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PAUL FINKELMAN

LINCOLN, EMANCIPATION, AND THE LIMITS OF CONSTITUTIONAL CHANGE

The Emancipation Proclamation[1] is rarely considered as a legal document and seems disconnected from the Supreme Court. The Court, after all, has never adjudicated its meaning or interpretation. It is at best a historical artifact brought out to dress up an opinion or illustrate a point that a Justice is trying to make.[2] Whatever legal significance it might have had in 1863 was superseded by the events of the Civil War and the ratification of the Thirteenth Amendment in 1865. At the end of the war, former Confederates surely had no moral standing—and uncertain legal standing—to challenge the Emancipation Proclamation. The federal courts were in disarray, and it is hard to imagine, in mid- or late 1865, how anyone in the former Confederate states would have litigated the Emancipation

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

[2] For example, in *Schneiderman v United States*, 320 US 118 (1943), Justice Murphy used the Emancipation Proclamation to demonstrate that Schneiderman's support for a radical political and economic change did not prove disloyalty to the government or the Constitution. Schneiderman, a naturalized citizen who was communist, faced denaturalization on the grounds that his party membership proved he was not "attached" to the Constitution. Murphy wrote: "And something once regarded as a species of private property was abolished without compensating the owners when the institution of slavery was forbidden. Can it be said that the author of the Emancipation Proclamation and the supporters of the Thirteenth Amendment were not attached to the Constitution? We conclude that lack of attachment to the Constitution is not shown on the basis of the changes which petitioner testified he desired in the Constitution." Id at 142. For another use of the Proclamation to illustrate jurisprudence, see Justice Brennan's dissent in *Oregon v Mitchell*, 400 US 112 at 254, 255.

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Proclamation, although masters might have argued that the Proclamation violated the Takings Clause of the Fifth Amendment, had they been able to get into court.[3] However, the ratification of the Thirteenth Amendment in December 1865 mooted any such legal claims, and only left the federal courts to consider whether the Proclamation affected certain antebellum property rights.[4]

Despite the lack of litigation over its implementation, the Proclamation is best understood as a legal document, albeit one promulgated under unusual circumstances. Lincoln wrote the Emancipation Proclamation believing, or fearing, that it might be litigated or challenged in the Supreme Court. As Justice Brennan noted, "even President Lincoln doubted whether his Emancipation Proclamation would be operative when the war had ended and his special war powers had expired."[5] The uncertain legality of emancipation was complicated by the makeup of the Supreme Court, which was still led by Chief Justice Roger B. Taney, an uncompromising opponent of emancipation, black rights, and the war effort. If Taney remained on the Court when the war ended he would undoubtedly hear cases on the legitimacy of the Emancipation Proclamation.

In the end, of course, none of this happened. Chief Justice Taney died in 1864 and Lincoln nominated Salmon P. Chase, a dedicated abolitionist, to replace him. Lincoln chose Chase, at least in part, because he could be counted on to support emancipation.[6] As Lincoln told New York Congressman Augustus Frank, Chase was

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[3] The answer to such a claim might have been that the Emancipation Proclamation was the land equivalent of *The Prize Cases*, 67 US (2 Black) 635 (1863). There Justice Grier upheld the blockade of southern ports, and the seizure of private property violating the blockade, on the ground that "As a civil war is never publicly proclaimed, *eo nomine*, against insurgents, its actual existence is a fact in our domestic history which the Court is bound to notice and to know." 67 US at 667.

[4] *Osborn v Nicholson*, 13 Wall 654 (1872); Grossmeyer's Case (*Henry Grossmeyer v United States*), 4 Ct Cl 1 (1868); Mott's Case (*Randolph Mott v United States*), 4 Ct Cl 218 (1867); *French v Tumlin*, 9 F Cas 798 (1871); *Miller v Keys*, 17 F Cas 328 (1869); *Martin v Bartow Iron Works*, 16 F Cas 888 (1867).

[5] *Oregon v Mitchell*, 400 US 112 at 254 (Brennan, J, dissenting).

[6] George S. Boutwell, 2 *Reminiscences of Sixty Years in Public Affairs* 29 (1902). "There are reasons in favor of his appointment, and one very strong reason against it. First, he occupies the largest place in the public mind in connection with the office; then we wish for a Chief Justice who will sustain what has been done in regard to emancipation and the legal tenders. We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it. Therefore, we must take a man whose opinions are known. But there is one very strong reason against his appointment. He is a candidate for the Presidency and if he does not give up that idea, it will be very bad for him and very bad for me."

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"sound" on the "general issues of the war," which included emancipation.[7] Within a year after Chase's appointment, the legality of emancipation was settled by the ratification of the Thirteenth Amendment in 1865. The cases that raised the legal issues surrounding emancipation did not question that slavery in fact was over.[8] Thus, for example, in *Osborn v Nicholson* (1872),[9] the Court upheld the contract for sale of a slave that took place in March 1861, with Justice Noah Swayne concluding: "Neither the rights nor the interests of the colored race lately in bondage are affected by the conclusions we have reached. The opinion decides nothing as to the effect of President Lincoln's Emancipation Proclamation. We have had no occasion to consider that subject."[10]

However, in 1863 Lincoln assumed that there would be a legal challenge to the Proclamation, and he wrote it with that prospect in mind. Thus he made it as narrowly focused and as constitutionally solid as possible. He avoided soaring language and inspiriting rhetoric.

The awkward style and structure of the Proclamation has troubled historians. The great historian Richard Hofstadter criticized the Proclamation as a cynical and meaningless document with "all the moral grandeur of a bill of lading."[11] Lincoln was one of the greatest craftsmen of the English language in American political history. But here, in the most important moment of his life, he resorted to the tools of the pettifogger, drafting a turgid and almost incomprehensible legal document. Unlike almost every other public document Lincoln wrote, the Proclamation was without style or grace. Even historians who admire Lincoln think it was "boring" and "pedestrian."[12]

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[7] Richard Aynes, *Bradwell v. Illinois: Chief Justice Chase's Dissent and the "Sphere of Women's Work,"* 59 La L Rev 521 at 532, quoting John Niven, *Salmon P. Chase* 374 (Oxford, 1995).

[8] The meaning of the Proclamation was at least partially at issue in a few postwar cases, but these cases did not involve undoing emancipation. Grossmeyer's Case (*Henry Grossmeyer v United States*), 4 Ct Cl 1 (1868); Mott's Case (*Randolph Mott v United States*), 4 Ct Cl 218 (1867); *French v Tumlin*, 9 F Cas 798 (1871); *Miller v Keys*, 17 F Cas 328 (1869); *Martin v Bartow Iron Works*, 16 F Cas 888 (1867).

[9] 80 US 654 (1872).

[10] Id at 663. Chase, who was the most dedicated abolitionist on the Court, dissented in this case, presumably because he believed no contract for the purchase of a slave should ever be recognized by American law.

[11] Richard Hofstadter, *The American Political Tradition* 110, 115, 131 (Knopf, 1948).

[12] Allen C. Guelzo, *"Sublime in Its Magnitude": The Emancipation Proclamation*, in Harold Holzer and Sara Vaughn Gabbard, eds, *Lincoln and Freedom: Slavery, Emancipation, and the Thirteenth Amendment* at 66 (Southern Illinois, 2007).

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In addition to its lack of rhetorical elegance, scholars have criticized the timing of the Proclamation, arguing it illustrates that Lincoln was not seriously committed to black freedom. It took Lincoln more than a year to even propose emancipation, and even then Lincoln seemed to vacillate, apparently willing to withdraw the preliminary Proclamation if the rebellious states would return to the Union.[13] He did not issue the final Emancipation Proclamation until nearly two years into the war. When finally issued, the Proclamation did not free all the slaves in the United States. In fact, it did not free any of the slaves *in* the United States, but only freed slaves in those states that claimed to be in the Confederacy and thus not actually under the jurisdiction of the United States. To the untrained eye, or at least the legally unsophisticated eye, the Emancipation Proclamation seems to be chimera. Lincoln only freed those slaves where he had no physical power to enforce his will—in the Confederacy—and refused to free any slaves where he had power to implement his policies—in the United States.

A careful understanding of Lincoln's own ideology and philosophy, the constraints of the Constitution, and the nature of the Civil War illustrates that these criticisms ultimately miss their mark. Lincoln's emancipation strategy turns out to be subtle, constitutionally innovative, and at times brilliant. Ultimately his policy worked, as slavery came to an end everywhere in the nation without any constitutional challenges.

I. Constitutional Limitations on Emancipation

A successful lawyer and lifelong student of the U.S. Constitution, Lincoln began his presidency with a strong sense of the limitations that the Constitution placed on any emancipation scheme. In his first inaugural he urged the seven seceding states to return to the Union. In making this case Lincoln argued that slavery in the southern states was safe under the Constitution and under his administration. He reiterated a point made during the campaign: "I have no purpose, directly or indirectly, to interfere with the

[13] Proclamation No 16 (Preliminary Emancipation Proclamation), 12 Stat 1267 (Sept 22, 1862). Lincoln indicated that the Proclamation would go into effect only if the Confederate states did not return to the Union. He had no expectation that any of the Confederate states would accept this offer, so his vacillation is more apparent than real. Had the Confederate states returned to the Union before the Proclamation went into effect, he would have had no constitutional power to end slavery in them.

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institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so." He underscored this position by quoting the Republican Party platform:

> *Resolved*, That the maintenance inviolate of the rights of the States, and especially the right of each State to order and control its own domestic institutions according to its own judgment exclusively, is essential to that balance of power on which the perfection and endurance of our political fabric depend. . . .

