THEORIES OF TITLE AND THE RECONSTRUCTION ADMINISTRATIVE STATE

Cynthia Nicoletti

Abstract

Reconstruction began with an extraordinary promise: formerly enslaved people would receive forty-acre parcels of confiscated Confederate land, giving emancipation a material foundation. That promise collapsed. The standard explanation is political. President Andrew Johnson pardoned former Confederates and restored their property, frustrating congressional plans for redistribution. But the political story rests on a legal mechanism that no one has examined: title transfer. A pardon could restore seized property only if the former owner's title had not yet passed to the United States. Once it had, the property was a government asset and its return required a congressional appropriation. Whether Johnson's pardons could do what Johnson wanted them to do turned on a question of title: had wartime seizure transferred ownership to the United States? That question drove a sustained interbranch conflict over the administration of the Captured and Abandoned Property Act and ultimately reached the Supreme Court in *United States v. Klein* (1871). That case has been read ever since as a separation-of-powers decision. This Article argues it is a title case — and that title, unglamorous and technical, turned out to be the issue that everything else turned on. Lawyers, both now and then, fight big-picture questions on narrow doctrinal terrain. To contest the title question, administrators, legislators, and judges reached into the property toolkit — the stuff of trusts, bailments, future interests, and usufructs — and found moves that determined the outcome of Reconstruction land redistribution. *Klein* settled the title question in ways that made the road not taken nearly impossible to see. This Article recovers that pathway.

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Introduction

Reconstruction began with an extraordinary promise. At the end of the Civil War, the federal government pledged to grant confiscated southern land to formerly enslaved people in forty-acre parcels, offering the prospect that emancipation would be accompanied by a meaningful measure of economic independence.[1] The program was intentionally redistributive. Land seized from Confederates would become the material foundation of freedom for those who had been enslaved, while simultaneously diminishing the economic power of the planter class.[2] Emancipation would thus transform not only legal status and political rights, but also the distribution of wealth. That promise disintegrated, not because of the failure of the land grant but because of the collapse of the land seizure. By 1867, much of the land initially reserved for freedpeople had been restored to former Confederates.[3] The failure of Reconstruction land redistribution remains one of the defining episodes of American legal history, and its economic consequences continue to be reflected in the nation's persistent racial wealth gap.[4] Understanding how that promise collapsed requires attending to the legal mechanics that made it possible — mechanics that have been largely invisible.

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[1] *See* ERIC FONER, RECONSTRUCTION: AMERICAN'S UNFINISHED REVOLUTION, 1863-1866, at 70-71 (1988); W.E.B. DUBOIS, BLACK RECONSTRUCTION, 1860-1880, at 272, 592 (1935).

[2] *See* FONER, *supra* note 1, at 160-64.

[3] *See id.*

[4] On the racial wealth gap, *see generally* WILLIAM A. DARITY & A. KIRSTEN MULLEN, FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY 135 (2020); Ellora Derenoncourt, Chi Hyun Kim, Moritz Kuhn & Moritz Schularick, *Wealth of Two Nations: The U.S. Racial Wealth*

We have traditionally explained this story through an act of presidential discretion: Andrew Johnson's decision to pardon former Confederates.[5] Johnson, a racial reactionary, issued pardons that erased not just the criminal penalty for committing treason against the United States but also restored ex-Confederates' property.[6] This frustrated congressional plans for meaningful land redistribution, provoking a sustained struggle with the more radical Congress over the scope of the pardon power.[7] It is, in other words, a political story. This Article tells a different one. It identifies a hidden legal mechanism that determined whether a pardon could have restorative effect at all: title transfer. A pardon could restore property only if the former owner's title had not been fully terminated. Once title had passed to the government, the property became a public asset that could be allocated only by means of congressional appropriation. The legal effect of a pardon therefore depended on an antecedent property question: had wartime seizure transferred title to the United States? Competing answers to that question ultimately reached the Supreme Court in *United States v. Klein*,[8] a case conventionally understood as a separation-of-powers decision.[9] This Article argues that *Klein* is better understood through the lens of title. The Court's answer to the property question licensed a broad presidential use of the pardon power.

Once brought to the surface, the title question also sharpens what *Klein* has to say about the separation of powers. The case has traditionally been understood as the final word on a struggle between Congress and the judiciary over Congress's effort to dictate the legal effect of a presidential pardon in pending litigation, with the pardon power appearing principally as the background to that dispute.[10] But its analysis of the relationship between the legislative and executive branches is no less significant. The case reveals a deep tension between the power of the purse and the power of the pardon. Once title transfers to the government and property becomes a public asset, only Congress can control its disposition through appropriation.[11] But if title has not yet passed to the government, the president can use the pardon to restore property despite congressional disapproval. Read against the backdrop of title theory, *Klein* demarcates a precise boundary between executive and legislative control over property.[12]

Gap, 1860-2020 (Nat'l Bureau of Econ. Rsch., Working Paper No. 30101, 2022), http://www.nber.org/papers/w30101.

[5] *See, e.g.,* FONER, *supra* note 1, at 159, 183-84, 190-91.

[6] *See id.*

[7] FONER, *supra* note 1, at 333-36 (1988); WILLIAM MCFEELY, YANKEE STEPFATHER: O.O. HOWARD AND THE FREEDMEN (1968); ERIC MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION (1960).

[8] 80 U.S. 128 (1871).

[9] For a modern reinterpretation emphasizing *Klein's* lost racial context, *see generally* Helen Hershkoff & Fred Smith, Jr, *Reconstructing Klein*, 90 U. CHI. L. REV. 2101 (2023).

[10] *See infra* notes 286 and 288.

[11] *See* Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1351 n32 (1988); *infra* note 86 and accompanying text.

[12] *Contra* Bernadette A. Meyler, Forgetting Oblivion: The Demise of the Legislative Pardon (2011) (unpublished manuscript) at 9-13, available at https://law.stanford.edu/publications/forgetting-oblivion-the-demise-of-the-legislative-pardon/ (last visited July 7, 2026).

The title question became a live one in the course of administering the Captured and Abandoned Property Act (CAPA), the principal statutory vehicle for wartime property seizure.[13] There, competing theories of title determined not only ownership, but also which institution had authority to resolve claims for restitution. Treasury Secretary Hugh McCulloch argued that the statute carved out only a limited class of claims from the secretary's broad general authority to restore property wrongfully held by the government,[14] while Congress insisted that wartime seizure had transferred title to the United States, making departmental restitution unconstitutional – a usurpation of the appropriations power.[15]

A battle raged throughout the three branches over these questions of title. As every first-year Property student learns, ownership frequently is not an all-or-nothing proposition.[16] Property law routinely divides legal interests among multiple parties, each holding different rights in the same asset. Once we look closely at the historical record, it is striking how thoroughly debates over wartime property administration were suffused with competing theories of ownership and title transfer. Because the CAPA granted the government custody of the property seized in the theater of battle and the former owner a conditional right to claim its proceeds following sale, the statute clearly divided legal interests between two parties.[17] During Reconstruction, administrators, judges, and legislators reached within the property toolkit – the forms of trusts, bailments, future interests, and usufructs[18] – to map CAPA

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[13] The statute was passed in 1863 and amended significantly in 1864. This piece refers to the original enactment as CAPA (1863), 12 Stat. 820 (1863), and to the 1864 amendments as CAPA (1864), 13 Stat. 375 (1864).

[14] *See infra* Part II.B.2.

[15] *See infra* Part III.

[16] To take an emblematic example, the denominator problem in the law of regulatory takings requires a lawyer to grapple with the problem of defining which interests have been stripped and which remain. *See generally* Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676–78 (1988); John E. Fee, Note, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. CHI. L. REV. 1535, 1536–41 (1994); Frank I. Michelman**,** *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); John D. Echeverria**,** *Making Sense of Penn Central*, 23 UCLA J. ENVTL. L. & POL'Y 171 (2005). Calculating the numerator (the property taken) and the denominator (the entirety of the property interest at stake) can often be a subject of intense disputation. This was at issue in the recent cases of *Horne v. Department of Agriculture* (particularly Justice Sotomayor's dissent) and in *Murr v. Wisconsin*, although it is also present in foundational cases like *Lucas v. South Carolina Coastal Council* and in *Penn Central v. New York City*. Horne v. Dep't of Agric.*,* 576 U.S. 350 (2015) (Sotomayor, J., dissenting); Murr v. Wisconsin, 582 U.S. 383 (2017); Lucas v. S.C. Coastal Council*,* 505 U.S. 1003 (1992); Penn Cent. Transp. Co. v. New York *City*, 438 U.S. 104 (1978).

[17] CAPA (1863) §3.

[18] *See* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L. J. 1, 12-13 (2000) (explaining the foundational premise of a finite number of legal forms within the law of property). On nineteenth century property forms *see generally* THOMAS LEWIN, A PRACTICAL TREATISE ON THE LAW OF TRUSTS AND TRUSTEES (1858); WADE KEYES, AN ESSAY ON THE LEARNING OF FUTURE INTERESTS IN REAL PROPERTY (1853); THOMAS J. SEMMES, THE CIVIL LAW AS TRANSPLANTED IN LOUISIANA (1882); WILLIAM F. ELLIOT, A TREATISE ON THE LAW OF BAILMENTS AND CARRIERS (1897); JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS (James Schouler ed., 9th ed. 1878).

categories onto preexisting property concepts.[19] Government officials characterized property in ways that either minimized or magnified the interest remaining in the former owner. These maneuvers had important consequences, because the theory of title also determined whether the pardon would operate.

Yet this sustained debate has largely been obscured. The principal reason, I argue, is the shadow cast by *Klein*. Decided three years after Andrew Johnson left office, it adopted—and even extended—the executive's theory of title, which made the pardon's reach purely a matter of executive discretion.[20] Once *Klein* had settled into the U.S. Reports as the definitive statement of the pardon power,[21] the underlying legal conflict over title gradually disappeared from view. Had Congress's competing theory prevailed, the scope of the pardon power over seized property would have remained within legislative rather than executive control.

At a fundamental level, this Article is about how lawyers *actually* make transformative legal arguments. Rather than arguing directly about how to make a statute achieve the outcome they want, they argue one step lower: within the legal doctrine. During Reconstruction, the doctrinal ground was title. The crucial disputes occurred there, not at the level of political decisionmaking about the real-world consequences of the pardon on land redistribution. The central disagreements were over theories of title, because the selection of one theory over another changed all the downstream outcomes. Instead of seeing property law as a stumbling block in the way of redistribution, Reconstruction-era lawyer looked for moves within the property law toolkit that would condition particular outcomes. Modern lawyers do much the same thing. In the recent Supreme Court case of *Sackett v. EPA*,[22] the stakes of the dispute were wetlands protection.[23] But the lawyers fought on much more technical

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[19] Freedpeople understood what was at stake and said so repeatedly. But their claims took the form of protests about betrayed promises, not formal assertions of cognizable property interests — and in this fight, that distinction was everything. The arguments sounded in a register of technical property doctrine to which freedpeople, one year out from slavery, had no access and no entry point. For instance, United States Colored Troops (USCT) veteran Lee Jackson complained to the Freedmen's Bureau about being ousted from land after it was returned to its former owner, asking whether "he has the right to do so; for we have nowhere to go and are made houseless....It is sincerely hoped by the colored people that some steps be taken by the Government in regards to homesteads." Lee Jackson to unknown recipient, [1867 approx. date], Unregistered Letters Received, series 16, Bureau Headquarters, Freedmen's Bureau Papers, RG 105, National Archives. *See generally* WILLIE LEE ROSE, REHEARSAL FOR RECONSTRUCTION: THE PORT ROYAL EXPERIMENT (1964); FONER, *supra* note 7; FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, 1861–1867, Series 3, Volume 1-2: Land and Labor, 1865 (Steven Hahn et al. eds., 2008). For an in-depth treatment of a notable case in which a freedperson did have a cognizable property interest – and won his claim, *see generally* Cynthia Nicoletti, *Robert Smalls's Tax Title and the Endurance of Land Redistribution in Port Royal, South Carolina*, *in* THE WAR THAT MADE AMERICA 141 (Caroline E. Janney, Peter S. Carmichael & Aaron Sheehan-Dean eds., 2024).

[20] *See infra* Part IV.

[21] *See* RICHARD M. THOMPSON II, CONG. RSCH. SERV., R44571, THE PRESIDENT'S PARDON POWER AND LEGAL EFFECTS ON COLLATERAL CONSEQUENCES 15 (2016).

[22] 598 U.S. 651 (2023).

[23] Adam Liptak, *High Court Decision Limits E.P.A.'s Power over Wetlands*, N.Y. TIMES, May 26, 2023, at A19; Paige Gilliard, *Frequently Asked Questions About* Sackett v. EPA, PAC. LEGAL FOUND. (Aug. 3, 2022), https://pacificlegal.org/sackett-frequently-asked-questions/ (last visited July 7, 2026).

terrain, arguing over what counts as "the waters of the United States."[24] They did not argue that the category was too narrow or too broad, but instead contested what was within the category.[25] Lawyers do not generally fight against existing doctrine. They fight within the doctrine: they use it to their advantage.

This dynamic is especially pronounced for government lawyers, who are the subject of this Article.[26] To a man, the government lawyers chronicale here had their bureaucratic roles firmly in mind when using doctrine to reach particular ends. Some invoked the limited authority of their own offices as a reason to construe the government's property interest conservatively, limiting what the United States could claim and, correspondingly, enlarging what it had to give back. Others treated the broader purposes of the offices they occupied as justification for reading the government's property interest much more expansively. The same doctrinal toolkit could be used either to constrain or to expand governmental authority, depending on how a lawyer understood the office he occupied. These lawyers' choices had material consequences, because they determined whether land stayed with freedpeople or reverted to former Confederates. Once the Supreme Court weighed in, the interpretive arguments made within the administrative state became part of constitutional doctrine.[27]

A rich historical literature about the limited economic gains Reconstruction afforded to freedpeople informs this Article.[28] Historians have explored the dire effects that Andrew Johnson's widespread pardoning policy had on land redistribution and on Reconstruction more generally, although most have focused their attention on its political operation and consequences rather than on the legal mechanisms for restoring property.[29] A few scholars have gone further into the pardon's legal effect or the property interests at stake, but none have devoted sustained attention to the underlying legal mechanism that determined its scope.[30] There is also a smaller literature on the confiscation of Confederate property.[31]

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[24] *Sackett*, 598 U.S. at 653.

[25] *See id.* at 663–669 (describing "decades of agency action and litigation" to determine what fell within the "waters of the United States" category).

[26] On government lawyering, *see generally* W. Bradley Wendell, *Government Lawyers, Democracy, and the Rule of Law*, 77 FORDHAM L. REV. 1333 (2008-09); GOVERNMENT LAWYERS: THE FEDERAL LEGAL BUREAUCRACY AND PRESIDENTIAL POLITICS (Cornell W. Clayton ed., 1995).

[27] *See infra* Part IV.

[28] *See, e.g.*, LaWanda Cox, *The Promise of Land for the Freedmen*, *in* FREEDOM, RACISM, AND RECONSTRUCTION 53 (Donald Nieman ed., 1997); WILLIE LEE ROSE, REHEARSAL FOR RECONSTRUCTION: THE PORT ROYAL EXPERIMENT 330–38 (1964); PAUL CIMBALA, UNDER THE GUARDIANSHIP OF THE NATION: THE FREEDMEN'S BUREAU AND THE RECONSTRUCTION OF GEORGIA, 1865-1870 (1997); EDWARD MAGDOL, A RIGHT TO THE LAND: ESSAYS ON THE FREEDMEN'S COMMUNITY (1977); JULIE SAVILLE, THE WORK OF RECONSTRUCTION (1994); CLAUDE F. OUBRE, FORTY ACRES AND A MULE: THE FREEDMEN'S BUREAU AND BLACK LAND OWNERSHIP 22–23 (1978). *See also* ROBERT RANSOM & RICHARD SUTCH, ONE KIND OF FREEDOM (1977), on the transformation to a post-emancipation southern economy.

[29] *See supra* note 7 (discussing the import of the pardon).

[30] *See* Hershkoff & Smith, *supra* note 9; *see also* Meyler, *supra* note 12; KATHERINE FRANKE, REPAIR: RECLAIMING THE PROMISE OF ABOLITION (2021).

[31] *See generally* JOHN SYRETT, THE CIVIL WAR CONFISCATION ACTS: FAILING TO RECONSTRUCT THE SOUTH (2005); JAMES RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN (1926); DANIEL HAMILTON, THE LIMITS OF SOVEREIGNTY: PROPERTY CONFISCATION IN THE UNION AND CONFEDERACY (2007);

Existing scholarship tends to treat the pardon's legal effect and Confederate confiscation as separate questions.[32] Looking closely at the historical evidence reveals that they were linked together: the durability of land redistribution depended on the effectiveness of confiscation efforts.[33]

This Article also builds on scholarship about the operation of the administrative state and the "internal law" that has governed its workings.[34] Administrative law scholars and legal historians have shown that the operation of the administrative state was shaped by day-to-day bureaucratic practice rather than merely through ex ante legislative design.[35] Their work has moved beyond formal institutional arrangements to encompass the interactions among competing governmental bodies, claims makers, petitioners, local officials, and affected populations, thereby explaining how the administrative state functioned.[36] This Article contributes by reconstructing the operation of claims administration in the Treasury Department from the bureaucratic record itself. Such efforts uncover historical dimensions of bureaucratic practice that are difficult to perceive from statutes, judicial opinions, and published administrative materials alone.

SILVANA SIDDALI, FROM PROPERTY TO PERSON: SLAVERY AND THE CONFISCATION ACTS, 1861-1862 (2005).

[32] *Compare, e.g.,* CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, 1864–88, at 776-848 (1971) (on property seizure) *with* FONER, *supra* note 1, at 104-06, 153-70, 374-77 (focusing on freedpeople's desire for land).

[33] *See infra* Part IA2.

[34] The "internal law" of the agency denotes the "agency or executive rules, orders, guidelines, and precedents" as opposed to the "external law" of legislation or common law. *See* JERRY MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 252 (2012).

[35] *See id.*; Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 581–86 (1984); Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1243 (2017) (asserting that "today's scholars" are "focusing on the internal life of agencies"); Gillian E. Metzger, *Administrative Law, Public Administration, and the Administrative Conference of the United States*, 83 GEO. WASH. L. REV. 1517, 1519 (2015) (describing "planning, assessment, oversight mechanisms and managerial methods, budgeting, personnel practices, reliance on private contractors" as "key internal agency dynamics"). *Cf. Heather Gerken, Federalism All the Way Down,*124 HARV. L. REV. 4 (2010); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009) (discussing discursive practice in the federalism rather than the administrative law arena).

[36] There is a large body of literature here. *See generally, e.g.,* NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940 (2013); Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s,* 130 YALE L.J. 1288 (2021); GAUTHAM RAO, NATIONAL DUTIES: CUSTOM HOUSES AND THE MAKING OF THE AMERICAN STATE (2016); WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996); Karen M. Tani, *After 504: Training the Citizen-Enforcers of Disability Rights*, 42 DISABILITY STUD. Q. no. 3–4 (2023); Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538 (2018); DANIEL CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY (2001); CARPENTER, DEMOCRACY BY PETITION: POPULAR POLITICS IN TRANSFORMATION, 1790–1870 (2021); SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT (2014).

