apposite to the post facto role of the zealous advocate, but if the intention champions support for directives that the administration resolutely already chose, the statement suggests that Yoo was unaware that he was required to render objective advice ex ante to a dispute.

Impeding politicization of legal advice may be more difficult with weak institutional restraints within the advising agency. One position is that the OLC could be impelled to issue obeisant opinions that ultimately aggrandize presidential power because it lacks an institutionalized monopoly over the provision of legal advice and must compete for clout with counsel of other agencies and legal officers inside the government. 

General Counsel and other legal counsel that offer judicial independence have an institutionalized monopoly, but the OLC lacks the independence. Yoo’s views on the relationship between presidential power and Justice Department officials who review the advice are consistent with his own involvement in judicial independence and separation of powers protections: “The Constitution is only as strong as the executive branch respects it, and that is where I believe I fit in.”

...
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advisory opinions on domestic or international law could issue opinions to curry favor with bosses.\textsuperscript{206} Once opinions are issued and controversial government action is taken, no prosecutor is apt to indict when there is a Justice Department opinion that authorizes the practices\textsuperscript{207} and political appointees serve in top posts. Pertinent to the time period in which legal memos were declassified, Alberto Gonzales was appointed attorney general in 2005, and he was Bush’s White House counsel who was receiving and concurring with Yoo’s memos that were written from 2001 to 2003.\textsuperscript{208} In 2006, there was also a direct influence placed on the Attorney General’s office when eight Department of Justice prosecutors were fired\textsuperscript{209} in order to “manipulate prosecutorial decisions in an effort to entrench their political allies,” but “[t]he White House, of course, denied any involvement.”\textsuperscript{210} Congressional investigations subsequently revealed that White House officials did play an active role in the firings and that there was “politicization of the American criminal justice system.”\textsuperscript{211}

Second, officials in the Bush Administration should have known that resulting legal advice may not have been serendipitously fortuitous due to the terms of the request. Newsweek explained that the message from Bush to White House lawyers “recalls one who was deeply involved at the time, was clear enough: find a way to exercise the full panoply of powers granted the [P]resident by Congress and the Constitution. If that meant pushing the boundaries of the law, so be it.”\textsuperscript{212} Professor Jack Goldsmith, who was later appointed by Bush

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\textsuperscript{208} See Bejesky, \textit{Call for Papers}, supra note 163, at 5, 48–49. The CIA went to the White House to be informed of the limits on interrogation. See Gellman & Becker, supra note 167. This does seem to be a logical step to create consistency between directives and limitations that could result in punishment for directives—the White House or Pentagon issues directives, the CIA executes orders, and the Justice Department enforces the law—but the White House does not bring charges.


\textsuperscript{210} Eric Lane, Frederick A.O. Schwarz, Jr. & Emily Berman, \textit{Too Big a Canon in the President’s Arsenal: Another Look at United States v. Nixon}, 17 Geo. Mason L. Rev. 737, 770 (2010).

\textsuperscript{211} Id. at 770–71.

to head the OLC, stated that the Bush Administration wanted to “act aggressively and preemptively,” but because they feared prosecution, the solution required having lawyers “find some way to make what [Bush] did legal.”

If the Bush Administration requested a predetermined result to defend decisions already made and legal advisors were tasked or petitioned to discern consonant arguments to sustain that request, some advisors might not interpret the inquiry as an appeal to be balanced, but as a solicitation to impart politicized advice impregnated with technicalities, which is more akin to the attorney’s zealous advocate role during litigation. This is not to surmise that all requests for consultation were accompanied by a similar appended caveat, but successions of legal memos produced for the Bush Administration did reflect advocacy rather than objective analysis. Professor David Scheffer remarked that “these lawyers—perhaps with honest but grossly misguided intentions—did exactly what was required of them to fulfill the expedient objectives of their political masters.”

The due diligence of the government-client that requests advocacy briefs to sustain decisions already made from attorneys with known inclinations becomes all the more unreasonable if the government would have disregarded or supplanted opposing legal analysis with amenable positions, or builds a firewall around opposing positions.

Third, the Bush Administration did build a firewall by exploiting national security secrecy prerogatives that hid legal memos that were purportedly relied upon to justify orders, which was particularly the case for advisory memos related to interrogation and torture. It was
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not until after scandal surfaced that successions of legal advisory memos emerged,\textsuperscript{217} but in many cases legal memos were not scheduled to be declassified until after Bush left office.\textsuperscript{218} In one example, Yoo produced a twenty-one page memo on wiretapping on November 2, 2001, and the entire document, except for eight sentences, was redacted.\textsuperscript{219} Professor Jack Goldsmith, the new head of the OLC after Bybee, acknowledged that the memos were kept secret, that there was “limited readership,” and that other departments, such as the State Department, would be expected to object to the opinions.\textsuperscript{220}

The Justice Department Office of Professional Responsibility later tendered a rather astounding explanation, which was that there were very few recipients of the legal memoranda because of “the limited number of security clearances granted to review the materials,” and that the denial of clearances departed from the “OLC’s traditional practices of widely circulating drafts of important opinions for

\textsuperscript{217} Now, PBS (May 21, 2004), http://www.pbs.org/now/thisweek/index_052104.html (“Since the release of the Abu Ghraib prison abuse photos, speculation has arisen as to whether the administration knew about or even sanctioned the use of torture.”). Scott Horton, President of the International League of Human Rights, identified the classified memo as “a legal framework to justify a secret system of detention and interrogation that sidesteps the historical safeguards of the Geneva Convention.” Id. (internal quotation marks omitted). With respect to the secrecy for authorized interrogation operations, Cofer Black, head of the CIA’s Counterterrorism Center, stated: “This is a very highly classified area, but I have to say that all you need to know: There was a before 9/11, and there was an after 9/11 . . . . After 9/11 the gloves come off.” Anthony Arnow, Iraq: The Logic of Withdrawal 26 (2006) (internal quotation marks omitted).

\textsuperscript{218} For example, when pressed about specific legal device, Gonzales explained that he renounced advice imparted in one of the memos and would review other opinions issued by the OLC (or “John Yoo”), but the document in question was not scheduled to be declassified until 2012. See Mike Allen & Susan Schmidt, Memo on Interrogation Tactics Is Disavowed, Wash. Post, June 23, 2004, at A01. Another memo was eighty-one pages and not declassified until March 31, 2008, but it was dated March 14, 2003. See Johannes van Aggelen, The Consequences of Unlawful Preemption and the Legal Duty to Protect the Human Rights of Its Victims, 42 Case W. Res. J. Int’l L. 21, 54–55 (2009); Yoo, supra note 171. With respect to the details of the authorized interrogation methods, Gonzales contended during his confirmation hearings that he could not reveal “exceptional” Top Secret interrogation standards or practices because disclosure “would . . . provide Al Qaeda with a road map concerning the interrogation that captured terrorists can expect to face and would enable Al Qaeda to improve its counter-interrogation training to match it.” Eric Lichtblau, Gonzales Says ’02 Policy on Detainees Doesn’t Bind CIA, N.Y. Times, Jan. 19, 2005 (internal quotation marks omitted), available at http://www.nytimes.com/2005/01/19/politics/19gonzales.html.


\textsuperscript{220} See Goldsmith, supra note 200, at 167; see also Neil Kinkopf, Is it Better to be Loved or Feared? Some Thoughts on Lessons Learned From the Presidency of George W. Bush, 4 Duke J. Const. Law & Pub. Pol’y 45, 46 (2009) (“Administration officials deliberated only among themselves: not publicly and not with Congress.”).
Classification of legal memos not only insulated the Bush Administration from being investigated, but may have undermined criminal justice processes of subordinates charged with detainee abuse, provided exculpatory defenses of those who might have been accused, and hindered the capability of other government officials to compel compliance with the law before orders reached down the chain of command.

B. Commonsense Analysis

Fourth, if the government-client holds potentially illicit policy preferences, requests legal advice to justify those desires, and affirmatively insulates accommodating legal advice from critique, it may be

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221. Dep’t of Justice, Office of Prof’l Responsibility Report, Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists 260 (2009).

222. See Human Rights Watch, supra note 212, at 2 (stating that top officials should be investigated and prosecuted if evidence warrants it, but pointing out that a main impediment to gathering evidence is that much information, internal memoranda, directives, and advisory memos remain classified).

223. For example, CIA contract employee David A. Passaro was convicted of assault for the death of Afghan detainee Abdul Wali in June 2003. See Gregory P. Bailey, Note, United States v. Passaro: Exercising Extraterritorial Jurisdiction Over Non-Defense Department Government Contractors Committing Crimes Overseas Under the Special Maritime and Territorial Jurisdiction of the United States, 58 Cath. U.L. Rev. 1143, 1157–59 (2009). At the beginning of the trial, Passaro sought to introduce classified memos and e-mails, and subpoena CIA officials to prove that CIA superiors directed and approved of abusive practices, but the judge denied his request in a closed hearing on the basis of protecting state secrets. See Ryan P. Logan, Note, The Detainee Treatment Act of 2005: Embodying U.S. Values to Eliminate Detainee Abuse by Civilian Contractors and Bounty Hunters in Afghanistan and Iraq, 39 Vand. J. Transnat’l L. 1605, 1635 (2006). Passaro claimed that the Bush Administration was classifying everything and that the judge did not know any better than to deny requests to documents that the Bush Administration classified. See id. at 1633–34. Likewise, Corporal Charles Graner was convicted for his role in the Abu Ghraib atrocities and Graner appealed on the basis of a “suspension” of war crime laws for the US military. See Dan Eggen & Josh White, Administration Asserted a Terror Exception on Search and Seizure, Wash. Post, Apr. 4, 2008, at A04. Both Passaro and Graner attempted to use the defense that they were acting on orders of superiors, and both claims were rejected, with Passaro’s claim being rejected specifically because the memos he wanted to introduce as evidence were classified and protected from disclosure under “national security.” See In the Name of Democracy: American War Crimes in Iraq and Beyond 113 (Jeremy Brecher et al. eds., 2005); Scott Horton, A Nuremberg Lesson: Torture Scandal Began Far Above “Rotten Apples,” L.A. Times, Jan. 20, 2005; Passaro Can’t Have Classified Documents, Assoc. Press, Aug. 4, 2006.

224. See Eggen & White, supra note 223, at A04 (noting that 22 out of 24 civil cases of alleged abuse by civilian employees and contractors were dropped by the Justice Department, and they may have been dropped substantially due to the defenses advanced by legal advisors).

rational to transfer predominant culpability to the government-client for taking actions consistent with that advice because of the government’s own negligence and failure to exercise due diligence. This is particularly the case when other legal and political advisors in the White House did or should have screened advice prior to implementing action or when the implemented policy would be condemnable based on a reasonable person’s commonsense.

At one extreme are the obvious cases of top officials who exhibit patent insouciance to legal restrictions, in which case it may not matter what legal advisors sanction. For example, President Nixon was famous for stating that “[w]hen the [P]resident does [something], that means that it is not illegal.”226 Henry Kissinger, Nixon’s Secretary of State, remarked: “The illegal we do immediately. The unconstitutional takes a little longer.”227 Underlying the tone of these statements are principles that the President and non-lawyer advisors should apprehend without legal advice. Congress is the law-making branch of government and the President executes the law.228 The President’s Oath of Office obligates the President to “solemnly swear (or affirm) that I will faithfully execute the Office of the President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”229 Nothing in the Constitution implies that the President is above the law.

Perhaps if one accepts that the Commander in Chief power sustains virtually every action the President takes and for as long as the Executive chooses, and that carte blanche Commander in Chief authority existed as soon as planes hit buildings on September 11, 2001, then a mens rea that arrogates impunity may also be conspicuous230 even if one orchestrates a public portrayal that laws are being honored. Alternatively, it may be reasonable to assume that heads of state should discern that they cannot direct acts amounting to torture and that the President must observe congressional will and interna-

227. Id. (internal quotation marks omitted) (citing DuPre Jones, The Sayings of Secretary Henry, N.Y. TIMES, Oct. 28, 1973, § 6 (Magazine), at 91).
228. See U.S. CONST. arts. I, II.
229. Id. art. II, § 1, cl. 8.
230. See Alvarez, supra note 196, at 197 (“It would appear that neither U.S. statutory nor federal law is really binding law, at least not for a President (or an attorney general) who asserts that any Congressional attempts to restrain the President’s ‘plenary’ power over military operations . . . would be unconstitutional.”).
tional law even when acting as Commander in Chief. Congress defines the scope of the Commander in Chief authority and if Congress adopted treaties that instituted restrictions applicable when the Commander in Chief authority would be activated, the President cannot assume that there is authority to violate the treaty. Some treaties, consummated to restrict acts of states during war, would make no sense in situations other than when the Commander in Chief power is applicable. Countries ratified treaties to prohibit torture in every context, from the domestic level, to war zones, to situations of occupation, and to operations in all foreign countries.

Consider Yoo’s impression of advice relating to interrogation practices and how experts responded. Yoo remarked: “A lawyer must not read the law to be more restrictive than it is just to satisfy his own moral goals, to prevent diplomatic backlash or to advance the cause of international human rights law.” Not being overly restrictive is entirely sensible, but scholars viewed legal opinions as exceeding the confines of the law. Affirming that a quest for loopholes is a misguided role for the legal advisor, Professor Harold Koh wrote: “[I]f a client asks a lawyer how to break the law and escape liability, a good lawyer should not say, ‘Here’s how.’ The lawyer’s ethical duty is to say no.” John J. Gibbons, former chief judge of the Third Circuit Court of Appeals, remarked: “The position taken by the government lawyers in these legal memoranda amount to counseling a client as to how to get away with violating a law.” Professor Waldron explained that the legal opinions to commit human rights abuses are a disgrace to the legal profession and subverted the rule of law. Professor David Luban denied that they were objective opinions, but instead deemed them biased advocacy briefs. Jesselyn Radack, a

231. See Bejesky, Dubitable Security Threats, supra note 58, at 14–16.
232. See U.S. CONST. art. VI, cl. 2 (“Laws of the United States . . . and all treaties made . . . shall be the supreme Law of the Land . . . .”); David J. Barron & Martin S. Lederman, The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding, 121 HARV. L. REV. 689, 721 (2008) (stating that peripheral Commander in Chief powers are bridled by both statutory and treaty restrictions).
235. Koh, supra note 65, at 654; see also Power, supra note 3, at 41 (“Law drove policy decisions throughout the war, and not always in good or morally justifiable ways.”).
236. Higham, supra note 179, at A4 (quoting John J. Gibbons, former chief judge of the Third Circuit Court of Appeals) (internal quotation marks omitted).
237. See Waldron, supra note 179, at 1687; see also Radack, supra note 5, at 2–3.
238. See Luban, supra note 40, at 198.
former legal advisor to the Department of Justice’s Professional Responsibility Advisory Office, explained this about the OLC’s opinions: “The acts endorsed by the torture memoranda violate a jus cogens norm of international law by advocating and excusing acts of torture.”

Professor Jordan Paust wrote: “As various memoranda . . . demonstrate, there were plans to deny protections . . . to other human beings under the Geneva Conventions[,] . . . [which] are war crimes.”

With such resolute assurance that specified memos were not objective, is it reasonable to assume that policymakers should be subject to a common sense test for culpability? Consider an analogy. The law imputes that everyone knows that murder is illegal. Suppose a client queries an attorney about modes of evading a criminal conviction for murder and the attorney furnishes a framework of the law and draws hypothetical scenarios equipped with defenses and factual sequences of “accidents” that have previously reduced the likelihood of conviction. If the client perpetrates a murder, there may be questions of whether the attorney knew or should have known whether the client was serious, or whether the scenario suggested the client’s inquiry was offhanded and related to a dramatic plot or some philosophical or benign peculiarity. Perhaps the lawyer should have inquired further before rendering advice, but unless there is reasonable notification that the client did intend to execute some egregious act, the attorney should generally not be implicated in any wrongdoing because he or she did not commit the act. The client would like to attempt to devise scenarios to pare the intensity of the vicious mens rea and selectively choose exonerating law and precedent and disregard unfavorable provisions of the criminal code, but the client cannot state that there was a misunderstanding surrounding laws that prohibit murder because of the attorney in order to avoid prosecution for the act of killing someone.

To make the example of interrogation and torture more vivid, consider analogies to domestic criminal procedure. What if the Bush Administration’s approved interrogation methods could be used in domestic cases? For example, assume there is a missing person and the police surmise that they have the correct suspect in custody, but without something beyond circumstantial evidence, an indictment for

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239. Radack, supra 5, at 24.
240. Paust, supra note 2, at 861–62.
murder is unlikely to prevail. Or, assume a fraudster stole $20 million from investors in a Ponzi scheme and hundreds of individuals lost their life savings. While there is sufficient evidence to convict the individual, the authorities believe that most of the stolen money could be recovered if hidden assets could be located. In both cases, if the police could employ the CIA’s psychological interrogation methods, such as prohibiting the suspect from sleeping for eleven days, leaving the detainee naked in a pitch black confined space for a few weeks, putting the individual in abnormally cold conditions, or not adequately feeding the accused, the police might force a confession and learn the location of the body or hidden assets.

Police in the United States cannot engage in any these tactics, which would be prohibited as cruel and unusual punishment under the Eighth Amendment because of the degree of harm to the individual and the practical concerns that confessions may not be effective but could produce bizarre and rambling tales. In fact, no government in any civilized society can employ these tactics. Nonetheless, discourse developed in the U.S., stating that the Bush Administration needed exceptions to thwart peril to Americans. Torture could expose a “ticking time bomb” terror plot on American soil and torture could avert devastating peril. Academics called the “ticking time bomb” scenario far-fetched, tantamount to searching for a needle in a haystack, and operations that would resort in grievous overuse.

Nonetheless, the Bush Administration legal advisors invented a string of loophole arguments to explain why combatants and suspected terrorists, detained in foreign war zones and at Guantánamo Bay, could be interrogated. Thus, instead of protecting Americans from “ticking time bombs” on U.S. soil, the Bush Administration de-

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242. See id. at 9–13.
244. See Alfred W. McCoy, A Question of Torture 112, 192–94 (2006); In the Name of Democracy, supra note 223, at 182.
246. See Bejesky, Call for Papers, supra note 163, at 29–30.
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cided that it would extrapolate the use of interrogation in the hope of attaining information to “protect the troops” even when the interrogation is facially, and without exception prohibited by Article 17 of the Geneva Convention.\textsuperscript{247} Moreover, human rights agreements prescribe harming human beings in the territory of a state or in the “effective control” of that state.\textsuperscript{248} At what point should legal restrictions be assumed? How should one construe whether the President asked for legitimate advice due to sincere confusion over legal requirements or whether the President requested loopholes to circumvent commonsense restrictions?

V. CONCLUDING ANALYSIS

A. An Inquiry

This article applied a recent high profile case to the question of whether a government’s legal advisor should be responsible for ethical violations under MRPC Rule 8.4 for rendering biased consultation to a government-client. The analysis respects the President’s right to appoint like-thinking individuals, such as those who may personally prefer to expand executive power, and it does not question the President’s prerogative to issue a call for advocacy papers from like-thinking counsel. However, deep agitation can fester if appointed legal advisors successively sanction virtually everything the President relishes by providing slanted opinions that are unreviewable because the attorney cannot reveal privileged advice, the government precludes review by classifying the memoranda under national security,\textsuperscript{249} and the selected legal advisor would need to reverse his or her existing position in order to gainsay the government’s preference.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{247} See Geneva Convention, supra note 172, art. 17.
\item \textsuperscript{248} See Bejesky, Call for Papers, supra note 163, at 25–28.
\item \textsuperscript{249} See Bejesky, supra note 14, at 402–07 (discussing leaked documentation that revealed controversies); see also Scharf, supra note 23, at 85 (noting that in the case of the Bush Administration changing its opinion and purportedly treating al-Qaeda and Taliban members in a fashion that was consistent with the Geneva Conventions, such conduct was finally revealed in January 2005, but the memo was written years earlier). This approach of issuing legal memos, classifying them, and then dealing with them later without knowledge of whether legal standards were complied with, seems equivalent to requesting a post facto opinion that rationalizes. See Scharf, supra note 23, at 72 (explaining how policymakers who cut the legal advisors out of the policymaking process also required “after-the-fact legal justifications for the decisions and actions taken”). An additional example of recognizing the right of Executive secrecy and misusing Framer intent is found in the Nixon Administration. In United States v. Nixon, Nixon cited the secrecy milieu of the Constitutional Convention as a basis for protecting Executive secrecy. See United States v. Nixon, 418 U.S. 683, 703–08 (1974); see also Lane, Schwarz, Jr. & Berman, supra note 210, at 758. The Constitutional Convention was secret because it was necessary to protect
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Political opposition and the public should neither be forced to experience chagrin after the President took condemnable initiatives based on the consultation, nor should they be obliged to accede that the advisory process was legitimate after the memos were leaked or declassified and the President feigned naïveté. The process is not remotely consistent with democratic norms and calls for distinctions to be drawn among good faith, accidents, misfeasance, and malfeasance.

This Article offered five preliminary questions to assess the factual scenario and inquire whether it would be compelling to shift primary responsibility for government actions to the political actor and away from the legal advisor to isolate the prospect of a government cleverly using scapegoating to diffuse its own culpability. First, with respect to the regime’s selection of an ideologically-synchronized legal advisor, if there is a hawkish regime that chooses to appoint legal advisors who have developed theories that loosen separation of powers and international law checks on the President and that regime requests legal consultation from those advisors on issues related to preexisting positions, there should be a warning as to the substance of the lawyer’s response, at least to the extent that preexisting positions would be perceived as eccentric by a substantial percentage of the legal community.

the process during deliberations for the Articles of Confederation, which was a germane precautionary measure if there were British spies who would undermine the independence movement. See Lane, Schwarz, Jr. & Berman, supra note 210, at 758. The Framers were not using a privilege to cover up the crimes of a President.

250. If one assumes that congresspersons are responsive to public opinion because they want to adequately represent constituents, but constituents are also oblivious of government actions and of the opinions that supposedly justified those actions, then Congress’s war powers are not only being directly undermined, but the democratic will of citizens is also being undermined because the lack of populace knowledge cannot register outrage at the time that acts are taken.

251. See generally Bejesky, Politico, supra note 117 (detailing how appointed neoconservatives were instrumental in driving the 2003 invasion of Iraq).

252. For example, in the case of divergence between a regime’s policy preferences and the advisor’s penchant to push the law, pairing a cautious/reluctant regime with an aggressive advisor is unlikely to lead to an aggressive action, or if it does, the legal advisor’s role may not appear controversial because of contrasting philosophies. An aggressive regime and a cautious lawyer is unlikely to foster constitutional or public choice problems because the advisor checks the administration and the regime would encounter more intense scrutiny for acting in opposition to the attorney’s position. The scenario with the reluctant regime and a reluctant advisor is also unlikely to generate controversy because both the regime and lawyer possessed reserved preexisting positions and later inconsistent acts would appear to be taken cautiously, depending on the exigency at hand. However, the aggressive regime that selects the aggressive advisor invokes the most consternation because of the propensity to exceed legal restrictions, such as by violating domestic or international law or usurping constitutional authority of another branch of govern-
Second, if the legal advice in question involves an essential policy issue with a consequential impact on democratic choice, sustained expense, and legal reverberations, both the regime and the advisor should be on notice of the need to exhibit due care. Third, and related, was the advisor aware that the advice would be relied on and used in implementing an essential government action or was the advice merely a think piece? If a regime requests advocacy papers or solicits legal rationalizations and loopholes, and advisors respond, perhaps legal advisors are being enticed into not being objective. In this case, if the legal advisor is uncertain whether the consultation will be scrupulously utilized, perhaps the attorney should not be responsible for policy implementation that coincides with the skewed view of the law that was requisitioned. The attorney did not implement the policy and both parties should have due diligence obligations on critical legal issues—the legal advisor should provide a reasoned analysis within the terms of the government’s request and policymakers should appreciate the gravity of certain initiatives and comprehend how to request objective guidance. Policy issues that involve prolonged national security measures, potential congressional and judicial checks on the Executive, directives that reside in a gray area of legality under the Commander in Chief authority, orders to engage in abusive interrogations, and expend enormous financial resources, should compel the government to make choices carefully and to be thorough in weighing the validity of opposing legal positions.

Fourth, on some issues, it is possible for the legal community to be so overwhelmingly acceptant of a particular position that a reasonable lawyer might construe that the alternative position is illegal and immoral. In this case, it would appear necessary for the attorney-advisor to offer that supermajority position, which might be so legally, morally, and ethically barefaced that even a harebrained government-client should have legitimately concluded that a legal opinion was unnecessary. To request an opinion that rationalizes acts that should be overtly recognized as illegal in order for the administration to take the action with less criticism should not provide a redeeming justification for the administration.

Fifth, if a reasonable person would have found the advice to be questionable and it is an essential policy question with prolonged neg-
ative ramifications, then it is highly probable that the consultation would lead to societal outrage and would fail a common sense test. If the regime hides the advice and then takes the action, the government should be all the more responsible. In the case at hand, John Yoo did not classify the legal memoranda or order government actions. The other problem is that there were so many other instances of diffused responsibility that nothing appears accidental.

B. Similar Instances

Consider the invasion of Iraq. The Bush Administration appointed neoconservatives whose opinions favoring an invasion of Iraq were well known.\textsuperscript{253} It was later learned that the Bush Administration held National Security Council meetings on the topic of displacing the Iraqi government as early as February 2001\textsuperscript{254} and tasked military commanders with developing war plans starting in November 2001, while publicly denying that there were any such war plans.\textsuperscript{255} At the Administration’s request, the CIA produced what was called the “Murky Relationship” paper, which intentionally stretched to surmise about relationships between al-Qaeda and Iraq; the Bush Administration used the same claims as fact when publicizing threats to Americans, even though the allegations were ultimately false and based on compiled rumors.\textsuperscript{256} Senator Rockefeller, then-chair of the Senate Select Committee on Intelligence, stated: “In making the case for war, the [Bush] Administration repeatedly presented intelligence as fact when in reality it was unsubstantiated, contradicted or even nonexistent . . . . Sadly, the Bush Administration led the nation into war under false pretenses.”\textsuperscript{257} Speaking of the ease of declassifying information, Rockefeller further stated that “[t]he Administration exploited this declassification authority in the lead up to the war and disclosed intel-

\textsuperscript{253} See Fisher, supra note 51, at 1213.

\textsuperscript{254} See Bejesky, supra note 117, at 62–65.


\textsuperscript{257} Press Release, U.S. Senate Select Committee on Intelligence Committee, Senate Intelligence Committee Unveils Final Phase II Reports on Prewar Iraq Intelligence (June 5, 2008), http://intelligence.senate.gov/press/record.cfm?id=298775 (quoting SSCI Chairman John D. Rockefeller) (internal quotation marks omitted).
ligence . . . with impunity” and threatened those intelligence officials who could have challenged the allegations with prosecution.258

The Bush Administration relied on Iraqi defectors, tasked them to work on propaganda operations inside the White House, developed the Future of Iraq Project that planned for displacing the regime over a year before the war, gratuitously accepted defector threat claims as evidence, and post facto distanced itself from defectors and acted like it was duped.259 For several years of occupation, the Bush Administration dissembled that it really did not market security threats to Americans on a near-diurnal basis for six months before the war, even though it did260 and suggested that the war was really about “liberation.” Consistently taken polls for six years revealed that approximately eighty percent of Iraqis wanted occupation forces to leave.261 A poll in 2006 revealed that seventy-two percent of U.S. soldiers favored withdrawal from Iraq within a year,262 and Americans clearly opposed the war by 2007.263 Americans also rewarded Bush with the lowest presidential departing approval ratings since Gallup began measuring approval ratings more than seventy years ago,264 and the ratings were foremost due to the Iraq War and poor U.S. economic conditions.

What these examples suggest is that the Bush Administration developed profoundly adroit means to diffuse responsibility before con-


260. A distinct security threat scenario was marketed. See generally Robert Bejesky, Public Diplomacy or Propaganda? Targeted Messages and Tardy Corrections to Unverified Reporting, 40 CAP. U. L. REV. 967 (2012) (specifying many of the Bush Administration’s propaganda operations after the invasion of Iraq that diffused dissent about the false pre-war claims); Bejesky, CFP, supra note 113, at 5–6, 22–42 (itemizing how the Bush Administration marketed the alleged threat from Iraq by linking it to 9/11); Bejesky, Press Clause, supra note 113, at 348–54 (expressing how top Bush Administration officials made numerous unequivocal claims about threats and noting how polls of populace sentiment believed the allegations); Bejesky, Weapon Inspections, supra note 115, at 370–75 (summarizing the chronology of Bush Administration assurances that there were prohibited weapon programs in Iraq and chastising the United Nations and weapons inspectors for not believing the allegations).

261. Bejesky, Politico, supra note 117, at 105.


263. See Bejesky, Political Penumbras, supra note 152, at 35–40.

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troversial action was taken on facts and law and that the expectation was that there would be no punishment. In the case of the controversial legal memos, if legal consultation hails from a division of the Justice Department and if the historical nonexistence of an event is any indication, it is highly improbable that the Justice Department would criminally investigate or indict a government official for taking action that was approved by one of its own departments. Time passes and the public becomes less irate and more concerned with current issues.265

For example, Professor Jack Goldsmith, who replaced Jay Bybee as head of the OLC in 2003, rescinded many of the controversial opinions266 and called Yoo’s work from 2001 to 2003 “deeply flawed: sloppily reasoned, overbroad, and incautious in asserting extraordinary constitutional authorities on behalf of the President.”267 As Professor Michael Scharf pointed out, after Goldsmith rescinded controversial memos, he was “anointed as a hero by the media.”268 Goldsmith altered opinions and offered controlled dissent, but shared a similar realist worldview in which international law does not mandate adherence.269 Scharf further stated that Goldsmith’s “2004 OLC memo that replaced Yoo’s 2002 work contained a footnote saying that ‘all the interrogation methods that earlier opinions had found legal were still legal.’”270 John Yoo believed that Goldsmith’s withdrawal of his opinion was merely “for appearances’ sake’ to divert public criticism in the immediate aftermath of the Abu Ghraib controversy. ‘In the real world of interrogation policy nothing had changed.’”271

265. See Bejesky, Flow, supra note 114, at 431–34.
266. Saltzman, supra note 38, at 446. Goldsmith was entirely supportive of the Bush administration, but partially cleaned up the mess left by Yoo’s memos. See Power, supra note 3, at 97–98.
268. Scharf, supra note 187, at 348–49.
269. See Scharf, supra note 23, at 58.
270. Scharf, supra note 187, at 349 (citing John Yoo, War by Other Means: An Insider’s Account of the War on Terror 183 (2006)); see also Goldsmith, supra note 200, at 155–56.
271. Scharf, supra note 187, at 349 (citing Yoo, supra note 270, at 183).
Goldsmith further maintained: “[T]he administration has been strangled by law, and since September 11, 2001, this war has been lawyered to death. The administration has paid attention to law not necessarily because it wanted to, but rather because it had no choice.”

Black is white and white is black.


273. It is questionable whether the Bush Administration could ever truly be bridled by law when politicized lawyers developed loophole arguments to rationalize frequent violations of international law. Critiquing Professors Eric Posner and Goldsmith’s realist-oriented book on international law, Scharf wrote that their positions are not far off from George Orwell’s “Newspeak concept of ‘Blackwhite,’” which is the “loyal willingness to say black is white when Party discipline demands this. But it means also the ability to believe black is white, and more, to know black is white, and to forget that one has ever believed the contrary.” Scharf, supra note 187, at 341 (citing George Orwell, Nineteen Eighty-Four (1981). Professor Chemerinsky explained: “To my knowledge, never before in American history had the United States claimed it could detain and treat people completely without regard to the Constitution or international law. To my knowledge, never before in American history had the United States government claimed the authority to torture individuals, unconstrained by federal law or international law.” Ersin Chemerinsky, Mary Ellen O’Connell & Jeremy Rabkin, Spring 2010 Symposium—A Collision of Authority: The U.S. Constitution and Universal Jurisdiction: A Symposium Transcript, 9 Rich. J. Global L. & Bus. 307, 331 (2010) (statement by Erwin Chemerinsky).
A Shared Sovereignty Solution to the Conundrum of District of Columbia Congressional Representation

JAMES L. CRAIG, JR.*

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Congress can provide congressional representation for the District of Columbia by sharing sovereignty over the District of Columbia with one or more states. This sharing would extend only to the congressional voting power, leaving other aspects of District of Columbia sovereignty under the control of Congress. Supreme Court precedent validates such sovereignty sharing between federal and state governments under the same constitutional clause that provides for the establishment of the District of Columbia. Sharing sovereignty in this way would give District of Columbia residents the connection with a state that is necessary to vote for congressional representatives under the Constitution.

Following a brief introduction, the first section surveys the law governing federal-state sovereignty sharing and explains how Supreme Court precedent supports using shared sovereignty to provide District of Columbia voting rights. The second section illustrates how shared sovereignty could be implemented with two examples, sharing sovereignty with one state, such as Maryland, or with multiple states.

INTRODUCTION

District of Columbia residents should be able to vote for members of Congress, just like other Americans, but nobody has found a way to do this that is both constitutional and politically viable. The constitutional problem is simple. Senators and Representatives must
be elected by people of the states under the plain language of the Constitution. The District of Columbia is not a state. Neither the exasperation of voting rights proponents nor the fundamental justice of their cause can change the simple truth that congressional representation is not yet available to District of Columbia residents under the Constitution because the territory comprising the District of Columbia has no sovereign connection to any state.¹

Political leaders have focused on three potentially constitutional ways to remedy the status quo, none of which has been politically achievable. First, Congress, in 1978, proposed amending the Constitution to provide the District of Columbia with Senate and House representation as though it were a state, but the amendment was not ratified by the States.² The second and third approaches might be possible under the Constitution without amending it. One of these would separate the District of Columbia’s residential and commercial neighborhoods from the governmental core surrounding the National Mall, retroceding the non-governmental territory to Maryland. The other alternative would perform the same division of District of Columbia territory and admit the non-governmental part as a state of the Union. While potentially constitutional if done the right way, both of these solutions have presented insurmountable political obstacles.

This Article analyzes a fourth approach to provide both Senate and House representation that relies on principles of shared sovereignty to allow District of Columbia residents to vote in congressional elections while also preserving the unique character of the District of Columbia as the nation’s capital under the sovereign control of the federal government. Under this approach, the federal government would cede to one or more states that element of sovereignty over District of Columbia territory associated with congressional representation, giving District of Columbia residents the sovereign connection to a State necessary to allow them to vote for Representatives and Senators. The federal government would retain all other aspects of sovereignty over the District of Columbia, thus preserving the District of Columbia’s constitutional role as the seat of American government.

¹. Adams v. Clinton, 90 F. Supp. 2d 35, 62 (D.D.C. 2000) (“Because those who live in the District lack state residency, they cannot qualify to vote in Maryland’s (or any other state’s) elections, and hence cannot vote for its representatives in the House.”) (citation omitted).
². Alexander Keyssar, The Right to Vote 230 (rev. ed. 2009); 1 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law: Substance and Procedure § 3.6, at 363 (3d ed. 1999) (discussing how the proposed amendment was not ratified by sufficient number of states within the time limit provided).
The idea of using shared sovereignty is not entirely new. In 1977 testimony before a House subcommittee considering the constitutional amendment, Congressman Ray Thornton of Arkansas proposed an alternative using shared sovereignty principles that came to be called “partial retrocession.” Unfortunately, Congressman Thornton’s proposal was questioned and criticized by subcommittee members and other witnesses, and Congress endorsed the failed constitutional amendment instead.

Shared sovereignty underpins American Federalism with its allocation of powers between federal and state governments. As discussed at greater length in the next section, sovereignty sharing also is a core element of the two-part constitutional clause under which the District of Columbia was established. Case law approving how sovereignty is shared under that clause demonstrates that shared sovereignty arrangements are consistent with the Constitution and so should be legally non-controversial as applied to the problem of District of Columbia voting representation. It should be politically viable as well because the concept is flexible enough to allow Congress to craft a proposal that is palatable across the political spectrum.


[T]o retrocede to Maryland the rights of District residents to vote in Maryland elections, at least for Federal representation. Now in order to understand this alternative, you have to consider that sovereignty can be divided, not only geographically, but also by function, and that it is . . . possible to retrocede certain aspects of sovereignty . . . .

Id. at 38; see also id. at 121–22 (describing Congressman Thornton’s proposal, a later witness uses the term “partial retrocession”); Eugene Boyd, Cong. Research Serv., RL33830, District of Columbia Voting Representation in Congress: An Analysis of Legislative Proposals 10–13 (2010) (describing similar congressional proposals under the category of “Semi-Retrocession”).

A Shared Sovereignty Solution

I. SHARED SOVEREIGNTY UNDER ARTICLE I, SECTION 8, CLAUSE 17 CAN PROVIDE CONGRESSIONAL REPRESENTATION TO DISTRICT OF COLUMBIA RESIDENTS

A. Shared Sovereignty Under the Constitution and the Election of Members of Congress as a Sovereign Power of the States

The sharing of sovereignty between state and federal governments is commonplace in our political life. The framers in Philadelphia were representatives of fully independent states with as much sovereign power and autonomy as any country. By uniting together under a federal government, the Constitution would take away some of the states’ sovereign power, so a critical question facing the Constitutional Convention was how much sovereign power the states would retain and how much the federal government would gain over the territory that would become the United States.

Our Constitution shares sovereign power largely by specifically enumerating the federal government’s powers and responsibilities, while reserving to the states those sovereign powers not given exclusively to the federal government, prohibited to the states by the Constitution, or reserved to the people. Whenever state and federal power comes into conflict, the Supremacy Clause resolves the conflict in favor of the federal government so long as its actions are within the scope of the enumerated federal powers.5

Because states’ sovereign powers are largely defined as those not superseded by the federal government, state sovereign powers are specifically listed in the Constitution only when there is a special need to do so. One such case is the states’ power to vote for members of

5. CHESTER J. ANTHEAUX & WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 43.00, at 4 (2d ed. 1997) (“In American constitutional law, the states possess those powers of sovereignty not given to the federal government exclusively by the United States Constitution, prohibited by the document to the states or reserved to the people.”); see U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”); U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people.”).

This power to enforce [federal] laws and to execute [federal] functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same places. The one does not exclude the other except where both cannot be executed at the same time. In that case, the words of the Constitution itself show which is to yield. ‘This Constitution, and all laws which shall be made in pursuance thereof, . . . shall be the supreme law of the land.’

Ex Parte Siebold, 100 U.S. 371, 395 (1879) (quoting U.S. CONST. art. VI, cl. 2).
Congress, because this power implicates not just the allocation of sovereign powers between the states and the federal government, but also the allocation of powers among the states themselves.

With respect to House representation, Article I, Section 2, Clause 1 states:

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.6

With respect to Senate representation, the Seventeenth Amendment states:

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.7

Among other things, limiting congressional representation to the States, as the above provisions do,8 guards against possible abuse by a Congress that might try to stack the deck by adding Senators or Representatives from federal territories and properties that are not states.9

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6. U.S. CONST. art I, § 2, cl. 1 (emphasis added). The congressional voting power is described in the first part of this clause, which requires that members be “chosen . . . by the People of the several States[,]” The second part of this clause prohibits states from excluding state voters from federal elections. See infra note 89.

7. U.S. CONST. amend. XVII (emphasis added); see supra note 6 (discussing similar language for election of House members). The seventeenth amendment superseded article I, section 3, of the original document, which provided for election of senators by state legislatures. “The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.” U.S. CONST. art. I, § 3, cl. 1 (amended 1913).

8. See U.S. CONST. amend. XIV, § 2 (“Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State”); Mark S. Scarberry, Historical Considerations and Congressional Representation for the District of Columbia: Constitutionality of the D.C. House Voting Rights Bill in Light of Section Two of the Fourteenth Amendment and the History of the Creation of the District, 60 ALA. L. REV. 783, 808 (2009) (analyzing Section 2 of the Fourteenth Amendment as a separate limitation on efforts to provide a congressional vote to District of Columbia residents).

B. How the District of Columbia Lost the Right to Vote for Congressional Representatives and Other Proposals on How to Restore That Right.

At first, the congressional voting power rested exclusively with the original thirteen states, but the power was extended to cover further American territory with the admission of new states. As for territory not yet part of a state, the congressional voting power lay dormant, waiting to be activated by the process of state admission.

This process went in reverse for the District of Columbia. When the Constitution went into effect, Maryland and Virginia were original states, and the territory within the borders of those states possessed congressional voting power under the Constitution. Shortly thereafter, Maryland and Virginia transferred full and complete sovereignty over a ten square mile tract to the federal government, which became the District of Columbia. When the transfer was finalized in 1801, the congressional voting power within that tract returned to dormancy, because the territory was no longer within the borders of a state, and residents of the tract could no longer vote in congressional elections.\(^{10}\)

That the congressional voting power merely became dormant, rather than being eliminated entirely, is shown by the federal government’s 1846 retrocession to Virginia of the state’s contribution of land.\(^{11}\) Once that retrocession went into effect, residents of that area could once again vote in congressional elections in Virginia, as residents of Arlington and parts of Alexandria demonstrate every two years.

The Virginia retrocession example is cited in support of retroceding to Maryland most of the District of Columbia, making District of Columbia residents citizens of Maryland and eligible to vote for members of Congress in that state. However, retrocession has its own constitutional hurdle. Retrocession would change the borders of Maryland, so Article IV, Section 3, Clause 1 prohibits adding District of Columbia territory to Maryland without that state’s consent.\(^{12}\)

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\(^{11}\) Act of July 9, 1846, ch. 35, § 1, 9 Stat. 35; see infra note 13 (discussing adjustments to the 1846 boundary); see also Phillips v. Payne, 92 U.S. 130 (1875) (discussing the fact of retrocession to Virginia).

\(^{12}\) See U.S. CONST. art. IV, § 3, cl. 1.

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.
There are two reasons why Maryland might withhold its consent. First, Maryland might not want to assume responsibility governing a city that has been outside its borders for over 200 years. Second, retrocession would require Maryland to bear the full burden of vote dilution caused by added voters, and it would not be unreasonable for Maryland to think that this burden should be borne more equitably.

District of Columbia statehood is another way to reactivate the congressional voting power, but it has been suggested that Article IV, Section 3, Clause 1 might also preclude District of Columbia statehood without Maryland’s consent. Maryland’s original cession was conditioned on the federal government using the land as a seat of national government and statehood would change how the land is used. Arguably, this change of use would give Maryland the right to reclaim the territory, thus making Maryland’s consent necessary for statehood.\(^{13}\)

In addition, the Twenty-third Amendment, which gives the District of Columbia three presidential electors, creates logistical problems for both statehood and retrocession. Short of repealing the amendment, it may be difficult to take these electors away from the lightly populated remnant of the non-ceded governmental area of the District of Columbia, giving the few people living there disproportionate influence in presidential elections.\(^{14}\)

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\(^{13}\) Compare Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 GEO. WASH. L. REV. 160, 177–83 (1991) (“Maryland’s formal consent is not a constitutional prerequisite to D.C. statehood.”), with Stephen Markman, *Statehood for the District of Columbia: Is It Constitutional? Is It Wise? Is It Necessary?* 51–54 (using same analysis, but concluding that Maryland must consent). Congress has not sought Maryland’s consent when ceding to Virginia the land made by filling in parts of the Potomac River ceded by Maryland. District of Columbia territory ceded by Maryland includes the entire Potomac River within the original ten square mile tract, so when new land was created by dredging and filling in the riverbed along the Virginia shoreline, that land was part of the District of Columbia because it was within the boundary of Maryland’s cession. Marine Ry. & Coal Co. v. United States, 257 U.S. 47, 64–65 (1921) (holding that filled land adjacent to Alexandria called Battery Cove was part of Maryland’s cession and thus part of the District of Columbia); see Act of Feb. 23, 1927, Pub. L. 69-634, 44 Stat. 1176, 1176–77 (ceding Battery Cove to Virginia). In 1945, Congress established the boundary between Virginia and the District of Columbia as the “mean high-water mark” on the Virginia side of the Potomac River, ceding to Virginia all territory between the new boundary and “the mean high-water mark as it existed January 24, 1791.” Act of Oct. 31, 1945, Pub. L. 79-208, §§ 101-102, 59 Stat. 552, 552. This law also prospectively cedes to Virginia any Potomac riverbed lands resulting from future “artificial fills” by the United States. *Id.* at § 101, 59 Stat. 552. Under the holding of *Marine Ry. & Coal Co.*, the ceded territory was part of Maryland’s cession and would be part of the District of Columbia but for the 1945 legislation.

Political considerations also have played a big role in preventing retrocession or statehood from being implemented. Democrats oppose retrocession and support statehood because statehood would likely add two new Democratic Senators, due to the District of Columbia’s overwhelmingly Democratic electorate. Republicans favor retrocession because it would effectively gerrymander the District of Columbia into Maryland, which is already largely Democratic, thus preventing District of Columbia residents from significantly changing the balance of power in Congress. In the end, each party’s preferred option requires the other party to give up too much power or potential power in Congress, which is why new approaches to thinking about this problem are needed almost as much as a solution to the constitutional problem.\footnote{The D.C. Voting Rights Act is a well-intentioned attempt to provide a new approach, but it ignores the constitutional requirement that members of Congress must be elected from the states and fails to provide District residents with the necessary sovereign connection to any state. See, e.g., Ending Taxation Without Representation: The Constitutionality of S. 1257, the District of Columbia House Voting Rights Act of 2007 Before the S. Comm. on the Judiciary, 110th Cong. (2007). In addition, the Act would be only a partial solution even if it were constitutional, because it fails to provide Senate representation. The arguments of the legislation’s proponents have been thoroughly refuted by others, so there is no point in rehashing those arguments here. Turley, \textit{supra} note 9.}

Understanding shared sovereignty will help to generate that new thinking. Shared sovereignty is common in international law and has been used by nations throughout history, but international examples cannot prove whether shared sovereignty can fully enfranchise residents of the District of Columbia. While independent nations have great flexibility in sharing their sovereignty, state and federal governments are bound by the Constitution, which sets its own rules about how sovereignty may be shared.\footnote{See Stephen D. Krasner, \textit{The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law}, 25 \textit{Mich. J. Int’l L.} 1075, 1091–1100 (2004) (describing shared sovereignty arrangements under international law); Caleb Nelson, \textit{A Critical Guide to Erie R.R. Co. v. Tompkins}, 54 \textit{Wm. & Mary L. Rev.} 921, 940 (2013) (“Given the uniqueness of America’s federal system, though, the unwritten law of nations did not necessarily supply determinate answers to questions about the relationship between state and federal courts.”).}

C. A Short History of Shared Sovereignty Under the Constitutional Provision Under Which the District of Columbia Was Established

Article I, Section 8, Clause 17 of the Constitution (“Clause 17”) is the key provision in analyzing whether the federal government can share sovereignty over the District of Columbia to provide Congres-
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sional representation. Clause 17 provides that Congress shall have power

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . .

The District of Columbia was established under the first part of Clause 17 (the “District Clause”), which requires Congress to exercise exclusive legislation over the seat of government. Aside from the retrocession of District of Columbia territory to Virginia, Congress has never tried to cede its sovereign power over the District of Columbia to a state, and it has never tried to share sovereignty over the District of Columbia with any state. Because it has never been tried, there is no case law concerning whether sovereignty over the District of Columbia may be shared between state and federal governments.

However, there is a substantial body of case law on sovereignty sharing under the second part of Clause 17, which governs federal enclaves, which the federal government has purchased within a state by consent of the state legislature “for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . .” Under this “Enclave Clause,” the federal government is to exercise “like Authority” over these enclaves, that is, authority like that which is exercised over the District of Columbia under the District Clause. Because the Constitution provides that there must be comparable federal authority over both the District of Columbia and federal enclaves, cases involving sovereignty sharing in federal enclaves should apply to a comparable sharing of sovereignty over the District of Columbia. Thus, if the courts would allow sovereignty sharing with respect to voting rights in

18. Some state law as it stood in 1801 continued to apply within the District of Columbia after its cession, but this is because Congress adopted Maryland law as the federal government’s own rule, and not because Maryland retained any residual control over District of Columbia territory. Act of Feb. 27, 1801, ch. 15, 2 Stat. 103, 103–05 (1801). While Congress did reserve “concurrent jurisdiction” over District of Columbia territory ceded to Virginia in the 1945 boundary adjustment, that territory became part of Virginia so this sovereignty sharing provision applied to Virginia territory and not District of Columbia territory. Act of Oct. 31, 1945, Pub. L. 79-208, § 102, 59 Stat. 552, 552 (1945); see supra note 13.
the federal enclaves, the courts should also permit sovereignty sharing with respect to voting rights in the District of Columbia.

The story of court decisions under Clause 17 is one that starts badly for voting rights generally and for the idea of pursuing shared sovereignty to remedy the denial of voting rights. Fortunately, the story winds up having a happy ending. As we shall see, early Enclave Clause cases prohibited any sharing of sovereignty over the Clause 17 enclaves. However, this strict rule began to erode in 1885 so that by 1937, the Supreme Court began to allow sovereignty sharing in federal enclaves between state and federal governments under Clause 17. In practice, this sovereignty sharing has included the right of enclave residents to vote. It therefore follows that federal sovereignty over the District of Columbia can be similarly shared, giving District of Columbia residents the right to vote in congressional elections in one or more states.

One of the first Clause 17 voting rights cases was decided under the District Clause. In 1813, *Custis v. Lane* held that the cession under Clause 17 had vested in Congress “exclusive power of legislation over the territory in question[,]” placing the District of Columbia “without the jurisdiction of the laws of Virginia, [which] is, as to it, another and distinct jurisdiction[.]” Thus, a District of Columbia resident in the territory ceded by Virginia could no longer vote in Virginia elections. “Persons standing in this predicament cannot be admitted to the right of suffrage, without running counter to all the principles on which that right is founded.”

Residents of federal enclaves fared no better. In 1841, *In re Opinion of Justices* held that residents of federal enclaves “do not thereby acquire any elective franchise as inhabitants of the towns in which such territory is situated.” In addition, enclave residents were held to have no other rights of town inhabitants, such as the right to attend public schools.

Voting cases like *Custis* and *Opinion of Justices* reflect the more general view among jurists of the time that a Clause 17 cession was an all or nothing proposition and that federal sovereignty under Clause

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20. *Custis v. Lane*, 17 Va. (3 Munf.) 579, 591 (1813). While *Custis* involved a state legislative election, there is no doubt that its reasoning would apply with equal force to an election for Virginia’s congressional representatives.

21. *Id.* at 593–94.


23. *Id.* at 583–84; see also *Commonwealth v. Clary*, 8 Mass. (7 Tyng) 72, 77 (1811) (enclave residents “not interested in any elections made within the state”).

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17 must be absolute and completely exclude state sovereignty. Even though there is nothing in the text of Clause 17 to prohibit some limited overlap or sharing of state and federal sovereignty, it was unthinkable to early courts that a state might retain any residual sovereign power within a federal enclave, even if both state and federal governments agreed to such sharing.

Of course, there often is a very real need for power sharing between state and federal authorities because each sovereign often carries out different functions. The rigid, absolute federal sovereignty view of the early courts soon came under pressure as the practical realities of governing the enclaves intruded, requiring courts and legislatures to make artful adjustments to this rigid principle to avoid absurd results.

The first adjustment allowed service of state court legal process in the federal enclaves, because if state court process could not be served, the enclaves would soon become havens for debtors and other scofflaws. Early on, state legislatures began qualifying their consents to federal enclave acquisitions under Clause 17 to reserve the power to serve state court process in the enclaves.

Courts allowed a service of process exception to the exercise of state power in the enclaves, reasoning that serving a state’s legal process within a federal enclave did not involve any actual sharing of sovereignty. In United States v. Cornell, Justice Story explained that by reserving the right to serve process, the state did not intend to exercise any power within the enclave.

Not a word is said from which we can infer that it was intended that the state should have a right to punish for acts done within the ceded lands. The whole apparent object is answered by considering the [state’s reservation] clause as meant to prevent [the enclave] from becoming a sanctuary for fugitives from justice, for acts done within the acknowledged jurisdiction of the state. Now there is nothing incompatible with the exclusive sovereignty or jurisdiction of one state, that it should permit another state, in such cases, to execute its processes within its limits. And a cession, or exclusive jurisdiction, may well be made with a reservation of a right of this nature, which then operates only as a condition annexed to the cession, and as an agreement of the new sovereign to permit its free exercise as quoad hoc his own process.24

Service of process, however, proved to be a very narrow exception to the general rule that state and federal governments could not preserve state sovereign power within the enclaves, even by agreement.25 Another voting rights case illustrates this point.

After the Civil War, the federal government established a Soldiers’ Home near Dayton, Ohio, to house and care for disabled Union Civil War veterans. This Soldiers’ Home was located within a federal enclave ceded by Ohio to the federal government under the Enclave Clause. When ceding the land, the Ohio legislature explicitly sought to reserve the voting rights of residents of the enclave. This voting rights reservation was held invalid by the Ohio Supreme Court in *Sinks v. Reese*26 because “the grounds and buildings of this asylum have been detached and set off from the State of Ohio, and ceded to another government, and placed under its exclusive jurisdiction for an indefinite period[,]” so it was “not constitutionally competent for the general assembly to confer the elective franchise upon persons whose legal status is fixed as non-residents of the State.” This disenfranchisement of disabled war veterans moved Congress promptly to retrocede the land to Ohio, which restored the veterans’ voting rights.27

The retrocession rendered moot the Soldiers’ Home controversy and also illustrated how Enclave Clause cessions often failed to satisfy the legitimate purposes of both state and federal governments. Often, the federal government was better off establishing its facilities on land not governed by the Enclave Clause. Federal control over these nonceded lands is not absolute, but the federal interest is protected from...

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25. Discussion typical of the early jurisprudence under Clause 17 is found in *Ex Parte Siebold*, where the Court contrasted the shared state-federal sovereignty over the United States generally with the absolute federal sovereignty under Clause 17.

This concurrent jurisdiction which the national government necessarily possesses to exercise its powers of sovereignty in all parts of the United States is distinct from that exclusive power which, by the first article of the Constitution, it is authorized to exercise over the District of Columbia, and over those places within a State which are purchased by consent of the legislature thereof for the erection of forts, magazines, arsenals, dockyards, and other needful buildings. There its jurisdiction is absolutely exclusive of that of the State, unless, as is sometimes stipulated, power is given to the latter to serve the ordinary process of its courts in the precinct acquired.

*Ex Parte Siebold*, 100 U.S. 371, 395 (1879).

26. *Sinks v. Reese*, 19 Ohio St. 306, 316, 318 (1869). As in *Custis v. Lane*, the votes at issue were cast in state elections, but there is no question that the same analysis would have applied to votes in federal elections as well.

27. *Act of Jan. 21, 1871, ch. 24, 16 Stat. 399, 399; Renner v. Bennett, 21 Ohio St. 431, 450 (1871).*
state encroachment by the general principles of federal supremacy described in cases like *McCulloch v. Maryland*.28

Voting rights were the least of the states’ concerns with the rigid Enclave Clause jurisprudence of early years. For example, state regulation of alcohol sales was not valid in federal enclaves.29 States were also frustrated by their inability to tax enclave residents and property.30

Judicial rigidity under the Enclave Clause did not stop states from pushing the envelope by reserving more and more state sovereignty in their Enclave Clause consents. These legally questionable attempts by states to retain partial sovereignty within the enclaves signaled that the courts’ rigid, absolute federal sovereignty approach to the Enclave Clause was proving unworkable from the states’ perspective, just as the congressional reaction to the Soldiers’ Home controversy sent a similar signal from the federal side. These state attempts to reserve partial sovereignty also presented a perplexing legal question. When states sought to reserve substantial sovereign powers over ceded enclaves when consenting to federal purchases, did the qualified consents fail to transfer sovereignty to the federal government under Clause 17, or instead did the qualified consents transfer sovereignty under Clause 17 with the state reservations of sovereignty being void?31

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28. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819). Even when the federal government establishes facilities on non-ceded land, it is not entirely without protection from state intrusion. *McCulloch v. Maryland* established the principle that a state cannot regulate a federal facility or activity “by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.” *Id.* at 436. This rule has been consistently applied to federal government activities on non-ceded lands ever since. See, e.g., *Hancock v. Train*, 426 U.S. 167, 178–80 (1976); *United States v. Tax Comm’n of Miss.*, 421 U.S. 599, 612–13 (1975); *Mayo v. United States*, 319 U.S. 441, 445 & 445 n.5 (1943); *Johnson v. Maryland*, 254 U.S. 51, 55–56 (1920). *See generally* U.S. CONST. art. IV, § 3, cl. 2 (“The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.”).

29. *In re Ladd*, 74 F. 31 (D. Neb. 1896); *Commonwealth v. Clary*, 8 Mass. (7 Tyng) 72 (1811); *State v. Intoxicating Liquors*, 78 Me. 401, 6 A. 4 (1886).


31. *See United States v. Cornell*, 25 F. Cas. 646, 649 (D.R.I. 1819) (“For it may well be doubted whether congress are by the terms of the constitution, at liberty to purchase lands for forts, dockyards, &c. with the consent of a state legislature, where such consent is so qualified that it will not justify the ‘exclusive legislation’ of congress there. It may well be doubted if such consent be not utterly void.”); Adam S. Grace, *Federal-State “Negotiations” Over Federal Enclaves in the Early Republic: Finding Solutions to Constitutional Problems at the Birth of the Lighthouse System*, 75 Miss. L.J. 545, 581 (2006) (“[T]he early federal administration worked out
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In 1885, the Supreme Court seemed to answer that question, while also dramatically loosening the constraints of the Enclave Clause by declaring that some ceded federal facilities were not Clause 17 enclaves at all. This allowed the Court to loosen the strictures of the Enclave Clause without repudiating the earlier cases that required absolute federal sovereignty under Clause 17.