He pledged that during his administration "all the protection which, consistently with the Constitution and the laws, can be given, will be cheerfully given to all the States when lawfully demanded, for whatever cause—as cheerfully to one section as to another."[14]

Lincoln's position reflected an orthodox and almost universally accepted interpretation of the U.S. Constitution. Since 1787 virtually all constitutional theorists had understood that national government had no power to interfere with the "domestic institutions" of the states. Thus the states, and not the national government, had sole power to regulate all laws concerning personal status, such as marriage, divorce, child custody, inheritance, voting, and freedom—whether one was a slave or a free person. After the Constitutional Convention, General Charles Cotesworth Pinckney told the South Carolina House of Representatives: "We have a security that the general government can never emancipate them, for no such authority is granted and it is admitted, on all hands, that the general government has no powers but what are expressly granted by the Constitution, and that all rights not expressed were reserved by the several states."[15]

On the eve of Lincoln's presidency virtually all constitutional theorists, lawyers, and jurists accepted Pinckney's understanding of the Constitution: that it created a government of limited powers and that any powers not explicitly given to the national government were retained by the states. Antebellum constitutional jurisprudence had strengthened this understanding and also had expanded it to actually encroach on the powers of Congress, limiting the reach of

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[14] Abraham Lincoln, "First Inaugural Address—Final Text," in Roy P. Basler, ed, *The Collected Works of Abraham Lincoln* 4:262–63 (Rutgers, 1953) (cited below as "*CW*").

[15] Pinckney, quoted in Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 5 vols, 4:286 (1888; reprint, Burt Franklin, 1987). For greater discussion of this issue at the convention see Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson* (M. E. Sharpe, 2d ed 2001).

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Congress to regulate slavery even in areas where the Constitution appeared to allow this.[16] Except for a few constitutional outliers, such as Lysander Spooner,[17] no antebellum politicians or legal scholars believed Congress had the power to regulate slavery in the states. In 1860 a claim of federal power to end slavery in the states was simply unthinkable for someone like Lincoln, who took law and constitutionalism seriously.

In *Dred Scott v Sandford* (1857), Chief Justice Roger B. Taney had asserted that Congress could never ban slavery in the federal territories. Lincoln and most other Republicans rejected the legitimacy of that portion of the decision on the grounds that once Taney found Dred Scott had no standing to sue the case became moot and everything Taney said after that was mere dicta.[18] In addition to rejecting Taney's jurisprudence on procedural grounds, Republicans like Lincoln also rejected it on substantive grounds. They argued that Congress did indeed have the power to ban slavery from the territories. But, even if Lincoln and his fellow Republicans were correct on this issue—and Chief Justice Taney was wrong—that did not affect emancipation in the states. There was a huge difference between banning slavery in new territories and taking slave property from people in the states or even in federal jurisdictions, like Washington, D.C., where slavery was legal. Thus, the accepted view was that the national government could not end slavery in the states. The only issue in dispute was whether the Republicans were right and Congress could ban slavery in the territories and the District of Columbia, or whether Chief Justice Taney was correct and Congress could not ban slavery in any federal jurisdictions.

In addition to the constitutional limitation on federal power, emancipation at the federal level also raised significant issues surrounding property rights—what modern legal scholars call "takings." The Fifth Amendment declares that "No person . . . shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just com-

[16] This was the outcome in *Dred Scott v Sandford*, 19 How (60 US) 393 (1857); see Paul Finkelman, *Was Dred Scott Correctly Decided? An "Expert Report" for the Defendant*, 12 Lewis & Clark L Rev 1219 (2008).

[17] Helen J. Knowles, *The Constitution and Slavery: A Special Relationship*, 28 Slavery and Abolition 309 (2007); Randy E. Barnett, *Was Slavery Unconstitutional Before the Thirteenth Amendment? Lysander Spooner's Theory of Interpretation*, 28 Pac L J 977 (1997).

[18] Paul Finkelman, *Dred Scott v. Sandford: A Brief History* (Bedford, 1995).

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pensation." An Emancipation Proclamation might violate the due process aspects of this amendment, but even if it did not, it might violate the takings provision. Lincoln, like almost all lawyers at the time, understood that even if Congress had the power to take slaves from American citizens, it could only be done through compensation, as required by the Fifth Amendment.

As a freshman congressman Lincoln had proposed a bill to end slavery in the District of Columbia through gradual emancipation, a process that would not constitute a taking because no living slaves would be freed. Under gradual abolition schemes the children of all slave women were born free, but indentured to the owners of their mothers until they reached the age of majority. This compensated the masters for raising these free-born children of slaves while not actually taking any property from the masters. Such legislation had been used to end slavery in most of the northern states in the wake of the American Revolution.[19]

Although Lincoln's bill for gradual emancipation in Washington, D.C., never reached the floor of Congress, it illustrates Lincoln's understanding that slave property could not be taken from masters without compensation. Indeed, when Congress finally did end slavery in the District of Columbia during the war, it did so through compensation, because that was the only constitutionally permissible way of immediately taking slave property from loyal masters in the nation's capital.[20] By 1862 gradual abolition was no longer realistic. No one in the government—and certainly not the slaves in Washington, D.C.—had any patience for any emancipation that was gradual.

Thus, when Lincoln entered office he fully understood that he had "no lawful right" to "interfere with the institution of slavery in the States where it exists." Because he had no "lawful right" to free slaves in the South, he could honestly tell the seceding states "I have no inclination to do so." This statement in his Inaugural Address could be interpreted to mean that Lincoln had no personal

[19] For a discussion of these schemes, see Arthur Zilversmit, *The First Emancipation: The Abolition of Slavery in the North* (Chicago, 1967); Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (North Carolina, 1981); Gary B. Nash and Jean R. Soderlund, *Freedom by Degrees: Emancipation in Pennsylvania and Its Aftermath* (Oxford, 1991); Shane White, *Somewhat More Independent: The End of Slavery in New York City, 1770–1810* (Georgia, 1991); and Robert Fogel and Stanley Engerman, *Philanthropy at Bargain Prices: Notes on the Economics of Gradual Emancipation*, 3 J Legal Stud 377 (1974).

[20] An Act for the Release of Certain Persons Held to Service or Labor in the District of Columbia, 12 Stat 376 (April 16, 1862).

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interest or desire in ending slavery. But Lincoln chose his words carefully. His personal views on slavery were clear: he hated slavery and had always believed that "If slavery is not wrong, nothing is wrong."[21] But his personal desires could not overcome the constitutional realities of his age. Because he had no power to touch slavery in the states he could honestly say he had no inclination to attempt to do what was constitutionally impossible. Consistent with his long-standing Whig ideology, Lincoln rejected the idea of acting outside the Constitution. Reflecting his sense of the politically possible, Lincoln willingly reassured the seceding states that he had no "inclination" to do what he could not constitutionally, legally, or politically accomplish. When circumstances changed, so would Lincoln's "inclination," but in March 1861 Lincoln had no reason to think that circumstances would change.

Lincoln's constitutional understandings in 1861 were hardly new. He had articulated them in the Illinois legislature in 1837, when he was one of six members of the state legislature who opposed a proslavery resolution which attacked abolitionists and declared that slavery was "sacred to the slaveholding States." Lincoln then framed his own resolution (supported by only one other member of the assembly), asserting that slavery was "founded on both injustice and bad policy." In this protest against the actions of a majority in the legislature, Lincoln asserted the traditional understanding that the national government had "no power, under the constitution, to interfere with the institution of slavery in the different States." However, Lincoln also asserted that Congress did have "the power under the constitution, to abolish slavery in the District of Columbia."[22] This early foray into the constitutional issues of slavery suggests that even as a young man Lincoln understood the constitutional limitations as well as the constitutional possibilities of fighting slavery.

A decade later, in his single term in Congress, Lincoln proposed a bill for the gradual abolition of slavery in the District of Columbia, noted above. His emancipation scheme would have avoided the Fifth Amendment takings problem, because gradual emancipation did not free any existing slaves, but only guaranteed that their as-yet-unborn children would be free. Lincoln read the proposed

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[21] Lincoln to Albert G. Hodges, April 4, 1864, *CW*, 7:281.

[22] "Protest in the Illinois Legislature on Slavery," *CW*, 1:74–75.

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emancipation bill on the floor of Congress, but in the end did not introduce it. A powerless freshman congressman, he explained, "I was abandoned by my former backers."[23] Nevertheless, this bill, like his state legislative resolution, underscores Lincoln's early opposition to slavery and his understanding of the constitutional limitations of federal action against slavery.

This, then, was the constitutional framework Lincoln understood as he entered the White House. He personally hated slavery—he was "naturally antislavery" and could "not remember when" he "did not so think, and feel."[24] But he understood the constitutional limitations on his actions.

Lincoln also knew, as all Americans did, that slavery was the reason for secession and the cause of the Civil War. The Confederate states made this clear when they seceded. South Carolina, for example, explained that it was leaving the Union because of the "increasing hostility on the part of the non-slaveholding States to the institution of slavery."[25] South Carolina asserted the "right of property in slaves was recognized" in the Constitution but that "these ends for which this Government was instituted have been defeated, and the Government itself has been made destructive of them by the action of the non-slaveholding States."[26] The free states had "denied the rights of property" in slaves, "denounced as sinful the institution of slavery," and had "permitted the open establishment among them of societies, whose avowed object is to disturb the peace and to eloign the property of the citizens of other States."[27] The South Carolinians also complained that the northern states had "united in the election of a man to the high office of President of the United States, whose opinions and purposes are hostile to slavery."[28] The other seceding states expressed similar views. Thus, because slavery was clearly the cause of secession and the war, it would seem that attacking slavery should have been the first goal

[23] Benjamin Quarles, *Lincoln and the Negro* 30 (Oxford, 1962). In fact, with the acrimonious debates over the Wilmot Proviso tearing Congress apart, a serious discussion of a bill to end slavery in the district was not even remotely plausible.

[24] Lincoln to Hodges, *CW*, 7:281.

[25] Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina, December 24, 1860, reprinted in Kermit L. Hall, Paul Finkelman, and James W. Ely, Jr., eds, *American Legal History* 250 (Oxford, 3rd ed 2005).

[26] Id at 251.

