

DRAFT

NOTE TO SCHMOOZE PARTICIPANTS:

I have omitted all citations from this draft, but have left them out as I have in years past. This draft should be read in the spirit in which it is offered. It is a collection of ever-developing but unvetted ideas that have been spawned from prior research and publications.

Lincoln, The Emancipation Proclamation and Executive Power

Henry L. Chambers, Jr., Professor of Law, University of Richmond

Maryland Constitutional Law Discussion Group - University of Maryland School of Law

Baltimore, Maryland, February 22-23, 2013

Introduction

One hundred and fifty years after President Abraham Lincoln signed the Emancipation Proclamation, the debate regarding the president's constitutional authority to issue the Proclamation is no less interesting than it was when the proclamation was issued. The 13th Amendment substantially mooted the need to determine the proclamation's constitutionality. However, thorny questions regarding the limits of President Lincoln's executive authority remain. Usually, the focus of the debate regarding the Emancipation Proclamation centers on President Lincoln's commander-in-chief power. However, when viewed relatively expansively, the commander-in-chief power can be more like a trump card or conversation ender. The arguably more interesting question is whether President Lincoln had the constitutional authority to issue the Emancipation Proclamation in the absence of commander-in-chief authority. Given the legislation that Congress passed before the Emancipation Proclamation was issued, President Lincoln may well have had the constitutional authority to issue a substantial portion of the Emancipation Proclamation under his general executive authority to take care that the laws be faithfully executed.

Between the advent of the Civil War and the issuance of the Emancipation Proclamation, Congress passed several laws that addressed slavery. In each one, Congress moved toward freeing more slaves and limiting slavery in general. Congress also indicated a willingness to emancipate slaves as war policy. Indeed, those laws also gave the president the power and duty to seize the property of those who were engaged in war against the United States or were disloyal. President Lincoln issued the Emancipation Proclamation against that legislative backdrop. The brief essay raises and discusses issues surrounding whether President Lincoln's Emancipation Proclamation that freed all slaves held in areas designated by the president to be under rebellion on January 1, 1863, was an exercise of his "take care" executive authority. The answer depends, of course, on the nature of executive authority. The brief essay begins with a discussion of the legislation that preceded the Emancipation Proclamation, continues with a discussion of the Emancipation Proclamation and ends with a discussion of the nature of executive authority.

I. Pre-Emancipation Proclamation Civil War Legislation

A. The First Confiscation Act

DRAFT

Passed soon after the First Battle of Bull Run, the First Confiscation Act (12 Stat. 319) was signed by President Lincoln on August 6, 1861. Titled “An Act to confiscate Property used for Insurrectionary purposes,” the Act provided that property, including slaves, used to support “the present or any future insurrection against the Government of the United States” would be “lawful subject of prize and capture.” The purpose of the First Confiscation Act was to slow the direct use of property against the United States. For example, rebel forces were being augmented by the use of slave labor, as slaves had been used to do jobs that Confederate soldiers might otherwise do. That increased the functional capacity of the confederate forces fighting the Union forces. The Act passed both as a way to stop the property from being used against the United States and as a reminder that the United States planned to respond to the rebellion seriously.

Under the Act, the property owner lost his rights in the property not necessarily as a punishment, but because the property had been used improperly against the United States. Given that the action was in the nature of forfeiture, the property rights in the property were to be transferred to the United States. The property had not merely been commandeered. The previous owner could not reclaim the property even at the war’s end. The Act stated that seized property would be condemned in a proper federal district court and sold for the benefit of the United States. The Act provided the President with both the right and the obligation “to cause the [subject property] to be seized, confiscated, and condemned.”

The Act did not explicitly distinguish between human and non-human property. However, it appeared to treat the different types of property somewhat differently. Non-human property was clearly to be sold for the benefit to the United States. No explicit provision was made for human property. The Act simply indicated that the owner of a slave lost his rights in the slaves and that the slave would be free of the obligation of labor to the previous owner. The First Confiscation Act did not clarify that slaves seized as a result of the Act were to be emancipated. However, it also did not suggest that those slaves would be treated as U.S. property, held and possibly sold at some later date. Later congressional enactments and the war itself clarified the issue.