The factual background of *Fort Leavenworth R.R. Co. v. Lowe* made this approach possible. Fort Leavenworth was established by the federal government before statehood, when Kansas was still a territory. Upon statehood, Congress failed to provide for exclusive jurisdiction over the property, which thus became subject to state sovereignty. Kansas was willing to correct this oversight and passed legislation ceding sovereignty to the United States, but also reserving Kansas’s right to tax a lucrative railroad that bisected the property. The railroad challenged the tax, arguing that Kansas had ceded its sovereignty to the federal government and that the Enclave Clause prohibited state taxation and other exercises of state sovereignty in federal enclaves.

Even while upholding the earlier Enclave Clause cases like *Cornell* and *Sinks v. Reese*, the Court held that the Enclave Clause did not apply to the Kansas tax, because Fort Leavenworth had not been “purchased by the Consent of the Legislature” as the language of the Enclave Clause provides. Instead, the property had been under federal control since long before statehood, and because the land was not “purchased” by the United States, the Enclave Clause did not apply.

The Court further held that the Enclave Clause did not provide the only means for states to cede sovereignty, which meant that the

its own adjustments with states that sought to place conditions upon jurisdictional cessions over federal enclaves. Some of those adjustments evince a flexibility of constitutional interpretation that would not be seen in Enclave Clause jurisprudence until the twentieth century.”). *Compare* New York Post Office Site, 10 Op. Att’y Gen 34, 39–40 (1861) (explaining that where state consent was “encumbered (as it often is) with conditions and reservations,” it is unclear whether “it do[es] not amount to a consent . . . and the United States hold the land, without exclusive jurisdiction” or whether “any exceptions, reservations, or qualifications contained in the [con- sent] are void, because, consent being given by the Legislature, the Constitution vests in Congress exclusive legislation over the place, beyond the reach both of Congress and the Legislature of New York.”), with Fort Porter Military Reservation, 16 Op. Att’y Gen. 592, 593–94 (1880) (explaining that where state reserved the right to use non-ceded land as “‘may be necessary for canal and harbor purposes[,]’” the state’s reservation “can be deemed valid only so far as it is not repugnant to the grant.”) (emphasis omitted).

32. 114 U.S. 525 (1885); see also Chicago, Rock Island & Pac. Ry. Co. v. McGl inn, 114 U.S. 542 (1885) (similar case decided on the same day).


34. U.S. CONST. art. I, § 8, cl. 17; see *Fort Leavenworth*, 114 U.S. at 528, 539.
cession by Kansas was valid, even though it fell outside the Enclave Clause. Because the Enclave Clause did not apply to the Kansas cession, there was no requirement for federal “exclusive Legislation,” so the state and federal governments could allocate sovereignty under their cession agreement however they liked, so long as the agreement left federal government activities unimpaired as provided by *McCulloch v. Maryland*. Therefore, Kansas’s right to tax the railroad was a valid reservation of state sovereignty because the Enclave Clause simply did not apply.  

*Fort Leavenworth R.R. Co.* opened a large loophole in the Enclave Clause, because prior to the decision it was generally thought that Clause 17 was the only way for states to cede sovereignty.  

The Court also sought to settle the larger question the parties had argued under the Enclave Clause itself, i.e., whether states could validly reserve limited sovereignty in their Enclave Clause cessions. While arguably non-binding dicta, the Court upheld the absolute federal sovereignty construction of the Enclave Clause, declaring that state consents containing reservations of state sovereignty did transfer sovereignty to the federal government under the Enclave Clause, but that the states’ reservations of sovereignty in those consents were invalid. In arriving at this conclusion, the Court relied in part on the absolute nature of Maryland’s cession of the District of Columbia under Clause 17. Thus, as to the Enclave Clause itself and Clause 17 generally, the early jurisprudence prohibiting any sovereignty sharing survived after *Fort Leavenworth R.R. Co.* Even so, *Fort Leavenworth R.R. Co.* had a big impact on sovereignty sharing between state and federal governments, because states now had the choice of struc-

35. *Fort Leavenworth*, 114 U.S. at 539–42.

36. David E. Engdahl, *State and Federal Power Over Federal Property*, 18 *Ariz. L. Rev.* 283, 306 (1976) (“This allowance of a cession of governmental jurisdiction, too limited to place the property under the article I clause, was without precedent before the *Fort Leavenworth Railroad* case.”) (footnote omitted).

37. *Fort Leavenworth*, 114 U.S. at 537–38 (“[N]o other legislative power than that of Congress can be exercised over lands within a State purchased by the United States with her consent for one of the purposes designated; and that such consent under the Constitution operates to exclude all other legislative authority.”).

38. Id. at 528–29.

39. See, e.g., *Surplus Trading Co. v. Cook*, 281 U.S. 647, 655–57 (1930) (holding U.S. Army training camp ceded under the Enclave Clause, but state reservation of taxing authority invalid); see also Engdahl, supra note 36, at 315 (“The question whether a state could validly reserve any measure of jurisdiction over property to which the state ceded jurisdiction under [Clause 17] was held ‘not an open one. It has long been settled’ that it could not.”) (quoting *Surplus Trading Co.* 281 U.S. at 652) (footnote omitted).
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turing their cessions to fall outside the Enclave Clause. Moreover, the Court’s rejection of state reservations of sovereignty in Enclave Clause cessions made it important in many cases for states to make sure that their cessions fell under the new rule of Fort Leavenworth R.R. Co. and steered clear of the Enclave Clause itself.

Thus, between 1885 and 1937, there existed a variety of sovereignty sharing arrangements governing federal enclaves, including old and new cessions under the Enclave Clause, which permitted no sharing of sovereignty, and the cessions under Fort Leavenworth R.R. Co., which permitted virtually unlimited sharing of sovereignty, so long as state power did not interfere with federal interests.

Voting rights were among the powers reserved by the states in cessions. A well-documented example is the cession by California of sovereignty over Yosemite and Sequoia National Parks. California ceded sovereignty to the federal government, reserving the state’s right to tax persons and property, fix and collect fishing license fees, and “saving also to the persons residing in any of said parks now or hereafter the right to vote at all elections held within the county or counties in which said parks are situated.”

While Fort Leavenworth R.R. Co. and its progeny are important in tracking the evolution of the Enclave Clause, the case had no effect on Congress’s power to share sovereignty with states under the District Clause. Because it upheld the old Enclave Clause cases rejecting sovereignty sharing, Fort Leavenworth R.R. Co. made no change in how courts might view a federal sharing of sovereignty with states to facilitate congressional voting by District of Columbia residents. Only if such sovereignty sharing is permitted under the Enclave Clause it-

40. States could do this by ceding sovereignty to the federal government separately from the federal government’s purchase of the land. See Arlington Hotel Co. v. Fant, 278 U.S. 439, 451 (1929) (“[T]he State and the Government of the United States could frame the cession and acceptance of governmental jurisdiction, so as to divide the jurisdiction between the two as the two parties might determine, provided only they saved enough jurisdiction for the United States to enable it to carry out the purpose of the acquisition of jurisdiction.”); Palmer v. Barrett, 162 U.S. 399, 402–03 (1896) (holding that federal purchase of land was not with consent of New York, whose cession took place well after the purchase). The Fort Leavenworth rule would also apply where the federal government did not purchase the land, as was common in many Western states where the United States had held the land in question as public land prior to statehood. United States v. Unzeuta, 281 U.S. 138, 142 (1930); Benson v. United States, 146 U.S. 325, 329–30 (1892).

41. See Engdahl, supra note 36, at 315 (stating that prior to 1937, the different treatment of sovereignty sharing was “the cardinal distinction” between a cession in accord with Clause 17 and a cession falling outside Clause 17).

self would there be any effect on the District Clause, whose “exclusive Legislation” provision constitutes “like Authority” with respect to the Enclave Clause, which means under the text of the Constitution that the two clauses should be given the same interpretation.43

The necessary change in interpretation of the Enclave Clause came in 1937. James v. Dravo Contracting Co.44 involved West Virginia’s attempt to tax a business operating on land “ceded” to the United States under the Enclave Clause, but over which West Virginia purported to reserve “concurrent jurisdiction” in its legislation consenting to the cession. Characterizing its contrary statements dating from Fort Leavenworth R.R. Co. as “obiter dicta,”45 the Court changed course and held that reservations of state sovereignty are permissible under the Enclave Clause of Clause 17.

Clause 17 contains no express stipulation that the consent of the State must be without reservations. We think that such a stipulation should not be implied. We are unable to reconcile such an implication with the freedom of the State and its admitted authority to refuse or qualify cessions of jurisdiction when purchases have been made without consent or property has been acquired by condemnation. In the present case the reservation by West Virginia of concurrent jurisdiction did not operate to deprive the United States of the enjoyment of the property for the purposes for which it was acquired, and we are of the opinion that the reservation was applicable and effective.46

A companion case decided the same day, Silas Mason Co. v. Tax Comm’n of Wash., explained that this new holding was based on the need for flexibility in allocating responsibilities between federal and state governments and that our system of government is “a practical adjustment by which the national authority may be maintained in its full scope without unnecessary loss of local efficiency. In acquiring property, the federal function in view may be performed without dis-

43. See Paul v. United States, 371 U.S. 245, 263 (1963) (“The power of Congress over federal enclaves that come within the scope of Art. I, § 8, cl. 17, is obviously the same as the power of Congress over the District of Columbia. The cases make clear that the grant of ‘exclusive’ legislative power to Congress over enclaves that meet the requirements of Art. I, § 8, cl. 17, by its own weight, bars state regulation without specific congressional action.”). See also Raven-Hansen, supra note 13, at 171 (“If [Congress] can thus change the form of such federal places, then it has ‘like authority’ to do the same to the District itself. This is not the strained analogy of the advocate, it is the Framers’ own, expressly written into the Constitution.”).
44. 302 U.S. 134 (1937).
45. Id. at 147.
46. Id. at 148–49.
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turbing the local administration in matters which may still appropriately pertain to state authority."

James and Silas Mason Co. are of critical importance to advocates of District of Columbia congressional voting because those cases make clear that state and federal governments can agree to divide or share sovereign power with respect to land ceded under Clause 17, so long as the federal purpose is not undermined. Because the District and Enclave Clauses were designed to mirror each other in scope (each clause requiring the federal government’s exercise of “like Authority” with respect to the other clause), agreements sharing such sovereignty also should be permitted under the District Clause so long as the essential purpose of the District of Columbia as the seat of national government is not undermined. This means that the federal government can cede to Maryland or other states that small measure of sovereignty over the District of Columbia relating to congressional voting power.

Collins v. Yosemite Park & Curry Co. was another important case decided later in the same term as James and Silas Mason Co. Collins made clear that previously negotiated sovereignty sharing agreements are not set in stone and that the sharing of sovereign powers can be adjusted by later agreement between state and federal authorities. After the end of Prohibition, California sought to tax and license the sale of alcohol in Yosemite National Park, under a reservation of rights in its 1920 cession agreement allowing the state to tax persons and private property in the park. As mentioned earlier, those agreements also contained a reservation of voting rights for Yosemite residents, which unfortunately was not directly at issue in the case. The 1919 and 1920 cession agreements replaced and super-

48. See Engdahl, supra note 36, at 324 (James and Silas Mason Co. “obliterat[ed] the traditional distinction between [Clause 17] and [other federal] property with regard to reservations in a cession of jurisdiction by a state . . . .”).
49. See supra note 43; see also Engdahl, supra note 36, at 377 (“Supreme Court decisions during the 1937 term further departed from the classic principles by holding that negotiation and agreement could fix any division of jurisdiction thought desirable by both the federal and state governments, affording opportunities for accommodation and flexibility in the governance of enclaves not possible under the earlier rules.”).
50. 304 U.S. 518 (1938).
51. Id. at 521–26 nn.9 & 10.
52. See supra note 42 and accompanying text. Even though the Court did not directly uphold the state’s reservation of voting rights, the Court did uphold California’s taxation reservation, and there is no reason to think that the Court would have treated voting rights less favorably than the state’s right to tax.
seded a number of earlier cession agreements with a uniform cession and a uniform set of state reservations of sovereignty. The court found this later modifying agreement entirely proper. By allowing state and federal governments to modify their sovereign relationship as needed on an ongoing basis, Collins strongly suggests that the federal government’s sovereign relationship with the District of Columbia also is not set in stone.53

Moreover, sovereignty sharing is not limited to state “reservations” of sovereign powers when ceding lands to the federal government. Congressional practice, upheld by the Supreme Court, also supports the affirmative cession of sovereign powers by the federal government to the states. In 1936, Congress enacted a federal law allowing state workers’ compensation laws to apply within federal enclaves. 54 In 1939, Congress enacted a similar law allowing state unemployment compensation laws to apply within federal enclaves. 55 More significantly, in 1940 Congress enacted laws giving to states the power to tax businesses and residents within federal enclaves, including the power to impose state income tax on enclave residents, which was upheld by the Supreme Court. 56 Finally, in 1948 Congress amended the

53. See Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 528–30 (1938); see also Raven-Hansen, supra note 13, at 171 (arguing that if Congress can change the form of federal enclaves, then Congress can do the same to the District).


55. See Social Security Act Amendments of 1939, Pub. L. No. 76-379, § 613, 53 Stat. 1360, 1392 (1939) (now codified at 26 U.S.C. § 3305(d)) (“No person shall be relieved from compliance with a State unemployment compensation law on the grounds that services were performed on land or premises owned, held or possessed by the United States, and any State shall have full jurisdiction and power to enforce the provisions of such law to the same extent and with the same effect as though such place were not owned, held, or possessed by the United States.”). Between 1939 and 1954, section 3305(d) was codified as 26 U.S.C. § 1606(d). See Internal Revenue Code of 1954, Pub. L. No. 83-591, 68A Stat. 3, 446 (1954) (showing recodification).


(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940.
Assimilative Crimes Act, allowing newly enacted state criminal laws to take effect in federal enclaves without the need for Congress to pass ratifying legislation. 57

D. How Enclave Residents Finally Got the Right to Vote

As things stood in 1938, states were permitted to exercise some sovereign powers within all enclaves, whether ceded under the Enclave Clause or not, and states’ had sometimes reserved residents’ voting rights (e.g., Yosemite and the Ohio Soldiers’ Home) but usually had not. Because states usually had not reserved voting rights, many enclave residents remained disenfranchised. 58

4 U.S.C. § 106 (2012). Between 1940 and 1947, sections 104–10 were codified as 4 U.S.C. §§ 12–18. See Act of Jul. 30, 1947, Pub. L. No. 80-279, 61 Stat. 641, 644–46 (1947) (showing recodification). See also Howard v. Comm’rs of the Sinking Fund of the City of Louisville, 344 U.S. 624, 627 (1953) (“The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries [by annexing it into the City], so long as there is no interference with the jurisdiction asserted by the Federal Government.”).

57. Crimes and Criminal Procedure Act, Pub. L. No. 80-772, 62 Stat. 683, 686 (1948) (codified as amended at 18 U.S.C. § 13 (2012)). The Assimilative Crimes Act provides that state criminal laws apply in federal enclaves, unless there is a specific federal law that covers the offense. The first of these laws was enacted in 1825, and periodically thereafter, Congress reenacted a version of the Act, with each new Act adopting the state criminal laws that were in effect at the time of passage. United States v. Sharpnack, 355 U.S. 286, 288–93 (1958) (discussing history of the Act and its amendment in 1948). The periodic reenactments of the law were designed to keep state criminal laws in the enclaves reasonably up to date. Id. at 291–92. The reason for periodically reenacting the Act was that under the old Clause 17 jurisprudence, it was thought that allowing newly enacted state criminal laws to apply in the enclaves without congressional ratification would give the states permissible legislative authority to change criminal law in the enclaves. See Franklin v. United States, 216 U.S. 559, 569 (1910) (“There is, plainly, no delegation to the states of authority in any way to change the criminal law applicable to places over which the United States has jurisdiction.”). The Supreme Court upheld the 1948 version of the Act, which allowed newly enacted state criminal laws to apply in the enclaves without congressional ratification. Sharpnack, 355 U.S. at 297.

58. There were a number of state cases denying enclave residents the right to vote. See Herken v. Glynn, 101 P.2d 946 (Kan. 1940); Royer v. Bd. of Election Supervisors for Cecil Cnty., 191 A.2d 446 (Md. 1963); Arledge v. Mabry, 197 P.2d 884 (N.M. 1948); State ex rel. Wendt v. Smith, 103 N.E.2d 622 (Ohio Ct. App. 1951); McMahon v. Polk, 73 N.W. 77 (S.D. 1897). However, some courts applied various rationales to allow enclave residents to vote, even where voting rights had not been reserved in the cession. See Arapajolu v. McMenamin, 249 P.2d 318, 323 (Cal. Dist. Ct. App. 1952) (“If the State retains jurisdiction over a federal area sufficient to justify a holding that it remains a part of the State of California [so] a resident therein is a resident of the State and entitled to vote by virtue of the Constitutionally granted right.”); Rothfels v. Southworth, 356 P.2d 612, 614 (Utah 1960) (“[W]e see no reason why it would not be within the prerogative of the legislature to grant the right to vote to persons residing on military reservations even where the federal government had exclusive jurisdiction, if the legislature so desired, because it is entirely within [the legislature’s] province to prescribe the conditions upon which the voting franchise may exist within our state.”) (footnote omitted); Adams v. Londeree, 83 S.E.2d 127, 140 (W. Va. 1954) (holding that where state’s Clause 17 consent to federal acquisition of land expressly extended only to the specific purpose for which the federal government...
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A lengthy federal government report issued in 1956 and 1957 described myriad problems faced by residents of federal enclaves due to their ambiguous legal status, including the lack of voting rights. Because so few states reserved voting rights in enclaves, the right of enclave residents to vote often depended on whether “informal [state] action” allowed enclave residents to vote. This created a hodgepodge of practices with enclave residents able to vote in some enclaves but not in others, these contradictory results sometimes occurring even within the same state. Occasionally, action would be

59. The report was published in two parts. Volume 1 was published in 1956, and volume 2 was published in 1957. See Interdepartmental Comm. for the Study of Jurisdiction over Fed. Areas Within the States, Submitted to the Att’y Gen. and Transmitted to the President, Jurisdiction over Federal Areas Within the States, Part I: The Facts and Committee Recommendations (1956) [hereinafter 1 Interdepartmental Study]; Interdepartmental Comm. for the Study of Jurisdiction over Fed. Areas Within the States, Submitted to the Att’y Gen. and Transmitted to the President, Jurisdiction over Federal Areas Within the States, Part II: A Text of the Law of Legislative Jurisdiction (1957) [hereinafter 2 Interdepartmental Study].

60. Voting.—It is clearly settled that should the State choose to do so, it could deny the right to vote to residents of areas of exclusive Federal jurisdiction. A few States (among them California) have granted the right of suffrage to residents of such enclaves but such States are the exception rather than the rule. According to reports received by the Committee there are more than 90,000 residents other than Armed Forces personnel on Federal areas within the States of Virginia, Kansas, and California alone, plus persons residing in 27,000 units of Federal housing. In view of the close connection that the right of suffrage bears to the traditions and heritage of the United States, the disenfranchisement or even the possibility of the disenfranchisement of such a large number of United States citizens is a cause for serious reflection.

1 Interdepartmental Study, supra note 59, at 54–55.

61. 2 Interdepartmental Study, supra note 59, at 224–25 (“[A] few States have by statute granted voting rights to [enclave] residents (e.g., California, Nevada (in some instances), New Mexico, and Ohio (in case of employees and inmates of disabled soldiers’ homes)). On the other hand, one State has a constitutional prohibition against voting by such persons . . . .”) (footnotes omitted).

62. 2 Interdepartmental Study, supra note 59, at 8. Absent informal state action between 1937 and 1970, a state reservation of voting rights was the only sure way for an enclave resident to obtain suffrage with reasonable certainty of withstanding court challenge. See supra notes 58, 61. Cf. Royer, 191 A.2d at 449 (“If a change [to allow voting rights in enclaves] is desirable . . . we think it should be through adjustment by the sovereign legislative bodies and not imposed by the courts.”); Arledge, 197 P.2d at 895 (discussing that while taxation and other exercises of state sovereign power in the enclave were expressly authorized by Congress, the right to vote was not ceded back to the state by Congress).

63. See 1 Interdepartmental Study, supra note 59, at 54 (“For example, in two Federal areas of exclusive jurisdiction within the same city, the residents of one were accorded the status of full citizens by State officials while the residents of the other were denied all rights thereof.”); A. Ludlow Kramer, AGO 65–66 No. 107 (Wash. Att’y Gen. Sept. 30, 1966), at 2 (noting that the “puzzlement” of some enclave residents not permitted to vote in Washington state was likely compounded by the fact that residents of other Washington federal enclaves were allowed to vote).
taken to restore voting rights to specific enclaves, but this was not common.\textsuperscript{64}

Until 1970, it was generally understood that most states could exclude enclave residents from voting if they so chose. Whenever informal state action allowed enclave residents to vote, it may have been due to a combination of factors, including local officials failing to understand the enclaves’ unique legal status and whether enclave residents were not so numerous as to upset local balances of political power.\textsuperscript{65}

The Supreme Court at last gave enclave residents the right to vote in 1970. \textit{Evans v. Cornman}\textsuperscript{66} was a suit brought by residents of the National Institutes of Health (NIH) campus in Montgomery County, Maryland, which was ceded to the United States by Maryland in 1953. County election officials had allowed NIH residents to vote from 1953 until 1968, when they purged NIH residents from the voter rolls in response to a state court decision holding that enclave residents were ineligible to vote in Maryland.\textsuperscript{67}

The Supreme Court rejected the state’s reliance on old Enclave Clause voting rights cases like \textit{Opinion of Justices}\textsuperscript{68} and \textit{Sinks v. Reese}.\textsuperscript{69}

We need not consider, however, whether these early cases would meet the requirements of the Fourteenth Amendment, for the relationship between federal enclaves and the States in which they are located has changed considerably since they were decided. As the District Court noted, Congress has now permitted the States to extend important aspects of state powers over federal areas.\textsuperscript{70}

Among these changes in state sovereign power over federal areas were the prospective application of state criminal law under the

\textsuperscript{64} A. Ludlow Kramer, \textit{supra} note 63, at 23 (“[F]or purposes of eligibility to vote, a person does live in the state of Washington if he lives within the geographical limits of the state but in an area over which the United States Congress has the power of ‘exclusive legislation.’”). One example of retrocession involving both state and federal action allowed residents of the Los Alamos reservation in New Mexico to reassert their civil rights, including “the right to vote in State and Federal elections.” 2 \textit{INTERDEPARTMENTAL STUDY, supra} note 59, at 92–93 (quoting S. Rep. 81-76 accompanying Pub. L. No. 81-14, 63 Stat. 11 (1949)); \textit{see also} State ex rel. Parker v. Corcoran, 128 P.2d 999, 1004–05 (Kan. 1942) (holding that federal statute providing for acquisition of property to house defense workers preserved the voting rights of the workers inhabiting the property).

\textsuperscript{65} 1 \textit{INTERDEPARTMENTAL STUDY, supra} note 59, at 54.

\textsuperscript{66} 398 U.S. 419 (1970).

\textsuperscript{67} \textit{Id.} at 419–21 (describing election officials’ response to \textit{Royer}).

\textsuperscript{68} 42 Mass. (1 Met.) 580 (1841).

\textsuperscript{69} 19 Ohio St. 306 (1869).

\textsuperscript{70} \textit{Evans}, 398 U.S. at 423.
amended Assimilative Crimes Act, state taxation of enclave residents, and state workers’ compensation and unemployment compensation laws.\textsuperscript{71} In addition, NIH residents apparently utilized Maryland’s automobile licensing and registration laws, state courts, and public schools.\textsuperscript{72} “All of these factors led the District Court to ‘conclude that on balance the [appellees] are treated by the State of Maryland as state residents to such an extent that it is a violation of the Fourteenth Amendment for the State to deny them the right to vote.’”\textsuperscript{73} The Supreme Court agreed with the district court that with respect to elections, the residents of the NIH enclave “have a stake [in elections] equal to that of other Maryland residents. As the District Court concluded, they are entitled under the Fourteenth Amendment to protect that stake by exercising the equal right to vote.”\textsuperscript{74}

Thus, shared sovereignty between state and federal governments over federal enclaves provided the factual predicate for the Court’s Fourteenth Amendment holding in \textit{Evans}. It was the federal government’s sharing of sovereign power with the states that gave NIH residents the necessary “stake” in Maryland’s electoral politics. In fact, the Court acknowledged that should a future Congress repeal those sovereignty sharing laws, once again reducing the states’ sovereign power over federal enclaves, it once again might be lawful for states to forbid enclave residents from voting.\textsuperscript{75}

Unfortunately, \textit{Evans v. Cornman} is of only limited relevance to District of Columbia voting rights because states now exercise no sovereign power over the District of Columbia.\textsuperscript{76} Moreover, many have thought it undesirable to share with states a comparable level of power over the District of Columbia’s day to day existence.\textsuperscript{77} How-

\begin{thebibliography}{9}
  \bibitem{71} Id. at 424; see \textit{supra} notes 54–57 and accompanying text (discussing the sovereignty sharing laws relied upon in \textit{Evans}).
  \bibitem{72} \textit{Evans}, 398 U.S. at 424.
  \bibitem{73} Id. at 424–25 (alteration in original) (quoting Cornman v. Dawson, 295 F. Supp. 654, 659 (D. Md. 1969)).
  \bibitem{74} \textit{Evans}, 398 U.S. at 426.
  \bibitem{75} Id. at 423–24 (“While it is true that federal enclaves are still subject to exclusive federal jurisdiction and Congress could restrict as well as extend the powers of the States within their bounds, whether appellees are sufficiently disinterested in electoral decisions that they may be denied the vote depends on their actual interest today, not on what it may be sometime in the future.”) (citation omitted).
  \bibitem{76} \textit{See} Adams v. Clinton, 90 F. Supp. 2d 35, 64 (D.D.C. 2000) (“The case before us is plainly not analogous [to \textit{Evans}] in this respect. Congress has ceded none of its authority over the District back to Maryland, and Maryland has not purported to exercise any of its authority in the District.”) (footnote omitted).
  \bibitem{77} Those hoping to retain federal control over the District of Columbia would want to keep the cession of sovereign powers to the barest minimum, given the District Clause’s require-
\end{thebibliography}

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ever, it is not necessary to use the *Evans v. Cornman* Fourteenth Amendment analysis to provide congressional voting rights to District of Columbia residents.\(^78\)

### E. Shared Sovereignty Under Clause 17 Can Fully Enfranchise District of Columbia Residents

Rather than giving Maryland or other states substantial governmental power over the District of Columbia, an alternative approach is to leave the District of Columbia under federal control and cede only the congressional voting power.\(^79\) One writer has already suggested that the United States and Maryland might be able to adjust the original cession agreement to allow for congressional voting rights.\(^80\) *Collins* would support modifying the original cession or negotiating an entirely new agreement with Maryland to allow for congressional voting rights,\(^81\) assuming that Maryland would be willing to accept the consequent dilution of its own residents’ congressional votes. If Maryland is unwilling to absorb the full burden of this dilution, it also is possible to use these same principles to allow for agreements with other states to accomplish the same goal.\(^82\)

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\(^78.\) Justice Stephen Markman (then an Assistant U.S. Attorney General) criticized Congressman Thornton’s proposal, largely because it did not fit within the parameters of *Evans v. Cornman*. Markman, *supra* note 13, at 25–28. However, under shared sovereignty, the voting rights are acquired through a different mechanism, so the analysis of *Evans* is not determinative. See Adams, 90 F.Supp. at 64. In *Evans*, enclave residents got the vote under the Fourteenth Amendment because so many sovereign powers had been transferred to the state. Under shared sovereignty, District of Columbia residents would get the vote because the voting power itself is ceded to a state, in much the same way that California reserved the voting power over Yosemite and other California federal parks, allowing residents there to vote in California elections for many years prior to *Evans* and indeed, for many years prior to Congress’s cession to states of the sovereign powers so important to the Court in *Evans*. See *supra* note 42 and accompanying text.

\(^79.\) *Adams*, 90 F.Supp.2d at 64 n.54 (the holding in *Evans* applied to NIH because Congress delegated authority to Maryland, but Congress’s delegation of power to the City Council would have no similar effect “provided [Congress] does not delegate that authority to another sovereign[.]”); Custis v. Lane, 17 Va. (3 Munf.) 579, 591 (1813) (“[I]t is only by the consent and courtesy of [C]ongress that any of the laws of Virginia have been permitted to operate therein.”).

\(^80.\) Scarberry, *supra* note 8, at 891–92.

\(^81.\) Both James and Silas Mason Co. make clear that state and federal governments have wide discretion in structuring sovereignty sharing arrangements, and *Collins* makes clear that the terms of old cessions can be adjusted by agreement of state and federal authorities. See *supra* text accompanying notes 44–53.

\(^82.\) Such a cession is within the federal government’s power over the District of Columbia. “Congress possesses ‘the combined powers of a general and of a State government in all cases
The exclusive legislation requirement is satisfied under the Enclave Clause so long as the state’s exercise of sovereign power in the enclave does not undermine the enclave’s federal purpose, and the same reading should hold true under the District Clause. Granting congressional voting rights would actually promote the District of Columbia’s federal purpose and certainly would not undermine it. It can hardly be argued that the congressional voting power, now lying dormant, serves any affirmative federal purpose contemplated by the District Clause. Indeed, ceding away that dormant power will help assure that Congress retains control over the District of Columbia by removing a source of injustice and discontent which has led some to suggest retrocession and others to suggest statehood. Both of those alternatives represent existential threats to the National Capital as we
now know it and could lead to the ultimate irrelevance of the District Clause itself. In order to bolster its power of exclusive legislation over the District of Columbia, Congress could cede this small bit of dormant sovereign power for which it has no use and which is potentially destructive while held in its own hands, to make more secure those other powers over the seat of national government which the drafters of the District Clause wanted Congress to have.

James, Silas Mason Co., and the other modern Enclave Clause cases show that shared sovereignty has ample legal support under Clause 17, and many policy makers who previously opposed congressional voting for District of Columbia residents on constitutional grounds might be expected now to support it.86 The next question is how to implement this shared sovereignty solution.

II. EXPLORING TWO DIFFERENT WAYS TO IMPLEMENT SHARED SOVEREIGNTY—THE MARYLAND OPTION AND THE MULTISTATE OPTION

A. Introduction

Sovereignty sharing is a flexible concept, and there are a number of ways Congress could choose to provide congressional representation to District of Columbia residents. For purposes of illustration, this section discusses two approaches: (1) ceding the congressional voting power for the entire District of Columbia to one state, such as Maryland (the “Maryland option”),87 or (2) ceding to multiple states the congressional voting power for discrete parcels of the District of Columbia (the “Multistate option”).

Under either option, the congressional voting power is the only power that would be ceded. All other sovereign power with respect to

86. Remaining opponents of congressional voting rights for District of Columbia residents should weigh carefully the risks of continued opposition. A shared sovereignty arrangement would give District of Columbia residents a legally binding connection with one or more states. It would be impossible for a critic to challenge the validity of that shared sovereignty connection without also putting into question the rights of voters whose connection to a state is far less tenable. This includes many Americans residing or serving overseas who no longer maintain a domicile in the United States. Opponents of District of Columbia voting rights should weigh carefully that their challenge to shared sovereignty, if successful, would open the door to challenges placing at risk the voting rights of overseas citizens, who are often allowed to vote in federal elections without being domiciled in a state. See infra note 89. That outcome is one that persons on all sides of this debate should avoid.

87. While Maryland is the obvious choice for a single state option, Congress could enter into an arrangement with any state willing to accept District of Columbia congressional voters, subject to the possible need for Maryland to consent.
the District of Columbia would remain with Congress and its designee, the District of Columbia Council, leaving intact the District of Columbia’s character as the seat of national government.88 District of Columbia voters would continue to vote for their own presidential electors as provided by the Twenty-third Amendment, and District of Columbia voters would vote only in congressional elections and not for state offices.89


89. District of Columbia residents would be eligible to vote in congressional elections in one or more states, notwithstanding their not being qualified to vote for state legislators and other state officials. Adams v. Clinton may have created confusion on this point by misunderstanding the Qualifications Clauses of Article I, Section 2, Clause 1 and the Seventeenth Amendment to require that District of Columbia voters be able to vote for state legislators in order to be able to vote for members of Congress in a state. See Adams v. Clinton, 90 F. Supp. 2d 35, 64 (D.D.C. 2000) (“Plaintiff’s enclave theory, by contrast, would permit residents of the District to vote in Maryland’s congressional elections notwithstanding that they lack . . . precisely those qualifications [to vote in state legislative elections].”). However, Adams v. Clinton incorrectly interpreted the Qualifications Clauses. The Qualifications Clauses provide that “[t]he Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislatures.” U.S. CONST. art I, § 2, cl. 1 & amend. XVII. The clauses contain two elements: they empower states to set voter qualification requirements, Arizona v. Inter Tribal Council of Ariz., Inc., 133 S.Ct. 2247, 2257–59 (2013), and also limit that power by forbidding states from “disenfranchis[ing] any voter in a federal election who is qualified to vote in a primary or general election for the more numerous house of the state legislature.” Tashjian v. Republican Party of Conn., 479 U.S. 208, 229 (1986). The Qualifications Clauses do not prevent voters from voting for federal offices in a state merely because they are not qualified to vote for state legislators, and Adams v. Clinton is wrong to the extent it suggests otherwise.

Far from being a device to limit the federal suffrage, the Qualifications Clause was intended by the Framers to prevent the mischief which would arise if state voters found themselves disqualified from participation in federal elections. The achievement of this goal does not require that qualifications for exercise of the federal franchise be at all times precisely equivalent to the prevailing qualifications for the exercise of the franchise in a given State. The fundamental purpose of the Qualifications Clauses contained in Article I, § 2, and the Seventeenth Amendment is satisfied if all those qualified to participate in the election of members of the more numerous branch of the state legislature are also qualified to participate in the election of Senators and Members of the House of Representatives. Tashjian, 479 U.S. at 228–29; see U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 865 (1995) (Thomas, J., dissenting) (“We have treated the Clause as a one-way ratchet: While the requirements for voting in congressional elections cannot be more onerous than the requirements for voting in elections for the most numerous branch of the state legislature, they can be less so.”) (citing Tashjian, 479 U. S. at 225–29). This point is further reinforced by examples where congressional action has caused the pool of voters for state and federal offices sometimes to be different, which shows that there need not be a perfect symmetry between the voter pools for state and federal elections. Tashjian cited the example of Oregon v. Mitchell, 400 U.S. 112 (1970) where a divided Court upheld federal legislation allowing citizens aged 18 to 20 to vote in federal elections, while allowing states to exclude the same voters from state elections. Tashjian, 479 U.S. at 229. Oregon v. Mitchell would have required many states to have separate federal ballots for under-21 voters who could not vote in state elections, had not the Twenty-sixth Amendment been speedily ratified. Kevssar, supra note 2, at 227–28. Discussing Oregon v. Mitchell, the Tashjian Court explained that “[o]ur conclusion that these provisions do not re-
While a cession is in effect under either option, District of Columbia voters must be treated as congressional voters in receiving states for all purposes, including Article I, Section 2, Clause 3, which provides that seats in the House of Representatives “shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . .” 90 Counting District of Columbia residents in apportioning House seats does create logistical problems.

The Maryland option presents more of these logistical problems than the Multistate option. Even so, the Maryland option is attractive from a historical perspective, and it would be similar to retrocession options considered in the past.

While the Multistate option may sound odd on first impression, 91 the participation of multiple states makes it possible to reduce or eliminate the logistical problems associated with the Maryland option, and this could make the Multistate option attractive to some policy makers. However, District of Columbia voters may feel that their voting power is diluted by being spread in small numbers across a large number of states.

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90. U.S. Const. art. I, § 2, cl. 3.
91. In considering another idea for multiple-state voting for District of Columbia residents, Professor Raskin observed that “[n]othing would be stranger in our political and constitutional experience than having citizens from one geographic community vote in fifty different states, so this solution is both theoretically and constitutionally disfavored.” Raskin, supra note 85, at 94. However, Professor Raskin likely would agree that there is at least one thing stranger, and that is the current disenfranchisement of District of Columbia residents itself. It also would be very strange for Congress to drop voting rights legislation altogether merely because one state out of fifty (Maryland) refused to accept the full burden of vote dilution. If Maryland refuses to be the sole recipient of District of Columbia voters, then other options must be explored, even if those other options strike some people as unusual. The status quo is far more offensive than any option providing full suffrage. Finally, a multiple-state solution may become more viable once its advantages are fully understood by current critics of statehood and retrocession, as explained in section II D. At a minimum, a multiple-state solution could prove the best way to provide Senate representation, even if House of Representatives representation is provided another way. See infra note 114.
Un fortunately, neither shared sovereignty option will provide one important benefit many expect and want: the District of Columbia will not receive its “own” seat in the House of Representatives.\textsuperscript{92} Even under the Maryland option, District of Columbia voters likely would be assigned to one or more Maryland congressional districts along with Maryland voters, the precise number of such districts depending on the terms of the cession agreement. Under the Multistate option, District of Columbia residents would be assigned to various congressional districts in a number of different states.\textsuperscript{93}

B. Both Options Require State Consent

Article IV, Section 3, Clause 1 provides that states must consent to changes in their borders. This provision will affect Congress’s cession of the congressional voting power in two ways: (1) it is clear that states \textit{receiving} a cession under both options must consent to receipt and (2) while this is less clear, Maryland’s consent may be needed before Congress can \textit{grant} cessions to any other state under the Multistate option.

The most obvious need for state consent is that any state receiving a cession must agree to its receipt. Even though all cessions would be limited only to the congressional voting power, a cession would extend a state’s sovereign power beyond its current borders to that limited extent, and as a practical matter, it would change the mix of voters in the state, potentially changing the balance of power in congressional elections.

\textsuperscript{92} In critiquing Congressman Thornton’s proposal, Congressman Edwards noted that the one-person, one-vote rule would prevent the District of Columbia from having its “own” members of the House of Representatives. 1977 \textit{House Hearings}, supra note 3, at 41. This concern was shared by a later witness, Professor Stephen Saltzberg. \textit{Id.} at 122. Another concern was that Senate vacancies often would be filled by a state governor that District of Columbia residents did not elect. \textit{Id.} at 122, 127, 130 (testimony of Professor Stephen Saltzberg and Assistant Attorney General Patricia Wald). There is little that can be done about such imperfections, but that is no reason to deny congressional voting rights altogether. Congress can only do what the Constitution permits.

\textsuperscript{93} Another deficiency of a shared sovereignty approach is that District of Columbia residents probably cannot run for Congress, because the Constitution requires that a member of Congress “be an Inhabitant of that State in which he shall be chosen.” U.S. \textit{Const.} art. I, § 2, cl. 2 (qualification for member of House of Representatives); \textit{see also} U.S. \textit{Const.} art. I, § 3, cl. 3 (similar provision for Senators). Cession of the congressional voting power would not make a District of Columbia resident an “inhabitant” of a state for the purpose of taking a seat in Congress. Expanding the cession to make District of Columbia residents “inhabitants” of a state could have unwanted consequences with respect to the application of state laws within the District of Columbia. One odd result of this rule could be that under some versions of the Maryland option, a District of Columbia resident might have to move to Maryland in order to represent the District of Columbia (and part of Maryland) in Congress.

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Under the Maryland option, the only state needing to consent to receiving a cession would be Maryland. Under the Multistate option, cessions could only be made to those states that consent to receive cessions.

In addition, Maryland also might need to consent to cessions being made to other states under a Multistate option. As the state which originally ceded the District of Columbia to the federal government, some have argued that Maryland has a right of reversion if the federal government ever stops using the District of Columbia as the seat of national government. By this reasoning, Maryland’s consent might be needed to allow District of Columbia statehood and the same logic would apply to cessions of the congressional voting power to other states.94

Ultimately, the need for Maryland’s consent to one or both of these options should prove to be a mere formality, rather than an obstacle. Maryland has been a good neighbor to the District of Columbia with many historical ties. While Maryland may have a preference as to which option is chosen, it is inconceivable to think that Maryland would try to block voting rights legislation altogether by withholding its consent to any solution. Maryland residents are well aware of the injustice associated with the District of Columbia’s voting status, and Maryland’s political leadership is unlikely to block District of Columbia voting rights. Whatever option Maryland ultimately prefers, Maryland can be expected to enact consent legislation with respect to that option.

C. The Maryland Option and Its Logistical Problems

1. In General

The Maryland option would differ from retrocession in that Maryland would exercise no governmental control over the District of Columbia because only the congressional voting power would be ceded. Another difference is that the cession of congressional voting power would cover the entire District of Columbia, including the area around the National Mall. After the cession, District of Columbia residents would be eligible to vote in Maryland congressional elections.

94. See supra note 13 and accompanying text; see also S.R.A., Inc. v. Minnesota, 327 U.S. 558, 564 (1946) (“As the purpose of Clause 17 was to give control over the sites of governmental operations to the United States, when such control was deemed essential for federal activities, it would seem that the sovereignty of the United States would end with the reason for its existence and the disposition of the property.”).
This option resembles what Congressman Thornton originally proposed in 1977.\footnote{See supra note 3 and accompanying text.}

2. Vote Dilution

By far, the most difficult problem with respect to the Maryland option is vote dilution, all of which would be borne by Maryland. In the 2010 Census, Maryland and the District of Columbia had 5,773,552 and 601,723 residents\footnote{2010 U.S. CENSUS BUREAU, http://www.census.gov/2010census/ (select “jurisdiction” from “Population Finder” drop down menu) (last visited Sept. 15, 2013).}, respectively, which means that the votes of each Maryland resident would be diluted by over ten percent with the addition of District of Columbia voters.\footnote{In his questioning of Congressman Thornton, Congressman Butler viewed the District of Columbia’s connection with Maryland as a “historical accident” and expressed concern about “diluting the representation of Maryland” in the Senate. 1977 House Hearings, supra note 3, at 42–43. See also Johnny Barnes, Towards Equal Footing: Responding to the Perceived Constitutional, Legal and Practical Impediments to Statehood for the District of Columbia, 13 UDC/DCSL L. Rev. 1, 40 (2010) (“However, the addition of over 500,000 votes to a Maryland federal election would change the dynamics of Maryland elections and government.”) (footnote omitted). But Maryland need not carry this burden alone, unless it chooses to do so by consenting to the Maryland option.}

Dilution of Maryland’s votes for the House of Representatives could be ameliorated to the extent that District of Columbia residents are credited to Maryland during the decennial reapportionment process. While Maryland would often get an additional House seat due to District of Columbia residents, this is not guaranteed.\footnote{The population of the District of Columbia is less than the average size of a congressional district (601,723 versus 710,767), which means that there is a chance Maryland would not receive an additional House seat in some decades. These two figures do not correlate precisely because the District of Columbia figure reflects the actual resident population, while the average district size reflects “apportionment” population numbers, which include a small number of overseas residents. Because it has no House representation, the Census Bureau does not calculate an apportionment population number for the District of Columbia. See Kristen D. Burnett, Congressional Reapportionment, 2010 CENSUS BRIEFS SERIES (Nov. 2011), http://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf; see also 2010 U.S. CENSUS BUREAU, supra note 96. The risk of receiving no additional House seat in future decades should be an important consideration for Maryland to weigh in deciding whether to consent to receiving District of Columbia voters under a Maryland option or whether to instead consent to some other option.} With respect to Senate votes, Maryland would always bear the full burden of dilution because each state has two Senators without regard to population, and there is no way under the Constitution to vary that number.
3. Apportioning District of Columbia Voters Among Maryland’s Congressional Districts

Under a cession agreement with Maryland, District of Columbia voters would become Maryland voters for purposes of congressional representation. As such, the congressional districts to which they are assigned would be subject to the Supreme Court’s one person, one vote standard, which requires that congressional districts be “apportioned to achieve population equality ‘as nearly as is practicable.’”99

It would be disingenuous for Congress to draft a cession agreement purporting to create a separate District of Columbia congressional seat, without regard to the one person, one vote rule. After all, the entire cession arrangement would be premised on the fact that District of Columbia voters are becoming Maryland congressional voters by way of the cession to empower them to vote under the Constitution. If the cession agreement applies for that purpose, it applies for other related purposes, including one person, one vote.100

Of course, Congress could draft the cession agreement to require Maryland to keep the District of Columbia intact to the maximum possible extent when it draws its congressional district maps. Using 2010 numbers and assuming that Maryland received an additional House seat, the District of Columbia would have about 100,000 fewer residents than the average size of a Maryland congressional district, so about 100,000 Maryland residents would need to be added to the resulting congressional district to bring it up to the required size.101 Choosing the 100,000 Marylanders to be placed in a congressional district dominated by non-Marylanders could prove controversial, giving

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100. Reviewing courts will be more likely to uphold the cession if its terms are applied consistently. Cf. INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987) (“An agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is ‘entitled to considerably less deference’ than a consistently held agency view.”) (quoting Watt v. Alaska, 451 U. S. 259, 273 (1981)).

101. Using 2010 resident population numbers because “apportionment” population numbers are not available for the District of Columbia (see supra note 98), the combined population of Maryland and the District of Columbia would be 6,375,275. See supra note 96 and accompanying text. Assuming that Maryland received an additional House seat raising its total to 9, the resulting average congressional district size for Maryland would be 708,364, using resident population numbers. Because the resident population for the District of Columbia is 601,723, slightly over 100,000 Marylanders would need to be added to a District of Columbia Congressional District to comply with one person, one vote.
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Maryland officials another reason for refusing to consent to a Maryland option if its power to draw districts were limited.

4. The Maryland Option’s Electoral College Anomaly

Another problem with the Maryland option is an Electoral College anomaly during decades when Maryland gains an additional House seat due to the addition of District of Columbia voters. The number of Electors each state receives is governed by Article II, Section 1, Clause 2, which unambiguously provides that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . .” Each state, therefore, gets two “Senate seat” electors and a number of “House seat” electors equal to the size of its House of Representatives delegation. Thus, if Maryland gets one more House seat by counting District of Columbia residents in reapportionment, Maryland would get one more electoral vote.

The problem is that District of Columbia voters are already counted in the Electoral College under the Twenty-third Amendment, which provides that the District of Columbia shall receive a number of electors “equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State.” Thus, District of Columbia residents are credited with one “House seat” elector under the Twenty-third Amendment, and under the Maryland option, Maryland could get an additional “House seat” elector largely attributable to those same District of Columbia residents.

While this double-counting problem is of some concern, it is less worrisome than the Electoral College anomaly that would result from retrocession or statehood. In those cases, the sparsely populated federal area around the National Mall would still retain the District of Columbia’s three electoral votes, allowing the very few remaining residents to exercise greatly disproportionate political power.

102. U.S. CONST. art. II, § 1, cl. 2.
103. For example, after the 2010 Census, Maryland was allotted 10 electoral votes. Under the Twenty-third Amendment, the District of Columbia always gets 3 electoral votes. If the Maryland option gave Maryland an additional House seat, Maryland would have 11 electoral votes, and the District of Columbia would have 3 electoral votes, even though the populations of the combined jurisdictions would remain exactly the same.
104. See supra note 14 and accompanying text. Justice Stephen Markman criticized Congressman Thornton’s proposal because of this potential conflict with the Twenty-third Amend-
cause only the congressional voting power would be ceded under the Maryland option, District of Columbia residents would still vote for their own Presidential electors under the Twenty-third Amendment. Thus, as compared to retrocession, the Maryland option would reduce the Electoral College anomaly from three electoral votes to one electoral vote, and that one anomalous vote would go to a populated jurisdiction (Maryland) rather than to the mostly depopulated remnants of a redrawn District of Columbia.

Unfortunately, there seems to be no sure way to make this Electoral College anomaly go away completely, short of repealing or amending the Twenty-third Amendment. Article II, Section 1, Clause 2 is clear on how electoral votes are to be allocated, and it is not susceptible to any other interpretation. Likewise, the Twenty-third Amendment is clear that the District of Columbia should have three electoral votes.

Like some other constitutional amendments, the Twenty-third Amendment contains a clause providing that “Congress shall have power to enforce this article by appropriate legislation.” The Amendment also provides that the electors shall be appointed “in such manner as the Congress may direct . . . .” Some supporters of retrocession and statehood argue that these clauses give Congress the power to stop the District of Columbia from appointing any electors. Under the Maryland option, an equivalent argument probably would be that Congress could reduce the number of District of Columbia electors from three to two in decades when Maryland gets an extra Congressional seat.

However, it is uncertain whether this approach would work and not just because of the unseemliness of requiring District of Columbia residents to trade one electoral vote to Maryland in exchange for congressional representation. Supreme Court precedent does not allow Congress to use “appropriate legislation” clauses to change the under-

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105. U.S. Const. amend. XXIII, § 2.
106. Id. § 1.
107. See, e.g., Turley, supra note 9, at 372 (while repeal of amendment would be the preferred option, other options may be to consider the amendment constructively repealed or allow it to remain dormant with Congress enacting a law “directing that no such electors may be chosen”); Raven-Hansen, supra note 13, at 188 (stating if Congress ignored the Twenty-third Amendment after D.C. statehood, “who would care?”) (footnote omitted).
lying constitutional provisions to which they are attached, so Congress might not have the power to take away the electors given to the District of Columbia by the Constitution, except by a constitutional amendment.

In the end, if Congress really wants to adopt the Maryland option, it could perhaps consider the extra electoral vote to be part of the compensation due to Maryland for its willingness to accept the dilution of its congressional votes. Conversely, if Maryland’s receiving an extra electoral vote proves to be too much for Congress to bear, then Congress might adopt the Multistate option, which is better equipped to prevent this and other logistical problems.

D. The Multistate Option—How Would It Work and How Can It Get Around the Logistical Problems Inherent in the Maryland Option?

1. How Would the Multistate Option Work?

If Congress or Maryland decides against the Maryland option, Congress could adopt a Multistate option with Congress ceding congressional voting power over specific tracts of District of Columbia territory to multiple states, preferably with Maryland’s consent. As with the Maryland option, the states receiving cessions would exercise no governmental control over the District of Columbia because only the congressional voting power would be ceded. After the cession, District of Columbia residents would vote in congressional elections in the state to which their tract was allocated.

In implementing this option, the starting point likely would be for Congress to enact legislation announcing the terms and conditions of

108. If Congress could define its own powers by [using its appropriate legislation authority to alter] the Fourteenth Amendment’s meaning, no longer would the Constitution be “superior paramount law, unchangeable by ordinary means.” It would be “on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it.” Marbury v. Madison, 1 Cranch, at 177. Under this approach, it is difficult to conceive of a principle that would limit congressional power. Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V. City of Boerne v. Flores, 521 U.S. 507, 529 (1997) (citation omitted); see also Kurland, supra note 14, at 491 (“The plain language does not give Congress the option of absolutely refusing to direct, in any manner whatsoever, the method of appointment of presidential electors.”) (footnote omitted). But see supra note 107. The concerns about constitutional usurpation expressed in City of Boerne might also apply to the “as the Congress may direct” phrase. U.S. CONST. amend. XXIII, § 1. However, that phrase could make congressional action under the Twenty-third Amendment distinguishable. Because there are reasonable arguments on both sides of this issue, it is not possible to predict whether the courts would allow Congress to reduce the number of Twenty-third Amendment electors.
the cession and voting arrangement, inviting states to pass their own legislation consenting to accept cessions under the arrangement (as required under Article IV, Section 3). While it is not possible to outline all the possible permutations of such legislation, there are a few issues that any legislation would need to address.

To protect small and early adopting states from getting swamped with an excessive number of District of Columbia voters, the cessions should go forward only after a minimum number of states have consented. For example, Congress could provide that the arrangement goes into effect only after consent by states whose aggregate House seats total twenty-five or fifty percent of total House of Representatives membership. The flip side of this problem is that the political power of District of Columbia voters may seem to grow smaller as its territory gets divided into ever smaller pieces, so Congress may want to limit the number of states that can accept cessions.

Once the number of consenting states is known, the District of Columbia could be divided into an appropriate number of tracts of roughly equal population, the number of tracts equaling the number of congressional districts in the accepting states. Under this scenario, for example, a state with ten House seats would be allocated ten tracts and a state with one House seat would be allocated one tract. That way, District of Columbia voters would be allocated to states in a manner that reflects the populations of the receiving states in order to not dilute the votes of small states more than the votes of large states. Once the congressional voting power for the tracts is ceded, District of Columbia voters living in each tract would be able to vote in Senate and House elections in the receiving states.

Congress will need to resolve a number of other minor issues to permit the voting to operate smoothly and efficiently. For example, Congress will need to decide whether District of Columbia congressional ballots are to be counted by District of Columbia election officials or by election officials in the states. Congress will need to decide whether states can revoke their consent to cessions and on what terms. Finally, because District of Columbia voters would be dispersed across a number of states, Congress may decide to retain the current office of Delegate for the District of Columbia.
2. How Could the Multistate Option Eliminate the Maryland Option’s Electoral College Anomaly?

Most logistical problems with the Maryland option can be eliminated by allowing the cessions of congressional voting power to expire for a brief period every ten years, with new cessions being made after each decennial census. This part of the legislation would need to be drafted very carefully, because time-limited cessions run the risk that congressional gridlock could cause voting rights to expire every ten years. However, there are benefits that might make time-limited cessions worth the risk. The most important benefit is that allowing the cessions to expire for a short period every ten years would prevent District of Columbia residents from being a factor in the apportionment of House seats under Article I, Section 2, Clause 3. As explained below, this would allow Congress to eliminate the Electoral College anomaly and other problems inherent to the Maryland option.

Recall that under the Maryland option, District of Columbia voters would be counted in apportioning House seats to Maryland as a way of compensating Maryland for its vote dilution. The same thing could happen under the Multistate option if the District of Columbia tracts remain allocated to states upon reapportionment. While the numbers of voters should be relatively small on a per state basis, it is possible that those District of Columbia voters could make a difference in close cases, causing one state to get an extra House seat at the expense of another state. That same event would also cause a change in the Electoral College allocation. There are always close cases in the apportionment of House seats, often resulting in litigation. Allowing District of Columbia voters to affect reapportionment could make the process even more contentious than it already is.

Allowing the cessions to expire for a brief period every ten years would allow apportionment to occur without District of Columbia re-

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109. The reallocation process should be done in a way that prevents congressional gridlock from endangering the voting rights of District of Columbia residents. One approach would be for the legislation revoking the cessions to also contain a self-executing mechanism for reallocation and new cessions to occur. House reapportionments themselves are conducted by such a self-executing mechanism. 2 U.S.C. § 2a (2012); see also Dep’t of Commerce v. Montana, 503 U.S. 442, 452 n.25 (1992) (describing the reapportionment process as self-executing).

110. See, e.g., Franklin v. Massachusetts, 505 U.S. 788 (1992); Montana, 503 U.S. 442. While the numbers would be smaller for each state, any reapportionment impact of District of Columbia residents would create a “double counting” problem for purposes of the Electoral College, because District of Columbia residents are already “counted” by the Twenty-third Amendment. See supra notes 103–04 and accompanying text.
sidents being counted. After House seats are apportioned, the District of Columbia can once again be divided into an appropriate number of tracts and allocated again with new cessions, so that District of Columbia voters remain fully enfranchised. This brief period of expiration of the cessions would eliminate even the slightest likelihood of anomalies for House reapportionment and for the Electoral College that are associated with the Maryland option.

Of course, Congress could allow the cession under the Maryland option to expire every ten years. The problem is that under the Maryland option, Maryland bears the full burden of vote dilution and would have every right to expect compensation by way of the apportionment advantage and the Electoral College anomaly that necessarily comes with it. Maryland likely would and probably should reject a Maryland option without an apportionment advantage. So as a practical matter, the apportionment advantage and the Electoral College anomaly are necessary parts of the Maryland option to compensate for vote dilution. Because the vote dilution per state is minimal under the Multistate option, there would be no need for District of Columbia residents to be counted during the apportionment process, which makes these time-limited cessions feasible.

By eliminating the Electoral College anomaly, the Multistate option with time-limited cessions may prove appealing to some members of Congress. The Multistate option could also seem fairer by having more states share the burden of vote dilution.

If the Multistate option is chosen, there would be other benefits to having time-limited cessions. First, the allocation of House of Representatives seats changes every ten years, sometimes changing the number of congressional districts in a state. If a state’s allocation of House seats changes, the number of tracts allocated to a state should also change. Unless the tracts are redrawn, some other way of redividing the ceded territory every ten years must be provided under this version of the Multistate option.

Second, new cessions every ten years would allow for participation of new states which belatedly agree to accept District of Columbia voters. If the Multistate option is chosen, there may be some symbolic value in having as many states as possible participate in the arrangement. However, as the number of participating states increases, District of Columbia voters would be divided into smaller and smaller blocs, which might reduce their impact in the outcome of individual congressional races. If all states participated, there would be
less than 700 District of Columbia voters allocated to each congressional district, based on 2012 election results.111

Third, new cessions could prevent the arrangement from causing any violations of one person, one vote. So long as the tracts of District territory are redrawn to be equal in population within constitutional tolerances every ten years,112 they should not cause any state’s congressional map to violate the one person one vote rule so long as the state simply allocates one tract to each of its congressional districts. In this way, decennial redrawing of the tracts would make the Multistate option easier for states to implement.