[27] Id.

[28] Id at 252.

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of the Lincoln administration. Root out the problem, destroy the institution, and the Union could be restored. However, such a simplistic response did not comport with the reality of the crisis Lincoln faced. As much as he hated slavery and would have liked to destroy it—and as much as he understood that the slaveholders of the South were the cause of the crisis—Lincoln also understood that an assault on slavery required the complete or partial fulfillment of four essential preconditions.

II. The Preconditions for Emancipation: Constitutional, Political, and Military

From the moment the war began, Lincoln faced demands for emancipation. Abolitionists and antislavery Republicans wanted Lincoln to make the conflict a war against slavery. Northern free blacks were anxious to serve in a war of liberation. From the beginning of the war slaves escaped to U.S. army lines where they assumed (usually correctly) that they would find freedom. But the seriously committed opponents of slavery in the North were relatively few in number, free blacks in most of the North were politically disfranchised, and southern slaves had no political influence, at least in the first year of the war. Most northerners wanted a quick end to the conflict and a restoration of the Union. Any attempt at emancipation would prevent a speedy restoration of the Union. Moreover, any national program for emancipation beyond the territories or the District of Columbia did not fit into any generally recognized interpretation of the Constitution.

Early attempts at emancipation—such as General John C. Frémont's precipitous and near disastrous proclamation freeing slaves in Missouri—illustrate the complexity of the issue and the delicate nature of achieving black freedom. Many abolitionists (and some modern-day critics of Lincoln) have bristled at the idea that achieving freedom could be delicate.[29] From their perspective slavery was immoral, wrong, and the cause of the war. Thus, emancipation

[29] For modern critical assessments of Lincoln and emancipation, in addition to Hofstader, see Lerone Bennett, Jr., *Forced into Glory: Abraham Lincoln's White Dream* (Johnson, 2000); LaWanda Cox, *Lincoln and Black Freedom*, in Gabor S. Boritt and Norman O. Forness, eds, *The Historian's Lincoln: Pseudohistory, Psychohistory, and History* (Illinois, 1988); Ira Berlin, *Who Freed the Slaves? Emancipation and Its Meaning*, in David W. Blight and Brooks D. Simpson, eds, *Union and Emancipation: Essays on Politics and Race in the Civil War Era* (Kent State, 1997); Julius Lester, *Look Out Whitey! Black Power's Gon' Get Your Mama!* (Dial, 1968); Lerone Bennett, Jr., *Was Lincoln a White Supremacist?* 23 Ebony 35 (1968).

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would be a great humanitarian act which would strike at the heart of traitorous Confederates. Without any regard to constitutionalism, the early proponents of emancipation simply argued that it was justified by secession. President Lincoln, however, could not accept such facile and simplistic arguments. For Lincoln, emancipation required the convergence of four preconditions involving legal and constitutional theory, popular support, and military success. Without these preconditions emancipation was both meaningless and impossible.

First, Lincoln needed a constitutional or legal framework for taking slaves—the private property of masters—and for freeing those slaves. Mere hostility to the United States by slave owners was not a sufficient reason for taking their property. Creating a constitutional framework for emancipation was complicated by the different statuses of the slave states. Four of the slave states—Maryland, Delaware, Kentucky, and Missouri—had not joined the Confederacy. Their citizens still enjoyed all of the protections of the U.S. Constitution. Since neither Congress nor the president had any power to interfere with the local institutions of the states, Lincoln had no constitutional power to end slavery in those states. Lincoln did believe Congress could end slavery in the District of Columbia, the Indian Territory, and other federal territories, like Utah and Nebraska. However, emancipation in those places presumably required compensation, since the Fifth Amendment prohibited the taking of private property without due process of law and just compensation. This provision of the Constitution would also hold true for ending slavery in the loyal slave states, if Lincoln somehow found a constitutionally acceptable method of ending slavery in these states.

The status of slaves in the putative Confederate nation was much less clear. Lincoln believed that secession was unconstitutional and that the Confederacy could not legally exist. If this were true, then presumably the citizens of the Confederacy were still protected by the Constitution. However, as combatants Confederates were surely not protected by the Constitution while making war against the United States. Confederates might be entitled to due process as civilians, but they were not protected in their capacity as enemies of the United States. Personal property used in combat—a weapon, a wagon, or a horse—could of course be confiscated on the battlefield. This would be true whether the combat was with Confed-

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erate soldiers in uniform or pro-Confederate guerillas in civilian clothes. Presumably, slaves used in a combat situation—as teamsters, laborers, or even cooks in military camps—might also be seized.

Thus, at the beginning of the war there was no clear legal theory on which emancipation might proceed. Lincoln believed that the Supreme Court—still dominated by Chief Justice Taney and his proslavery allies—would doubtless overturn any emancipation scheme that was not constitutionally ironclad. At the beginning of the war every one of the six Justices on the U.S. Supreme Court was a proslavery Democrat.[30] Five of the Justices, including Chief Justice Taney, had been part of the majority in *Dred Scott* and had held that the Fifth Amendment protected slave property in the territories. The sixth, Nathan Clifford, was a classic doughface—a northern man with southern principles—who could be expected to support slavery and oppose emancipation. Taney, a "seething secessionist," in fact drafted an opinion striking down emancipation just in case he had the opportunity to use it.[31] Lincoln reasonably assumed the Court would strike down any emancipation act that was not constitutionally impregnable.

Second, even if Lincoln could develop a coherent legal and constitutional theory to justify emancipation, he still needed to have political and popular support to move against slavery. Most northerners disliked slavery, but this did not mean they were prepared for a long, bloody crusade against bondage. When the war began, even Republicans who had been battling slavery all their adult lives, like Salmon P. Chase and William H. Seward, did not think there was sufficient public support to attack slavery. Lincoln, who was already on his way to becoming a master politician, needed to create the political climate to make emancipation an acceptable wartime goal. The war began as one to save the Union, which commanded support among almost all northerners. He could not afford to jeopardize that support by moving too quickly to end slavery, even though he deeply hated slavery.

Third, Lincoln needed to secure the four loyal slave states before he could move against slavery. This required a combination of po-

[30] There were three vacancies on the Court when Lincoln took office, and he could not fill them right away. The seats could not be filled until Congress reconfigured the circuits for Justices.

[31] Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (Oxford, 1978).

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litical and military success. The demographic and geographic issues were crucial. There were more than two and a half million whites living in these states. If Missouri and Kentucky seceded they would become the second and third largest states in the Confederacy. More importantly, in terms of the crucial white population that would provide troops for the Confederacy, they would be the largest and third largest states in the Confederacy. If the border slave states left the United States they would also provide three of the four largest cities in the Confederacy—Baltimore, St. Louis, and Louisville—dwarfing all other Confederate cities except New Orleans.[32] Strategically and geographically they were even more important. If Maryland joined the Confederacy the nation's capital would be completely surrounded by the enemy. If Missouri seceded there would be a Confederate army on the upper Mississippi poised to threaten Lincoln's home state of Illinois and able to penetrate into Iowa and Minnesota.

Kentucky was the most crucial of the states. A Confederate army on the southern bank of the Ohio River would interrupt east-west commerce and troop movements, threaten the vast agricultural heartland of Ohio, Indiana, and Illinois, and endanger key cities, including Cincinnati, Chicago, Indianapolis, and Pittsburgh. With more than 200,000 slaves in the state, Kentucky was vulnerable to Confederate entreaties. A precipitous movement toward emancipation would push the bluegrass state into the hands of the enemy, and that would probably lead to secession in Missouri as well. Early in the war a group of ministers urged Lincoln to free the slaves, because God would be on his side. He allegedly responded, "I hope to have God on my side, but I must have Kentucky."[33] Early emancipation would almost certainly have cost him that crucial state and possibly the war.

This leads to the fourth precondition for emancipation: the actual possibility of a military victory. Lincoln could only move to end slavery if he could win the war; if he attacked slavery and did not win the war, then he accomplished nothing. Lincoln's reply to a group of ministers illustrates this point. In September 1862 Lincoln

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[32] Peggy Wagner, Gary W. Gallagher, and Paul Finkelman, *The Library of Congress Civil War Desk Reference* 70–72 (Simon and Schuster, 2002).

[33] Lowell Hayes Harrison, *Lincoln of Kentucky* 135 (Kentucky, 2000); see also David Lindsey, review of *The Civil War in Kentucky* by Lowell H. Harrison, 63 J Am Hist 136 (1976).

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had already decided to move against slavery, but was waiting for the right moment—a substantial military victory. He could not tell the ministers of his plans, and instead told them that emancipation was useless without a military victory. He said an emancipation proclamation without a victory would be "like the Pope's bull against the comet"; he asked how he "could free the slaves" when he could not "enforce the Constitution in the rebel States."[34]

This analysis turns modern critiques of Lincoln on their head. Critics of Lincoln argue that he eventually moved toward emancipation for military and diplomatic reasons: because he needed black troops to repopulate his army and to prevent Britain and France from giving diplomatic recognition to the Confederacy.[35] Emancipation is explained as a desperate act to save the Union, reflecting the title of Leone Bennett's book that Lincoln was "forced into glory" by circumstances.

But the chronology of emancipation and all of Lincoln's statements leading up to emancipation do not support this analysis. Both Lincoln and Congress began to move toward emancipation only after a series of U.S. victories in early 1862. Lincoln then waited to announce emancipation until after a major victory that stopped Lee's army dead in its tracks—with huge casualties—at Antietam. Early emancipation would have probably thrown Kentucky and Missouri into the Confederacy and perhaps doomed the Union cause. While emancipation may be properly seen as one of the elements of victory, it must also be seen as an outcome of the likelihood of ultimate victory. Victory would probably have been possible without emancipation, although it might have been more difficult and perhaps taken longer.[36] Victory could also have been accomplished without black troops, although they surely made a huge difference in the last years of the war, but a general eman-

[34] "Reply to Emancipation Memorial Presented by Chicago Christians of All Denominations," Sept 13, 1862, *CW*, 5:419–25 (quotations on 420). According to various stories, in 1456 Pope Calixtus III issued a Papal Bull against Halley's Comet. This event was recounted in a biography of Calixtus III by Pierre-Simon Laplace published in 1475. Modern scholars believe this is not a true story, but it was believed at the time of Lincoln. For one discussion of this, see Andrew Dickson White, *A History of the Warfare of Science with Theology in Christendom* 177 (D. Appleton, 1896).