B. The Second Confiscation Act

The Second Confiscation Act (12 Stat. 589) was more complex than the First Confiscation Act. Signed on July 17, 1862, the Act was titled “An Act to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Property of Rebels, and for other Purposes.” Unlike the First Confiscation Act, which focused on property used to support the war effort directly, the Second Confiscation Act was meant to target the property of people who were making war against the United States. The Act had two separate aims. The first was the confiscation of property. The second was the emancipation of slaves who were subject to confiscation.

The Act explicitly reached the property of people who were convicted of treason and those who were convicted of being involved in the rebellion, including those who had given aid or comfort to the rebellion. The punishment for the criminal offense was, in part, the seizure of the defendant’s property and the liberation of the defendant’s slaves. The slaves need not have directly supported the confederate war effort. Rather, they merely needed to be the property of people who had supported the war effort and been convicted of the crime.

The Act also identified specified groups of people who were to have their property seized. Groups included officers of the army or navy of the Confederacy, high-level officers in the

DRAFT

Confederate government and lower-level officers in Confederate state governments. In addition, the act covered “any person who, owning property in any loyal State or Territory of the United States, or in the District of Columbia, shall hereafter assist and give aid and comfort to such rebellion.” The president was charged with seizing subject property and using the proceeds from that property to support the army. After naming the groups covered, the Act provided President Lincoln the power to designate an additional group of people whose property would be subject to forfeiture.

The Act authorized the president to warn “any person within any State or Territory of the United States . . . being engaged in armed rebellion against the government of the United States, or aiding or abetting such rebellion” to stop supporting the rebellion and return their allegiance to the United States. If they did not do so within sixty days of the warning, their property would be subject to seizure. Indeed, the President was obligated to seize the subject property and use proceeds from the seizure. The Act provided a mechanism to speed condemnation proceedings against all of the non-human property the president was duty-bound to seize, so that it could be sold and its proceeds used for the United States. This mechanism was easier for the government to use than the mechanism provided in the First Confiscation Act, though forfeiture through courts was not used particularly broadly pursuant to either Confiscation Act.

A significant textual difference between the First Confiscation Act and the Second Confiscation Act is that the Second Confiscation Act explicitly provided for the emancipation of slaves. This is not an idle point. The confiscation portion of the Second Confiscation Act and the forfeiture portion of the Second Confiscation Act had been separate bills for much of the legislative process. Congressmen understood that there was a difference between taking property rights in slaves from rebels either to stop them from using their property against the government or as punishment for making war on the United States, and freeing those slaves. Indeed, there had been congressional debate about the distinction. However, by the time the Second Confiscation Act passed, the forfeiture and the emancipation sections had been joined.

The substance of the emancipation portion of the Act is significant. The Act freed any slave who escaped into Union lines, was captured from his master, or was found in a place that had been occupied by rebel forces, if the slave’s master had engaged in rebellion or had “in any way [given] aid or comfort” to the rebellion. The Act stated that those slaves “shall be deemed captives of war, and shall be forever free of their servitude, and not again held as slaves.” The Act noted that a fugitive slave could be returned to his owner, if the person claiming the fugitive swore an oath that the slave’s owner “[had] not borne arms against the United States in the present rebellion, nor in any way given aid and comfort thereto.” However, members of the armed forces could not be party to surrendering fugitive slaves or returning fugitive slaves to their owners. Lastly, the president was authorized to use African manpower “as he may deem necessary and proper for the suppression of this rebellion,” freeing the president to use seized, freed and escaped slaves in the military.