3. The Political Benefits of the Multistate Option

Aside from eliminating the Electoral College anomaly, the Multistate option’s political benefits could prove just as important. The gridlock between statehood and retrocession advocates has been only partly about the Constitution. Statehood would almost certainly allow Democrats to gain two Senate seats and retrocession to Maryland would allow Republicans to put those Senate seats out of reach. The statehood and retrocession options allow for no middle ground as a political matter.113

111. In 2012, 293,764 votes were cast for President and Vice President in the District of Columbia. D.C. Bd. of Elections, Declaration of Winner and Certification of Election Results General Election Held November 6, 2012 for the Office of Elector of President and Vice President of the United States (2012), http://www.voteresults.org/Results2012/Nov2012.DC.BOE.CertifiedResults.pdf. If all states were to participate in a Multistate option, the District of Columbia would be divided into 435 tracts. Assuming that the same number of votes would be cast in congressional races, there would be approximately 675 District of Columbia voters participating in each House of Representatives election (293,764 / 435 = 675). Of course, the number of voters per tract would rise if fewer than all states participated and also if voter turnout were to grow.

112. During the 1977 House Hearings, Congressman McClory seemed displeased that under Congressman Thornton’s proposal, the District of Columbia’s congressional districts would be drawn by a state legislature that District of Columbia residents did not elect. 1977 House Hearings, supra note 3, at 41–42. This need not be the case. Under a Maryland option, the actual drawing of congressional districts could be the subject of negotiations between Congress and Maryland. If Congress retains that authority, it could delegate this power to the District of Columbia Council. For example, under the Maryland option, the Council might be instructed to create districts of equal population, each of which would vote in one of Maryland’s Congressional districts. Under a Multistate option, the Council might be instructed to create the number of tracts necessary to allow one to be assigned to each congressional district in all of the participating states.

113. Democrats’ reluctance to vigorously pursue the political benefit associated with statehood (and that of Republicans to pursue retrocession) is inconsistent with our political history. The admission of states was often influenced by partisan political implications. GARRINE P. LANEY, STATEHOOD PROCESS OF THE FIFTY STATES 4–5 (2002) (“political partisanship” among factors influencing congressional decisions on statehood); see RUSSELL R. ELLIOTT, HISTORY OF NEVADA 89 (2d rev. ed. 1987) (“The strategy of the Republican Congress and president in push-
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Considering different versions of a Multistate option could allow Congress to work toward resolving this political stalemate. Spreading District voters evenly across the country could make some District of Columbia voters feel powerless when viewed in comparison to the much larger congressional districts to which they would be attached. Only very rarely would such small numbers of voters change the outcome of a race. However, in very close races, a small bloc of District of Columbia votes could provide the margin of victory. Striking the right balance on this point could be an important part of the political negotiation between Republicans and Democrats on how to implement shared sovereignty.\textsuperscript{114} Studying how District of Columbia voters might have affected the outcomes of past congressional elections under different versions of a Multistate option, could help Democrats and Republicans compromise on this difficult issue, providing the District of Columbia with a level of influence in congressional elections that is commensurate with its size and allowing a political bargain to be struck.

CONCLUSION

There is no excuse for further inaction. The legality of a shared sovereignty solution is well supported by modern Clause 17 case law.

\textsuperscript{114} The political negotiation could give rise to a hybrid solution by which House representation could be provided one way and Senate representation another way. For example, Congress might decide to cede the House of Representatives voting power to Maryland and the Senate voting power to multiple states. Part of the political compromise could require a constitutional amendment (such as providing the District of Columbia with its own House seat separate and apart from Maryland). A constitutional amendment should be achievable if it is the product of bipartisan political compromise.
While statehood and retrocession remain as viable as they ever were, shared sovereignty is an alternative that would provide full suffrage without changing the fundamental nature of the District of Columbia as the seat of national government. Because its legality is clear and because it addresses the objections to other proposals, shared sovereignty hopefully will bring closer a solution to this longstanding problem.
Religious Law Schools and Democratic Society

JENNIFER L. WRIGHT *

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Many believe that in a democratic society, the law must be approached as a purely secular, neutral system to which all members of society can assent. Discussion of religious foundations of law is condemned as inherently divisive and destructive of democratic process. Many in the legal academy believe that law school education should not involve teaching students to examine the moral foundations of the law and the legal system, and certainly should not invite and challenge law students to examine their professional role in the justice system in light of their own moral commitments and religious faiths. Law students both reflect these attitudes rooted in modern skeptical culture and respond to the tacit lessons of the law school classroom about the inappropriateness of normative discussion in legal education.

Stable democratic societies require law schools to uphold the value of normative discussion based on religious and other moral values. These societies, in order to flourish, require a widespread basic trust in the predictability, efficacy, and integrity of the legal system, which regulates their basic functions. In order for such trust to continue, a large majority of the professionals constituting the legal system must behave according to durable moral values.

This Article examines the importance of legal education in helping to sustain core values essential to a functioning legal system and a stable democratic society. It examines the challenges posed by cul-
tural beliefs about the implausibility of non-relative moral values. It examines some possible secular bases for grounding absolute values. It then describes the advantages of basing non-relative values in a religious faith tradition. It discusses how religious law schools can effectively use religious truths in a reasoned manner consistent with academic values to foster their students’ effective moral professional formation. Finally, it examines the case of the University of St. Thomas School of Law, a relatively new law school founded with a mission to “integrate faith and reason in the search for truth through a focus on morality and social justice.”

I. INTRODUCTION AND SUMMARY OF ARGUMENT

There is an enduring mindset, which holds that in a democratic society, the law must be approached as a purely secular, neutral system to which all members of society can assent.\footnote{1. “In contemporary political theory, the indictment of those who would shape politics and law on the basis of what they regard as a correct anthropology often proceeds from the premise that it violates the requirement of ‘public reason,’ which in turn is understood as those minima on which agreement can in principle be expected.” Patrick McKinley Brennan, Are Catholics Unreliable From a Democratic Point of View? Thoughts on the Occasion of the Sixtieth Anniversary of Paul Blanshard’s American Freedom and Catholic Power, 56 VILL. L. REV. 199, 219 (2011).} Discussion of religious (or any other absolute-truth-based) foundations of law appears to many to be inherently divisive and destructive of democratic process.\footnote{2. See id. at 218 (citing Encyclical Letter Centesimus Annus from Pope John Paul II para. 46 (May 1, 1991)).} In line with these attitudes, many in the legal academy believe that law school education should not involve teaching students to examine the moral foundations of the law and the legal system, and certainly should not invite and challenge law students to examine their professional role in the justice system in light of their own moral commitments and religious faiths.\footnote{3. See William M. Sullivan et al., The Carnegie Foundation for the Advancement of Teaching, Educating Lawyers: Preparation for the Profession of Law 133 (2007) [hereinafter Carnegie Report].}

In the minds of many faculty, ethical and social values are subjective and indeterminate and, for that reason, can potentially even conflict with the all-important values of the academy—values that underlie the cognitive apprenticeship: rigor, skepticism, intellectual distance, and objectivity . . . . Many faculty who doubt the value of education for professional responsibility in law schools equate ef-
forts to support students’ ethical development with inculcation, which they see as illegitimate and ineffective.4

The reluctance of many law faculty to engage in critical examination of the role of moral values in the development of the substantive law, in legal procedure, and in the role of lawyers in the justice system is mirrored on the part of many law students. Law students both reflect attitudes rooted in modern skeptical culture and respond to the tacit lessons of the law school classroom about the inappropriateness of normative discussion in legal education.5

Such skepticism about the value of normative discussion based on religious and other moral values runs directly counter to the demands that a stable democratic society must make on the legal academy. Modern trends, including the growth in moral subjectivism and relativism, the market’s elevation of economic self-interest as the primary motivator of human activity, extreme individualism, and the popularity of purely self-referential definitions of human well-being, if unopposed, will ultimately destroy the moral foundation which provides the continuing stability underlying democratic societies.6 These societies, in order to flourish, require a widespread basic trust in the predictability, efficacy, and integrity of the legal system, which regulates their basic functions.7 In order for such trust to continue, a large majority of the professionals constituting the legal system must behave according to durable moral values which run counter to the skeptical moral posture described above.

In this Article, I will look at the importance of legal education in helping to sustain core values essential to a functioning legal system and a stable democratic society. I will examine the challenges posed by deeply-engrained-cultural beliefs about the implausibility of any non-relative, reality-based moral values. I will briefly examine some possible secular bases for grounding absolute values. I will then de-

4. Id. at 133, 135.
5. “The wariness of law students toward the discourse of values is reinforced by the tendency of legal education to translate ethical questions into purely legal ones. And once they are in the legal classroom, students absorb the message that the law is malleable, indeterminate, unstable, and arbitrary from the standpoint of morality—in short, a foundation of shifting sand upon which to build any kind of normative system.” W. Bradley Wendel, Teaching Ethics in an Atmosphere of Skepticism and Relativism, 36 U.S.F. L. Rev. 711, 719–20, 722 (2002).
6. “[S]kepticism that deepens into a belief in the meaninglessness of principles, the relativism of values or the non-existence of an ultimate reality is dangerous and crippling. Tendencies toward moral relativism and value nihilism are pervasive in the general society.” Roger C. Cramton, The Ordinary Religion of the Law School Classroom, 29 J. Legal Educ. 247, 253 (1978).
7. See id. at 255.
scribe the advantages of basing non-relative values in a religious faith tradition. I will discuss how religious law schools can effectively use religious truths in a reasoned manner consistent with academic values to foster their students’ effective moral professional formation. Finally, I will explore the specifics of this endeavor by examining the case of the University of St. Thomas School of Law, a relatively new law school founded with a mission to “integrat[e] faith and reason in the search for truth through a focus on morality and social justice.”

II. LEGAL EDUCATION AND DEMOCRATIC SOCIETY

The tendency of modern society to reject the possibility of objective moral values has serious implications for the ability of a stable democratic system to endure and prosper. Our legal system, and by extension, our economic and political systems, depend upon a broad acceptance of notions of fairness, justice, honesty, and right action, particularly on the part of the lawyers who constitute and function within this system.

Case analysis, opinion writing, and legal argument all involve and require lawyers to make, defend, and criticize arguments based on rights, morality, and social utility in common law adjudication. . . . The details of the legal rules governing social life cannot be defined by deduction or mechanical derivation from the nature of basic institutions or concepts or rules. Our common law system defines those legal rules partly by reference to moral considerations, and it is not clear that our legal system could operate at all if it put these controversial moral arguments off the table.

If it is essential to a stable democratic society that lawyers accept and incorporate moral values in their professional work while the culture of such societies tends to erode these same values, what can be done with regard to the training and formation of lawyers in the interests of democratic society?

Market pressures on lawyers toward a single-minded focus on maximizing billable hours and profits are intense. Legal education
often does not provide any substantial bulwark to enable attorneys to withstand such pressures to do whatever it takes to please the client and increase the bottom line.

Modern dogmas entangle legal education—a moral relativism tending toward nihilism, a pragmatism tending toward an amoral instrumentalism, a realism tending toward cynicism, an individualism tending toward atomism, and a faith in reason and democratic processes tending toward mere credulity and idolatry.\(^\text{11}\)

The only really effective restraint pushing back against these pressures is attorneys’ internal sense of professional identity and integrity.\(^\text{12}\) Lawyer discipline systems alone cannot enforce professional conduct simply by sanctioning its opposite. Unless a significant percentage of lawyers enforce professional norms on themselves and, by force of social approval, on their colleagues, these norms will become words that bear no relationship to the realities of legal practice.\(^\text{13}\) Enforcement of rules of professional conduct can only, at best, set a floor by punishing egregious misbehavior—it cannot instill an ethic of aspiration to excellence in the profession. As William Sullivan describes in *Work and Integrity: The Crisis and Promise of Professionalism in America*, “[a]ccording to the ethics of character, moral rules play at


\(^{12}\) See *William M. Sullivan, Work and Integrity: The Crisis and Promise of Professionalism in America* 159 (1995) (“[T]he long-term viability of free institutions, and thus of individual freedom, required some means whereby the intrinsic values of activities essential to the common welfare could be protected from meltdown into the cash nexus. At a moment when the unregulated cash nexus of the market threatens to imploade upon the social order it should serve, the reinvigoration and institutionalization of the ideals of integrity of function and public responsibility that professionalism represents would fill an essential need.”); Symposium: The Opportunity for Legal Education, 59 Mercer L. Rev. 859, 890 (2008) (“When we neglect the development of identity, we rob our students of the purpose that brought them to law school with devastating consequences for our students and the profession they enter. There are signs of trouble: attrition rates; incidence of mental illness, such as depression, suicide, and substance abuse; and the popular negative image of lawyers.”); *Carnegie Report, supra* note 3, at 127 (“Large-scale changes in the conditions of practice have washed away many of the institutional plinths that supported the ideals expressed in the Model Rules.”).

\(^{13}\) “The problem is that the whole notion of the conscientious discharge of one’s function, traditionally described as an ethic of vocation, seems to be breaking down. At the same time, the ever more Byzantine elaboration of rules has failed to satisfactorily replace it. The furor over professional integrity is an expression of the great need modern societies have for professionalism as a reliable social ethic.” *Sullivan, supra* note 12, at 194.
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most a secondary role in ethical life; the real focus of ethics should be on delineation and development of good patterns of judgment and action.”

Our society needs ethical judgment and action on the part of lawyers to survive and thrive. Lawyers and judges control access to the justice system, they affect its functioning at every level, and they have enormous influence over its outcomes. Events ranging from political scandals to business and financial sector crises indicate the enormous cost to society when lawyers abandon their broader professional and societal perspective and seek only to enrich or empower themselves and/or the client before them. When brilliant lawyers use their skills and knowledge to provide tenuous legal justification for human torture, this situation seems to indicate that there is something very seriously wrong with the state of legal professionalism.

The 2007 Carnegie Foundation’s report on the state of legal education points out the importance and the power of legal education to shape the professional identities of lawyers. The Carnegie Report insists that law schools have no choice about whether they will shape their students’ professional identities, only about how they will do so.

For better or worse, the law school years constitute a powerful moral apprenticeship, whether or not this is intentional. Law schools play an important role in shaping their students’ values, habits of mind, perceptions, and interpretations of the legal world, as well as their understanding of their roles and responsibilities as lawyers and the criteria by which they define and evaluate professional success.

Law schools have an essential role to play in intentionally and thoughtfully instilling in their graduates a professional identity designed to preserve the profession and maximize the profession’s contribution to a functional system of justice and to the common good.

What is the purpose and proper function of a law school? Can the nature of the law school experience substantially affect the ethical, moral, and professional identity of the lawyers that emerge from that

14. See id. at 197.
16. Carnegie Report, supra note 3, at 2 (“Law school provides the single experience that virtually all legal professionals share. It forms minds and shapes identities.”).
17. Id. at 139.
experience? Should this kind of professional and moral shaping be the responsibility of law schools generally? How can law schools determine what kind of lawyers they want to produce? How can the effect of law school training be defined and measured? These questions are essential to the future of legal education, of the profession of law, and of democratic society in general. The traditional notion that law schools' only essential task is to teach students to “think like lawyers” has come under increasing challenge, as failures of basic social institutions, including banks, accounting firms, and institutions of government, have occurred under the noses of, and often with the active support of, the lawyers who were supposed to uphold the law.\textsuperscript{18} The American Bar Association, which has the responsibility for accrediting law schools in the United States, is considering significant changes to its accreditation standards, with a much greater focus on requirements that law schools invest in intentional ethical professional formation of their students.\textsuperscript{19} Law schools must reconsider the nature and boundaries of their essential function within the legal system and within democratic society as a whole.

Law schools can, should, and must devote thought and effort to the question of the professional and ethical formation and identity of their graduates.\textsuperscript{20} When law school classes and professors appear to declare moral reasoning irrelevant to the task of learning to “think like a lawyer,” they instill and indoctrinate a particular view of the moral role of the lawyer—one that has led to personal and professional disaster for many lawyers and for society.\textsuperscript{21} Many professors intentionally exclude from the law school classroom any discussion of

\begin{footnotesize}
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\item \textsuperscript{18} See Neil W. Hamilton, \textit{Ethical Leadership in Professional Life}, 6 U. St. Thomas L.J. 358, 395 (2009) ("Legal education needs both to assess its failures of socialization that contribute to catastrophic failures of morally responsible leadership in our society and to move from rhetoric and exhortation about opportunities for ethical leadership in speeches to law students toward educational engagements to equip students for the leadership roles lawyers serve in society.").
\item \textsuperscript{20} "Our current methods of teaching legal ethics focus on the understanding and analysis of the rules and obligations of the profession… [M]oral reasoning and knowledge of the legal rules are not sufficient. ... The legal profession, and society, needs more lawyers who possess virtues such as honesty, courage, and wisdom." Timothy W. Floyd, \textit{Moral Vision, Moral Courage, and the Formation of the Lawyer’s Professional Identity}, 28 Miss. C. L. Rev. 339, 340 (2009).
\item \textsuperscript{21} See \textit{Carnegie Report}, supra note 3, at 140.
\end{itemize}
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the ethical and social implications of the law. 22 Unfortunately, such silence unavoidably conveys an implicit—and unfortunate—message to law students about the unimportance of these crucial issues to the study and practice of law. 23

Some legal educators have assumed that moral character is already set and unchangeable by the time that people enter law school and that it is unrealistic to expect that the law school experience will make any significant change in lawyers’ moral perspectives or choices. 24 Many law school professors assert that they have no effect on the moral development of their students who are, after all, adults by the time they arrive in the law school classroom.25 This assertion rings rather dissonantly with the claim that law professors teach law students to “think like lawyers.” The claim appears to be that law school has a profound effect on law students’ basic cognition in every area except that of moral reasoning—an odd assumption at best.26

Research in moral development has established that, in fact, moral development is an ongoing process that continues well into adulthood and which can be shaped by postgraduate education. 27

22. See id. at 133–36.
23. See id. at 140 (“When faculty routinely ignore—or even explicitly rule out-of-bounds—the ethical-social issues embedded in the cases under discussion, whether they mean to or not, they are teaching students that ethical-social issues are not important to the way one ought to think about legal practice.”).
24. See id. at 133.
25. See id.
26. See Walter H. Bennett, Jr., Making Moral Lawyers: A Modest Proposal, 36 CATH. U. L. REV. 45, 47–48 (1986) (“That law students are susceptible to mega-changes in their intellectual processes is the assumption underlying the belief that one can learn to ‘think like a lawyer.’ And toward this end, law schools have employed many of the tools which Kohlberg’s work suggests: role models (professors) and peer influence, not to mention reward and punishment. . . . [G]iven the findings of Kohlberg and the basic assumption of legal educators that significant changes can be wrought in the thinking process of law students, it seems beyond serious dispute that the opportunity is there.”).
Moral character is built of many components, including explicitly cognitive ones.

First, one must perceive relevant moral concerns in the situation (moral sensitivity); this might also be labeled “moral perception.” Next, one must put those concerns together into an adequate, mature judgment about what is right or wrong (moral judgment). Further, if one perceives and judges well, one must still place moral values above other values relevant to the situation, thus effectively deciding to do the moral act (moral motivation). Finally, one must effectively implement the decision to act morally, through perseverance, effective problem solving, etc. (implementation skills).

Law school is the logical place to teach the skills needed to recognize the moral and ethical issues that present themselves most often in the context of law practice, as well as to continue the development of the moral judgment needed to resolve these issues. Law students and new lawyers also face new challenges with respect to competing values (strict honesty in time-keeping versus strict billable hour requirements, e.g.), which will require new applications of moral judgment as professional practice habits are developed. And certainly, law school bills itself as a place to learn how to effectively implement decisions and solve problems. Finally, theories of moral identity indicate that “when morality is important and central to one’s sense of self and identity, it heightens one’s sense of obligation and responsibility to live consistent with one’s moral concerns.” Law school is the place where the law student begins to develop and define her identity as a lawyer.

If law schools must begin a conscious and intentional attempt to shape the moral and professional formation of lawyers in a way that will uphold the values of the legal profession and its crucial role in society, how are they to undertake this enormous task? The Carnegie Report indicates that “[a]s far as we know, there is no research on the extent to which this influence [of law school education] results in


29. Hardy & Carlo, supra note 27, at 238.
30. See discussion infra Part VII.B.2.
greater incorporation of the ethical-social values of the profession into students’ personal and professional identities.”31 Such research is essential to the renovation of legal education and the preservation of the legal profession. Legal pedagogy is still at the point of development of theories as to how best to instill specific moral and professional values. The call at this point in time is for systematic testing of theories and study of educational outcomes. “The law school must become intentional about its own aims, educational processes, and identity. Like good students, good law schools should also be constantly learning and assessing their progress. They should be developing greater institutional intentionality.”32

III. THE DIFFICULTY OF MAINTAINING CORE VALUES IN A MODERN, LIBERAL SOCIETY

Modern culture in democratic societies manifests a pervasive skepticism about the ability to justify or defend objective values. The reflexive position of many first-year law students faced with a normative discussion reflects this sense that there can be no reasoned defense of absolute values. Students (and many faculty) wonder: “How can we make normative arguments in a fragmented and skeptical age? How can we justify legal rules that bind everyone when we have fundamental disagreements about the nature of the good, and our methods of reasoning seem to embody, rather than transcend, those disagreements?”33

Our society suffers from a “skepticism that deepens into a belief in the meaninglessness of principles, the relativism of values or the non-existence of an ultimate reality . . . .”34 However, paradoxically, the majority of individuals do affirm, explicitly or implicitly through their behavior, that Good does exist in some non-relative way, that some moral positions are obligatory, and that the laws governing society can and should reflect these moral commitments.35 The very structure of everyday conversation (“put yourself in my shoes for a

31. C ARNEGIE REPORT, supra note 3, at 135.
32. Id. at 182.
33. Singer, supra note 9, at 911.
34. Cramton, supra note 6, at 253.
35. “I want to believe—and so do you— in a complete, transcendent, and immanent set of propositions about right and wrong, findable rules that authoritatively and unambiguously direct us how to live righteously. I also want to believe—and so do you—in no such thing, but rather that we are wholly free, not only to choose for ourselves what we ought to do, but to decide for ourselves, individually and as a species, what we ought to be.” Arthur Allen Leff, Unspeakable Ethics, Unnatural Law, 1979 DUKE L.J. 1229, 1229 (1979).
moment”), our shared indignation at perceived wrongs (“those investment bankers are getting million dollar bonuses for helping to trash our financial system!”), the fact that we engage in normative evaluation on a daily basis (“what a jerk he is”) all implicitly presume existent and commonly accessible standards of value. Indeed, the role of the academy as discoverer and imparter of knowledge presupposes that there is objective knowledge to be discovered and taught in the humanities as well as in the physical sciences.36

What are the reasons for this intellectual skepticism about objective moral values? One key factor is the tendency since the Age of Enlightenment to equate knowledge with empirical verifiability: “[A] good deal of the seductive quality of moral relativism is due to the tendency of students to assume that the only beliefs that count as ‘knowledge’ are those that can be verified through the methods of the empirical sciences.”37 In other words, that which cannot be tested in a laboratory, yielding experimental results that can be verified by others, is not truly real and does not belong to the sphere of the academy. Under this line of thought, the failure of moral thinkers to come up with a theory that compels consensus is, in itself, an indication that there is no underlying reality to moral values, leaving skepticism and relativism as the only intellectually respectable moral postures. Other cultural factors reinforce this sense of frustration at the lack of empirical verifiability of moral judgments:

As for the skeptics and relativists, however, I think their attitude may be explained by one or more currents in the wider intellectual culture: the occasional association in popular attitudes between non-relative ethical arguments and the political Right; the multiculturalism movement; the decidedly chilly reception given to American assertions of universal rights in international law, and the broader attack on traditional sources of authority and certainty carried out by critics who brand themselves postmodern.38

Once moral skepticism gains force, due to the visible lack of moral consensus and in reaction to the intellectual, political, social, and moral failures attributed (often fairly) to traditional absolutilist
moral positions, it becomes self-perpetuating in ways both subtle and obvious. “The belief that there is no right answer (beyond what individuals determine for themselves) to questions of value compounds the problem by steering people toward atomism, complacency, and a reluctance to debate ethical issues.” 39 Once ethical debate is rejected as inappropriate for the classroom, students will not acquire the skills to engage in rational normative discussion, and will, therefore, be even more reluctant to participate in such discussion. 40 Finally, the exclusion of discussion of moral values from the classroom itself conveys a tacit judgment of the value of such values:

When faculty routinely ignore—or even explicitly rule out-of-bounds—the ethical-social issues embedded in the cases under discussion, whether they mean to or not, they are teaching students that ethical-social issues are not important to the way one ought to think about legal practice. This message shapes students’ habits of mind, with important long-term effects on how they approach their work. 41

Many factors combine to create and reinforce the rejection of rationally defensible, reality-based moral claims: an inappropriate standard for evaluating moral reasoning and claims; the experience of cultural diversity and a lack of social consensus as to many moral issues; the rejection of specific authoritarian and unjust moral regimes; doubt about the value of reasoned discourse on moral questions; the resulting lack of experience in how to engage in such discourse; and, finally, the inference that moral issues are not discussed in academic settings because they are not important or appropriate to intellectual discourse. If moral claims have no basis in reason and reality, then they are optional, subjective, and, not surprisingly, ineffective in shaping choices and behaviors.

IV. POSSIBLE SECULAR SOURCES FOR CORE VALUES

Thinkers who defend non-relative moral values without recourse to religiously-based argument face a difficult challenge. They must find a source of value which will be applicable to all people, but which is grounded entirely in this world and this order of reality, without

40. “[L]egal education tends to get students out of the habit of making ethical arguments, since the only arguments traditionally admissible in the law school classroom are those which make reference to legal concepts.” Wendel, supra note 5, at 723.
41. Carnegie Report, supra note 3, at 140.
appeal to any transcendent source of authority. I have a tremendous respect for this endeavor. I believe that it fulfills an important purpose in demonstrating the method of normative discourse in language and concepts accessible to the many people who simply reject religiously-based argument out of hand.

I am not a moral philosopher. Neither are the vast majority of lawyers, law students, or law professors. I do not aspire to plumb the depth or survey the breadth of theories of moral value. Rather, I take the practitioner's/policy maker's-eye view of moral theory, seeking those ideas can be both accessible and convincing to lawyers as they do their daily work within the legal system.\textsuperscript{42} Given that initial limitation on the endeavor, I will briefly survey some arguments for founding non-relative moral values on secular foundations and assess their strengths and weaknesses as motivators of moral conduct by lawyers.

One familiar system of moral justification takes “an approach inspired by Kant and attempt to locate the objectivity in ethics in the structure of reason . . . .”\textsuperscript{43} If reasoned thought itself demands certain characteristics of consistency, objectivity, and recognition of the equal dignity of others, then we can appeal to thinking persons to acknowledge and act according to these values inherent in the process of thought.

The Kantian idea that people are ends-in-themselves entitled to dignity is a secular equivalent of the religious understanding that human beings are created in the image of God and [are] therefore [of enormous importance and] deserve to be treated with dignity. The liberal corollary to this view is that each person is of equal importance and entitled to equal concern and respect. This insight leads to some version of the golden rule, perhaps the central moral principle governing the acceptability of public reasons: the equal moral worth of persons means that one cannot claim something for oneself while denying it to others. It also means that one cannot demand something of others unless one can give reasons that we think they should be able to accept.\textsuperscript{44}

\footnotesize{\textsuperscript{42} “Lawyers and law students therefore need to know the available frameworks and vocabulary for engaging in normative argument—especially normative argument about considerations of fairness, justice, morality, and the basic values of liberty and equality underlying the contours of a free and democratic society that treats each person with equal concern and respect.” Singer, supra note 9, at 950.}

\footnotesize{\textsuperscript{43} Wendel, supra note 5, at 718.}

\footnotesize{\textsuperscript{44} Singer, supra note 9, at 960.}
The Kantian Categorical Imperative, in general form, is familiar to most educated people, even if not necessarily correctly attributed or understood. I would not venture on any substantive critique of Kant’s moral theory, remembering the tears I shed as an undergraduate wrestling with the *Groundwork*. My concern here is to what extent a Kantian basis for moral values can serve as an effective foundation for lawyers in their professional endeavors. The irony of Kant’s framework is that, while he upholds a good will as the core of morality, his appeal to a purely intellectual motivation seems inadequate in many cases to move actual human beings to choose the right. Kant’s refusal to incorporate the emotions as any part of a theory of moral value means that real human beings, whose wills are often moved by the heart as much as by the head, find Kant’s arguments inadequate to motivate them to Kant’s notion of right action. Most people do not subjectively experience reason as the sole source of their autonomous actions, nor do they see their emotional commitments as external constraints on their personal autonomy. In order to have the power necessary to guide moral action, even in the face of cultural and personal impulses to the contrary, moral values must be able to motivate the entire person to right action. The demands of rational consistency, I would argue, are not enough to motivate most people, who do not identify themselves solely, or perhaps even primarily, with their intellect.

Another argument attempting to found non-relative moral values on purely secular foundations focuses on what is at base an empirical claim about human nature. According to this argument, human beings are constituted such that they will find happiness, well-being, and flourishing if certain conditions are met. In order to be truly happy, human beings must be compassionate, other-regarding, just, responsible, self-controlled, truthful, and any number of other qualities that may be defended as essential to individual and societal thriving. These conditions, which appear to have no metaphysical justification or source (perhaps the result of some not-yet-understood Darwinian

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45. For a complete explanation of Kant’s Categorical Imperative, see *Immanuel Kant, Groundwork for the Metaphysics of Morals* 14–16 (Lara Denis ed., Thomas K. Abbott trans., 2005).


48. See id. at 2–3.
imperative), apparently just happen to accord with the moral values necessary to sustain a stable democratic society. Under this theory, it is human psychology, taken as an empirically discoverable given, that dictates the objective basis for morality. People just happen to be constituted in a given way; if we examine what it is that truly makes us happy and fulfilled, we will find that it is faithfulness to certain moral values. “Despite our various and even competing visions of what it might mean to thrive as human beings, we can perhaps agree that these traits or capacities are valuable, even vital, to our capacity to thrive in a modern democratic society.”

This argument has a great deal of appeal. Many studies of what makes human beings happy have yielded results that do not square with the account of human thriving offered by materialist, market-based theories of human motivation. Current psychological research is offering fascinating views of human nature and human thriving that contradict the relativistic, individualistic, self-referential values often assumed to control human behavior. To the extent that such research establishes universal truths applicable to our common humanity, these truths can be offered as a basis for objective moral values.

And there lies the rub. If, instead, research into human psychology establishes that, at least in some contexts or with regard to some values, human happiness and thriving are increased by principles or actions which are destructive of a stable system of justice, then we have no foundation on which to base an argument in favor of social goods over individual goods (especially where free ridership is an option). And, from an objective perspective, it would seem metaphysically...
cally significant if human flourishing does indeed track exactly the
moral values required to sustain a stable and just legal system. Such
an outcome would seem to beg the question, Why are people psycho-
logically constituted thus? The argument from human flourishing it-
self can provide no answer to this question because it simply takes
human psychology as the given. A stronger argument would give a
metaphysical accounting of this curiously symmetrical outcome. With-
out such an accounting, doubt must linger as to whether psychological
researchers are actually studying objective phenomena, or whether
their theory has instead pre-determined their results through some
flaw in research design.

Another ground commonly proposed as a foundation for objec-
tive moral values relies on a somewhat less ambitious argument.
Without necessarily making claims that are applicable to all people
everywhere, the argument is directed at the particular interlocutor
who is challenged to analyze her own, perhaps unexamined, moral
values and to act consistently with those values.

The point is to get people to commit to first-order ethical evalua-
tions, before beginning the much more complicated process of justi-
fying them. . . . Once people have offered an evaluation of an
action or a person’s character, the next step is to inquire into the
basis for this judgment.53

In fact, within a given culture, and even to some extent across
cultures, we will find that the various individuals engaged in debate
about moral values do, in fact, hold many such values in common.54
Indeed, only because we do, in fact, share some key normative values
are we able to engage in such a discussion.55 This argument provides
an essentially ad hominem response to the moral skeptic—challenging
her to see that the way that she commonly thinks, speaks and acts is
inconsistent with a belief in purely subjective or relative moral values.

But how do we ground the values we identify and assert? . . . The
argument from consistency suggests that valuing [something] re-

54. “We can call this the argument from humanity. . . . Whether it is a universal principle or
simply a fundamental assumption of our society is less important than the fact that, at least for
us, it is a fundamental assumption.” Singer, supra note 9, at 961 (emphasis added).
55. “We act for reasons, and we can make those reasons known to others. If we disagree
with someone, it is because we disagree with their reasons, but we do understand them. If we
did not share concepts with persons with whom we disagreed, they would be unintelligible to us,
not opponents in a debate. . . . Simply to participate in the practice called ‘ethics’ means to be
committed to a process of giving certain kinds of reasons in justification for judgments about
what one ought to do.” Wendel, supra note 5, at 744.
quires respecting it for others as well. The pragmatic argument suggests that we take for granted the things that no one seriously questions. . . . Evaluative assertions can provide an answer to the “because clause” by appealing to the things we in fact already believe.\textsuperscript{56}

Once again, the rub comes when we encounter the arguably unusual individual who either declines to feel bound to think and behave consistent with tacitly adopted values, or who perhaps declines to engage in normative discussion altogether.

We cannot refute the steadfast relativist with logic. The best we can do is to show that most people, most of the time, care very much that the reasons they put forward in ethical argument are reasons that others might share. Similarly, they are prepared to be moved by reasons where they are persuasive.\textsuperscript{57}

It may be that this mode of argument is effective for the large majority of law students and lawyers, and that an argument that provides a common ground for normative discussion for all but the few amoral outliers is good enough for the purposes of providing a firm foundation for a stable system of justice and a stable democratic society. It is hard to imagine any moral theory that would enlist and control the actions of the amoral or willfully bad person. On the other hand, once again the lack of metaphysical grounding to explain why we tend to speak, think and act as we do undermines the stability of the moral justification offered. If our “normative reflexes” have no particular connection to reality, perhaps we can train ourselves out of these irrational allegiances, or simply ignore the inconsistency of our thoughts and actions. The foundation for ethical training and development still seems less than solid. The values we seek to defend have no claim to value of their own.

\textbf{V. THE VALUE OF RELIGION AS A SOURCE OF CORE VALUES}

There are undeniable advantages in turning to religious foundations in order to engage the whole person, including both mind and heart, in the quest for objective moral values. Religion provides a metaphysical grounding to explain why people tend to share certain normative assumptions and commitments and why human flourishing

\textsuperscript{56} Singer, \textit{supra} note 9, at 966 (emphasis added).
\textsuperscript{57} Wendel, \textit{supra} note 53, at 180.
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might depend on acting in accordance with particular moral values.58 Religions make the claim that certain moral values are true and good because they are ordained by and correspond to a transcendent source of Truth and Goodness.59 Such claims can be definitive for the believer, and may be persuasive even to the agnostic, particularly in connection with and as metaphysical foundation for other justifications for moral values (some of which are described above). Given the large number of Americans who identify themselves as believers in some divine power,60 religion is a broad-based potential foundation for the stable values necessary to sustain a democratic society in the United States.

The most basic challenge to instilling moral values lies in the apparent indeterminacy of those values. We have trouble drawing lines in hard cases, and we have even more trouble defending our moral beliefs to those who have opposite intuitions or commitments. Disagreement seems to be permanent and inevitable—even among persons of good will who actively seek to reach agreement or to discover the truth of the matter. . . . What is the foundation of assertions of justice, morality, right, and fairness? Why is a claim of justice any more than [your] personal opinion? Is it possible to reason about justice?61

Attempts to establish some values as absolutely true and universally binding on a purely secular basis fall short of the ultimate goal. The essential problem of secular arguments for non-relative values is that there is no universal basis, unaffected by situational or personal contingencies, to give any particular value or set of values unquestionable validity. As a result:

[T]here is discontent verging on despair whenever some theorist tries to develop a system in which ‘found’ ethical or legal propositions are to be treated as binding, but for which there is no supernatural grounding. . . . If [God] does not exist, there is no metaphoric equivalent. No person, no combination of people, no document however hallowed by time, no process, no premise, noth-

58. See The Vision of John Paul II: Assessing His Thought and Influence 112, 113 (Gerard Mannion ed., 2008) (citing Karol Wojtyla, Ethics and Moral Theology, in Person and Community: Selected Essays 103 (Theresa Sandok trans., 1993)).
61. Singer, supra note 9, at 903.
ing is equivalent to an actual God in this central function as the unexaminable examiner of good and evil.62

Whatever standard we use to justify the values we defend is subject to challenge unless it is grounded in a metaphysical reality that our interlocutors accept as true.

Western democratic societies were all founded upon certain core values, rooted in religion-based understandings of reality. These values have been translated into secular versions in the post-Enlightenment world, but have been cut adrift from the source of their claims to non-relative truth.63 Once these values are reduced to the status of contenders for subjective evaluation and adoption, they are found to be logically refutable in any number of ways. Only axioms can provide a foundation for a rationally coherent, defined system of morality. If the source of transcendent axioms is denied, then they are reduced to refutable, contingent statements.64

The current situation is still worse, with regard to defending core moral values. Not only are they refutable logically, in a purely secular arena of discussion, but there are strong incentives to reject these values based on self-interest, as discussed above. Religious faith as a basis for moral values provides not only the metaphysical justification and logical grounding for these values, but the motivational system to encourage people to uphold and act according to these values.65 Religion-based moral values do not offer, among their advantages, an end to moral debate. Rather, they frame a mode of discussion about moral issues that offers common ground to fellow believers, both from

62. Leff, supra note 35, at 1232.
63. “[Enlightenment rationalism] has translated certain Christian values into secular terms and, in an age becoming increasingly secular, has given them political force. It is doubtful, however, that it could have created those values or that it can provide them with adequate metaphysical foundations.” Glenn Tinder, Can We Be Good Without God?, ATLANTIC MONTHLY, Dec. 1, 1989, at 68–72, 76, available at www.theatlantic.com/magazine/archive/1898/12/can-we-be-good-without-god/306721/.
64. “[Without religion] all logical grounds for attributing an ultimate and immeasurable dignity to every person, regardless of outward character, disappear . . . . Thus the spiritual center of Western politics fades and vanishes. If the principle of personal dignity disappears, the kind of political order we are used to—one structured by standards such as liberty for all human beings and equality under the law—becomes indefensible.” Id.
65. “Without a religious point of reference, one can, as did Aristotle, arrive at and articulate a definition of the person as being in relationship with the community, and to have as one’s chief end the common good. But it is undoubtedly difficult to maintain such a vision, and even more difficult to act accordingly in daily life. . . . Religious reflection and experience have provided not only rich insights into the nature of the human person, the community, and the definition of the common good, but also a guide to understanding the implications of the vision in daily life, and a source of strength to live accordingly.” Amelia J. Uelman, Can a Religious Person Be a Big Firm Litigator?, 26 FORDHAM URB. L.J. 1069, 1077 (1999).
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the same faith tradition and from other faith traditions. Religion-based moral values also offer to the individual believer a firm basis for resisting cultural forces that encourage self-interested, bottom-line-based behavior.

While there is broad overlap and agreement between religions over what moral values are mandated by God (or other name for transcendent reality), different faiths found and develop their understandings of God’s moral mandates differently. Therefore, while different religions generally agree on the first-order moral values (compassion, empathy, justice, fairness, honesty, equality, etc.), they frequently disagree on how these values are to be pursued within a society or a legal system. In order to go into greater depth and specificity about the value of religion-based moral values, I will examine the values offered by Christianity, and specifically, Roman Catholicism. I offer this examination as an example of religious justification of moral values, not as the only possible religious basis for moral values. 66

Catholic teachings about moral values and social justice are founded in the theory of natural law.

The Catholic contribution to the political sphere includes the claim that we are all, each of us and all of us collectively, always under the divine natural law, which, though divine in its promulgation, is known by the use of our natural powers of intelligence. This is the law on the basis of which human law can be made; this is the law that gives us our natural rights; this is the law that provides the basis for criticizing and perhaps disobeying human laws that are in fact perversions of law through their violations of human rights and the deprivations of what is good for humans. 67

This concept of natural law is rooted deep in American legal, political, and moral thinking. 68 Natural law provided the foundation for the modern civil rights movement and its successor social justice movements. 69 “How does one determine whether a law is just or unjust? A just law is a man-made code that squares with the moral law

66. I am a Christian, although not a Roman Catholic. However, I teach in a Catholic law school and have therefore become more familiar with Catholic thinking and teaching regarding moral values and social justice than with that of other religious traditions. 67. Brennan, supra note 1, at 223–24. 68. See The Declaration of Independence para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.”). 69. See Joseph W. Koterski, The Use of Philosophical Principles in Catholic Social Thought: The Case of Gaudium Et Spes, 45 J. CATH. LEGAL STUD. 277, 283 (2006).
or the law of God. An unjust law is a code that is out of harmony with the moral law.70

Under natural law theory, the ultimate source of validity and reality lies in God.71 According to Catholic social teaching based on natural law, in accordance with the will of God, human beings must integrate and act according to certain first-order moral values, including sanctity of the human person, solidarity and community with others, preferential concern for the poor and vulnerable, just distribution of economic resources, and wise stewardship of creation.72 Under this view of reality, first principles of natural law can be discerned by faith, while the correct application of and interaction of these principles can be ascertained through reason.73 Both faith and reason are essential components needed in order to move toward divine truth.74 While faithful, reasonable people may still disagree about what action is in accordance with truth in a given situation, their disagreement will be founded on these common grounds, giving a basis for discussion and possible reconciliation of conflicting views.

Not only does natural law give a context for reasoning about moral choices, it also provides the basis to motivate right action.75 For those who accept its validity, it provides a powerful counter to social pressures towards self-interested motivation and subjective values:

Once the idea of a universal truth about the good, knowable by human reason, is lost, inevitably the notion of conscience also changes. Conscience is no longer considered in its primordial reality as an act of a person’s intelligence, the function of which is to apply the universal knowledge of the good in a specific situation and thus to express a judgment about the right conduct to be chosen here and now. Instead, there is a tendency to grant to the individual conscience the prerogative of independently determining the criteria of good and evil and then acting accordingly. Such an outlook is

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70. Letter from Martin Luther King, Jr. to Fellow Clergymen (Apr. 16, 1963) (on file with the Estate of Martin Luther King, Jr.).
74. See generally id. (stating that practical truth requires conformity of the intellectual judgment and rectified by virtue).
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quite congenial to an individualist ethic, wherein each individual is faced with his own truth, different from the truth of others. 76 This moral vision, backstopped by a metaphysical grounding in transcendent reality, can provide the basis for inculcating moral action on the part of lawyers. This is necessary to preserve the stability of the legal system and the democratic society, which depends upon it. Given the overwhelming disincentives to make and to stand by a commitment to serve the common good, what will be the source of this resolve? . . . Perhaps the time has come for the profession to recognize a hidden source of will, strength and resolve to make and to stand by a commitment to serve the common good: lawyers who are inspired by religious vision, strengthened by religious experience, and willing to act on this vision.77

VI. HOW RELIGIOUS LAW SCHOOLS CAN INCULCATE CORE VALUES

I have examined the difficulty of effectively instilling the specific moral values necessary to the ongoing stability and smooth functioning of a system of justice in a democratic society, within the commonly prevailing Western worldview of extreme individualism, market-driven self-interest, and relativism of values. I have shown some of the challenges faced by those who attempt to ground these non-relative moral values on a purely secular basis. I have pointed out some of the advantages of imparting such values within a religious context and have examined some of the particulars of one such context and its implications for encouraging action in accordance with moral values. Finally, I want to look at how law schools, particularly religious law schools, can effectively instill such values in their students so that their graduates actually practice law on a daily basis in accordance with these values.

To begin with, despite the crucial role that moral values play in professionalism,78 the field of research into how to effectively teach


77. Uelman, supra note 65, at 1110.

78. "How legal education is structured has important implications for what counts as ‘ethical’ in legal practice, and it has enormous implications concerning the survival of the ideal of ‘professionalism’ in the practice of law. Beyond that, it has implications for the survival of idealism and religious faith as sources of ethical orientation and praxis within legal practice.” Patrick Brown, Ethics as Self-Transcendence: Legal Education, Faith, and an Ethos of Justice, 32 SEATTLE U. L. REV. 293, 296 (2009) (citation omitted).
moral values is young and still very much in the process of development.\textsuperscript{79} In addition, the legal academy, despite the growing scholarly interest in the topic, has not been eager to embrace either the central goal of instilling moral values in its graduates or the emerging pedagogical insights into how best to accomplish that goal.

Even though both the profession’s rhetoric and lawyers’ responsibilities in government and private sector decision-making call for morally responsible leadership, virtually nothing happens in the law school curriculum to help students develop leadership skills. . . . Legal education’s failure to engage students and the profession in developing leadership skills including character and moral courage may in turn contribute to professional dereliction.\textsuperscript{80}

In order for law schools to begin to reverse this pattern of neglect of moral formation of law students, they need to give close attention to the developing research on appropriate pedagogy and take prudent steps to try new teaching paradigms and assess their results.

The Carnegie Report speaks of the three crucial apprenticeships in all professional education: the cognitive apprenticeship, the practice skills apprenticeship, and the professional values and identity apprenticeship.\textsuperscript{81} Law schools have tended to privilege the first apprenticeship, to include the second apprenticeship in a marginalized manner, and, often, to ignore the third apprenticeship altogether, aside from a single required course in the rules of professional conduct. In order to teach law students to adopt and integrate the moral values essential to ensure professionalism and a stable, functional system of justice, law schools must examine means of integrating education in this third apprenticeship into the entire law school experience.

In order to effectively inculcate moral values in law students, there are certain steps that have been identified as crucial:

\begin{itemize}
  \item The teaching and discussion of legal analysis of cases and statutes, the core of legal pedagogy, must consistently include the
\end{itemize}

\textsuperscript{79} “Current scholarship tells us little about which approaches are most effective in socializing law students and practicing lawyers into the principles of professionalism. We need leadership from both legal education, the practicing profession, and the bench both to emphasize the importance for the profession that this socialization occur and to support efforts to assess which pedagogies are most effective to help adult professionals grow over a career into an ethical professional identity.” Neil Hamilton, \textit{Professionalism Clearly Defined}, 18 PROF. LAW. 4, 14 (2008).

\textsuperscript{80} Hamilton, \textit{supra} note 18, at 359; see also Anne Colby & William M. Sullivan, \textit{Formation of Professionalism and Purpose: Perspectives from the Preparation for the Professions Program}, 5 U. ST. THOMAS L.J. 404, 420 (2008).

\textsuperscript{81} \textit{See Carnegie Report, supra} note 3, at 28.
moral implications of different modes of analysis and case outcomes. Sensitivity to the moral implications of legal judgment must be included as a basic part of legal analysis from the beginning of law school.82

- Law students must be engaged in regular group discussions and individual reflection on moral issues arising in actual legal practice contexts.83 Civil and reasoned discussion especially of “hot button” moral issues must be modeled and taught.84

- Law school professors, particularly when discussing the moral implications of legal doctrine and practice, must have a realistic understanding of how these issues arise in law practice. It is therefore essential that a substantial proportion of the law faculty be experienced and successful legal practitioners.85

- Law students must be provided with role models and mentors, within the law school and within the practicing bar, who demonstrate highly integrated moral awareness in their deliberations and actions.86

- Law students must have opportunities to experience directly the moral dimensions of law practice through experiential learning opportunities, including externships, clinics, and realistic simulations that include realistic moral issues.87

- The law school must provide a consistent internal moral context in which the institution articulates its own values and self-regulates to uphold and practice those values. When the institution fails to live up to its own values, it must provide the opportunity for critical input and the ability to accept valid

82. See id. at 142.
83. See Hamilton, supra note 79, at 9.
84. See Singer, supra note 9, at 950–51.
85. See Muriel J. Bebeau, Promoting Ethical Development and Professionalism: Insights from Educational Research in the Professions, 5 U. St. Thomas L.J. 366, 391 (2008). “Intellectual mastery alone is, indeed, always a possible pathology of schooling—one that can subtly subvert the best efforts of professional schools by displacing the goal of learning the profession with a more self-contained academic aim of technical virtuosity, detached from attention to the ends of legal training. This danger is intensified by the fact that students who go on to become the next generation of law school faculty are drawn from the subset of students who achieve the very highest levels of technical, intellectual mastery.” Carnegie Report, supra note 3, at 144. This is also applicable to those and who often had a miserable and brief experience of law practice.
86. See Colby & Sullivan, supra note 80, at 421–22.
87. See id. at 421.
criticism and to make the changes required for moral consistency.\textsuperscript{88}

- Law students must be encouraged to explore their own moral values and commitments, to analyze, test, and try them for truth and consistency, and to integrate these values into all aspects of their thought, choice, and action, both in their personal lives and in their professional practice.\textsuperscript{89} Specifically, law students must examine how they will balance their personal and professional lives in light of their values and commitments.\textsuperscript{90}

- Law students must be prepared for the challenges of maintaining these moral values and commitments in contexts where those values and commitments are not valued and may even be punished.\textsuperscript{91} The law school must identify and address specific foreseeable challenges to moral values that are common to law practice.\textsuperscript{92}

- Law students must be encouraged and assisted to find their own vocation in the law – the employment context where they can use their particular strengths and abilities and find joy and fulfillment in their work. Students must be educated to pursue intrinsic, rather than extrinsic, sources of reward and value.\textsuperscript{93}

- The law school must educate students to share responsibility for the proper functioning of the legal system and all its component institutions. Law students should expect that they will, throughout their legal careers, assess the functioning of the justice system and accept an obligation to act when justice is denied due to system failures.\textsuperscript{94}

- The law school must identify the specific moral values and qualities that it considers to be essential to professional con-

\textsuperscript{88} See Bebeau, supra note 85, at 391–92.


\textsuperscript{90} See Hamilton, supra note 79, at 14; Schiltz, supra note 89, at 787.

\textsuperscript{91} See Colby & Sullivan, supra note 80, at 408.

\textsuperscript{92} See Patrick J. Schiltz, On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession, 52 VAND. L. REV. 871, 916–29 (1999).

\textsuperscript{93} See Colby & Sullivan, supra note 80, at 412–14; Sheldon & Krieger, supra note 11, at 263.

\textsuperscript{94} See Colby & Sullivan, supra note 80, at 424–25.
duct and make a convincing, reasoned case for them to law students.95

• The law school must develop practical, reliable means of assessing its achievement of all the above goals.96

In this difficult challenge of effectively instilling moral values in lawyers-in-training, the religiously-based law school has several major advantages over its secular peers. The first, and perhaps most basic and crucial, advantage is the ability to ground the values of the profession, essential to the continuing functioning of the justice system, in a well-reasoned claim of truth and therefore of non-relative validity and applicability. As discussed above, it is impossible to mount a consistent, rational defense of any set of values without first founding those values in some non-relative reality. Most law schools deal with this problem by ignoring it, either trusting that students will apply their own values, and that these values will suffice to make them ethical lawyers, or else rejecting altogether the formation of ethical lawyers as part of the law school’s task. Unfortunately, the secular law school classroom, from which all claims of absolute value have been excluded, does not have a neutral effect on the values that law students bring to law school. Rather, the implicit message is that moral values are unimportant and irrelevant to the study and practice of the law—in effect, affirmative teaching law students not to be ethical in law practice.97

Religious law schools from many faith traditions can add to the advantage of being able to offer a source for absolute moral values, a rich and well-developed system of coherent moral teachings based on these values. The major religious faiths each encompass a lengthy tradition of moral thought, tested and tried over centuries, dedicated to reasoning about the significance and impact of first-order moral values, the relationship between moral values, and how to deal with

95. “[E]ntering students may experience the other-directed values that have been set by the profession itself and communicated by the instructor as an imposition on their personal values, including their need for a career that could help them pay their school loans and begin adult- hood with a secure future.” Bebeau, supra note 85, at 375; see discussion supra Part III.

96. See generally Hamilton, supra note 89 (suggesting that the legal profession is one regulated through peer review, which gives the profession’s members control over the entry into, mobility in, and standards of the profession).

97. “When faculty routinely ignore—or even explicitly rule out-of-bounds—the ethical-social issues embedded in the cases under discussion, whether they mean to or not, they are teaching students that ethical-social issues are not important to the way one ought to think about legal practice.” Carnegie Report, supra note 3, at 140.
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value conflicts. Faith-based legal education can call on well-thought-out teachings on the relationship between moral values, moral decisions, moral actions, a good society, and a good life. In addition, religious law schools have access to the teachings of other religious traditions to further ground their moral education of students in the fabric of moral thought through the ages. Members of one religious tradition can engage with the religiously-based arguments of another tradition far more successfully than purely secular thinkers can engage with any religiously-based thought. Once room is made in law school for a transcendent source of values, an arena of discussion is opened that is not available in a classroom limited to a purely worldly framework.

Researchers and scholars examining ethical failures on the part of the legal profession often focus on the tendency for lawyers to have one set of moral rules for their private lives and another set that governs their behavior in law practice.98 This deep disconnect in the moral lives of lawyers leaves their decisions and actions in their professional role unanchored by their own core values and commitments. “[D]efining personal conscience separate from professional conscience will socialize law students and lawyers to live professional lives where personal conscience is relevant in only a small subset of professional decisions.”99 A religious law school can focus the students’ growing analytical abilities on their own deeply held beliefs and values instead of ignoring the personal values and moral beliefs that law students bring to the classroom as irrelevant. Once these beliefs and values are legitimated in the classroom and in other law school discussion venues, then law students can be taught and encouraged to examine their own beliefs in the light of reason, make explicit their tacit assumptions, and mature and strengthen the depth and consistency of their beliefs. A religious law school also offers, as described above, a well-considered, reasoned defense of a system of beliefs, which can serve as a comparator and standard against which students can measure their own belief systems. This process of self-examination and analysis helps each law student develop a coherent single set of moral values, firmly based in a deeper understanding of who s/he is and who s/he chooses to be.100

98. See Schiltz, supra note 89, at 785–86.
100. See id.; see also CARNEGIE REPORT, supra note 3, at 128–32; Schiltz, supra note 89, at 785.
A religious law school, at least in many of the major religious traditions, can also make use of the crucial concept of vocation in a way that few, if any, secular law schools do.101 While a purely secular case can be made that each person should seek the kind of work that their unique combination of abilities, predilections, experiences, and values best fits him/her to do well and to love doing, such a case generally is not made in law school and/or is not compelling to law students. Endless statistics indicate that a large proportion of lawyers find themselves doing work that makes them “unhealthy, unhappy, and unethical.”102 In order to maintain a high standard of professionalism, practitioners must find some source of lasting joy in their work.103 The religious notion of vocation as being a calling from God to fulfill the divine purpose by seeking to do the work that God intends one to do is a far more powerful and immediate motivation.104 It is also a notion that comes packaged with a well-developed understanding of the nature of vocation and the process for discerning it.

Law school is generally known as a competitive, cutthroat, stressful experience in which law students are pitted against each other in the Socratic arena to fight for survival and respect. In such a context, discussion of moral issues close to the heart is likely to be extremely personally risky and is unlikely to offer much reward in terms of honest mutual examination and analysis of the issues at stake. Competition for advantage in debate displaces any chance at honest and open dialogue. As a result, law students receive no training in a skill essential to democratic society but at risk of dying out in modern societies—the ability to engage in rational normative discussion. As a result of this lack of skill and experience in normative deliberation, we live in a society where moral and political “hot topics” generally are...
only discussed within the circle of those who already agree with each other. Exchanges with those with different views are marked with name-calling and vituperation—practices not particularly useful in finding common ground or learning from different perspectives. As a result, our public deliberation is impoverished, and our social and political decision-making is the poorer for lack of rational discussion.

A religious law school can provide a basis for community and mutual trust that permits open, honest and mutually respectful discussion of passionately held convictions.\textsuperscript{105} The religious values calling for respect for each person as embodying an aspect of the divine do not permit treating people with opposing viewpoints as subhuman or incapable of offering anything of worth.\textsuperscript{106} Living in a community that seeks to live out these values daily will generate the trust and respect necessary to reasoned normative discussion of “hot-button” issues. A religious law school will understand the need to model and teach such discussion, which is so rare in the broader society, to its students in order to help them to live out their religious values in community.\textsuperscript{107} Religious values can provide the foundation for a community of learners who, rather than seeking comparative advantage over each other, seek to advance the knowledge, skills and wisdom of the entire community. This experience of community within the profession can then be extended to the community of lawyers who can support and hold each other accountable to high standards of practice through mutual caring and shared values.\textsuperscript{108}

Finally, religious law schools enjoy a substantial advantage in motivating law students to apply moral principles to their own decision-making and choices. While every law school (at least in the United States) requires law students to take at least one course in the rules of professional conduct, little or no attention is paid to how to convince law students to incorporate the values reflected in these rules in their

\textsuperscript{105} See Organ, \textit{A Vocation-Based System of Ethics for Law Students}, supra note 101, at 1003–04.

\textsuperscript{106} “We believe that human beings are created in the image and likeness of the living God, with a common natural vocation to live with each other creatively, and justly, and lovingly.” Rev. D. Reginald Whitt, O.P., at the University of St. Thomas School of Law Opening Mass (Sept. 2002) (on file with author).