[35] For modern critical assessments of Lincoln and emancipation, in addition to Hofstader, see Bennett, *Forced into Glory*; Cox, *Lincoln and Black Freedom*; Berlin, *Who Freed the Slaves?*; Lester, *Look Out Whitey!*; and Bennett, 23 Ebony 35 (1968) (all cited in note 29).

[36] It is also possible that without the Emancipation Proclamation the Confederacy would have surrendered earlier, and that the threat of ending slavery actually prolonged the war.

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cipation was not a precondition to enlisting blacks. While victory was possible without emancipation, emancipation was clearly impossible without victory. Conditions looked bright after Antietam, when the preliminary Proclamation was announced, and Lincoln assumed they would look just as bright in a hundred days, when he planned to sign the Proclamation on January 1, 1863. Thus, rather than being forced into glory when he announced the Preliminary Emancipation Proclamation, Lincoln understood that moral glory—emancipation—could only be possible through military glory.

III. Constitutional Principles and Emancipation in Time of War

In the spring of 1861 none of the four preconditions for emancipation existed. However, demands for emancipation would not wait until the circumstances allowed for it. In the first half year of the war Lincoln faced three different models for attacking slavery. Two of these models satisfied the first three preconditions: there was a legal/constitutional basis for emancipation, they would not undermine northern support for the war, and they would not chase Kentucky and Missouri out of the Union. The third one, General John C. Frémont's proclamation freeing slaves in Missouri, failed all of these tests, and Lincoln wisely overruled it.

Almost immediately after the war began slaves began to abandon their masters and flee to the safety and protection of the U.S. Army. In exercising this self-emancipation these fleeing slaves created the need for a clear government policy, well before anyone in the administration was ready to develop such a policy. This set the stage for clever lawyering that ultimately created a constitutional basis for emancipation. In his second inaugural Abraham Lincoln would assert that in 1861 "All knew" that slavery "was somehow the cause of the war." However, when the war began, the administration could not attack slavery—the cause of the war—because of the lack of preconditions necessary to attack slavery. Most importantly, Lincoln still hoped to reunite the Union without a war, and when the war came he needed to keep the loyal slave states in the Union. These priorities, as well as the absence of a constitutional theory or strong popular support, led Lincoln to defer any consideration of ending slavery.

The slaves, however, were under no such constraints. They knew,

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even more than their masters or the blue-clad enemies of their masters, that this war was about slavery—about them and their future. While Lincoln bided his time, waiting for the moment to strike out against slavery, hundreds and then thousands of slaves struck out for freedom on their own.

From almost the beginning of the war slaves streamed into U.S. Army camps and forts. The army was not a social welfare agency and was institutionally unprepared to feed, clothe, or house masses of propertyless refugees. Initially the army returned slaves to masters who came after them. This situation undermined the morale of U.S. troops, who fully understood that they were returning valuable property to their enemies who would use that property to make war on them. Slaves grew the food that fed the Confederate Army, raised and cared for the horses the Confederates rode into battle, and labored in the workshops and factories that produced the metals and weapons necessary to fight the war.[37] As Frederick Douglass noted, "The very stomach of this Rebellion is the negro in the form of a slave." Douglass correctly understood that if the government could "arrest that hoe in the hands of the Negro," the Lincoln administration would be able to "smite the rebellion in the very seat of its life."[38] Returning slaves to Confederate masters was hardly different than returning guns or horses to them. Initially, however, some army officers did just that.

Circumstances began to change on May 23, when three slaves owned by Confederate Colonel Charles K. Mallory escaped to Fortress Monroe, under the command of General Benjamin F. Butler. A day later Butler faced the surrealistic spectacle of Confederate Major M. B. Carey, under a flag of truce, demanding the return of the slaves under the Fugitive Slave Law. Major Carey, identifying himself as Mallory's agent, argued that Butler was obligated to return the slaves under the Fugitive Slaves Clause of the Constitution and the Fugitive Slave Law of 1850. Butler, a successful Massachusetts lawyer before the war, had devoted some thought to the issue. He told Major Carey "that the fugitive slave act did not affect a foreign country, which Virginia claimed to be and she must reckon it one of the infelicities of her position that in so far at least

[37] Charles Dew, *Bond of Iron: Master and Slave at Buffalo Forge*, 264–311 (W.W. Norton, 1994).

[38] Douglass, quoted in James M. McPherson, *Battle Cry of Freedom: The Civil War Era* at 354 (Oxford, 1988) (cited below as "*Battle Cry of Freedom*").

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she was taken at her word." Butler then offered to return the slaves to Colonel Mallory if he would come to Fortress Monroe and "take the oath of allegiance to the Constitution of the United States."[39] But until Mallory took such an oath his slaves were contrabands of war and could not be returned.[40]

This was the end of Colonel Mallory's attempt to recover his slaves, but it was the beginning of a new policy for the United States. Butler, in need of workers, immediately employed the three fugitives, who had previously been used by Mallory to build Confederate defenses. Taking slaves away from Mallory and other Confederates served the dual purposes of depriving the enemy of labor while providing labor for the United States.

Butler's new contraband policy was not applied everywhere at once. By the middle of the summer slaves poured into U.S. forts and camps, where soldiers had conflicting orders. Some officers returned slaves to all masters; others only returned them to loyal masters in Maryland, Kentucky, and Missouri. Some offered sanctuary to all slaves who entered their lines.

Clarity of sorts came from Secretary of War Simon Cameron on August 8, when he informed Butler of the president's desire "that all existing rights in all the States be fully respected and maintained" and reminded Butler the war was "for the Union and for the preservation of all constitutional rights of States and the citizens of the States in the Union." Because of this, "no question can arise as to fugitives from service within the States and Territories in which the authority of the Union is fully acknowledged." This of course meant that military commanders could not free fugitive slaves in Missouri, Kentucky, Maryland, and Delaware. All of this was consistent with Lincoln's public position at the beginning of the war. Moreover, this position would shore up support for the Union in the loyal slave states. But Cameron added a new wrinkle, which indicated an important change in administration policy. Cameron told Butler that the president also understood that "in States wholly or partially under insurrectionary control" the laws could not be enforced, and it was "equally obvious that rights dependent on the laws of the States within which military operations are conducted must be nec-

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[39] Maj. Gen. Benjamin F. Butler to Lt. Gen. Winfield Scott, May 24/25, 1861, in *The War of the Rebellion: The Official Records of the Union and Confederate Armies*, 127 vols, index, and atlas (GPO, 1880–1901), ser 2, vol 1:752 (cited below as "*O.R.*").

[40] Benjamin F. Butler, *Butler's Book* 256–57 (A. M. Thayer, 1892).

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essarily subordinated to the military exigencies created by the insurrection if not wholly forfeited by the treasonable conduct of the parties claiming them." Most importantly, "rights to services" could "form no exception" to "this general rule."[41]

Quietly Lincoln had now changed his administration's policy toward slavery in the Confederacy. Under this policy the military would return fugitive slaves from the loyal slave states, but not in the Confederate states, where of course most of the slaves were held. The slaves of loyal masters who lived in the Confederacy presented a "more difficult question." The solution was to have the army employ the fugitives, but to keep a record of such employment, so at some point loyal masters might be compensated for the use of their slaves. Speaking for the president, Secretary of War Cameron admonished Butler not to encourage slaves to abscond nor to interfere with the "servants of peaceful citizens" even in the Confederacy, nor to interfere in the voluntary return of fugitives to their masters "except in cases where the public safety" would "seem to require" such interference.[42]

By late August Butler's contraband policy had become the norm. The U.S. Army could employ any slaves who ran to its lines, provided they came from Confederate states. This was not a general emancipation policy, and, indeed, the army was not supposed to deliberately attempt to free slaves. But the army would not return fugitive slaves to masters in the Confederate states, even if the masters claimed to be loyal to the United States. Shrewdly, the Lincoln administration had become part of the process of ending slavery while professing not to be doing so. To abolitionists the administration could point to the growing thousands of "contrabands" who were being paid a salary and often wearing the only clothing available, blue uniforms.[43] But to conservatives and loyal masters still living in the United States, his administration could still point out that it had no emancipation policy and was not interfering with slavery *in the states*, it was only taking military contraband from people who claimed to be living outside the United States and were at war with the United States.

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[41] Simon Cameron to Maj. Gen. Benjamin F. Butler, Aug 8, 1861, *O.R.*, ser 2, vol 1: 761–62.

[42] Id.

[43] Special Orders No 72, October 14, 1861, and General Orders No 34, November 1, 1861, *O.R.*, ser 2, vol 1:774–75 (setting out pay scale for black laborers).

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This emerging policy began with General Butler's response to a Confederate colonel and was soon adopted by the Department of War and the president. It was not a direct attack on slavery, and it was not an emancipation policy per se. But it did protect the freedom of thousands of slaves who were developing their own strategy of self-emancipation by running to the U.S. Army. By the time Secretary of War Cameron spelled out the policy to General Butler, Congress had endorsed it and pushed it further along with the First Confiscation Act.

The First Confiscation Act, passed on August 6, allowed for the seizure of any slaves used for military purposes by the Confederacy.[44] This was not a general emancipation act and was narrowly written to allow the seizure of slaves only in actual use by Confederate forces. The law did not jeopardize the slave property of masters in the loyal slave states, even those sympathetic to the Confederacy. Freeing slaves under the Confiscation Act might have violated the Fifth Amendment, if seen as allowing a taking of private property without due process. But the law was carefully drawn as a military measure. Surely the army could seize a weapon in the hands of a captured Confederate soldier without a due process hearing, or take a horse from a captured Confederate. Similarly, slaves working on fortifications, or being used in other military capacities, might be taken.