C. Additional Laws

Congress passed additional acts, before the Emancipation Proclamation was issued, that suggest that Congress was tilting toward emancipation. Congress prohibited military officials from returning fugitive slaves to their masters, with President Lincoln signing the law on March 13, 1862. Congress abolished slavery in the District of Columbia, with President Lincoln signing the

DRAFT

law on April 16, 1862. Congress abolished slavery in the territories, with President Lincoln signing the law on June 19, 1862. Congress passed the Militia Act of 1862, with President Lincoln signing the law on July 17, 1862, the same day he signed the Second Confiscation Act. Further, it granted freedom to any former slave who rendered military service under the Militia Act if that slave had been owned by someone who had levied war on the U.S. or had given aid or comfort to enemies of the U.S. during the rebellion. In addition, the former slave's mother, wife and children, would be free based on the former slave's military service if the mother, wife and children had been owned by someone who had levied war or given aid or comfort to the enemies of the United States. These laws suggest that Congress was willing to emancipate slaves wherever it thought reasonable and wherever it thought it had the authority to do so. When added to the First and Second Confiscation Acts, President Lincoln had been provided significant latitude to affect slavery directly.

D. Implications

With the laws Congress passed before the Emancipation Proclamation was issued, Congress gave President Lincoln significant authority to seize property, liberate slaves as a result, and to use black Americans militarily whenever appropriate to help suppress the rebellion. President Lincoln was specifically given the authority and duty to confiscate and condemn property used directly against the United States in support of the rebellion. President Lincoln was specifically given the authority and duty to seize the property of certain groups of people inside of the Confederate states and inside of loyal states who were supporting or giving aid to the rebellion. President Lincoln was given the authority to issue a proclamation giving notice to people in Confederate states that the president could seize the property of people in those states who continued to aid or abet the rebellion.

All property, including slaves, of the affected persons was subject to forfeiture. Those owners lost all rights to the property. Though the First Confiscation Act did not foreclose the possibility that property rights in human property – slaves – could have been transferred to the United States, with the government owning the labor of slaves and with the proceeds of the sale of slaves being used to fight the war, congressional action demonstrated no interest in having the United States own slaves and no interest in preserving slavery, though slavery was still legal in the slave states that remained part of the Union.

Lastly, President Lincoln was authorized to use people of African descent in the armed forces as he saw fit. President Lincoln could use now-former slaves to supplement the manpower necessary to fight the war and presumably could encourage former slaves to become a part of the armed forces to help suppress the rebellion. This was a significant step, as some did not want to see African Americans explicitly become part of the armed forces either because they did not want to make the war about slavery or because they believed that the psychological effect that black soldiers might have on the south would guarantee a prolonged or more savage rebellion.

II. The Emancipation Proclamation

When commentators discuss the Emancipation Proclamation, they tend to refer only to the proclamation issued on January 1, 1863. However, the preliminary proclamation, issued on

DRAFT

September 22, 1862, provides context for the final proclamation. Indeed, the final proclamation was arguably just a reconfirmation, in slightly different language, of the preliminary proclamation. The preliminary and final Emancipation Proclamations should be discussed together.

A. The Preliminary Proclamation

The preliminary Emancipation Proclamation began with a statement of purpose declaring that President Lincoln, as President and Commander-in-Chief planned to restore the Union. The proclamation was issued to that end, with the proposition that the rebellious states ought to rejoin the Union and accept gradual emancipation and colonization of slaves. Barring reconciliation, “all persons held as slaves within any state, or designated part of a state, the people whereof shall then be in rebellion against the United States shall be then, thenceforward, and forever free[.]” The president would, on January 1, 1863, indicate the areas of the United States to which the proclamation would apply. The government, including the military, would recognize the freedom of slaves and do nothing to impede the exercise of their freedom. The proclamation concluded with a pledge from President Lincoln that he would recommend that, after the restoration of the Union, loyalists be “compensated for all losses by acts of the United States, including the loss of slaves.”

The proclamation provided statutory authority for its issuance. The proclamation noted the law, passed March 13, 1862, prohibiting the military from returning fugitive slaves to their owners. It also noted section 9 of the Second Confiscation Act, which freed slaves of persons engaged in rebellion or who had given aid or comfort, whenever those slaves came under the U.S. Army’s control. Finally, it noted section 10 of the Second Confiscation Act which barred the return of fugitive slaves unless the person seeking the fugitive slave swore oath that the owner of the slave had not participated in rebellion or given aid or comfort to the rebellion and which reiterated that the military would not participate in the return of fugitive slaves.