\textsuperscript{108} See generally id. (recognizing the role of “community” within the profession as impacting the high standards of the practice of law).
actual decisions and actions in the practice of law. From a purely market-based viewpoint, there is no particular reason to comply with the rules of professional conduct if one can escape detection or punishment for breaking them. Religious law schools can provide a compelling answer to the question, “Why be a moral lawyer?” Religious law schools can offer a non-relative, integrated, comprehensive understanding of moral truth and right action founded in reason and in faith (the experience of the numinous or transcendent). Such an understanding of the basis of right choice and right action makes its appeal not only to the mind, but to the heart and the will as well.

VII. A CASE STUDY OF THE UNIVERSITY OF ST. THOMAS SCHOOL OF LAW

How can these theoretical advantages of religious legal education be put into effect? What must religious law schools do differently in order to realize these benefits? How will the graduates of a religious law school differ from their peers in the way that they practice law? In order to capture the potential of faith-based legal education to instill in lawyers the moral values required to preserve a stable democratic society, we will need to closely examine specific legal education programs and their effects on their graduates. In order to assess a given law school with regard to its effectiveness in development of an integrated, morally sound professional identity in its graduates, first that law school must envision with some specificity what kind of lawyer it intends to produce. Religious law schools that embark on this project must come to an internal consensus on the outcomes at which they are aiming. The desired educational effect must be defined in a way that is accepted by those who interact closely together in the educational process. In the remainder of this Article, I will examine the case of the University of St. Thomas School of Law (“St. Thomas”) in Minneapolis, Minnesota. I will describe at some length the results of research into what the relevant stakeholders—faculty, administrators, staff, students, and alumni—are striving to achieve as the desired “St. Thomas Effect.” I will outline the ways in which St. Thomas has tried to generate this effect, and particularly those ways that set St. Thomas apart from secular (and many nominally religious) law schools. I will describe preliminary research into whether St. Thomas graduates, in

fact, display the desired St. Thomas Effect. Finally, I will look ahead to future research and analysis in this ongoing endeavor, and the usefulness of the St. Thomas Effect project and data to other law schools, secular and religious.

A. Putting the Mission into Effect

In May of 1999, when the University of St. Thomas considered the re-opening of its law school, which had been closed since 1933, the trustees and administrators were moved by a desire to “do a new thing.” They faced repeated challenges to the very notion of founding yet another law school—the fourth in the Twin Cities metropolitan area, the 187th in the country. In the year before the opening of St. Thomas, law schools in the United States graduated 38,158 new lawyers, to bring the total of admitted attorneys to 1,049,751 or one attorney for every 272 people. Both at the local level and in the national context, the question was repeatedly raised, “Where is the benefit in establishing another law school? Do we really need more lawyers?”

The answer given by the founders of St. Thomas to this question was consistent from the start. The world (the United States, the state of Minnesota, the Twin Cities) may or may not need more lawyers, in general, but it badly needs more of a particular kind of lawyer. As stated by Patrick Schiltz, the founding associate/acting dean, “[T]he paramount purpose of the law school should be to help law students integrate their religious convictions and personal values into their professional identities. This . . . would lead those students to practice law

110. Isaiah 43:19 (New Revised Standard Version) (“I am about to do a new thing; now it springs forth, do you not perceive it?”).

111. This figure is based on the number of law schools that are accredited by the American Bar Association and that grant the J.D. degree. See ABA-Approved Law Schools by Year, A.B.A., http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/by_year_approved.html (last visited Aug. 29, 2013).


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more ethically and use their legal training not to get rich, but to serve God and the most needy among us.” 115

St. Thomas justified its existence from its inception by a claim that it would produce a specific kind of lawyer—a lawyer who would incorporate faith and moral values in her self-definition as a lawyer, who would hold herself to a higher moral standard in the practice of law, and who would use her professional degree to seek the common good and serve the poor and vulnerable. Thus, nearly a decade before the publication of the Carnegie Report, St. Thomas focused its mission on the development of the professional identities of its students and graduates.116

St. Thomas adopted as its mission and vision statement: The mission of the University of St. Thomas School of Law, as a Catholic law school, is to integrate faith and reason in the search for truth through a focus on morality and social justice. To implement this mission, each member of the law school community is dedicated to promoting excellence in:

Professional Preparation
By providing, from a faith-based perspective, practical skills and theoretical legal education and mentoring, the law school commits to preparing students to become accomplished servant leaders in the practice of law, in the judiciary, in public and community service, in business, and in education. The law school's faculty and curriculum will be distinctive in supporting and encouraging students' integration of their faith and deepest ethical principles into their professional character and identity. Because a legal education is enhanced by a broad understanding of global society's many challenges, the law school will also provide students with opportunities for interdisciplinary study and experiential learning.

Scholarly Engagement and Societal Reform
The law school will undertake to expand knowledge about law and society and participate in the improvement of legal institutions and other organizations through recruitment and development of a faculty of outstanding teachers and scholars, sponsorship of academic lectures and interdisciplinary research activity, and establishment of a strong law library collection and staff. As members of a

115. Id. at 1050.
116. CARNEGIE REPORT, supra note 3, at 13 (“Amid the useful varieties of mission and emphasis among American law schools; the formation of competent and committed professionals deserves and needs to be the common, unifying purpose.”).
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Catholic law school, faculty and students will particularly explore the intellectual integration of faith into the study of law, professional ethics, public policy, and social justice.

Service and Community
The law school will work to establish a diverse community of talented students, faculty, and staff dedicated to supporting and serving each other, the law school’s mission, and the local, national, and global communities. The law school, inspired by Catholic social teaching, and members of the law school community, drawing on their own faith and values, will promote and participate in service programs designed to address the needs and improve the conditions of the disadvantaged and underserved. The law school will strive to enhance social justice and will assist students in integrating their commitments to serve society into their personal and professional lives.  

In order to accomplish its mission, the faculty, staff and administration of St. Thomas took much careful thought about every aspect of the legal education it would offer students. Of course, in many ways, St. Thomas’s legal education looks very similar to that of other American law schools. In order to maintain accreditation that permits its graduates to take the bar exam and be licensed to practice law, St. Thomas must comply with American Bar Association accreditation requirements. However, St. Thomas has made specific choices about hiring and admissions criteria, scheduling, curriculum, course content, public service requirements, honors, faculty scholarship, and extracurricular activities that make it stand out from other law schools in its broad and deep focus on the mission. 

First, St. Thomas has maintained a firm commitment to hiring according to its mission. Each potential faculty and staff hire is ex-


119. There are important contributors to the St. Thomas mission that I will not be discussing here, particularly our outstanding Lawyering Skills program and our exceptional Interprofessional Center for Counseling and Legal Services. Particularly, since my own appointment is in the Clinical Education Department, and I teach in the Interprofessional Center, I would love to describe the mission-related work done in these settings. However, I am focusing here primarily on what St. Thomas does that clearly sets it apart, on a mission-related basis, from most other law schools. Most law schools do have clinics and teach lawyering skills, so I will not describe these programs here.
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amined for what the person will be able to bring to advance the mission. While the faculty and staff are a fairly diverse group, representing many religious faiths and political viewpoints, all are committed to the value and importance of the mission. Similarly, prospective students are also evaluated according to their “mission fit.” While many students are admitted based on standard criteria of academic excellence, significant numbers of applicants whose academic credentials might not immediately win them admission are accepted, and sometimes offered merit-based scholarship support, based on their perceived ability to advance St. Thomas’s mission. Some of these applicants have already demonstrated a deep and mature faith that has shaped their personal formation and has led them to seek justice and the righting of social wrongs that they have encountered. These qualities are of equal importance with outstanding academic achievement in determining who will be admitted to St. Thomas. While some St. Thomas stakeholders have expressed concerns that this emphasis on mission in the selection of faculty, staff, and students could lead to a reduction in academic credentials and quality, in fact, it appears that the mission has attracted academic “stars” to St. Thomas who might not otherwise have considered a new and relatively unknown school. The St. Thomas mission has provided a “niche market,” its uniqueness attracting stellar faculty, staff and students to the law school.

St. Thomas perceives the need to make its commitment to its mission visible on a daily basis, in the routine round of classes and appointments. The school has set aside both space and time for religious practice to try to ensure that those who seek to include prayer and worship in their daily schedule can do so.121 The law school has a

120. A lighthearted attempt at one point in our early years to map the St. Thomas faculty across the political spectrum led to a great deal of amused indignation—“Why is she ranked ‘more lefty’ than I?,” “But I voted for __,” etc. Suffice it to say that our faculty range from far left to far right in our political views, with interesting faith-based commitments cutting across the ordinary left/right political continuum. See, e.g., Thomas Berg, Intellectual Property and the Preferential Option for the Poor, 5 J. CATH SOC. THOUGHT 193, 196–200 (2008); Elizabeth Rose Schiltz, Should Bearing the Child Mean Bearing All the Cost? A Catholic Perspective on the Sacrifice of Motherhood and the Common Good, 10 LOGOS 15, 20–22, 26 (2007); Susan Stabile, An Effort to Articulate a Catholic Realist Approach to Abortion, 7 U. ST. THOMAS L.J. 340, 340–43 (2010); Robert K. Vischer, Subsidiarity and Suffering: The View from New Orleans, 45 J. CATH. LEGAL STUD. 183, 183–85, 187–88, 190 (2006).

chapel and a meditation room open all day, every day. Catholic Mass
is celebrated daily during the school year at noon. During the time
from noon to 12:30, no classes, events, or meetings may be scheduled,
except for those which directly relate to religious practice. Prayer ser-
vices, guided meditation, yoga, and other worship and prayer opportu-
nities are offered during this hour, so that people of all faiths have an
opportunity to participate, if they choose. All-school gatherings,
faculty meetings, and some classes begin with prayer. While no one is
obligated to pray at St. Thomas, prayer is never considered weird or
out of line, unlike in the vast majority of law schools and legal practice
environments. It is made a natural, normal, organic part of the law
school day.

St. Thomas offers members of its community a wide variety of
opportunities to discern their vocations and to deepen their spiritual
lives. Every year, students organize mission trips to serve needy peo-
el. Faculty offer vocational retreats for students at the beginning of
each semester to help students explore deeply what they are called by
God to do with their lives and their gifts. Retreats in daily living and
special programs are offered each semester to help guide spiritual
growth. Opportunities are provided to meet and discuss the faith
tale journey in small groups. While some members of the community may
never participate in any of these activities, their pervasive presence in
the law school schedule again helps to normalize religious values and
religious practice in everyday life. The large numbers who do partici-
pate find a deepened sense of community within the law school as a
result. They also find many opportunities to reflect on what they be-
lieve, what they value, and how these beliefs and values will be inte-
grated into their professional identity and their practice as lawyers (or
law professors or law school administrators).

These gatherings also bring members of the law school commu-
nity together, without regard to status or hierarchy. Community
members learn to understand and value each other as equals in the
sight of God, breaking down many of the external divisions between
professor and student, secretary and dean. St. Thomas works to cre-
ate an inclusive, caring, respectful community. When students,
faculty, or staff are faced with life crises, from the serious to the mun-
dane, the community supports them and prays for them. Students

Law, http://www.stthomas.edu/campusministry/liturgyworship/on-campusworship/#d.en.27212
(last visited Aug. 28, 2013).
know that the St. Thomas faculty and administration care about them and will listen and spend time trying to help with problems, especially those beyond the normal travails of law school, but there is sympathy for the everyday challenges of law school, too, and help in putting them in proper perspective. Abusive behavior in the classroom, by faculty or students, is not tolerated. All members of the community are called to treat each other with respect and civility, and all call each other to account for failure to do so.

In terms of curriculum, one of the most obvious differences from other law schools is the required course in Foundations of Justice taught in the first year. This course was designed to:

[Introduce] students to the foundational moral commitments shaping both the structure of our system of justice and the multiple roles of the lawyer in administering that system. Each line of inquiry is explored through both Catholic texts and texts from other religious or philosophical traditions, and by examining the multiple roles of the lawyer – as advocate for powerless or powerful clients, as policy-maker, as judge, as voter, as community member, and as family member. . . . The course also is designed to provide a common vocabulary for continued consideration of the moral dimension of law and legal practice and the concepts that inform our understanding of justice in other law school courses.

Students read, reflect and discuss the moral implications of legal issues and examine specifically what moral values they will bring to their practice of law. The discussions in the Foundations course provide a chance to begin modeling and teaching modes of civil normative discourse on “hot-button” topics.

A bound set of the extensive readings assigned for the course is available to each St. Thomas faculty member. Faculty members are aware of the issues that the students have addressed in Foundations and are familiar with the readings and materials that the students studied in that course. This common set of readings provides a basis for the faculty to use and build on these ideas and concepts in their own courses. Every faculty member is expected to seek opportunities to incorporate the mission into the teaching of his/her own courses, from Poverty Law to Mergers and Acquisitions. Faculty members are asked periodically to report on their methods of incorporating the mission into their classes. The faculty retreats offer opportunities to brainstorm new ways of bringing the mission into every course and classroom.

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A second major curricular innovation at St. Thomas is the required, three-year Mentor Externship. Each St. Thomas student is assigned a practicing attorney or judge as a mentor each year. Mentors are trained in the program’s requirements and goals. Law students must spend substantial time each year observing and reflecting on the practice of law as demonstrated by their mentors. They also participate in a seminar in the second and third year in which they discuss in small groups the many professionalism issues that arise in practice. Students write multiple reflective papers on both their experiences in the field and their classroom work.

The Mentor Externship brings law students into contact with a wider variety of role models in the practice of law who are trained to help law students see and understand the messy realities of professionalism in practice. Students are also taught to reflect on and integrate their own values and commitments in the face of the challenges that are likely to confront them in practice. They develop reflective learning skills that will enable them to continue integrating lessons from experience throughout their legal careers.

In order to “address the needs and improve the conditions of the disadvantaged and underserved,” and “assist students in integrating their commitments to serve society into their personal and professional lives,” St. Thomas requires all of its law students to complete at least fifty hours of community service during their law school careers. This requirement makes concrete the need to, and the challenge of, integrating service to the broader community into a busy and challenging professional life. Studies of pro bono requirements in law schools give conflicting results about whether such programs actually increase the amount of pro bono work done by graduates. Surveys of law graduates have consistently found that they believe that a pro bono requirement in law school increased the likelihood that they would do pro bono work in the future. On the other hand, the only study of actual pro bono participation by lawyers found no difference

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123. See, e.g., Mission & Vision, supra note 117.
between those whose law schools required pro bono work and those whose law schools did not.\textsuperscript{126} The results of this study indicate that the design of the pro bono program is crucial in determining its effects on students. To have a positive effect on lawyers’ attitudes toward, and future involvement in pro bono work, a law school pro bono program must:

\begin{quote}
[P]rovide positive public interest experiences and ensure that they are available to the maximum number of students. Moreover, the value of pro bono service needs to be reflected and reinforced throughout the law school experience in both curricular coverage and resource priorities.\textsuperscript{127}
\end{quote}

St. Thomas's public service requirement meets the standards for an effective pro bono program. It offers students a wide variety of opportunities to fulfill the requirement. The requirement is not limited to legal work because attorneys’ obligations to serve the greater community are not limited to their role as attorneys, but rather are rooted in what it means to be a morally sound and integrated human being.\textsuperscript{128} While St. Thomas does not impose a similar requirement on its faculty and staff (an opportunity for improvement?), faculty and staff are encouraged to meet a similar requirement. The entire law school is called to participate in twice-annual Public Service Days, where members of the community work together to serve the needs of the poor and marginalized. This working together both builds community bonds and symbolizes the importance of such service to the law school. The importance of public service is reflected and emphasized by the significant investment of law school resources in the public service program and the award of the honors to those who excel in public service.

Another way that St. Thomas puts its mission into practice is in whom it chooses to honor. The highest honors given by St. Thomas to students, faculty, staff, adjuncts, mentors, or alumni are the Mission Awards.\textsuperscript{129} These are presented annually at an all-school luncheon to those members of the community who have done outstanding work in carrying out the mission of St. Thomas.\textsuperscript{130} The Living the Mission

\textsuperscript{126} See id. at 159–60.
\textsuperscript{127} Id. at 165.
\textsuperscript{130} See id.
Awards, given each year to the student in each class who has done the most to advance the mission that year, are accompanied by substantial checks. All mission award recipients are listed in a display in the law school atrium and are recognized at commencement, as are students who have posted the highest hours of community service and pro bono legal work. St. Thomas affirms its mission-based values by those it holds up for honor and emulation.

Finally, St. Thomas faculty devotes a great deal of their scholarly research and writing to topics related to the mission of the law school. While St. Thomas faculty write in the broad range of doctrinal areas common at other law schools, a large proportion of the faculty also sometimes write on faith, morality, social justice, and professionalism. In the 254 articles published in the St. Thomas’s legal studies research paper series on SSRN, 117133 dealt in some way with one or more of these topics, and twenty-three related specifically to the education of law students in relation to these topics.134 Given that most of the faculty were drawn to teach at St. Thomas because of the mission, it is not surprising that many of them are also drawn to think, research, and write about subjects related to the mission. In addition, the presence of the Holloran Center for Ethical Leadership in the Professions135 and the Terrance Murphy Institute for Catholic Thought, Law, and Public Policy,136 both located in the law school and staffed largely by law school faculty, provide additional resources for scholarship in mission-related areas.

131. See id.
132. See generally id. (highlighting the values of the University of St. Thomas School of Law and the great honor associated with being a Mission Award recipient).
134. See id.
135. “[T]he Holloran Center’s purpose is to develop leading-edge interdisciplinary research, curriculum, and other programs that focus on the formation of accomplished ethical leaders.” University of St. Thomas School of Law Draft 2010 AALS Self-Study 5 (2010) (on file with the Univ. of St. Thomas Sch. of Law).
136. See id. (“[T]he Murphy Institute seeks to ‘explore the various interactions between law and Catholic thought on topics ranging from workers’ rights to criminal law to marriage and family.’”)

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B. Evaluating the Outcome: What Defines “The St. Thomas Lawyer”?

I have described the most significant, concrete ways in which St. Thomas has attempted to put its faith-based mission into effect. However, these efforts were all initiated in some sense in the dark. There was little useful research that could guide St. Thomas’s efforts to instill its mission in its students.\footnote{“As far as we know, there is no research on the extent to which this influence [of law school education] results in greater incorporation of the ethical-social values of the profession into students’ personal and professional identities.” \textit{Carnegie Report}, supra note 3, at 135.} St. Thomas was required to take what guidance it could from limited data in different fields (moral development, adult learning theory, etc.) and makes reasoned choices about the best way to pursue its mission. In order to evaluate and refine its program, St. Thomas must commit to ongoing self-evaluation and assessment. This assessment must include the development of a clear picture of what success in mission will look like. What will the desired “St. Thomas lawyer” look like? How will she differ from peers in the practice of law? In the ordering of her personal life? In order to search for “the St. Thomas effect,” we must:

1) define clearly the distinguishing characteristics that St. Thomas intends to foster in its graduates;

2) identify useful indicators of the presence or absence of those characteristics; and

3) gather data to determine whether St. Thomas graduates in fact possess the desired characteristics to a degree exceeding what we find in the general population of lawyers.

I conducted an initial small-scale largely qualitative study to identify the kind of lawyer St. Thomas is seeking to produce. I began by:

1) reading all available written descriptions of the goals and mission of the law school; 2) reading all scholarly writing by St. Thomas professors and administrators related to the education, socialization, identity and value formation of lawyers; 3) conducting unstructured interviews with a broad sample of St. Thomas faculty, staff and administrators; 4) conducting a semi-structured survey of a random sample of the first graduating class a year after their graduation; 5) distributing an initial draft of an article describing the St. Thomas Effect to all law school faculty, staff, and administrators and soliciting comments and criticisms; and 6) presenting my preliminary findings at a colloquium attended by faculty and staff and incorporating the many of the
suggestions I received. In this process, I identified common themes and key concepts that emerged repeatedly from all sources. I summarize these key findings below.  

1. The Law as Vocation

The first defining quality of the kind of lawyers that St. Thomas seeks to produce is that they view the law as a vocation to which they are called, rather than only as a career that they choose. As Jerry Organ, professor and former associate dean, wrote:

Our responsibility as individuals then, is to discover the aptitudes, qualities, charisms and special gifts that God has given us, and then to discern prayerfully how best to foster, develop and use these gifts in our lives so that we can enhance the common good and the kingdom of God. Law students and lawyers particularly, to whom much has been given in terms of intellectual ability, communication skills and educational opportunities, have a special responsibility to discover their gifts and to use them for the common good.

The St. Thomas lawyer thus has a sense of a duty to seek out the best and highest use of her skills and abilities. She has an obligation to find her proper work in the world, and, in whatever workplace she finds herself, to discover her role in making that place better. The St. Thomas lawyer will engage in continual reflection about her career, seeing it as a coherent whole, seeking to shape it according to her deepest values.

St. Thomas lawyers won’t all find themselves doing the same kind of work. St. Thomas does not expect that its alumni will all work for non-profit public interest organizations, for example. St. Thomas lawyers will be called to a wide variety of jobs and fields based on the unique abilities and vocations of each graduate, from legal aid and public defenders offices, to small, medium and large firms, to in-house

138. Clearly, the mission of St. Thomas is an organic notion that continues to grow and change to some extent with the law school. The discussions among stakeholders as to the nature of the St. Thomas lawyer will and should continue as long as the law school exists.

139. See Mengler, supra note 136, at 145 (“The most inspiring part of our mission is our commitment to establish a law school dedicated to graduating lawyers who view their professional lives as a calling or vocation.”); Rev. Whitt, supra note 106. (“We believe that human beings are created in the image and likeness of the living God, with a common natural vocation to live with each other creatively, and justly, and lovingly. . . . [W]e want to appreciate the law as God sees it, so that we can be of service to the human family that God loves.”).

140. Organ, From Those to Whom Much Has Been Given, Much Is Expected, supra note 101, at 368–69.

141. See Interview with Mitch Gordon, Assoc. Professor, Univ. of St. Thomas Sch. of Law (July 8, 2005) (on file with author).
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work, to government employment, etc. However, we might expect that the pattern of employment distribution will be different for St. Thomas graduates from that of graduates of other law schools. Job choice, when viewed as a function of vocation, greatly de-emphasizes some common determining factors in the pursuit of legal employment—i.e., salary, status and power—while emphasizing the opportunity to make positive changes in some part of the world. It would be logical to assume that such differences in priorities would be reflected in somewhat different job choices.

2. Integration, Integrity and Independence

St. Thomas’s mission, in contrast to the worldview reinforced at most law schools, focuses on the integration of two modes of knowing that are often seen as contradictory in western cultures—faith and reason. St. Thomas asserts in its mission statement that these two modes are not in opposition, but will reinforce and supplement each other in the search for truth. The St. Thomas lawyer will call upon faith-based moral and ethical values as well as logic and reason in seeking the answers to questions she faces in her life and in her law practice. The St. Thomas lawyer will seek the “right” answer in both broad senses of the word—the answer that best comports with reality and the answer that is consonant with the highest good. These two modes of knowing come from the same roots in our language, and the St. Thomas lawyer will affirm their congruity in her life and practice.

This integration of faith and reason in seeking answers will express itself in an internal integration of character—also known as in-

142. See Interview with Elizabeth Brown, Assoc. Professor, Univ. of St. Thomas Sch. of Law (July 12, 2005) (on file with author).

143. See Organ, A Vocation-Based System of Ethics for Law Students, supra note 101, at 1001–03.

144. Schiltz, supra note 89, at 753 n.181 (“If we are to assist our students in internal integration, we must be willing to discuss with them their religious convictions and the role that those convictions will play in their professional lives. . . . Apparently, . . . few law professors are willing to put religion on the table. According to Thomas Shaffer, ‘the [legal] academy, more than any other, has systematically discouraged and disapproved of invoking . . . religious tradition as important or even as interesting.’ . . . Religion is generally ignored in discussions about legal ethics and in the materials that students use in studying ethics.”) (quoting Thomas L. Shaffer, American Lawyers and Their Communities: Ethics in the Legal Profession 214 (1991); Thomas L. Shaffer, Lawyers in the United States: A Brief Moral History 41, 75 (1995)).

145. Mission & Vision, supra note 117 (“The University of St. Thomas School of Law, as a Catholic law school, is dedicated to integrating faith and reason in the search for truth through a focus on morality and social justice.”).
tegrity—in the St. Thomas lawyer. An attorney who is integrated internally uses the same moral compass in all aspects of her life. She does not have one set of ethics for home and another for the office. The St. Thomas lawyer will resist this destructive tendency, so common in law practice. She will address the decisions in her life with a single, integrated approach. The morals and values that govern dealings with family and friends will equally direct interactions with clients, work colleagues, opposing parties, opposing counsel, court personnel, etc.

The St. Thomas lawyer, relying on this single, integrated set of values, will resist cultural pressures of law practice to conform to expected behavior in violation of those values. Her behavior and choices will be guided by this internal compass, rather than being subject to conventional mores or expectations. The St. Thomas lawyer will be able to resist pressures to act contrary to her values, and will

146. Integrity Definition, Merriam-Webster's Collegiate Dictionary (11th ed. 2003) ("1. firm adherence to a code of especially moral or artistic values: incorruptibility; 2. an unimpaired condition: soundness; 3. the quality or state of being complete or undivided: completeness").
147. Schiltz, supra note 89, at 732.
148. See id. at 785-86 ("Most of our students will encounter strong pressure to develop one set of ethics for work and another for home. We can anticipate this pressure and help our students to resist it if, as we introduce them to their new life in the law, we also challenge them to bring along their personal values.") (citation omitted); see also Teresa Stanton Collett, To Be a Professing Woman, 27 Tex. Tech L. Rev. 1051, 1051 (1996) ("Such a false sense of self is not uncommon among lawyers. But ultimately, like all falsehoods, it proves to be enslaving or deadening.").
149. Mission & Vision, supra note 117 ("The law school's faculty and curriculum will be distinctive in supporting and encouraging students' integration of their faith and deepest ethical principles into their professional character and identity."); see also Response from Jessica Sanborn to Survey of Members of Original Graduating Class (Sept. 16, 2005) (on file with author) [hereinafter, Survey] ("I think that St. Thomas should be trying to make lawyers who do not need to compartmentalize their profession, their faith, and their social consciousness. Rather, St. Thomas lawyers should be able to integrate these aspects of their person."); Response from Jennifer to Survey of Members of Original Graduating Class (Aug. 29, 2005) ("I hope that lawyers from St. Thomas strive everyday to practice law ethically and staying true to their core values and beliefs."); Email from Cari L. Haaland, Dir. of Admissions, Univ. of St. Thomas Sch. of Law to author (July 8, 2005) (on file with author) ("Our message has always been that the St. Thomas attorney will not check her faith at the door of the classroom or the law firm. No matter what her faith or belief system she will incorporate her personal ethics/values into her professional decisions.").
150. See Robert K. Vischer, Legal Advice as Moral Perspective, 19 Geo. J. Legal Ethics 225, 271 (2006) ("The road out of amoral lawyering starts with a profession-wide emphasis on greater moral sensitivity and self-awareness among attorneys. Certainly this effort must begin in law schools, where the legal ethics curriculum all too often focuses strictly on the inculcation of profession-wide norms, giving short shrift to the personal and professional benefits of integrating one's own moral claims with one's work."); Interview with Dan Liebenson, Assoc. Professor, Univ. of St. Thomas Sch. of Law (May 27, 2005) (on file with author); Interview with Greg Sisk, Professor, Univ. of St. Thomas Sch. of Law (June 23, 2005) (on file with author); Interview with Scott Swanson, Dir. of Academic Achievement, Univ. of St. Thomas Sch. of Law (July 15, 2005) (on file with author).
push back against and attempt to change cultural expectations and values that she finds unacceptable.151

3. Drawing on the Springs of Living Water152

Not every lawyer who graduates from St. Thomas will be a religious believer. However, we expect that relatively few students will choose to attend St. Thomas if they find its focus on faith in legal education and law practice distasteful or irrelevant. Therefore, it is expected and desired that the St. Thomas lawyer will be more likely than the average attorney to have an active religious faith and practice that informs her life and her values.153 As Dean Thomas Mengler states, “We expect our community to explore the spiritual side of our lives, the implications of religion for development of the law and legal profession, and, most profoundly, the extent to which our faith and core values should guide and shape our professional choices, actions and directions.”154

The St. Thomas lawyer will find her faith a bulwark for her fidelity to her own values and an inspiration for her work on behalf of clients. “We want to appreciate the law as God sees it, so that we can be of service to the human family that God loves.”155 Membership in a faith community will ground and reinforce the moral and ethical values that will inform the St. Thomas lawyer’s legal practice.

For religious lawyers, connecting the motivational force of faith with the practice of law gives them reason to transcend the profession’s murky, unambitious vision of profit-oriented lawyering. Such integration not only brings coherence to the lawyer’s professional

151. Interview with Elizabeth Brown, supra note 142; Interview with Mitch Gordon, supra note 141; see also Organ, A Vocation-Based System of Ethics for Law Students, supra note 101, at 1008 (“[Just as the cultures of the organizations of which law students are a part exert a gravitational force upon the law students, so too do law students exert a gravitational force upon the other members of their law school community and the profession by the ethical choices they make.”).

152. See John 4:14 (New Revised Standard Version) (“The water that I will give will become in them a spring of water gushing up to eternal life.”).

153. See Vischer, supra note 107, at 450–51 (citations omitted) (“At its best, religious faith motivates individuals to better themselves and their communities, to put others above self, and to invest with meaning the otherwise mundane, materialist conception of existence. Among lawyers, these qualities are sorely needed, both to heighten a lawyer’s sense of satisfaction with their chosen vocation and to enrich the quality and ethical aspirations of the legal services provided.”); Interview with Greg Sisk, supra note 150; Interview with Scott Swanson, supra note 150; Survey, supra note 149.

154. Mengler, supra note 128, at 146–47.

155. Whitt, supra note 106; see also Schiltz, supra note 92, at 24.
and personal identities, but stands to benefit the profession by raising the bar as to what it means to be a good lawyer.\textsuperscript{156}

An important aspect of a legal practice that integrates faith as a fundamental component lies in the nature of faith as essentially communitarian.\textsuperscript{157} U.S. society and its legal system both tend to be strongly individualistic, even atomistic, in orientation.\textsuperscript{158} Religious faith provides an important counterweight to this conception of the law and legal practice. Religious community provides the individual lawyer with support, critique, and feedback from others who share her values and goals—factors essential to the ability to maintain those values and goals in the secular and individualistic world of law practice.\textsuperscript{159}

St. Thomas is a Catholic law school; however, the vision of the St. Thomas lawyer does not include the expectation that non-Catholic students should convert to Catholicism. St. Thomas may attract a disproportionate number of Catholic students, and it is desired that Catholic graduates will be faithful and active members of the Catholic Church. However, non-Catholic graduates can fully embody the “St. Thomas Effect” within the context of their own belief systems and/or faith communities. Non-believing graduates can also participate in this aspect of the St. Thomas Effect through their openness to and acceptance of spiritual values, identities and communities.

\textsuperscript{156} Vischer, supra note 107, at 454–55 (citation omitted).

\textsuperscript{157} See Collett, supra note 148, at 1059 (“Staying focused on God and our families while practicing law is not easy. Certainly it cannot be done alone. To remain faithful and focused requires an active prayer life and the support of a community of believers in the workplace.”); Vischer, supra note 107, at 431 (“Community is at the core of every major religion, and lawyers’ efforts to break out of the prevailing professional paradigm are centered in community—specifically, communities of other religious lawyers. It is the fundamentally communal nature of religious lawyering that has been left largely unexplored, both in term of the promise it holds for lawyers seeking to integrate their faith with their professional lives, and in terms of the tensions it creates with the liberal project, tensions spawned both by the communal and religious aspects of the movement.”); Interview with Virgil Wiebe, Dir. of Clinical Educ. & Assoc. Professor, Univ. of St. Thomas Sch. of Law, Comments (approximately Apr. 12, 2006) (on file with author).

\textsuperscript{158} See W. William Hodes, Rethinking the Way Law is Taught: Can We Improve Lawyer Professionalism by Teaching Hired Guns to Aim Better, 87 Ky. L.J. 1019, 1042 (1999).

\textsuperscript{159} Vischer, supra note 107, at 442–43 (“First, to the extent that communities of religious lawyers facilitate the integration of faith and practice, these groups bring coherence to the lives of religious lawyers. Second, . . . these groups allow lawyers to transcend the minimalist and visionless ethical regime of the profession. Third, the shared ethical norms emanating from a common faith make dialogue more possible, both within the group and with other groups. Such dialogue is a key path toward raising a lawyer’s own ethical awareness . . . .”).
4. The Servant Leader and the Listening Ear

The St. Thomas lawyer will be humble, a characteristic not usually associated with lawyers. St. Thomas’s mission is dedicated to the search for truth—an indication that the St. Thomas lawyer will not be convinced that she already has the final, complete truth. Honest searching requires humility about the completeness and correctness of answers already found. Honest searching also requires the ability and willingness to truly listen, to open oneself to another’s argument and be alert to the chance that it embodies an important part of the truth.

[One] meaning the phrase Search for Truth conveys is humility and tolerance. We are all searching for the truth, but darn if it’s not hard to find in this world. . . . Consequently, we should bring to . . . our search for truth an overriding sense of humility, and of our tolerance for difference. We should bring a warm intellectual embrace to those who are also searching—to those on the left, if we are on the right. To those who are Jewish or Muslim, if we are Christian. We should challenge the premises of others with whom we disagree, but we should do so respectfully—because we are all on the same journey, and none of us holds the tiger by the tail.

Humility will also inform the role of the St. Thomas lawyer as a dedicated servant leader, defined as “[A] person who is a servant first, motivated to serve others to become what they are capable of becoming.” The servant leader is the leader who leads, not for her own benefit or to serve her own ends, but in order to empower those she leads to achieve their own human potential and goals. The St. Thomas vision statement states that, “the law school commits to preparing students to become accomplished servant leaders in the practice of law, in the judiciary, in public and community service, in business, and in education.” The St. Thomas lawyer will offer her skills and vision as a leader, but a leader dedicated to the growth and well being of others, not to her own aggrandizement.
5. The Dignity of All People

The St. Thomas lawyer will respect and honor the dignity of every human person. Catholic Social Thought holds this respect for the dignity of every human being as the first of its ten major themes. The St. Thomas lawyer must demonstrate this respect in all aspects of her professional and personal life.

This respect and honor is due regardless of whether another’s beliefs comport with those of the St. Thomas lawyer or whether another’s actions are seen as good or evil. The St. Thomas lawyer would offer such basic, unalterable respect to defendants guilty of terrible crimes, unprofessional attorneys, abusive judges, and lying clients, to the same degree that she would offer it to models of moral behavior.

The St. Thomas attorney will not be able to demonize legal opponents, or make use of abusive or manipulative means to advance her client’s interests or her own career. Law is a profession inherently filled with conflict, but the St. Thomas lawyer will always be burdened with the realization that legal opponents are as fully human, as inherently valuable, and as worthy of respect as herself and her clients. The legal profession and the justice system also tend to be organized very hierarchically (just think about the formal indicia of respect required when addressing judges at various levels in the court system, or the nature of the relationship between junior associates and partners, or between lawyers and staff). The St. Thomas lawyer will be bound to extend the same degree of respect and honor to people at every level of the legal hierarchy, regardless of her position within that hierarchy. The St. Thomas judge or the St. Thomas senator will treat all others with respect and honor.

165. See Major Themes in Catholic Social Teaching, supra note 72; Gaudium et Spes: Pastoral Constitution on the Church in the Modern World, Second Vatican Council para. 29 (1965) [hereinafter Second Vatican Council] (“All women and men are endowed with a rational soul and are created in God’s image; they have the same nature and origin and, being redeemed by Christ, they enjoy the same divine calling and destiny; there is here a basic equality between all and it must be accorded ever greater recognition. . . . [A]ny kind of social or cultural discrimination in basic personal rights on the grounds of sex, race, color, social conditions, language or religion, must be curbed and eradicated as incompatible with God’s design.”).

166. See Organ, From Those to Whom Much Has Been Given, Much Is Expected, supra note 101, at 379 (“We should show respect for others and recognize their dignity—whatever their ‘station’ in life—recognizing that as God’s children, they deserve our respect and love.”); see also Interview with Elizabeth Brown, supra note 142; Interview with Mitch Gordon, supra note 141.

167. See Collett, supra note 157, at 1054 (“Recognizing the justice within the claims of others is one expression of our pursuit of justice while loving God and neighbor.”).
with the same basic honor and respect as the St. Thomas first-year associate.168

6. The Client in the Round

The St. Thomas attorney will not limit her understanding of her clients, or the counsel that she gives them, to only the strictly “legal” issues that the client’s situation presents.169 She will see the client as a whole person, with legal, psychological, social, medical, ethical, religious, political, and other values and goals.170 She will inquire into and seek to understand how legal problems fit into the client’s entire situation, and how possible legal remedies may affect other problems, goals and values of the client. The vision statement of the law school emphasizes the importance of “opportunities for interdisciplinary study,”171 which enable the St. Thomas lawyer to perceive both non-legal problems, and solutions that might be best provided by professionals from other disciplines.172 The St. Thomas lawyer will adopt “a fundamentally therapeutic mindset in addressing client problems and concerns through its focus on the opportunities and challenges of interprofessional collaboration.”173

The St. Thomas lawyer will also see how the client’s problems and potential solutions may affect other people and society as a whole.174

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168. Cf. id. (“We are called to build up a sense of Christian community. . . . In the practice of law our best compels us to envision what justice requires our society become, and to direct our efforts to promoting its creation. . . . It means treating people in a manner consistent with their human dignity. Thus, the person working in the firm copy room is to be treated with as much respect as the managing partner.”).

169. But see id. at 1051–52 (citations omitted) (“Instead of encountering people who have legal needs as whole persons, such lawyers reduce clients to the elements of their legal claims. . . . Similarly, the lawyer comes to understand herself only as a source of technical knowledge—a sophisticated version of the Lexis machine. . . . This understanding of self and relationships with others is radically inconsistent with the way we are called to understand the world.”).

170. Response from William J. Fleming to Survey of Members of Original Graduating Class (Aug. 19, 2005); Collett, supra note 157, at 1052 (citation omitted) (“[L]ove born of faith causes us to love God and seek justice. It calls us to relate to our clients in the fullness of their present pain or desire.”).


172. See Interprofessional Center for Counseling & Legal Services, Univ. of St. Thomas, http://www.stthomas.edu/ipc/about/missionvision/ (last visited Sept. 9, 2013). The mission of the St. Thomas Legal Services Clinic, located within the university’s Interprofessional Center for Counseling and Legal Services, is to “advance[ ] social justice through service and advocacy with underserved individuals and communities through transformative educational experiences for our students.” Id.


174. See Michelle Lore, Whatever Became of Univ. of St. Thomas Law in Minneapolis’s First Class?, Minn. Law., May 22, 2006, at 1, 16. (“Caitlin Hazard Firer, a staff attorney with Western
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She will seek to build a relationship with her clients such that she understands the client’s values and beliefs and can counsel the client about how different legal choices may affect those values, beyond the maximization of the client’s financial gain or legal advantage.175 The St. Thomas lawyer will be bound to counsel clients regarding moral and ethical consequences of client decisions and choices, which the client might not otherwise consider. The St. Thomas lawyer must undertake such counseling combined with humility and respect for client dignity and autonomy, not usurping the client’s decision-making role, but putting the client’s choices in a broader social context.176

7. Working for the Poorest and Weakest

The St. Thomas attorney will take seriously the tenets of Catholic Social Teaching that declare a preferential option must be given to the poorest and the most disadvantaged.177

As followers of Christ, we are challenged to make a fundamental ‘option for the poor’—to speak for the voiceless, to defend the defenseless, to assess life styles, policies, and social [and legal—JLW] institutions in terms of their impact on the poor. This ‘option for the poor’ does not mean pitting one group against another, but rather, strengthening the whole community by assisting those who are most vulnerable. As Christians, we are called to respond to the needs of all our brothers and sisters, but those with the greatest needs require the greatest response.178

St. Thomas lawyers should be led to “use their legal training not to get rich, but to serve God and the most needy among us.”179 “[W]e must be particularly aware of the poor and vulnerable within our com-

Minnesota Legal Services in Willmar, said that one of the law school’s strengths is its holistic approach to the law. ‘The professors encourage students to think about the repercussions of their actions in a greater sense – for the client and for the community as a whole,’ she said . . . . ‘The professors encourage you to look outside the legal system for solutions,’ he [Ryan R. Palmer] said. ‘They encourage a whole-person whole-world solution to problems.’”); Interview with Margie Axtmann, Assoc. Dir. for Info. Res., Univ. of St. Thomas Sch. of Law (July 12, 2005) (on file with author); Interview with Greg Sisk, supra note 150.

175. See Interview with Mitch Gordon, supra note 141; Interview with Greg Sisk, supra note 150.
176. See Interview with Greg Sisk, supra note 150.
177. See Major Themes from Catholic Social Teaching, supra note 72.
178. U.S. CATHOLIC BISHOPS, ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY viii (1986); see also id. at 22 (“The needs of the poor take priority over the desires of the rich; the rights of workers over the maximization of profits; the preservation of the environment over uncontrolled industrial expansion; production to meet social needs over production for military purposes.”).
179. See Schiltz, supra note 114, at 1050.
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...munities (and beyond these communities) who deserve our special attention as we share our time, talents and treasure.” 180

A greater proportion of St. Thomas attorneys will likely choose to work in traditional public interest settings, representing poor clients. However, the majority of St. Thomas attorneys may not be called to such work. The St. Thomas attorney, no matter where she practices, will work to expand the opportunities and the number of lawyers participating in service to the poor and disadvantaged.181 In addition, the St. Thomas lawyer will seek to provide service to the poorest among us across the board, not just in legal representation, but in food, housing, education, care of children, health care, employment, civil rights, and all other areas of life.182 “Community service, in our view, need not be law-related because the moral imperative to provide service to others does not derive principally from our positions as lawyers, but from our roles as members of God’s community.”183

8. Making a Better World

St. Thomas “strive[s] to enhance social justice and . . . [to] assist students in integrating their commitments to serve society into their personal and professional lives.”184 The St. Thomas lawyer will understand part of her role as a lawyer as working together with others to fight injustice wherever she encounters it, and trying to foster legal and social systems which promote justice for all.185

[I]t is imperative that no one . . . would indulge in a merely individualistic morality. The best way to fulfill one’s obligations of justice and love is to contribute to the common good according to one’s

180. Organ, From Those to Whom Much Has Been Given, Much Is Expected, supra note 101, at 379–80 (citation omitted); see also Mission & Vision, supra note 117 (“The law school, inspired by Catholic social teaching, and members of the law school community, drawing on their own faith and values, will promote and participate in service programs designed to address the needs and improve the conditions of the disadvantaged and underserved.”).

181. See Email from Haaland, supra note 149 (“[T]he St. Thomas attorney will give back to the community by either serving in a public interest legal position or doing pro-bono work advocating for the underrepresented members of the community.”); Interview with Elizabeth Brown, supra note 142; Interview with Dan Liebenson, supra note 150.

182. See Mengler, supra note 128, at 152.

183. Id.


185. See Neil Hamilton & Lisa Montpetit Brabbit, Fostering Professionalism Through Mentoring, 57 J. LEGAL EDUC. 102 (2007); Interview with Margie Axtmann, supra note 174; Interview with Nora Fitzpatrick, Assistant Dean for Admin., Univ. of St. Thomas Sch. of Law (July 15, 2005) (on file with author); Survey, supra note 149 (“St. Thomas lawyers should be . . . committed to contributing toward social justice and the social welfare of our society.”).
means and the needs of others, and also to promote and help public and private organizations devoted to bettering the conditions of life.\textsuperscript{186}

The St. Thomas lawyer will not be satisfied with simply doing good work for her clients; she will seek to identify structural problems in social systems, particularly the legal system, and to reform and correct these systems to enhance the common good. A disproportionate number of St. Thomas lawyers may therefore enter public employment, or work with private organizations devoted to societal change. Again, however, the St. Thomas lawyer will seek to serve the common good through social reform wherever she is called to work.

9. Living Passionately

The St. Thomas lawyer will not passively accept unethical cultures, unjust systems, or boring and pointless work done only for a paycheck. As Dean Thomas Mengler states, “[O]ur mission is likely to draw passionate students, activists who want to use their law degrees for extraordinary purposes.”\textsuperscript{187} The St. Thomas lawyer will resist falling into cynical or resigned acceptance of forces in the world that crush the human spirit or work against all the qualities of the St. Thomas lawyer described above.\textsuperscript{188} St. Thomas lawyers will passionately seek “[that] we might prevail over the powers of evil—over cynicism and greed and oppression and indifference, in our lives and in our laws—this year, and every year, and throughout our lives and the life of this faith-based law school.”\textsuperscript{189}

10. Life in Balance

Last, but definitely not least, the St. Thomas lawyer will seek a reasonable and humane balance in her life between professional work, family life, friends, community commitments, and reflection, relaxation and self-care. The St. Thomas lawyer will not seek balance because she is a slacker, unwilling to devote herself to hard work in her profession. She will seek balance as a part of her ethical and moral obligation.

\textsuperscript{186} Second Vatican Council, supra note 165, para. 30.
\textsuperscript{187} Mengler, supra note 128, at 146; see also Interview with Dan Liebenson, supra note 150.
\textsuperscript{188} See Schiltz, supra note 92, at 924 (“Believe in something—care about something—so that when the culture of greed presses in on you from all sides, there will be something inside of you pushing back.”).
\textsuperscript{189} Whitt, supra note 106.
Being admitted to the bar does not absolve you of your responsibilities outside of work—to your family, to your friends, to your community, and, if you’re a person of faith, to your God. To practice law ethically, you must meet those responsibilities, which means that you must live a balanced life.\footnote{190}

The kind of unbalanced life lived by so many lawyers, with overwhelming billable hour requirements, will not be an option for the St. Thomas lawyer. The St. Thomas lawyer will strive for a life structure that makes her happy, while still subject to all the frustrations, pains and tragedies of everyday life.\footnote{191}

11. Content and Process

A review of the headings under which this definition of the St. Thomas Effect is organized may give rise to the question, “Are there specific political, moral or ethical positions that will be taken by the St. Thomas lawyer?” In other words, is there specific content to the judgments of the St. Thomas lawyer, or is the Effect rather based on the process by which the St. Thomas lawyer reaches her judgments? I would argue that the answer is “both,” although there will be far more focus on process than on a detailed definition of content. St. Thomas is not seeking to produce lawyers who march in political lockstep, agreeing on all ethical and moral positions. St. Thomas is seeking to produce lawyers who go about the process of making moral and ethical judgments by integrating a particular understanding of the attorney’s role and identity. However, among the above-listed elements that comprise the St. Thomas Effect, there are some that definitely exclude certain moral positions from the range of the St. Thomas lawyer. For instance, a respect for the dignity of all human beings would preclude moral or political positions that fail to take seriously human death, suffering, discrimination, and exploitation. A preferential option for the poor and underprivileged prohibits a strict laissez faire attitude toward the sufferings of those at the bottom of the socio-economic spectrum. St. Thomas lawyers will apply these principles in a variety of ways and come to a variety of conclusions. Still, these prin-
C. Measuring Success or Failure

After developing a detailed description of the kind of lawyer St. Thomas is trying to produce, those who work in and for the School must examine and evaluate whether it is fulfilling its asserted educational mission. If we justified the creation of St. Thomas by the claim that it would graduate a particular kind of lawyer, then we are obligated to examine our own product, to see if we are producing what was promised. If St. Thomas graduates are indistinguishable from their peers in the profession, then St. Thomas is failing to achieve the promised professional education. As the first associate dean stated:

First, Catholic law schools should do something different from non-Catholic law schools; otherwise they wouldn’t be Catholic. And second, whatever it is that Catholic law schools do differently should have some impact on their students; otherwise, it would hardly be worth doing. Thus, one test of whether a law school is Catholic is whether its graduates behave differently—make different choices—than the graduates of non-Catholic schools.

Significant challenges face the researcher who wishes to assess the effects of mission-based legal education on lawyers. Some researchers have used quantitative means to assess clearly definable aspects of such complex traits as social justice or service orientation, life satisfaction, or value congruence in the lives of practicing attorneys.

192. See, e.g., Collett, supra note 36, at 117 ("All of this illustrates the need for lawyers, law students, and law professors to be devoted to the search for truth. For this to occur, law schools . . . must begin with a common understanding that 1) objective truth exists, 2) some aspects of it are capable of being described accurately, and 3) those descriptions are relevant to our endeavors as scholars and as lawyers."); Robert K. Vischer, Faith, Pluralism, and the Practice of Law, 43 CATH. L AW. 17, 22–23 (2004) (quoting Congregation for the Doctrine of the Faith, Doctrinal Note on Some Questions Regarding the Participation of Catholics in Political Life (2002), available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20021124_politica_en.html) ("There is no pluralism ‘in the choice of moral principles or essential values,’ but there is a ‘legitimate plurality of temporal options’ given the ‘variety of strategies available for accomplishing or guaranteeing the same fundamental value, the possibility of different interpretations of the basic principles of political theory, and the technical complexity of many political problems.’").

193. Schiltz, supra note 114, at 1043.

Qualitative methods offer another useful means to gather information about professional identity and legal career choices in a contextual, factually rich way, incorporating the viewpoint of the researcher without compromising the usefulness of the data. St. Thomas faculty and administrators continue to use a variety of methods and approaches to assess the effects of the mission-oriented choices St. Thomas has made in hiring and admissions, opportunities for prayer, worship, and reflection, community building, curriculum, public service, honors, and scholarship.195

Research has been conducted and is ongoing by St. Thomas faculty and administration into topics related to the success of St. Thomas’s mission, including the concepts that entering law students bring to law school about the nature of lawyers’ professionalism and ethics,196 the moral development of students while they are in law school and afterwards,197 the relationship of high professional standards to effective law practice,198 the effect of the structure of scholarship grants on the culture of the law school,199 the effects of faith processes and moral decision making of lawyers is difficult. The introspective analysis of one’s motivations and influences is not easy to stimulate or capture using an Internet-based survey instrument with hypothetical scenarios and Likert scales.”); Deborah A. Schmedemann, Poverty Law: Pro Bono Publico as a Conscience Good, 35 WM. MITCHELL L. REV. 977 (2009).

195. “[W]e hope to document the extent to which our distinctive formation approach to legal education has a demonstrable impact on the moral development of our graduates. The Holloran Center hopes to work with scholars in other professions to develop instruments and tests that can measure moral development in professional students, specifically law students, so that we can determine generally whether our educational program favorably impacts the moral development of our graduates. We also hope to pursue research that isolates the potential impacts of different components of the formation approach to legal education to assess their distinctive effectiveness. This research may also include a longitudinal component that tracks the career progress and satisfaction of our graduates.” University of St. Thomas School of Law Draft 2010 AALS Self-Study at 94 (2010).


integration on law students, the relationship between law students’ spirituality and academic performance, the effects of mentoring on the development of professional identity, the value of storytelling in teaching ethics, and the specifics of the kind of lawyer that St. Thomas aims to produce.

1. Report on Survey Research Conducted by the Author in 2009-10

During the academic year 2009-10, I conducted research to begin to measure the degree to which St. Thomas’s first five graduating classes incorporate the values that St. Thomas has tried to instill, and whether these graduates resemble the description of the St. Thomas lawyer. In the first phase of this research, I surveyed recent law graduates. The survey was conducted via a convenience sample, not necessarily representing a random sample of the total. An email with a link to the survey was sent to the St. Thomas alumni from the classes of 2004-08, a group of 601 people. In order to obtain a comparison group of graduates of other law schools, I sent a similar email to the members of the New Lawyers Section of the Minnesota State Bar Association. The New Lawyers Section “is comprised of attorneys who were admitted to practice within the past six years or who are less than 36 years of age. The Section’s efforts focus on professional development, community outreach and networking.” At the time of the survey, the New Lawyers Section had approximately 3,500 members. There was a much higher response rate for St. Thomas graduates (21.6%) than for New Lawyers Section members (1.2%). Some

202. See Hamilton & Brabbit, supra note 194 at 105.
204. See Jennifer L. Wright, The St. Thomas Effect 1–2 (unpublished research paper) (on file with the University of St. Thomas School of Law electronic library system).
205. See infra Appendix 1.
206. Email from Jill Akervik, Registrar, Univ. of St. Thomas Sch. of Law (July 13, 2012) (on file with author).
207. New Lawyers Section, MINN. ST. B. ASS’N, http://www2.mnbar.org/sections/new-lawyers/index.asp (last visited Sept. 9, 2013) (explaining that Minnesota does not have an integrated bar and that membership in the MSBA is voluntary, as is membership in any of its sections).
208. Telephone Interview with the Minnesota State Bar Association (July 12, 2012). Some of these members would also be St. Thomas graduates. However, the survey questions identified St. Thomas graduates regardless of how they accessed the survey.
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respondents did not indicate their law school. However, the survey was distributed first to St. Thomas graduates and a few days later to the members of the New Lawyers Section. I could be sure that all responses prior to the date that the survey was distributed to the New Lawyers Section were from St. Thomas graduates. After that date, I could not include responses that did not indicate the school the respondent graduated from.

The survey generated both quantitative and qualitative data. Quantitative analysis of the data provided some interesting preliminary information. The preliminary data indicated that St. Thomas graduates are more likely to be actively religious, to volunteer in both legal and non-legal capacities, and to be happier with their lives than their peers from other law schools. These findings relate to the qualities of a St. Thomas lawyer referenced in sections VII B.3 (“Drawing on the Springs of Living Water”); 7 (“Working for the Poorest and Weakest”); 8 (“Making a Better World”); and 10 (“Life in Balance”); above. These data support the hypothesis that St. Thomas is achieving its goal of nurturing a different kind of lawyer in at least some of the desired ways.

There were 202 responses, of which 172 (85%) were complete. The way the survey was done led to oversampling of St. Thomas graduates. Of the 172 valid responses, 130 (76%) were from St. Thomas graduates. The low response rate from non-St. Thomas graduates hindered the ability to obtain statistically significant results.

The average respondent in the sample was 30.81 years old at the time s/he filled out the survey, had been practicing for 3.23 years and had held 1.58 jobs in that time. There were no statistically significant differences between St. Thomas graduates and non-St. Thomas graduates with regards to age, years of practice, or number of jobs per year of practice. There were no significant differences between the two populations in the proportion of graduates whose first job was in a legal capacity, paid, or full-time.

The findings that achieved statistical significance all tended to support the existence of the St. Thomas Effect. These findings related to respondents’ participation in a religious community, volunteerism, and life satisfaction. Half of the St. Thomas respondents reported participating in a religious community on a regular basis, compared to 37% of the non-St. Thomas respondents. Volunteerism was measured in three questions: whether respondents volunteered regularly for any organization; how many hours of pro bono legal work respondents
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had done in the last year; and how many hours of non-legal volunteer work respondents had done in the last year. There were no significant differences between the two populations in the proportion of respondents who volunteered for a particular organization on a regular basis, and the proportion in the two populations of people who performed more than twenty hours of pro bono legal work during the previous year was not significantly different. However, St. Thomas graduates were significantly more likely to have volunteered more than twenty hours in any kind of work during the previous year. Forty-three percent of the St. Thomas graduates reported volunteering more than twenty hours in the previous year compared to 26% of non-St. Thomas respondents. This difference was found to be statistically significant at the 0.051 level.

Survey takers were asked to rate their life satisfaction on a five-point scale (very dissatisfied, not satisfied, neutral, satisfied, and very satisfied). St. Thomas respondents were more likely to report that they were very satisfied, with almost a third of them indicating this response compared to less than 10% for non-St. Thomas respondents. This difference was found to be significant at the 0.005 level.

Survey data indicate that St. Thomas graduates are significantly more likely to participate in a religious community, to volunteer more than 20 hours per year, and to have a high degree of life satisfaction than their peers from other law schools.
Some interesting patterns emerge in examining correlations in these data. These findings indicate a connection between some of the desired aspects of the St. Thomas Effect and overall life satisfaction. Survey results reveal that regular participation in a religious community was associated with life satisfaction. For the entire sample, 85% of those who reported regular religious participation stated that their level of life satisfaction was better-than-neutral. About a third of them reported that they were very satisfied with their lives. Similarly, regularly participating in volunteer activities was found to be associated with a better-than-neutral level of life satisfaction. Three quarters of those who volunteer regularly reported being satisfied or very satisfied with their lives as opposed to 59% of those who did not volunteer. This difference was found to be statistically significant at the 0.05 level. Volunteering more than 20 hours during the previous year was also associated with life satisfaction. Of those who volunteered at that level, 80% reported better-than-neutral life satisfaction compared to 62% for those who volunteered fewer hours. This difference was found to be statistically significant at the 0.01 level. Furthermore, close to one third of the respondents who volunteered more than twenty hours in the previous year reported that they were very satisfied with their lives compared to only 18% of those who volunteered fewer hours. This difference was found to be statistically significant at the 0.05 level. Similarly, people who did more than twenty hours of pro bono legal work in the previous year were more likely to report better-than-neutral life satisfaction. Close to 80% of those who did more than twenty hours of pro bono legal work reported being satisfied or very satisfied with their lives compared to only 12% of those who worked fewer hours. This difference was found to be statistically significant at the 0.01 level.

In addition to the limited quantitative analysis that was possible based on the survey responses, I conducted a qualitative analysis of the essay responses to the sole essay question on the survey, “Describe briefly your most important goals in life.” There were 163 responses to this question, of which 118 could be identified as coming from St. Thomas graduates and 38 from non-St. Thomas graduates. These responses were first taken all together and coded for common themes and sub-themes. The most common theme in the responses revolved around family (n=159), followed by moral/spiritual qualities (n=133), happiness/enjoyment (n=65), financial security (n=45), professional success (n=43), friends/relationships other than family...
(n=30), balance (n=25), intellectual/personal growth (n=15), and health (n=12). Three respondents indicated that they had no goals.