The First Confiscation Act was ambiguous and cumbersome and did not threaten slavery as an institution. Under the law only those slaves being used specifically for military purposes—relatively few in number—could be freed. But the law did indicate a political shift toward emancipation. It was not decisive, because the emancipatory aspects of the law were limited, but it did show that Congress was ready to support some kind of emancipation. Neither Congress nor the American people were ready to turn the military conflict into an all-out war against slavery; however, Congress—which presumably reflected the ideology of its constituents—was ready to allow the government to free some slaves in the struggle against the Confederacy.

The First Confiscation Act along with the contraband policy were major steps toward eventual public support for emancipation. In the Confiscation Act, Congress embraced the principle that the

[44] An Act to confiscate Property used for Insurrectionary Purposes, 12 Stat 319 (Aug 6, 1861).

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national government had the power to free slaves as a military necessity. The logical extension of this posture could be the total destruction of slavery. If Congress could free some slaves through the Confiscation Act, or the executive branch could free some slaves through the contraband policy, then the two branches might be able to free all slaves if the military and social conditions warranted such a result.

Just a few weeks after Lincoln signed the Confiscation Act, Major General John C. Frémont issued a "proclamation" declaring martial law in Missouri and announced that all slaves owned by Confederate activists in that state were free.[45] This proclamation went well beyond the Confiscation Act. Lincoln immediately and unambiguously urged Frémont to withdraw his proclamation, pointing out that it undermined efforts to keep Kentucky in the Union: "I think there is great danger that the closing paragraph, in relation to the confiscation of property, and the liberating slaves of traitorous owners, will alarm our Southern Union friends, and turn them against us—perhaps ruin our rather fair prospect for Kentucky." Thus he asked the general to "modify" his proclamation "on his own motion," to conform to the Confiscation Act. Aware of the exaggerated egos of his generals, Lincoln noted, "This letter is written in a spirit of caution and not of censure."[46]

While Lincoln waited for Frémont to withdraw his proclamation, politicians, generals, and border state unionists urged the president to directly countermand Frémont's order. Lincoln agreed with a Kentucky unionist who told him, "There is not a day to lose in disavowing emancipation or Kentucky is gone over the mill dam."[47] Lincoln told Senator Orville Browning that "to lose Kentucky is nearly . . . to lose the whole game."[48] Lincoln hoped that Frémont—who had been the Republican candidate for president in 1856—would be politically savvy enough to withdraw the order.

Hoping to score points with the abolitionist wing of the Republican Party, embarrass Lincoln, and set himself up to be the Republican candidate in 1864, Frémont refused to comply with the request of his commander-in-chief. Instead of withdrawing his proc-

[45] J. C. Frémont, Proclamation, August 30, 1861, *O.R.*, ser 1, vol 3:466–67.

[46] Lincoln to John C. Frémont, Sept 2, 1861, *CW*, 4:506.

[47] Both quotations in William E. Gienapp, *Abraham Lincoln and Civil War America: A Biography* 89 (Oxford, 2002).

[48] Lincoln to Orville H. Browning, Sept 22, 1861, *CW*, 4:531–32.

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lamation, Frémont asked Lincoln to formally countermand it. This would allow Frémont to later blame the president for undermining emancipation. Lincoln "cheerfully" did so, ordering Frémont to modify the proclamation. Still playing politics, Frémont claimed he never received the order, but only read about it in the newspapers, and even then Frémont continued to distribute his original order.[49] Frémont's stubbornness, lack of political sense, and military incompetence led to his dismissal by Lincoln on November 2, 1861.[50] He would get another command, and fail there, and by the end of the war Frémont would be marginalized and irrelevant.

Some scholars have asserted that Lincoln's response to Frémont illustrates his insensitivity to black freedom. Frémont was a national hero before the war, and by supporting his abolitionist general, critics argue that Lincoln could have turned the war into a crusade against slavery. However, unlike Frémont, Lincoln understood that an unwinnable war would not end slavery; it would only destroy the Union and permanently secure slavery in the new Confederate nation. His comments to Frémont bear out his realistic assessment that if Kentucky, and perhaps Missouri, joined the Confederacy, the war might be lost. Frémont's proclamation jeopardized Kentucky, and Lincoln correctly countermanded it. The fall of 1861 was simply not the time to attack slavery, especially in the loyal slave states.

Lincoln could have responded to Frémont with a lecture on constitutional law. Freeing slaves as contrabands of war in the Confederacy was probably constitutional. Freeing slaves *within* the United States—which included Missouri—was not constitutional unless those slaves were actually being used as part of active resistance against the government. The First Confiscation Act could have been used to free slaves being used by pro-Confederate forces in Missouri for military purposes; however, this is not what Frémont wanted to do. He wanted to take slaves from anyone who supported the Confederacy, even if those slaves were not directly being used for military purposes and were the property of people living in the United States. Because Missouri had not seceded, Confederate sympathizers who were not involved in direct combat were still protected by the Constitution. But Frémont's plan was ambiguous about their status or the status of their property. Moreover, because

[49] Lincoln to John C. Frémont, Sept 11, 1861, *CW*, 4:517–18.

[50] General Order No 28, Nov 2, 1861, *O.R.*, Additions and Corrections to Series 2, vol 3:558–59 (GPO, 1902).

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Frémont's plan would have summarily deprived American citizens living in the United States of their property without due process, it clearly violated the Fifth Amendment.

Some Republicans were deeply troubled by Lincoln's response to Frémont. Privately Lincoln assured Senator Charles Sumner that the difference between them on emancipation was only a matter of time—a month or six weeks. Sumner accepted this statement and promised to "not say another word to you about it till the longest time you name has passed by."[51] The time would in fact be more like a year, but there is little reason to doubt that Lincoln was moving toward some sort of abolition plan.

For Lincoln there were two paramount issues to consider. The first was timing. He could only attack slavery if he could win the war; if he attacked slavery and did not win the war, then he accomplished nothing. Critics of Lincoln argue that he eventually moved toward emancipation because he needed black troops to win the war. But the alternative reading—starting with his correspondence with Frémont—is that he could only move against slavery after he had secured the border states and made certain that victory was possible. Only then could emancipation actually work. Rather than a desperate act to save the war effort, emancipation becomes the logical fruit of victory. Frémont's proclamation surely did not fit that bill; consequently, Lincoln countermanded it.

IV. Military Victory, Securing the Loyal Slave States, and Emancipation

Lincoln clearly underestimated the time needed before he could move against slavery. The preconditions he needed for emancipation did not emerge in the month or six weeks he forecast to Sumner. A call for emancipation had to be tied to securing the loyal slave states and to a realistic belief that the war could be won; there was no point in telling slaves they were free if the government could not enforce that freedom. The prospect of a military victory was not great in the fall of 1861. The embarrassing defeats at the First Battle of Bull Run and Ball's Bluff did not bode well for the future.[52]

In November 1861 the course of the war began to change, as

[51] Stephen Oates, *With Malice Toward None: The Life of Abraham Lincoln* 292 (Mentor, 1978).

[52] McPherson, *Battle Cry of Freedom*, 358–68.

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Admiral Samuel du Pont successfully seized the South Carolina Sea Islands with the important naval base at Port Royal. Once established, the United States would never be dislodged from this beachhead off the South Carolina coast. At least some of the war would now be fought in the heartland of the South.[53] Although Lincoln could not know it at the time, this was the beginning of the shrinking of the Confederacy. The first half of the next year would turn out to be "one of the brightest periods of the war for the North."[54] In February, Roanoke Island was captured, and by the end of April the navy and army had captured or sealed off every Confederate port on the Atlantic except Charleston, South Carolina, and Wilmington, North Carolina. Ports such as Savannah, Georgia, remained in Confederate hands, but the rebels no longer had access to the ocean except through blockade runners, who had virtually no affect on the Confederate war effort.

In the West, the United States won a series of crucial victories, securing Kentucky for the Union. Although the Kentucky legislature had voted in September to stay in the Union, support for the Confederacy remained strong in the bluegrass state. The state's governor, Beriah Magoffin, had resigned to join the Confederacy. In November General McClellan had told General Don Carolos Buell, "It is absolutely necessary that we shall hold all the State of Kentucky" and to make sure that "the majority of its inhabitants shall be warmly in favor of our cause." McClellan believed that the conduct of the "political affairs in Kentucky" was perhaps "more important than that of our military operations." He wanted to ensure that the U.S. Army respected the "domestic institution"—slavery—in the state.[55]

McClellan's concerns were real. In late November about two hundred Kentuckians organized a secession convention and declared their state to be in the Confederacy. In December the rebel congress admitted Kentucky into the Confederacy. With more than 25,000 Confederate troops in the state, Kentucky was hardly secure.

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[53] One of the important results of this was the liberation of thousands of slaves on the Sea Islands, many of whom would later be enlisted when the United States began to organize black regiments in late 1862. See David Dudley Cornish, *The Sable Arm: Negro Troops in the Union Army, 1861–1865* (W. W. Norton, 1966), and Willie Lee Rose, *Rehearsal for Reconstruction: The Port Royal Experiment* (Oxford, 1976).

[54] McPherson at 368 (cited in note 52).

[55] [General] George B. McClellan to Brig. Gen. D. C. Buell, Nov 7, 1861, *O.R.*, ser 2, vol 1:776–77.

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All of this changed in a ten-day period in early February. On February 6, Ulysses S. Grant, until then an obscure brigadier general, captured Fort Henry on the Tennessee River in northern Tennessee. On February 16 he captured Fort Donelson on the Cumberland River along with more than 12,000 Confederate troops. These twin victories established a U.S. presence in the Confederate state of Tennessee and emphatically secured Kentucky for the Union. By the end of the month the U.S. army was sitting in Nashville, Tennessee, the first southern state capital to fall. Instead of Kentucky possibly going into the Confederacy, it was more likely that Tennessee would be returned to the United States.