B. The Final Proclamation

The final Emancipation Proclamation was issued on January 1, 1863. It quoted from the preliminary proclamation, essentially noting that the final proclamation merely sealed the preliminary proclamation. President Lincoln indicated that his authority to issue the final Emancipation Proclamation emanated from his commander-in-chief power and that the proclamation was “a fit and necessary war measure for suppressing the rebellion.” The President named the areas in the United States that were deemed to remain in rebellion. He then stated: “I do order and declare that all persons held as slaves within said designated States, and parts of States, are, and henceforward shall be free; and that the Executive government of the United States, including the military and naval authorities thereof, will recognize and maintain the freedom of said persons.” The proclamation then noted that the then-former slaves could join the United States armed forces.

III. Executive Authority and the Emancipation Proclamation

For the purposes of this essay, all legislation passed by Congress before the Proclamation’s promulgation is assumed to be constitutional. That is the only reasonable way to consider

DRAFT

whether President Lincoln's constitutional duty to "take care that the laws be faithfully executed" authorized him to sign and issue the Emancipation Proclamation. If some of the legislation enacted before the Emancipation Proclamation was issued was unconstitutional, the analysis becomes much too complicated for this brief essay.

Arguably, the Emancipation Proclamation did little more than push the emancipation train down the tracks apace. If emancipation was clearly coming and had been set in motion by prior congressional action, the Emancipation Proclamation could be thought to be a mere continuation of congressional policy that was likely within the president's executive authority precisely because it was not bold. Conversely, the Emancipation Proclamation arguably was a bold step toward freedom. However, if the Emancipation Proclamation was a break with or radical departure from congressional action, it is less likely to be within the president's executive authority. Paradoxically, the Emancipation Proclamation's value as proof of President Lincoln's greatness may be inversely proportional to its apparent constitutionality.

In the Emancipation Proclamation, President Lincoln identified the areas in the United States not under the Union's effective political or military control, deemed them to be in rebellion, and declared that all slaves living in those areas were free. The Emancipation Proclamation could be thought to be a declaration that every slaveholder in the areas under rebellion should be considered to be aiding and abetting the rebellion. That would subject all of their property, including their slaves, to forfeiture. However, the preliminary Emancipation Proclamation's suggestion that loyalists living in areas controlled by rebel forces might have claims after the war for compensation for destroyed property, it is unlikely that the final Emancipation should be deemed to treat everyone in such areas as collaborators with the Confederacy. Rather than being deemed a blanket condemnation of the motives and actions of all persons living in areas in rebellion, the Emancipation Proclamation ought to be seen as a confiscation of the property of all subjects – loyal and disloyal – living in areas in rebellion. Viewed in this way, the Emancipation Proclamation may be problematic because it fails to distinguish between the loyal and disloyal in a way that the Confiscation Acts and other laws passed before the Emancipation Proclamation was issued do.

In practice, the Emancipation Proclamation is not a single proclamation. It is three Emancipation Proclamations, as it applies differently to three groups of slaves. The first group of slaves consists of slaves held by disloyal masters. The second group consists of slaves who escape or somehow end up behind Union lines during the war, but are held by loyal masters. The third group consists of slaves held by loyal masters who do not escape through Union lines during the war. Each group arguably was treated differently under the laws in place when the Emancipation Proclamation was issued. The proclamation's emancipation of some slaves is on very solid constitutional ground. Its emancipation of other slaves may be on dubious constitutional ground, at least when the president's take care authority is taken as the only constitutional support for the president's executive authority to issue the Emancipation Proclamation.