This Article reconstructs the administrative history of Civil War property restitution claims, drawing on a range of published and unpublished materials, including Treasury Department records, officials' private correspondence, executive branch memoranda and departmental opinions, congressional debates, reports, and investigatory records, and judicial opinions. To show how competing theories of title were developed and contested, it follows the same legal dispute as it moved through the executive branch, Congress, and the courts. Part I lays out the statutory architecture of the very complicated wartime property seizure regime, laying necessary groundwork for understanding the gamesmanship at work about title within that regime. Part II examines how Treasury Department officials and other executive branch actors understood the Department's authority to resolve restitution claims. Part III traces Congress's challenge to the executive branch's assertion of authority over property restoration. Part IV turns to the Supreme Court's resolution of these disputes, focusing on *United States v. Klein* and the legislative responses that followed.

I. Wartime Property Regimes and Government Ownership

The statutory framework of property seizure during the Civil War was a highly technical regime, in which seemingly small, non-intuitive distinctions between legal categories carried significant legal consequences. The individuals who worked within this statutory framework (whom we shall meet beginning in Part II) discovered that parts of it were internally incoherent in practice. Nonetheless, the regime possessed an underlying architecture, one that the discussion below reconstructs so that later Parts can draw on it. Section A lays out the statutory property categories. Section B explains the legal consequences of those classifications by examining the theory of title transfer implicit in each category and its interaction with the presidential pardon. Section C then explains the institutional consequences of those classifications by examining how property seizure disputes were adjudicated after the fact.

A. Wartime Seizure Regimes

During the Civil War, the Union government conducted a large-scale program of property seizure in the Confederate states.[37] Although the conflict involved extensive destruction and appropriation of private property, wartime seizures generally fell outside the ordinary framework of compensable takings under the Fifth Amendment.[38] This was because of the peculiar legal status the Confederacy occupied vis-à-vis the United States. As a matter of domestic law, secession was void and Confederates remained citizens subject to the law of treason.[39] Under the law of nations, however, the Confederacy was treated as a belligerent

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[37] *See* JOHN SYRETT, THE CIVIL WAR CONFISCATION ACTS: FAILING TO RECONSTRUCT THE SOUTH (2005); JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN (1926).

[38] *See* Prize Cases, 67 U.S. 635, 674 (1862); Brown v. United States., 12 U.S. (8 Cranch) 110, 129 (1814) (holding that the question of wartime seizure "is proper for the consideration of the legislature, not of the executive or judiciary").

[39] *See* CYNTHIA NICOLETTI, SECESSION ON TRIAL: THE TREASON PROSECUTION OF JEFFERSON DAVIS 206-24 (2017).

power, making the law of war applicable to Confederate territory and its inhabitants.[40] As one commentator put it, none of the guarantees of the Bill of Rights applied to Confederates "after they have become belligerents against their own government."[41] Because the Confederacy was treated as a belligerent power, the Union claimed the authority to seize enemy property in the Confederate states under the law of war.[42] "All persons residing within [Confederate] territory whose property may be used to increase the revenues of the hostile power are in this contest liable to be treated as enemies though not foreigners," the Supreme Court said in the *Prize Cases*.[43] This made non-compensable property seizure available to the United States as a tool of war.

But there was a wrinkle. When the United States exercised its powers to seize property under international law, legislation was necessary to authorize those seizures. The Supreme Court had held in *Brown v. United States* that compliance with the law of nations did not itself furnish the necessary domestic legal authority.[44] The law of nations set an outer limit on what was permissible, but the Constitution dictated that policy decisions about the extent of the enemy property confiscation were the proper province of the legislative branch.[45] Property seizure was only a legitimate exercise of sovereign power in the United States if Congress made it operative through statute.[46]

Congress could exercise powers stemming from either international or domestic law to regulate the denizens of Confederate territory.[47] By grounding its actions in international law, it could authorize seizure and forfeiture of property without the ordinary Fifth Amendment constraints of compulsory compensation for government takings.[48] Government compensation was treated as a matter of legislative grace rather than obligation,[49] such that

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[40] *See id.*

[41] WILLIAM WHITING, WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES 53 (10th ed. 1871).

[42] *See Brown*, 12 U.S. at 129 ("[T]he power of confiscating enemy property is in the legislature"); U.S. CONST., art. I, § 8. ("Congress shall have power to … make Rules concerning Captures on Land and Water.")

[43] Prize Cases, 67 U.S. 635, 674 (1862).

[44] *Brown*, 12 U.S. at 129.

[45] *Id.* at 128-129.

[46] *Id.*at 115–16. This point (the necessity of domestic legislation to operationalize the international law permitting captures in domestic law) was rather obscured in the *Prize Cases* because of the fact that there was an extant statutory foundation for prize (captures at sea) long before the Civil War – although there were new prize statutes enacted during the war. Captures on land (booty) were much rarer and disfavored although still permissible, so legislation such as the CAPA was necessary to legitimize it. The idea was implicit in what the Court said. The point was made much more clearly in Judge Peleg Sprague's lower court opinion in the *Amy Warwick*. *See* Amy Warwick, 1 F. Cas. 799, 802 (No. 341 D. Mass. 1862). On the disfavored status of booty in the nineteenth century, *see* HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 429 (William Beach Lawrence ed., 5th ed. 1855). For the early prize *see* Act of June 26, 1812 (2 Stat. 759), although there were some earlier naval statutes that would have allowed maritime captures as well. For the Civil War statute, *see* an Act to Regulate Proceedings in Prize, 12 Stat. 759, § 2 (March 3, 1863).

[47] *See* NICOLETTI, SECESSION ON TRIAL, *supra* note 39.

[48] H.R. Rep. No. 43-262, War-Claims and Claims of Aliens 10-11 (1874). *See also* William Lawrence, *War Claims against the United States*, 22 AM. L. REG. 273 (1874); William Lawrence, *War Claims against the United States*, 22 AM. L. REG. 401 (1874). Lawrence was the chair of the Committee on Civil War Claims.

[49] *See In re* Mrs. Alexander's Cotton, 69 U.S. 404, 421 (1864) ("[B]y this liberal and beneficent legislation, a

in practice questions about the permissibility of wartime property seizure turned on statutory authorization rather than on takings doctrine.

1. Confiscation, Capture, and Abandonment

A multi-pronged statutory regime undergirded wartime property seizure. Today, the best-known instruments effectuating property confiscation are the First and Second Confiscation Acts, enacted in 1861 and 1862, which authorized the forfeiture of Confederate property either because the property was used for hostile military purposes or because its owner participated in the rebellion.[50] In this context, "confiscation" was a term of art, indicating formal forfeiture measures that complied with due process, rather than informal seizures conducted by the army. Confiscation followed a successful federal court proceeding, either in rem[51] or in personam, that established the guilt of the person or property.[52] But because the Confiscation Acts depended on federal court proceedings, they were largely inoperative during the Civil War, as U.S. federal courts were not open in Confederate-held territory.[53]

The Confiscation Acts were supplemented by two Captured and Abandoned Property Acts (CAPA), passed in 1863 and 1864, designed to fill the gap by authorizing seizures in the field.[54] They inverted the mechanism of the Confiscation Act by allowing seizure without prior adjudication,[55] bypassing the strictures associated with federal court proceedings entirely. Drafted jointly by Treasury Secretary Salmon P. Chase and Secretary of War Edwin Stanton, the statutes legalized existing on-the-ground military practice, formalizing an ongoing power-sharing arrangement between the War and Treasury Departments.[56] Property designated as either "captured" or "abandoned" (of which more below) was to be turned over to the Treasury Department unless it was of immediate utility to the army. Treasury "special agents," were to "appropriate" the property in question, or more generally, to forward it to New York for sale, whereupon the proceeds were to be deposited into the

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distinction is made between those whom the rule of international law classes as enemies.").

[50] 12 Stat. 319 (1861); 12 Stat. 589 (1862).

[51] The in rem portions of the act were much easier to enforce for various reasons, including the fact that there was no jury trial needed for prosecutions thereunder. *See* Miller v. United States, 78 U.S. 268, 289 (1870).

[52] *See* Confiscation Act of 1861, ch. 60, 12 Stat. 319 (1861); Confiscation Act of 1862, ch. 195, 12 Stat. 589 (1862). *See also* JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 293-341 (1926); James G. Randall, *Captured and Abandoned Property during the Civil War*, 19 AM. HIST. REV. 65 (1913); SYRETT, *supra* note 31 (analyzing the interactions of the statutes). There was one exception here: court proceedings were not required to effectuate the forfeiture of enslaved (human) property. *See* Confiscation Act of 1862, *supra* note 50, §9.

[53] They operated on southerners' northern property, particularly intangible personalty like shares of stock. *See, e.g.*, *Miller*, 78 U.S. at 292; HENRY D. SHAPIRO, CONFISCATION OF CONFEDERATE PROPERTY IN THE NORTH 42-53 (1962)

[54] 12 Stat. 820 (1863); 13 Stat. 375 (1864).

[55] *See supra* note 53 and accompanying text.

[56] For confirmation of Chase's central role in drafting the statute, see Cong. Globe, 37th Cong., 3d Sess. 1338 (1863) (1863 statute); Letter from Salmon P. Chase, Sec'y of the Treasury, to Hon. E. B. Washburne, Chairman, H. Comm. on Commerce, H.R. Misc. Doc. No. 18, 38th Cong., 1st Sess. (1864) (1864 statute). *See also* Salmon P. Chase to Edwin Stanton, May 28, 1863, in REPORT OF THE JOINT COMMITTEE ON THE CONDUCT OF THE WAR: RED RIVER EXPEDITION at 356-57 (Government Printing Office 1865).

Treasury.[57] Crucially, there was no requirement – and no mechanism – for legal process before the property's seizure and disposition.

What exactly constituted "captured" or "abandoned" property was left murky, although later sections of the statute plainly indicated that it would cover cotton and other consumable goods.[58] In 1864, Chase maintained that the statute applied only to personal property, prompting Congress to amend it expressly to include land as well.[59] However, Treasury agents were only authorized to "take charge of and lease" real property.[60] They could not dispose of it.[61] Land and personalty were subject to much different treatment under the statute, as the statute granted the government far more control over personalty.[62]

It took some time for Union officials to settle into working definitions of the statutory categories. "Captured" property was essentially a self-proving category: it consisted of personal property on land taken by a military officer, and it incorporated the army's existing rules governing military seizure by reference.[63] "Abandoned" property was more complicated. The statute discarded the common law definition of the term for its common sense understanding as applied by officers in the field, indicating property left behind by Confederates fleeing Union occupation.[64] The 1864 amendments to the act provided a two-part legal definition. Property would be regarded as abandoned when (1) "the lawful owner thereof shall be voluntarily absent therefrom," and (2) that owner was "engaged… in aiding or encouraging the rebellion."[65] In other words, property could be seized when its owner was absent and presumed to be a traitor.[66]

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[57] CAPA (1863), § 2.

[58] CAPA (1863), § 6; *see also* Salmon P. Chase to Edwin Stanton, May 28, 1863, in REPORT OF THE JOINT COMMITTEE ON THE CONDUCT OF THE WAR: RED RIVER EXPEDITION at 356-57 (Government Printing Office 1865); Salmon P. Chase to William P. Mellen, July 3, 1863, in COMMERCIAL INTERCOURSE WITH AND IN STATES DECLARED IN INSURRECTION, AND THE COLLECTION OF ABANDONED AND CAPTURED PROPERTY 3-4 (Washington, D.C., Gov't Printing Office 1863).

[59] H.R. Exec. Doc. No. 1, 38th Cong., 1st Sess. 24 (1863) (annual report of the Secretary of the Treasury).

[60] *Id.*

[61] CAPA (1864), § 2.

[62] CAPA (1863), §2, CAPA (1864), §2,

[63] *See* Letter from James Speed to Hugh McCulloch (July 5, 1865), in S. Exec. Doc. No. 22, at 17 (1868). *See infra* text accompanying note 147. *See also* Salmon P. Chase to Edwin Stanton, May 28, 1863, *in* REPORT OF THE JOINT COMMITTEE ON THE CONDUCT OF THE WAR: RED RIVER EXPEDITION 356-57 (Government Printing Office 1865). The statute incorporated the Lieber Code and the law of war.

[64] Under the common law, property abandonment required that an owner intend to relinquish all interest in the property, which was clearly not the case here. *See generally* Lior Strahilevitz, *The Right to Abandon*, 158 U. PA. L. REV. 355 (2010).

[65] Captured and Abandoned Property Act of 1864 § 2, 13 Stat. 375 (1864). The term went undefined in the initial version of the statute, but this was remedied the following year.

[66] This was a powerful presumption, which the government generally deployed to substitute for actual proof of disloyalty as required under the Confiscation Acts. With few exceptions, military commanders treated disloyalty as something that could be inferred from the mere fact of a property owner's absence in the face of Union occupation. *See, e.g.,* EDWARD BATES, DIARY OF EDWARD BATES, 1859-1866 at 410-11 (Howard K. Beale, ed., Gov't Printing Off. 1933) (discussing the problems with employing the presumption).

To complicate things further, there were several other legal foundations for property seizure beyond capture, abandonment, and confiscation, and each of the categories was quite porous. Two of these additional grounds were specifically mentioned in the CAPA and carved out from its coverage: (1) the law of prize, which permitted the capture of enemy ships and their goods on the high seas, and (2) the seizure of military supplies (contraband of war).[67] Two other forfeiture mechanisms stemmed from other wartime statutes: (3) property traded across enemy lines and (4) land sold for non-payment of direct taxes.[68] Finally, the Union also claimed ownership of (5) the public property belonging to the Confederate government based on theories of conquest and successor state accession.[69] For our purposes, the precise contours of each of these additional categories are less important than the fact that there were other legitimate grounds for property seizure that had a legal foundation outside the CAPA.

The definitions and the distinctions between the various grounds for seizure were unstable enough that a given seizure could often fit within multiple legal categories. In many cases, clever lawyers could make compelling arguments for various classifications. As a result, the property seizure regime left ample room for the Congress, the executive branch, and the courts to clash over its application in particular cases.

2. Seizure Statutes and Grant Statutes

On their own, these gossamer distinctions might be a matter of little note, of interest only to completists and sticklers. But they became a topic of great importance because wartime seizure statutes were intimately connected to the government's program of Reconstruction-era land grants to freedpeople, which Congress built directly atop the wartime seizure regime. Under the Freedmen's Bureau Acts, the government could only convey the interest it had acquired through the wartime seizure regime, rather than from the public domain as a whole.[70] The government's authority to seize property and its authority to convey it anew were treated as distinct legal issues. The official name of the Freedmen's Bureau – the Bureau of Refugees, Freedmen, and Abandoned Lands – underscored that its land grants were to be drawn from land acquired through wartime seizure. This meant that the government's ability to convey good title depended on the effectiveness of the effort to terminate preexisting interests. That problem was not unique to Reconstruction, but it was especially acute here, since the entire promise to freedpeople rode on it. Like other federal land grants, Freedmen's Bureau grants generally carried no warranty of good title; their effectiveness depended on the government's success in extinguishing prior interests. In many instances, the government made grants before competing claims – including Native title – had been fully extinguished.[71]

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[67] *See* CAPA (1863), §§1, 7.

[68] *See* Act of July 13, 1861, ch. 3, 12 Stat. 256; Act of June 7, 1862, ch. 93, 12 Stat. 422. This was forbidden under the non-Intercourse Act and the Direct Tax Act. *See also* Randall, *Captured and Abandoned Property*, *supra* note 52.

[69] *See* United States v. Huckabee, 83 U.S. (16 Wall.) 414, 425 (1872).

[70] 13 Stat. 507, §4 (1865).

[71] *See, e.g.,* Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 28 (1947) (discussing the case law

The Bureau Acts granted freedpeople property in forty-acre plots, but the effectiveness of those grants depended on the interests the government had actually acquired.[72] Thus, the principal flaw in the structural design of land redistribution stemmed less from the limited nature of grants made to freedpeople than from the government's failure to extinguish prior property interests through wartime seizure.[73] There were solutions, including one hiding in plain sight. The Freedmen's Bureau Act contained something of a throwaway clause, stating that it repealed prior legislation 'inconsistent' with its terms.[74] This was a provision that might have called for a reading of the seizure statutes that took the Bureau Act's redistributive purposes into account, but it was largely a pathway not taken.[75]

B. Title Transfer

1. Title to Abandoned Land and Personalty

Under most theories permitting wartime seizure in the theater of war, title to property transferred immediately to the federal government.[76] So long as the statutory requirements were met, the bare act of seizure resulted in immediate government ownership. But the CAPA was different in this regard, precisely because the statute both imposed some limits on government control over the property in question and recognized some remaining rights in the former owner. The seizure did not terminate all of the owner's existing property

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which establishes that "establishes the invalidity of federal grants that ignore Indian title); Cynthia Nicoletti, *Reconstructing the Meaning of "Forty Acres and a Mule"*, 27 U. PA. J. CONST. L. 522, 572 ("Western grants of "public" land were often complicated by the fact that aboriginal title had not yet been extinguished, thus rendering a white settler's possessory title inferior to the Indians' right of occupancy.") (2025); MICHAEL BLAAKMAN, SPECULATION NATION: LAND MANIA IN THE REVOLUTIONARY AMERICAN REPUBLIC (2023).

[72] *See* Nicoletti, *Forty Acres*, *supra* note 71, at 566 ("If Indian title had not been extinguished by federal government action . . . then it would prevail against a claim by someone who had purchased from the U.S. government.").

[73] Reconstruction historians have overwhelmingly told this story from the grant's side — why the allotments failed — rather than the seizure's side, which determined whether the government had transferable title to grant in the first place. *See supra* note 28. The premise is assumed because the two topics — land redistribution and property confiscation — have largely been treated as separate categories rather than analyzed as one interaction. Legal scholarship on the pardon's reach has largely proceeded from the caselaw, where the title question looks settled, and so does not see the administrative conflict that *Klein* obscured. *See* Hershkoff & Smith, *supra* note 9, at 2142; Meyler, *supra* note 12, at 8–9. Historians working from the fuller record come closer without quite arriving. *See* CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, 1864–88, at 846–49 (1971) (narrating the disorder without analyzing the competing title theories behind it). Randall comes closest: he calls the pattern 'something of a puzzle' rather than a contest between title theories, RANDALL, *supra* note 37, at 334, then quotes *Klein's* holding and turns immediately to the Bureau's loss of the abandoned estates without connecting the two. *Id.* at 338–41. *See also* SYRETT, *supra* note 31, at 103–19, 145–46, 169–84, who treats Treasury's administrative restorations of CAPA property as distinct from confiscation and the pardon's operation on confiscated property, disposing of *Klein* in a single endnote stating its holding, *id.* at 247 n.49.

[74] Freedmen's Bureau Act of 1865, §5.

[75] *See infra* Part II C.

[76] The one exception here is the law of prize, which had its own separate (and longstanding) mechanism of adjudication in order to disgorge title.

rights. As a result, government officials struggled to answer a recurring question: which property interests transferred to the United States upon wartime seizure of CAPA property?