Responses frequently overlapped two or more themes, and in those cases, responses were coded under each theme. The two most common themes were broken down into sub-themes. The theme of family was broken down into raising children (n= 38), providing financial support to the family (n=22), relationship with spouse (n= 19), time balance in the family (n=19), good relationships in general in the family (n=17), starting or expanding a family (n=15), and happiness within the family (n=12). The theme of moral/spiritual qualities was broken down into sub-themes of service (n=82), personal moral or spiritual qualities (n=31), and qualities explicitly related to God or faith (n=20).

The coded responses from known St. Thomas graduates followed a similar pattern of prevalence of general themes (not surprisingly, since St. Thomas graduates contributed 75.6% of the total identified responses), with family leading the way (n=124), followed by moral/spiritual qualities (n=109), happiness/enjoyment (n=49), financial security (n=34), professional success (n=29), friends/relationships other than family (n=23), balance (n=18), intellectual/personal growth (n=8), and health (n=9). One respondent indicated that s/he had no goals. The St. Thomas graduates’ responses fell into the family sub-themes of raising children (n=26), providing financial support to the family (n=17), relationship with spouse (n=14), time balance in the family (n=13), good relationships in general in the family (n=13), starting or expanding a family (n=10), happiness within the family (n=7), the moral/spiritual qualities subthemes of service (n=65), personal moral or spiritual qualities (n=26), and qualities explicitly related to God or faith (n=18).

Of these themes, the category of moral/spiritual qualities with its subthemes is most clearly associated with the desired qualities of a St. Thomas lawyer referenced in sections VII B.2 (“Integration, Integrity and Independence”); 3 (“Drawing on the Springs of Living Water”); 4 (“The Servant Leader and the Listening Ear”); 7 (“Working for the Poorest and Weakest”); and 8 (“Making a Better World”); above. The category of balance (n=18) is also clearly related to section VII B.10 (“Life in Balance”), although this category was not as salient overall in the responses, and occurred with similar frequency among the responses of non-St. Thomas graduates (5.6% of coded responses) as those of St. Thomas graduates (4.5% of coded responses).
Comparing the responses from known St. Thomas graduates from known non-St. Thomas graduates, the most significant quantitative difference between the two groups is the greater prevalence of responses coded for moral/spiritual qualities among the St. Thomas group—27% of all items coded for St. Thomas lawyers, as opposed to 16% of the codings for the non-St. Thomas lawyers. Sample responses of St. Thomas graduates’ description of their goals of moral/spiritual development include:\textsuperscript{209}

To strive to bring every area of my life into conformity with my beliefs and to work for the recognition of true justice (‘justice’ being an understanding and appreciation of objective, moral realism in both a legal and non-legal capacity).\textsuperscript{210}

My most important goal in life is to live a life consistent with my Christian values. A life in which I strive to emulate the example of Jesus Christ.\textsuperscript{211}

I want to help people in some way, and make the world a better place.\textsuperscript{212}

\textbf{St. Thomas Effect}

Coded responses indicate differences in the frequency with which St. Thomas graduates mention particular values related to important life goals, in comparison with graduates of other law schools.

\textsuperscript{209} See infra Appendix 2.
\textsuperscript{210} Id. (Respondent 11438824, coded as Moral/Spiritual Qualities–Personal).
\textsuperscript{211} Id. (Respondent 11439740, coded as Moral/Spiritual Qualities–God/Faith).
\textsuperscript{212} Id. (Respondent 11438719, coded as Moral/Spiritual Qualities–Service).
Looking at the coded responses, it is clear that St. Thomas graduates share many of the same life and career goals as non-St. Thomas graduates. The data support the hypothesis that St. Thomas graduates are more oriented toward moral and spiritual goals than their peers who attended other law schools.

2. Other Sources of Data Relevant to the St. Thomas Effect

There are data gathered by external entities that also help shed light on the degree to which St. Thomas is accomplishing its mission. The Law School Survey of Student Engagement (LSSSE) is an ongoing effort by the Association of American Law Schools and the Carnegie Foundation to assess law students’ involvement in their education and their opinions about what they have learned. St. Thomas participated in the 2006, 2008, 2010, and 2012 editions of the survey, with a high rate of student participation. The LSSE data allow St. Thomas to compare its students’ responses with those of law students nationwide and with a specific peer group of religious law schools. In an examination of the 2006 and 2008 results, St. Thomas students reported that their law school experience contributed more to their personal development in the areas that are central to the St. Thomas Effect than did respondents nationally or at peer schools. These areas included: (1) a deepened sense of spirituality; (2) a personal code of values and ethics; (3) a commitment to making contributions to the welfare of their communities; and (4) self-understanding. In the 2006 survey, St. Thomas students’ responses were statistically significantly different from those of peers in that they reported that St. Thomas had a greater emphasis on ethics in law practice and on the spiritual and moral development of law students, a greater commitment to pro bono service, and a stronger and more supportive law school community.

The 2010 and 2012 surveys continued to demonstrate significant differences between St. Thomas and its peer law schools.
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Thomas students were more likely to have had serious conversations with students who are very different in terms of their religious beliefs, political views, or personal values (2010 average effect size = .31).218 The law school encouraged greater contact among law students from different economic, social, sexual orientation, racial, and/or ethnic backgrounds (2010 average effect size = .39).219 Diverse perspectives were more likely to be included in class discussions or writing assignments (2010 average effect size = .47).220 St. Thomas students were more likely to report that their law school experience increased their self-understanding (2010 average effect size = .29)221 and helped them to develop a person code of ethics and values (2010 average effect size = .60)222 than law students at peer schools. St. Thomas was more likely to encourage its students to contribute to the welfare of their communities (2010 average effect size = .56)223 and to encourage the ethical practice of law (2010 average effect size = .74).224 St. Thomas students reported more often that their law school experience helped them to develop a deepened sense of spirituality (2010 average effect size = .92).225

The Princeton Review conducts an annual quality of life survey that ranks law schools “based on student assessment of: whether there is a strong sense of community at the school, how aesthetically pleasing the law school is, the location of the law school, the quality of the social life, classroom facilities, and the library staff.”226 In terms of building a caring and mutually supportive community, St. Thomas has been ranked by the Princeton Review first or second of all law schools in the United States in terms of quality of life for law students five times in its relatively short existence.227

lege of Law, University of Wisconsin Law School, Valparaiso University Law School. The peer schools were chosen by St. Thomas deans based on comparable size, geographic location, and full–time and non–religious status. LSSSE also provides comparisons with all private religious law schools and with all schools under 500 total students.

218. PowerPoint on LSSSE results for 2006-12 (on file with author).
219. Id.
220. Id.
221. Id.
222. Id.
223. Id.
224. Id.
225. Id.
Another indication of St. Thomas’s success in creating the St. Thomas Effect can be drawn from data regarding where St. Thomas students choose to work. The general data that are available indicate that St. Thomas graduates have entered public interest work after law school at a rate exceeding the national average. The first three graduating classes entered public interest work at a much higher rate, between 12% and 15% of the graduates, as compared to national rates of around 5%.\textsuperscript{228} The percentage of St. Thomas graduates going into public interest jobs has declined somewhat in later classes, ranging around 6% to 9% from the class of 2007 to 2011, still exceeding the national average.\textsuperscript{229} In March 2008, the National Jurist, which bills itself as “the magazine for law students,” rated St. Thomas seventh in the nation in a ranking of “where public interest lawyers go to law school.”\textsuperscript{230}

One question not directly addressed by any of the research currently available is whether students who choose to attend St. Thomas are different from the general population of law students. It is possible that some or all of the St. Thomas Effect is the result of student selection rather than law school experience. This is an important question for future research and another article, either by me or by one of my St. Thomas colleagues. We do have some preliminary indications that St. Thomas is doing something different from other law schools in ways that are consistent with its mission. The LSSSE results indicate that St. Thomas law students experience law school significantly differently than law students at peer schools. Law school, as experienced by students at schools around the country and over many years, has been shown to have effects that tend to discourage, in many ways, the formation of the kind of lawyer that St. Thomas seeks to nurture.\textsuperscript{231} I believe that St. Thomas could still justify its existence if it


\textsuperscript{229} See id.

\textsuperscript{230} See Where Public Interest Lawyers Go to Law School, 17 NAT’L JURIST, no. 6, Mar. 2008.

\textsuperscript{231} See Sheldon & Krieger, supra note 11, at 262 (“Potential negative aspects of legal education include excessive workloads, stress, and competition for academic superiority; instructional emphasis on comparative grading, status-seeking placement practices, and other hierarchical markers of worth; lack of clear and timely feedback; excessive faculty emphasis on analysis and linear thinking, causing loss of connection with feelings, personal morals, values, and sense of self; teaching practices that are isolating or intimidating, and content that is excessively abstract or unrelated to the actual practice of law; and conceptions of law that suppress moral reasoning and creativity.”) (citations omitted).
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only provides a uniquely supportive and welcoming home for students already aiming to become this new kind of lawyer. The data reported here indicates that it is likely that St. Thomas has not only provided such a supportive environment, but has also influenced its graduates to some extent in the desired directions.

CONCLUSION

I believe that St. Thomas’s success or failure is of vital interest to democratic society. I believe that the St. Thomas project is one example of a desperately needed change in attitude toward the education of lawyers and, indeed, of professionals in general. Law schools must turn their attention to studying and thinking intentionally about the characteristics, values, and professional identity of the lawyers that they produce.

I do not argue that every law school should become a religious law school. Many of the strengths of faith-based legal education described in this Article would not apply to many law students. For a devout atheist, a faith-based legal education would likely pose a serious barrier to the inculcation of moral values. We need a wide variety of moral perspectives in legal education to match the wide variety of law students. However, if law schools choose not to play any intentional role in the shaping of the professional identity of new lawyers and the moral values that they will practice by, the ongoing stability of democratic societies will continue to be threatened. By evading their responsibility to shape the professional identity of new lawyers, law schools fail in one of their most important tasks. Lawyers all have value systems and criteria for making decisions and choosing actions in the practice of law. If law schools offer nothing to shape them, those systems and decision-making criteria will then be shaped by the prevailing social themes of extreme individualism, market-based self-interest, and value relativism. These values will be the death of professionalism and the common good. If law is to survive as a profession, and if democratic societies are to thrive based on a functional system of justice, then serious scholarly and practical attention must be paid to how lawyers’ values and professional identities are shaped. It is vital to all of us that we learn whether a law school can succeed in creating a certain kind of lawyer and that we pay great attention to exactly what kind of lawyers our law schools are, and should be, turning out.
Law School Education and Professional Identity Formation

I am conducting a study about how law school graduates perceive their own professional identity, and how that professional identity affects their work as lawyers. I invite you to participate in this research. You were selected as a possible participant because you were admitted to the Minnesota bar between 2004 and 2009. Please read this statement and ask any questions you may have before agreeing to be in the study.

This study is being conducted by Jennifer L. Wright, professor of law at the University of St. Thomas School of Law.

Background Information:

The purpose of this study is to examine whether and how the University of St. Thomas School of Law graduates differ from their graduation cohort from other law schools in their: 1) understanding of their professional identity; 2) choice of work; 3) conduct of their legal career; 4) integration of faith into their professional work; and 5) balance of life and work. I will compare my results to the goals of UST Law, as outlined in my earlier article, “The St. Thomas Effect”. This research will help UST Law measure its achievement of its goals and may suggest directions for change to better achieve those goals. It will also provide more general information about how professional identity is understood by attorneys and how professional identity affects attorneys’ legal careers.

Procedures:
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If you agree to be in this study, I will ask you to complete the survey by clicking on the button below. I estimate that the survey will take approximately 10 minutes to complete. Your consent to participate in this study is implied when you complete and return this survey.

Risks and Benefits of Being in the Study:

The study has no risks to you. You will not be identified in the survey. The survey results will be anonymous.

You will receive no direct benefits for participating, aside from the satisfaction of contributing to knowledge on this topic. The report of this study will be made available to all interested participants.

Confidentiality:

The records of this study will be kept confidential. Survey data will be kept in electronic files stored online and on my office computer, both of which are password-secured. Only I and my research team will have access to these data. These data will be kept indefinitely. In any sort of report I publish, I will not include information that will make it possible to identify you in any way. Indeed, I will not request any information that could directly identify you in the survey.

Voluntary Nature of the Study:

Your participation in this study is entirely voluntary. Your decision whether or not to participate will not affect your current or future relations with Professor Jennifer Wright or with the University of St. Thomas. If you decide to participate, you are free to withdraw at any time up to and until you submit your completed survey online. Once you have submitted your completed survey, you will not be able to withdraw that information. You are free to skip any questions I may ask. If questions are skipped, the survey may be discarded and not included in the study.

Contacts and Questions

My name is Jennifer Wright. You may contact me at 651-962-4952. You may also contact the University of St. Thomas Institutional Review Board at 651-
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962-5341 with any questions or concerns.

You may print out a copy of this information if you wish to keep copy for your records.

Statement of Consent:

I understand that my consent to participate in this study is implied when I complete and return this survey.

Thank you very much for your time and support. Please start with the survey now by clicking on the Continue button below.

Would you be interested in participating in an interview or focus group discussion about some of the issues raised in this survey? If so, please send an email to Professor Jennifer Wright, jlwright1@stthomas.edu, with the subject line “interview”, telling me how best to contact you. Your decision whether or not to participate further in this study will have no affect on your relationship with the University of St. Thomas School of Law or with Professor Jennifer Wright. Thank you for your participation.

2. What law school did you attend?
   - University of St. Thomas
   - Other Minnesota law school
   - Other non-Minnesota law school

3. What year did you graduate? (please type full year 1995, 2005, etc.)

4. What is your age?
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5. Have you worked since graduating from law school? If not skip to question 27.
   - Yes
   - No

6. Where have you worked since graduation from law school? First job - type of employer
   - private law firm (>100 attorneys)
   - private law firm (51-100 attorneys)
   - private law firm (31-50 attorneys)
   - private law firm (11-30 attorneys)
   - private law firm (2-10 attorneys)
   - solo practice
   - government
   - private business
   - non-profit
   - educational institution
   - religious institution

7. First job - substantive area of work (for example, trusts and estates, business litigation, immigration law, elementary school teaching, retail sales, etc.):
8. First job:

- Legal
- Non-legal

9. First job:

- Full time
- Part time

10. First job:

- Paid
- Volunteer

11. Second job - type of employer (if none, skip to question 27)

- private law firm (>100 attorneys)
- private law firm (51-100 attorneys)
- private law firm (31-50 attorneys)
- private law firm (11-30 attorneys)
- private law firm (2-10 attorneys)
- solo practice
- government
- private business
- non-profit
- educational institution
- religious institution
12. Second job - substantive area of work:

13. Second job:
   - Legal
   - Non-legal

14. Second job:
   - Full time
   - Part time

15. Second job:
   - Paid
   - Volunteer

16. Third job - type of employer (if none, skip to question 27)
   - private law firm (>100 attorneys)
   - private law firm (51-100 attorneys)
   - private law firm (31-50 attorneys)
   - private law firm (11-30 attorneys)
   - private law firm (2-10 attorneys)
   - solo practice
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- government
- private business
- non-profit
- educational institution
- religious institution

17. Third job - substantive area of work:

18. Third job:
   - Legal
   - Non-legal

19. Third job:
   - Full time
   - Part time

20. Third job:
   - Paid
   - Volunteer

21. Fourth job - type of employer (if none, skip to question 27)
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- private law firm (>100 attorneys)
- private law firm (51-100 attorneys)
- private law firm (31-50 attorneys)
- private law firm (11-30 attorneys)
- private law firm (2-10 attorneys)
- solo practice
- government
- private business
- non-profit
- educational institution
- religious institution

22. Fourth job - substantive area of work:

23. Fourth job:
- Legal
- Non-legal

24. Fourth job:
- Full time
- Part time

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25. 
**Fourth job:**
- [ ] Paid
- [ ] Volunteer

26. Any additional jobs, please describe and provide the same information as above.

27. **How many hours of pro bono legal work did you do in the last year?**
- [ ] 0 to 10 hours
- [ ] 11 to 20 hours
- [ ] 21 to 50 hours
- [ ] 51 to 100 hours
- [ ] over 100 hours

28. **How many hours of non-legal volunteer work did you do in the last year?**
- [ ] 0 to 10 hours
- [ ] 11 to 20 hours
- [ ] 21 to 50 hours
- [ ] 51 to 100 hours
- [ ] over 100 hours

29. Do you participate regularly in a specific religious community?
30. Do you volunteer on a regular basis with a particular legal organization, religious group, community group, public service organization or political organization?

- Yes
- No

31. How many hours do you generally work at paid employment each week?

- 0 to 20 hours
- 21 to 40 hours
- 41 to 50 hours
- 51 to 60 hours
- 61 to 70 hours
- more than 70 hours

32. Describe briefly your most important goals in life.

33. Based on the goals listed above, do you feel a sense of satisfaction with your life and work?

- Very Dissatisfied
- Not Satisfied
- Neutral
Would you be interested in participating in an interview or focus group discussion about some of the issues raised in this survey? If so, please send an email to Professor Jennifer Wright, jlwright1@stthomas.edu, with the subject line “interview”, telling me how best to contact you. Your decision whether or not to participate further in this study will have no affect on your relationship with the University of St. Thomas School of Law or with Professor Jennifer Wright. Thank you for your participation.
Kids, Cops, and Sex Offenders: Pushing the Limits of the Interest-Convergence Thesis

DAVID A. SINGLETON*

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INTRODUCTION

Derrick Bell’s interest-convergence thesis has profoundly influenced me—both as a scholar\(^1\) and a practitioner. According to Professor Bell, “[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”\(^2\) For example, Professor Bell has argued that *Brown v. Board of Education*,\(^3\) which declared state laws establishing separate public schools for black and white students unconstitutional,\(^4\) “cannot be understood without some consideration of the decision’s value to whites . . . in policymaking positions able to see the economic and political advances at home and abroad” from desegregation.\(^5\) Improving America’s credibility during the Cold War, Bell argues, was one of the benefits to whites of desegregating schools.\(^6\)

Building upon Professor Bell’s theory, scholars have extended the interest-convergence thesis beyond racial justice issues, using it to explain judicial decisions in cases involving First Amendment religious rights,\(^7\) employment discrimination,\(^8\) and criminal law,\(^9\) among other areas.

As part of my work with the Ohio Justice & Policy Center (“OJPC”), I represent prisoners and formerly incarcerated individuals. OJPC’s client roster includes some of the most despised people in my community: sex offenders.\(^10\) Though most OJPC cases do not explicitly raise issues of race, they invariably involve clients who lack political power vis-à-vis more influential criminal justice stakeholders,

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4. Id. at 495.
5. Bell, supra note 2, at 524.
6. Id.
10. “Sex offenders” is a term I use with a great deal of reluctance. We use these sorts of labels to distance ourselves from people we deem unworthy of full membership in our community. Despite my objections to the term, I will use it for convenience’s sake to refer to individuals who have been convicted of sexual offenses. “Sex offenders” is a label I am loath to use.
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such as victim advocacy organizations and law enforcement groups. As advocates, we use Professor Bell’s interest-convergence thesis not only to understand, in a macro sense, why courts decide cases the way they do, but also as an advocacy tool in individual cases. We do so by framing arguments to persuade those in power that reforms that benefit our clients also serve the interests of society as a whole.

The first time we incorporated Bell’s interest-convergence thesis into our advocacy was in 2005, shortly after we lost a case challenging Ohio’s sex offender residency statute. At the time, the statute barred sex offenders from living within 1,000 feet of schools.

During the first round of litigation, we framed the case in constitutional and human rights terms, emphasizing the burden the statute imposed on our clients. We lost—both in the courts of law and public opinion. In hindsight, our defeat was not surprising because few people find sex offenders sympathetic.

But after our initial loss, we re-framed our message along public safety grounds, using child protection, law enforcement and treatment organizations to educate the courts and the media why residency restrictions are bad policy. In short, we argued that such laws are ineffective and potentially (and counterintuitively) harmful to children. After our change in strategy, we not only transformed the media narrative, but also won two important lawsuits barring retroactive application of the residency restriction on state and federal constitutional grounds. I have long credited these victories to our use of interest-convergence strategies.

Accordingly, I read with great interest two recent articles about Bell’s interest-convergence thesis—the first attacking it; the second defending it. In Rethinking the Interest-Convergence Thesis, Justin Driver acknowledges that the thesis is “a valuable corrective to the

11. Kathy Wilson, David Singleton and the Ohio Justice and Policy Center Advocate Justice for All and Just Us For All, CITY BEAT (March 15, 2005), http://www.citybeat.com/cincinnati/article-860-cover_story_david_singleton_and_the_ohio_justice_and_policy_center_advocate_jus-
tice_for_all.html.


13. Jill S. Levenson, Yolanda N. Brannon, Timothy Fortney & Juanita Baker, Public Perceptions About Sex Offenders and Community Protection Policies, ANALYSES SOC. ISSUES & PUB. POL’Y, 2007, at 137, 138 (“Sex offenders and sex crimes incite a great deal of fear among the general public and as a result, lawmakers have passed a variety of social policies designed to protect community members from sexual victimization.”).

narrative of unambiguous triumph that plagues a disconcertingly large portion of scholarship regarding racial considerations in constitutional law,” but criticizes the theory on a number of grounds, including that the “theory cannot be refuted—and thus, cannot be examined for its validity.”15 Professor Driver also notes that “human beings—complex creatures that they are—sometimes have multiple motivations for reaching their decisions.”16 Thus, people may act not in their narrow self-interest but may instead be motivated by “honor, altruism, justice and morality.”17 According to Driver, the theory “principally contemplates what will be, rather than what has been.”18

In Do the Right Thing: Understanding the Interest-Convergence Thesis,19 Professor Stephen Feldman defends Professor Bell’s thesis in response to Driver’s critique. Among other points, Feldman argues that Driver fundamentally “misconstrues the thesis as future-oriented” rather than “chiefly concerned with historical developments” as Bell intended it to be used.20 Countering Driver’s assertion that the interest-convergence thesis cannot be refuted or falsified, Feldman contends that “interest convergence is historical, and like most historical research it is empirical in the qualitative sense.”21

Reading both Driver’s and Feldman’s papers forced me to re-evaluate my understanding of what the interest-convergence theory is and the role, if any, it has played in OJPC’s advocacy on behalf of sex offenders. Feldman’s essay made me wonder whether our advocacy on behalf of sex offenders, particularly our alignment with child protection interests, is appropriately characterized as an “interest-convergence” strategy, if the thesis is “historically descriptive rather than a recommendation for future-oriented strategies.”22 In other words, do we misconstrue Bell’s theory by using it as an advocacy tool?

15. Id. Driver identifies three additional analytical flaws: (1) the thesis’s “overly broad conceptualization of ‘black interests’ and ‘white interests’”; (2) the theory’s suggestion that race relations are “notable more for continuity than for change”; and (3) “the interest convergence theory accords insufficient agency to two groups of actors—black citizens and white judges—who have played, and continue to play, significant roles in shaping racial realities.” Id. at 156–57.
16. Id. at 169.
17. Id.
18. Id. at 161.
20. Id.
21. Id. at 257.
22. Id. at 253.
Driver’s article also left me questioning whether our advocacy approach—regardless of whether one calls it an “interest-convergence” strategy or something else—actually explains why we won. What if I am unable to prove that our strategy worked? Does that mean that Bell’s thesis is not useful as an advocacy tool? Should I not teach my students the practical skills they need to apply Bell’s thesis in social justice advocacy?

This Article grows out of my attempt to answer these questions. Part I presents a case study of OJPC’s three-year effort to halt enforcement of Ohio’s sex offender residency restriction. I have subdivided the case study into three subparts, which together narrate the evolution of our advocacy from a losing effort to a winning cause.

Subpart A discusses our first residency restriction case, Coston v. Petro, which ended in defeat—not only in the court but also in the media. I theorize in this subpart that we lost because we framed the case as a clash between the rights of sex offenders to remain in their homes and society’s need to keep children safe.

Subpart B discusses how OJPC, after losing Coston, partnered with the Association for the Treatment of Sexual Abusers (“ATSA”) in writing an amicus brief in support of the certiorari petition in Doe v. Miller, the Eighth Circuit opinion upholding the constitutionality of Iowa’s residency restriction. The Brandeis Brief we filed presented social science research establishing that residency restrictions were both ineffective and potentially counterproductive to the goal of protecting children from sexual abuse. Though the Supreme Court did not grant certiorari, writing the brief introduced us to the public safety frame—a potentially helpful lens through which the courts, the media, and the public could determine whether residency restrictions served their collective interests.

23. Doe v. Petro, No. 1:05-cv-00125, 2005 WL 1038846, at *5 (S.D. Ohio May 3, 2005). On March 4, 2005, Plaintiff Doe filed an amended complaint. He then filed a second amended complaint on May 6, 2005, using his real name and adding five additional class representatives. The second amended class action complaint was captioned Coston v. Petro et al. and retained the same case number listed above. The case will be referred to hereinafter as Coston v. Petro or simply Coston.

24. 405 F.3d 700, 705 (8th Cir. 2005).


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Subpart C describes how we incorporated the public safety frame into our media advocacy and how doing so transformed our local paper’s coverage of sex offender residency restrictions.

Subpart D chronicles our post-Coston residency restriction litigation. I discuss two cases, Mikaloff v. Walsh and Hyle v. Porter, both of which held that Ohio’s sex offender residency restriction could not be applied retroactively. With respect to each case, I explain how we incorporated interest-convergence theory into our litigation strategy by using a public safety frame.

Part II explores the questions Driver’s and Feldman’s articles made me ponder. First, I attempt to reconcile Feldman’s characterization of the interest-convergence thesis as “historically descriptive rather than a recommendation for future-oriented strategies” with OJPC’s use of the theory as a forward-looking advocacy tool. After briefly noting the work of other scholars who advocate using Bell’s thesis to make social change, I conclude that there is no tension between using the thesis to explain history and employing it to make change. I also theorize that most successful advocacy on behalf of marginalized people involves converging the interests of those who lack power with those who have it.

Second, I analyze whether our use of interest-convergence strategies in Mikaloff and Porter is the reason we won those cases. Although I cannot prove that causal link, I conclude that our strategy was nonetheless beneficial because it likely increased our chances to prevail.

Before concluding Part II, I address a third question: Is there a downside to using interest-convergence strategies (i.e., aligning the interests of the powerless with the interests of the powerful) when advocating on behalf of marginalized groups like sex offenders? This question occurred to me after re-reading a passage of Professor Michelle Alexander’s The New Jim Crow, in which she argues for building a movement to dismantle the system of mass incarceration rather than fighting for more narrow piecemeal reform. Although using dominant frames may impair the ability of marginalized groups

29. Feldman, supra note 19, at 253.
31. Id. at 230–36.
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to obtain more far reaching social change, that frame also presents an opportunity to educate potential allies who do not embrace the particular cause at issue. As an example, I point out how the Cincinnati Enquirer Editorial Board, after its initial editorial supporting residency restrictions, progressed from a dominant public safety frame to a non-dominant frame supporting fairness for sex offenders.

Part III concludes the Article by discussing the need for law schools to better equip aspiring social justice attorneys with the skills they need to incorporate Professor Bell’s interest-convergence thesis into their practices. I describe a course I teach called Complex Problem Solving, where my students work collaboratively to develop legal, public relations, community building, and lobbying skills to solve a simulated problem involving sex offenders.

I. THE CASE-STUDY

In the spring of 2005, OJPC began representing sex offenders who faced eviction from their homes under Ohio’s residency restriction statute. The litigation concluded in early 2008 with a victory in the Ohio Supreme Court. What happened in between is a story of contrasts—both in strategy and results.

A. Coston v. Petro: The Constitutional/Human Rights Frame

There can be little dispute that sex offenders are among the most feared, despised, and marginalized members of the community. In the years since six-year-old Adam Walsh was abducted from a department store in 1981, news coverage of high profile child sexual abuse cases has grown exponentially. And with that news coverage came

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32. See, e.g., McKune v. Lile, 536 U.S. 24, 32 (2002) (plurality opinion) (“Sex offenders are a serious threat in this Nation.”); Cassie Dallas, Not in My Backyard: The Implications of SexOffender Residency Ordinances in Texas and Beyond, 41 TEX. TECH L. REV. 1235, 1237 (2009) (“Community members have been forced out of their neighborhoods and branded as social pariahs because they are sex offenders—a reviled and vilified class.”); Meghan Sile Towers, Protectionism, Punishment and Pariahs: Sex Offenders and Residence Restrictions, 15 J.L. & POL’Y 291, 292 (2007) (referring to laws that “make] pariahs out of sex offenders.”); Lindsay A. Wagner, Sex Offender Residency Restrictions: How Common Sense Places Children at Risk, 1 DREXEL L. REV. 175, 175 (2009) (“Sex offenders, as a group, incite the public’s fear and hatred, and politicians seeking to curry electorate favor often support increasingly harsh sanctions against these ‘political pariahs of our day.’”); Roger N. Lancaster, Sex Offenders: The Last Pariahs, N.Y. TIMES, Aug. 20, 2011, at SR6 (“The most intense dread, fueled by shows like ‘America’s Most Wanted’ and ‘To Catch a Predator,’ is directed at the lurking stranger, the anonymous repeat offender.”).

an increase in laws aimed at controlling and managing sex offenders in the community, including residency restrictions.34

Against this backdrop, OJPC launched a challenge to Ohio’s sex offender residency restriction in 2005.35 At the time, Ohio’s residency restriction prohibited sex offenders from living within 1,000 feet of schools.36 The lead plaintiff had just been released from prison for two rapes he committed when he was seventeen.37 One of the conditions of his parole was that he find stable housing.38 He did so, but his parole officer blocked him from living there because the home was located within 1,000 feet of a school.39 Running out of time to find housing, he worried that he would be sent back to prison if he did not secure a residence soon.40 Complicating the picture was the fact that a new provision of the law was about to come into effect that would give prosecutors the ability to enforce the residency restriction by seeking an injunction requiring the offender to move from a home located within the 1,000-foot buffer zone.41 OJPC determined that it would need to move quickly to halt enforcement of this new provision, as it would affect thousands of sex offenders across the state.

My approach to the case drew from my days as a young public defender. First, OJPC did not spend much time searching for sympathetic plaintiffs,42 partly because I never had to do that as a public defender handling whatever cases the court assigned to me. Also, my role as a public defender was to fight for all clients I was appointed to represent, irrespective of whether they were sympathetic or not. I had been trained to see the humanity in every man or woman I represented, irrespective of what he or she had done (or were accused of doing). Thus, the idea of “model” clients was somewhat foreign and offensive to me. Perhaps for these reasons, none of plaintiffs in the

34. Id. at 609.
36. § 2950.031 (West). See supra note 12 for history of statute after repeal.
38. Id. ¶ 55.
39. Id. ¶ 65.
40. Id. ¶¶ 69–73.
41. Id. ¶ 14 (citing to § 2950.031 (West)).
42. See Sarah Geraghty, Challenging the Banishment of Registered Sex Offenders from the State of Georgia: A Practitioner’s Perspective, 42 HARV. C.R.-C.L. L. REV. 513, 522 (2007) (discussing the importance of choosing plaintiffs carefully in challenges to state residency restrictions).
residency case were particularly sympathetic, except for an elderly nursing home resident who had been convicted of fondling the breast of another nursing home resident.43

Second, the type of storytelling I did as a public defender skewed the narrative we crafted in the residency restriction litigation. As a public defender, I saw many of my cases as fight-to-the-death battles between my client and the overreaching state. The stories I told at trial focused on my clients’ innocence or reduced culpability and how the state was attempting unfairly to deprive them of their liberty. In short, my public defender clients were the victims of state wrongdoing. The Coston complaint similarly painted the state as the wrongdoer and our clients as victims who would be rendered homeless by the residency restriction.44 Focusing on the burdens the residency restriction imposed on our clients, the complaint alleged eight violations of their constitutional rights.45

Third, as a public defender, I never worried about the press. Our office policy precluded staff attorneys from speaking to the media. The only people I worried about persuading were the twelve citizens seated in the jury box. This way of thinking carried over to my work with OJPC. Although I occasionally fielded calls from the press, I was not in the habit of thinking carefully about the media before filing a case. Coston was no exception.

When we filed Coston we had the law on our side—at least initially. The only federal decision addressing the constitutionality of residency restrictions was from a district court in Iowa. That case,

43. Second Amended Complaint, supra note 37, ¶ 82.
44. See, e.g., id. ¶ 73 (“If Coston cannot find another place to live by May 30, 2005, he will become homeless. Unfortunately he will not be able to live at the . . . homeless shelter . . . since it is located within 1000 feet of a school.”).
45. We alleged that the statute violated (1) the “right of privacy and personal choice in family matters” to the extent class members were prevented from living with their families; (2) the right to travel for Ohio sex offenders who wish to live elsewhere in the state, and out-of-state offenders who wish to move to Ohio; (3) the right to procedural due process “because the statute did not provide for an individualized determination of danger posed by particular sex offenders”; (4) the right to procedural due process because the statute did not provide fair notice of where a sex offender could live; (5) the right to contract “to the extent [the statute] substantially impairs rental contracts between landlords” and sex offenders; (6) the Fifth Amendment privilege against self-incrimination to the extent that sex offenders had to choose between admitting that they were in violation of the residency statute, which would result in their eviction, or refusing to disclose their address, which could result in their criminal prosecution; (7) the Ex Post Facto Clause by imposing retroactive punishment; and (8) “the Fifth Amendment Takings Clause as applied to plaintiffs and proposed class members who reside in homes they have owned prior to July 31, 2003, the effective date of the statute.” Id. ¶¶ 105–20.
Doe v. Miller,46 held that Iowa’s statute, which banned sex offenders from living within 2,000 feet of schools and child care facilities, violated several provisions of the United States Constitution. Specifically, the court found that Iowa’s statute violated (1) the Ex Post Clause of the United States Constitution by imposing retroactive punishment;47 (2) the Fourteenth Amendment’s Substantive Due Process right to personal choice regarding family matters, specifically the right to “privately choose how to conduct family affairs and decide where and with whom family members will live;”48 (3) the Fourteenth Amendment’s Substantive Due Process right to interstate and intrastate travel;49 (4) the Fourteenth Amendment’s Procedural Due Process right to have an individualized determination of dangerousness before being subject to the residency restriction;50 (5) the Fourteenth Amendment’s Procedural right to fair notice of where they could live;51 and (5) the Fifth Amendment’s right against self incrimination to the extent sex offenders are required to disclose they reside in violation of the residency restriction, which is a misdemeanor offense under the Iowa statute.52 The claims we raised in our suit largely mirrored the claims the Iowa plaintiff raised successfully in the Iowa district court.53

In sum, we used a constitutional/human rights frame to sell Conston to the court. We painted our sex offender clients as victims and the state as the wrongdoer. We did not realize when we filed the case that our frame would fair poorly—first in the media and then in the courts.54

47. Id. at 871.
48. Id. at 874.
49. Id. at 875.
50. Id. at 877.
51. Id.
52. Id. at 879.
53. Id.; see supra note 45.
54. For an excellent discussion of how making rights-based arguments on behalf of sex offenders can be counterproductive, see Wagner, supra note 32 (“Legal arguments need to be framed in terms of ‘rights.’ Courts strip the issues down to a narrow legal question. This has several important issues for sex offender rights. This framing of the issue, in turn, creates a social and political backlash. It is not socially or politically popular to be supporting ‘sex offender rights,’ so politicians and society in general refuse to support a legal battle to vindicate such abhorred rights. Therefore, even if a court decision strikes down the law . . . politicians feel the need to counteract the decision with additional measures to control the ‘risk’ presented by sex offenders. Therefore, attempts to reform sex offender legislation through the court system may not result in the effective policy measures one would hope.”) (citation omitted).
The day after filing suit, a reporter from the *Cincinnati Enquirer* contacted me for an interview. When asked why we had filed suit, I said: “The law makes it all but impossible for sex offenders to find places to live.” As we had done in the complaint, we focused our media message singularly on our client’s interest—in hindsight foolishly so. We should have realized that few people care about the rights of sex offenders, especially if those rights could be viewed as imperiling children. Of course, the protection of children from harm is a societal interest of paramount importance. When the community’s interest in keeping children safe collides with the constitutional rights of sex offenders, most people would conclude that the latter must give way.

The photograph the *Enquirer* ran with the story reveals much about where the paper stood on the issue. Located to the right of the two-inch column about our lawsuit is a six-inch by five-inch photograph of a woman walking through a field of flags. Above the photo is the title “Remebering Crime Victims.” Underneath the photograph is a caption describing the woman, an employee of a local Children’s Services Office, “walk[ing] th[rough] some of the 1,901 flags representing victims of sexual assault.” The pairing of the photo with the article about our suit sent an unmistakable message: challenging the constitutionality of the statute put us on the wrong side of the issue.

If there was any doubt about the *Enquirer’s* position on residency restrictions, the editorial board put it to rest two days later: “We believe the farther child sex offenders are kept away from children anywhere, the better.” The editorial then reinforced the perception that sex offenders are very dangerous people: “Unlike other types of criminal offenses, sexual offenses, especially those against children, often stem from pathological behavior that cannot be permanently corrected. Many offenders will re-offend.” To underscore its point, the editorial ended by mentioning the tragic case of Jessica Lunsford, who

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55. Consistent with our lack of a media strategy, we did not issue a press release. The reporter must have learned of the filing from either the state or from reviewing the court’s list of recently filed cases.
57. *See* Geraghty, *supra* note 42 (“[Georgia] struck back with its press strategy, pitting the safety of children against our purported concern for the ‘inconvenience to sex offenders.’”).
58. Horn, *supra* note 56.
59. *Id.*
61. *Id.*
was kidnapped, buried alive and murdered by a convicted sex offender. Although not stated explicitly, the editorial’s thrust was that society’s interest in protecting children trump the constitutional rights of sex offenders.

We fared no better in court—at least not initially. On the afternoon the district court was scheduled to hear our motion for a temporary restraining order to halt enforcement of the residency restriction, the Eighth Circuit Court of Appeals reversed *Doe v. Miller*, the Iowa federal district court case upon which we had based our entire case. The case law was now against us.

Predictably, the district court denied our motion for a temporary restraining order. After concluding that the plaintiffs were unlikely to succeed on the merits and that there was no irreparable harm justifying a temporary restraining order, the court concluded that “the public interest is substantially in favor of [the residency restriction] being enforced.” The court then noted that the statute “was enacted to protect children, who are among the most vulnerable members of our society and who are least able to protect themselves.”

Briefly addressing the question of whether residency restrictions are effective in preventing sexual crimes against children, the court wrote that although “[w]e may never know the answer to that question . . . the potential cost of discovering the answer by enjoining [the statute] is a risk too great to countenance.”

A few months later, after trial on the merits, the court dismissed our case. Although the court did so on standing grounds, it went on to say that it would have rejected our Ex Post Facto claim and other constitutional challenges to the statute had it reached the merits. In addressing whether the statute bore a rational relationship to a non-punitive purpose, one of the five factors courts traditionally consider in determining whether a statute is punitive in effect for Ex

62. *Id.*
63. *See id.*
66. *Id.* at *4.
67. *Id.*
68. *Id.*
70. *Id.* at 884.
71. *Id.* at 885–87.
Post Facto purposes, the court stressed that it is rational to conclude “that the safety of children is promoted when sex offenders are prohibited from living near schools. For instance, the legislature might reasonably have concluded that safety is furthered by denying sex offenders . . . convenient safe havens near schools.”

Rather than appeal, we decided to refocus our efforts, learn from our mistakes and eventually bring a stronger federal court case. We also resolved to develop an effective media strategy to complement any new litigation we would be filing.

B. OJPC’s Introduction to the Social Science

A month before Coston was dismissed, Plaintiffs’ counsel in Doe v. Miller asked OJPC to author an amicus brief in support of their certiorari petition to the United States Supreme Court. Specifically, counsel asked us to write the brief on behalf of the Association for the Treatment of Sexual Abusers (“ATSA”), “an international, multi-disciplinary [professional] association dedicated to preventing sexual abuse.”

In the brief, ATSA urged the Court to grant certiorari “because of the national significance of the Eighth Circuit’s decision.” ATSA’s frame differed from the one we used in Coston:

A crisis is looming in Iowa and nationally as a result of the Eighth Circuit’s decision. Although the protection of children from sexual abuse is indisputably a compelling government interest—one that ATSA works hard to promote—sex offender residency laws actually harm the innocent children they are intended to protect.

ATSA made four main points. First, ATSA cited research in support of its argument that sex offender residency restrictions “increase the risk of harm to children.” Referencing research showing that “isolation, unemployment, depression and instability—conditions known as dynamic risk factors—correlate with increased recidi-

72. Smith v. Doe, 538 U.S. 84, 97 (2003). The other four factors courts traditionally consider are: whether the statute imposes an affirmative disability or restraint, whether it is historically considered punishment, whether it promotes the traditional aims of punishment, and whether the alleged non-punitive purpose is excessive. Id.
73. Coston, 398 F. Supp. 2d at 886.
75. Brief, supra note 25, at *1.
76. Id. at *1–2.
77. Id. at *4.
ATSA argued that “[u]prooting offenders . . . from housing, social support and services, and employment opportunities, will only increase, rather than reduce, the risk that they will recidivate and sexually abuse children.”

Second, ATSA addressed the rationale that residency restrictions were necessary to reduce the opportunity for sex offenders to abuse children, pointing out that “states that have examined the question closely have concluded that such restrictions do not protect children.” In particular, ATSA cited a study conducted by the Minnesota Department of Corrections, which examined whether a sex offender’s proximity to schools or parks increased recidivism rates for sexually violent predators. The study concluded:

Based on the examination of [sexually violent predators], there were no examples that residential proximity to a park or school was a contributing factor in any of the sexual re-offenses [observed in the study]. Enhanced safety due to proximity restrictions may be a comfort factor for the general public, but it does not have any basis in fact. The two [sexual violent predators in the study] whose re-offenses took place near parks both drove from their residence to park areas that were several miles away. . . . Based on these cases, it appears that a sex offender attracted to such locations for purposes of committing a crime is more likely to travel to another neighborhood in order to act in secret rather than in a neighborhood where his or her picture is well known.

ATSA also cited a study conducted by the Colorado Department of Public Safety, which reached a similar conclusion: “Placing restrictions on the location of . . . supervised sex offender residences may not deter the sex offender from re-offending and should not be considered as a method to control sexual offending recidivism.”

78. Id. (citing R. Karl Hanson & Andrew J.R. Harris, Dynamic Predictors of Sexual Recidivism, 27 CRIM. JUST. BEHAV. 6 (1998); R. Karl Hanson & Kelley Morton-Bourgon, Predictors of Sexual Recidivism: An Updated Meta-Analysis (2004); COLO. DEP’T PUB. SAFETY, REPORT ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATION OF SEX OFFENDERS IN THE COMMUNITY (2004); Candace Kruttschnitt, Christopher Uggen & Kelly Shelton, Predictors of Desistance Among Sex Offenders: The Interaction of Formal and Informal Social Controls, 17 JUST. Q. 61–88 (2000)).

79. Id. at *5.

80. Id. at *6.

81. Id. at *6–7 (quoting MINN. DEP’T CORRECTIONS, LEVEL THREE SEX OFFENDERS RESIDENTIAL PLACEMENT ISSUES, 2003 REPORT TO THE LEGISLATURE 9 (2003)).

82. Id. at *7 (quoting COLO. DEP’T OF PUB. SAFETY, REPORT ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATION OF SEX OFFENDERS IN THE COMMUNITY 5 (2004)).
Third, ATSA argued that “the proliferation [of sex offender residency restrictions] . . . is driven by fear, not facts.” Specifically, ATSA contended that while “child abduction[s] and sexually motivated murder[s] receive extraordinary media attention,” such occurrences are “extremely rare.” Citing Justice Department statistics, ATSA pointed out that only 7 percent of child victims of sexual assault reported abuse by strangers.

Finally, arguing that “the existing situation in Iowa and surrounding states demonstrates the national significance of [Doe v. Miller],” ATSA painted a picture of the chaos that the residency statute had created in Iowa and surrounding states. Specifically, ATSA described how “‘unprotected’ smaller towns (i.e., those that do not have a school or daycare), [were] rush[ing] to pass ordinances prohibiting sex offenders from living within 2000 feet of parks or other places where children might be expected to congregate.” Additionally, ATSA explained that “numerous towns in nearby Nebraska and South Dakota ha[d] passed, or [were] considering enacting, ordinances prohibiting sex offenders [who had no place to live in Iowa] from relocating there.”

Although the Supreme Court did not grant certiorari, the experience of collaborating with ATSA on the brief proved useful in two
respects. First, we learned about the wealth of social science research that indicated that sex offender residency restrictions are bad policy. This research allowed us to see the issue through a new frame: not only are residency statutes ineffective, but they are also potentially harmful to the children the restrictions seek to protect.

Second, we realized the importance of partnering with credible allies. ATSA, whose mission is to prevent sexual violence, is a much more persuasive opponent of residency restrictions than we were as lawyers for sex offenders. Going forward, we hoped to find other unexpected and unusual allies to support our challenges to residency restrictions.

C. Transforming the Media Narrative

Armed with social science research, we then worked to educate the local media about the ineffectiveness and potential dangers of residency restrictions. We decided to shift from the rights-based arguments we had used in Coston to a public safety frame. The opportunity to use our new frame came in February 2006 after the city of Covington, Kentucky proposed a new residency restriction.

Located just across the Ohio River from Cincinnati, Covington proposed banning sex offenders from living within 2,000 feet of schools and daycares, which would widen the buffer zones that already existed under Kentucky state law. After learning of the proposal, OJPC attended the council meetings and presented testimony at one of the sessions. Stephen JohnsonGrove, the OJPC attorney who testified at one of the hearings, cited the Minnesota study as evidence that sex offender residency restrictions are ineffective. JohnsonGrove also referenced and distributed copies of a recently released statement from the Iowa County Attorney’s Association (“ICAA”), an organization that represents prosecutor interests in that state. In its statement, the ICAA contended that “the 2,000 foot residency restriction... does not provide the protection that was orig-
inally intended."94 Citing the cost of enforcement and the “unintended effects on families of offenders,” the ICAA called for Iowa’s statute to be “repla[ced] . . . with more effective protective measures.”95 The ICAA gave fourteen reasons why the statute should be repealed, including (1) the absence of research showing a correlation between residency restrictions and reducing the sexual abuse of children;96 (2) the absence of research to “support the belief that children are more likely to be victimized by strangers at [schools and child care facilities] than at other places;”97 (3) that “80 to 90 percent of sex crimes against children are committed by a relative or acquaintance who has some prior relationship with the child and access to the child that is not impeded by residency restrictions;”98 and (4) the fact that “the residency restriction is causing offenders to become homeless, to change residences without notifying authorities . . . , to register false addresses or to simply disappear,” thus frustrating the purpose of registration requirements.99 Among the reforms the ICCA sought was a statute creating more narrowly drawn exclusion zones “that sex offenders would be prohibited from entering except in limited and safe circumstances.”100

In addition to testifying that Covington’s proposed restriction was both ineffective and potentially harmful, OJPC joined forces with an

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95. Id.
96. Id.
97. Id.
98. Id.
99. Id. at 1–2. Other factors listed in the statement are: (5) the “huge draining of scarce resources” to enforce the statute; (6) the imposition of the restriction on offenders “who present no known risk to children” at schools and child care facilities; (7) some offenders had married or reunited with their victims, in which case the burden of the restriction is imposed on those victims as well; (8) the burden on families of offenders subject to the restriction, especially the children of such offenders; (9) the impact on offenders with physical or mental disabilities who are prohibited from living with family members or others who take care of their needs; (10) the inability to access “realistic opportunities for affordable housing” because of the extensiveness of the geographic areas off-limits to sex offenders; (11) the fact that “there are many offenders who are subject to the residency restriction but who are not required to inform law enforcement of their place of residence [because they no longer have an obligation to register], making enforcement [against those particular offenders] impossible”; (12) “[t]he restriction causes many [parole or probation] supervised residential placements to be unavailable even though the may be the most appropriate and safest locations for offenders to live”; (13) because of the severe burden imposed by the residency restriction, the reduction in the number of confessions by the accused “in cases where defendants usually confess after disclosure of the offense by the child”; and (14) “[t]he drastic reduction in the availability of appropriate housing, along with the forced removal of many offenders from established residences, is contrary to well-established principles of treatment and rehabilitation of sex offenders.” Id. at 2–4.
100. Id. at 4.
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unusual ally: community members who lived more than 2,000 feet from schools and daycares and who feared that sex offenders displaced as a result of the proposed restriction would move to their neighborhoods. OJPC equipped these anxious neighborhood residents with talking points based on the Minnesota study and ICAA statement, and encouraged them to make their voices heard at City Hall.

We also saw the proposed Covington ordinance as an opportunity to educate the local media. We emailed the Minnesota study and the ICAA statement to the *Cincinnati Enquirer* Editorial Board along with a brief explanation for why those documents were relevant to the Covington debate.

On February 20, 2006, the same *Cincinnati Enquirer* that championed residency restrictions after we filed the Coston case struck a very different tone in response to the Covington controversy: “Restricted zones of 1,000, 2,000, or even 2,500 feet may make us feel safer, but there’s no research evidence they cut down on repeat offenses. They could increase the chances.”101 Drawing from the materials we provided to the Board, the editorial noted that “[o]ne Minnesota study found a sex offender was more likely to travel to another neighborhood where he could seek victims without being recognized.”102 The editorial also discussed the myth of “stranger-danger,” noting that ninety percent of sexually abused children are molested by someone they already knew, such as family members, friends or acquaintances.103 The editorial concluded by referencing the ICAA statement we had forwarded: “And Iowa found, after its 2,000-foot restriction became law, more offenders failed to register. If made outcasts, they’re less likely to abide by the rules.”104

The *Enquirer* continued to issue editorials supportive of our position. On March 16, 2006, the paper published another editorial warning its readership of the dangers of residency restrictions. It began, “Sex offender laws are fast becoming a national proving ground for the Law of Unintended Consequences. Lawmakers need to make sure bans against sex offenders living within specified distances of where children study or play are not giving families a false sense of

102. *Id.*
103. *Id.*
104. *Id.*
The editorial advised legislators against “making living conditions so punitive for sex offenders . . . that they can’t find jobs, can’t find decent housing and are more likely to re-offend or ‘disappear,’” which would undermine the registration laws. The editorial also referenced the problems caused by Iowa’s restriction, citing, among other problems, the fact that the statute “increased the numbers who are homeless or that quit registering. One spent his days at the sheriff’s office because he had no where [sic] else to go.” The editorial concluded by proposing a new framework for determining whether to pass sex offender laws: “Sex offenders and child molesters in particular are not great candidates for public sympathy, but the test for new legislation ought to be: Will it make us safer?”

The public pressure worked. On March 20, 2006, the Covington City Council failed to pass the residency restriction. The 2,000-foot restriction never became law.

In December 2006, another controversy brewed over a proposed residency restriction—this time one offered by a city of Cincinnati council member. Although Ohio law already banned sex offenders from living within 1,000 feet of schools, a council member proposed prohibiting sex offenders from also residing within 1,000 feet of state-licensed child care centers, YMCAs or YWCAs, Boys & Girls Clubs of Greater Cincinnati, or any public parks, public playgrounds, public recreational centers, or public swimming pools owned or operated by the City of Cincinnati or any of its boards or commissions.

On December 12, 2006, the Enquirer published another editorial asking, “would any expert on sexual offense suggest that families in communities with bans can actually relax—the ‘simply-make-this-go-away’ response that, at heart, most communities and families naively long for?” Deriding residency restrictions as being “popular with officials in part because they cost little more than the ink to sign them into law,” the paper declared, “It’s time for research to trump emo-
tion on this issue.” Despite the Enquirer’s objections, a watered-down version of the ordinance passed.

Over the next few months, the Enquirer continued to publish stories and editorials critical of residency restrictions. As will be discussed in Part III, whether the positive news coverage made a difference in our litigation outcomes is debatable. There is no question, though, that we had educated the paper and had succeeded in changing how that paper covered the issue.

D. Litigating Mikaloff and Coston

As we were transforming the local coverage of sex offender residency restrictions, we continued to litigate. We brought a new federal court challenge and defended several men who faced evictions in state court proceedings. To the extent possible, we framed our litigation along public safety lines.

1. Mikaloff v. Walsh

In 1986 eighteen-year-old Lane Mikaloff, and two accomplices, raped a woman during a burglary. He pled guilty and received a sentence of 16 to 53 years in prison.

After his release from prison in 2004, Mikaloff moved back to his family home in Akron, Ohio. He fell in love with a woman and started a family with her. But in December 2005, Mikaloff received a notice from the sheriff’s office notifying him that he would have to move because he lived within 1,000 feet of a school.

We learned about Mikaloff’s case from newspaper reports. What made his story particularly newsworthy was the fact that his victim came out in support of him. She told the local press that she had forgiven Mikaloff for raping her and “wanted to do something to help...
his children before Christmas.”122 Soon after, she took up a collection for Mikaloff and his family and contributed to it herself.123 The CBS Early Show did a two-part series on her forgiveness of Mikaloff.124

We raised a single issue in the lawsuit we filed on Mikaloff’s behalf: whether the statute imposed punishment in violation of the Ex Post Facto Clause.125 In addition to jettisoning our weaker arguments and focusing on our strongest, the Ex Post Facto claim gave us the best vehicle to convey the message that residency restrictions are ineffective and potentially counterproductive to the goal of reducing the sexual victimization of children. We used one of the factors the courts use to determine whether a statute imposes punishment for Ex Post Facto purposes—whether it is rationally related to a non-punitive purpose—to make our public safety arguments.126 Though we knew that the “rational relationship” standard was deferential to the government,127 we would nonetheless be able to use that factor to educate the court about the reasons residency restrictions are ineffective and potentially harmful.

We educated the court through our expert, Dr. Luis Rosell. Rosell testified that residency restrictions are “based more on fear and anger than . . . research and data.”128 He opined that enforcement of the residency restrictions would increase the risk of recidivism by increasing the offender’s stress and by depriving the individual of positive social support.129 Referring to the situation in Iowa, Rosell testified that the residency statute undermined safety by making it “more difficult to keep track of [sex offenders] and that’s one of the reasons why in Iowa the county attorneys have come out against this law.”130

122. Id.
123. Id.
127. See Doe v. Miller, 405 F.3d 700, 714 (2005) (“[The Does’ contention] understates the authority of a state legislature to make judgments about the best means to protect the health and welfare of its citizens in an area where precise statistical data is unavailable and human behavior is necessarily unpredictable.”).
129. Id. at 85–86, 110.
130. Id. at 97.
In addition to testifying that residency restrictions increased the risk of recidivism, Rosell also testified that residency restrictions are ineffective. After explaining that “80 to 90 percent” of children are abused by relatives or people they know, Rosell testified that residency restrictions would not prevent those crimes, because they have “nothing to do with the fact of where these individuals live.” When asked whether restrictions would reduce the likelihood that a sex offender who lives near a school could use his location to cultivate or “groom” potential victims by, for example, putting a puppy in the offender’s front yard to attract children, Rosell responded that a sex offender who lived outside the exclusion zone “could walk around the school with the puppy every day.” Rosell also explained that residency restrictions do not prevent the relatively rare instances of stranger abductions, “which can occur at any time, anyplace, anywhere. It doesn’t really matter where the [offender lives].” Finally, Rosell cited the Minnesota and Colorado studies to underscore his point that there is no evidence that residential proximity to a school is related to sexual recidivism.

We re-emphasized Rosell’s public safety concerns in our post-trial briefs. We argued that the statute, at most, bore only a “minimal” relationship to the non-punitive purpose of protecting children.

Unlike Coston, Mikaloff went our way. The court concluded that the legislature intended for the residency restriction to punish and even if it did not so intend, the statute nonetheless had the effect of imposing punishment.

2. Hyle v. Porter

After losing Coston, OJPC was inundated with requests for help from people subject to eviction under the statute. Gerry Porter was one of the men who sought our assistance. After finding that there was an appellate district split on the state constitutional claim Porter

131. Id. at 87.
132. Id. at 92.
133. Id. at 94.
134. Id. at 100–01.
135. Id. at 103–04.
138. Id.
had raised, the Ohio Supreme Court decided to hear his appeal. It requested briefing on the following question:

Whether R.C. 2950.031—Ohio’s residency-restriction statute prohibiting certain sexually oriented offenders from living within 1,000 feet of a school—can be applied to an offender who had bought his home and committed his offense before July 31, 2003 (the effective date of the statute).140

Unlike the federal Ex Post Facto issue in Mikaloff, the question in Porter’s appeal concerned the state constitution’s Retroactivity Clause.141 In determining whether a statute violates the Retroactivity Clause, courts first must determine whether the legislature expressly intended the statute to be retroactive.142 If not, then the statute can only apply prospectively.143 But if the legislature clearly expressed its intent for the statute to apply retroactively, then the court goes to the next step of determining whether such application would impair a vested substantive right.144 If so, then the statute cannot be applied retroactively.145

Regarding the first prong of the state retroactivity analysis—whether the legislature clearly expressed intent for the statute to apply retroactively—we doubted we would prevail. The relevant portion of the statute read:

No person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to either a sexually oriented offense that is not a registration-exempt sexually oriented offense or a child-victim oriented offense shall establish a residence or occupy residential premises within one thousand feet of any school premises.146

By applying the statute to anyone who “has been convicted of” or “has pleaded guilty to” a sex offense, the legislature indicated its intent to apply the statute to such persons regardless of the date of conviction or guilty plea.