The slaves who were held by disloyal masters arguably were free as soon as President Lincoln issued the final Emancipation Proclamation. Under the Second Confiscation Act, the property of rebels was subject to seizure and forfeiture after the president issued a proclamation warning persons in areas under rebellion to stop supporting the rebellion and declare allegiance to the United States. The preliminary Emancipation Proclamation served as notice to persons living in

DRAFT

areas under rebellion. Rebel property became subject to seizure when the final Emancipation Proclamation was issued.

The Second Confiscation Act placed a duty on President Lincoln to seize property subject to forfeiture. The easiest way for the slaves of rebels to be seized and become emancipated was to have them cross Union lines. Section 9 of the Second Confiscation Act makes clear that slaves of rebels who come physically under United States military control are free. Section 11 of the Second Confiscation Act authorized President Lincoln to use persons of African descent however necessary to suppress the rebellion. Consequently, the Emancipation Proclamation notes that newly freed slaves will be welcomed into the armed services. Given the congressional directives, the proclamation can be deemed to be an attempt to drive human property already subject to forfeiture toward Union lines as a way to add men who can help the Union to suppress the rebellion. Though there is reason to believe that that was not President Lincoln's intent, President Lincoln would appear to have been clearly authorized under his "take care" authority to issue the Emancipation Proclamation for that purpose. The application of the Emancipation Proclamation to the slaves of disloyal persons appears constitutional based on a simple and straightforward use of the President's "take care" authority.

How the Emancipation Proclamation applies to slaves who are held by loyal masters, but who escape or end up behind Union lines is trickier to address. The Second Confiscation Act does not address how to treat the slaves of loyalists who end up behind Union lines, though it suggests that under certain circumstances the slaves of loyalists who cross borders and are found in non-seceding states can be sent back to their loyalist owners. The issue is difficult to analyze because slaves of loyalist owners who cross Union lines cannot be sent back to their loyalist masters by the military, per Congress' "Law Enacting an Additional Article of War" (signed March 13, 1862) and the Second Confiscation Act. Again, it is important that the Second Confiscation Act allows President Lincoln to use freed or fugitive slaves to suppress the rebellion, and that the Emancipation Proclamation invites freed slaves to join the armed forces.

The legislation enacted before the Emancipation Proclamation was issued complicated a practical problem for military commanders in the field. Since the beginning of the war, military commanders had to address fugitive slaves who crossed Union lines. After the Confiscation Acts were passed, some of the fugitive slaves were free because they had been used in support of the rebellion or had masters who were rebels. Conversely, other slaves arguably were not free because their masters had remained loyal to the Union. The commanders in the field had no way of knowing who was free and who was not. Indeed, many commanders may not have cared who was technically free and who was not given that the commanders could not return fugitive slaves to their masters. In addition, the fugitive slaves – free or not – could be used to do tasks that regular soldiers would have had to do otherwise. After the Second Confiscation Act, the fugitive slaves who were sufficiently fit could be used for any military purpose. Taken together, the various enactments suggest that commanders were authorized to use and should use whichever people of African descent arrived behind Union lines or in Union encampments however possible.

Given the problem of fugitive slaves reaching Union lines that had existed since the beginning of the war, the Emancipation Proclamation could be read to recognize that slaves of loyalists almost certainly would continue to reach Union lines, would be put to work for the Union cause and almost certainly would not be re-enslaved after the war. Congress' arc toward emancipation

DRAFT

makes it difficult to imagine that slaves who served as Union soldiers would be returned to their loyalist masters after defending the Union cause in the war. Indeed, President Lincoln's mention in the preliminary Emancipation Proclamation of future attempts to suggest compensation for those loyalists who lost property in the war could be relevant. It suggests a recognition that loyalists might be compensated for slaves lost or possibly commandeered during the war, but that those slaves would not be returned. The Emancipation Proclamation's grant of freedom to slaves of loyalists who might escape to Union lines could be viewed as an implied exercise of the president's duty to take care that the laws be faithfully executed. The proclamation may be justified as a preemptive way to deal with a problem that federal law helped create, but did not solve: fugitive slaves of loyalists behind Union lines who commanders can use for military purposes and who cannot be returned to loyalist owners.