The statute answered the title question only indirectly, by indicating the powers that the government would have over CAPA property after seizure. Its treatment of land and personalty was markedly different, and the government's powers over abandoned land were far more circumscribed than they were with regard to personalty. Wartime seizure gave the government possession of abandoned land, but it was difficult to argue that it divested the owner of title. Under the statute, Treasury agents were entitled to "take charge of and lease" abandoned land for the "employment and general welfare of" freedpeople.[77] By contrast, Treasury agents were directed to *appropriate* or to *sell* captured and abandoned personal property under their control, with the proceeds of the sale to be deposited into the U.S. Treasury.[78] Appropriation or sale were acts that ordinarily would divest the owner's title, whereas the power to possess and lease suggested quite limited rights of use rather than acquisition.[79]

The fact that it was much easier to disgorge title to personalty under the CAPA reflected longstanding differences in Anglo-American law between real and personal property, as well as distinctions recognized by the law of war.[80] It was generally the case that title to goods would pass upon possession – ownership culminated with delivery, whereas title to real property passed only with a writing or other formalities.[81] The law of war reflected the same idea. Contemporary authorities generally treated title to personal property as passing upon capture, while title to enemy-occupied land remained in abeyance until subsequent legal or political settlement. Henry Halleck, Francis Lieber, and William Whiting all drew the same line: title to personalty passed the moment it reached the captor's hands, whereas the disposition of army-occupied land would be deferred until the war's end.[82]

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[77] CAPA (1864), § 2.

[78] *Id.* § 3.

[79] Both appropriation and sale transferred title. *See Appropriate*, BLACK'S LAW DICTIONARY 82 (1st ed. 1891) (defining "appropriate" as "[t]o make a thing one's own" and "to make a thing the subject of property"); *id.* at 1059 (defining "sale" as an act that for a price, "transfers the title and possession to an object of property"). As was the case with the direct tax act of 1862, it was the sale that disgorged the title from its current owner – and the mere fact of government possession did not result in an appropriation. *See* 12 Stat. 422 (1862).

[80] *See infra* Part IB1.

[81] WILLIAM BLACKSTONE, COMMENTARIES 447 (Samuel Warren ed., 1855).

[82] HENRY HALLECK'S INTERNATIONAL LAW 448-49 (1861). This is the pre-war edition, but Halleck's view remained the same in the 1866 version. HENRY HALLECK'S INTERNATIONAL LAW 205 (1866); Gen. Orders No. 100, Instructions for the Government of the Armies of the United States in the Field art. 31 (War Dep't Apr. 24, 1863) (Lieber Code). The rule in Lieber's code pertained specifically to public property, which was the only property that was automatically confiscable. Detailed procedures with regard to the appropriation of private property (such as captured and abandoned property would have been) were less clear under the code, as Lieber repeated the general adage of international law that private property on land was to be protected against seizure, with a rather giant carveout for military necessity, defined as useful "for the support or other benefit of the army of the United States." *Id.* at art. 38; WILLIAM WHITING, WAR POWERS UNDER THE

The status of "abandoned land," the principal source of Bureau grants, functioned as a holding pattern, a necessarily temporary designation, because the government's ownership interest was so liminal. Seizure conferred only possession, but land in one legal category could be moved into another and mere possession could be turned into ownership subsequently. Passed in early 1865, before the war's end, the Freedmen's Bureau Act reflected the understanding that abandoned land's status would be made more secure over time. In addition to tasking the Bureau Commissioner with the responsibility to make grants of abandoned land to freedpeople, it also empowered him to convey interests in land "to which the United States shall have acquired title" by "confiscation or sale, or otherwise."[83] Confiscation or sale would disgorge title from the former owner, transforming the government's prior possessory interest into ownership.

At war's end, military and Treasury officials expected that the abandoned land in their possession would be condemned by the courts in confiscation proceedings and thus become property that the government owned outright. As Treasury Department regulations had assured personnel in 1864, "by these sections [of the Captured and Abandoned Property Act] we propose to take *possession* [of these lands] by *seizure*, and hold possession until condemnation by the courts – this condemnation will be almost universally certain and take place quite at the pleasure of the Department."[84] So too with land the government had acquired through sale, a category that primarily referred to tax sales conducted under the auspices of the 1862 Direct Tax Act for nonpayment of a federal tax on land. If the tax sales continued apace after the war's conclusion, as the statute contemplated, title to more land would transfer to the United States.[85]

2. Pardon

The question of when title to property seized by the Union passed from an individual to the government was not merely a formality. It determined the reach of both the president's power of the pardon and Congress's power of the purse. A pardon could erase criminal penalties outright, but it could restore property only if title had not yet passed to the United States. Once it had, the property belonged to the government, and its return required a congressional appropriation; the pardon alone was insufficient. Although the courts had not clearly addressed the issue, Attorney General John Berrien had treated this limitation as a significant constraint on the pardon power.[86] In 1830, he wrote that although the power to

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CONSTITUTION OF THE UNITED STATES 56, 60 (10th ed. 1871).

[83] Freedmen's Bureau Act of 1865, 13 Stat. 507, § 4.

[84] Productive Armed Occupancy of the Subdued and Deserted Territory Lying on the Mississippi River 13 (Washington, D.C.: McGill & Witherow, 1864), in TREASURY INTERCOURSE AND CAPTURED & ABANDONED PROPERTY REGULATIONS & CIRCULARS, 1861–1865, vol. 2, RG 56, Nat'l Archives & Recs. Admin., College Park, Md.

[85] *See id.* at 14–15.

[86] The Supreme Court eventually settled the question of pardon's inoperability on property that had transferred to the government in *Knote v. United States*, 95 U.S. 149, 154-55 (1877). *Knote* presented a much easier question than *Klein* did, because the property at issue was confiscated, meaning the owner's title had clearly been fully terminated. For discussion of *Klein*, see *infra* Part IV.

remit penalties was within the president's ambit, a pardon could not, "after the money has reached the treasury, compel the restitution of it."[87] Once funds had entered the Treasury, restitution lay with Congress alone.[88]

President Lincoln's and Johnson's amnesty proclamations were written against this background understanding.[89] Both included the restoration of property, but both also reflected the limits of the pardon once title had passed from its former owner and vested either in the government or a third party, through confiscation or sale. Lincoln's proclamation promised pardon recipients the restoration of "all rights of property, except as to slaves, and in property cases where rights of third parties shall have intervened,"[90] and Johnson's restored "all rights of property, except as to slaves and except in cases where legal proceedings, under the laws of the United States providing for the confiscation of property of persons engaged in rebellion, have been instituted."[91] The usually banal formalities of title transfer became, for exactly this reason, a subject of high-stakes dispute between the three branches.

C. Claims Adjudication

Unlike the Confiscation Acts, which required federal court adjudication before property forfeiture,[92] the CAPA operated on a seizure-first basis. Military officers were to seize captured or abandoned (personal) property and turn it over to Treasury agents, who would either appropriate it or forward it to the Port of New York and have it sold there, after which the proceeds "were to be paid into the treasury of the United States."[93] Although seizure came first, the statute also provided for after-the-fact relief in the Court of Claims. Under Section 3 of the CAPA, claimants who could prove ownership of the property, their loyalty, and "a right to the proceeds thereof" were entitled to recover the residue of the proceeds by filing suit in the Court of Claims.[94] The statute thus contemplated that questions about the legality of seizures conducted under the CAPA would be resolved only after property had already passed into government hands.

Such post-hoc review provided a crucial corrective to the messy realities of on-the-ground

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[87] Pardons and Remissions of Forfeitures, 2 Op. Att'y Gen. 319 (1830) (John M. Berrien, Att'y Gen.). *See also* Effect of Pardons, 8 Op. Att'y Gen. 281 (1857) (Caleb Cushing, Att'y Gen.).

[88] On the pardon power broadly, *see generally* SAIKRISHNA BANGALORE PRAKASH, THE PRESIDENTIAL PARDON: THE SHORT CLAUSE WITH A LONG, TROUBLED HISTORY (2026); JEFFREY CROUCH, THE PRESIDENTIAL PARDON POWER (2009); William Duker, *The President's Power to Pardon*, 18 WM & MARY L. REV. 475 (1977)

[89] JONATHAN T. DORRIS, PARDON AND AMNESTY UNDER LINCOLN AND JOHNSON (1953).

[90] Abraham Lincoln, *Proclamation No. 11—Granting Pardon to Those in Rebellion, Upon Conditions, and Excepting Certain Persons*, 13 Stat. 737, 737 (1863).

[91] Andrew Johnson, *Proclamation No. 38—Granting Amnesty and Pardon to Persons Who Have Participated in the Existing Rebellion, with Certain Exceptions*, 13 Stat. 758, 758 (1865). *See also supra* Part I.A.1 (on confiscation).

[92] *See supra* notes 50–53 and accompanying text.

[93] CAPA (1863) § 2.

[94] *Id.* § 3.

practice, because Treasury officials only conducted a minimal amount of investigation before seizing property. Surviving records indicate that they did sometimes question both enslaved persons and neighbors to determine the loyalty of absentee owners, as disloyalty as well as absence was necessary for property's classification as "abandoned." In some instances, they decided on the spot that property should not be seized, but for the most part, they relied heavily on the presumption that property found in the Confederacy, particularly when its owner was absent, was subject to seizure.[95] Absence was treated as prima facie evidence of disloyalty, because, the reasoning went, an owner would only flee from the advance of the Union army if he was a Confederate.[96] The expectation was that property would be seized first and difficult questions would be subsequently sorted out through claims for restoration.[97]

The Court of Claims, which the CAPA had designated as the forum for loyal claimants' restitution suits, occupied an unusual position in the American administrative and judicial landscape. The court had been created by Congress in 1855 to act as a semi-replacement for private bills, through which Congress would appropriate funds to particular claimants who had petitioned the legislature for relief.[98] Because investigating those claims was a substantial undertaking, Congress instead empowered the Court of Claims to perform that function, granting it jurisdiction over claims founded on contracts or particular statutes.[99] The court thus occupied a position somewhere between an Article I and an Article III court. Although it functioned like a court, it was also essentially an "advisory board" for legislative appropriation decisions in its early years.[100] Initially, its awards were reviewable by both the Secretary of the Treasury and Congress, which had to make specific appropriations to satisfy them.[101] In 1866, Congress removed some aspects of outside control.[102] The secretary would no longer review the court's awards, but Congress did retain the power to withdraw an

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[95] *See, e.g.,* Journal of Abandoned Real Estate, Entry A1 489, Records of the Third Special Agency (New Orleans), Record Group 366, Records of Civil War Special Agencies of the Treasury Department, National Archives, Washington, D.C.

[96] *See id.*

[97] *See* Letter from John C. Gray to John C. Ropes (Oct. 17, 1864), *in* WAR LETTERS OF JOHN CHIPMAN GRAY TO JOHN CODMAN ROPES 396 (Worthington Ford, ed., 1927).

[98] On private bills, *see generally* James Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862 (2010); David Keenan, *Discretionary Justice: The Right to Petition and the Making of Federal Private Legislation*, 53 HARV. J. ON LEGIS. 21 (2016); Jane Manners, Congress and the Problem of Legislative Discretion, 1790–1870 (Ph.D. dissertation, Princeton University, 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3344925&__cf_chl_f_tk=bs3tPlECYAYdlscwx3ybP8EFGU1x1b.KkuHPajoEEl8-1783455859-1.0.1.1-5zql6ecCy59VsNOdC6L47gxmWLFqk.n4syuubr_dmec (last visited July 7, 2026).

[99] *See* Act of Feb. 24, 1855, §1, 10 Stat. 612 (establishing a Court of Claims). Crucially, it could not hear tort claims until the latter part of the nineteenth century.

[100] William M. Wiecek, *The Origin of the United States Court of Claims*, 11 ADMIN. L. REV. 387, 397 (1968); *see also* Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment,* 45 LA. L. REV. 625, 651–54 (1985) (describing the Court of Claims' early existence as an advisory court).

[101] *See id.*

[102] *See* Act of March 17, 1866, 14 Stat. 9 (1866).

appropriation from the general fund for any particular award it disapproved.[103]

There were several potential legal inquiries for after-the-fact adjudication under to tackle with regard to CAPA property. First was the one squarely covered by the CAPA: if the property seized in the field unquestionably met the statutory definition of captured or abandoned property, was an individual (loyal) claimant entitled to restitution as contemplated by the statute? Second, a case where classification itself was in dispute: had the property in the field actually been captured or abandoned within the meaning of the statute, or not? And third, if the property in question did not fall within the scope of the CAPA, was its seizure nonetheless legal under some other legal predicate, such as enemy trading or its character as contraband? Although grounded in statute, these other classes of property had no comparable mechanism for post-seizure relief such as the one specifically established by the CAPA in the Court of Claims.

This is where the substantive questions about wartime seizures ran into the question of forum. The CAPA clearly assigned the first category of case—a loyal claimant seeking restitution of the proceeds of captured or abandoned property—to the Court of Claims. But what happened to the other two? Federal courts, including the Court of Claims, could not hear cases brought by individuals against the United States without a statute that specifically granted jurisdiction.[104] That meant that if a claimant's property did not meet the statutory definition of captured and abandoned property, the Court of Claims would have no jurisdiction over his case. More problematic still, there was no other judicial forum available for wartime seizure claims against the federal government, although it was possible to bring a tort claim against a federal officer personally.[105] Thus, if claimant's property was seized based on a legal theory other than the CAPA, or without legal grounding of any kind, there was nowhere to bring suit against the federal government.[106]

But there was another available pathway to dispute the actions of executive officials in seizing property in the Confederate states during wartime: the Treasury Department.[107] Because the Department controlled captured and abandoned property, individuals asked the Secretary of the Treasury, or sometimes his deputies, to restore property wrongfully taken, regardless of the particular statutory predicate undergirding the seizure.[108] The practice was sanctioned by the actions of several secretaries, including Salmon P. Chase, who had drafted the CAPA. But was it legal? The CAPA allowed for claims revision in a court, but it did not explicitly state that Departmental review of the decisions undertaken by Treasury officers was thereby forbidden. For several years after the war's conclusion, the executive and legislative branches clashed over the proper forum for revision claims — and the reach of both the power of the

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[103] *Id.*; *see* Wiecek *supra* note 100, at 400, 402.

[104] *See* United States v. Clarke**,** 33 U.S. 436 (1834); Nichols v. United States, 74 U.S. 122, 126 (1868).

[105] *See infra* Part II B (on *Dennistoun*).

[106] *See supra* note 104.

[107] Claimants also went to the War Department, as the general rule was to approach whichever department had custody of the property. *See, e.g.*, Case of Johns, 11 Op. Att'y Gen. 356 (1865) (involving a captured plantation).

[108] *See infra* Part II.

purse and the power of the pardon depended on the same question: when title passed to the United States. It was a question that Treasury officials, Congress, and the courts all answered differently.

II. The Executive Branch

A. Claims Agents and Departmental Revision

A bevy of claims agents acting on behalf of southern property owners descended on Washington beginning in the summer of 1865, seeking government compensation for losses their clients had incurred during the Civil War. Charged with the task of securing pardons and seeking the restoration of property, agents crowded Johnson's White House and department offices, looking for a chance to bend the secretary's ear about their clients' claims.

Claims agents operated in America throughout the nineteenth century, representing clients in claims commissions and before government bodies.[109] In the wake of the Civil War, hugely destructive and fought on American soil, their business exploded.[110] In 1864, War Department Solicitor William Whiting even went so far as to say that the government faced more of a threat from the "army of claimants" than from the "army of Confederates."[111] Two years later, Rep. Columbus Delano (R-OH), reported to the House from the Committee on Claims that if the government were to "attempt to indemnify and compensate this numerous class of [potential] claimants," it would "require an amount of appropriations much greater than the revenues of this nation can possibly satisfy."[112]

In 1867, an article in the first issue of the *American Law Review* detailed the emerging practice of claims-making against the government, explaining that a new "system of jurisprudence is gradually growing up, at once peculiar and important, based upon the common law, but derived mainly from the regulations of the Departments, the opinions of attorneys general, the acts of Congress, and the decisions of the federal courts."[113] What the author described

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[109] *See Government Claims*, 1 AM. L. REV. 653, 653 (1867).

[110] So did concerns about their scrupulousness, as they were often suspected of defrauding both their clients and the government, such that governments increasingly sought to license and to regulate their activity. *See Important Treasury Notice*, N.Y. TIMES, Aug. 9, 1864, at 3; Gen. Orders No. 30, WAR DEP'T (Mar. 8, 1865), *reprinted in* ARMY & NAVY OFFICIAL GAZETTE, May 23, 1865, at 733; *An Honest Claim Agent*, DAILY OHIO STATESMAN (Columbus, Ohio), Nov. 22, 1865, at 3; *Arrest of Another Claim Agent Charged with Defrauding Soldiers*, N.Y. TIMES, July 11, 1869, at 6; *General Sherman's Claim Agent Decision*, N.Y. TIMES, Oct. 17, 1869, at 1; ARMY & NAVY J., Dec. 25, 1869, at 293.

[111] William Whiting to Elihu Washburne, January 15, 1864, *in* WHITING, WAR POWERS UNDER THE CONSTITUTION, *supra* note 82, at 467.

[112] CONG. GLOBE, 39th Cong., 1st Sess. 302 (Jan. 18, 1866); CONG. GLOBE, 39th Cong., 1st Sess. 509–10 (Jan. 30, 1866). *See also* WILLIAM LAWRENCE, THE LAW OF CLAIMS AGAINST GOVERNMENTS, INCLUDING THE MODE OF ADJUSTING THEM AND THE PROCEDURE ADOPTED IN THEIR INVESTIGATION, H.R. REP. No. 43-134 (1875).

[113] *Government Claims*, 1 AM. L. REV. 653, 653 (July 1867). *See also* Lawrence, The Law of Claims, *supra* note 48.

was a body of law and practice regarding "the business relations of our national government with its citizens," which he dubbed "government claims."[114] Modern lawyers would recognize this today as a diffuse system of petitioning the government for money it owed – unfulfilled legal entitlements, or compensation for legally cognizable wrongs caused by government activities.[115] But in the nineteenth century, it was an area of law just beginning to coalesce – a "field scarcely yet trodden"[116] – and it included a flood of war claims. These claims were navigated through a burgeoning bureaucracy by a body of claims agents, as historians Brandi Brimmer and Kristin Collins have shown.[117] Claims agents were non-lawyers as well as lawyers who helped clients to navigate government bureaucracy. Their payment usually was structured as a contingency fee, but sometimes they were paid on retainer by individuals or by state or local governments. They earned their keep by pressing claims before executive departments, the courts, and Congress as well, through private bills.[118]

Civil War claims practice was particularly prevalent in the Treasury Department, where captured and abandoned property was the subject of a great deal of revision. With few exceptions, claims agents preferred the informal petitioning for property restoration in the Treasury Department rather than filing suit in the Court of Claims. The process was cheaper and susceptible to emotional manipulation on the part of supplicants, who could play on the sympathies of a government official, often by claiming genteel poverty or feminine dependency and widowhood. Even more crucially, Treasury officials did not deny access peremptorily to unpardoned rebels. Whereas the CAPA required that litigants filing suit in the Court of Claims prove to the court's satisfaction that they had "never given any aid or comfort to the present rebellion" even to access the court, there was no such impediment in catching the ear of the Treasury secretary.[119]

The stakes of this informal petitioning were huge because they depended on the as-yet-unclear impact of the pardon on the permanent status of captured and abandoned property. This determination, in turn, had consequences for the title to public property available for government regrant under the Freedmen's Bureau Acts. In the early years of Reconstruction, when there was yet no established doctrine on how far the extent of the presidential pardon might reach – and whether it might undo the substantive grounds for seizure and possibly

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[114] *Id.*

[115] *Cf.* Christine Desan, *Remaking Constitutional Tradition at the Margin of the Empire: The Creation of Legislative Adjudication in Colonial New York*, 16 LAW & HIST. REV. 257 (1998); Christine Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381 (1998) (explaining earlier claims-making before legislative bodies).