139. The split resulted from the First District Court of Appeals’ decision in Hyle v. Porter, 868 N.E.2d 1047 (2006), and the Second District Court of Appeals’ decision in Nasal v. Dover, 862 N.E.2d 571 (2006). OJPC was counsel in both cases.
141. OHIO CONST. art. II, § 28.
143. Id.
144. Id.
145. Id.
146. OHIO REV. CODE ANN. § 2950.034(a) (West 2007). See supra note 12 for explanation of code’s history.
With regard to the prohibited actions, the phrase “shall establish a residence” indicates the legislature’s intent to prohibit sex offenders from commencing to reside within 1,000 feet of schools after the statute’s effective date. But “occupy residential premises” is a continuing action, one that could have commenced before the state’s effective date. In other words, a fair reading of the statute is that the legislature intended it to apply to any person living within 1,000 feet of a school who had been convicted of his offense and commenced his or her residency before the statute’s effective date. Accordingly, we believed the Ohio Supreme Court would conclude that the legislature intended the residency restriction to apply retroactively.

We were much more confident, however, that we would fare much better on the second prong of the analysis: whether the statute impaired our clients’ vested property rights. Retroactively divesting a homeowner of the right to live in his house seemed to be precisely what the Ohio Constitution’s Retroactivity Clause aimed to prevent. But winning this prong of the analysis would only protect people like Porter who had purchased their homes before the statute’s effective date.

The question the Ohio Supreme Court asked the parties to brief posed a challenge for the story we wanted to tell. In Mikaloff we used a public safety frame that allowed us to present evidence and argue that the residency restriction was ineffective and potentially harmful. Our arguments were relevant because the court, in determining whether the statute imposed punishment, had to consider whether the statute was rationally related to a non-punitive purpose.

Unlike Mikaloff, Porter was not an Ex Post Facto case. Thus, whether the residency restriction furthered a non-punitive purpose was irrelevant to the Ohio Supreme Court’s analysis of the state constitutional issue before it.


148. This is the issue that generated the appellate district split that required the Ohio Supreme Court to take Porter’s appeal. The First District held that because Porter had not been totally divested of his property rights and could continue to own, rent or lease the property, prohibiting him from residing in the home did not impair his vested rights. Porter, 868 N.E.2d at 1054–55. However, the Second District held that prohibiting a sex offender from residing in the home he owns impairs his vested property rights. Dover, 862 N.E.2d at 575.

149. Porter raised an Ex Post Facto claim in his intermediate appeals. However, he lost that claim. Porter, 868 N.E.2d at 1053.
Because there was no opportunity to make our public safety arguments in our brief to the court, we decided to have others tell that story in an amicus brief. Drawing on our experience drafting ATSA’s amicus brief in the Iowa case, we assembled a coalition of amici whose commitment to preventing child sex abuse could not be questioned.

ATSA agreed to join the coalition, as did the Iowa County Attorneys Association, the Iowa State Sheriffs and Deputies Association, and the Iowa Coalition Against Sexual Assault. Perhaps the most important member of the team was the Jacob Wetterling Foundation (“JWF”). Named after an eleven-year-old boy who was abducted and presumably murdered (his body was never found), JWF works to keep children safe from sexual violence. A federal statute, which required states to implement a sex offender and crimes against children registry, also bore Jacob’s name. Having JWF speak out against residency restrictions significantly enhanced the credibility of our arguments.

The Porter amici made essentially the same points ATSA had made two years earlier in urging the United States Supreme Court to grant certiorari in Doe v. Miller. Addressing their interest in Porter, amici explained that their “missions are furthered by the implementation of evidence-based practices and polices that are most likely to protect the public from sexual violence, while allowing for the rehabilitation of sexual offenders,” goals not accomplished by Ohio’s residency restriction statute. Amici’s principal argument was that sex offender residency statutes “increase the risk of harm to children” by (1) destabilizing offenders, which increases their recidivism risk; and by (2) giving the community a false sense of security. Amici

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150. The Rosenthal Institute for Justice (“RIJ”) also signed onto the brief. Housed at the University of Cincinnati College of Law, the RIJ is an umbrella organization that houses, among other projects, the Ohio Innocence Project. See History of the Lois and Richard Rosenthal Institute for Justice Ohio Innocence Project, UNIV. CINCINNATI COLL. L., http://www.law.uc.edu/institutes-centers/ohio-innocence-project/brief-history (last visited Aug. 26, 2013).


156. Id. at 6.

157. Id. at 9 n.3.
also emphasized the lack of research showing the effectiveness of residency restrictions.158

Finally, amici argued that residency restrictions are “driven by fear, not facts,” noting that “[t]ragic cases of child abduction and sexually motivated murder receive extraordinary media attention, and the publicity of such events creates a sense of alarm and urgency among citizens.”159 Amici attributed the proliferation of sex offender residency restrictions to these high profile but “extremely rare” cases.160

Although amici did not address the merits of the legal question before the court, we hoped that their brief would influence the court's thinking. If amici were able to persuade the court that residency restrictions were ineffective—and could actually harm children—then we might have a chance of winning the case on the ground that the legislature did not express its intent to apply the statute retroactively. We wanted the broadest possible ruling, i.e., that the statute did not apply retroactively to any sex offender, rather than a narrower ruling that would only protect the property rights of homeowners like Porter.

For that reason, we did not abandon our legislative intent argument, despite being advised to do so by several experienced and thoughtful lawyers. Those lawyers believed that the statute’s language clearly indicated the legislature’s intent to apply the restriction retroactively, and that we would damage our credibility by arguing otherwise. But instead of conceding at oral argument that the legislature intended the statute to apply retroactively, I argued that the statute contained, at most, a suggestion of retroactivity,161 which was not sufficient under Ohio case law to apply the restriction retroactively.162

On February 20, 2008, the Ohio Supreme Court held, by a six to one vote, that “neither the description of convicted sex offenders nor the description of prohibited acts includes a clear declaration of retroactivity.”163 The court concluded that the statute “presents at best a suggestion of retroactivity, which is not sufficient to establish that a statute applies retroactively.”164 Because the court disposed of the

158. Id. at 10–11.
159. Id.
160. Id. at 12.
162. Consilio, 871 N.E.2d at 1172 (“A statute must clearly proclaim its own retroactivity to overcome the presumption of prospective application. Retroactivity is not to be inferred.”).
163. Porter, 882 N.E.2d at 902.
164. Id.
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case on legislative intent grounds, it did not address the narrower question of whether retroactive application of the statute to Porter would have unconstitutionally impaired his vested property rights. Instead of benefiting only homeowners like Porter, the court’s ruling protected a much greater number of individuals who would otherwise be forced to move from their homes if the statute applied retroactively.

By deciding the case on the grounds it did, the court necessarily left open the possibility that the legislature could add language making the restriction retroactive. Concerned about this possibility, we met with key legislators shortly after the ruling to educate them about the increased risk of harm to children that could result from residency restrictions. To date, the legislature has not changed the language of the statute to make it expressly retroactive.

II. THREE QUESTIONS ABOUT OJPC’S USE OF INTEREST-CONVERGENCE STRATEGIES IN ITS SEX OFFENDER ADVOCACY

In this Part, I will address three questions. First, is the phrase “interest convergence” the appropriate label to describe our advocacy strategy in Mikaloff and Porter? Second, did we win those cases because we converged our clients’ interests with society’s interest in protecting children from sexual abuse? Third, does using interest convergence as an advocacy tool on behalf of marginalized clients serve their interests too narrowly?

A. “Interest-Convergence” or Something Else?

When I first read Professor Feldman’s characterization of the interest-convergence thesis as “historically descriptive rather than a recommendation for future-oriented strategies,” I questioned whether I had misconstrued the theory by appropriating its name to describe OJPC’s advocacy in the residency restriction cases. To be clear, the question was a purely academic one for me. Regardless of whether OJPC’s strategy fit squarely into Professor Bell’s theoretical construct is not my foremost concern as an advocate. Irrespective of how one labels our strategy, we will continue to use it if it serves the interests of the clients we represent. In any event, upon reflection, I no longer

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165. Id. at 904.
166. Feldman, supra note 19, at 253.
question whether “interest convergence” appropriately describes the strategy we used in the residency restriction cases.

First, the point of Feldman’s essay was to defend Bell’s thesis against Professor Driver’s attack.\(^{167}\) Feldman argues that Driver’s critique is “seriously flawed”\(^{168}\) because Driver “misconstrues the thesis as future-oriented.”\(^{169}\) For example, one of Driver’s criticisms is that the interest-convergence thesis cannot be “refuted,”\(^{170}\) and therefore “cannot be assessed” for its validity.\(^{171}\) In response, Feldman notes that “if interest convergence were a forward-looking thesis that purportedly predicted future behavior, it might reasonably be held to a standard of falsifiability.”\(^{172}\) However, Feldman asserts that because “interest convergence is historical . . . it is empirical in the qualitative sense.”\(^{173}\) Overall, the thrust of Feldman’s essay is that Driver should have analyzed the validity of Bell’s thesis based on how Bell intended the theory to be used: as a tool to understand and explain the history of racial progress in the United States. But the fact that Bell may have intended the thesis be “historically descriptive” does not mean that it does not (or should not) inform “future-oriented” advocacy strategies. Indeed, numerous scholars have proposed using the thesis to effect change on a wide range of issues.\(^{174}\)

Second, regardless of how one chooses to describe it, most advocacy on behalf of the poor and oppressed involves, to some extent, aligning their interests with the those of more powerful constituencies—even at seemingly mundane levels. For example, when I was a public defender, I always made sure that my jailed clients wore court

\(^{167}\) Id. at 249.

\(^{168}\) Id. at 252.

\(^{169}\) Id. at 249.

\(^{170}\) Driver, supra note 14, at 157.

\(^{171}\) Id. at 165.

\(^{172}\) Feldman, supra note 19, at 257.

\(^{173}\) Id.

clothes when they appeared before the jury. Obviously, allowing juries to see the accused in a jail jumpsuit could undermine the presumption of innocence, making the jury more likely to convict.\footnote{See Estelle v. Williams, 425 U.S. 501, 512 (1976) (“[T]he State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes . . . .”).} Dressing the accused in courtroom attire mitigated that possible danger.\footnote{See Norman W. Spaulding, The Rule of Law in Action: A Defense of Adversary System Values, 93 CORNELL L. REV. 1377, 1396 (2008) (discussing the potential impact of courtroom attire on the jury).}

But I also wanted to humanize my clients—to have the jury to see them as fellow human beings deserving of the same fair treatment the jurors would want if in my clients’ shoes. This was especially important when representing black men, which were the overwhelming majority of clients I served. In such cases, I worried that the jury might conflate my clients’ blackness with criminality.\footnote{See Joan W. Howarth, Representing Black Male Innocence, 1 J. GENDER
d. 97, 104 (1997) (quoting Clyde W. Franklin, II, Men’s Studies, the Men’s Movement, and the Study of Black Masculinities: Further Demystification of Masculinities in America, in The American Black Male: His Present Status and His Future 127 (Richard G. Majors & Jacob U. Gordon eds., 1994)) (“[T]he Black man recognized by mainstream society today is fearsome, threatening, unemployed, irresponsible, potentially dangerous, and generally socially pathological.”).} Therefore, I did what I could to make the jury see my clients as members of the community whom should not be defined as “other.”\footnote{See [A] kind of consensus has emerged that members of the dominant group—no matter how ‘intimate’ . . . their sense of involvement with the people concerned, no matter how deep their proposed interest in the subject—will represent nothing but the assumption of their own kind . . . . There will be a tendency, as James Clifford put it, ‘to dichotomize into we-they contrasts and to essentialize the resultant other.’”}. By “de-otherizing” my clients, I hoped that jurors would see my clients’ interests as their own. Although getting jurors to identify with my clients might not be the kind of “interest-convergence” Professor Bell had in mind when he articulated his thesis, it is a related concept.

In sum, OJPC’s use of Bell’s interest-convergence thesis is not a misappropriation of it, but rather a logical extension. OJPC will continue to employ interest-convergence strategies to the extent they are effective and consistent with our clients goals. But, did that strategy pay off in the Mikaloff and Porter cases? I attempt to answer that question below.

\footnote{175. See Estelle v. Williams, 425 U.S. 501, 512 (1976) (“[T]he State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes . . . .”).}
\footnote{178. It is easy to marginalize and reject people who we view as different from ourselves. Legal scholars refer to this phenomenon as “otherizing.” See, e.g., Margaret E. Montoya, Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse, 5 MICH. J. RACE & L. 847, 878 n.176 (2000) (quoting Mick Gidley, Representing Others: An Introduction, in Representing Others: White Views of Indigenous Peoples 2-3 (Mick Gidley ed., 1992)) (“[A] kind of consensus has emerged that members of the dominant group—no matter how ‘intimate’ . . . their sense of involvement with the people concerned, no matter how deep their proposed interest in the subject—will represent nothing but the assumption of their own kind . . . . There will be a tendency, as James Clifford put it, ‘to dichotomize into we-they contrasts and to essentialize the resultant other.’”).}
B. Did OJPC’s “Interest-Convergence” Strategy Work?

We won Mikaloff and Porter after a string of early defeats in the courts and the press.179 I often tell people that we prevailed because we replaced our constitutional/human rights frame—which pitted the rights of sex offenders against the right of children to be safe—with a public safety message that emphasized the ineffectiveness and potential harmfulness of residency restrictions. I explain that we essentially converged our clients’ interests in remaining in their homes with society’s interest in protecting children from sexual abuse. I proudly point to Mikaloff and Porter as examples of how to use Professor Bell’s interest-convergence thesis to advocate successfully for sex offenders and other marginalized individuals. But did our strategy make the difference in the outcomes we achieved? My answer: Possibly, but I cannot prove so definitively.

The difficulty in answering this question lies in the fact that we do not know how the courts would have decided those cases if we had not shifted strategies. Professor Driver is certainly right at least about one thing: “human beings—complex creatures that they are—sometimes have multiple motivations for reaching their decisions.”180

Take the court’s decision in Mikaloff, for example. In its analysis of whether the residency restriction was rationally related to a non-punitive purpose, the court concluded that the restriction “is at best minimally” so.181 In reaching that conclusion, the court first noted that “an important question asks whether many children reside around the sex offender’s house, not that home’s proximity to a school.”182 The court then observed that the statute “shifts the risk of molestation from children living near a school to children living farther away.”183 The court also remarked that “if the sex offender lived near the school, the children’s parents would be notified of their [sic]

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179. Before the Ohio Supreme Court decided Porter, we represented approximately a dozen men who faced eviction from their homes under the statute. See, e.g., State ex rel. White v. Billings, No. CA2006-09-072, 2007 WL 2410895, at *7 (Ohio Ct. App. 2007) (“Appellant’s conviction of the sexually-oriented offense prior to the enactment of the statute and subsequent classification as a sex offender exposed him to future collateral consequences of his conviction.”); State ex rel. Yost v. Stack, No. 06CAE030022, 2007 WL 725153, at *1 (Ohio Ct. App. 2007) (holding that the statute did not violate ex post facto laws). As a result of Porter, our clients in the cases we lost were allowed to remain in or return to their residences.
182. Id. at *20.
183. Id.
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presence, due to Ohio’s notification law, and therefore could advise their children to stay away from the offender.\textsuperscript{184} The court then noted that parents receive no warning of the presence of sex offenders who live more than 1,000 feet from the school but who might come near school grounds in the day.\textsuperscript{185} Finally, referencing another argument we had made, the court wrote that the statute “does not address the majority of child sex abuse cases because those cases involve family members or acquaintances.”\textsuperscript{186}

Although the judge adopted many of our proposed findings of fact regarding the ineffectiveness of residency restrictions, it is possible he could have decided in Mikaloff’s favor even if we had not introduced evidence on that specific point. We do not know if the judge saw any of the press coverage of Mikaloff’s plight,\textsuperscript{187} and if so, whether it impacted the judge’s thinking. Additionally, Judge Gwin had a reputation for being a fair and independent-minded judge who was disinclined to defer to the government as a matter of course as many judges do.\textsuperscript{188} I do not know if this description of the judge is accurate. But if it is, perhaps it played a part in the court’s analysis. I simply do not know.

Similarly, it is impossible to know exactly why the Ohio Supreme Court decided \textit{Porter} on the legislative intent grounds it did, which had the effect of benefiting a much larger number of sex offenders than a narrower ruling for homeowners like Porter would have done.

Although the court’s opinion makes no reference to amici’s public safety arguments, the amicus brief did not go unnoticed. During the government’s oral argument, the late Chief Justice Moyer referred to the amicus brief, stating to opposing counsel: “The amicus brief, as you know, from some law enforcement authorities and others who have been, who work with children who have been molested and . . . they don’t like this law either. They don’t think it’s helpful.”\textsuperscript{189} The amicus brief obviously made an impression on the Chief Justice, who authored the majority opinion.\textsuperscript{190} But did he factor amici’s arguments

\textsuperscript{184.} \textit{Id.}
\textsuperscript{185.} \textit{Id.}
\textsuperscript{186.} \textit{Id.}
\textsuperscript{187.} See supra notes 120 and 123 (describing media coverage of Mikaloff’s threatened eviction).
\textsuperscript{188.} As one of my mentors told me, “Judge Gwin is not afraid to use his power even when the state disagrees.”
\textsuperscript{189.} Oral Argument, supra note 160 at 28:17.
\textsuperscript{190.} See \textit{Porter}, 882 N.E.2d at 899.
into his statutory interpretation analysis? Did those arguments persuade other justices? Short of interviewing each justice, there is no way to know.\textsuperscript{191}

My inability to prove that we won Mikaloff and Porter because we aligned with child protection interests does not mean that interest-convergence has no value as an advocacy tool. To the contrary, the benefit of incorporating interest-convergence theory into advocacy is evident from the \textit{Cincinnati Enquirer}'s coverage of residency restrictions. Given where the \textit{Enquirer} started after we filed our first residency restriction case (“[W]e believe the farther child sex offenders are kept away from children anywhere, the better”),\textsuperscript{192} and where it ended up the day after we won Porter (“Applying these laws retroactively is inhumane. Forcing an offender . . . to later uproot himself and move beyond an arbitrary boundary line . . . do[es] nothing to protect society”),\textsuperscript{193} I have no difficulty attributing the shift to OJPC's use of a public safety frame. The fact that the editorials repeated many of our talking points validates my point.\textsuperscript{194}

In sum, I cannot prove that we won Mikaloff and Porter because of interest convergence. But I believe strongly that our use of the strategy improved our chances of winning those cases. In reflecting on the value of the interest-convergence theory to advocates, I am reminded of some advice that James Klein, the Appellate Chief of the Public Defender Service for the District of Columbia, gave me as I prepared for oral argument in a case: “Don’t put yourself in the position of defending on the one-yard line. Reframe your argument.” In other words, opt for the easier argument over the more difficult one if there is a choice. Framing Coston as a case involving the violation of sex offenders’ constitutional rights was a very hard sell that made us defend from our one-yard line. Reframing Mikaloff and Porter as cases involving the state’s desire to enforce an ineffective statute that potentially put children in danger was a much easier argument to make.

As the discussion above concludes, interest-convergence theory can be useful to advocates seeking to win justice for marginalized cli-

\begin{itemize}
  \item \textsuperscript{191} I rejected the idea of interviewing the justices because I still practice and may one day appear before the Ohio Supreme Court again on a sex offender issue.
  \item \textsuperscript{192} Editorial, \textit{supra} note 60.
  \item \textsuperscript{194} Based on my research, the composition of the editorial board did not change during the first editorial on April 7, 2005, which supported residency restrictions, \textit{see supra} note 59, and the second editorial on February 20, 2006, which questioned their effectiveness, \textit{see supra} note 100.
\end{itemize}
ents. But do such strategies have a downside? The following discussion addresses that question.

C. Are There Downsides to Incorporating Interest-Convergence Theory into Advocacy Strategies?

In *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Professor Michelle Alexander advocates for a movement to end the War on Drugs and warns against tinkering with piecemeal criminal justice reforms.\(^\text{195}\) Such “[c]hallenges to the system,” she writes, “will be easily absorbed or deflected, and the accommodations made will serve primarily to legitimate the system, not undermine it. We run the risk of winning isolated battles but losing the larger war.”\(^\text{196}\)

Later in her book, Alexander poses the question, “So how should we go about building this movement to end mass incarceration?”\(^\text{197}\) To Alexander, such a movement must deal with mass incarceration as a racial caste system, not as a system of crime control,\(^\text{198}\) and advocates “must stop debating crime policy as though it were purely about crime,” and instead “talk about race openly and honestly,” even though doing so may be “uncomfortable.”\(^\text{199}\)

Reflecting on these passages made me examine more critically our advocacy on behalf of sex offenders and ask the following questions: Would it be possible to build a movement for people who bear the sex offender labels? If so, what would the goals of such a movement be? Does the public safety frame undercut any movement we would hope to build? Had we merely won isolated battles in *Mikaloff* and *Porter* while losing the larger war?

Regarding the need for movement building, our clients would likely articulate their goals as follows: (1) not to be written off forever based on their past conduct; (2) to be judged as an individual and not as a member of an outcast group; (3) to be treated fairly, humanely and with respect; and (4) to be given an opportunity to reintegrate successfully into the community.

Perhaps most people scoff at the idea of building such a movement, finding such an idea ludicrous in light of the conventional por-

\(^{195}\) ALEXANDER, supra note 30, at 236.

\(^{196}\) Id.

\(^{197}\) Id.

\(^{198}\) Id. at 236.

\(^{199}\) Id. at 238.
trait of sex offenders: repeat offenders who “lurk in areas such as playgrounds and schoolhouses preying on little children,” often kidnapping and killing them.\textsuperscript{200} However, that image is not the reality for most sex offenders. Many pose a low risk of recidivism.\textsuperscript{201} Most never reoffend at all.\textsuperscript{202} Some of their crimes are non-serious, such as when an eighteen-year-old Romeo who has consensual sex with a fourteen-year-old Juliet.\textsuperscript{203} In light of these truths, it is understandable why my clients would not want to be categorized as monsters beyond redemption.

So if the goal is to build a movement for the fair and humane treatment of people who are convicted of sex crimes, do we undermine it by using the public safety frame to address discrete burdens or instances of unfairness? Perhaps. The danger of the public safety frame is that it reinforces negative stereotypes of all sex offenders as dangerous individuals who pose a serious risk to community safety. While emphasizing the ineffectiveness and potential harmfulness of residency restrictions, the public safety frame ignores the humanity of people subject to these restrictions. Therefore, while the public safety frame may facilitate narrow victories in some cases, it may undercut prospects for more substantial reform.

With respect to OJPC’s residency restriction litigation, the Mikaloff and Porter victories were relatively narrow ones compared to the more transformative goal of having our clients be treated like human beings rather than dangerous pariahs who must always be monitored.\textsuperscript{204} Although the courts held in those cases that residency restrictions could not be applied retroactively, those statutes continue to be applied prospectively. Additionally, in 2007, the Ohio legislature amended the residency restriction to forbid sex offenders from living within 1,000 feet of preschools and daycares in addition to


\textsuperscript{202} See Hanson & Bussière, \textit{supra} note 201, at 357; Hanson & Morton-Bourgon, \textit{supra} note 201, at 1; Langan, \textit{supra} note 201, at 24.

\textsuperscript{203} See Wood, \textit{supra} note 200, at 386 (“[A] lot of juvenile offenders are labeled ‘sex offenders’ because of consensual acts performed with their girlfriends or boyfriends.”).

\textsuperscript{204} But these “narrow” victories were very important to our individual clients. Though beyond the scope of this Article, the difference between narrow and broad reform reflects the tension between an attorney that represents individual clients and a “cause lawyer.”
Kids, Cops, and Sex Offenders

The legislature continues to pass burdensome legislation against sex offenders because of their status as community outcasts. To the extent the legislature continues to do so, it will be in part because society sees sex offenders as deserving of our collective scorn.

But while using the public safety frame poses risks, it also creates opportunity: to open a dialogue with potential allies who care about public safety but not about sex offenders, and to use the dialogue to educate these potential allies about why it is wrong to paint all sex offenders with the same brush. The goal of such education would be to turn these public safety advocates into advocates for the fair and humane treatment of sex offenders.

Can the public safety frame actually be used in this way? Yes. This is precisely what happened as a result of our initial dialogue with the Cincinnati Enquirer. As discussed in Part I, the Enquirer was initially hostile to the Coston suit and voiced support for residency restrictions by declaring, “the farther child sex offenders are kept away from children anywhere, the better.” Over the course of the next two-and-a-half-years, the tone and substance of the editorials changed, progressing from a public safety frame (“Sex offender laws are fast becoming a national proving ground for the Law of Unintended Consequences”) to a human rights frame (“Applying [residency restriction] laws retroactively is inhumane”).

Of course, the Enquirer is just one newspaper, which by itself is unable to change the conversation about how society should respond to sexual offenders at a macro level. Moreover, having the paper weigh in on our side did not necessarily translate into tangible victories for us. To the contrary, the city of Cincinnati expanded the list of places near which a sex offender cannot live despite the Enquirer’s editorial condemnation of the proposed ordinance. But the fact that the Enquirer editorial board eventually used a human rights frame to argue against retroactive application of residency restrictions underscores the potential value of using public safety arguments as a step in building a movement to end the degrading treatment of sex offenders as a class.

205. See supra note 12.
207. See supra note 159
208. See supra note 104.
209. See supra note 192.
210. See Klepal, supra note 109.
In sum, we will continue to employ interest-convergence strategies—including use of the public safety frame—where doing so is consistent with our clients’ goals and objectives and where it improves the likelihood our clients will prevail on their claims.

III. TEACHING INTEREST-CONVERGENCE AS A TOOL FOR SOCIAL CHANGE

I teach a course called Complex Problem Solving for Lawyers. If the course had a subtitle, it would be: Using Interest-Convergence Theory to Effect Progressive Social Change.

The struggles OJPC faced while litigating Coston inspired me to create the course. Although law school did a fine job developing my legal analysis, research, writing and basic trial litigation skills, it fell short on equipping me with what I would eventually need to become a well-rounded and effective advocate for marginalized people. While knowing the law is helpful, it is only one tool in the social justice lawyer’s toolbox. There are a host of additional skills a social justice lawyer needs in order to maximize his or her impact, including how to frame media messages, build diverse coalitions, and lobby persuasively.

I give my students a hypothetical problem based on the Mikaloff and Porter cases.211 Throughout the semester, the students work collaboratively in small groups to develop legal and non-legal (media, coalition building and lobbying) strategies to halt enforcement of residency restrictions. The highlight of the class for the students—as well as for me—is when we screen the short videos the small groups produce to show why residency restrictions are ineffective and potentially harmful to children. While some of the videos are amateurish and ineffective, others are quite good and compelling.

The transformation in the students’ approach to problem solving during the semester is remarkable. At the beginning of the semester, I ask students what arguments they would make against enforcement of the residency restriction. Invariably, they make arguments about how the statute burdens their clients. But they do so half-heartedly and without conviction, many times explaining that the case is one they cannot win. However, as they read the various social science re-

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211. Syllabus and class materials on file with the author.
search and policy papers I assign, they begin to see the value of framing arguments in public safety terms, and they grow more confident and impassioned in their advocacy on behalf of their hypothetical clients.

At the end of each semester, I discuss OJPC’s campaign against residency restrictions and tell the students how I wish I had had a class in law school to teach me the non-legal skills we eventually used. I tell them that had I understood the benefit of using Professor Bell’s interest-convergence thesis as an advocacy tool, and how to apply the theory through thoughtful messaging and coalition building, we would have avoided the missteps we made in Coston, and would have been more effective advocates from the start.

CONCLUSION

As this Article goes to print, OJPC is using interest-convergence strategies on behalf of sex offenders—this time in Colorado. Colorado’s sex offense laws are among the most stringent in the country. Under the Colorado Sex Offender Lifetime Supervision of Sex Offenders Act of 1998 (“LSA” or the “Act”), most individuals who commit sex offenses face potential incarceration and supervision for the rest of their lives. Although sex offenders may be eligible for release after short periods of incarceration, the reality is much different. Inmates who have successfully completed all available sex offender treatment, passed their legislatively-intended parole date, and met all other requirements for release are not granted parole. These prisoners are held indefinitely because the LSA does not contain a presumption of release for sex offenders who meet parole eligibility requirements.

Additionally, there are substantial obstacles to entering and completing prison-based sex offender treatment, which is essentially a re-

212. These include the Minnesota and Colorado studies and the Iowa County Attorneys Association’s Statement on Sex Offender Residency Restrictions in Iowa. See supra notes 77, 78 and 93, respectively.
216. Id.
requirement for parole eligibility. Long waitlists, followed by ineffective, lengthy treatment programs, cause most LSA-inmates to remain incarcerated long past their legislatively-intended parole date.217

Furthermore, admission of guilt is required to access treatment in prison. Incarcerated offenders who deny guilt cannot enter treatment programs and are therefore ineligible for parole. Those few who are released to the community and who deny guilt during treatment are sent back to prison for violating the treatment conditions. The admission-of-guilt requirement is particularly problematic for inmates who are incarcerated for a non-sexual offense, but who are administratively-labeled as a sex offender and required to undergo treatment (and admit guilt).218

In sum, the reality of the LSA is that most sex offenders in Colorado have no meaningful hope of being released from prison and will remain incarcerated, at tax payer expense, even though many could be safely supervised in the community.

OJPC is using both public safety and financial cost to frame the problem and mobilize the public to support LSA reform. OJPC has already helped form the Colorado Sex Offense Information Coalition to promote evidence-based legislation and policies to reduce the risk of sexual offender recidivism. The Coalition includes diverse stakeholders representing victims, prosecution, law enforcement, treatment, and sex offender interests. The Coalition brings together community stakeholders to identify cohesive strategies to reduce victimization, advance effective rehabilitation, and create fair, safe communities.

Although it remains to be seen whether OJPC will achieve its goals in Colorado, its voice has already been reflected in a recently released audit of the Colorado Department of Corrections Sex Offender Treatment and Monitoring Program (“SOTMP”).219 With in-


219. See generally DEIRDRE D’ORAZIO, DAVID THORNTON, & ANTHONY BEECH, A PROGRAM EVALUATION OF IN-PRISON COMPONENTS: THE COLORADO DEPARTMENT OF CORRECTIONS SEX OFFENDER TREATMENT AND MONITORING PROGRAM (2013) (reviewing the
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put from OJPC on the LSA’s legislative framework, the audit revealed that SOTMP needs to improve its therapy framework and curb mismanagement of taxpayer dollars. The audit recommended that changes in the legislative system could significantly improve the efficacy of the program.\textsuperscript{220} It confirmed that most people are incarcerated well beyond their legislatively-intended sentence and may receive ineffective, unnecessarily-lengthy treatment.\textsuperscript{221}

Hopefully OJPC’s Colorado work, if successful, will inspire other advocates to employ interest-convergence strategies when advocating for marginalized people who lack political power.

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operation of the Colorado Department of Corrections Sex Offender Treatment and Management Program (“SOTMP”).

\textsuperscript{220} See id.
\textsuperscript{221} See id.
COMMENT

EPA’s Remedies for Federal Agency Compliance Under CERCLA: A Look at Judicial Enforcement

Trisha Grant

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INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601–9657 (1988), was enacted by Congress to address the most contaminated sites in the United States.1 Under CERCLA, the federal government is liable in the same manner and to the same extent as any non-governmental entity.2 Consequently, if the federal government engaged in activities that would make a private party liable, and the private party engaged in the types of activities warranting liability under CERCLA, then the federal government would also be liable under CERCLA.3 The Environmental Protection Agency (EPA) may enforce CERCLA by filing lawsuits against parties—who are called Potentially Responsible Parties (PRPs)—who may be responsible for the violation.4 However, ambiguity remains about whether the EPA may sue other units of the

1. See generally Rhodes v. Cnty. of Darlington, 833 F. Supp. 1163, 1175–76 (D.S.C. 1992) (stating that the key objective of CERLCA is to promptly cleanup hazardous dump sites by providing a means of financing governmental and private response and by placing the ultimate financial burden upon those responsible for the danger).
3. See § 9620(a)(1); FMC Corp., 29 F.3d at 840.
4. See Cooper Indus., Inc. v. Aviall Servs., 543 U.S. 157, 161 (2004) (“Under CERCLA... the Federal Government may clean up a contaminated area itself, [under] § 104, or it may compel responsible parties to perform the cleanup, under [§] 106(a)). EPA defines a potentially responsible party (PRP) as the following: “An individual or company (e.g., an owner, operator, transporter, or generator of hazardous waste) that is potentially responsible for the contamination problems at a Superfund site.” Glossary, EPA.gov (Aug. 9, 2011), http://www.epa.gov/superfund/programs/reforms/glossary.html#p. See infra Part II.F.
A Look at Judicial Enforcement

federal government.5 There are arguments and advantages, both for and against, such intragovernmental litigation.6 Accordingly, the focus of this Comment examines the ability of EPA to utilize litigation against fellow federal agencies and the feasibility of doing so.

Hanford Nuclear Reservation (Hanford) in southeastern Washington State is a major CERCLA hazardous waste site where the federal government is the PRP.7 Hanford is a 586-square mile site that was originally a 554-building laboratory campus, constructed by the military in the 1940s to aid the World War II nuclear arms race by manufacturing plutonium for nuclear bombs.8 Today, Hanford is an inactive military campus that contains contaminated buildings. Buried at the site are millions of gallons of nuclear, liquid waste and 75,000 barrels of solid radioactive waste.9 Exposure to this radioactive, hazardous waste can cause injury or death to a person, animal or plant.10 Long term exposure to hazardous waste is known to cause chronic health effects, such as cancer, liver failure, or slowed growth and development.11 Specifically, communities surrounding Hanford have experienced cancers, miscarriages, and other disorders in unusually high numbers.12

5. See, e.g., Melinda R. Kassen, Environmental Federalism: The Inadequacies of Congressional Attempts to Legislate Federal Facility Compliance with Environmental Requirements, 54 Md. L. Rev. 1475, 1484–85 (1995) (noting the skepticism expressed that EPA can regulate federal agencies as vigorously as it regulates private or local government polluters). See generally Michael Herz, United States v. United States: When Can the Federal Government Sue Itself?, 32 WM. & MARY L. REV. 893, 897 (1991) (stating how the dispute over intragovernmental litigation has recently been most active in regard to enforcement of the environmental laws against federal facilities).

6. See discussion infra Part IV.


8. See Hanford-Washington, supra note 7. Hanford is a remnant of the Manhattan Project, the Department of Energy’s effort during World War II to build the first nuclear bomb. See DEPT OF ENERGY, Manhattan Project, ENERGY.GOV, http://energy.gov/management/manhattan-project (last visited Sept. 16, 2013). The production of nuclear materials at Hanford led to the release of radioactive iodine into the region’s atmosphere, soil, and water. Citizens in the vicinity of Hanford continue to pursue lawsuits against the United States as their health risks include thyroid disease, among other unknown risks. See Pritikin v. Dep’t of Energy, 254 F.3d 791, 793 (9th Cir. 2001); Hanford Downwinders Coal., Inc. v. Dowdle, 71 F.3d 1469, 1471–72 (9th Cir. 1995).


11. See id.

Because of the dangers that exposure to radioactive, hazardous waste poses to people and the environment, Hanford must be cleaned up. Hanford’s first underground waste storage tanks were built in 1944 and were expected to last up to twenty years. Consequently, today, seventy underground tanks containing liquid nuclear waste are leaking. Radioactive waste in unknown quantities persistently crawls toward the Columbia River in central Washington State. There is no way to know the level of contamination, the extent of the contamination, or how much worse it may get before cleanup efforts are successfully completed.

The cleanup of Hanford does not come without high costs. The cleanup itself is one of the largest, ongoing hazardous waste projects in the United States as Hanford has been listed on EPA’s National Priorities List (NPL) since 1989. Workers involved in remediation efforts are battling serious, chronic illnesses from breathing in Hanford’s on-site toxic contaminants. Recently, the Department of En-

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14. See Harrison, supra note 9; The first tank leak was suspected in 1956, and then confirmed in 1959. See id. Hanford’s storage tanks were never designed to permanently store high-level radioactive waste. See Tank Waste, Hanford Challenge, http://www.hanfordchallenge.org/the-big-issues/tank-waste/ (last visited Sept. 16, 2013).
15. See Harrison, supra note 9.
16. See id. Additionally, residents had been unaware that the site had been emanating measurable radioactive material for nearly four decades, of which they are presently suffering the effects of long-term radiation exposure. See Grover Glenn Hankins, The Federal Tort Claims Act: A Smooth Stone for the Sling, 31 Gonz. L. Rev. 27, 28 (1996).
17. Contamination of the Columbia River especially concerns Washington State residents and local Native American tribes. See Hankins, supra note 16, at 34–35. In addition to groundwater contamination, which directly affects drinking water, millions of radioactive particles have been released into the air, “exposing more than 10,000 local residents to dangerous levels of radiation.” See id. at 31–32.
18. Hanford’s waste treatment plant is the world’s largest facility for vitrification, which is a treatment process for radioactive waste that converts liquid, radioactive waste into a stable glass form suitable for permanent, safe disposal. See Hanford Tour Information, Hanford, http://www5.hanford.gov/c.cfm/publicTours/ (last updated Sept. 10, 2013); see also The Hanford Story Tank Waste Cleanup, YouTube (Jan. 26, 2012), http://www.youtube.com/watch?v=na8qyYb5dg&feature=related (explaining how the Hanford waste is the focus of our nation’s largest environmental cleanup effort).
20. Heart of America Northwest, The Public’s Voice for Hanford Cleanup!, HOANW.ORG, http://www.hoanw.org/more/index.cfm?Fuseaction=more_47323 (last visited Sept. 16, 2013). The University of Washington Occupational and Environmental Medicine program once hosted a medical monitoring program specifically dedicated to monitoring worker’s health. Former Hanford Worker Medical Monitoring Program, U. Wash., http://depts.washington.edu/fmrwrk/links.htm (last visited Sept. 16, 2013). Hanford is also monitored by the Department of Health and Human Services under the Agency for Toxic Substances and Disease Registry (ATSDR), pursuant to 42 U.S.C. § 9604(i), which monitors sites posing the most significant potential threat to human health for known or suspected toxicity to humans and the potential for human expo-
ergy extended its contract to provide private company support services for the cleanup program for another three years—a contract valued at $950 million.21

CERCLA was designed to clean up the most egregiously-contaminated sites in the United States—such as Hanford.22 Under CERCLA, when EPA determines that an environmental cleanup is necessary at a contaminated site, the agency has four ameliorative options.23 First, EPA may negotiate a settlement with the PRPs responsible for the site's contamination.24 Another option for EPA is to conduct cleanup of the site itself using Superfund money25 and then, by filing suit, seek reimbursement from PRPs for the cleanup.26 The third option EPA has is to file an abatement action in a federal district


22. “CERCLA was enacted to ‘protect and preserve public health and the environment’ by facilitating the expeditious and efficient cleanup of hazardous waste sites.” Pritikin, 254 F.3d at 794–95. It establishes a procedure for the cleanup of hazardous waste sites and to whom cleanup costs should be allocated. See id.


24. See 42 U.S.C. § 9622 (2012); Gen. Elec. Co., 610 F.3d at 114. Settlement may be carried out by an administrative order/agreement or consent decree. See 42 U.S.C. § 9622(d)(1)(A); United States v. Drum Serv. Co., 109 F. Supp. 2d 1348, 1357 (M.D. Fla. 1999). Consent decrees bear some resemblance to judgments entered after litigation because they are arrived at through mutual agreement by the parties, closely resemble contracts, and noncompliance of a consent decree is subject to contempt of court. See Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland, 478 U.S. 501, 518–19 (1986). An Administrative Order is an administrative agency agreement and parties in violation may be subject to civil penalties; and the EPA may seek judicial enforcement. See Pharmacia Corp. v. Clayton Chem. Acq., 382 F. Supp. 2d 1079, 1086 (S.D. Ill. 2005). Administrative Orders on Consent (AOCs) are legal documents that do not require court approval “that formalize an agreement between EPA and one or more PRPs to address some or all of the parties’ responsibility for a site.” See Negotiating Superfund Settlements, EPA, http://www2.epa.gov/enforcement/negotiating-superfund-settlements (last updated June 18, 2013). “Administrative Agreements are legal documents that formalize an agreement between EPA and one or more PRPs to reimburse EPA for costs already incurred (cost recovery) or for costs to be incurred (cashout) at a Superfund site.” Id. Agreements with federal agencies are termed Interagency Agreements or Federal Facilities Agreements. See 40 C.F.R. § 35.6550(a)(9)(i) (2008); BRUCE M. DIAMOND, EPA, FEDERAL FACILITIES HAZARDOUS WASTE COMPLIANCE MANUAL (1990), available at 1990 WL 608666, at *6 (Jan. 9, 1990); Federal Facilities Cleanup Enforcement, EPA, http://www.epa.gov/compliance/federalfacilities/enforcement/cleanup/ (last updated Feb. 6, 2013); Hanford History, PHYSICIANS FOR SOCIAL RESPONSIBILITY, http://www.psr.org/chapters/washington/hanford/hanford-history.html (last visited Sept. 16, 2013).

25. See discussion infra Part II.C.

court against a PRP. EPA’s final option is to issue a Unilateral Administrative Order (UAO) that instructs the PRP to clean up the contaminated site. Remedies are nonexclusive—a variety, either in unison or separately, may be the solution for a particular site and group of PRPs.

For Hanford, EPA is utilizing a voluntary interagency settlement agreement. Accordingly, the overall cleanup of Hanford is a joint effort by the Department of Energy (DOE), the EPA, and the Washington Department of Ecology. However, this tri-party agreement did not manifest itself until 1989, after concerned citizens uncovered (formerly) top-secret military records about Hanford using the Freedom of Information Act. The veil of secrecy accompanying the site and work conducted there, along with the DOE’s failure to maintain the strict oversight required by law, resulted in safety and environmental concerns being ignored until concerned citizens got involved.

With CERCLA firmly in place by 1986, it has been argued that EPA may use litigation to compel federal agencies to clean up contaminated sites in order to speed up the cleanup process. EPA has discretion to use a variety of enforcement tools. For some egregiously contaminated sites, the best enforcement tool may be litigation—even if it is against another federal agency; however, given the cost, time, resources, and complexity involved with litigation, EPA’s best option for these situations may be to use agreements, such as the one utilized to clean up the Hanford site.

This Comment discusses the feasibility of EPA utilizing litigation to enforce CERCLA against fellow government agencies. Part I will discuss litigation within the federal government. Part II will explore the history of CERCLA and its key provisions. Part III will focus on theories and exemplary case law that demonstrate why federal agen-

29. See United States v. Ottati & Goss, Inc., 900 F.2d 429, 433 (1st Cir. 1990) (acknowledging that EPA has pursued a combination of courses of action for enforcing CERCLA, including reimbursement provided by § 9607 and injunctive relief provided by § 9606(a)).
31. See Harrison, supra note 9.
32. See DIAMOND, supra note 24, at *12; Hanford History, supra note 24.
33. See Hanford History, supra note 24.
cies may not litigate against each other. Part IV will explore whether Congress intended CERCLA to authorize intra-governmental litigation by examining CERCLA section 120’s legislative history. Part IV will also discuss EPA’s views on the matter by analyzing public comments to regulations promulgated in connection with CERCLA section 120. Part V will conclude this Comment and present the feasibility and practicality of EPA utilizing its litigation enforcement option against other federal agencies.

I. FEDERAL LITIGATION

A. Structure of Federal Litigation

When an agency of the federal government is involved in litigation, in general, the Department of Justice (DOJ) is the appropriate federal agency to handle the suit. Each agency may have its own in-house counsel, but DOJ works with, and represents, that agency until the suit is resolved. DOJ’s “clients” are therefore fellow federal agencies. Specifically, environmental lawsuits fall under the DOJ’s Environment & Natural Resources Division (ENRD). ENRD is structured to handle both defensive and affirmative litigation by containing both an environmental defense section and an environmental enforcement section.

For environmental defense, the Environmental Defense Section (EDS) of ENRD is tasked with defending the United States against civil litigation arising under environmental statutes. Such lawsuits include defending the EPA against challenges to its rulemaking power and defending federal agencies against claims that they are in viola-

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35. See id.
36. Unique to this structure is that some agencies have their own separate legal departments that are independent of DOJ jurisdiction, such as the Tennessee Valley Authority (TVA). See About TVA, TENNESSEE VALLEY AUTHORITY, http://www.tva.com/abouttva/index.htm (last visited Sept. 12, 2013); see also N.C. ex rel. Cooper v. Tenn. Valley Auth., 515 F.3d 344, 349, 355 n.3 (4th Cir. 2008) (discussing how a lawsuit against TVA is an independent governmental agency and so is not a lawsuit against the United States or subject to the direct executive control of the Executive Branch).
tion of pollution control statutes.\textsuperscript{39} For CERCLA, EDS defends agencies against claims for contribution and damages.\textsuperscript{40}

The federal government also initiates suits to enforce environmental statutes. On the affirmative litigation side is ENRD’s Environmental Enforcement Section (EES).\textsuperscript{41} EES initiates civil judicial actions under federal environmental laws, such as the Clean Air Act, Clean Water Act, Safe Drinking Water Act, Oil Pollution Act, Resource Conservation and Recovery Act (RCRA), and CERCLA.\textsuperscript{42} However, before any litigation moves forward, ENRD’s Assistant Attorney General must approve the action.\textsuperscript{43}

B. Conflict of Interest Concerns

Because both EES and EDS are within the same governmental agency—the ENRD of DOJ—the issue with a federal agency initiating suit against another federal agency is whether there would be a conflict of interest. A conflict of interest is defined by the American Bar Association in Rule 1.7 (Conflict of Interest: Current Clients), which states that a lawyer may not represent two opposing clients.\textsuperscript{44} Likewise, it would follow that DOJ could not represent two opposing federal agencies because the representation would be a conflict of interest. However, DOJ is currently representing the United States government on both sides in current CERCLA litigation surrounding Fox River.\textsuperscript{45} In the past, DOJ has also represented both sides in a

\textsuperscript{39} See id.
\textsuperscript{40} See id.
\textsuperscript{42} See id.
\textsuperscript{43} See Cruden, supra note 37, at 66; see also Exec. Order No. 12146, Management of Federal Legal Resources, 44 Fed. Reg. 42657, 42658 (July 18, 1979) (“Whenever two or more Executive agencies whose heads serve at the pleasure of the President are unable to resolve such a legal dispute, the agencies shall submit the dispute to the Attorney General prior to proceeding in any court, except where there is specific statutory vesting of responsibility for a resolution elsewhere”).
\textsuperscript{44} Model Rules of Prof'L Conduct R. 1.7 (1983), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_7_conflict_of_interest_current_clients.html (last visited Sept. 12, 2013) (“Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client . . . .”).
CERCLA remediation effort with the Department of the Army,\textsuperscript{46} despite the court’s concern that the public interest was not being served by the dual representation.\textsuperscript{47} Additionally, there have been several lawsuits involving intra-governmental agencies on opposing sides, including the Interstate Commerce Commission (ICC), Federal Maritime Commission (FMC), Federal Labor Relations Authority (FLRA), Federal Energy Regulatory Commission (FERC), former Federal Maritime Board (FMB),\textsuperscript{48} and Federal Power Commission.\textsuperscript{49}

In conclusion, the federal government is equipped to handle both the defense and the prosecution when it comes to environmental violations under CERCLA. Additionally, although a conflict of interest is a genuine concern, it appears that it does not foreclose intra-governmental, federal litigation.

II. ABOUT CERCLA AND ITS HISTORY

A. CERCLA

CERCLA was made law in 1980.\textsuperscript{50} It was largely a result of a compromise between three major hazardous waste response bills that were enacted as a response to Love Canal.\textsuperscript{51} Love Canal was a toxic waste catastrophe that brought national attention to the need to

\textsuperscript{46} See Colo. v. U.S. Dep’t. of the Army, 707 F. Supp. 1562, 1570 (D. Colo. 1989). The case represented two (consolidated) actions directed at cleanup of the Army’s Arsenal as a whole, which were filed under CERCLA. Id. at 1564. Department of Justice attorneys repeatedly claimed to represent both the Army and the EPA, without a conflict of interest, even though the Army was the defendant and the EPA was the plaintiff on behalf of the United States. Id. at 1570.

\textsuperscript{47} See Colo. 707 F. Supp. at 1570.


\textsuperscript{49} See infra Part III.C.


\textsuperscript{51} See id. Love Canal is a 16-acre landfill site near Niagara Falls, NY. See United States v. Hooker Chemicals & Plastics Corp., 123 F.R.D. 3, 4 (W.D.N.Y. 1988). From 1942-1953, the Occidental Chemical Corporation (OCC) dumped over 21,000 tons of industrially produced chemical waste. See id. The area surrounding the site became an increasingly residential area between the 1960 and 1970s, and by 1976 an estimated “1,000 families lived within approximately 1,500 feet of the site.” Id. “During the 1970’s, several different hazardous substances were detected in the surface water, groundwater, soil, sewers, creeks, basements of homes, and other locations in the area surrounding the site.” Id. “On August 2, 1978, then New York State Commissioner of Health Dr. Robert P. Whalen declared the existence of a public health emergency at Love Canal, and his successor Dr. David Axelrod continued that emergency in an order dated February 8, 1979.” Id. On May 21, 1980, President Jimmy Carter declared a national emergency at Love Canal. See id.
clean up hazardous waste sites in order to protect the public health.\(^{52}\) Unfortunately, the rush to draft a statute to handle hazardous waste cleanup led to a version of CERCLA that was criticized as lacking clarity and precision.\(^{53}\) The statute was frequently criticized for its inartful drafting, numerous ambiguities, and inadequately defined terms.\(^{54}\) Six years later, Congress amended CERCLA by enacting the Superfund Amendments and Reauthorization Act (SARA)\(^{55}\) to define terms and clarify issues not addressed in the 1980 CERCLA legislation.\(^{56}\) One such issue that was supposed to be clarified with the amendment was the federal government’s liability for cleaning up its facilities.\(^{57}\)

B. SARA and Federal Government Liability

The SARA Committee reports suggest that federal agencies needed to clean up their contaminated sites.\(^{58}\) The clearest understanding of how the SARA amendments were to address federal agency compliance was outlined in the SARA Conference Report from the October 3, 1986’s Proceedings and Debates of the 99th Congress, Second Session.\(^{59}\) Specifically, EPA needed to identify and assess compliance by federal agencies.\(^{60}\) This need stemmed from hazardous wastes at the Department of Defense (DoD)’s former military installations,\(^{61}\) which EPA and DoD had addressed through a

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\(^{52}\) The OCC transferred its chemical landfill site to the City of Niagara Falls for $1. Major Stuart W. Risch, The National Environmental Committee: A Proposal to Relieve Regulatory Gridlock at Federal Facility Superfund Sites, 151 MIL. L. REV. 1, 104 n.100 (1996) (“The city covered over the dump and constructed houses and a school on top of this morass of deadly chemicals. In 1976, heavy rains forced the chemicals to surface and seep into the water supply, posing serious risks to all of the residents. Reports surfaced that children and animals were burned while playing close to their homes, and that “[r]ocks striking the sidewalk sent off colored sparks.”) (citing Roger C. Dower, Hazardous Wastes, in POLICIES FOR ENVIRONMENTAL PROTECTION 151, 168 (R. Portney ed. 1990)) (alteration in original).

\(^{53}\) See Rhodes, 833 F. Supp. at 1174.

\(^{54}\) See id.


\(^{56}\) See Rhodes, 833 F. Supp. at 1174.


\(^{58}\) “According to [the] September 1984 General Accounting Office report, there [were at] least 340 potential Federal hazardous waste sites. EPA regional offices had no knowledge of actions taken at these Federal facilities. In addition, the [DoD] had identified 473 bases with potential hazardous waste sites. These site may be some of the worst contaminated sites in the U.S.” H.R. REP. NO. 99-253, at 58 (1985).

\(^{59}\) See generally 132 CONG. REC. S14895-02 (detailing the need for the EPA to ensure government compliance).

\(^{60}\) Id.

Memorandum of Understanding. The sentiment from the congres-
sional report was that EPA and DOJ dealt with the federal facility
cleanup program too slowly and did not aggressively pursue enforce-
ment. Consequently, Congress expanded CERCLA section 107(g)
from its original form—concerning how EPA was to deal with federal
agencies whose facilities were not in compliance—and made it a more
comprehensive section. In the expanded version, re-designated sec-
tion 120, Congress specifically laid out the procedures for EPA to
bring federal facilities into compliance with CERCLA. Accordingly,
CERCLA section 120(a)(1) provides that:

Each department, agency, and instrumentality of the United States
(including the executive, legislative, and judicial branches of gov-
ernment) shall be subject to, and comply with, this chapter in the
same manner and to the same extent, both procedurally and substan-
tively, as any nongovernmental entity, including liability under sec-
tion 9607 of this title. Nothing in this section shall be construed to
affect the liability of any person or entity under sections 9606 and
9607 of this title.

CERCLA section 120 addresses the previous statute’s shortcom-
ings for federal facilities’ compliance in three fundamental ways. First, it makes clear that EPA has final and absolute authority over all
federal agencies to ensure that cleanup efforts are both adequate and
consistent with its private sector counterparts. The second and third
key areas allow for the assessment of all federal hazardous waste sites
in the same manner as privately owned or operated facilities, specifi-
cally by creating an inventory, and including such facilities on the Na-
tional Priorities List, as well as creating a timetable and schedule of
cleanup goals. Accordingly, the overarching goal was to speed up the
cleanup efforts for federal agencies’ facilities that were not in com-
pliance by specifically laying out how the CERCLA process applied.

comm. of the Comm. on Gov’t Operations, 98th Cong. 117–18 (1983) (statement of Lee M.
Thomas, Assistant Adm’r, Solid Waste & Emergency Response).
63. 132 CONG. REC. S14895-02.
64. See 42 U.S.C. § 9607(g) (2012); Carson Harbor Vill. v. Cnty. of L.A., 433 F.3d 1260, 1265
(9th Cir. 2006).
65. See 42 U.S.C. § 9607(g); Carson Harbor Vill., 433 F.3d at 1265.
66. 42 U.S.C. § 9620(a)(1) (2012) (emphasis added); see Menasha Corp. v. DOJ, 707 F.3d
846, 852 (7th Cir. 2013) (emphasis added).
67. See 132 CONG. REC. S14895-02 (1986).
68. See id.
69. See id.
70. See 131 CONG. REC. S11563-02 (daily ed. Sept. 17, 1985).
Overall, the EPA “should exercise authority where necessary.” However, it is not clear if the statute allows EPA to initiate full scale litigation against federal government PRPs, like the agency may do for private parties, simply because the SARA amendments re-designated federal facility liability, which was one sentence, from section 107(g) to a more comprehensive section 120. Therefore, there is continuous debate over whether this statutory provision authorizes EPA to sue other agencies as it may do with private parties.

C. CERCLA’s Superfund

CERCLA is designed to speed up the cleanup of contaminated waste sites in order to protect the public health and welfare. CERCLA states that EPA itself may initiate cleanup. EPA has funds to clean up hazardous waste sites through the Hazardous Substances Trust Fund, which is commonly referred to as the “Superfund.” Originally established as a trust, the money to fund Superfund came from an excise tax on petroleum, petroleum byproducts, and other chemicals. EPA is authorized to use Superfund to pay any costs for cleanup.


72. In 1990, Congressman Charles Luken asserted that the “DOJ refuses to let EPA sue other Federal agencies, thwarting the fundamental intent of environmental laws, including CERCLA, that Federal agencies be treated the same as other polluters.” 136 CONG. REC. H13513-02 (daily ed. Oct. 24, 1990). See generally Michael W. Steinberg, Can EPA Sue Other Federal Agencies?, 17 ECOLOGY L.Q. 317, 325 (1990) (noting the argument that judicial resolution of an intra-branch dispute is not appropriate because such disputes do not satisfy the Article III case or controversy requirement).

73. See Basic Information, EPA, http://www.epa.gov/superfund/about.htm (last updated Sept. 11, 2013); see also CERCLA Overview, EPA, http://www.epa.gov/superfund/policy/cercla.htm (last updated Sept. 11, 2013). Prior to the passage of CERCLA, contaminated land or non-navigable waters were addressed by common law causes of action—such as nuisance, trespass and strict liability for ultra-hazardous activities. See Martha L. Judy & Katherine N. Probst, Superfund at 30, 11 V. J. ENVTL. L. 191, 192 (2009); see also Atl. Research Corp. v. United States, 459 F.3d 827, 830 (8th Cir. 2006), aff’d, 551 U.S. 128 (2007) (describing CERCLA as Congress’s monumental attempt to encourage the timely cleanup of hazardous waste sites and recover costs, under strict liability, of the cleanup from responsible parties).

74. See Basic Information, supra note 73; see also CERCLA Overview, supra note 73. The remedial purpose of CERCLA is to provide for the prompt and efficient cleanup of hazardous waste sites. See Mobay Corp. v. Allied-Signal, Inc., 761 F. Supp. 345, 354 (D.N.J. 1991). These purposes are achieved in that CERCLA has transformed to centuries of real property and tort liability law by making those who contaminate a site strictly liable for the costs of subsequent cleanup by others. See also Atl. Research Corp., 459 F.3d at 830.