On the other side of the Mississippi, in early March Confederate forces suffered a devastating loss at Pea Ridge in Arkansas. The Confederates, led by Earl Van Dorn, had planned to march into Missouri and eventually capture St. Louis. But Pea Ridge ended any chance of Missouri becoming a Confederate state. Instead, the outcome made it all the more likely that Arkansas would be brought back into the Union. A month later the United States won a major victory at Shiloh, in southwestern Tennessee. On the same day U.S. naval forces combined with the army to seize Island No. 10 in the Mississippi River, capturing more than 50 big guns and some 7,000 Confederate soldiers. In April a combined naval and army operation captured Memphis, and on May 1, General Benjamin Butler, who had developed the contraband policy while a commander in Virginia, marched into New Orleans.

This truncated history of the first months of 1862 illustrates how circumstances allowed Lincoln to begin to contemplate emancipation. By June he knew that the loyal slave states were unlikely to join the Confederacy. There would still be fighting in that region—especially horrible guerrilla warfare in Missouri—but by June 1862 it was clear that Kentucky, Maryland, Delaware, and Missouri were secure. So too was a good piece of Tennessee as well as the cities of New Orleans, Baton Rouge, Natchez, and smaller river towns in Mississippi, Louisiana, and Arkansas. There could be no more realistic fears that an emancipation policy would push Kentucky or Missouri into the Confederacy.

Lincoln now had a reasonable chance of implementing an emancipation policy for a substantial number of slaves. Even if the war ended with some part of the Confederacy intact, the president could

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break the back of slavery in the Mississippi Valley. Once free, these blacks could not easily be reenslaved.

By the spring of 1862 Lincoln had the third and fourth prerequisites in place for emancipation: security of the upper South and a reasonable chance of military success that would make emancipation successful. He was also moving toward the first prerequisite: a legal theory that would justify emancipation. The theory was not complete, but it had been developing since Butler discovered the legal concept of contrabands of war and brilliantly applied it to slaves. The First Confiscation Act had supplemented it. In March 1861 Congress prohibited the military from returning fugitive slaves, whether from enemy masters, loyal masters in the Confederacy, or masters in the border states. Any officers returning fugitive slaves could be court-martailed and, if convicted, dismissed from military service.[56] None of these laws or policies had attacked slavery directly. Freeing contrabands required that the slaves take the initiative of running to the army *and* that the army be in close proximity to them. The Confiscation Act only applied to slaves being used for military purposes. Most slaves fit neither category. But these policies showed that the national government was now secure in its understanding that it could implement an emancipation program. These policies also indicated that Lincoln was becoming comfortable with the idea that as commander-in-chief he could attack slavery. By the fall of 1862 Lincoln was convinced that there were "no objections" to emancipation "on legal or constitutional grounds; for, as commander-in-chief of the army and navy, in time of war, I suppose I have the right to take any measure which may best subdue the enemy."[57]

The second of the four prerequisites—insuring political support for emancipation—was still an open question in early 1862. But the nation was moving toward emancipation. On April 10 Congress passed a joint resolution declaring the United States would "co-operate with," and provide "pecuniary aid" for, any state willing to adopt a gradual emancipation scheme.[58] Most importantly, on April

[56] An Act to make an Additional Article of War, 12 Stat 354 (March 13, 1862). This law modified an important part of the Fugitive Slave Law of 1850, which had authorized the use of the military or the militia to return fugitive slaves.

[57] "Reply to Emancipation Memorial Presented by Chicago Christians of All Denominations," Sept 13, 1862, *CW*, 5:419–25 (quotations on 421).

[58] Joint Resolution No 26, 12 Stat 617 (April 10, 1862).

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16, Congress abolished slavery in the District of Columbia and provided compensation for the masters. This law was consistent with Lincoln's long-standing understanding that the Constitution allowed Congress to fully regulate the District of Columbia. The president happily signed this law.[59] Fifteen years earlier he had been ready to move against slavery in the district through gradual emancipation, which acknowledged the Fifth Amendment claims of masters. Now he was able to act through compensated emancipation, which was also likely to survive a challenge on Fifth Amendment grounds.

In addition to providing payment to masters for the slaves, the D.C. emancipation law also provided money for colonization of former slaves in Africa or Haiti. Critics of Lincoln often have focused on this provision as proof of Lincoln's racism and his insincerity with regard to both emancipation and black rights. However, a serious analysis of this provision undermines such claims.

The law provided up to $100,000 for the colonization outside the United States of both free blacks already living in the district and the newly emancipated slaves. The operative language, however, was critical. The money was "to aid in the settlement and colonization of such free persons . . . as *may desire to emigrate* to the Republics of Hayti or Liberia, or such other country beyond the limits of the United States as the president may determine."[60] This language, which Lincoln had demanded, did not require or force anyone to leave the United States. Moreover, it allowed the president to prevent voluntary emigration if he "determine[d]" the destination was not suitable. The law also limited the amount to be appropriated for each emigrant to $100.[61]

This provision was clearly a sop thrown to conservatives and racists, who feared a free black population. In 1860 there were 14,000 blacks in the city, including about 3,200 slaves. The appropriation would have provided money for the colonization of only 1,000 blacks—less than a third of the newly freed slaves and less than 7 percent of the entire free black population of the city in

[59] An Act for the Release of Certain Persons Held to Service or Labor in the District of Columbia, 12 Stat 376 (April 16, 1862).

[60] Id at 378 (emphasis added).

[61] Id. Misunderstanding of the colonization bill is common. John Hope Franklin, for example, asserts that the law "provided for the removal and colonization of the freedmen," John Hope Franklin, *The Emancipation Proclamation* 17 (Doubleday, 1963), when in fact it did not provide for "removal" but merely allowed voluntary colonization.

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1860. Moreover, by 1862 the black population in the city was much larger than 14,000, which meant that even a smaller percentage of the population could leave under the appropriation. Furthermore, the $100 was hardly an incentive for any free black or former slave to move to a new country. Not surprisingly, no record exists of *any* African American taking advantage of this offer. This law in fact may be unique in American history: the only time that Congress appropriated a substantial sum of money, to be given out to individuals, and no one applied to receive the money.

The political message of this law was significant. Congress, in an election year, was beginning to dismantle slavery. House members, who were to stand for reelection in the fall, were willing to run on a record that included voting to free some slaves. In June Congress abolished slavery in the federal territories, this time without compensation.[62] In doing so Congress completely ignored Chief Justice Taney's decision in *Dred Scott v Sandford*,[63] which specifically held that Congress could never abolish slavery in the territories. Congress was apparently not worried that the Chief Justice and his colleagues would have the audacity to undo their handiwork. This was one more incentive for the president to begin to think about a larger emancipation. It was in this context, with the war going relatively well, with the border states secure, and some emancipation taking place, that Lincoln began to work on the greatest issue of his lifetime.

V. Political Support for Remaking America

As Congress moved to end slavery in the territories and the District of Columbia, Lincoln contemplated a much larger issue: ending slavery in the Confederacy. Before Lincoln could act, one of his generals once again began to move against slavery without authority. On May 9, 1862, Major General David Hunter, the commander of U.S. forces in the Department of the South, issued General Order No. 11, declaring martial law in his military district, which comprised the states of South Carolina, Georgia, and Florida. The General Order declared all slaves in those states to be free. Hunter justified this on the grounds that slavery was "incompatible"

[62] An Act to Secure Freedom to all Persons Within the Territories of the United States, 12 Stat 432 (June 19, 1862).

[63] 60 US 393 (1857). See Finkelman, 12 Lewis & Clark L Rev 1219 (cited in note 16), and Finkelman, *Dred Scott v. Sandford* (cited in note 18).

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with a "free country" and undermined military operations and his imposition of martial law.[64]

Hunter had vastly exceeded his authority. Indeed, his action went well beyond the authority of any military officer. Even if Lincoln had wanted to support Hunter's program, he could not possibly have approved of a general acting in this manner without authority of the executive branch. Not only did Hunter lack authority for such an action, but he had not even consulted with his military superiors, the War Department, or the president. No president could have allowed a military commander to assume such powers and, not surprisingly, ten days later Lincoln revoked Hunter's order.[65]

This was not like the situation in Missouri in 1861. Lincoln did not have to placate border state slaveholders. South Carolina, Georgia, and Florida were already out of the Union. Nor would such an order cause Lincoln any great political harm. Most northerners were by this time ready to see the slaveocracy of the deep South destroyed, and Hunter's action was a major step in that direction. Politically, it would not have cost Lincoln much to allow Hunter to abolish slavery in South Carolina where the rebellion began. But the need to preserve executive authority and maintain a proper chain of command, if nothing else, forced Lincoln to act. He simply could not let major generals set political policy.

Even as he countermanded Hunter, Lincoln gave a strong and unambiguous hint of his evolving theory of law and emancipation. He rebuked Hunter for acting without authority, but he did not reject the theory behind Hunter's General Order: that slavery was

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[64]

> HEAD-QUARTERS, DEPARTMENT OF THE SOUTH, HILTON HEAD, S.C. May 9, 1862.
>
> The three States of Georgia, Florida, and South Carolina, comprising the Military Department of the South, having deliberately declared themselves no longer under the protection of the United States of America, and having taken up arms against the said United States, it becomes a military necessity to declare them under martial law. This was accordingly done on the 25th day of April, 1862. Slavery and martial law in a free country are altogether incompatible. The persons in these three States—Georgia , South Carolina , and Florida—heretofore held as slaves, are therefore declared forever free.
>
> DAVID HUNTER, Major-General Commanding. ED. W. SMITH, Acting Assistant Adjutant-General.

http://mac110.assumption.edu/aas/Manuscripts/generalorders.html.