[116] *Government Claims, supra* note 113 at 653.

[117] *Id.*; *see* BRANDI C. BRIMMER, CLAIMING UNION WIDOWHOOD: RACE, RESPECTABILITY, AND POVERTY IN THE POST-EMANCIPATION SOUTH 101-23 (2020); Kristin Collins, *Administering Marriage: Marriage-Based Entitlements, Bureaucracy, and the Legal Construction of the Family*, 62 VAND. L. REV. 1085, 1124–1126 (2009).

[118] For a nineteenth-century guide to the claims process, which likely functioned as an advertisement for some claims agents, see LAWS AND INFORMATION RELATING TO CLAIMS AGAINST THE GOVERNMENT (Washington, D.C.: McGill and Witherow, 1866).

[119] CAPA (1863) § 3.

grant access to the Court of Claims in spite of the wording of the statute – it made sense to try the Secretary of the Treasury first. This was particularly true because the department route did not preclude formal suit if the informal petition was unsuccessful.

Supplicants seeking restorations in the Treasury Department (and elsewhere in the slim federal bureaucracy) often sought out the secretary or his deputies personally, asking for a decision about whether a particular seizure had been lawful or authorized by statute. This was a world apart from today's formalized agency procedure.[120] Legal determinations – application of formal doctrinal rules to particularized facts – were being made in offices, corridors, and at dinner parties. When those decisions were favorable to an applicant, an official's signature would release the property or its proceeds back to its formal owner. [121] Such practice was quite standard in the nineteenth century, but the sheer volume of war claims made the practice legible to the wider American public and drew attention to the fact that white southerners, including former Confederates, were getting somewhat sympathetic treatment within Johnson's government.[122]

One group was conspicuously absent: freedpeople. They did not participate in the decisions being made in the hallways and the anterooms of the Treasury Department. Nor were they present at the dinner parties where personal connections were forged between elites, which might then bleed over into favorable consideration of a restoration claim. This is not to say that freedpeople did not hire claims agents or that they did not navigate the federal bureaucratic thicket. They did. As Brandi Brimmer's work has shown, both United States Colored Troops (USCT) veterans and their widows threaded their way through the federal bureaucracy to collect pensions, and they often hired claims agents to assist them along the way.[123] But freedpeople's right in the property susceptible to restoration was not structured as a legally cognizable interest.[124] It was a mere expectancy, the product of the poor

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[120] What emerges from the archives is a bureaucratic world of claims agents and informal petitioning in hallways strikingly unlike the one described in much of the literature or that modern lawyers would expect to see. Both Jerry Mashaw and Philip Hamburger construct the history of mid nineteenth-century bureaucracy primarily from the top down, drawing largely on statutes and reported cases rather than archival reconstruction of practice, so some messiness drains out of the picture. *Contra* MASHAW, *supra* note 34, 238-282, 390-408. *Contra* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 191-198 (2014). Brimmer and Collins, whose careful archival work is focused on the ground, both look at pension claims, where the process was bureaucratic enough to incentivize hiring guides but fairly orderly nonetheless. Claims-making for Civil War seizures was far more chaotic. Claims agents often served as sherpas through the maze. *See supra* note 117 and accompanying text.

[121] *See* Cynthia Nicoletti, *William Henry Trescot, Pardon Broker*, 11 J. CIV. WAR ERA 478, 481 (2021).

[122] *See President Andrew Johnson Pardoning Rebels at the White House*, HARPER'S WEEKLY, Oct. 14, 1865, at 1.

[123] *See* BRIMMER, *supra* note 117, at 77-122.

[124] Freedpeople did participate in the Civil War claims machine occasionally. CAPA claims (in court) were mainly about cotton, which will be discussed throughout this article, and in rare instances there were Black claims-makers in the Court of Claims. *See* United States v. Anderson, 76 U.S. (9 Wall.) 56, 60 (1869). Anderson was a free person of color, a designation that meant he was probably free before the war. *See* WARREN MILTEER, OUT OF THIS STRIFE WILL COME FREEDOM (2026). The other much more commonly used forum for freedpeople's property claims was the Southern Claims Commission, but this was not created until 1871 and existed only for a short time. Its jurisdiction was a subset of the CAPA's, but it was much easier – and

integration of the CAPA with the Freedmen's Bureau Act as well as the more general structure of public land grants, which promised nothing more than whatever title the U.S. government could legally convey.[125] As a result, freedpeople did not have a recognized "government claim" in the formal sense, and so they were shut out of the places where power operated in the informal sense.[126] Racism and the broader realities of postwar social hierarchy meant they would likely have been shut out of those same rooms even had they held a cognizable legal entitlement.

In the particular case of the CAPA, the commonplace activity of departmental petitioning was potentially suspect. Had the statute, by providing specifically for suit in the Court of Claims to recover the proceeds of personal property taken in the field as captured or abandoned, meant to cut off other remedies? And by directing Treasury officials to appropriate or to sell the property in question and to pay its proceeds into the Treasury, had it limited the department's role merely to collection rather than to mistake remediation? Perhaps informal claims-making in the Treasury Department was uniquely off limits for captured and abandoned property.

Wartime practice, initiated by Secretary Salmon P. Chase, one of the statute's drafters, said otherwise. Aggrieved parties brought their claims of wrongful seizure to Secretary Chase's Treasury during the war, when the Court of Claims remained inaccessible to southern petitioners. In 1864, Chase had asked Treasury Department Solicitor Edward Jordan to provide an opinion on the permissibility of bypassing the Court of Claims.[127]

Jordan obliged, declaring that the statutory mechanism of a civil suit in the Court of Claims was not an exclusive remedy. The Secretary of the Treasury, Jordan stated, "has the power to inquire into the facts attending the action of the military authorities, and to so construe the act as to decide whether the property so turned over was actually captured or abandoned property."[128] If the secretary decided that the property in question did not meet the statutory definition and was improperly seized, he was permitted "to release it to claimants."[129] This inquiry, he said, was "both the power and the duty" of the Treasury agent receiving such property from the military and, in the last instance, of the secretary. The duty arose out of the "nature of the duties to be performed," because the agent "is not to take *all* property indiscriminately, but such only as it specified by the law."[130] As Jordan put it, "Who is to

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cheaper – to bring claims there rather than in the Court of Claims because its commissioners traveled throughout the South. *See* Act of Mar. 3, 1871, ch. 116, § 2, 16 Stat. 521, 524; FRANK KLINGBERG, THE SOUTHERN CLAIMS COMMISSION (1956); DYLAN PENNINGROTH, THE CLAIMS OF KINSHIP: AFRICAN AMERICAN PROPERTY AND COMMUNITY IN THE NINETEENTH CENTURY (2003).

[125] *See supra* note 71.

[126] *See generally* McKinley, *supra* note 36; CARPENTER, *supra* note 36, on petitioning.

[127] *See* Edward Jordan to Salmon P. Chase, May 26, 1864, in COTTON CLAIMS: LETTER FROM THE SECRETARY OF THE TREASURY, H.R. Exec. Doc. No. 114, 39th Cong., 2d Sess. (1867), at 15.

[128] *Id.*

[129] *Id.*

[130] *Id.*

determine whether any given parcel of property is such as [an agent] is required to take or not? I cannot doubt that it is first himself and afterward his superior, the Secretary of the Treasury."[131] This was power *inherent* in the role of Treasury secretary, Jordan suggested.[132] Jordan's opinion came down soon after the passage of the 1864 act, and it guided Chase's actions, as well as those of his successors in the office, William P. Fessenden and Hugh McCulloch. All three secretaries believed they were legally authorized and duty bound to perform investigations when importuned by claimants and to return unlawfully seized property.[133]

B. Captured and Abandoned Personalty and Court of Claims Revision

The Treasury Department's practice of hearing restitution claims for captured and abandoned property continued for more than a year, until Secretary Hugh McCulloch asked for Attorney General Speed's view in early July 1865. The occasion was General William T. Sherman's seizure of large quantities of cotton in Savannah in early 1865 on his march to the sea. The seizures prompted an overwhelming number of supplicants to present "claims for the proceeds of the sales…to [the treasury] department."[134] They argued that they were entitled to compensation, either because they were loyal Unionists or because the seizures lacked a sufficient legal basis. In response, Speed set forth an elaborate overview of the captured and abandoned property regime and the Treasury's responsibilities within it.

1. Speed

Speed's opinion in the Savannah Cotton case turned on questions of title: whether the interest in the cotton had passed to the government or not. Speed argued that it had not, working backward from the contrast between confiscation and seizure in the theater of war. A confiscation proceeding – a court of law's determination of guilt – was the precipitating event that ensured that all title passed out of the former owner and to the government. The

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[131] *Id.*

[132] It is possible to read Jordan as suggesting that review of inferior officers' actions can be inferred from the structure of the Treasury Department itself -- if we were to apply Charles Black style reasoning to the way the department is set up. *See* CHARLES BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969). *See also* An Act to Establish the Treasury Department, 1 Stat. 65 (1789). Either way, this does not look like a modern conception of "delegation" stemming from some contained language in robust statutory text.

[133] This type of argument about inherent supervisory authority to review officers' actions and correct mistakes, with possible roots in the statutory language of the Act creating the Treasury Department and laying out its basic functioning, looks quite different from modern conceptions of agency review and internal executive supervision. For modern discussions of this topic, *see generally* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836 (2015); Peter L. Strauss, *The Internal Relations of Government: Cautionary Tales from Inside the Black Box*, 61 L. & CONTEMP. PROBS. 155 (1998); Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141 (2019); Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377 (2021). Both Jerry Mashaw and Philip Hamburger do discuss agency adjudication in the nineteenth century but my account differs from both of theirs. Mashaw emphasizes operational continuity with the modern day and Hamburger argues that vested property rights were not being adjudicated administratively. His account presupposes the antecedent question, whereas CAPA adjudication shows that the issue of whether an interest was a cognizable property right was precisely the issue at hand. *Contra* MASHAW *supra* note 34, at 251–82; HAMBURGER, *supra* note 120, at 191–98.

[134] James Speed, Savannah Cotton, 11 Op. Att'y Gen. 273, 273 (1865).

"proceeds of property sold under a judicial sentence of confiscation" therefore passed to the United States, Speed maintained.[135] Seizure of property in the theater of war, licensed by the CAPA, he said, could not have this same effect, because there had been no adjudication of guilt, even if court review was available after the fact.

Speed maintained that title had not passed out of the original owner – not completely – even though the terms of the statute obliged Treasury officers to appropriate or to sell captured and abandoned personalty and to deposit its proceeds into the Treasury. Under the normal operation of the law of personal property, appropriation and sale would be enough to transfer title.[136] So Speed needed a property theory that would account for these facts, and he found it in the law of trusts. The selection of the doctrinal form was not a neutral one, because it conditioned downstream effects. Under the trust theory, the proceeds of captured and abandoned property did not belong to the United States. Instead, they were "simply held by the United States, so to speak, *in trust* for those who may, in the manner provided [in the statute]…ultimately establish a legal right to receive them after the pacification."[137] The government was merely a trustee of the funds derived from sale, which it held pending a successful suit to recover them.

The trust form did some work for Speed, although only a limited amount. A trust provided a familiar legal framework in which interests in property could be divided and one party could hold property for the benefit of another. In that respect, the analogy captured an important feature of the CAPA regime. Once property had been seized and sold, the proceeds passed into Treasury custody, but they did not become ordinary government funds. This made the arrangement look trust-like, as Treasury officials were obligated to account for the proceeds in individual cases and to make them available for successful claimants in the Court of Claims. The analogy thus helped explain why the government could possess and control the fund without treating it as wholly its own. But beyond that, the comparison lost descriptive power. The proceeds were not segregated from general revenues and the government assumed none of the ordinary obligations associated with trusteeship.

Furthermore, it was uncertain that a claimant's interest after sale could properly be characterized as "property." One possibility was that seizure and sale extinguished the owner's property rights entirely. Under that theory, the right to sue in the Court of Claims was merely a statutory right created by Congress rather than a continuing property interest.

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[135] *Id.* at 278.

[136] *Id.* Authorities of the day tended to assume rather than stating outright that sale and delivery would divest title, devoting their analysis to departure from this baseline rule. *See* JOSHUA WILLIAMS, PRINCIPLES OF THE LAW OF PERSONAL PROPERTY 33, 332 (1860); JUDAH P. BENJAMIN, A TREATISE ON THE LAW OF SALE OF PERSONAL PROPERTY 24, 130, 338–39 (1868); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 718–23 (Oliver Wendell Holmes, Jr. ed., 12th ed. 1873); Bills of Sale Act 1854, 17 & 18 Vict. c. 36, § 7 (Eng.). The U.C.C. is also instructive here, since it codified in the mid-twentieth century common understandings of basic commercial law principles, like sales of goods. *See* U.C.C. §§ 2-105(1), 2-401(2) (Am. L. Inst. & Unif. L. Comm'n 1952).

[137] *Id.*

The Supreme Court's recent opinion in *Mrs. Alexander's Cotton* pointed in this direction, describing the loyal Unionist's right to sue as the product of "liberal and beneficent legislation," which Congress had chosen to bestow as a matter of grace upon the deserving, although both the loyal and the disloyal were equally "classe[d] as enemies" under "the rule of international law."[138]

By contrast, Speed's opinion insisted that title had not fully passed to the government.[139] In arguing that the ability to recover the proceeds in the Court of Claims was a residual property right, Speed suggested that seizure and sale did not extinguish every property interest the owner possessed.[140] The right to sue was not a new statutory benefit conferred after seizure and sale had extinguished the owner's preexisting rights, but the survival of a residual property interest—now in altered form.[141] The issue was not merely semantic, because Congress could withhold statutory rights (and appropriations) at its discretion, whereas a property right was not something that could be abolished without violating the Fifth Amendment, now that the war had ended and the property of Confederate denizens could no longer be considered "enemy" property.

Speed then turned to McCulloch's specific query: was Treasury Department review proper under the statute? Questions about the recovery of funds derived from the sale of captured and abandoned property had to be resolved by the Court of Claims, Speed insisted, because the statute directed them there.[142] The CAPA forbade review by the Treasury Department, he said, because the statute limited Treasury officers' role to ministerial tasks: to collect "abandoned and captured property" and to "dispose of it in the manner provided by the law."[143] Officials were not supposed "to inquire whether or not such property had been rightfully captured."[144] Once proceeds had made their way into the Treasury, they "await[ed] the action of the Court of Claims, when duly invoked," which was the forum Congress had designated for the "judicial ascertainment of the rights of persons affected by our captures."[145] To bolster his analysis, Speed pointed to *Mrs. Alexander's Cotton*, in which the Supreme Court had emphasized the centrality of the Court of Claims as the appropriate forum for review of CAPA cases.[146] If a claim involved captured or abandoned property, resolving it was off limits to the Treasury Department.

The critical question, then, was whether the Savannah cotton claims actually involved captured property within the meaning of the statute. If they did, Treasury lacked authority to consider them regardless of the merits of the underlying claim. Speed insisted that all the

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138 *In re* Mrs. Alexander's Cotton, 69 U.S. 404, 422 (1864).
139 *See* Speed, supra note 134, at 277-79.
140 *See id.*
141 *See id.*
142 *See id.*
143 *Id.* at 278.
144 Speed, *supra* note 134, at 278.
145 *Id.* at 277.
146 *Id.* at 275.

claims in the Savannah cases necessarily involved captured property. After acknowledging that the statute did not provide a definition of "captured property," Speed supplied one: it consisted of all moveables "actually and hostilely seized and taken on land, by a military officer or soldier of the United States" in Confederate territory.[147] The category was extraordinarily broad. Whether property qualified as "captured" depended on the fact of military seizure, not on whether an officer's order had been properly grounded in the law of war.[148] The fact remained that the cotton had been seized by Sherman's soldiers on his command, and so the cases involved captured property claims that had to be heard by the Court of Claims rather than the Treasury Department.

2. McCulloch

Speed's opinion, although perfectly serviceable when applied to the issue of the Savannah cotton, immediately became strained when subjected to the stress testing of Treasury Department practice, and McCulloch followed it in letter but not in spirit. McCulloch accepted Speed's characterization of the federal government as constructive trustee, along with his view that the CAPA directed all claims about captured and abandoned property to the Court of Claims. But McCulloch also made room for Edward Jordan's view that the secretary held the inherent power to revise decisions made by departmental officers. He made sense of the two opinions by treating captured and abandoned property claims as a narrow carveout from the Department's general responsibility to hear claims about wartime property seizure. In other words, if a claimant raised an issue involving property that met the statutory definition of captured and abandoned property, McCulloch directed him to the Court of Claims, but if seizure had been conducted on any other grounds, he would entertain it. The latter alternative was extremely significant for disloyal southerners, who were barred by the CAPA from the Court of Claims. [149]

There were plenty of grounds for wartime property seizure that fell outside the ambit of the legal categories of captured and abandoned property. For example, property could be seized because it belonged to the Confederate government rather than an individual. As Francis Lieber's influential law of war code (issued as instructions to the army) made clear, title to such property passed to the United States government.[150] Property could be captured on sea rather on land, making it prize rather than booty, a category carved out from the act's

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[147] *Id.* at 274.

[148] It was possible for seizures to exceed lawful authority, but only if they had been done outside the chain of command and amounted to thievery.

[149] *See infra* Part IV; Impeachment Investigation: Testimony Taken Before the Judiciary Committee of the House of Representatives in the Investigation of the Charges Against Andrew Johnson, H.R. JUDICIARY COMM., 39th Cong., 2d Sess. & 40th Cong., 1st Sess. 615 (1867) [hereinafter Impeachment Investigation].

[150] This was the one exception to the rule that a statute was needed for property seizure and transfer. *See* United States v. Huckabee, 83 U.S. 414, 434 (1872). The common law of war was sufficient.

coverage.[151] Military supplies were also subject to seizure,[152] as was property traded across enemy lines, a practice that was banned except under license from the president under the Non-Intercourse Act.[153] Property subject to seizure on these grounds was to become government property, but unlike the provisions for captured and abandoned property, its former owner had no statutory recourse to the Court of Claims.

Then there were illegal seizures – seizures made by military or Treasury officers with no legal predicate at all. Some of these might have happened in good faith, but others were made either with the goal of vengeance or harming the enemy. Many more were out-and-out thievery. For instance, one of the problems that Naval Secretary Gideon Welles identified with the licensure system for enemy trading (aside from the fact that trading in cotton across enemy lines amounted to "carrying on war and peace at the same time") was that it was replete with corruption.[154] The whole system was, in his view, one of legalized graft, as many cotton merchants and financiers lobbied for and received such licenses.[155] Even so, much of the trading across enemy lines was unlicensed and thus illegal. The Civil War saw a huge black market in cotton. As Welles put it, "the moment cotton appeared, approaching a market, it was immediately seized and appropriated by our own soldiers and others. It was plunder."[156]

McCulloch's attempt at taxonomy was inherently problematic, because it revealed a deeper tension in the law. Under the CAPA regime, classification and forum were questions that inherently ran together – they were impossible to separate. As McCulloch's record-keeping revealed, if property were captured or abandoned, he always rejected the claim, leaving the claimant to the Court of Claims. If property was classified under another designation, such as property of the rebel government, or blockaded cotton, he would investigate the claim to see whether the criteria for those categories had been met. He might restore the property or its proceeds after a fact-dependent inquiry based on what the claimant could prove and what

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[151] The Captured and Abandoned Property Act of 1864 transferred the handling of property captured on inland waters to the Treasury Department, when it had previously been treated as prize of war. CAPA (1863), § 7; CAPA (1864), § 7.