76. See Rhodes, 833 F. Supp. at 1176 (citing 42 U.S.C. §§ 9631–9641 (1986)); see also Basic Information, supra note 73.
the removal or remediation of hazardous sites, pursuant to 42 U.S.C. § 9604; finance the National Contingency Plan (NCP), pursuant to 42 U.S.C. § 9605; and pay claims from other parties’ removal or remediation actions, pursuant to 42 U.S.C. § 9612. Claims for compensation may be from private parties, state government agencies, or federal government agencies.

D. CERCLA’s National Contingency Plan and the National Priorities List

The NCP is the guideline for how EPA is to proceed in responding to releases and threatened releases of hazardous substances, pollutants, or contaminants from contaminated sites. The NCP’s purpose is to provide the organizational structure and procedures for preparing for and responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants. The NCP must include methods for discovering and investigating facilities, evaluating andremedying releases or threats, and ensuring that remedial actions are cost-effective. The NCP specifies requirements for the two types of response actions at CERCLA sites: “removal” and “remediation.” The NCP also requires that EPA create the National Priorities List (NPL), a compilation of waste facilities that are in most need of cleanup. The NPL identifies sites warranting further action under CERCLA, and only these sites are eligible to receive money from Superfund.

77. See 42 U.S.C. § 9611; Rhodes, 833 F. Supp. at 1176.
78. See Rhodes, 833 F. Supp. at 1176; see also Fireman’s Fund Ins. Co. v. City of Lodi, 302 F.3d 928, 943 (9th Cir. 2002) (describing the right of federal, state, or local governments to initiate abatement actions).
79. See CERCLA Overview, supra note 73; see also Judy & Probst, supra note 73, at 194 (describing how the National Oil and Hazardous Substances Pollution Contingency Plan, also known as the “National Contingency Plan,” guides EPA actions under CERCLA).
80. See 40 C.F.R. § 300.1 (2013); Rhodes, 833 F. Supp. at 1176.
81. See Morrison Enters. v. McShares, Inc., 302 F.3d 1127, 1136 (10th Cir. 2002) (describing how the NCP is a long and detailed list of procedures that must be carried out by parties when they are responding to hazardous waste releases); see also Artesian Water Co. v. Govt. of New Castle Cnty., 659 F. Supp. 1269, 1291 (D. Del. 1987), aff’d, 851 F.2d 643 (3d Cir. 1988) (detailing how the legislative history of CERCLA indicates that the NCP was regarded as a means of assuring that response actions would be both cost-effective and environmentally sound).
82. See 40 C.F.R. § 300.5 (2013). Removal is generally characterized as a short-term response that reduces the immediate threat from the release to human health and environment, whereas remediation is a response action intended to permanently reduce or eliminate the threat from the release. See Morrison Enters., 302 F.3d at 1136.
E. CERCLA’s Enforcement Provisions

EPA has several enforcement options. In addition to settlement and cooperative agreements, EPA may seek judicial action, as CERCLA authorizes this action when a substantial, immediate threat or threatened release of hazardous materials poses a danger to public health or the environment.\(^{85}\) EPA may file suit to seek reimbursement for its cleanup costs from PRPs,\(^{86}\) or for contribution.\(^{87}\) This cost sharing and reimbursement scheme stems from the rationale that the “polluter pays.”\(^{88}\) Alternatively, EPA may file an abatement action, seeking an injunction order in a federal court, with fines as a penalty for noncompliance.\(^{89}\) Another option is that EPA may issue a Unilateral Administrative Order (UAO), directing parties to clean up hazardous waste for which they are responsible.\(^{90}\) If parties refuse to comply, EPA may file suit in federal court to compel compliance.\(^{91}\) Lastly, EPA may negotiate a settlement with PRPs.\(^{92}\)

When EPA enters into an agreement with a PRP for remedial action, it may be in the form of a Consent Decree that is approved by the Attorney General and filed with a United States district court.\(^{93}\)

\(^{85}\) See 42 U.S.C. § 9606 (2012); see Rhodes, 833 F. Supp. at 1176.


\(^{87}\) 42 U.S.C. § 9607(a); see Rhodes, 833 F. Supp. at 1176; (D.S.C. 1992); see also Fireman’s Fund Ins. Co. v. City of Lodi, 302 F.3d 928, 945 (9th Cir. 2002) (describing how CERCLA § 113(f) explicitly recognizes a claim for contribution).

\(^{88}\) These purposes are achieved in that CERCLA has transformed centuries of real property and tort liability law by making those who contaminate a site strictly liable for the costs of subsequent cleanup by others. See Atl. Research Corp. v. United States, 459 F.3d at 827, 830 (8th Cir. 2006) aff’d, 551 U.S. 128 (2007).

\(^{89}\) See Gen. Elec. Co., 610 F.3d at 113. The EPA can petition the district court for an injunction to coerce responsible parties to clean up any site that presents an imminent threat to the general welfare or the environment. See 42 U.S.C. § 9606(a); Rhodes, 833 F. Supp. at 1176.

\(^{90}\) See Gen. Elec. Co., 610 F.3d at 114.

\(^{91}\) See 42 U.S.C. § 9622 (2012); Menasha Corp. v. DOJ, 707 F.3d 846, 848 (7th Cir. 2013).

\(^{92}\) See 42 U.S.C. § 9622; Menasha Corp., 707 F.3d at 848. Consent decrees, which bear some resemblance to judgments entered after litigation, are arrived at through mutual agreement of the parties and closely resemble contracts; noncompliance with a consent decree is enforceable by citation for contempt of court. See Local No. 93, Int’l. Ass’n of Firefighters v. City of Cleveland, 478 U.S. 501, 518–19 (1986).
Alternatively, settlement may be carried out by an administrative order. An Administrative Order is an administrative, agency agreement. Administrative Orders on Consent (AOCs) are legal documents that do not require court approval and formalize an agreement between EPA and one or more PRPs to address some or all of the parties' responsibilities for a site. Alternatively, EPA may negotiate an administrative agreement. Administrative Agreements also do not require court approval and are legal documents that formalize an agreement between EPA and one or more PRPs to reimburse EPA for costs already incurred (cost recovery) or for costs to be incurred (cash-out) at a Superfund site.

F. Potentially Responsible Parties (PRPs)

CERCLA section 107 defines who may be held responsible for the cleanup of a contaminated site. Specifically, PRPs are persons who own or operate a facility causing the contamination, own or operate a facility at which hazardous waste was disposed of, and whoever arranges and accepts transportation for disposal of hazardous waste—or “owners,” “operators,” “arrangers” and “transporters.” There is no exception for government agencies that, like private corporations, may be found liable under any type.

CERCLA is set up so that EPA does not have to first identify a PRP, giving EPA discretion to choose which PRPs it will pursue and

95. See Pharmacia Corp. v. Clayton Chem. Acq., 382 F. Supp. 2d 1079, 1086 (S.D. Ill. 2005). Additionally, parties in violation may be subject to civil penalties, and the EPA may subsequently seek judicial enforcement. See id.
96. See Negotiating Superfund Settlements, supra note 24.
97. See id.
98. See id. Agreements with federal agencies are termed Interagency Agreements or Federal Facilities Agreements. See Cooperative Agreements and Superfund State Contracts for Superfund Response Actions, 55 Fed. Reg. 22994-01, 23020 (June 5, 1990) (to be codified at 40 C.F.R. pt. 35); DIAMOND, supra note 24, at *1; Federal Facilities Cleanup Enforcement, supra note 24; Hanford History, supra note 24.
100. See 42 U.S.C. § 9607(a)(1)-(4); Carson Harbor Vill., 433 F.3d at 1265; see also Steven G. Davison, Governmental Liability Under CERCLA, 25 B.C. ENVTL. AFF. L. REV. 75, 75–82 (1997) (describing how the types of liability under CERCLA include the current or former owner of the contaminated facility or waste site (“owner” liability), the current or former operator (“operator” liability), the person who arranged for the disposal of hazardous substances at the contaminated facility or waste site (“arranger”), and the persons who transported the hazardous substance to contaminated facility or waste site (“transporter”).
101. Liability also includes the government and its regulatory activities. See FMC Corp. v. U.S. Dep’t of Commerce, 29 F.3d 833 (3d Cir. 1994) (en banc); Davison, supra note 100, at 840.
by which method of enforcement.102 Any PRP, or all PRPs, may be held responsible for the cleanup of the hazardous waste or for financial reimbursement to EPA because EPA has discretion to select which PRPs to pursue to recover for its response costs.103 Furthermore, EPA has authority to pursue joint and several liability against parties.104

In conclusion, there appears to be no direct statutory barrier to intra-governmental suit. In general, section 107 and section 120 address who may be found liable for the hazardous waste at a contaminated site.105 Because this liability includes federal agencies, and because EPA has discretionary authority to pursue PRPs, there appears to be no statutory barrier to EPA using any enforcement tool against any federal agency.106

102. See 42 U.S.C. § 9604(b)(1) (2012); United States v. Sensient Colors, Inc., No. 07–1275, 2009 WL 394317, at *9 (D.N.J. Feb. 13, 2009) (explaining that 40 C.F.R. § 300.415(a)(2) provides that the EPA does not have a nondiscretionary duty to notify all responsible parties of its activities). EPA’s duty to determine whether responsible parties will perform the necessary removal action is discretionary. See 40 C.F.R. § 300.400(i)(3) (2010); see also Quarles v. United States ex rel. Bureau of Indian Affairs, No. 00–913, 2005 WL 2789211, at *13 (N.D. Okla. Sept. 28, 2005) (explaining that 40 C.F.R. § 300.400(i)(3) provides that the government’s duty was nondiscretionary).


104. See 42 U.S.C. § 9607(a)(4)(B) (2012). Additionally, any PRP that EPA pursued may in turn seek contribution from other responsible parties. See 42 U.S.C. § 9622(h) (2012); see, e.g., United States v. Atl. Research Corp., 551 U.S. 128, 131 (2007) (holding that § 107(a) provides potentially responsible parties under the liability schemes of 42 U.S.C. §§ 9607(a)(1)–(4) with a cause of action to recover costs from other potentially responsible parties); Kramer, 757 F. Supp. at 434 (describing how the burden is on EPA’s named PRPs to then name other PRPs as defendants in contribution actions).

105. See 42 U.S.C. § 9607; Carson Harbor Vill., 433 F.3d at 1265; see also discussion infra Part II.B.

106. See 40 C.F.R. § 300.400(i)(3) (“This subpart does not create in any private party a right to federal response or enforcement action.”); United States v. E.I. Dupont De Nemours & Co., 432 F.3d 161, 164–66 (3d Cir. 2008) (describing how the NCP specifically states that the EPA’s duty to determine whether responsible parties will perform the necessary removal action is discretionary); Quarles, 2005 WL 2789211, at *13 (finding government’s duty was not nondiscretionary based, in part, on the language in 40 C.F.R. § 300.400(i)(3)). Liability also includes the government and its regulatory activities. See FMC Corp., 29 F.3d at 840; Davison, supra note 100, at 75.
III. THEORIES–SOVEREIGN IMMUNITY AND JUSTICIABILITY

A. Waiver of Sovereign Immunity—The U.S. as a Defendant

Sovereign immunity prohibits lawsuits against the federal government.107 The United States may serve as a defendant, but only if the United States waives its sovereign immunity.108 When sovereign immunity has been waived and the U.S. is a litigant, it is treated like any private individual.109 The waiver of sovereign immunity must be explicit.110 Therefore, if CERCLA has waived sovereign immunity for federal government agencies, the statutory language must expressly allow it.

Courts have already recognized that CERCLA waives the federal government’s sovereign immunity.111 First, the term “person”112 under CERCLA section 101(21) includes the United States.113 Courts have recognized this language as being virtually identical to other federal statutes that have waived sovereign immunity.114 Second, the language in section 120(a)115 has been interpreted as an “unequivocal expression” that the federal government is waiving its own sovereign immunity.116 Courts have concluded that there can be no other plau-

109. See In re Attty. Gen. of U.S., 596 F.2d 58, 62 (2d Cir. 1979) (citing Bank Line, Ltd. v. United States, 163 F.2d 133, 138 (2d Cir. 1947) (Hand, J.) (stating that it has been the policy of the American courts to treat the government, when appearing as a litigant, like any private individual).
110. See United States v. Shell Oil Co., 294 F.3d 1045, 1051 (9th Cir. 2002).
111. See generally id. (affirming the district court’s holding that CERCLA section 120(a)(1) waives sovereign immunity of the United States).
113. See 42 U.S.C. § 9601(21) (2012); see also United States v. Union Gas Co., 792 F.2d 372, 379 (3d Cir. 1986) (stating that the United States is included in the definition of person in 42 U.S.C. § 9601(21)).
115. Section 120(a)(1) of CERCLA, as set forth in 42 U.S.C. § 9620(a)(1), provides that: “Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.”
116. See Union Gas Co., 491 U.S. at 10 (quoting United States v. Testan, 424 U.S. 392, 399 (1976) and stating that there could not be any other plausible explanation for the language in the
sible explanation for the language in both section 101(21) and 120(a) other than that Congress intended to waive sovereign immunity.\textsuperscript{117} Therefore, through CERCLA section 120 and section 101(21)’s definition of a “person,” courts have agreed that CERCLA clearly waives sovereign immunity for the federal government.\textsuperscript{118} The recognized exception for the federal government is that a federal agency is exempt from a State’s civil penalties.\textsuperscript{119}

The waiver of sovereign immunity for federal agencies applies to all four types of general liability—“owners,” “operators,” “arrangers,” and “transporters.”\textsuperscript{120} The federal government can also be found liable under CERCLA for its role in regulatory action. For example, in \textit{FMC Corp. v. United States Dep’t of Commerce}, a private corporation alleged that the United States should be found liable under CERCLA for the War Control Board’s actions as the “operator” of a facility where hazardous substances had been released.\textsuperscript{121} The court found that Congress’s intent for CERCLA was that “those who planted their polluted seed should pay for the fruit they bear.”\textsuperscript{122} Accordingly, the court considered both the government’s regulatory and non-regulatory activities with respect to the facility during the war and determined that, in total, the government’s activities were of the type commonly associated with being an operator or arranger under CERCLA.\textsuperscript{123} This case solidified government liability, even from a regulatory role.\textsuperscript{124}

\textsuperscript{117} See \textit{Union Gas Co.}, 491 U.S. at 10; see also \textit{Shell Oil Co.}, 294 F.3d at 1062 (upholding the district court’s determination that 42 U.S.C. § 9620(a)(1) waived the sovereign immunity of the United States under CERCLA).

\textsuperscript{118} See \textit{Union Gas Co.}, 491 U.S. at 10; see also \textit{Shell Oil Co.}, 294 F.3d at 1062 (affirming the district court’s ruling that CERCLA section 120(a)(1) waives sovereign immunity of the United States).

\textsuperscript{119} See \textit{Maine v. Dep’t of Navy}, 973 F.2d 1007, 1011 (1st Cir. 1992); see also \textit{Abate & Cogswell}, supra note 107, at 21 (surveying circuit courts for their holdings in regard to waiver of sovereign immunity and discussing how the First Circuit held that CERCLA’s federal facilities section does not waive sovereign immunity with respect to civil penalties).

\textsuperscript{120} See \textit{Union Gas Co.}, 491 U.S. at 1. The waiver of sovereign immunity is coextensive with the scope of liability under 42 U.S.C. § 9607, but the United States is liable under that section only when it qualifies as an owner or operator of a facility, an arranger of waste disposal, or an entity that accepts waste for treatment or disposal. See \textit{Shell Oil Co.}, 294 F.3d at 1053.

\textsuperscript{121} See \textit{FMC Corp. v. U.S. Dep’t of Commerce}, 29 F.3d 833, 842 (3d Cir. 1994) (en banc).


\textsuperscript{123} See \textit{FMC Corp.}, 29 F.3d at 842.

\textsuperscript{124} See id.
B. Justiciability: The Unitary Executive and the “Case or Controversy” Requirement

Federal courts have jurisdiction over cases arising from the laws of the United States.\(^{125}\) CERCLA is a federal law.\(^{126}\) Therefore, any CERCLA suits against the federal government are under the jurisdiction of federal courts. However, federal courts’ judicial power is limited to an actual “case or controversy.”\(^{127}\) A “case” or “controversy” requires that the courts have jurisdiction, can provide a remedy, or judicial determination, and that the parties have sufficiently adverse legal interests.\(^{128}\) The Supreme Court has affirmed that there is a time-honored concern about keeping the Judiciary’s power within this proper constitutional sphere.\(^{129}\) Accordingly, judicial resolution of CERCLA intra-executive branch disputes must also meet the “case” or “controversy” requirements.\(^{130}\)

The Unitary Executive theory is that Executive Branch disputes are not adverse to one another to meet “case” or “controversy” requirements because both branches are subordinate parts of a single organization headed by one executive.\(^{131}\) The theory stems from the rationale that, because the Constitution vests executive power in the President of the United States,\(^{132}\) the President is responsible for ensuring that all laws of the United States are faithfully executed.\(^{133}\) The Unitary Executive theory is an argument for prohibiting intra-branch disputes because when one agency of the Executive Branch sues another member of that same branch, the constitutional structure may be compromised.\(^{134}\) Therefore, because the President controls the Executive Branch, for either legal or policy disputes, any intra-executive

\(^{125}\) See U.S. Const. art. III, § 2, cl. 1.

\(^{126}\) See Basic Information, supra note 73.


\(^{128}\) See Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239–41 (1937). A sufficiently adverse legal interest is a separate issue than the “standing” issue. See United States v. Richardson, 418 U.S. 166, 173 (1974) (holding that the “gist” of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy for the requisite, concrete adverseness upon which the court so largely depends for illumination of difficult constitutional questions).


\(^{131}\) See id. at 997.

\(^{132}\) See U.S. Const. art. II, § 1, cl. 1.

\(^{133}\) See U.S. Const. art. II, § 3.

\(^{134}\) See SEC, 568 F.3d at 997.
branch disputes are typically resolved by the President, or a designee of the President, without judicial intervention. \textsuperscript{135}

The Unitary Executive rationale dictates that executive agencies are not technically “adverse” to each other because they are one and the same, or just two subordinates under one authority—the President’s. \textsuperscript{136} Therefore, under the Unitary Executive theory, intra-executive branch disputes do not constitute a justiciable “case” or “controversy,” as constitutionally required. \textsuperscript{137}

C. Justiciability—“Case” or “Controversy” for Independent Agencies

The immediate exception to the Unitary Executive theory is that independent agencies do not fall within the “case” or “controversy” paradigm because they operate with some degree of substantive autonomy from the President. \textsuperscript{138} Independent agencies are created by Congress to “address concerns that go beyond the scope of ordinary legislation.” \textsuperscript{139} They are “responsible for keeping the government and economy running smoothly.” \textsuperscript{140} The EPA is an independent agency. \textsuperscript{141} Therefore, an independent agency and a traditional executive agency (or fellow independent agency) embroiled in litigation represent a sufficiently justiciable case. \textsuperscript{142}

Justiciability has not been an issue when the Federal Labor Relations Authority (FLRA) \textsuperscript{143} has been involved. The FLRA has been directly embroiled in litigation against the National Aeronautics and Space Administration (NASA), DOJ, the Department of the Interior, the Department of the Treasury \textsuperscript{144} as well as the Department of

\textsuperscript{135} See id.; see also Exec. Order No. 12,146, 44 Fed. Reg. 42,657, 42,658 (July 18, 1979) (providing for review of certain interagency legal disputes by the Attorney General).

\textsuperscript{136} See SEC, 568 F.3d at 997.

\textsuperscript{137} See id.

\textsuperscript{138} See Humphrey’s Ex’r v. United States, 295 U.S. 602, 630 (1935).


\textsuperscript{140} Id.

\textsuperscript{141} Id.

\textsuperscript{142} See SEC, at 568 F.3d at 997–98.


\textsuperscript{144} See NASA v. FLRA, 527 U.S. 229, 231 (1999); Nat’l Fed’n of Fed. Emps., Local 1309 v. Dep’t of the Interior, 526 U.S. 86, 88 (1999); Dep’t of the Treasury v. FLRA, 494 U.S. 922, 924 (1990); FLRA v. NASA, 120 F.3d 1208, 1210 (11th Cir. 1997); FLRA v. DOJ, 137 F.3d 683, 685
Health and Human Services (HHS).145 In these intra-branch disputes, justiciability was never raised to challenge the court’s jurisdiction, even when before the Supreme Court.146

Disputes with other independent agencies have also glossed over justiciability issues. The issue of justiciability was not raised when the Federal Energy Regulatory Commission147 was involved in litigation against La Jolla Band of Mission Indians.148 Because the case involved a federal reservation, the defendants were represented by the Department of the Interior, which is a fellow executive branch agency.149 Here, too, a discussion on justiciability was not in the ruling.150 The same was true for disputes involving the Department of the Interior.151

The former Federal Maritime Board152 also litigated positions adverse to a fellow executive branch agency.153 In these cases, instead of raising the issue of justiciability, the main defense focused on the proper application of administrative law and the proper deference to give agency expertise.154 In a lawsuit involving its progeny, the Federal Maritime Commission, the court held that although the dispute was between officials of the same branch of government, the issues presented were of the type traditionally justiciable.155

The Interstate Commerce Commission (ICC)156 was also involved in litigation where its interests were in direct opposition to

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147. FERC is an independent agency that regulates the interstate transmission of natural gas, oil, and electricity. FERC also regulates natural gas and hydropower projects. See About FERC, FERC, https://www.ferc.gov/for-citizens/about-ferc.asp (last updated Feb. 7, 2012).
149. See id. at 767.
150. See id. at 765.
152. The Federal Maritime Board is an independent agency. See Records of the Federal Maritime Commission, supra note 48.
other intra-executive branch agencies. The ICC also defended itself against federal agencies when its rate decisions were challenged. Ultimately, the issues raised were sufficient for a solid “case” or “controversy” that the court could decide.

An inter-agency suit involving an independent agency with its own independent litigating authority is also not precluded. For example, in *Cooper v. Tennessee Valley Authority*, the court confirmed the independent right of the Tennessee Valley Authority (TVA), an independent agency with its own litigating authority, to represent itself in litigation. In that suit, EPA outlined the three exceptions in which intra-executive branch disputes could be litigated, in other words where a true Article III case or controversy existed. According to EPA, the exceptions were the following: (1) one of the disputants had to be an independent regulatory agency whose leaders are insulated from the President’s discretionary removal authority; (2) the litigation must involve an agency whose position is aligned with that of a private party who is the real party in interest; or (3) one of the parties is the target of a federal criminal investigation or prosecution. Outside of these three categories, EPA asserted that courts cannot maintain an intra-executive branch suit.

Despite EPA’s assertions, an intra-executive branch dispute will not automatically succumb to justiciability challenges. First, Congress may authorize, by statute, that the federal government should take on a role representing dual interests. Second, when analyzing the legal definition of “controversy” in the constitutional sense, the term means more than a disagreement or conflict, but a matter that

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159. *Int’l Commerce Comm’n*, 337 U.S. at 430.
161. Tenn. Valley Auth. v. EPA, 278 F.3d 1184, 1193 (11th Cir. 2002).
162. *Id.*
163. *Id.*
165. *See* Nevada v. United States, 463 U.S. 110, 142 (1983) (holding that where Congress has imposed upon the United States, in addition to its duty to represent Indian tribes, a duty to obtain water rights for reclamation projects, and has even authorized the inclusion of reservation lands within a project, the analogy of a faithless private fiduciary cannot be controlling for purposes of evaluating the authority of the U.S. to represent different interests).
courts traditionally resolve.\textsuperscript{166} While the case or controversy requirement will foreclose a suit if the same party who is the plaintiff is also the defendant,\textsuperscript{167} courts will look beyond names and relationships to determine whether the issues are of a type that are traditionally justiciable.\textsuperscript{168} Under this analysis, it is therefore possible for any type of agency to be involved in litigation against another. For example, even though EPA is an independent agency, and agencies such as DOJ, Department of Energy and DoD are not,\textsuperscript{169} justiciability would not completely foreclose the suit.

D. Justiciability and Unique Issues

Unique issues arise in litigation when DOJ is on both sides of the litigation. When representing parties on both sides, DOJ is concerned with taking inconsistent legal positions.\textsuperscript{170} To ensure that the United States remains “one voice,” DOJ minimizes any conflict by allowing internal communications between its attorneys.\textsuperscript{171} In other words, even when on opposite sides of the litigation, its attorneys may freely trade legal briefs and solicit each other’s comments.\textsuperscript{172} In an environmental law context, this means that both EES and EDS confer with one another to ensure one, cohesive, United States government position.\textsuperscript{173} However, in \textit{Menasha Corp. v. U.S. Department of Justice}, corporate PRPs argued that the EES and EDS represented separate adversarial interests.\textsuperscript{174} Consequently their communications with each other waived the government’s attorney-client and work product privileges.\textsuperscript{175} DOJ counter-argued that those communications were

\begin{footnotes}
\footnotetext[166]{Tenn. Valley Auth., 13 Cl. Ct. at 698.}
\footnotetext[167]{\textit{Int’l Commerce Comm’n}, 337 U.S. at 430–31.}
\footnotetext[168]{United States v. Nixon, 418 U.S. 683, 697 (1974); \textit{Int’l Commerce Comm’n}, 337 U.S. at 430; see also United States v. Fed. Mar. Comm’n, 694 F.2d 793, 809 (D.C. Cir. 1982) (stating that a suit filed by John Smith against John Smith might present no case or controversy which courts can determine, but one person named John Smith might have a justiciable controversy with another John Smith).}
\footnotetext[171]{Id.}
\footnotetext[172]{Id.}
\footnotetext[173]{Menasha Corp. v. DOJ, No. 11–C–682, 2012 WL 1034933, at *2 (E.D. Wis. 2012).}
\footnotetext[174]{Id.}
\footnotetext[175]{Id.}
\end{footnotes}
necessary for representing one client—the United States government. The court disagreed with DOJ and ruled that, by communicating with each other internally, the DOJ sections’ lawyers had waived the government’s attorney-client and work product privileges.

One clear prohibition against intra-executive branch disputes occurred when it was clear to the court that the government was actually suing itself. In *U.S. v. Shell Oil Co.*, EPA had settled with the Department of the Army, a PRP. EPA then sued Shell Oil as another PRP. Shell Oil attempted to indemnify the Army by joinder. Because the Army had already sided with EPA, and was working toward an ameliorative resolution with its share of the site’s contamination, the court found that joining the Army as a defendant would result in the government suing itself. Accordingly, pursuant to the case or controversy requirement, the claim was not justiciable and Shell’s motion for joinder of the Army was denied.

E. Legal Scholarship

Legal scholars have also examined whether the intra-executive branches of the federal government may initiate suit against each other. Overall, there is consensus among legal scholars that conflicts between intra-executive branches regarding environmental laws are justiciable. One scholar found that although enforcement of CERCLA becomes complicated when DOJ is representing both the interests of plaintiff and defendant, it is unclear if there are any constitutional prohibitions to the dual representation of federal agencies on different sides of litigation. For CERCLA, it seems that Congress explicitly intended this result.

Another legal scholar concluded that although powerful policy arguments exist against allowing intra-executive branch litigation when CERCLA is involved, EPA is a sufficiently independent agency.

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176. *Id.*
177. *Id.*
179. *Id.* at 1084.
180. *Id.*
181. *Id.*
184. *Id.*
185. *Id.*
A Look at Judicial Enforcement

that is empowered to bring suit against fellow agencies despite the theory of the unitary executive.\textsuperscript{186} For one scholar, the unitary executive theory rests on a faulty premise.\textsuperscript{187} EPA’s responsibilities would inevitably cause the situation, which justifies resolution by the judiciary.\textsuperscript{188} This conflict is acceptable since it is the role of the judiciary to “say what the law is.”\textsuperscript{189} The requisite adverseness exists and does not infringe upon the President’s constitutional prerogative.\textsuperscript{190} Accordingly, a suit by EPA against another government agency is, without a doubt, justiciable.\textsuperscript{191}

In conclusion, sovereign immunity and justiciability do not preclude intra-governmental litigation under CERCLA. EPA may initiate suit against a fellow government agency because the parties would be sufficiently “adverse.” Lastly, to avoid unique issues, DOJ would need to institute sufficient safeguards to its sections’ information, and not share the information among its attorneys.

IV. LEGISLATIVE HISTORY, EPA POLICY, AND THE FEDERAL REGISTER

This section examines the legislative history surrounding CERCLA, EPA policy, and comments from the Federal Register for regulations related to CERCLA section 120. Exploring congressional intent through exploration into the legislative history provides insight into the purposes and goals of a statute.\textsuperscript{192} Agency regulations, in furtherance of statutory purposes and goals, also provide answers to statutory ambiguities and congressional intent.\textsuperscript{193}

\begin{itemize}
\item \textsuperscript{186} Steinberg, supra note 72, at 352–53.
\item \textsuperscript{187} Herz, supra note 5, at 915.
\item \textsuperscript{188} Steinberg, supra note 72, at 353.
\item \textsuperscript{189} Id.
\item \textsuperscript{190} Herz, supra note 5, at 990–91.
\item \textsuperscript{191} Id.
\item \textsuperscript{193} See generally Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) (describing that an administrative agency necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress to administer a congressionally created program, and if Congress has explicitly left a gap for the agency to fill, there is express delegation of authority to the agency to elucidate a specific provision of the statute by regulation); Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta, 458 U.S. 141, 152–54 (1982) (discussion how agency regulations fill in what is not address by statute); United States v. McCall, 727 F. Supp. 1252, 1253 (N.D. Ind. 1990) (explaining how regulations are given general applicability and legal effect); Lopez v. World Sav. & Loan Ass’n., 130 Cal. Rptr. 2d 42, 48 (Cal. App. Dist. 2003) (discussing how, for purposes of determining Congressional intent, federal regulations enacted under authority granted by Congress are entitled the same preemptive effect as a federal statute).
\end{itemize}
A. Legislative History Involving EPA, DOJ and Judicial Enforcement

There is inconclusive legislative history dealing with EPA’s ability to enforce compliance for federal agencies through litigation. In a House conference report dated August 1, 1985, EPA proposed amendments to CERCLA concerning section 107(g), or federal liability.\(^{195}\) In EPA’s “Section-by-Section” analysis of Section 212: Federal agency settlement,\(^{196}\) EPA stated that the goal for the amendments would be to provide an administrative mechanism for enforcement of CERCLA provisions.\(^{197}\) The administrative mechanism would be modeled after the language in the Federal Tort Claims Act, 10 U.S.C. § 2672 for settlement claims against federal agencies without resorting to litigation.\(^{198}\) Therefore, it appears that EPA did consider the viability and repercussions of enabling itself to bring suit against other federal agencies and instead opted to take a less adversarial route.

During a July 17, 1985 oversight hearing before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary, DOJ Assistant Attorney General Henry Habicht of the Land and Natural Resources Section stated DOJ’s position on the matter of enforcement provisions for CERCLA.\(^{199}\) Habicht confirmed DOJ’s longstanding position that there exists no authority for EPA to sue other federal agencies for cleanups.\(^{200}\) With this statement, it appears that there was some discussion on the topic of utilizing litigation, and that historically, there had been decades of opposition to it.

Congress was well aware of, and had possibly fully considered, the arguments for and against empowering EPA with litigation enforcement authority against federal agencies for CERCLA violations. The first statement on CERCLA enforcement provisions, as they relate to EPA’s ability to bring suit against federal agencies, appears on

194. This section is a discussion of findings from the legislative history that includes perspectives from the EPA, itself, the DOJ, and congressmen.
196. This section was within the legislative record. Because it is the agency’s analysis, it should not be considered “legislative history.”
198. Id.
200. Id.
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November 12, 1985 from Congressman Moody.²⁰¹ He expressed concern that EPA had no enforcement action authority against federal agencies.²⁰² Although he believed that it was essential for EPA to have the necessary enforcement authority, Congressman Moody hoped that, “a spirit of full cooperation between the EPA and other federal agencies [would] not require litigation to bring about abatement actions.”²⁰³ While it appears that there was a need for EPA to enforce CERCLA against federal agencies, it seemed that Congressman Moody was not advocating enforcement in terms of full litigation. Congressman Moody’s statements suggest that the federal government, as a whole, has a common goal once laws are passed. Therefore, instead of initiating litigation, EPA is to initially negotiate, or settle, with federal agencies that are not in compliance. There is thus no need for litigation.

The second statement on CERCLA enforcement provisions comes a month later in the December 5, 1985’s Proceedings and Debates of the 99th Congress, First Session, from Congressman Lent. In a few brief sentences, Congressman Lent mentioned that an amendment was proposed that would allow EPA to sue noncompliant, federal agencies.²⁰⁴ He strongly disagreed with the amendment, stating that it would make “very little sense and ought to be defeated.”²⁰⁵ Unfortunately, there are no other accompanying arguments or statements from other congressmen to determine who, if any, agreed with Congressman Lent, and why. The lack of additional argument or statements would suggest that such an amendment was not seriously considered.

In 1986, Congress begins to assert that litigating against federal agencies is an enforcement option for the EPA. First, one year after Congressmen Moody and Lent’s statement about no judicial enforcement, comes Congressman Stafford’s assertions in the October 3, 1986’s Proceedings and Debates of the 99th Congress, Second Session, that Congress’s intentions were to allow EPA the ability to pursue enforcement to the same extent as any other PRP.²⁰⁶ Congressman Stafford explained that, “the law’s definition of a ‘person’ accords no special treatment for the United States, and two other provisions,

²⁰² Id.
²⁰³ Id.
²⁰⁵ Id.
107(g) and 111(e)(3), expressly prohibit [special treatment of the U.S.].”207 Congressman Stafford, using the “plain text meaning” to interpret statutes, finds no support that the EPA cannot use any and all varieties of enforcement provisions allowed by law against other federal agencies.208 Therefore, EPA may—as a first resort and not contingent on at least attempting settlement and negotiation—initiate a lawsuit against federal agencies.

Second, a few days after Congressman Stafford’s assertions, comes Congressman Synar’s statements in the October 8, 1986’s Proceedings and Debates of the 99th Congress, Second Session, that the amendments to CERCLA preserve the clear statutory authority to bring civil actions and issue administrative orders against federal agencies whose facilities are not in compliance. Congressman Synar explained that federal cleanup activities “should serve as a model for the private sector.”209 Furthermore, Congressman Synar expressed concern that EPA and DOJ had not aggressively pursued enforcement actions using civil litigation against federal agencies whose facilities were not in compliance.210

When referring to federal agencies’ cleanup of their facilities, pursuant to CERCLA section 120, Congressman Fazio explicitly stated that litigation may be necessary.211 Congressman Fazio explained that, “while formal enforcement action against Federal owners, operators, generators or transporters should be the last resort of an effective cleanup program, such actions should be pursued in cases which cannot be resolved by negotiation among the Federal agencies involved.”212 Congressman Fazio limited what his predecessors, Congressman Synar and Stafford, had said, in that he seems to support litigation only when all else has failed.

B. EPA Policy

The EPA issued its listing policy for how it was to deal with federal agencies whose facilities were not in compliance with

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207. Id. (statement of Rep. Stafford).
208. See id.
210. Id.
211. Id.
Specifically, EPA believed that the best method to address federal agencies’ noncompliant sites was to create an enforceable agreement, or an Interagency Agreement (IAG). Ideally, this agreement would include the EPA, the federal agency and the applicable State agency. The IAG, in some cases, would not strictly address CERCLA alone, but could also serve RCRA purposes as well. The IAG would also contain provisions to deal with any and all disagreements.

EPA addresses the situation, termed an “inconsistent response action,” in which an IAG cannot be made, or when a State agency does not agree to the arrangement. Citing that CERCLA authorizes the President (whose authority is accordingly delegated to EPA) to take action at NPL sites, EPA states that its decisions about the site in terms of CERCLA trumps any other action—by a State or another PRP. However, if the site is not on the NPL, state action would control. Once on the NPL, no Federal agency may adopt or utilize guidelines, rules, regulations, or criteria that are inconsistent with those established by EPA under CERCLA. Finally, EPA would, on a case-by-case basis, make any determinations of the steps to take at a NPL site in which there is discord between state action, EPA, and the federal agency that cannot be resolved by the IAG.

C. Federal Register

Section 106 of CERCLA gives EPA the authority to promulgate regulations and set guidelines for imminent hazard, enforcement, and emergency response authorities, and their applicable scope. Any
rulemakings by EPA are found in the Federal Register. In connection with an agency’s rule making proceedings, draft regulations are open to notice-and-comment periods in which substantive views and compelling arguments are explored.

Federal registry entries reinforce EPA’s preference, in most situations, to handle federal agency compliance under section 120 with an IAG. EPA solicited public comments to its proposed rules and regulations concerning the listing policy for federal agencies. There were six comments. Commenters were concerned with how CERCLA and RCRA would simultaneously be followed, and asserted that no Superfund money should be spent on federal facilities. In response to a commenter asserting that placing RCRA-regulated federal facilities on the NPL was inconsistent with section 120(a) because “[f]ederal facilities comply with CERCLA in the same manner as any nongovernmental entity,” EPA explained that sections 120(b), (c), and (d) referred to its establishment of the Federal Agency Hazardous Waste Compliance Docket, and that it was to evaluate facilities on this docket for potentially listing the site on the NPL. EPA further explained that section 120 means that EPA should use the same rules and criteria as it does with private sites to evaluate federal sites for the NPL.

EPA did not believe that section 120(a)(2) actually meant identical treatment of federal and private sites in all circumstances, as sections 120(c), (e)(2) and (h) demonstrated Congress’s recognition of the need to address aspects of federal facilities that were unique from private sites. EPA, therefore, interpreted section 120 to mean that

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227. See id. at 10,524.
228. See id.
229. HRS score of 28.50 or greater would be used to evaluate the NPL on the Federal Agency Hazardous Waste Compliance Docket. See id. at 10,525.
230. Neither pre-remedial work—preliminary assessments and site inspections—nor remedial work should be financed by the Trust Fund. See id. at 10,524.
232. See id.
233. See id.
the criteria it uses to list federal sites on the NPL should not be more exclusionary than its private sites’ counterparts. In other words, EPA’s belief—based on legislative history, and consistent with congressional intent—was that it should not adopt a deferral listing policy, as it did with RCRA, or adopt policies which would treat federal agencies in a more exclusionary manner than private facilities.

The EPA also defended its use of the IAG against one commenter concerned that RCRA and CERCLA could not be simultaneously addressed. The IAG was selected as EPA’s best enforcement policy for federal sites because the agreement could be drafted comprehensively in order to deal with both CERCLA and RCRA and, appropriately advance site remediation goals, as well as allow EPA and the State to take steps that were not duplicative or in conflict in terms of remedy and jurisdiction. The IAG was selected because it was the most efficient method.

There is an overarching emphasis that section 120’s requirement to treat federal sites the same as private sites means that EPA is to use the same criteria in evaluating and listing federal sites as it does with private sites. Specifically, EPA stated that section 120 directed it to establish a federal agency hazardous waste compliance docket for federal facilities. Additionally, EPA needed to perform preliminary assessments at those facilities in order to determine their inclusion on the NPL. “Section 120(d) clarifies that federal facilities shall be evaluated for inclusion on the NPL by applying listing criteria in the same manner as the criteria are applied to private facilities.” Furthermore, while federal agencies are to comment within six months of their facilities being listed on the NPL, EPA and the federal agency may select an appropriate remedy, with States having the opportunity to participate in the planning and selection of the remedial action.

One commenter did directly state that EPA’s regulation at 40 C.F.R. § 300.23(b)(8) (40 C.F.R. § 300.175) currently may create a
conflict of interest because the DOJ may end up representing both the
EPA, in enforcing CERCLA, against another federal agency because it was a PRP.244

Named a “generic legal issue” concerning the proper role of DOJ, pursuant to 28 U.S.C. § 516,245 EPA asserted that the statutory duty to represent EPA and a PRP federal agency in a counterclaim did not constitute a conflict of interest.246 The counterclaim scenario was described as being a situation without an inherent conflict because DOJ would not be enforcing CERCLA on behalf of EPA against a federal agency.247 DOJ would merely be simultaneously prosecuting and defending claims, as per the normal course of litigation.248 Furthermore, the law did not require EPA and the PRP federal agency to obtain separate legal representation.249 Citing Nevada v. United States250 as a conclusive resolution of any perceived conflict of interest issues, EPA described how the Attorney General represented dual interests and opposing parties in a water rights suit.251 In brief, the government need not follow fastidious standards of a private fiduciary because Congress directed DOJ to represent dual interests and responsibilities in litigation.252 Therefore, as a matter of law, DOJ is not barred from conducting litigation on behalf of adverse interests.253

In conclusion, legislative history is inconclusive. The absence of any follow up statements or discussion surrounding the congressmen’s statements makes it unclear if there were any others in agreement.

DOJ represents the federal government, including its agencies, in litigation relating to such discharges or releases. Other legal issues or questions shall be directed to the federal agency counsel for the agency providing the OSC/RPM for the response.” 40 C.F.R. § 300.175(b)(10) (2012).

244. See National Oil and Hazardous Substances, 50 Fed. Reg. at 47,939.
245. “Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefore, is reserved to officers of the Department of Justice, under the direction of the Attorney General.” 28 U.S.C. § 516 (2012). Later, this position was re-affirmed by President Ronald Reagan’s Executive Order. Superfund Implementation, Exec. Order No. 12580, 52 Fed. Reg. 2923, 2926 (Jan. 23, 1987) (“Litigation. (a) Notwithstanding any other provision of this Order, any representation pursuant to or under this Order in any judicial proceedings shall be by or through the Attorney General. The conduct and control of all litigation arising under the Act shall be the responsibility of the Attorney General.”).
247. Id.
248. Id.
249. Id.
252. Id.
253. Id.
The statements do confirm, however, that Congress at least considered EPA’s authority to initiate suit against other federal agencies. The strong sentiments on each side signal that Congress was actively engaged in discussion about the issue. However, without a record of such discussions—only statements from a few—it is difficult to gauge true, universal, congressional intent about EPA initiating suit against federal agencies. From the legislative history, Congress was aware of the issue, yet they left language in place that, on its face, allows EPA to sue other agencies. Therefore, there is no legislative history to contradict the assertion that Congress did intend for EPA to utilize judicial enforcement. There is also no legislative history to contradict the assertion that Congress did not either.

As evidenced by the notice-and-comment period from the Federal Register, EPA stated that there would be no conflict of interest if DOJ were to represent EPA and a fellow PRP agency. The only requirement is that DOJ have the statutory authority to represent both sides. Despite the ABA’s admonition about conflicts of interest, DOJ attorneys are distinguishable in that they must not only represent the interests of the client federal agency, but also exercise its independent judgment as to what is in the best interests of the United States. Additionally, DOJ ensures that the positions it takes are consistent with those taken by the government in other cases, and that filing the case is consistent with the overarching goals of the Executive Branch. Because the legislative history does not contradict EPA’s interpretations, there appears to be no conflict of interest barrier to intra-governmental suits under CERCLA.

V. CONCLUSION

Congress intended for CERCLA to serve as an incentive for the sound treatment and handling of hazardous substances as well as place the burden of hazardous waste cleanups on those parties responsi-
sible for the pollution.\textsuperscript{260} In enforcing CERCLA, EPA has discretion in its enforcement options and in which parties it will pursue.\textsuperscript{261} However, because federal agencies are part of the same executive branch of government, there may be unique feasibility concerns attached to EPA’s enforcement actions for federal agencies.

A. Settlement is the “Spirit” of CERCLA

EPA may choose settlement over litigation, which would be the option that best adheres to the “spirit” of CERCLA. Congress enacted section 122 to encourage early settlement of claims between the EPA and PRPs.\textsuperscript{262} The specific settlement provisions found in section 122 were added by Congress in 1986 in an effort to eliminate impediments to the settlement of claims relating to the cleanup of Superfund sites.\textsuperscript{263} Furthermore, the structure of CERCLA intends to allow EPA to act quickly to address environmental problems without becoming immediately entangled in litigation.\textsuperscript{264} Accordingly, the Act was designed to encourage PRPs to voluntarily assume their responsibilities for hazardous waste cleanup\textsuperscript{265} and precludes claims for contribution between settling parties and other PRPs.\textsuperscript{266} Another incentive


\textsuperscript{261} See Part II(F) discussion on CERCLA.

\textsuperscript{262} See 42 U.S.C. § 9113(f) (2012); Blasland, Bouck & Lee, Inc. v. City of North Miami, 283 F.3d 1286, 1304 (11th Cir. 2002) (stating that congressional intent of CERCLA to have pollution cleaned up as quickly as possible and to see that responsible polluters are made to pay for the cleanup); see also William A. Shirley, \textit{When EPA Cleans A CERCLA Site: Preclusion of Pre-Enforcement Judicial Review with Respect to Generators and Transporters}, 36 \textsc{Wash. U. J. Urb. & Contemp. L.} 187, 212 (1989).

\textsuperscript{263} See United States v. Akzo Coatings, Inc., 949 F.2d 1409, 1436 (6th Cir. 1991) (stating that there is a presumption in favor of voluntary settlement); \textit{CERCLA Overview}, SS042 ALI-ABA 455, 490–91 (2011).


\textsuperscript{265} Key Tronic Corp. v. United States, 511 U.S. 809, 820 (1994) (providing that corporate PRP, that had settled with EPA over a CERCLA site, could seek contribution from the Air Force); \textit{see} Unified Agenda, 55 FR 45202, 45202 (1990) (providing that under CERCLA, potentially responsible parties defined under Section 107(a) are liable for the cost of cleanup of superfund sites and that it would be agency policy to pursue those potentially responsible parties in court for costs expended but only if a cleanup settlement is not reached).

\textsuperscript{266} Shirley, \textit{supra} note 262, at 211–12.
for the settling PRP is that liability may be minimized if more extensive contamination is found.\(^{267}\)

Settlement over litigation is further supported by Executive Order 12988,\(^{268}\) which requires DOJ to give the prospective defendant notice of the proposed claim and an opportunity to settle.\(^{269}\) It is also not unusual for settlement negotiations to commence prior to approval of the initial complaint.\(^{270}\) Additionally, an advantage to the government for settling is that it will be compensated for claims in which it may not have prevailed in litigation.\(^{271}\) Lastly, courts are recognizing broad discretion for both EPA and DOJ in deciding how CERCLA settlements should be structured and are accepting such settlements over opposition.\(^{272}\)

B. Advantages to Settlement Agreements

Settlement agreements may also contain creative solutions that litigation does not. For example, a settlement may include a Supplemental Environmental Project (SEP).\(^{273}\) A SEP is a project that is beneficial to the environment or to public health that a PRP agrees to perform as part of a settlement to an enforcement action.\(^{274}\) For example, a facility found violating hazardous waste disposal regulations voluntarily agreed to a SEP where it would create a recycling program for its facilities and its shop users.\(^{275}\) An advantage for the PRP violator is that SEPs provide monetary penalty mitigation.\(^{276}\)

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\(^{267}\) Id. at 212; see John M. Hyson, “Fairness” and Joint and Several Liability in Government Cost Recovery Actions Under CERCLA, 21 HARV. ENVTL. L. REV. 137, 146 (1997) (stating that Congress provided EPA with section 113(f) to allow the agency to reward settlors while punishing non-settlors, that Section 113(f)(2) rewards settlors by granting them protection against claims for contribution from non-settling PRPs, and that EPA can therefore offer to settle with cooperating parties for less than their “fair share” of the cleanup costs, while insulating them from claims for contribution by non-settlors and then extracting the balance of its response costs from the non-settlors, subjecting them to disproportionate liability).


\(^{269}\) Hazardous Substances, Site Remediation, and Enforcement, U.S. DEP’T JUST. ACTIVITY, SK057 ALI-ABA 1, 73 (2005).

\(^{270}\) Id.

\(^{271}\) Shirley, supra note 262, at 212.

\(^{272}\) Hazardous Substances, Site Remediation, and Enforcement, U.S. DEP’T JUST. ACTIVITY, SK057 ALI-ABA 1, 80–81 (2005).


\(^{275}\) EPA, supra note 273.

C. Disadvantages to Settlement Agreements with Federal Agencies

There are disadvantages to settlement agreements with federal agencies. First, federal agencies are subject to political forces and control. The President appoints agency heads. The President remains in office for no more than two, four-year terms. Accordingly, the new Presidential appointment of each new President potentially brings new directions for agencies. There is evidence of the potential abuse that the appointment power brings.

Internal agency priorities may defeat cleanup commitments and promises made in settlement agreements. For example, in Cannon v. Gates, a landowner entered into a six-month lease of his 1,416 acres to the United States War Department in 1945 for $1. The lease permitted the Army to enter onto the landowner’s land to survey, carry exploratory work, and perform construction work of any nature. The Army agreed to leave the property in as a good condition as it was on the date of the Army’s entry. In reality, the Army used the property to test incendiary weapons—including aviation fuel, butane, gasoline, napalm, PT jell, and napalm-gas mixtures—conventional bombs, rockets, and chemical weapons, which included phosgene, hydrogen cyanide, mustard gas, and defoliants. Unfortunately, the Army failed to keep its promise of immediate remediation. As of 2008, the Army had only conducted preliminary assessments and a site inspection had been scheduled. Other concerns had clearly taken priority over the past sixty-three years. Accordingly, CERCLA settle-
ment agreements may contain promises that are subject to a variety of other agency priorities.288

D. Advantages of Litigation

In contrast to administrative settlement agreements, judicial proceedings evade political influence and administrative reprioritization. The judicial system provides an eternal record of proceedings and fact-finding.289 When involving the court in the resolution of a dispute, the resolution acquires the enforcement power of the court.290 The leverage associated with a court order is therefore significantly more powerful than an administrative agreement with a federal agency. Additionally, the process encourages communal participation as multiple parties with a special interest in the proceedings may voice their opinions through amicus briefs or may intervene.291 Lastly, unlike an administrative settlement, there is the benefit of an objective decision-maker.292

E. Disadvantages to Litigation

Unfortunately, the costs of litigation are high.293 Litigation is expensive and time consuming.294 Suits against federal agencies do not

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288. See Risch, supra note 52, at 84 (agreeing that politics and funding cuts limit the EPA’s ability to function properly to enforce the NPL; and that IAGs provide no guarantee for success as parties are not solidly bound by its terms).


291. See Arakaki v. Cayetano, 324 F.3d 1078, 1083 (9th Cir. 2003) (describing the party’s right to intervene); see, e.g., Voices for Choices v. Illinois Bell Tel. Co., 339 F.3d 542, 544 (7th Cir. 2003) (discussing how unnamed parties may be allowed to participate through amicus briefs in litigation).


293. Cf. Margaret Meriwether Cordray, Settlement Agreements and the Supreme Court, 48 HASTINGS L.J. 9, 58 (1996) (describing the goals that underlie the policy of favoring settlement as the conservation of judicial resources, reduction of backlog, reduction of expense to parties, and achievement of a more satisfactory resolution of the dispute).

294. See Mariza R. Gelpa, Pollution Control Laws Against Public Facilities, 13 HARV. ENVTL. L. REV. 69, 89 (1989) (describing Interview with Mike Murphy, Dir., Legal Servs. of Iowa Dep’t of Water, Air & Waste Mgmt., in Des Moines, Iowa (Mar. 18 1986); Interview with Don Larson, Chief, Enforcement Section of Water Mgmt. of Indiana Dep’t of Envtl. Mgmt., in Indianapolis, Ind. (Jan. 12, 1987); Interview with Alan Leiserson, Assistant Gen. Counsel, Tenn. Dep’t of Health and Env’t (Mar., Apr. 1986)).
alter the federal funding scheme.\textsuperscript{295} Judges may not make decisions as effective as an environmental agency because judges lack the expertise, experience, and a broad view of the problem.\textsuperscript{296} Lastly, most of the litigation EPA would initiate would be against the DoD.\textsuperscript{297}

The Second National People of Color Environmental Leadership Summit, held in Washington, DC on October 23-26, 2002, reported that DoD sites comprised 81\% of federal sites on the Superfund National Priorities List (or 129 of 160 sites) as of August 1995 and that DoD accounted for 71\% of EPA enforcement actions against federal agencies in FY 1997 and 64\% in FY 1998.\textsuperscript{298} In 1997, 79 of the 124 federal facilities reporting to the Toxic Release Inventory (61\%) were DoD facilities.\textsuperscript{299} Even though this comment has shown that there is no barrier to EPA litigating against any federal government agency, the scenario of \textit{EPA v. DoD} has never been litigated and there is skepticism about EPA being able to do so.\textsuperscript{300}

There are three main litigation scenarios in which government agencies would be PRPs. First, the government agency is impleaded when there are other private PRPs. Second, the government could have 100\% CERCLA liability. Lastly, there could be a 50-50 split of liability between a government agency and other PRPs. Accordingly, with such variety, litigation can grow to be extremely complex, encompassing dozens of private and government PRPs.\textsuperscript{301} Additionally, private party PRPs may stall proceedings by arguing that because EPA is also part of the executive branch of the federal government it

\textsuperscript{295.} See Steinberg, \textit{supra} note 72, at 322–23 (explaining that litigation cannot be used to redirect an agency’s budgetary priorities because the Anti-Deficiency Act prohibits agencies from spending funds not appropriated by Congress; and that any civil penalties paid by federal government violators of CERCLA go to the Treasury, not the Superfund).

\textsuperscript{296.} See Gelpe, \textit{supra} note 294.


\textsuperscript{298.} Id.

\textsuperscript{299.} Id.

\textsuperscript{300.} See, e.g., SEC v. Fed. Labor Relations Auth., 568 F.3d 990, 997 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (“No one plausibly thinks, for example, that a federal court would resolve a dispute between the Department of Justice and, say, the Department of Defense or the Department of State.”); In re Sealed Case, 146 F.3d 1031, 1031 (D.C. Cir. 1998) (Silberman, J., concurring) (“We cannot have two opposing lawyers before us representing the same named party.”).

must be biased in its decision making because of its desire to shift liability away from the government.302

F. EPA Agency Discretion is the Solution

Having weighed the pros and cons of litigation and settlement, the decision about which option is the best course of action is best left within the agency discretion of the EPA.303 There are no barriers to EPA litigating against a federal agency, but the “spirit” of CERCLA favors settlement. When no private PRPs are involved, settlement may be the more cost effective and cooperative resolution, but includes the potential danger of politically influenced re-prioritization, causing the settlement agreement to lack true effect. However, litigation is free from political influence and has the authority of the courts behind it. Therefore, the best option would be for EPA to use its discretion because it is the agency in the best position to evaluate time, resources, and case management.

302. United States v. Iron Mountain Mines, Inc., 987 F. Supp. 1250, 1258 (E.D. Cal. 1997); see Atlantic Research Corp. v. United States, 459 F.3d 827, 837 (8th Cir. 2006) (involving litigation between a private PRP seeking contribution from the federal government, pursuant to CERCLA § 113 and § 107); aff’d, 551 U.S. 128 (2007); E.I. DuPont De Nemours & Co. v. United States, 460 F.3d 515, 541 n.31 (3d Cir. 2006) (finding underwhelming the attempt by a private party PRP to deflect liability with the argument that the government could use its enforcement discretion to avoid governmental liability under CERCLA); United States v. Hunter, 70 F. Supp. 2d 1100, 1101, 1103 (C.D. Cal. 1999) (involving litigation where EPA pursued commercial hazardous waste treatment facility as PRPs and defendants attempted to deflect financial liability by indicating that multiple, unnamed governmental agencies delivered waste to the Casmalia site); United States v. Kramer, 757 F. Supp. 397, 434 (D.N.J. 1991) (finding that the assumption that the government will insulate other government PRPs from liability is impossible because the CERCLA statute permits other PRPs to bring in such PRPs and seek contribution).

303. See generally Chevron, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (lending deference to the EPA, which possesses great expertise and is therefore in the best position to make reasonable interpretations about statutory provisions it was charged with administering).
COMMENT

National Security Surveillance on the Basis of Race, Ethnicity, and Religion: A Constitutional Misstep

CINDY C. UNEGBU*

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INTRODUCTION

Picture this: you live in a society in which the government is allowed to partake in intrusive surveillance measures without the institutionalized checks and balances upon which the government was founded. In this society, the government pursues citizens who belong to a particular race or ethnicity, practice a certain religion, or have affiliations with specific interest groups. Individuals who have these characteristics are subject to surreptitious monitoring, which includes undercover government officials disguising themselves as community members in order to attend various community events and programs. The government may also place these individuals on watch lists, even where there is no evidence of wrongdoing. These watch lists classify domestic individuals as potential or suspected terrorists and facilitate the monitoring of their personal activity through various law enforcement agencies for an extended period of time. This “hypothetical” society is not hypothetical at all; in fact, it is the current state of American surveillance.

The government’s domestic spying activities have progressed to intrusive levels, primarily due to an increased fear of terrorism.¹ This fear has resulted in governmental intelligence efforts that are focused on political activists, racial and religious minorities, and immigrants.²


² Shoba Sivaprasad Wadhia, Business As Usual: Immigration and the National Security Exception, 114 PENN ST. L. REV. 1485, 1513 (2010) (discussing the implications of the Court’s decision in Ashcroft v. Iqbal, and arguing that the decision perpetuates a longstanding “Business As Usual” standard that permits the federal government to create and sustain laws that selectively discriminate against foreign nationals during times of national security with minimal accountability).
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The government’s domestic surveillance efforts are not only geared toward suspected terrorists and those partaking in criminal activity, but reach any innocent, non-criminal, non-terrorist national, all in the name of national security. The government’s power to engage in suspicionless surveillance and track innocent citizens’ sensitive information has been granted through the creation and revision of the National Counterterrorism Center and the FBI’s (Federal Bureau of Investigation) Domestic Investigations and Operations Guide. The grant of surveillance power has resulted in many opponents, including those within the current presidential administration, who challenge the order for numerous reasons. These reasons include the inefficiency of storing citizens’ random personal information for extended periods of time, the broad unprecedented authority granted to this body of government without proper approval from Congress, and the constitutional violations due to the deprivation of citizens’ rights.