This construction of the president's "take care" power would suggest that the president must attempt to faithfully execute all of the laws, as best as possible. That is, when faced with a tangle of laws that creates a practical nightmare, the president may be allowed to choose a path that best addresses the practical problems that the legislation will almost certainly create. The power to choose the best path would be implied by the more general duty to take care to faithfully execute all of the laws. The Emancipation Proclamation's preemptive freeing of the slaves of both loyalists and rebels appears to go beyond the legislation congress had passed before the Emancipation Proclamation was issued. However, if the proclamation can be justified as a way to help address the practical problem of contraband fugitive slaves that commanders in the field had seen and likely would continue to see because of legislation that tilted toward encouraging fugitive slaves to find refuge behind Union lines and that tilted toward emancipation for former slaves who served in the U.S. armed forces, the proclamation could be well within the executive's "take care" authority.

The last group of slaves ostensibly freed by the Emancipation Proclamation – slaves who were owned by loyalists and who would never escape to Union lines – is the most difficult group to emancipate constitutionally under an interpretation of the president's "take care" authority. Even an expansive reading of any particular piece of legislation that Congress had passed before the Emancipation Proclamation was issued would not appear to suggest that the property of loyalists was subject to forfeiture. In addition, the emancipation of such slaves does not readily appear to resolve a problem created or exacerbated by legislation. A standard reading of the president's "take care" authority that provided the president the implied power to go beyond the text of an enactment to do what was necessary to effectuate the purposes of a statute's text might not cover the group of slaves at issue, as the law in place when the Emancipation Proclamation was issued appeared to protect the property of loyalists living behind Confederate lines. However, a reading of the "take care" authority that allows the president to execute policy based on a broader vision of the sweep of legislation that has Congress has passed on a general topic might allow the Emancipation Proclamation to cover the group of slaves at issue.

The mass of legislation that Congress had passed regarding slaves, slavery and the prosecution of the war provided President Lincoln with significant latitude and authority to confiscate and seize rebel property, to emancipate slaves, to use former slaves in the armed forces and to be aggressive in suppressing the rebellion. If the president's "take care" authority is aimed at the general arc of legislation rather than at a particular piece of legislation, the executive authority might cover the remaining group of slaves affected by the Emancipation Proclamation. Of

DRAFT

course, such a vision of the “take care” clause might seem sensible in the context of emancipating slaves during the Civil War, but might not be so sensible in other contexts.

How broadly the “take care” clause should be read depends on how broadly the nation’s chief executive’s job is conceived to be. If the president’s job is to execute legislative enactments, the take care clause can be viewed either narrowly or expansively only relative to particular sections of legislation. Conversely, if the president’s job is to execute legislative policy reflected by the whole of legislation, the “take care” clause can be viewed very expansively. There much more to say on the topic, but an initial exploration of the issue through the well-traveled terrain of the Emancipation Proclamation is useful, even after 150 years.

Conclusion

A reasonably liberal interpretation of the commander-in-chief power would likely deem the Emancipation Proclamation a legitimate exercise of constitutional executive authority. Even when applied to the group of slaves least likely to have been covered by legislation in effect when the Emancipation Proclamation was passed – slaves of loyalists who had not escaped to Union lines – the Emancipation Proclamation could have been viewed, as President Lincoln suggested, as a fit war measure on a number of different bases. However, justifying the Emancipation Proclamation without a resort to the commander-in-chief power is far more difficult.

Nonetheless, some of the Emancipation Proclamation can be justified with reference to the executive’s standard “take care” power. Most of the Emancipation Proclamation can be justified with reference to a sensibly broadened vision of the executive’s “take care” power that impliedly allows the executive to plot the best way to execute laws that, if applied strictly, would create serious problems for government officials charged with carrying out policy. All of the Emancipation Proclamation could be justified if the president’s “take care” power were expanded to allow the president to execute broad legislative policy rather than just legislative enactments. Which vision is best is a question for another day.