[152] *See* CAPA (1863), § 1; Act to Regulate Proceedings in Prize, 12 Stat. 759, § 2 (March 3, 1863).

[153] The Captured and Abandoned Property Acts, along with the Non-Intercourse Act of 1861, also prohibited trade across enemy lines, except under license granted by the president. A ban on trading was a common economic weapon of war, although the generous licensure system, which bestowed a boon on northern merchants looking to benefit from southern cotton, undercut the overall purpose of the ban. CAPA (1863), § 1.

[154] 2 GIDEON WELLES, DIARY OF GIDEON WELLES: SECRETARY OF THE NAVY UNDER LINCOLN AND JOHNSON 257-58 (Edgar T. Welles ed., Houghton Mifflin Co. 1911). In explaining why a system rife with corruption – the enemy trading system – was allowed to continue under President Lincoln, the historian Ludwell Johnson once offered this pithy explanation: it was because "Lincoln was a man who often found it hard to say no." LUDWELL H. JOHNSON, RED RIVER CAMPAIGN: POLITICS AND COTTON IN THE CIVIL WAR 5 (2d ed. 1993).

[155] 2 WELLES, *supra* note 154, at 257-58.

[156] 2 WELLES, *supra* note 155, at 139; *see also* James Campbell to unknown recipient, December 31, 1865, Box 11, Folder 110F, James Butler Campbell Papers, Caroliniana Library, University of South Carolina.

government record-keeping showed. But many of the designations were extremely vague, such as "improperly seized" or "erroneously seized," which provided no information about the grounds for seizure – and potentially covered a multitude of sins.[157]

One liminal category exposed the incoherence of McCulloch's line-drawing, and it appeared repeatedly in Treasury records: property "erroneously seized as abandoned."[158] Property qualified as abandoned only if its owner was both absent and disloyal, yet Treasury agents often operated on the presumption that absentee-owned property was subject to seizure, leaving factual determinations about its actual status to be revisited later. To conclude that property had been erroneously seized as abandoned, however, someone first had to determine that the statutory conditions for abandonment had not in fact been satisfied. That decision required an inquiry into the owner's status as a loyal Unionist—the very inquiry Speed had said belonged in the Court of Claims rather than the Treasury Department. The category thus depended on Treasury revisiting the same loyalty determination that supposedly placed the claim beyond Treasury's jurisdiction in the first place.

Difficulties began with the basic idea of revisiting officers' on-the-ground determinations. To ask why a military or Treasury officer in the field had seized property was to assume that he had acted pursuant to some particular legal theory of seizure. After all, Treasury secretaries did issue complicated sets of instructions containing brittle and murky legal distinctions for agents to follow. But in reality, many officers simply operated on a broad presumption in favor of seizure and left the legal categories for someone else to sort through after the fact.[159] No wonder that McCulloch later characterized his dealings with abandoned property as "a very large [and] uncomfortable" responsibility and "the most troublesome and disagreeable duty which I was called upon to perform," a view co-signed by his predecessors in the office.[160]

However difficult and stressful, the task of revising wartime property seizures in the Treasury Department seemed to McCulloch to be a necessary one. There were two reasons for this. First, Treasury officials, including McCulloch himself, faced the prospect of costly personal lawsuits arising out of wrongful government seizures, making the availability of informal administrative settlement indispensable to the department's actual operation. In early 1866, for instance, Dennistoun & Company, a New York cotton merchant, filed 122 suits in trover and replevin against Simeon Draper, the Collector of the Port of New York, for cotton in

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[157] Letter from the Secretary of the Treasury, Communicating, in Compliance with a Resolution of December 9, 1867, Information in Relation to the Action of That Department with Reference to Captured and Abandoned Property, S. Exec. Doc. No. 22, 40th Cong., 2d Sess. 8-14 (1868).

[158] *Id.* There was no category of erroneously seized as captured, since the fact of military capture was self-proving.

[159] *See* CONG. GLOBE, 40th Cong., 2d Sess. 146 (1867); RED RIVER INVESTIGATION, *supra* note 56, at 356-57; Lamar v. McCulloch, 115 U.S. 163 (1885).

[160] HUGH MCCULLOCH, MEN AND MEASURES OF HALF A CENTURY: SKETCHES AND COMMENTS 234 (1888); *infra* Part IV.

the South after the war's conclusion and later sold in New York as captured property.[161] Although Dennistoun could have sought compensation in the Court of Claims, it instead challenged the constitutional foundation of the entire captured and abandoned property regime through private tort litigation against Draper personally.[162] The company sought $400,000 in damages and it had retained "a strong array of counsel" to prosecute the suits.[163]

McCulloch took the threat seriously. Dennistoun's particular claims were "not well founded," he told the president, but he was worried about the broader implications of claimants bypassing the Court of Claims. A lawsuit could prompt a federal court to declare that the CAPA was either unconstitutional or had exceeded the bounds of the law of war. The litigation was also expensive: the government was facing the possibility of indemnifying Draper, and it had retained former Attorney General Caleb Cushing to defend the suits and to remove them to federal court while continuing to store the cotton at government expense rather than to sell it. Ordinarily, McCulloch would have referred the claimants to the Court of Claims, under the taxonomy of the Speed opinion, because there was "no question existing as to the fact of actual capture in those cases."[164] But "after careful examination of the subject," he considered the "persistency" of Dennistoun's formidable legal counsel and the risks posed by the litigation and successfully urged President Johnson to settle the dispute for $50,000.[165]

Second, and more fundamentally, McCulloch believed that the Treasury needed to ensure that wartime seizures had a statutory foundation. Restoration represented more than just an equitable impulse on McCulloch's part toward the victims of wrongful seizure – it was a legal obligation. Underlying the remedy question was a deeper concern about the nature of sovereign power to seize private property in enemy territory. In *Brown v. United States*, the Supreme Court had held that Congress had to supply domestic legal authority for the seizure of enemy property through legislation.[166] There was simply no authority to act outside the four corners of a statute. Captured and abandoned claims could go to the Court of Claims,

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[161] Before the development of modern federal officer immunity (which began to coalesce during and after the Civil War because of the prospects of lawsuits like these), federal officers were subject to such private tort suits. It was a common tactic for challenging the legitimacy of statutes. *See generally* Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396 (1987); Louis Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209 (1963); Pfander & Hunt, *supra* note 98.

[162] *See* Dennistoun v. Draper, 7 F. Cas. 488, 489 (C.C.S.D.N.Y. 1866) (No. 3,804); CHARLES O'CONOR, OPINION OF CHARLES O'CONOR, ESQ'R, ON THE TREASURY AGENT SYSTEM OF COTTON SEIZURES IN THE SOUTH, ALSO CONCURRING OPINION OF WM. M. EVARTS, EDWARDS PIERREPONT, AND JAMES T. BRADY, ESQ'RS. (1866); *see also* David Schwartz, *Section 1500 of the Judicial Code and Duplicate Suits Against the Government and Its Agents*, 55 GEO. L.J. 573, 575-578 (1967).

[163] LAFAYETTE DAILY COURIER (Lafayette, Ind.), May 8, 1866, at 1 (reprinting a *New York Times* Washington dispatch) ("a strong array of counsel has been retained by the plaintiffs").

[164] Hugh McCulloch to Schuyler Colfax, in Letter from the Secretary of the Treasury on Sales of Captured and Abandoned Cotton, S. Exec. Doc. No. 56, 40th Cong., 2d Sess. (1868), at 2.

[165] Letter from Hugh McCulloch to Andrew Johnson (Oct. 10, 1867), (on file with Ind. Univ., McCulloch Copybooks, Box 6).

[166] Brown v. United States, 12 U.S. 110, 129 (1814). *See supra* note 46 (discussion of the *Amy Warwick*).

where the statute allowed for compensation for the loyal claimant. All other property would, by contrast, be restored within the Treasury Department if it had been seized without a statutory foundation.

As time went on and the large volume of cases sharpened the question, Attorney General Speed shifted toward McCulloch's narrow view of the "captured and abandoned" category and away from his earlier impulse to channel disputes into the Court of Claims. In 1866, the president asked him to review the case of Joseph Billups, whose cotton was seized by Treasury agents in late 1865 on the faulty predicate that it belonged to the Confederate government.[167] Billups convinced McCulloch and Speed that it had never been anything other than private property. The cotton, Speed concluded, was neither Confederate property, nor abandoned property, nor property "captured by the armies of the United States."[168] Because the seizure fell into none of the recognized wartime categories, the CAPA did not govern the claim at all.

For Speed, the Billups matter exposed a broader post-war problem: Treasury agents had continued seizing cotton without first establishing a firm legal rationale, even though the categories that had justified wartime confiscations had largely evaporated with the close of hostilities, a point forcefully pressed by counsel in the Dennistoun litigation.[169] (In late 1865, one lawyer from South Carolina complained that Treasury agents were still "irritat[ing] and impoverish[ing] the country" by seizing cotton on the pretext that it was "prize of war," despite the fact that hostilities had ended eight months earlier.[170] The pretext was successful enough because the mere declaration worked against "a fair trial" on behalf of an "honest, rightful, individual owner.")[171]

Indeed, most of the cotton that came into Department hands after the war's conclusion was rather speciously classified as Confederate government rather than private property, a fiction that usually proved impossible to sustain upon investigation. Speed accordingly decided that the cotton "should be restored," because the seizure "did not fall" within any legitimate legal category and had been founded on a mistake "made manifest by the proofs."[172] Speed also

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[167] *See* Amnesty Petition of Joseph P. Billups, *microformed on* Amnesty Papers, 1865–1867 (on file with Nat'l Archives, National Archives Microfilm Publication M1003, roll 31, RG 94).

[168] Captured property was captured by the army rather than Treasury agents. To some extent, Speed's thinking on this last point was emblematic of a larger theme in his legal opinions, which was that wartime statutes ceased to be operational after hostilities had ended because they lost their constitutional foundation.

[169] *See* O'CONOR, *supra* note 162.

[170] Letter from James Campbell to Unknown Recipient (December 31, 1865) (on file with Univ. S.C., Campbell Papers).

[171] *Id.*

[172] Billups's Cotton Opinion, 11 Op. Att'y Gen. 478, 480 (1866); *see also* Case of Mrs. Johns, 11 Op. Att'y Gen. 356 (1865). Speed maintained that property could be reclassified if it was taken on one theory but also fit another – at the time of the seizure. The fact that Billups (and Johns) had been traitors at one time did not mean that their property could be summarily reclassified as abandoned later. They must, at the time of seizure, have been "actively engaged in the rebellion." *See* Mrs. Johns, 11 Op. Att'y Gen. at 357.

agreed that the Treasury Department should restore the property directly, without resort to the Court of Claims. The "agents of the Treasury Department would not do right in holding the cotton," Speed concluded, and McCulloch understood the Billups opinion as an endorsement of his views about departmental restoration.[173]

C. Abandoned Land, Restorations, and the Problem of Redistribution

The debates about property restoration in the context of cotton seizure carried over into a subject with much higher stakes: abandoned land, which was the source of most of the land available for redistribution to freedpeople at war's end.[174] Here the question of title had immediate practical consequences, because the Freedmen's Bureau Act of 1865 did not provide any independent statutory authority to terminate Confederate property ownership. It merely stated that abandoned land, along with land in formerly Confederate territory "to which the United States shall have acquired title by confiscation or sale, or otherwise," was to become the basis of family-sized land grants to freedpeople.[175] The vast majority of land in government possession was in the abandoned category.[176] Because the Bureau could convey only the interest it held, the nature of the interest in abandoned land became a subject of intense dispute between Bureau Commissioner O. O. Howard and Secretary McCulloch.

In July 1865, Howard requested that the Treasury Department turn over all of the abandoned land in its custody.[177] McCulloch told Howard that he would willingly surrender it to the Bureau, as the statute directed, but maintained that because title to abandoned land did not truly belong to the United States, the government was obliged to restore it upon demand

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[173] Billups's Cotton Opinion, *supra* note 172, at 479.

[174] The Bureau held about 450,000 acres of abandoned land in South Carolina, and about 340,000 in all other states. Contemporaries never compiled a complete list of land that was confiscated or the target of confiscation, despite congressional efforts to liberate the numbers from the executive branch. Direct tax numbers were also somewhat elusive but probably amounted to a little more than 125,000 acres of land, primarily in South Carolina. *See* S. EX. DOC. NO. 47-85 (1883); S. EX. DOC. NO. 47-82 (1882). Howard noted that confiscated lands "comprise but a small proportion of the entire amount which the bureau has held in its possession." Pardons and Abandoned Property: Message from the President of the United States, in Answer to a Resolution of the House of the 5th of March Last, Relative to Pardons and Property Seized as Enemies' Property, and Returned to Those Who Claimed to Be the Original Owners, H.R. EXEC. DOC. NO. 39-99, at 12 (1866); *see also* RANDALL, *supra* note 37, at 340-41.

[175] Freedmen's Bureau Act of 1865, § 4.

[176] *See supra* note 174.

[177] Letter from O.O. Howard to Hugh McCulloch (July 29, 1865) (on file with Nat'l Archives, FB Headquarters Records, Reel 1, 201). *See also* Circular No. 13, Bureau of Refugees, Freedmen, and Abandoned Lands (July 28, 1865), at 14–15 (on file with Nat'l Archives, Assistant Adjutant General Circulars 1865–1869, RG 105, Entry 24, No. 139,). Howard's effort to consolidate Treasury-held land under Bureau control was not his first attempt to secure an expansive reading of the Bureau Act on the land question. Earlier that month, Howard sought Attorney General James Speed's opinion on whether the Act required all abandoned land to be committed to the Bureau or only such lands as the President chose to set apart. Speed adopted the latter view, concluding that the President retained discretion over the amount of land transferred to the Bureau. That exchange concerned the issue of how much abandoned land the Bureau would control rather than the distinct question addressed here: the nature of the government's title to abandoned property. *See* 11 U.S. Op. Atty. Gen. 255 (1865), 1865 WL 1157.

from a former owner. The government's possessory interest in abandoned land was necessarily temporary, McCulloch said, because the designation of "abandoned" was itself only provisional.[178] As previously discussed, the CAPA gave the government only the power to "take charge of" and "lease" the property for freedpeople's "employment and general welfare."[179] Therefore it did not transfer the title to land, merely possession. McCulloch maintained that if the government's interest was to harden into something more permanent, the land would have to move out of the legal category of abandoned property and into another—through sale, confiscation, or some other recognized mode of transfer.

In describing the status of abandoned land, McCulloch borrowed heavily from Speed's early July opinion on the Savannah cotton, which characterized abandoned property as held in trust.[180] Abandoned real estate, "I conceive to be held for the time in trust by the Government," McCulloch said.[181] Either it was owned by a loyal citizen, in which case it was "awaiting…the return of the loyal owner," or, if it was not restored, it was awaiting "proceedings for confiscation."[182] Until that happened, the title remained in the original owner. Furthermore, the decision of whether to confiscate the land or to restore it to the original owner depended entirely on the president's discretion, as confiscation proceedings "may be prevented or stayed by the pardon of the President."[183] A pardon, if "full and unqualified, will restore to [a Confederate] his former rights, and place him in the position, legally, of an unoffending citizen."[184] In that case, he "cannot constitutionally be deprived of his property or its use without compensation."[185]

Just as in the context of abandoned personalty, there were discrepancies between the doctrinal form of the trust and the statutory attributes of abandoned land, although now the deficiencies were on the government's side rather than the owner's. Other property forms were imperfect analogies as well. The arrangement resembled a bailment insofar as the government possessed property belonging to another, although bailment traditionally applied only to personal property.[186] The civil-law usufruct perhaps came closer to describing the separation of ownership and possession created by the statute.[187] It required some

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[178] Letter from Hugh McCulloch to O.O. Howard (July 31, 1865) (on file with Nat'l Archives, Records of the Commissioner of the Bureau of Refugees, Freedmen, and Abandoned Lands, Record Group 105, Reel 18, Letters Received, 1865).

[179] *Id.*

[180] *See supra* Part II.B.1.

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *See* ARMISTEAD M. DOBIE, HANDBOOK ON THE LAW OF BAILMENTS AND CARRIERS 20 (1914). Dobie explains that the closest analogy under the common law of real property was that of a lease, but this is not all that close. To some extent, the lack of symmetry here is because bailments derived from the civil law. *See* WILLIAM F. ELLIOT, A TREATISE ON THE LAW OF BAILMENTS AND CARRIERS 3 (1897); JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS § 23 (James Schouler ed., 9th ed. 1878).

[187] *See* SEMMES, *supra* note 18, at 14.

contortion to see the relationship between the government and a dispossessed owner of abandoned land as akin to the legal relationships created by a trust. The CAPA did not purport to terminate the owner's title, but merely conferred rights of possession and a limited power of alienation through leasing.[188] It was therefore difficult to conceive of the government's interest as "title," legal or otherwise, in the manner ordinarily associated with trusteeship, as trustees could usually alienate property so long as they did so for reasons that would serve the beneficiary. Nevertheless, the trust metaphor captured an important feature of McCulloch's position. The government's possessory rights were severely limited by the continuing property interests of the dispossessed owner, as were a trustee's vis-à-vis a beneficiary's. Because of McCulloch's view of the potency of the presidential pardon, federal possession could evaporate at any moment, which made the trust form primarily a vehicle for restoration rather than redistribution.

Howard pushed back against McCulloch's characterization of the property interest the government held in abandoned realty.[189] Although the trust was not Howard's preferred formulation, his response exposed a question McCulloch had never stopped to ask: were the beneficiaries of the abandoned land arrangement truly the Confederate class?[190] McCulloch assumed so. But the statute itself directed that captured and abandoned property be used to "provide for the employment and general welfare" of formerly enslaved people within Union lines.[191] If the CAPA created anything resembling a trust relationship, Howard suggested, the intended beneficiaries were not necessarily the former owners at all.[192]

In his annual report to Congress in December 1865, Howard described the government's interest in abandoned land as something approaching ownership, or at least a right to retain the land indefinitely in order to carry out the CAPA's stated statutory purpose.[193] The government's tenure, he argued, necessarily "must continue to exist until those purposes were accomplished."[194] Howard acknowledged that the statute did not authorize the sale of abandoned land and therefore did not vest the United States with "full and perfect title in fee simple."[195] But the Bureau's authority "in every way to control the property, to lease it, and to take rents and profits" was, he maintained, "undeniable, so long as these acts remain law." [196]

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188 *See* CAPA (1864), § 2.

189 *See* FREEDMEN'S BUREAU: MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, TRANSMITTING REPORT OF THE COMMISSIONER OF THE BUREAU OF REFUGEES, FREEDMEN, AND ABANDONED LANDS, H.R. EXEC. DOC. NO. 39-11 at 3-5 (1865).

190 *See id.*

191 CAPA (1864), § 2.

192 *See* H.R. EXEC. DOC. NO. 39-11 at 4.