3. Exec. Order No. 13,354, 69 Fed. Reg. 53,589 (Aug. 27, 2004). The original NCTC was created by the executive order of President George W. Bush in an attempt to combine the surveillance and national security capabilities of various U.S. agencies, such as the FBI and the CIA. Since then, the capabilities of the program have developed as United States government officials and domestic terrorism pressures have elevated.


5. Angwin, supra note 1 (noting that the NCTC amendment discussions took place after the attempted terrorist attack by Abdulmutallab on December 25, 2009, and throughout the development of the law, leaders within the Department of Homeland Security objected to the program due to policy concerns). These objections have been made available to the public because various interest groups, such as the ACLU, and journalists, such as those at the Wall Street Journal, have been able to piece together internal conversations and objections of the law through Freedom of Information Act requests. Id.

6. Id.


8. Darlene Storm, ACLU: FBI Mapping and Suspicionless Spying, Violate 1st, 4th and 14th Amendments, COMPUTERWORLD (Oct. 24, 2011, 4:15 PM), http://blogs.computerworld.com/1915/05/aclu_fbi_mapping_suspicionless_spying_violate_1st_4th_and_14th_amendments. The ACLU equates these extended surveillance powers to unconstitutional racial and religious profiling and racial “mapping,” which is evident through past FBI reports made available through FOIA requests. Id.
This Comment argues that the wide-sweeping surveillance authority granted to the government results in a violation of the Fourteenth Amendment’s Equal Protection Clause due to far-reaching domestic monitoring practices. Surveillance practices, such as posing as members of the community and placing individuals on watch lists without suspicion of terrorist activity, result in the impermissible monitoring of individuals on the basis of their race or ethnicity. These practices, although done in the name of national security, an established compelling government interest, violate the Equal Protection Clause of the Fourteenth Amendment because they are not narrowly tailored to the stated interest. The procedures are not narrowly tailored to the interest of national security because of the over-inclusiveness of the measures.

Part I of this Comment discusses the historical background of American national security efforts, as well as the factors that have shaped this country’s surveillance practices. Part II of this Comment describes this country’s trend toward more invasive monitoring procedures and identifies the rationale of the proponents of these measures. Part III details the current grant and scope of the government’s surveillance authority that has been established through executive orders and guidance. Part IV identifies the various improper surveillance measures that the FBI has taken, including the nomination of individuals to the watch list, and the FBI’s use of race or ethnicity as a factor in the nomination process. Part V of this Comment analyzes the constitutionality of the government’s national security surveillance authority and procedures according to established Fourteenth Amendment jurisprudence.

I. HISTORICAL PERSPECTIVE

The United States has a rich history as it pertains to national security. An understanding of the history of war and terrorism that has confronted this country will provide a clear backdrop in order to conceptualize the current state of American national security.

According to the U.S. Department of Defense, national security may be defined as a “defense posture capable of successfully resisting hostile or destructive action within or without, overt or covert.” America’s national security interest is the foundation upon which le-
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gitimate national objectives that define this country’s goals and purposes are developed. These national security goals and interests include: preserving U.S. political systems, ensuring U.S. economic stability, and encouraging international order that supports the fundamental interests of the U.S. and its allies.\textsuperscript{10}

As the threat of deadly attack became a concern for U.S. government officials due to the tumultuous international climate over the years, so, too, did domestic sentiment on the need for added security measures.\textsuperscript{11} These fluctuations have resulted in the government’s proactive response to preventing or mitigating future deadly attacks on domestic soil.\textsuperscript{12} The attacks of September 11, 2001 (“9/11 attacks”) are referenced as one of the most horrific events in the history of the United States and has shaped modern national security and surveillance efforts.\textsuperscript{13} Although this may or may not be true, it is important to note the historical backdrop that has influenced modern day domestic and international surveillance efforts.

A. The Cold War and the National Security Act of 1947

The fundamental change in national security efforts may be somewhat attributed to the forty-five year Cold War, which resulted in the passage of the National Security Act of 1947.\textsuperscript{14} The Cold War

\begin{itemize}
  \item Id.
  \item Id.
  \item Multiple Polls: Americans are More Afraid of the GOVERNMENT than TERRORISTS, WASHINGTONS BLOG, (Apr. 29, 2013), http://www.washingtonsblog.com/2013/04/multiple-polls-americans-are-more-afraid-of-the-government-than-terrorists.html (indicating that in May 2001, a Fox News survey polled Americans and asked if they would be willing to give up some of their personal freedom in order to reduce the threat of terrorism; the results indicated that 40% answered “no” and 33% answered “yes,” which was a drastic difference from the results from the same poll taken immediately following the 9/11 attacks where 71% of Americans agreed to sacrifice personal freedom to reduce the threat of terrorism).
  \item Angwin, supra note 1 (noting that NCTC amendment discussions took place after the attempted terrorist attack by Abdulmutallab on Dec. 25, 2009).
  \item Holly Epstein Ojalvo, Teaching 9/11: Why? How?, N.Y. TIMES (Aug. 29, 2011, 3:31 PM) http://learning.blogs.nytimes.com/2011/08/29/teaching-911-why-how/; see also Jason Villemez & Dalia Mortada, 9/11 to Now: Ways We Have Changed, PBS NEWS HOUR (Sept. 14, 2011, 4:55 PM), http://www.pbs.org/newshour/rundown/2011/09/911-to-now-ways-we-have-changed.html (“While the Patriot Act may be the most recognizable piece of legislation relating to Sept. 11, more than 130 pieces of 9/11-related legislation were introduced in the 107th Congress in the year after the attacks, with 48 bills and resolutions approved or signed into law.”).
\end{itemize}
developed out of a stark power struggle between the major Western powers, primarily led by the United States and the North Atlantic Treaty Organization (NATO), and the Eastern dominances, led by the Soviet Union and the Warsaw Pact. The Warsaw Pact was a mutual defense treaty equivalent to NATO, but included only communist states of Central and Eastern Europe. In the early years of the Cold War, Congress passed the National Security Act of 1947, which established a fundamental restructuring of the foreign policy and military establishment of the American government. The Act established many institutions that are now central to this country’s national security framework, such as the National Security Council (NSC) and the Central Intelligence Agency (CIA), which served as the primary civilian intelligence-gathering organization in the government. However, it is important to note that although the Act created the CIA, it established the Agency to focus primarily on international affairs, as opposed to domestic criminal activity.

During the tumultuous war-stricken times of the Cold War era, the United States and other countries relied heavily on intelligence gathering efforts. Because the United States played a vital role in

Moore, 59 Geo. Wash. L. Rev. 1684, 1693 (1991) (noting that because of America’s dominant status after the Cold War, the executive branch began to view each country in the entire world as potential threats to America, and they were eligible for national security monitoring as a result).

15. A Short History of NATO, NATO, http://www.nato.int/history/nato-history.html (last visited Oct. 4, 2013) (noting that the North Atlantic Treaty Organization (NATO) was an international alliance that was founded to (1) counter Soviet Union forces, (2) deter the rise of militant nationalism, and (3) to provide the foundation of collective security that would encourage democratization and “political integration” in Europe).


17. Id.

18. 50 U.S.C. § 401 (2012); see also CIA, supra note 14 (“Intelligence reform was a secondary goal for the passage of the Act; however, the intelligence section of the bill was still heavily debated over in Congress due to concerns that its brevity would cause “the [Director of Central Intelligence and the CIA]” to be “menace[s] to civil liberties.”).


20. Grant T. Harris, The CIA Mandate and the War on Terror, 23 Yale L. & Pol'y Rev. 529, 532 (2005); see also Norman C. Bay, Executive Power and the War on Terror, 83 Denn. U. L. Rev. 335, 372 (2005) (“The CIA, in other words, was intended to combat the foreign enemies of the United States, not its domestic wrongdoers.”).

the Cold War conflict, the executive branch began to view the entire free world as “American soil” for purposes of national security and threat analysis. During this time, intelligence information collection became a normal and accepted part of national security efforts worldwide. At the close of the Cold War, tensions were not as high as they had been at the height of the struggle; however, the national government has remained silently vigilant in its pursuit of potential threats to national security. In fact, former director of the CIA, Robert Gates, stated at his 1991 confirmation hearing that further safeguards must be in place as it pertains to recognizing and acting upon intelligence information that raises suspicion or the possibility of illegal activities that may be outside the scope of the CIA. He further acknowledged that, by statute, the CIA is not a law-enforcement agency, but believed that the Agency had to act conscientiously when information of concern was presented. This proactive rationale was further intensified after the monumental domestic attack on the United States ten years later.

B. The September 11th Attacks and the War on Terror

On September 11, 2001, a terrorist group called al-Qaeda flew four hijacked planes, and successfully crashed two of the planes into the North and South towers of the World Trade Center in New York City. The third plane crashed into the Pentagon building, and the fourth crashed into a field in Pennsylvania after the passengers attempted to overtake the terrorists. These attacks on the United States are considered acts of terrorism, and they resulted in severe destruction across the country.

23. Jackamo, supra note 21, at 935 (noting that there was an international acceptance of traditional methods of espionage during the Cold War).
24. The Gates Hearings; Excerpts from Senate Hearings on Nominee to Be Director of Intelligence, N.Y. Times, Oct. 5, 1991, at 1 (providing excerpts of the transcript of the Senate Select Committee hearing on the nomination of Robert Gates as the next Secretary of Defense, replacing Donald Rumsfeld, and illustrating Congress’s stressed importance of strong U.S. national intelligence).
25. Id. (referencing Gates’s closing remarks).
26. Id.
However, perhaps a greater influence on the American government’s focus on national intelligence came from the sequence of events that preceded the tragic attacks. In the spring and summer of 2001, the government received a substantial amount of reported terrorist threats and planned attacks on the United States, including a walk-in to the FBI claiming that there was a plan to launch attacks on London, Boston, and New York.\footnote{Nat’l Comm’n on Terrorist Attacks Upon the U.S., The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States 255–56 (2004), http://www.gpoaccess.gov/911/pdf/fullreport.pdf (noting that after warning National Security Advisor, Condoleezza Rice, about the many reports of terrorist attack plans on the U.S., Richard Clarke, the NSC counterterrorism coordinator, stated that “[w]hen these attacks occur, as they likely will, we will wonder what more we could have done to stop them.”).} Initially, the FBI struggled to build its institutional capabilities and authority to fight against domestic terrorism, primarily because the Justice Department felt that counterterrorism was outside of the investigative scope of the FBI.\footnote{Id. at 209 (noting that prior to the 9/11 attacks, the FBI was struggling to build up its institutional capabilities to do more against terrorism, and that Dale Watson, the FBI’s assistant director for counterterrorism, had the sense that the Justice Department wanted the FBI to get back to the investigative basics of guns, drugs, and civil rights).} However, after the 9/11 attacks, the focus shifted.\footnote{Id. at 361 (discussing the 50% increase in the congressional budget after 9/11 due to increased federal spending on defense, homeland security, and international affairs).} The new focus became protecting the United States in the new era of terrorism and international relations.\footnote{Id.} This focus was displayed through the increase in federal spending on counterterrorism efforts.\footnote{Id.}

The 9/11 attacks changed the methodology and opened the eyes of American government officials.\footnote{Id. at 362.} The fact that an organization like al-Qaeda, headquartered in a developing country, could insight such terror upon a mega-power like the United States was daunting.\footnote{Id. at 361 (detailing how national security became a top priority for the United States after the 9/11 attacks, evidenced by the fact that between the 2001 and 2004 fiscal years, federal funding on defense, homeland security, and international affairs rose more than 50%, from $354 billion to $547 billion).} The scope of terrorism had changed for the United States.\footnote{Id. at 362.} In a report detailing the behind-the-scenes events that preceded the 9/11 attacks and the government’s reaction, a government official stated that “terrorism against American interests ‘over there’ should be regarded just as we regard terrorism against America ‘over here.’”\footnote{Id.} However, as noted in the report, the enemy was not merely terrorism itself, but
A Constitutional Misstep was, more precisely, the “threat posed by Islamic terrorism.”38 After the 9/11 attacks, America affirmed a dangerous foe—the radical ideological movement birthed out of the Islamic world, partly inspired by al-Qaeda, which had spawned terrorist groups and violence around the world.39

The wake of 9/11 has resulted in combined efforts that seek to marry external and internal security and foreign and domestic intelligence functioning.40 Furthermore, in post-9/11 congressional hearings, testimony in public sessions demonstrated extensive support for breaking down barriers to a freer exchange of information among law enforcement and intelligence agencies.41 Although it was apparent that the nature of surveillance and intelligence was shifting towards a more accessible and collaborative system within the governmental agencies, there remained members of the government who sought to consider the American people’s desire and civil interests while the country’s national security system was being crafted.42 For example, General Michael Hayden, the Director of the National Security Agency (NSA) stressed, in a 2002 congressional hearing, that Congress needed to speak to constituents and determine where the American people wanted the line between security and liberty to be drawn.43 However, as the threat of a terrorist attack continued to hit closer to home over the following years, the government inevitably began to draw the line for the American people in the name of national security.

C. Attempted 2009 Umar Farouk Abdulmutallab Attack and the After Effects

On December 25, 2009, a 23-year-old Nigerian man named Umar Farouk Abdulmutallab boarded a Northwestern Airlines flight from Amsterdam, Netherlands bound for Detroit, Michigan with explosives.44

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38. Id.
39. Id.
40. Norman C. Bay, Executive Power and the War on Terror, 83 DENN. U. L. REV. 335, 372 (2005) (noting that the CIA, in other words, was intended to combat the foreign enemies of the United States, not its domestic wrongdoers).
42. Id. at 14 (referencing the Director of the NSA’s remarks to Congress, which was almost identical to those of Mary Jo White, former U.S. Attorney for the Southern District of New York).
43. Id.
44. Id.
sewn into his undergarments. He unsuccessfully attempted to blow up the plane in the name of al-Qaeda. Once captured, Abdulmutallab plead guilty to all counts against him, including attempting to use a weapon of mass destruction and conspiring to commit an act of terrorism against the United States. He is now serving out his life sentence in prison.

It is suspected that Abdulmutallab received his Islamic radicalization while living in London with his family, and later disappearing to Yemen, where al-Qaeda trained him. He, unfortunately, was not on the government’s watch list. This was, perhaps, the most daunting aspect of the botched terror mission for the national government. An investigation revealed that the government had, in fact, received information on Abdulmutallab, but intelligence agencies failed to utilize all resources in order to connect the appropriate dots. As a result of this inadequacy, President Obama demanded a watch list overhaul. One of the most debated changes is the National Counterterrorism Center’s (NCTC) ability to query different databases for individuals' personal information and retain the information for up to five years, even when the query results in no indication of criminal or terrorist activity. This change in procedure was primarily due to counterterrorism officials’ belief that some info-

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44. Mr. Abdulmutallab’s attempted terrorist attack on Christmas day was an act that resonated throughout the country for several reasons, but primarily because he was able to get onto the plane with the bomb undetected. See Angwin, supra note 1 (noting that this incidence became the driving force behind the current administration’s unwavering passion towards national security and surveillance efforts).


47. Id.


49. Angwin, supra note 1 (noting that because the government failed to piece together information about Abdulmutallab to determine that he was a terrorist, its focus is now on having the functionality and capacity to pull bits of information from various sources together to determine whether someone is a terrorist or engaged in criminal activity).

50. See id. (discussing how the lack of information on Abdulmutallab prior to the attack exposed fundamental incapacities in the government’s monitoring system).

51. See id.

52. Id.

53. Id.
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tion could possibly prove helpful later.\textsuperscript{54} The Abdulmutallab attack marked the beginning of more intense counterterrorism measures, in which personal information is made subject to government surveillance without prior suspicion of criminal activity.\textsuperscript{55} Over time, as the threat of a terrorist attack on the United States has become increasingly hostile, the pressure placed on the federal government to ensure domestic safety has led to a broadening of surveillance authority.

II. TREND TOWARD INVASIVE SURVEILLANCE MEASURES

After the 9/11 attacks, domestic fear of future terrorist attacks grew, spurring the national government’s focus of more intrusive levels of surveillance.\textsuperscript{56} The government’s focus on national security surveillance was indicative of the ballooning of the post-9/11 national security budget, the expansion of technological abilities, and the almost complete unaccountability and secrecy of national security covert operations.\textsuperscript{57} Former Vice President Dick Cheney, a well-known advocate of the government’s surveillance programs, has argued that the surveillance programs are necessary if terrorist attacks are to be stopped.\textsuperscript{58} Other major political figures, like Robert Mueller, the current director of the FBI, assert that the loss of privacy for everyday Americans is justified because the eavesdropping has thwarted terrorist plots.\textsuperscript{59} In an address to Congress in 2013, Mueller stated that the “challenge in a position such as I have held in the last 11 years is to

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\item \textsuperscript{54} Id. The rationale that the information should be held in the databases because it could possibly become relevant sometime in the future is heavily in contention because the government is, in essence, saying that even if it monitors an individual and he or she appears to be innocent, it will, nevertheless, continue to monitor said individual.
\item \textsuperscript{55} Id.
\item \textsuperscript{56} See Multiple Polls: Americans are More Afraid of the GOVERNMENT than TERRORISTS, supra note 11 (indicating that in May 2001, a Fox News survey polled Americans and asked if they would be willing to give up some of their personal freedom in order to reduce the threat of terrorism; the results indicated that 40% answered “no” and 33% answered “yes,” which was a drastic difference from the results from the same poll taken immediately following the 9/11 attacks where 71% of Americans agreed to sacrifice personal freedom to reduce the threat of terrorism).
\item \textsuperscript{59} Id.
\end{itemize}
balance on the one hand the security of the nation and on the other hand the civil liberties that we enjoy in this country."  

Following 9/11, the government instituted specific profiling of U.S. nationals who were residents or citizens of a foreign country of interest and were traveling through the airways. After the Abdulmutallab attack, the Obama administration reinstated this airport profiling of approximately fourteen countries, most of which were majority Muslim countries. This program may be similarly compared to the National Security Entry-Exit Registration System Program implemented by President George W. Bush in 2002. Critics of the 2002 program noted that it failed to capture any terrorists, yet it placed approximately 14,000 of the individuals into deportation proceedings. This program required male nationals from twenty-five countries, twenty-four of which were predominantly Muslim, who were working, visiting, or living in the United States to report to immigration authorities for fingerprinting and interviews. Critics of both programs contend that the singling out of individuals from these countries has the effect of singling them out because of their religion or nationality.

Initially, Americans welcomed the heightened security measures; however, as the government’s surveillance measures began to increasingly violate domestic civil liberties, American sentiment became wearier of these government measures. In fact, a new CBS poll found

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61. James J. Zogby, Profiling is Back…. RACE MATTERS (Jan. 11, 2010), http://endnseers.blogspot.com/2010/01/profiling-is-back.html (noting that there was a discriminatory intent behind singling out individuals from majority Muslim nations).

62. Id.


64. Id.

65. Id.

66. Id. (statement of Nawar Shora) 
[T]his takes millions of people and frankly labels them for the general public. . . . . You’re telling broader society it’s OK to treat them different because they are different. Because we have one 23-year-old Nigerian do something very dangerous and stupid, 100 million Nigerians are going to be labeled?

67. Multiple Polls: Americans are More Afraid of the GOVERNMENT than TERRORISTS, supra note 11 (indicating the results of a recent Fox News poll taken April 16, 2013, asking
that nearly six in ten Americans said they were very concerned or somewhat concerned about losing privacy because of federal efforts to fight terrorism. The debate on national security surveillance practices has resulted in the public’s awareness and disdain for the government’s intrusive practices. Some of this disdain is sparked by the June 2013 information leak by Edward Snowden, a former intelligence agent who leaked to the public highly sensitive intelligence. He asserted that the public deserved to be aware of the government’s intrusive intelligence gathering practices. In an interview with The Guardian, Snowden stated “I, sitting at my desk, . . . could ‘wiretap anyone, from you or your accountant, to a federal judge or even the president, if I had a personal email.’”

This country’s well-founded focus of national security has led to a development of policy and laws that create a very fine line between national security and the unrestrained infringement upon civil liberties. Because of responses to Freedom of Information Act requests, the government’s surveillance practices are now exposed and shed some light on the inappropriate measures that are being taken in the post-9/11 national security era.

### III. CURRENT GRANT OF SURVEILLANCE POWER

Recently, the government has been granted a broad authority to monitor domestic individuals for purposes of national security without requiring any suspicion of criminal or terrorist activity. Many counterterrorism authorities have addressed monitoring procedures; however, two specific laws are gaining much criticism—the NCTC and

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70. Id. Unfortunately, there was not clear support for the premise in the article.

71. Id. at 1–2.


73. There need not be documented suspicion of individuals, i.e., individuals need not be flagged by any government organization in order for a counterterrorism agency to begin intrusive surveillance.

74. Other counterterrorism laws that grant a surveillance authority include the Patriot Act and the creation of the Transportation Security Administration (TSA).
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the FBI Domestic Investigations and Operations Guide (DIOG). These authorities are discussed and analyzed below.

A. Development of the National Counterterrorism Center

The NCTC was created as an approach to prevent potential terrorist attacks on the United States. President George W. Bush signed the program into effect through an Executive Order on August 27, 2004. The order granted the government with the authority to utilize comprehensive transnational threat assessments through the compilation of terrorist and potential terrorist information collected domestically and internationally. The NCTC integrates the intelligence capabilities of the CIA, the FBI, local police enforcement, and other agencies in order to collect and analyze information for the development of strategic plans to ensure national security. It now serves as the primary American government organization for analyzing and integrating all intelligence possessed or acquired by the government pertaining to terrorism and counterterrorism.

Over time, the NCTC guidelines have evolved and increased the surveillance power of the government. However, the variance between the 2008 NCTC Guidelines and the 2012 Guidelines has caused a great deal of disapproval from opponents within the government and those who are a part of independent organizations, such as the American Civil Liberties Union. Under the 2008 NCTC Guidelines, the government was not permitted to collect non-terrorism information of citizens who were not suspected of terrorism. If this material

76. Id. at 53589, 53592.
78. Thompson, supra note 7, at 3.
81. Angwin, supra note 80, at 5–6; see also ACLU Factsheet on Information Collection at the National Counterterrorism Center (NCTC), ACLU, https://www.aclu.org/files/assets/aclu_fact_sheet_on_information_collection_at_the_national_counterterrorism_center_nctc.pdf (last visited Oct. 5, 2013) (describing the difference between the 2008 and 2012 guidelines for collecting information about individuals who are not under suspicion of terrorism) [hereinafter ACLU Factsheet].
was collected, the procurement of information was to be treated as a mistake, and the government was required to purge this information from its databases within 180 days. The procurement of information was to be treated as a mistake, and the government was required to purge this information from its databases within 180 days.83

However, as U.S. national security threats have intensified, so, too, have the efforts to prevent any potential terrorist attacks that may occur on American soil right under the government’s nose, like the Abdulmutallab airplane attack.84 On March 23, 2012, the Office of the Director of National Intelligence announced substantial developments to the surveillance and information collection authority and practices of the NCTC.85 The controversial amendment to the NCTC came after a debate within the executive branch on how to create a function of the government that could collect random citizen information from various sources in order to determine potential threats to U.S. national security.86 A notable opponent to the amendment was Department of Homeland Security (DHS) leadership, which opposed the amendments because it potentially infringed upon civil liberties.87 Two weeks after the debate, the attorney general approved the proposed NCTC amendments.88 The 2012 NCTC Guidelines provide the government with the ability to collect and utilize non-terrorism information on citizens for up to five years, even if the individual is not suspected of terrorism or criminal activity.89 Through this amendment, the NCTC can now utilize entire government databases to analyze suspicious patterns of behaviors.90 The databases that are available to the NCTC range from flight records, casino-employee lists, and even the names of U.S. citizens who have volunteered to host foreign-exchange students, just to name a few.91 Furthermore, the guidelines authorize data mining techniques to collect the information, such as “pattern-based inquiries and analyses.”92

The newly amended NCTC guidelines broaden the scope of government surveillance to levels that are intrusive and do not provide for proper controls to prevent the unacceptable infringement upon individuals’ civil liberties. Therefore, further analysis must be con-

83. ACLU Factsheet, supra note 82.
84. Angwin, supra note 1, at 4.
85. ACLU Factsheet, supra note 82.
86. Angwin, supra note 1, at 5.
87. Id. at 4–5.
88. Id. at 6.
89. NCTC Guidelines 2012, supra note 79 at 9; see also ACLU Factsheet, supra note 82.
90. NCTC Guidelines 2012, supra note 79 at 10; see also ACLU Factsheet, supra note 82.
91. Angwin, supra note 1.
92. NCTC Guidelines 2012, supra note 79 at 10; see also ACLU Factsheet, supra note 82.
ducted in order to determine the constitutional permissibility of these measures.

B. Additions to the FBI’s Domestic Investigations and Operations Guide

In addition to the procedural power given to the NCTC through its amended guidelines, the FBI has been given express surveillance procedural authority through the DIOG. The new rules were enacted to give agents more latitude as they search for indications of criminal and terrorist activity. The various FBI surveillance procedures that have been outlined include the ability to observe and collect any form of protected speech by citizens and those residing within the country’s jurisdiction. Furthermore, the FBI has the authority to use religion as a factor when determining whether an individual or group deserves greater scrutiny and monitoring. Race and ethnicity may be considered as a factor in its national security assessment, as long as it is not the dominant factor for focusing on a particular person. Another power that has been granted is the authority to retain personal information that has been collected on an individual, even if an assessment does not suggest that an individual is engaged in any wrongdoing. Perhaps the most daunting new permission that has been granted to the FBI is the ability to monitor domestic individuals and citizens without there being any presupposed suspicion of terrorist or criminal activity. The manual prohibits “racial profiling” in the national security assessments; however, it allows an assessor to moni-

93. DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE, supra note 4, at 29–30.
95. DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE, supra note 4, at 26 (“Surveillance is permissible as long as [it is] done for a valid law enforcement or national security purpose and conducted in a manner that does not unduly infringe upon the ability of the speaker to deliver his or her message.”).
96. Id. at 27 (“FBI employees may take appropriate cognizance of the role religion may play in the membership or motivation of a criminal or terrorism enterprise.”).
97. Id. at 32. The DIOG recognizes that many members of the same ethnic group will not necessarily belong to the same terrorist or criminal group; thus, there must be some other information beyond race and ethnicity that links the individual to the terrorist or criminal group. However, the guidelines do not describe what other information is necessary and to what degree the additional information must be ethnic neutral.
98. Id. at 74.
99. Charlie Savage, Wider Authority for F.B.I. Agents Stirs Concern, N.Y. TIMES, Oct. 29, 2009, at A1 (“It raises fundamental questions about whether a domestic intelligence agency can protect civil liberties if they feel they have a right to collect broad personal information about people they don’t even suspect of wrongdoing.”) (quoting Mike German, a former FBI agent).
tor “religious practitioners or religious facilities,”100 and to identify locations of concentrated ethnic communities.101

The FBI, in essence, has the authority to infiltrate lawful and peaceful places of worship, communities and businesses, and take race, religion and ethnicity into account when developing its threat analysis.102 The guidelines permitting the use of race, religion, or ethnicity to assess national security threats or criminal activity could result in the unconstitutional and prejudicial monitoring of individuals.103

IV. IMPROPER DOMESTIC SPYING PROCEDURES

The authority to spy and monitor domestic individuals has been granted to various agencies within the government, such as the FBI and the DHS.104 This power, granted through the establishment of the NCTC and the DIOG, has led to various improper surveillance practices, such as using race, ethnicity, or religion as a basis for monitoring an individual when there is no suspicion of criminal or terrorist activity.105 The government has used race and ethnicity as a basis for selecting individuals to monitor and for conducting threat analysis in the past.106 Furthermore, with the additional surveillance power that has been given to the government, the use of race and ethnicity as a basis for surveillance is disconcerting. Past Department of Justice national security guidance has explicitly disallowed the consideration of race or ethnicity, except to the extent permitted by the Constitution

100. DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE, supra note 4, at 27.
101. Id. at 32.
103. Wadhia, supra note 2, at 1514. While profiling based on nationality or national origin may not be inherently wrong, there are at least five reasons why it is offensive and in many cases no different from profiling based on race, ethnicity or religion: 1) in practice, many policies based on nationality disproportionately impact particular religions and ethnicities; 2) this disproportionate impact creates the perception that a particular policy is premised on anti-Arab or anti-Muslim sentiment; 3) most of the countries identified by the government as harboring terrorists have been Arab or Muslim; 4) in practice, “nationality” based profiling is often conflated with “national origin” profiling; 5) profiling based on country of birth has extended to naturalized United States from particular countries, leading to the presumption that citizens from particular places are somehow less reliable or loyal in their allegiances to the United States.
104. ACLU Factsheet, supra note 82; see also Wadhia, supra note 2, at 1513.
105. ACLU Factsheet, supra note 82.
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and laws of the nation. 107 Although a constitutional analysis of the government’s surveillance efforts will be conducted later in this Comment, it is important to note that the Justice Department’s past guidance stated that “in absolutely no event . . . may Federal officials assert a national security or border integrity rationale as a mere pretext for invidious discrimination.” 108 This 2003 guidance explains what efforts regarding race or ethnicity are allowed and not allowed as a means to protect national security; however, the DIOG has permitted measures that are contrary to the standards outlined in the 2003 Department of Justice Guidance. 109

Although the DIOG prohibits the FBI from considering race or ethnicity as the sole factor in determining whether an individual or group will be subject to intense monitoring, 110 ethnicity may be considered in evaluating whether an individual is a possible associate of a criminal or terrorist group that is known to be comprised of members of the same ethnic grouping as that individual. 111 Furthermore, the DIOG permits the FBI to identify areas of concentrated ethnic communities if the locations will reasonably aid in threat analysis. 112 The locations of “ethnic-oriented” businesses and facilities may be gathered if their locations will reasonably contribute to an awareness of threats, vulnerabilities, and intelligence collection opportunities. 113 Just as race or ethnicity is often closely correlated to religious affiliation, the FBI has been granted the authority, although accompanied with many restrictions, to utilize religion as a basis for examination. 114

In accordance with its surveillance and national security investigation power, the FBI has conducted various undercover monitoring procedures that call into question their constitutional permissibility. 115 In 2009, the FBI participated in a career day event conducted in San

108. Id.
109. Id.; see also DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE, supra note 4, at 31.
110. DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE, supra note 4, at 31.
111. Id. at 32.
112. Id.
113. Id.
114. Id. at 38.
Jose, CA sponsored by an Assyrian community organization. The FBI’s observations were placed in a mapping report. In the report, the FBI recited information about the organization’s activities, the identities of several leaders within the organization, and the content of conversations at the event. This content included opinions, backgrounds, travel histories, educations, occupations, and charitable activities.

Similarly, a memo submitted by the Sacramento Division of the FBI details a conversation in which an undercover agent discusses the Saudi Student Association with an innocent California State University student. The conversation included the organization’s size, purpose, and activities. The memo, which included the student’s social security number, telephone number, and address, was submitted to the FBI in Washington, DC. Additionally, in San Francisco, the FBI submitted a 2007 and 2008 report that detailed FBI spy efforts at Ramadan Iftar dinners. In the reports, the FBI documented the names of attendees, the contents of various conversations and presentations, a photo of dinner participants, and other information. Both of the reports indicate that the information was disseminated outside of the FBI. There are several other instances, similar to these, in which the FBI utilized individuals’ race or ethnicity as a basis for monitoring.

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117. See id.; see also ACLU, supra note 116.
118. FBI, MAPPING REPORT JUNE 2009, supra note 116.
119. Id.
121. Id. at 2.
122. Id. at 1.
125. FBI, MAPPING REPORT OCT. 2007, supra note 123; see also FBI, MAPPING REPORT SEPT. 2008, supra note 124. The ACLU presumes that the information that was “disseminated outside the F.B.I.” was sent to other law enforcement or intelligence agencies.
126. Another example includes a 2007 San Jose Division FBI report documenting a mosque outreach meeting attended by fifty people representing twenty-seven Muslim communities and religious organizations, analyzing the “demographics” of those in attendance, and identifying each individual by name and organization. FBI, MAPPING REPORT 012783 (2007), available at http://www.aclu.org/files/fbimappingfoia/20111110/ACLURM012669.pdf.
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other organizations have protested the wide-sweeping authority that has been granted to the national government to monitor domestic individuals, especially those that are not suspected of terrorism or criminal activity.\textsuperscript{127}

Furthermore, the government has received criticism in the past for misusing its surveillance authority.\textsuperscript{128} In March of 2007, the Director of the FBI, Robert Mueller III, acknowledged that the bureau had improperly used the Patriot Act to obtain surveillance information.\textsuperscript{129} An investigation into the government’s surveillance practices found that national security letters, which allow the bureau to obtain records from telephone companies, internet service providers, banks, credit companies, and other businesses without a judge’s approval, were improperly, and sometimes illegally, used.\textsuperscript{130} Additionally, incorrect recordkeeping was exposed, in which the actual number of national security letters utilized were frequently understated when reported to Congress.\textsuperscript{131}

Several legislatures have expressed concern about the misuse of government surveillance.\textsuperscript{132} It is apparent that this concern is not misguided since the Justice Department’s Office of the Inspector General noted, in a 2007 audit report, that many FBI failures had occurred as a result of its surveillance procedures.\textsuperscript{133} These failures include a lack of internal controls\textsuperscript{134} and the absence of required information in national security letter approval memoranda.\textsuperscript{135}

Critics of the government’s surveillance procedures assert that the broad monitoring authority given to the government not only is unconstitutional because of a lack of checks and balances that would

\textsuperscript{127}. *ACLU Factsheet*, supra note 82.
\textsuperscript{129}. *Id.*
\textsuperscript{132}. Stout, *supra* note 128 (“National security letters are a powerful tool, and when they are misused, they can do great harm to innocent people.”) (statement of Senator Patrick J. Leahy).
\textsuperscript{134}. *Id.* at 104.
\textsuperscript{135}. *Id.* at 105.
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allow for proper controls of the monitoring of citizens, but also because it has the effect of inappropriately singling out individuals for no other reason than their race or ethnicity. Therefore, the surveillance power given to the government and the anti-terrorist domestic monitoring procedures must be analyzed to determine their constitutional permissibility.

V. FOURTEENTH AMENDMENT ANALYSIS

The government’s surveillance authority must satisfy the constitutional standard of strict scrutiny because it permits the use of race and ethnicity as a basis for monitoring. This permission of race and ethnicity has a disparate impact on individuals who belong to a particular racial, ethnic, or religious group, especially those who are Arab, South Asian, or who practice the Islamic religion. Because of the disparate impact on a protected class, the surveillance measures must be narrowly tailored to a compelling government interest in order to be permissible under the Fourteenth Amendment’s Equal Protection Clause. The monitoring procedures do not satisfy this standard because the procedures have the tendency of being over-inclusive, in which it permits the use of apparently innocent individual’s information in counterterrorism analysis. Because the procedures are not narrowly tailored to the compelling interest of national security, the newly amended NCTC and DIOG guidelines are unconstitutional.

A. Equal Protection Standard

The United States Constitution, in its Fourteenth Amendment, prohibits the denial of any person within its jurisdiction the equal protection of the laws. However, there are many ways in which a law, regulation, or activity can violate the Fourteenth Amendment’s Equal Protection Clause. An act may be in violation of the Fourteenth

136. Stout, supra note 129 (“It is time to place meaningful checks on the Bush administration’s ability to misuse the Patriot Act by overusing national security letters.”) (statement of Senator Harry Reid of Nevada, the majority leader).
137. Wadhia, supra note 2 at 1514.
138. Shaw v. Hunt, 517 U.S. 899, 908 (1996) (holding that a North Carolina redistricting plan was unconstitutional because it violated the Equal Protection Clause of the Fourteenth Amendment by using race as a distinguishing factor and noting that drawing racial distinctions are permissible in circumstances in which the government is pursuing a “compelling state interest” and the action is narrowly tailored to achieve that compelling interest); see also Miller v. Johnson, 515 U.S. 900, 904 (1995) (“Laws classifying citizens on the basis of race cannot be upheld unless they are narrowly tailored to achieving a compelling state interest.”).
139. U.S. Const. amend. XIV, § 1.
Amendment if there is disparate treatment or a disparate impact on a particular insular minority. Because the grant of surveillance authority does not specify a particular group for monitoring, but simply permits the use of race or ethnicity in counterterrorism analysis generally, this Comment’s constitutional argument will pertain to the law’s disparate impact on a minority group, as opposed to its direct disparate treatment.

Supreme Court jurisprudence establishes the requirements that a particular governmental act or law must satisfy in order to be considered in violation of the Fourteenth Amendment. When an act has a disparate impact on a protected class or insular minority, it does not explicitly discriminate against this class, but it does so in an inadvertent and residual way. In order for an act to be classified as having a disparate impact, there must be a showing by the framers of the law or regulation that there was intent to discriminate at the time the law was passed or act was conducted. The Court has established that a state action that is racially neutral on its face can violate the Equal Protection Clause only if it is motivated by a discriminatory purpose. Because a showing of intent to discriminate may be difficult to establish, the Court has permitted challengers to establish intent to discriminate through direct or indirect evidence.

140. Roden v. Diah, No. 7:07CV00252, 2008 WL 5334309, at *12 (W.D. Va. Dec. 19, 2008) (holding that the plaintiff’s claim of discrimination through a disparate impact and disparate treatment was unsuccessful because she failed to establish that she was a member of a protected class).

141. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988) (noting that in certain cases, facially neutral employment practices that have significant adverse effects, including statistical disparities, on protected groups have been held to be inappropriate).

142. Washington v. Davis, 426 U.S. 229 (1976) (holding that where black applicants for employment as D.C. police officers brought a class action claiming that recruiting procedures, including a written personnel test administered to determine whether applicants have acquired a particular level of verbal skill, were racially discriminatory, the disproportionate impact of the test, which was neutral on its face, did not warrant conclusion that the test was a purposely discriminatory device).


144. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977) (holding that respondent failed to meet burden of proving that racially discriminatory intent or purpose was a motivating factor in the rezoning decision where a nonprofit real estate developer contracted to build racially integrated low and moderate income housing and alleged that local authorities’ refusal to change the tract from a single-family to a multi-family classification was racially discriminatory).
1. Direct Evidence

In the longstanding Supreme Court case *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court stuck down a California statute for violating the Equal Protection Clause of the Fourteenth Amendment. Section eight of the statute prohibited any person from establishing or maintaining a laundry facility within San Francisco without having first obtained the consent of the board of supervisors. This act had a disparate impact on Chinese laundry owners because a large number of them were not getting the approval needed to maintain their businesses, while their non-Chinese counterparts were getting the necessary approvals. The Court determined that there was no reason why the Chinese laundry owners were not permitted to carry on their businesses, except that it was the will of the supervisors. Therefore, it was clear that the regulation was enacted for the purpose of disenfranchising Chinese laundry owners in the area. Because the statute had a disparate impact on Chinese laundry owners and was clearly enacted for this purpose, the statute was held to be in violation of the Fourteenth Amendment.

The California act in *Yick Wo* was an example of disparate impact on an insular minority through direct evidence of discriminatory intent. Even still, this example may be distinguished from the laws set forth in the NCTC and the DIOG guidelines because the statute in *Yick Wo* was one that was made through congressional channels and required the participation of the public in order to be effective, whereas the national security laws discussed throughout this Comment are secretive in nature. Although the executive order and guidelines are, themselves, made available to the public, the actual surveillance procedures in contention are not. The critics of the government surveillance authority procedure are made privy to past confidential government monitoring documents only because of the pressure placed on the government through Freedom of Information Act requests. Because of the justifiably secretive nature of govern-
ment surveillance and national security procedures, it may be difficult to establish intent to discriminate from the passage of the NCTC and DIOG guidelines through direct evidence. Therefore, indirect evidence of intent to discriminate through the government’s surveillance practices is explored below.

2. Indirect Evidence

The key Supreme Court case in determining whether there is sufficient indirect evidence of intent to discriminate is Village of Arlington Heights v. Metro Housing Development Corporation, 429 U.S. 252 (1977). The starting point for assessing discriminatory intent under Arlington Heights is to determine the impact of the official action and whether it bears heavily on one race over another. Arlington Heights involved a zoning ordinance that barred the construction of multi-family housing facilities, such as apartment complexes, in the center of the area. This ordinance had the effect of preventing families from various socio-economic and cultural backgrounds from moving into the neighborhood. The importance of Arlington Heights rests in the Court’s analysis in determining whether there was discriminatory intent on a suspect class, which would then establish the unconstitutionality of the ordinance. The Court used a five-factor test to identify indirect evidence of discriminatory intent. These five factors include: (1) a stark pattern of discrimination in which numbers and statistics display a large pattern of discrimination on a particular group; (2) a historical background in which the pattern of discrimination pertains to a group that has been historically discriminated against; (3) whether the timing of the passage of the law was done in such a way that could illicit suspicion as to the reasoning behind the law; (4) departures from normal procedure in which the government has altered the way it normally does business; and lastly (5) the legislative history, including suspicious statements made by members of the government. An application of the Arlington Heights
factors to the government’s monitoring authority and practices is conducted to determine whether the U.S. surveillance procedures violate the Fourteenth Amendment’s Equal Protection Clause.

3. Stark Pattern of Discrimination

The first, and most influential, factor stated by the Court is whether there is a stark pattern of discrimination, such as that in *Yick Wo*.

The FBI surveillance reports, previously mentioned, all single out individuals or organizations that are affiliated in some way with developing countries, particularly the Middle Eastern area of the world, or those that practice Islam. Although only a few FBI reports were discussed, civil rights organizations have questioned the national government for seeking out individuals and organizations of a particular ethnicity, for example, Nigerian or Pakistani individuals, and monitoring them solely because of their ethnicity.

Furthermore, the post-9/11 racial profiling of Arabs, Muslims, and South Asians has become publically and politically acceptable, especially in instances of airport security. Following 9/11, the Assistant Attorney General for Civil Rights, in conjunction with the Department of Justice’s Civil Rights Division, had to create the Initiative to Combat Post-9/11 Discriminatory Backlash. This project was necessitated by an effort to quell violations of civil rights laws against Arab, Muslim, Sikh, and South-Asian Americans, and those perceived to be members of these groups. The initiative works to combat crimes and discrimination against these groups by ensuring that there are accessible means for individuals to report crimes, that proactive measures to identify crimes and discrimination are implemented, and that outreach programs to affected communities are conducted.

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155. *Id.* at 266.
156. *ACLU Factsheet, supra* note 82.
157. The Aviation and Transportation Security Act grants air carriers the discretion to refuse to transport a passenger whom the carrier “decides is, or might be, inimical to safety.” 49 U.S.C. § 44902(b) (2013); see also *Wadhia, supra* note 2 at 1514.
158. *Initiative to Combat Post-9/11 Discriminatory Backlash*, U.S. Dep’t of Justice, http://www.justice.gov/crt/legalinfo/nordwg_mission.php (last visited Oct. 5, 2013) (“Assistant Attorney General for Civil Rights Thomas E. Perez has directed the Civil Rights Division’s National Origin Working Group to work proactively to combat violations of civil rights laws against Arab, Muslim, Sikh, and South-Asian Americans, and those perceived to be members of these groups, through the creation of the Initiative to Combat Post-9/11 Discriminatory Backlash.”).
159. *Id.*
160. *Id.*
4. Historical Background

The second factor is the historical background of the decision and determining if it reveals a series of official actions taken for invidious purposes.161 This factor also calls for an analysis of whether the group that is negatively affected by the action has been historically disfavored. In order to conduct this particular analysis, the political and emotional state of the country after September 11, 2001 must be considered. The events that transpired on this date, widely known as the 9/11 attacks, have forever shaped the national security efforts of this country. On 9/11, the United States fell victim to four synchronized suicide attacks by the Islamist terrorist group al-Qaeda. The group’s members were able to highjack these planes with the aid of various weapons. After these events, United States national security developed new procedures to intensify security efforts. These procedures include the creation of the National Counterterrorism Center and other domestic monitoring programs. The events of 9/11 placed a damaging spotlight on Middle Eastern individuals and those who practiced Islam in America. Since 9/11, there have been other events by those that observe the Islam religion that fundamentally posed a threat to U.S. national security, such as the botched 2009 airplane murder suicide mission of Umar Farouk Abdulmutallab.162 Because of the terror attacks on United States soil, the relations between many American non-Islamic followers and those that practice Islam or appear to be of the Middle Eastern heritage have become strained.

Therefore, the fact that these groups have been historically disfavored in regards to national security since 9/11 means that it is more than likely that the government’s surveillance efforts would focus or single out these groups of people to monitor. Since the government may now use race or ethnicity as a factor in developing their monitoring and surveillance efforts, this will likely result in the utilization of personal information of domestic individuals who have similar characteristics to people like Abdulmutallab and other known terrorists. The government now has the permission to closely monitor any individual without prior suspicion of criminal or terrorist activity. Therefore, the singling out of innocent individuals who belong to Arab, South Asian, or Muslim groups will likely occur since these groups are

162. Angwin, supra note 1.
prime suspects for national security threats against the United States.163

5. Specific Sequence of Events

The third factor in determining whether an official action displays sufficient discriminatory intent is the specific sequence of events that lead up to the challenged decision.164 The beginning point of the newly amended NCTC is the Abdulmutallab attack on Dec. 25, 2009, in which the White House issued a report to the public of the news on January 7, 2010.165 In May of 2010, the Senate Select Committee on Intelligence reported that the Abdulmutallab attack happened because the NCTC was not equipped with the necessary information and procedures to have prevented the attack and fulfill its mission.166

In a debate held at the White House before the passage of the executive order that broadened the authority of the NCTC, opposition to the amended surveillance power was made apparent.167 By March of 2011, the various agencies and departments were editing and submitting concerns for the amendment of the NCTC monitoring authority.168 During this time there became clear opposition to the amended power proposed for the NCTC, in which the DHS feared that the amendments would encroach upon individuals’ civil liberties.169 In redacted email correspondence between the agencies, an official in the Office of the Director of National Intelligence expressed concern to the DHS, who opposed the amendment, that the DHS possessed a lack of understanding of the overarching intent of the guidelines.170 Furthermore, the official worried that the DHS’s edits to the

163. Wadhia, supra note 2 at 1513.
167. Angwin, supra note 1.
168. Id.
169. See Angwin, supra note 1.
proposed guidelines would “eviscerate” the authorities of the NCTC.171

The concerns of the DHS were primarily made by Chief Privacy Officer, Mary Ellen Callahan and the Officer for Civil Rights and Civil Liberties, Margo Schlanger.172 After it became apparent that the concerns would not be addressed,173 in May 2011, the officers elevated their concerns to the DHS Secretary in a memo entitled, “How Best to Express the Department’s Privacy and Civil Liberties-Related Concerns over Draft Guidelines Proposed by the Office of The Director of National Intelligence and the National Counterterrorism Center.”174 In November, Callahan and Schlanger, after pushing for further privacy protections, issued corresponding emails, in which Schlanger wrote, “I’m not sure I’m totally prepared with the firestorm we’re about to create.”175 Staffers for the Homeland Security Privacy and Civil Rights and Civil Liberties offices prepared talking points for the meeting to finalize the NCTC amendments.176

The civil liberty concerns were made clear to the Office of the Director of National Intelligence and the other governing agencies, yet the amended NCTC guidelines were enacted irrespective of these concerns.177 Furthermore, because the discussion of amendment procedures was conducted following the Abdulmutallab attack, it is clear that the government sought to prevent future domestic attacks of this nature. However, the solution for preventing these types of attacks is to collect and analyze data on individuals from various inconspicuous sources, and the likely result will be to collect this information on people who the government itself deems likely to engage in terrorist activity. Therefore, the sequence of events that led to the amended government surveillance procedures display the intent to monitor domestic individuals who are likely to engage in terrorist activity, those

171. Id.
172. Id.
173. Id. (showing how Homeland Security Associate General Counsel Matthew Kronisch expressed “little expectation of resolving our concerns,” but requested a meeting with the Office of Director of National Intelligence and the Department of Justice).
174. Id.
175. Id. (noting that on November 9, 2011, Homeland Security Civil Rights and Civil Liberties Officer Margo Schlanger wrote in an e-mail to Chief Privacy Officer Mary Ellen Callahan in November, referring to the fact that the two wanted to push for further privacy protections in the guidelines while others in the department were willing to agree to the counterterrorism proposal).
176. E-mail Correspondence Between Staffers at the Dep’t of Homeland Sec. (Sept. 23–24, 2011), http://s3.documentcloud.org/documents/526365/dhs-interim-response-content.pdf.
177. See Angwin, supra note 1.
being people of Arab or South Asian descent and those belonging to the Muslim religion.

6. Departures from Normal Procedures

The fourth factor to be analyzed is whether there has been a departure from the normal procedural sequence of events that led to the establishment of the law.\textsuperscript{178} The NCTC amendments were enacted with no legislative input, and were argued to have been an abuse of executive power.\textsuperscript{179} In a letter released on December 17, 2012, two Congressmen, Representatives Jason Chaffetz (R-Utah) and Trey Gowdy (R-South Carolina) address Attorney General Eric Holder asking whether the Justice Department justifiably believes that the government has the legal authority to: a) keep data on citizens who are not suspected of any crime; b) analyze aggregated government databases; and c) change fundamental rules governing surveillance without approval from Congress.\textsuperscript{180} Furthermore, in another letter addressed to Attorney General Holder, U.S. Senators Ron Wyden and Mark Udall express their concern of the executive branch’s decision-making power under its interpretation of the Patriot Act.\textsuperscript{181} The letter states “as we see it, there is now a significant gap between what most Americans think the law allows and what the government secretly claims the law allows. This is a problem, because it is impossible to have an informed public debate about what the law should say when the public doesn’t know what its government thinks the law says.”\textsuperscript{182}

Although the NCTC itself was enacted under the authority of the executive branch, the additional surveillance authority given to the government through the NCTC guidelines was not vetted through congressional channels, which are supposed to be representatives of the people. In fact, many argue that the configuration of the guidelines result in surveillance procedures that will be very difficult for

\textsuperscript{179} See Chaffetz & Gowdy, supra note 7.
\textsuperscript{180} Id.
\textsuperscript{182} Id.
other government authority, like Congress, to monitor and ensure that the civil liberties of domestic individuals remain intact.\footnote{183. See Thompson, supra note 7, at para. 6 (“Congress must provide the [Privacy and Civil Liberties Oversight Board] with greater independence, increased oversight powers, and appropriate authority to guide the development of comprehensive, consistent, and effective privacy policies that will ensure that the NCTC becomes an effective means to protect our nation from terrorism — and not a tool to rob Americans of their rights.”).}

Furthermore, the NCTC guidelines now allow the government to examine the files of U.S. nationals for possible criminal or terrorist activity, even if there is no reason to suspect such behavior.\footnote{184. Angwin, supra note 1.} This surveillance procedure is contrary to past established guidelines, which barred the agency from storing information about domestic individuals unless there was suspicion of terrorist activity or it was related to an ongoing investigation.\footnote{185. See, e.g., Memorandum of Agreement Between the Attorney General and the Director of National Intelligence on Guidelines for Access, Retention, Use, and Dissemination by the National Terrorism Center of Terrorism Information Contained within Datasets Identified as Including Non-Terrorism Information and Information Pertaining Exclusively to Domestic Terrorism 3–4 (2008).} This departure in procedure of collecting and storing individuals’ information has the effect of essentially permitting the government to collect information for discretionary reasons. This could cause an abuse of discretion, especially if individuals belonging to a particular racial or ethnic group are historically and presently garnering terrorist suspicion simply because of their membership in that group.

7. Legislative History

The final factor mentioned by the Court is the legislative or administrative history pertaining to the passage of the law, especially where there are contemporary statements by members of the decision-making body in records, such as meetings minutes and other reports.\footnote{186. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 (1977).} Because the NCTC and DIOG are apart of the executive body, many of the administrative materials surrounding the guidelines may be considered. In a 2010 audit of the FBI’s surveillance activity, the Inspector General of the Justice Department reported that various FBI spying investigations were improper because they were frequently opened based upon “factually weak” justifications.\footnote{187. OFF. OF INSPECTOR GEN., supra note 4, at 190.} For example, the audit report noted that the FBI might have inappropriately classified some investigations that related to nonviolent civil disobedi-
ence as “Acts of Terrorism.” Therefore, it is apparent that the government’s surveillance efforts tend to classify individuals or certain actions as “acts of terror” inaccurately. This may be done to get an opportunity to closely monitor the individual or group without just cause.

The passage of the surveillance guidelines has the effect of permitting the government to monitor individuals as potential terrorists without any indication or suspicion placed on the individual. Based on the timing of the passage of the law and the lack of accountability placed on the government, it is apparent that the law not only has the effect of discriminating against individuals who belong to a particular racial or ethnic group, but also that the law was passed for this particular purpose. The race and national origin of an individual is a category that warrants maximum protection under the Fourteenth Amendment. Therefore, in order for the FBI’s grant of power and practices to be sustained, it must pass strict scrutiny.

B. Strict Scrutiny Analysis

Supreme Court jurisprudence has established that in order to classify individuals of a suspect class, the government must establish that it is acting to accomplish a compelling interest and that the discriminatory treatment is necessary and narrowly tailored to accomplish the compelling interest. Here, the compelling interest is satisfied because it has legally been established that national security is a compelling governmental interest. Therefore, the analysis will turn on whether the government surveillance procedures are narrowly tailored to meet the compelling interest of national security. In order to be narrowly tailored to the stated goal, the action must not be over-inclusive or under-inclusive. This FBI procedure is over-inclusive because it knowingly captures those individuals who have no ties to

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188. Id.
189. See Angwin, supra note 1 (noting that the government began the process of broadening surveillance authority under the NCTC immediately after the Abdulmutallab attack).
190. See Chaffetz & Gowdy, supra note 7.
191. Wadhia, supra note 2, at 1514.
192. Id.
196. Freeman v. City of Fayetteville, 971 F. Supp. 971, 975 (E.D.N.C. 1997) (“A narrowly tailored remedy cannot be over-inclusive and must be confined to alleviate ‘the effects of identi-
terrorism and have no suspicion placed on them. When the government places non-suspect individuals on watch lists, their names may remain on the lists for an extended period of time in the event the information will be valuable. With this line of reasoning, every individual in the United States is subject to surveillance because any minute detail could possibly be relevant in a future national security surveillance effort.

The government advocates for the authority to monitor individuals without suspicion of criminal or terrorist activity and for the ability to retain seemingly innocent individuals’ information in databases in order to ensure that all possible domestic terrorists are monitored, including those that show no signs of criminal activity. While these procedures likely may unearth current or potential terrorists, it will also capture many more individuals who are not and will never be terrorists. Furthermore, the authority to retain personal information on watch lists for longer periods of time, even if there is no indication that the individual is involved in criminal or terrorist activity, enhances the over-inclusiveness of these monitoring procedures. The purpose of the watch list is to provide an efficient means for government agencies to monitor and track individuals who, either are suspected of terrorist activity, or have the potential to engage in terrorist activity. If the government discovers that a selected individual is not engaged in criminal activity and continues its surveillance practices, the government is now monitoring an individual who it, in essence, knows is participating in no criminal or terrorist activity. In this case, the stated purpose of national security is mute.

The FBI’s procedures are not narrowly tailored to achieve the established compelling interest of national security because the procedures are over-inclusive by including those who are known to be innocent in the government’s terrorist watch list. Therefore, this surveillance authority and practice does not fully meet the stated goal of ensuring national security. Because the government’s surveillance system has a disparate impact on those who belong to a particular racial or ethnic group, specifically those who are Arab, South Asian, or practice the Islam religion, it can only be constitutionally upheld if

\[\text{Howard Law Journal}\]

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197. Angwin, supra note 1.
198. Id. (discussing the watch list database and noting that data about Americans “reasonably believed to constitute terrorism information” may be permanently retained).
it is narrowly tailored to a compelling state interest.\textsuperscript{199} The government’s new monitoring authority and procedures are, indeed, not narrowly tailored to the established compelling interest of national security. Therefore, the surveillance efforts unconstitutionally discriminate against a particular racial or ethnic group and thus violate the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

The grant of surveillance power to monitor individuals without suspicion of criminal or terrorist activity and the ability to collect personal information from various sources on the basis of race or ethnicity has resulted in the discrimination of domestic individuals who belong to a particular racial or ethnic group. This discrimination is generated through a disparate impact that the new government surveillance authority has on various ethnic and religious groups, specifically those that are Arab, South Asian, or practitioners of the Islamic religion. Through a balancing test of five factors established through Supreme Court jurisprudence, it is apparent that there is sufficient indirect evidence of the government’s intent to discriminate. Because there is an established intent to discriminate, the new government surveillance authority and procedures can only be constitutionally upheld if the acts are narrowly tailored to a compelling government interest. The compelling state interest is satisfied through the goal of nationally security; however, the narrowly tailored prong fails because of the monitoring system’s over-inclusiveness. Therefore, the government national security surveillance authority and procedures, via the NCTC amendments and DIOG guidelines, are in violation of the Fourteenth Amendment’s Equal Protection Clause.

\textsuperscript{199} Johnson v. Cal., 543 U.S. 499, 505 (2005) (noting that all racial classifications that are made by the government are subject to strict scrutiny, in which the government must prove that the racial classifications further a compelling government interest and are narrowly tailored) (citation omitted).