[65] "Proclamation Revoking General Hunter's Order of Military Emancipation of May 9, 1862," May 19, 1862, *CW*, 5:222.

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incompatible with both a free country and the smooth operation of military forces suppressing the rebellion. Instead, in his "Proclamation Revoking General Hunter's Order of Military Emancipation," Lincoln wrote:

> 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 questions which, under my responsibility, I reserve to myself, and which I can not feel justified in leaving to the decision of commanders in the field.[66]

Lincoln ended his public proclamation by urging the loyal slave states to accept Congress's offer of March 6, to give "pecuniary aid" to those states that would "adopt a gradual abolishment of slavery." He asserted that "the change" such a policy "contemplates" would "come as gentle as the dews of heaven, not rending or wrecking anything." He asked the leaders of the slave states—within the Union and presumably those who claimed to be outside the Union—if they would "not embrace" this offer of Congress to accomplish "so much good . . . by one effort."[67]

In hindsight, this document is a stunning example of Lincoln deftly and subtly shaping public opinion in advance of announcing his goals. By this time he was fully aware that none of the Confederate states were ever going to end slavery on their own, and that for the foreseeable future neither would the border states. But he was willing to continue to make conciliatory gestures, urging a peaceful and seemingly painless solution to the problem. This helped him to court conservatives, who might be opposed to federal action against slavery, while at the same time advocating abolition and preparing the public for an eventual end to slavery. He was offering a solution to America's greatest social problem with the least amount of social disruption. But he also hinted that there were alternative solutions. He did not exactly say he had the power to end slavery as commander-in-chief, he merely asserted that *if* such power existed, it rested with him, and that if he felt emancipation

[66] Id at 222–23.

[67] Id at 223.

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had "become a necessity indispensable to the maintenance of the government" he was prepared to act against slavery.

Lincoln was preparing the public for what he would do. He was in no hurry. He was carefully laying the groundwork for public support and constitutional legitimacy, on the basis of military necessity. Lincoln the "commander-in-chief" had found the constitutional authority to end slavery that Lincoln the president did not have. Like any good courtroom lawyer, Lincoln was not ready to lay out his strategy all at once. He wanted to prepare his jury—the American public—for what he was going to do. He did not emphatically assert that he had the constitutional power to end slavery in the Confederacy, he merely raised it as a theoretical possibility. At the same time he made it unmistakably clear that if such power existed, it rested with him, and that he was prepared to use that power.

A series of events in mid-July converged to convince Lincoln that emancipation would have to come soon. On July 12 he met for the second time with representatives and senators from the upper South, urging them to endorse compensated emancipation (with federal help) for their states. He argued that by taking this stand the loyal slave states would help the war effort by showing the rebels "that, in no event, will the states you represent ever join their proposed Confederacy." Although by this time Lincoln did not expect the loyal slave states to join the rebellion, he apparently believed that voluntary emancipation in those states would be a blow to Confederate hopes and morale. He also urged the border state representatives and senators to act in a practical manner to salvage what they could for their constituents. He famously told them that the "incidents of war" could "not be avoided" and that "mere friction and abrasion" would destroy slavery. He bluntly predicted—or more properly warned—that slavery "will be gone and you will have nothing valuable in lieu of it." He also pointed out that General Hunter's proclamation had been very popular and that he considered Hunter an "honest man" and "my friend."[68] The border state representatives and senators did not take the hint, and two days later more than two-thirds of them signed a letter denouncing any type of emancipation as "unconstitutional." Eight border state representatives

[68] "Appeal to Border State Representatives to Favor Compensated Emancipation," July 12, 1862, *CW*, 5:317–18; Gienapp, *Abraham Lincoln and Civil War America* at 110 (cited in note 47); McPherson, *Battle Cry of Freedom* at 503 (cited in note 38).

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then published letters of their own supporting the president.[69]

On July 14, the same day that the border state representatives denounced emancipation, Lincoln took a final stab at gradualism, although he doubtless knew the attempt would fail. On that day he sent the draft of a bill to Congress that would provide compensation to every state that ended slavery. The draft bill left blank the amount for each slave that Congress would appropriate, but provided that the money would come in the form of federal bonds given to the states. This bill was part of Lincoln's strategy to end slavery through state action where possible as a way of setting up the possibility of ending it on the national level. If he could get Kentucky or Maryland to end slavery it would be easier to end it in the South. This was also consistent with prewar notions of federalism and constitutional interpretation that the states had sole authority over issues of property and personal status. Congress reported this bill and it went through two readings, but lawmakers adjourned before acting on it.

Lincoln surely knew that this bill, like his meeting with the border state representatives, would not lead to an end to slavery in the upper South. Nevertheless, this very public attempt at encouraging the states to act to end slavery was valuable. Like his response to Hunter, Lincoln showed the nation that he was not acting precipitously or incautiously. On the contrary, he was doing everything he could to end slavery with the least amount of turmoil and social dislocation.

This proposed bill must also be seen in the context of Lincoln's actions on July 13, which was the day before he proposed the bill and the day after his meeting with the border state representatives. On July 13, Lincoln privately told Secretary of State William H. Seward and Secretary of the Navy Gideon Welles that he was going to issue an Emancipation Proclamation. This was not a sudden response to the border state representatives rejecting compensated emancipation. Had they accepted Lincoln's proposal it would not have affected slavery in the Confederacy, where most slaves lived. Indeed, Lincoln told Welles that for weeks the issue had "occupied his mind and thoughts day and night."[70] That was probably an understatement. Lincoln had probably been troubled by the issue

[69] *CW*, 5:319; Gienapp, *Abraham Lincoln and Civil War America* at 110 (cited in note 47); McPherson, *Battle Cry of Freedom* at 503 (cited in note 38).

[70] Lincoln, quoted in McPherson, *Battle Cry of Freedom* at 504 (cited in note 38).

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since had been forced to countermand Frémont's proclamation, or maybe from the moment he first heard of Butler's contraband solution to runaways. Lincoln's conflicting views over emancipation—his desire to achieve it, his sense that the time was not right, and his initial uncertainty about its constitutionality—were surely evident in his response to Hunter's proclamation, which Lincoln announced on May 19—nearly two months before he spoke with Welles.

Up until this time Lincoln had stressed that he could not move against slavery until there was a fair prospect of securing the border states and winning the war. He had also framed his power to end slavery as inherent within his powers as commander-in-chief. By early July 1862 Lincoln believed he had a fair prospect of winning the war, he knew the loyal slave states were secure, and he had a coherent legal and constitutional rationale for emancipation. Ever the master politician, Lincoln suddenly shifted the argument for emancipation to one of military necessity. This was the key to gaining full northern support for what he was about to do.

Thus, he told Welles the issue was one of military necessity. "We must free the slaves" he said, "or be ourselves subdued." Slaves, Lincoln argued, "were undeniably an element of strength to those who had their service, and we must decide whether that element should be with or against us." Lincoln also rejected the idea that the Constitution still protected slavery in the Confederacy. "The rebels," he said, "could not at the same time throw off the Constitution and invoke its aid. Having made war on the Government, they were subject to the incidents and calamities of war."[71] Here Lincoln sounded much like Benjamin Butler in his response to Major Carey. Since that incident the administration had accepted the idea that the Fugitive Slave Clause of the Constitution could not be invoked by rebel masters. But why, Lincoln might have asked, was the Fugitive Slave Clause different from any other part of the Constitution? If rebel masters were not entitled to the protection of that clause, then they were not entitled to the protection of any part of the Constitution. Thus, Lincoln had found a constitutional theory that would be acceptable to most northerners. It might not pass muster with the U.S. Supreme Court, but that issue might not

[71] Id.

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arise until after most slaves had been freed. More importantly, it would help secure northern public opinion.

The military-necessity argument is more complex. Lincoln did not begin to move toward emancipation until after the United States had had substantial military success in the first five months of 1862. Thus, emancipation was not a desperate act forced by military necessity. Rather, it was an act that could only be accomplished by military success. However, in framing its constitutionality, Lincoln argued simultaneously that emancipation grew out of military power—that is, his power as commander-in-chief—and that as commander-in-chief he could do whatever was necessary to win the war and thus preserve the Union. This too would garner public support. Lincoln might *know* that he should free the slaves for moral reasons and that he had the constitutional power to do so, but he also knew that he would have greater support in the North if his actions appeared to be tied to military necessity. Thus, the irony of emancipation emerged. Lincoln could only move against slavery when he thought he could win the war, but he could only sell emancipation to the North, and only justify it constitutionally, if he appeared to need it to win the war.

Four days after speaking with Welles and Seward, Lincoln signed the Second Confiscation Act into law.[72] This law was more expansive than the First Confiscation Act. The law provided a death penalty as well as lesser penalties—including confiscation of slaves—for treason and also allowed for the prosecution of "any person" participating in the rebellion or who gave "aid and comfort" to it. The law also provided for the seizure and condemnation of the property of "any person within any State or Territory of the United States . . . being engaged in armed rebellion against the government of the United States, or aiding or abetting such rebellion." This would include Confederate sympathizers in the border states as well as in the Confederacy. Two separate provisions dealt, in a comprehensive way, with the issue of runaway slaves and contrabands.

Under section 9 of the law any slave owned by someone "engaged in rebellion against the government" who escaped to Union lines or was captured by U.S. troops would be "forever free of their servitude, and not again held as slaves." Section 10 prohibited the military from returning any fugitive slaves to any masters, even those

[72] An Act to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Property of Rebels, and for other Purposes, 12 Stat 589 (July 17, 1862).

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in the border states, unless the owner claiming the slave would "first make oath that the person to whom the labor or service of such fugitive is alleged to be due is his lawful owner, and has not borne arms against the United States in the present rebellion, nor in any way given aid and comfort thereto." Like the Washington, D.C., emancipation act, this law allowed for the colonization of such blacks "as may be willing to emigrate" to other lands. This was a sop to conservatives who feared black freedom, but it would not require anyone to leave the United States.[73] Significantly, unlike the D.C. emancipation bill, the Confiscation Act allowed colonization but did not appropriate any money for it.