193 *See id.*

194 *Id.*

195 *Id.*

196 *Id.* The Act did not prevent sale, although there were various proposals in Congress (and among reformers) to make the parcels inalienable. Possibly the statute could be read as requiring occupancy, but in the West, possessory titles were regularly sold. Howard was probably overreading the statute here. *See* Freedmen's

Howard gave the statute a purposivist reading, molding the property forms to do the work the statute identified for abandoned land: freedpeople's support. Unlike McCulloch, who emphasized the limited nature of the government's possession, Howard underscored the narrowness of the former owner's remaining property rights. Howard boldly characterized the government's interest in abandoned real estate as "almost identical with an estate upon condition subsequent, that condition being the restoration of the property by competent authority to its former owner."[197] Howard's formulation effectively inverted McCulloch's. The government held the present possessory estate, while the former owner retained only a conditional future interest – a right of entry that would become possessory only upon restoration. Framed this way, the former owner's rights appeared marginal and might never become possessory. If it were possible to block Confederates from using the pardon to reclaim abandoned property, their right of entry could never be exercised. Thus the government's possessory interest would necessarily remain undisturbed. And the government's limited interest would thus become the functional equivalent of fee simple.

Howard was not alone in advancing such a view. Rufus Waples, a former U.S. attorney and the author of a prominent treatise on in rem proceedings, took the position that wartime property seizure statutes could not be read separately from the ways in which the government sought to repurpose the property in question. Waples had been involved in wartime confiscation proceedings in Louisiana, and in his treatise, written in the 1880s, he argued that Johnson administration officials had misapplied the CAPA a decade and a half earlier by reading its halfhearted title-stripping provisions in isolation.[198] Its interpretation should have been tethered to the later Freedmen's Bureau Act, which meant that the CAPA had to be read to transfer title to the government. The Bureau Act, he argued, had modified the earlier statutory framework by repealing provisions "inconsistent" with its commands. Rather than treating the wartime seizure statutes as self-contained, Waples insisted that they be read together with the Bureau Act, with the Bureau's promise of land for freedpeople shaping their construction.[199]

In doing so, Waples sought to reconcile the anemic property seizure statutes with the Bureau Act's far more ambitious land redistribution program. Section 8 of the Confiscation Act instructed courts conducting confiscations to "direct such deeds and conveyances to be executed . . . as shall fitly and effectively effect the purposes of this act, and vest, in the purchasers of such property good and valid titles thereto."[200] And Waples took that instruction seriously. If freedpeople were to become purchasers rather than temporary occupants awaiting dispossession, the confiscation statutes could not be constrained by the narrow theories of title that had come to dominate the Johnson administration. "Could land be sold in forty-acre lots, improved with little homes and fences, and then be taken from the

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Bureau Act of 1865, 13 Stat. 507, 509, §§ 1, 4.

[197] H.R. EXEC. DOC. NO. 39-11 at 4.

[198] *See* SYRETT, *supra* note 31, at 92-93, 113-199, 243-44.

[199] *See* WAPLES, *supra* note **Error! Bookmark not defined.**, at 500.

[200] Confiscation Act of 1862, *supra* note 50, § 8.

freedmen and refugees?" he asked.[201] The Bureau Act made little sense unless wartime confiscation had successfully terminated preexisting title.

Howard also sought to challenge the Johnson administration's expansive use of the pardon to restore property. Once he saw that Johnson was determined to pardon widely, he urged the president to condition Confederate pardons on their recipients' willingness to transfer a portion of their property to the United States – a suggestion Johnson immediately rejected. When that idea failed, Howard urged Congress to block the president from using the pardon to restore property, which would ensure that, although freedpeople only held possession rather than title, they would not be dispossessed.

By the fall of 1865, the Johnson administration's understanding of abandoned property had become devastating to the Bureau's project of land redistribution.[202] If title to land had not fully vested in the United States government, former Confederates could reclaim their property upon pardon, making stable land grants to freedpeople nearly impossible. General Howard therefore refused to assign parcels to freedpeople "before it became probable that [the land] could be retained," fearing that freedpeople who were "so eager for the possession of land" would eventually "be obliged to leave their present homes."[203] Howard had attempted to read the CAPA creatively so as to enlarge the government's interest in abandoned land beyond mere temporary custody, but in the end it proved difficult to do in light of the limited powers the statute granted over real property.

What was really driving efforts to sustain the government's land tenure and to limit the pardon was the practical need to provide for freedpeople's support. That statutory imperative arose not from the CAPA or the Confiscation Act, but from the Freedmen's Bureau Act.[204] That approach was not implausible: the Bureau Act itself stated that it would modify the preexisting statutory landscape by repealing "inconsistent" parts of prior legislation.[205] But it would have required a bolder approach: treating freedpeople, rather than former Confederates, as the beneficiaries of the abandoned property trust. This was not how President Johnson and his Cabinet members chose to interpret the government's duty as a trustee.

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[201] WAPLES, *supra* note **Error! Bookmark not defined.**, at 534.

[202] Ironically, the category of "abandoned land" had been so useful during the war that it bypassed the confiscation requirement, which ended up becoming a liability.

[203] Freedmen's Bureau Report, *supra* note 192, at 11.

[204] *See* Mark A. Graber, *The Second Freedmen's Bureau Bill's Constitution*, 94 TEX. L. REV. 1361, 1368 (2016). Graber argues that both the First and Second Freedmen's Bureau Acts were part of a broader congressional effort to manage the transition from slavery to freedom, although the Second was more comprehensive. *Id.* at 1363–65.

[205] Freedmen's Bureau Act of 1865, § 5.

III. Congressional Pushback

In 1866, Congress entered the fray, alarmed that the executive branch had returned so much property to southern supplicants.[206] Johnson's clash with the legislative branch had high political stakes, with the more radical Congress seeking to wrest control of Reconstruction policy away from the conservative president, and property restoration was a key part of that struggle. By returning property that had been seized during the war, the Treasury Department was not just undermining the economic foundation for Radical Reconstruction by shrinking federal assets that might be redistributed to freedpeople or otherwise used for government projects. It was simultaneously re-empowering the dispossessed rebel class. To Republicans in Congress, it seemed as though the president had done an end run around the CAPA by hijacking the claims process it had entrusted to the Court of Claims.

Executive restorations arguably violated the CAPA by engaging in an adjudicative function that the statute had entrusted to the Court of Claims, but they also quite possibly violated the Constitution. The Appropriations Clause specifies that "no money shall be drawn from the Treasury, but in Consequence of Appropriations made by law."[207] Legal scholar Kate Stith lays out two interlocking parts of the constitutional framework of appropriations, governing both inflows to and outflows from the Treasury. [208] As Stith explains, the Clause requires that any outflows (the expenditure of federal money or grant of federal assets) must be done pursuant to an appropriation.[209]

Thus, if Johnson's cabinet members were "restoring" property to supplicants – and the title to that property had transferred to the United States – these actions were grants of federal money without an appropriation. On the other hand, if the title to the property was still held by the claimant, it was within the purview of the executive branch to restore it without violating the Appropriations Clause. This issue of Congressional appropriations was entwined with the president's pardon power because it was generally understood (although not definitively settled) that the presidential pardon could remit financial penalties associated with a criminal act up until the point that the property in question was paid into the Treasury and belonged to the government.[210]

There was a second appropriations problem with McCulloch's restorations, which concerned inflows to the Treasury. In creating the Treasury Department in 1789, Congress required the various officers of the department, including the secretary, to deposit the funds of the United States into the Treasury.[211] The Miscellaneous Receipts Act of 1849 further provided that all funds "received from [any source] for the use of the United States, shall be paid into the

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[206] *See* MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 257 (1974)

[207] U.S. CONST., art. I, § 9.

[208] Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1364 (1988).

[209] *Id.* at 1352–56, 1377-86.

[210] *See* Pardons and Remissions of Forfeitures (Berrien), *supra* note 87.

[211] Act of Sept. 2, 1789, ch. 12, § 4, 1 Stat. 65.

treasury of the United States."[212] These directives obliged Secretary McCulloch to deposit government assets into the Treasury, as did the specific language of the CAPA, which directed Treasury agents, once property had been turned over to them, to cause it to be sold (or appraised, in the case of direct appropriation), with the "proceeds thereof [to] be paid into the Treasury of the United States."[213]

Given that this was the statutory arrangement, Congress wanted to know how it was that the Secretary of the Treasury or his underlings were returning property or its proceeds to the planter class. Where were these funds coming from? Had government officials withheld proceeds from the Treasury contrary to the statutory directive? Or were they making unconstitutional executive appropriations of government property instead?

A. House of Representatives (Outflows)

On January 4, 1867, the House sent a formal "resolution of inquiry" to Secretary McCulloch, asking him to explain how much money the Treasury had expended in settling "cotton claims" within his department. McCulloch had submitted some information about these payments (about $2 and a half million) in his annual report to Congress, filed on December 3, but his statement of accounts was so general that it was impossible to determine what that figure covered.[214] Three days later, the House opened an impeachment investigation against President Johnson, alleging that he had abused his pardon power by using amnesty to return government property to its former owners. The House charged that Johnson had "corruptly used the pardoning power" and "corruptly disposed of public property of the United States" in making the restorations.[215] McCulloch was called to testify no fewer than four times during the impeachment investigation, which meant that he was on the hot seat for more than a year.[216]

McCulloch's written reports and in-person testimony were calm and measured, but behind the scenes, he was angry. The impeachment was an attack on him as well as the president, and a good deal of the investigation concerned his supposedly corrupt practices at the Treasury. In McCulloch's view, congressional Republicans were improperly impeding executive power. They were constraining the president's use of the pardon and preventing the Treasury secretary from correcting mistakes and misbehavior within his department. McCulloch disagreed with Republicans' effort to limit property restorations by channeling all claims into the Court of Claims and restricting former Confederates' access to that court. McCulloch endorsed Johnson's mild program of Reconstruction. In his view, the South—and the national economy more broadly—could be stabilized only by restoring property to

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[212] Act of Mar. 3, 1849, ch. 110, § 1, 9 Stat. 398.
[213] CAPA (1863), § 2.
[214] Annual Report of the Treasury, 1866, at 98.
[215] Impeachment Investigation, *supra* note 149, at 91.
[216] *Id.* at 71, 604, 680, 860.

white southern elites and reestablishing, in broad strokes, the pre-war racial and economic order.

McCulloch's friends urged him to consider his own "fame and reputation" and to distance himself from Johnson to save his own skin. Edward Atkinson, a conservative northern businessman, counseled McCulloch to do whatever he could to stay at the helm of the Treasury Department and "give such direction to the reorganization of the south as shall prevent the creation of a black men's party and also to kill the scheme of confiscation."[217] Atkinson advised that the best way to accomplish this was, ironically, to deemphasize his affinity for the southern planter class, which put him at odds with the Radicals in Congress, and to present his suspect property restorations as a means of combatting corruption within the department. "Only give the Republicans who hold sound views on financial questions a chance to support you as the Secy of the United States Treasury and not as a member of the present cabinet," Atkinson told him, "and you can almost dictate future policy."[218]

McCulloch refused to desert Johnson, although he did stress the necessity of departmental revision in a system that had been rife with wartime corruption, as Atkinson had suggested. But the ordeal of the investigations, as he told Senator William P. Fessenden, his predecessor in office and an old friend from Maine, was "hell itself." He was up against "a combination of unprincipled scoundrels [scheming] to get control of the Treasury Department," and just hoped the country could survive the battle without plunging into a "political or financial disaster."[219] Fessenden had had the luxury of serving in the role "when there was harmony between the executive and legislative branches of the government," and so he could have "no conception of the embarrassments that surround the Treasury at the present time."[220]

In response to the congressional inquiries, McCulloch initially provided an eight-page list of claims he'd awarded within the Department and an explanation about the protocol he followed in investigating and granting them. He'd granted relief either in the form of "redelivery" of the seized property or payment, if the "property improperly taken had been converted into money."[221] He told the House that the "claims examined and decided have been numerous," but confirmed that his restorations had come after "an investigation of the facts" and a determination that the property "proved not to be legally or properly liable to

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[217] Letter from E.A. [Edward Atkinson] to Hugh McCulloch (August 7, 1867) (on file with Libr. of Cong, McCulloch Papers).

[218] *Id.*

[219] Letter from Hugh McCulloch to William P. Fessenden (August 29, 1867) (on file with Ind. Univ., McCulloch copybooks).

[220] *Id.*

[221] Letter from the Secretary of the Treasury on Captured and Abandoned Property, S. EXEC. DOC. NO. 39-37, at 2 (1867).

such seizure."[222] All of the cases had a lengthy paper trail, he said, and he offered to provide more information "in any particular case which Congress desires specially to investigate."[223]

McCulloch described the sorting process as a mess, and he carefully explained that he was merely following the protocol established by his predecessors, Fessenden and Chase. He produced Solicitor Jordan's opinion endorsing the practice, as well as Speed's opinions, and explained how very difficult the job of reviewing claims was. The claims that crossed his desk were numerous, varied, and not easily classifiable, revealing that in a great number of instances, he was seeking to correct blatant incompetence, bribery, and corruption on the part of Treasury agents who had operated during the war.[224] There was a good deal of outright thievery that had no justification, McCulloch said, and given that there were no grounds for the seizure, "it would not only have been inexpedient, but unlawful, for me to have refused to…correct the errors, mistakes, and frauds of my own subordinate officers and agents."[225]

McCulloch was at pains to explain to Congress that it did not understand the practical realities of running the department on a day-to-day basis and facing a phalanx of complaints about wrongful seizure. To insist that litigants pursue all claims for property seizure only in the Court of Claims was laughable, McCulloch suggested, and it would be impossible for the department to operate without such informal restorations. "It would hardly have been tolerated," McCulloch said patronizingly, "if the department at the close of the rebellion had sent throughout the south agents to collect captured and abandoned property, and had refused to exercise the authority to revise and control their proceedings."[226]

When he was called before the House Judiciary Committee to give testimony in President Johnson's impeachment investigation, McCulloch and his subordinates were pressed – hard – on the subject of property restorations within the Treasury Department. Rep. George Boutwell (R-MA), who led the investigation, did not understand how McCulloch had reconciled Speed's opinion on the necessity of referring captured and abandoned property claims to the Court of Claims with Jordan's earlier view that departmental review of wartime seizures was permissible. McCulloch's reliance on the existence of a "captured and abandoned carveout" seemed to Boutwell to evade the statute. He was incredulous that there was any real doctrinal distinction between the claims that McCulloch would hear and those that he would refer to the Court of Claims. Under questioning, McCulloch insisted on the coherence of his line-drawing and asserted "the authority of the Executive to deal with these questions [of revision] on the same footing as Congress or the law."[227] In other words,

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[222] *Id.* at 1-2.

[223] *Id.* at 2.

[224] *Id.*

[225] Letter from the Secretary of the Treasury on Captured and Abandoned Property, S. EXEC. DOC. NO. 40-22, at 2 (1868).

[226] *Id.*

[227] Impeachment Investigation, *supra* note 149, 28.

McCulloch maintained that the executive branch had the inherent power both to determine the reach of the pardon and to revise wrongful property seizure. "The proceeds [of seized property were] to be held for such ultimate decision as might be made in the premises," he insisted, "either by the action of the Court of Claims, by Congress, *or by order of the President*."[228]

When pressed by Boutwell on the question of where statutory authority for this type of claim settlement of "erroneously seized property" and, crucially, "the payment of money" within the executive branch had come from, McCulloch replied that he did "not know that there is any statute expressly authorizing it."[229] Still, he insisted that the secretary's power to revise Treasury agents' misadministration of wartime property seizure was one that necessarily inhered in the Department in order to make the system workable. Treasury agents were authorized to "take possession *only* of captured or abandoned property; property being moved in violation of the commercial intercourse laws; and property that belonged to the Confederate government," McCulloch said.[230] If it was not, there were no statutory grounds to seize it and it was his duty to return it. "Both of my two immediate predecessors and myself considered it right and proper to release lots that had been taken in violation of [department instructions] and of the acts of Congress, and to restore the proceeds to the lawful claimants when sold," McCulloch said.[231]

General Joseph Fullerton explained a similar thought process in restoring abandoned land throughout the fall of 1865 and into the spring of 1866.[232] Some of those restorations were founded on the pardon, to be sure, a circumstance that troubled the Judiciary Committee, but Fullerton said that many of them were corrections that resulted from mistaken and sloppy administration of the criteria for designating land as "abandoned" in the theater of war. "If a loyal man was absent from his property, he would not be aiding or encouraging the rebellion, and the land, therefore, in accordance with that definition, would not be abandoned," Fullerton said.[233] When he had evaluated the claims presented to him, "more than half of the property restored by men, and held as abandoned, was not really abandoned. There had been all sorts of ways of seizing property."[234] Fullerton cited instances in which property occupied by a renter had been seized on the basis of a landlord's absence.[235] More troublingly, when General Benjamin Butler had been in charge of occupied Louisiana, he had manufactured absence from plantations by sending men "out of the lines, and then their

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[228] *Id.*

[229] *Id.* at 861.

[230] *Id.*

[231] *Id.*

[232] These restorations were not as problematic in the constitutional sense, since abandoned land never became definitively the property of the United States. For more on Fullerton's semi-clandestine role in orchestrating the return of abandoned land, *see* Nicoletti, *William Henry Trescot*, *supra* note 121, at 496-97.

[233] Impeachment Investigation, *supra* note 149, at 515.

[234] *Id.* at 516.

[235] *See* EDWARD BATES, THE DIARY OF EDWARD BATES, 1859–1866 410–11 (Howard K. Beale ed., U.S. Gov't Printing Off. 1933); 2 WELLES, *supra* note 155, at 148–50 (for debates about the topic of renters and absentee owners in the Cabinet).

property [was] seized [as] abandoned."[236] Disloyalty had also been presumed rather than interrogated, and although many restorations were founded on the pardon, in quite a few cases, he said, "parties made proof of their loyalty, not only of their loyalty before that time, but after that time [too]."[237]

Boutwell and McCulloch thrashed out abandoned property questions in their discussion of an emblematic case, that of Lewis Washington, a Confederate colonel whose real and personal property had been seized by Treasury agents in Virginia during the war. McCulloch had heard the case within the Department despite the fact that Washington's rebel service would have kept him out of the Court of Claims.[238] Upon investigation, McCulloch had found that a Treasury agent had "taken possession" of Washington's land and furniture "as abandoned property; but I do not think it was abandoned according to the proper intention of Congress." This was because the home was occupied by a tenant, and although Washington was absent therefrom, he had not fled from it. In such cases, McCulloch had adopted the general policy not to regard "property in the possession of tenants of the owners, or of lessees of the owners" as abandoned property. [239]

Boutwell vehemently disagreed. Washington "was in the rebel service," and to Boutwell it was inconceivable that his property was not to be regarded as abandoned, as Washington was voluntarily absent from the property and "engaged in aiding the rebellion."[240] McCulloch had interpreted the statute to require an implicit causal link between the two elements of abandonment, such that a property owner had to be absent *because* of his engagement in disloyal actions, but Boutwell did not. McCulloch had classified the property as "erroneously" seized as abandoned and thus restored it within the Department, whereas Washington would never have recovered in the Court of Claims because of his Confederate service.