The Confiscation Act was one more step toward creating public opinion that would allow emancipation. It also helped clarify the legal and constitutional issues, by once again affirming that under the war powers Congress, or the president, might emancipate slaves. The act did not, however, do much to actually free any slaves. The law provided numerous punishments for rebels, but their slaves would only become free after some judicial process. Had there been no Emancipation Proclamation or Thirteenth Amendment, the act might have eventually been used to litigate freedom, but it would have been a long and tedious process. The only certain freedom created from the act came in sections 9 and 10, which secured liberty to fugitive slaves escaping rebel masters. But this was not really much of a change from existing policy.

On July 22, five days after signing the act, Lincoln presented his cabinet with his first draft of the Emancipation Proclamation. The draft began with a reference to the Second Confiscation Act, and contained a declaration warning "all persons" aiding or joining the rebellion that if they did not "return to their proper allegiance to the United States" they would suffer "pain of the forfeitures and seizures" of their slaves.[74] This language would not appear in the final Proclamation. However, a few days after he showed this language to the cabinet, he recast it as a separate public proclamation.[75]

The rest of the first draft of the Proclamation focused on Lincoln's intent to urge Congress to give "pecuniary aid" to those states voluntarily ending slavery and "practically sustaining the authority

[73] Id.

[74] Emancipation Proclamation—First Draft [July 22, 1862], *CW,* 5:336.

[75] Proclamation of the Act to Suppress Insurrection, July 25, 1862, *CW*, 5:341.

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of the United States." This was one more attempt to get the loyal slave states to end slavery. The final sentence of this draft proclamation finally went to the main issue. Lincoln declared that "as a fit and necessary military measure" he did "order and declare" as "Commander-in-Chief of the Army and Navy of the United States," that as of 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."

This was the great change for Lincoln. He was now on record as believing that he had the constitutional power to end slavery in the Confederacy. Lincoln had solved the first precondition of emancipation. Kentucky, Missouri, Maryland, and Delaware were securely in the United States, and while their leaders were not ready to end slavery, they clearly would not be joining the Confederacy. The third condition had been met. The fourth condition had at least been partially met. With U.S. troops controlling most of the Mississippi Valley, a good deal of Tennessee, the islands off the coast of South Carolina and Georgia, and most southern ports closed by the navy, Lincoln knew that an emancipation program would be successful in freeing a substantial number of slaves, even if somehow a shrunken Confederacy survived. The only precondition that was left was the development of political support for emancipation. Here Lincoln was also close to achieving his goal. Congress had been moving toward emancipation; generals such as Hunter were pushing for emancipation; and once he proposed it to his cabinet, only the conservative Montgomery Blair, who was from a slave state, expressed reservations about emancipation. Blair did not oppose the concept, but did think it would cost the Republican Party votes in the fall elections. In the next two months Lincoln would work to lay the political groundwork for gaining greater public support for emancipation.

VI. Preparing the Public for the Inevitable

For the rest of the summer Lincoln quietly shaped the political climate to create the necessary conditions for emancipation. Illustrative of this was his famous letter to the *New York Tribune* on August 22. In an editorial titled "The Prayer of Twenty Millions," Horace Greeley had urged Lincoln to end slavery. Lincoln responded with a letter, declaring his goal was to "save the Union,"

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and that he would accomplish this any way he could. He would free some slaves, all slaves, or no slaves to save the Union. He also noted that this position was a description of his "*official* duty" and not a change in his "oft-expressed *personal* wish that all men every where could be free."[76]

The answer to Greeley was one more step to creating the political conditions for emancipation. Lincoln had now warned the nation that he would end slavery if it were necessary to preserve the Union. He was also now on record as asserting that he had the power to end slavery, although he did not spell out exactly what that power was or where in the Constitution he found it.

Lincoln had been quietly and secretly moving toward this result all summer. His letter to Greeley was a prelude to what he had already determined to do. No northerner could be surprised when he did it. Abolitionists could be heartened by having a president who believed, as they did, that "all men every where" should "be free." Conservatives would understand that they had to accept emancipation as a necessary policy to defeat the rebellion and save the nation.

On September 13 he replied coyly to an "Emancipation Memorial" from a group of Chicago ministers. He asserted that emancipation was useless without a military victory and would be "like the Pope's bull against the comet." He asked how he "could free the slaves" when he could not "enforce the Constitution in the rebel States."[77] Tied to this problem, he noted, was the possibility that emancipation would take "fifty thousand bayonets" from Kentucky out of the Union Army and give them to the Confederates.[78] Lincoln surely no longer believed this was the case, since Kentucky was firmly in the Union, but it underscored his long-standing belief that he had to make sure Kentucky was secure before he could move against slavery in the Confederacy. He also noted that he needed full public support to succeed. Thus, he urged the ministers to be patient. Emancipation could only come with military success and the ability to "unite the people in the fact that constitutional government" should be preserved. In passing, Lincoln also noted that he had the power, as commander-in-chief, to emancipate the slaves

[76] Lincoln to Horace Greeley, August 22, 1862, *CW*, 5:388–89.

[77] "Reply to Emancipation Memorial Presented by Chicago Christians of All Denominations," Sept 13, 1862, *CW*, 5:419–25 (quotations on 420).

[78] Id at 423.

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in the Confederacy. Most importantly, perhaps, he also told these ministers that he had no "objections of a moral nature" to emancipation.[79]

Even as he responded to the ministers, evading any commitment and refusing to reveal his plans, Lincoln knew he had almost all his prerequisites on the table. To end slavery he needed the prospect of military success, the ability to secure the loyal slaves states, public support for black freedom, and a constitutional theory to justify his actions. In early September he had all of this except the first. The war had been going well since the previous December, but he needed a significant battlefield victory to have all his prerequisites in place. When he had that victory, emancipation would not be a "necessity" of preserving the Union, as he had said in the Greeley letter, but rather it would be the fruit of victory. The victory at Antietam was the last piece of the puzzle. He could now issue the Proclamation as the logical fruit of the military successes that had taken place since the previous December.[80]

On September 22 he issued the preliminary Proclamation, declaring that it would go into effect in one hundred days. He chose September 22 carefully, because it would be exactly one hundred days until January 1, 1863, thus tying emancipation with the new year. He now also had his constitutional/legal theory for issuing the Proclamation as he had explained in his letter to the *New York Tribune*.

He issued the Proclamation in his dual capacity as "President of the United States of America, and Commander-in-Chief of the Army and Navy." The purpose of the Proclamation was "restoring the constitutional relations" between the nation and all the states. The preliminary Proclamation authorized the enlistment of black troops and put the nation on notice that in one hundred days he would move against slavery in any place that was still in rebellion against the nation.[81]

On January 1, 1863, the final Proclamation was put into effect. Here Lincoln made the constitutional argument even more precise.

[79] Id at 424, 421.

[80] In hindsight it is of course clear that Antietam was not the knockout blow Lincoln was hoping for, and the end of 1862 and the first half of 1863 would be a period of enormous frustration for Lincoln, as the war went badly. But Lincoln could not know or foresee this when he issued the preliminary Proclamation.

[81] Preliminary Emancipation Proclamation, Sept 22, 1862, *CW*, 5:433; Proclamation No 16, 12 Stat 1267 (Sept 22, 1862).

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He issued it "by virtue of the power in me vested as Commander-in-Chief, of the Army and Navy of the United States in time of actual armed rebellion." This was, constitutionally, a war measure designed to cripple the ability of those in rebellion to resist the lawful authority of the United States. It applied only to those states and parts of states that were still in rebellion. This was constitutionally essential. Lincoln only had power to touch slavery where, as he had told the ministers from Chicago, he could not "enforce the Constitution." Where the Constitution was in force, federalism and the Fifth Amendment prevented presidential emancipation. The document was narrowly written, carefully designed to withstand the scrutiny of the Supreme Court, still presided over by Chief Justice Taney. It narrowly applied only to the states in rebellion. It would not threaten Kentucky or Missouri and it would not threaten the constitutional relationship of the states and the federal government.

A careful reading of the Proclamation suggests that Professor Hofstadter was right. It did have "all the moral grandeur of a bill of lading." But, Hofstadter failed to understand the significance of a bill of lading to a skilled railroad lawyer, which is what Lincoln had been before the war. A bill of lading was the key legal instrument that guaranteed the delivery of goods between parties that were far apart and may never have known each other. A bill of lading allowed a seller in New York to safely ship goods to a buyer in Illinois, with both knowing the transaction would work. One contemporary living in Britain, Karl Marx, fully understood the highly legalistic nature of the Proclamation. Writing for a London newspaper during the war, Marx had a clear fix on what Lincoln had done, and why he did it the way he did: the "most formidable decrees which he hurls at the enemy and which will never lose their historic significance, resemble—as the author intends them to—ordinary summons, sent by one lawyer to another."[82]

So, in the end, when all the preconditions were met—the loyal slave states secured, military victory likely, political support in place, and the constitutional/legal framework developed—Lincoln went back to his roots as a lawyer and wrote a carefully crafted, narrow document: a bill of lading for the delivery of freedom to some 3 million southern slaves. The vehicle for delivery would be the army

[82] Marx, quoted in Phillip Shaw Paludan, *The Presidency of Abraham Lincoln* 187–88 (Kansas, 1994).

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and navy—for which he was commander-in-chief. As the armies of the United States moved deeper into the Confederacy they would bring the power of the Proclamation with them, freeing slaves every day as more and more of the Confederacy was redeemed by military success. This was the moral grandeur of the Proclamation and of Lincoln's careful and complicated strategy to achieve his personal goal that "all men every where could be free."[83]

[83] AL to Horace Greeley, Aug 22, 1862, *CW*, 5:388–89.

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