Boutwell pressed McCulloch on the first-order question: shouldn't the Court of Claims be the body to resolve cases such as Washington's? It was a captured and abandoned property case, whether the property was "erroneously" seized or not, because there were no other possible grounds for its seizure. In Boutwell's view, the statute had provided "a way by which all persons entitled to the property, or its proceeds, can obtain it by going to the Court of Claims."[241] McCulloch reiterated the view that recovery in the designated forum was a statutory carveout from ordinary practice. It was "unjust" and "disreputable to the government" to "compel" claimants such as Washington "to go to the Court of Claims, at

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[236] Impeachment Investigation, *supra* note 149, at 517.
[237] *Id.* at 516.
[238] See *infra* Part IV for more on the Court of Claims's jurisdiction over the claims or pardoned rebels.
[239] Impeachment Investigation, *supra* note 149, at 694.
[240] *Id.* at 694.
[241] *Id.* at 695.

great expense" to recover property when the secretary had deemed his agents' seizure to be improper.[242]

McCulloch's defenses fell on deaf ears, and Boutwell highlighted the Johnson administration's unauthorized return of property in his 1867 recommendation to Congress to impeach the president. Johnson's policies had had the practical effect of erasing land grants to freedpeople, Boutwell charged. He emphasized that Congress had deliberately constructed a broad system of property seizure during the Civil War, one that came within its powers under the law of nations. All it would have taken to see it through was commanders in the field willing to carry it out.[243] But what Congress had done, the president had seen fit to unravel. Through the expansive use of the pardon and administrative restoration, executive officials had exhibited "habitual contempt for the law" by failing to recognize that the title to captured and abandoned property had transferred to the United States. Instead, they had summarily returned what had become government property to its former owners.[244]

Boutwell argued that Congress had deliberately confined restoration claims to the Court of Claims and had sought to restrict Confederates' access to that forum. Instead, Treasury officials had resolved disputed factual questions administratively, often on the basis of ex parte submissions from former Confederates and their advocates. The executive had transformed the pardon from a power to relieve criminal penalties into a mechanism for undoing congressional directives concerning property seizure and restoration. In doing so, Johnson had behaved more like a king than a president, and his legal arguments owed less to constitutionally-bounded theories of executive power than they did to expansive analogies to "the royal prerogative in England."[245]

In interpreting the pardon power, the president's cabinet relied not on established precedents, but only on guidance drawn from opinions of the attorney general. By applying the pardon in the context of "mere forfeitures, not touching the person, but recoverable only by proceedings in rem," the executive was reaching beyond the erasure of criminal punishment and into the power of the legislative branch.[246] Boutwell's report made it clear that Johnson's illegal choice to dispose of what had become government assets had thwarted land redistribution in the post-war United States.[247] The Secretary of the Treasury had violated the explicit directives of the CAPA, Boutwell charged. He had done so by acceding to the demands of the southern planter class – "proud patricians" who had destroyed the

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[242] *Id.* at 694, 26.

[243] *See* Brown v. United States, 12 U.S. (8 Cranch) 110, 127 (1814) ("That reprisals may be made on enemy property found within the United States at the declaration of war, if such be the will of the nation, has been admitted . . . .").

[244] Impeachment Investigation, *supra* note 149, at 26, 817.

[245] Impeachment Investigation, *supra* note 149, at 25.

[246] Impeachment Investigation, *supra* note 149, at 25.

[247] Impeachment Investigation, *supra* note 149, at 2.

government through secession but "had now become by their defeat the masters of the government they had endeavored to destroy."[248] As a direct result, the president had shrunk the pool of property available for redistribution. He had betrayed "the helpless freedman, the only 'faithful among the faithless,' who was in the ranks of our armies, and had earned his settlement as the price of his blood."[249]

B. The Senate (Inflows)

Boutwell's damning indictment of Johnson's behavior was not enough to impeach the president – not just yet. The Judiciary Committee Report recommending Johnson's impeachment was rejected by an overwhelming vote in November 1867.[250] But in February 1868, the House moved forward with impeachment again, charging the president with a single targeted offense: violation of the Tenure of Act.[251] Still, the 1867 impeachment investigation had exposed the problem of Treasury Department restorations, and Congress was determined to stamp the practice out. In December, the Senate sent McCulloch another inquiry asking him to explain his office's practice "in what are known as cotton cases."[252] McCulloch wearily assembled the documents he'd presented to the House, plus a lengthy written explanation that drew on the answers he'd given during his in-person examinations by the Judiciary Committee. In "some cases," he conceded, he had restored property "without requiring proof that [its owners] had not participated in the rebellion," although he had never done so if dealing with an "unpardoned rebel."[253] In other words, he had allowed the pardon to operate as an adequate substitute for a showing of actual loyalty.

The Senate was focused on a different issue from the one that had animated the House: inflows to the Treasury. There was a lingering question sparked by McCulloch's answers about Treasury restorations. From whence had McCulloch made reimbursements? He had restored abandoned land in kind, but what about personalty, which the statute had directed to be sold and its proceeds paid into the Treasury? Given that Congress had not authorized the secretary to withdraw funds from the Treasury with which to pay claimants, the reasonable inference was that he had never paid the proceeds of captured and abandoned property sales into the Treasury in the first place, as the statute clearly directed him to do.[254]

McCulloch was unhappy about the inquiry, personally affronted by the implication that he had done something untoward with government funds. He wrote Senator John Sherman to complain about the tenor of the Senate resolution. "I do not believe that the adoption of the resolution will be advantageous to the public interests," he said, "and I cannot help regarding

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[248] Impeachment Investigation, *supra* note 149, at 23.

[249] Impeachment Investigation, *supra* note 149, at 23.

[250] *See* BENEDICT, *supra* note 206, at 284-85.

[251] *See id.* at 295.

[252] CONG. GLOBE, 40th Cong., 2d Sess. 79 (1867).

[253] Letter from Hugh McCulloch to Andrew Johnson (Jan. 16, 1868) (on file with Ind. Univ., McCulloch Copybook).

[254] *See* CONG. GLOBE, 40th Cong., 2d Sess. 79 (1867); S. EXEC. DOC. NO. 40-22 (1868).

it as a reflection upon myself."[255] To Sherman, McCulloch defended the practice of withholding some funds from coverage into the Treasury to satisfy claims and lawsuits against Treasury officers, insisting that without it he would be unable to operate or staff the department. If Congress intended to prohibit the practice, he said, it should instead "place at my disposal…an amount sufficient to enable me to prosecute and defend all suits now pending or hereafter to be commenced by the government or against it in relation to captured or abandoned property."[256]

To Congress, McCulloch explained that he had made payment to claimants out of funds derived from the sales of captured and abandoned property that had not been "covered into the Treasury." Generally speaking, "all moneys received from sales or property received" under the CAPA and "other similar acts…have passed into the hands of the Treasurer of the United States, and have also been regularly covered into the treasury as receipts from captured and abandoned property," McCulloch told Congress.[257] By "covered into the treasury," McCulloch meant that the funds the United States had received had been paid into the Treasury, as required by the Treasury Act of 1789 – they had been placed into the hands of the Treasurer of the United States and were now U.S. funds. It was a technical term used within the Department – and *only* within the Department – for the formal turning over of money that belonged to the U.S. into the Treasury.[258]

Under questioning in the impeachment investigation, McCulloch revealed that not "all" of the funds his Department had received from the sale of captured or abandoned personalty had been "covered into the treasury."[259] After sale, he had held some funds back from the treasurer in anticipation of worthy claims or other expenses that would arise in the future. He had already repaid some amounts to claimants whose property had been wrongfully seized, as determined by an internal investigation within the department. And a fund of $700,000, he explained, "remains in the hands of the Treasurer, uncovered," for expenses associated with the collection of property, with hiring counsel to represent the government in the Court of Claims, and to satisfy personal judgments against individual officers and the Treasury secretary himself for the wrongful seizure of property.[260] That money was "now on deposit with the Farmers' Loan and Trust Company of New York" to indemnify the sureties

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[255] Letter from McCulloch to Sherman (Jan. 7, 186[8]) (on file with Ind. Univ., McCulloch Copybook).

[256] Letter from McCulloch to Sherman (Jan. 7, 186[8]) (on file with Ind. Univ., McCulloch Copybook).

[257] Letter from Hugh McCulloch, Sec'y of the Treasury, to the President of the U.S. Senate (Mar. 2, 1867), *reprinted in* S. EXEC. DOC. NO. 40-22, at 4-5 (1868).

[258] This was a specialized nineteenth-century term only found in government accounting materials, not more generally. *See, e.g.,* Internal Revenue Rec. & Customs J. vol. 8, no 22, at 5 (Nov. 28, 1866); vol. 11, no. 7, at 52 (Feb. 12, 1870); Information Relating to the Accounting System of the United States Treasury Department 42 (1905); U.S. Dep't of the Treasury, Annual Report of the Secretary of the Treasury on the State of the Finances 18 (1874).

[259] Impeachment Investigation, *supra* note 149, at 692.

[260] *See* Welles, *supra* note 155, at 300; *see generally* Robert Neil Mathis, *The Ordeal of Confiscation: The Post-Civil War Trials of Gazaway Bugg Lamar*, 63 GA. HIST. Q. 339 (1979) (analyzing an emblematic private litigation effort by a claimant).

on Simeon Draper's employment bond in connection with the Dennistoun law suit.[261] The Department was under immense pressure as a result of such lawsuits, and had had to hire counsel to represent Draper and other Treasury officials – including McCulloch himself – in litigation outside the Court of Claims over "nearly the whole amount of cotton captured at Savannah, Charleston, and Mobile."[262]

By statute, Treasury officials (including the secretary) were required to deposit money into the Treasury of the United States. The particular depositary institution had varied over time, but the requirement that the Secretary of the Treasury ensure that funds that belonged to the United States were actually paid into the Treasury was non-negotiable.[263] Senate Republicans were mind-boggled that the Secretary of the Treasury had kept some funds segregated from the rest in a private bank – Farmers' Loan and Trust became Citibank in the twentieth century – and was somehow able to evade the requirement to pay money into the Treasury as a result.[264] It also appeared that the two appropriations problems Congress had identified were linked, because McCulloch had failed to cover funds into the Treasury in order to make them available for unauthorized restorations of government property. This was seemingly confirmed by U.S. Treasurer Francis Spinner, who provided a troubling explanation for the practice: "If it [the property] once got into the treasury, there is no way of getting it out except by warrant under act of Congress."[265]

Senate Republicans regarded this failure to "cover" money into the Treasury as an accounting trick and began calling for a formal censure of the secretary. Upon learning of McCulloch's actions, Senator Lyman Trumbull asked: "What he means by [certain funds] being 'covered into the Treasury' I do not know. I suppose it means that these sums were not in the Treasury, where the law required them to be until some action had been taken by the Secretary to have them placed there."[266] Senator Timothy Howe echoed these sentiments, saying that despite the fact that the Special Agents of the Treasury "did what the law told them to do" by selling the property and "pay[ing] it over to the Secretary of the Treasury; paid into where it is within the control of the Secretary of the Treasury," the secretary himself, "instead of allowing it to go into the books of the Treasury…kept it somewhere

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[261] Letter from Hugh McCulloch, Sec'y of the Treasury, to the President of the U.S. Senate (Mar. 2, 1867), *reprinted in* S. EXEC. DOC. NO. 40-22, at 5 (1868).

[262] Letter from Hugh McCulloch to Schuyler Colfax (Mar. 2, 1867) *reprinted in* H.R. EX. DOC. NO. 39-114, at 2 (1867). On the personal McCulloch litigation, *see generally* Lamar v. McCulloch, 115 U.S. 163 (1885). *See also infra* Part IV.

[263] Act of Sept. 2, 1789, ch. 12, 1 Stat. 65; Act of Aug. 6, 1846, ch. 90, 9 Stat. 59; Stith, *supra* note 208, at 1350–58 (1988); BRAY HAMMOND, BANKS AND POLITICS IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR (1957); Harry N. Scheiber, *The Pet Banks in Jacksonian Politics and Finance, 1833–1841*, 23 J. ECON. HIST. 196 (1963); DAVID KINLEY, THE INDEPENDENT TREASURY OF THE UNITED STATES AND ITS RELATIONS TO THE BANKS OF THE COUNTRY (1910). The law was suspended during the Civil War.

[264] *See* BRADLEY A. HANSEN, INSTITUTIONS, ENTREPRENEURS, AND AMERICAN ECONOMIC HISTORY: HOW THE FARMERS' LOAN AND TRUST COMPANY SHAPED THE LAWS OF BUSINESS FROM 1822 TO 1929, at 69–92 (2009).

[265] Impeachment Investigation, *supra* note 149, at 26, 817.

[266] CONG. GLOBE, 40th Cong., 2d Sess. 377 (1868).

aside – in his portemonnaie, in his portfolio, in his pocket; he kept it somewhere off from the books of the Treasurer and out of the protection of the Congress of the United States."[267]

Unlike in the impeachment inquiry, McCulloch did not have to defend himself in person. Instead, former Treasury Secretary William P. Fessenden – now serving in the Senate – ended up on the hot seat. Asked by Senator Lyman Trumbull to explain "what the word 'covered' means" in Treasury practice, Fessenden responded irritably that "the Senator might understand it without any explanation."[268] But he nonetheless laid out the accounting mechanics before clarifying succinctly: "It is a mere formal transfer."[269]

Once Senator Trumbull understood how claims practice operated within the Treasury Department, he was irate. He insisted that McCulloch had "no jurisdiction over the matter" of restorations and had defied the CAPA by adjudicating claims himself, restoring roughly $3 million of government money to claimants who could not have gained entry to the Court of Claims.[270] Fessenden insisted that Trumbull was misunderstanding the statute. The Court of Claims was not supposed "to correct errors at all," Fessenden argued, but rather to compensate loyal owners whose property had been lawfully seized in the first instance.[271] Treasury review served a different purpose: rescuing property wrongfully taken "from the hands of plunderers."[272] Senator Howe (among others) was baffled by the gossamer distinction between types of property seizure that Fessenden laid out, saying that it was a sorting process "I cannot understand."[273] Backed into a corner, Fessenden acknowledged that he too had found the categories nearly impossible to administer in practice. But he had been contending with the reality that officers in the field "were in the habit of taking property wherever they could find it, if they believed, and in many cases, perhaps, where they did not believe – that it belonged to rebels."[274] Faced with the Senate's intense scrutiny, Fessenden could only respond: "All I have to say is that I decided as well as I knew how."[275]

The Senate considered McCulloch's conduct outrageous, but in the end, it did not censure him. Instead, Congress responded with a joint resolution followed by legislation that put an

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[267] CONG. GLOBE, 40th Cong., 2d Sess. 382 (1868). This raises the question of how much wiggle room there was in terms of Treasury accounting practice whether "delayed" formal deposits constituted embezzlement in a world in which accounting began to look fairly abstract. *See* ALBERT BOLES, FINANCIAL HISTORY OF THE UNITED STATES FROM 1861 TO 1865, at 530 (1874); DAVID KINLEY, THE USE OF CREDIT INSTRUMENTS IN PAYMENTS IN THE UNITED STATES 53–117 (Nat'l Monetary Comm'n, S. Doc. No. 61-399, 2d Sess. 1910). The dispute also raises more fundamental questions about the legal character of "money" and its relation to the state. *Cf.* CHRISTINE DESAN, MAKING MONEY: COIN, CURRENCY, AND THE COMING OF CAPITALISM (2014).

[268] CONG. GLOBE, 40th Cong., 2d Sess. 377 (1868).

[269] CONG. GLOBE, 40th Cong., 2d Sess. 377 (1868).

[270] CONG. GLOBE, 40th Cong., 2d Sess. 383 (1868).

[271] CONG. GLOBE, 40th Cong., 2d Sess. 1213 (1868)

[272] CONG. GLOBE, 40th Cong., 2d Sess. 1213, 1215 (1869)

[273] CONG. GLOBE, 40th Cong., 2d Sess. 382 (1868).

[274] CONG. GLOBE, 40th Cong., 2d Sess. 146 (1867).

[275] CONG. GLOBE, 40th Cong., 2d Sess. 147 (1867).

end to McCulloch's disbursement of money to aggrieved claimants of captured and abandoned property.[276] The joint resolution stated, in no uncertain terms, that the practices McCulloch had engaged in would henceforth be considered illegal.[277] An officer who retained control of money derived from the sale of captured and abandoned property without paying it into the Treasury was "guilty of embezzling the public money of the United States."[278] But the resolution also did what McCulloch said was necessary for the Treasury's functioning: it appropriated $75,000 for incidental expenses associated with the administration of captured and abandoned property, including the defense of lawsuits against officers charged with its collection and sale.[279]

The statute, passed a few months later, went further. It directed that all claims arising from the administration of the various acts Treasury agents were charged with carrying out were to be maintained exclusively in the Court of Claims, to the exclusion of all other state and federal courts.[280] It also extended protection to Treasury officials, granting them immunity from suit for actions undertaken in the course of their duties and indemnifying them against successful judgments.[281] Lastly, Congress declared that the exclusivity of the Court of Claims remedy had "been the true intent" of the CAPA all along.[282]

The legislation was a decisive rejection of the Treasury Department's longstanding practice of revising wartime property seizures. It represented an effort to settle a dispute that had simmered between the branches since the war's end. By channeling claims into the Court of Claims and declaring that exclusivity had always been the statute's "true intent," Congress rejected the department's position that Treasury possessed the inherent power to restore property. In doing so, it attempted to foreclose the administrative process through which executive officials had restored property to former Confederates and, in Congress's view, frustrated Reconstruction policy. The expectation was that the institutional and doctrinal questions were bound together: once Congress had settled where claims would be heard, it expected the legal premises on which Treasury had rested its revisionary authority to fall with them.

Three years earlier, in *Mrs. Alexander's Cotton*, the Supreme Court had already hinted that the right to recover in the Court of Claims was a matter of legislative grace rather than a residual property right.[283] The choice of a judicial forum therefore appeared, from Congress's

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[276] *See* Joint Resolution Requiring Certain Moneys of the United States to be Paid into the Treasury, 15 Stat. 251 (1868).

[277] *See id.*

[278] *Id.*

[279] *See id.*

[280] *See* 15 Stat. 243 § 3 (July 27, 1868).

[281] *See id.*

[282] *Id.*

[283] 69 U.S. (2 Wall.) 404, 422 (1864).

perspective, to be a safe bet: the courts seemed unlikely to embrace the executive branch's theory of title.

IV. The Supreme Court

Congress believed it had resolved the matter. It had settled the question of forum – and firmly foreclosed the administrative pathway by criminalizing the Treasury Department's practice of withholding proceeds from "coverage into the treasury." What Congress could not so easily solve was the doctrinal foundation on which those claims would be adjudicated once they arrived in the proper forum. The trust theory of title that Speed had developed to justify departmental revision, and that McCulloch had deployed to defend executive restoration, had not disappeared when Congress shut down the administrative pathway. Instead, the same questions of title came before the Supreme Court—and before Chief Justice Salmon P. Chase, who had drafted the statute and administered it as Secretary of the Treasury.[284]

In 1871, the Supreme Court decided *United States v. Klein*, and the trust theory escaped its administrative origins entirely.[285] Today *Klein* is well-known as part of the Federal Courts canon for two reasons: (1) it held that Congress cannot invade the judicial function by passing a piece of legislation that purports to overrule a court's statutory interpretation[286] and (2) it limited Congress's power to restrict federal courts' jurisdiction after *Ex parte McCardle*.[287] Over time, the case has gained something of an ignominious reputation, both because of the muddiness of its opinion, [288] and because the decision's doctrinal technicalities have served to obscure its racialized context, a story carefully excavated in recent work by Helen Hershkoff and Fred Smith.[289]

But if we look at *Klein* as a case primarily about title, its conclusions about the relative powers of the three branches become more legible, as does its place in the larger story of how courts, legislators, and executive branch officials actively forged legal doctrine in ways that hampered meaningful property confiscation from elite white southerners during Reconstruction. *Klein* adopted the trust theory of title to captured and abandoned property – and many of the

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284 *See supra* Part I.A.

285 80 U.S. 128 (1871).

286 RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (7th ed. 2015); Amanda L. Tyler, *The Story of Klein: The Scope of Congress's Authority to Shape the Jurisdiction of the Federal Courts*, *in* FEDERAL COURTS STORIES 87 (Vicki C. Jackson & Judith Resnik eds., 2010).

287 *Id.*

288 For scholarly criticism and analysis of *Klein*, *see generally* Barry Friedman, *Reconstruction's Political Court: The History of the Countermajoritarian Difficulty, Part Two*, 91 GEO. L.J. 1 (2002); Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043 (2010); Lawrence G. Sager, *Klein's First Principle: A Proposed Solution*, 86 GEO. L.J. 2525 (1998); Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of* United States v. Klein, 100 NW. U. L. REV. 437 (2006); Evan C. Zoldan, *The* Klein *Rule of Decision Puzzle and the Self-Dealing Solution*, 74 WASH. & LEE L. REV. 2133 (2017).

289 *See* Hershkoff & Smith, *supra* note 9. *See also* Tyler, *supra* note 286.

decision's oddities followed from that premise. Hershkoff and Smith, who address the Court's strained – and highly motivated reasoning on property questions, do not fully unpack the Chief Justice's use of the trust theory or trace the genealogy of the doctrinal categories he employed.

Klein's adoption of the administration's trust theory was not preordained. In fact, Chief Justice Chase's decision in *Mrs. Alexander's Cotton*, one of the earliest he rendered on the bench, pointed in the opposite direction.[290] Chase, fairly newly off his stint as Treasury secretary, did not yet have a ready-made theory of title to apply to captured and abandoned property—in spite of the fact that he had been dealing with it in his capacity within the executive branch.[291] Treasury administration had largely been occupied with operational questions, whereas litigation required the Court to specify the nature of the government's title in a way departmental practice had not previously demanded.[292] After looking at the matter more closely, his opinion in *Mrs. Alexander's Cotton* confirmed that the CAPA was a valid exercise of the government's belligerent power to seize enemy property, emphasizing that cotton was one of the Confederacy's "main sinews of war."[293] He also came close to endorsing Congress's view of the relief the statute granted to loyal denizens of Confederate territory, characterizing it as merely an act of legislative grace rather than a property right retained and transformed into a quasi-beneficial interest. The CAPA was, according to the *Mrs. Alexander's Cotton* opinion, an act of "liberal and beneficent legislation" that generously bestowed upon the loyal a right to receive some recompense from the government by drawing a "distinction…between those whom the rule of international law classes as enemies."[294] It was hard to read the opinion as treating the right as a property interest protected by the Takings Clause.

By the time *Klein* was decided six years later, Attorney General Speed's trust theory had gained some traction on the Court, although it had not yet come into conflict with the view that the rights extended by the CAPA remained subject to congressional control. If not pushed very far, the two ideas could coexist in harmony. In *United States v. Anderson*,[295] the Court had characterized the CAPA as an act of "great beneficence," which had extended to loyal citizens a right of reclamation in the Court of Claims.[296] Borrowing Attorney General Speed's earlier formulation, the *Anderson* Court characterized the government as a "trustee" for the benefit of loyal potential claimants, who held a not-entirely-extinguished property interest in the proceeds of captured and abandoned property.[297]

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[290] 69 U.S. (2 Wall.) 404, 422 (1864).

[291] *See supra* notes 127–133 and accompanying text.

[292] *See* WALTER STAHR, SALMON P. CHASE: LINCOLN VITAL RIVAL 424, 432 (2022) (on Chase's supervision of the CAPA regime at the helm of Treasury).

[293] *Mrs. Alexander's Cotton*, 69 U.S. at 420.

[294] *Id.* at 422.

[295] 76 U.S. 56 (1869).

[296] *Id.* at 65.

[297] *Id.*

Padelford introduced the complications of the pardon into the discussion, holding that a presidential pardon could substitute for the statutory requirement that a claimant prove that he had given "no aid or comfort to the rebellion" in order to gain access to the Court of Claims.[298] Because Padelford had taken the loyalty oath and complied with the terms of Lincoln's amnesty proclamation before the seizure of his cotton, the court treated him as standing in the position of a loyal Unionist at the time of the capture.[299] As a result, he was entitled to share in the proceeds of captured and abandoned property on the same terms as a claimant whose loyalty had never wavered.[300] Thus far, the trust theory could be reconciled with Congress's ability to control who had access to its corpus.

Klein presented a harder question: what became of the title if a claimant had been disloyal at the time of the property's seizure but was later the recipient of a pardon?[301] Further complicating the issue was the fact that Congress had made very clear that it did not want to extend the right to sue for the proceeds of captured and abandoned property to any pardon recipients. In other words, it had implicitly called into question the notion that the right to recover the proceeds was a property interest rather than a discretionary legislative grant – by attempting to withdraw it. Following *Padelford*, Congress sought to reverse the Supreme Court's holding on the substitutability of the pardon for a demonstration of actual loyalty in order to invoke the Court of Claims's jurisdiction. In 1870, Congress inserted a proviso into an appropriations measure barring recovery claims under the CAPA brought by litigants relying on the pardon rather than on proof of actual loyalty.[302]

The *Klein* Court struck down the proviso as unconstitutional,[303] and its analysis rested heavily on a foundation of title theory. The Court decided that a claimant who had been disloyal at the time of the seizure but later received a presidential pardon was entitled to recover the proceeds of captured and abandoned property notwithstanding Congress's attempt to bar such claims.[304] The majority opinion, authored by Chief Justice Chase, veered away from the suggestions in *Mrs. Alexander's Cotton* that the ability to access the captured and abandoned property fund was a boon bestowed following completed confiscation rather than a property right retained by the owner. Chase echoed Attorney General Speed's analysis of title transfer, arguing that only confiscation proceedings were effective to disgorge title, such that property owners retained an interest after government seizure and sale or appropriation.[305] After acknowledging that the CAPA was singular in creating "a peculiar description [of property], known only in the recent war, called captured and abandoned property," he went on to lay out its unique features, although he did not call attention to the fact that he had been its

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[298] United States v. Padelford, 76 U.S. 537, 538 (1869).
[299] *See* Ex parte Garland, 71 U.S. 333 (1867).
[300] *See* Padelford, *supra* note 298.
[301] United States v. Klein, 80 U.S. (13 Wall.) 128, 142 (1871).
[302] Act of July 12, 1870, ch. 251, 16 Stat. 230, 235 (1870).
[303] *Klein*, 80 U.S. at 147.
[304] *Id.* at 148.
[305] *See infra* Part II for discussion of Speed's view.

architect as Treasury secretary.[306] He described the act – and indeed, the government's entire property confiscation regime – as embodying a policy of adherence "to the fullest extent [to] the humane maxims of the modern law of nations, which exempt private property of non-combatant enemies from capture as booty of war."[307] After comparing "different parts of the act" and its carveout provisions for war materiel and prize,[308] he came away convinced that "it was not the intention of Congress that the title to [captured and abandoned property] proceeds should be divested absolutely out of the original owners of the property."[309]

Chase reasoned backwards from the premise that the property form needed to do the work of Johnson's theory of the pardon, and he wrestled the doctrine into place in order to accomplish that goal. Chase was explicit about this, saying that "[t]he promise of the restoration of all rights of property decides that [title] question affirmatively." The pardon, in his formulation, held out a promise of property restoration to former Confederates, and a refusal to honor "would be a breach of faith not less 'cruel and astounding' than to abandon the freed people whom the Executive had promised to maintain in their freedom."[310] He pushed the trust metaphor further than it had previously gone, arguing that at the moment of seizure, the government became "a trustee for those who were by that act declared entitled to the proceeds of captured and abandoned property, and for those whom it should thereafter recognize as entitled."[311] This was a crucial change. It expanded the class of beneficiaries beyond the people who were loyal at the moment of seizure, even if the factual determination of who fell into that category had not yet taken place. The government had now become, under Chase's formulation, a trustee for a class not yet populated: people who were currently traitors but might be pardoned in the future. The logic depended on seeing the class of potential beneficiaries as not yet fixed at the moment the property was seized.

The class of beneficiaries of the trust had been enlarged to accommodate Chase's broad conception of the pardon power, which endowed the president with the authority to pardon "without limit," and to use that power to restore property notwithstanding Congress's attempts to "change the effect of such a pardon."[312] The solution Chase came up with was not inelegant but ultimately it was still problematic. The property rights of the disloyal were somehow not-quite-extinguished at the moment of seizure, existing in a state of suspended animation until they could be revived through the transformative power of the pardon.

Yet again, the trust form did a good deal to disguise the creakiness of the conceptual structure of the captured and abandoned property fund. Once reframed as a question of identifying

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[306] The briefs did call attention to this fact. *See* Argument for the Respondent at 71, United States v. Klein, 80 U.S. (13 Wall.) 128 (1871) (No. 156).

[307] *Klein*, 80 U.S. at 137.

[308] Under the law of prize, there was a different (specified) process for disposing of the title. *See* 12 Stat. 820, §§ 1, 7 (1863). *See also supra* note 153 on the carveouts.

[309] *Klein*, 80 U.S. at 138.

[310] *Id.* at 142.

[311] Klein at 138-39.

[312] Klein at 148 (Miller, J., dissenting).

the beneficiaries of a collective trust rather than tracing the fate of any individual owner's title, the type of problem posed by the zombified property interests began to recede. A trustee could hold the corpus of a trust for the benefit of a group of not-yet-ascertainable recipients.[313] The beneficial interests at stake could be analogized to a class gift, a contingent interest held by individuals who could not be ascertained because they had not yet satisfied the relevant condition: being pardoned. The law of trusts accommodated such an arrangement, as it permitted a trustee to hold property for the benefit of a class whose ultimate membership remained uncertain.[314] In the end, the trust form had proved malleable enough to allow restorations to escape the statutory design altogether – reaching the very claimants the CAPA had explicitly excluded.

Presaging many modern scholars, Justices Miller and Bradley, writing in dissent, found great flaws in *Klein's* majority holding.[315] But unlike most scholars, who focus their criticisms on the way that the Court limited Congressional power over both the president and the judiciary, Miller's dissenting opinion concentrated instead on Chase's analysis of the transfer of property interests under the terms of the CAPA. "I do agree to the proposition that the proviso to the act of July 12th, 1870, is unconstitutional," Miller said, as it did exert an undue degree of power over both coordinate branches of government.[316] And yet, he felt compelled to dissent because he could not assent to Chase's view that under the CAPA, "there remains in the former owner, who had given aid and comfort to the rebellion, any interest whatever in the property or its proceeds when it had been sold and paid into the treasury or had been converted to the use of the public under that act."[317]

In other words, the facts of the property's appropriation – and particularly, of its sale – made it impossible to believe that it had not been wholly transferred to the government, with no interest retained by the former owner. There was a crucially important distinction ("too apparent to be disregarded") between the statute's treatment of the loyal, whose property (or proceeds from its sale) were to be returned, and the disloyal, whose property was "transferred…absolutely to the government."[318] In the first instance, as the Court had previously held, echoing the attorney general, "the government is converted into a trustee for the former owner; in the other it appropriates to its own use the property of a public enemy captured in war."[319]

In Miller's view, the Court's reading bordered on the nonsensical because if the loyal and the disloyal retained some interest in the property, there was no mechanism "by which the title

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313 *See* DANIEL SMITH REMSEN, THE PREPARATION OF WILLS AND TRUSTS 127-28 (1930).
314 *See* 1 THOMAS JARMAN, A TREATISE ON WILLS 259 (1881).
315 *See supra* note 288 (discussing scholars' reactions to *Klein*).
316 *Klein* at 148 (Miller, J., dissenting).
317 *Klein* at 149 (Miller, J., dissenting).
318 *Klein* at 149.
319 *Klein* at 149.

of the government could at some time be made perfect."[320] If sale did not perfect title, only confiscation could do so. Until then, the disloyal (unpardoned) owner's interest would exist but be held in legal limbo, since the owner "cannot maintain a suit for its recovery, and the United States can obtain no perfect title to it."[321] The only plausible reading of the act was that it effectuated an absolute transfer of the property in question. In Miller's view, once the property had been "sold and the proceeds paid into the treasury," its title had been completely divested, and "the pardon does not and cannot restore that which has thus completely passed away."[322]

Miller also pointed out that *Klein's* collapsing of the loyal and the disloyal into one category marked a departure from the Court's previous jurisprudence on the CAPA. In *Anderson*, the Court had said that the government became "a trustee for so much of the property as belonged to the faithful southern people" and that the act "gave to this class of persons an opportunity to establish their right to the proceeds."[323] In *Padelford*, the fact that the claimant had been pardoned prior to the seizure of his property was crucially important, and as Miller pointed out, the timing of the pardon merited "extended argument in that case."[324] Padelford had been restored to the position of a loyal citizen before the capture had occurred. But now that the Court had decided that Klein's title had not been fully divested, "it was wholly immaterial whether Padelford was pardoned before or after the seizure."[325]

Klein illustrates the power of doctrinal migration within the Reconstruction-era administrative state. Congress had attempted to channel disputes over captured and abandoned personalty into a highly constrained framework that treated restoration as a matter of appropriation rather than executive discretion. Yet executive officials' efforts to characterize the interests retained by former owners generated a theory of title that escaped its original administrative setting. The Court imported Speed's trust metaphor and extended it, thus transforming an improvisational solution to an administrative problem into a constitutional limitation on congressional power. By locating title in the former owner until the moment of confiscation, *Klein* placed restoration through the pardon beyond Congress's control. Had the Court adopted Miller's view that a disloyal owner's title vested absolutely in the United States upon sale, restoration would have become a matter of legislative discretion rather than executive fiat.

Congress understood *Klein* as an affront to its attempts to control the disbursal of funds to compensate for wartime losses. Accordingly, after the *Klein* decision, Congress considered ways it might get around the decision and simply refuse to fund judgments the Court of Claims had rendered against Confederates. In 1872, Senator Justin Morrill of Vermont was

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[320] *Klein* at 149.
[321] *Klein* at 149.
[322] *Klein* at 150.
[323] *Klein* at 149.
[324] *Klein* at 150.
[325] *Klein* at 150.

incensed enough to offer an amendment to the yearly deficiency appropriations bill denying compensation from the general fund allocated for Court of Claims payments for cases in which a claimant's loyalty had not been affirmatively proven but was inferred from the pardon instead.[326] He would not absolutely deny compensation, but he would have Congress approve awards on an individualized basis, thus essentially treating the Court of Claims' adjudication as an advisory opinion. Senator Sherman emphasized that in passing the CAPA, Congress had expressed in the "very strongest language that could possibly be used" that it intended "to confine the benefits of that act to loyal persons," and that *Klein* "is an entire reversal of the policy of Congress during the whole war."[327] To Senator Edmunds, it seemed as though the Supreme Court had undermined the functioning of a coordinate branch of government in denying the Congress the right to decline to pay claims. He noted that because there was no constitutionally guaranteed right to sue the government, their best option might be to abolish the Court of Claims altogether.[328]

The issue surfaced again the following year, when, on the strength of *Klein*, the Court of Claims had awarded the notorious Confederate blockade runner Gazaway Bugg Lamar $580,000 for the cotton General Sherman's troops had seized in early 1865.[329] It was the largest single successful claim under the CAPA,[330] and Congress balked when presented with an itemized bill for judicial expenses. Republican Senators complained, once again, that the Court had effectively undermined their efforts to distinguish between the loyal and disloyal in awarding compensation for wartime property seizures.

Senator Edmunds insisted that the *Klein* decision was contrary to the basic constitutional structure of the United States.[331] Senator Thurman agreed, saying that in *Klein*, the Court had required restitution paid to former Confederates out of "fund[s] resulting from the sale of property taken possession of under the captured and abandoned property act," which was "money in the Treasury of the United States."[332] But the Court, "with but two dissenting voices, has decided that the money does not belong to the United States, but that the United States holds it simply as trustee for the persons whose property was taken."[333]

Edmunds wanted to know, "in view of the structure of this Government, whether it is within the competency of the Supreme Court of the United States to make a decision which is the

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[326] Cong. Globe, 42d Cong., 2d Sess. 2725 (1872).

[327] Cong. Globe, 42d Cong., 2d Sess. 2728 (1872).

[328] Cong. Globe, 42d Cong., 2d Sess. 2769-71 (1872).

[329] 8 Ct. Cl. 564 (1874). It was not entirely clear when Lamar had taken the loyalty oath and whether he committed disloyal acts afterward. Potentially, he was within the purview of Padelford, but certainly he fell within the ambit of Klein, and discussion in the Senate was based to some extent on whether he took Lincoln's oath or that offered by Johnson. *See* discussions in Cong. Globe, 42d Cong., 3d Sess. 969 (1873).

[330] *See* Mathis, *supra* note 260, at 349.

[331] *See* Cong. Globe, 42d Cong., 3d Sess. 970 (1873). *See also* 1 CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, 1864–88, at 842 (1971).

[332] *See* Cong. Globe, 42d Cong., 3d Sess. 969 (1873).

[333] *See* Cong. Globe, 42d Cong., 3d Sess. 970 (1873).

law of the land in respect to money that by law has been paid into the Treasury."[334] The Constitution directed that "no money shall be drawn from the Treasury except in pursuance of an appropriation made by law; not an appropriation made by the nine honorable men who sit in the next room of the Capitol, but an appropriation made by us."[335] Through the *Klein* decision, the Court had managed to usurp that power.

Anger was palpable enough for some Senators to propose eliminating the Court of Claims altogether and to reassume the pre-1855 process of adjudicating claims in Congress.[336] Some Senators contended that the court should be abolished, arguing that there was no common-law right to recover from the government and that the court was merely an extension of congressional authority, akin to the Court of the Exchequer. But in the end, Congress defeated the proposals by a close margin and learned to live with the decision.[337] The Court had helped the president to erase most of the distinction between the innocent and the guilty and had put an end to the possibility of wide-scale property seizure.[338]

Conclusion

Over time, Congress largely acclimated to *Klein*, funding awards for wartime property seizure and even extending the availability of relief in the Court of Claims well beyond the time limit built into the CAPA.[339] *Klein* also had an outsized historical afterlife. As the decision came to define our understanding of the legal consequences of the pardon – and the interests retained by former owners in property taken in the field during the Civil War – it simultaneously obscured the broader interbranch debate about that subject that had raged five years earlier. Indeed, if George Boutwell was right that former owners retained no interest in captured and abandoned property after seizure, the president's pardon could not restore their property without Congress's assent. The Court's endorsement of the trust theory did more than settle a doctrinal dispute — it retroactively transformed Johnson's wide-ranging use of the pardon from an unconstitutional appropriation of government assets into a mere policy decision (albeit one with devastating consequences). Recovering the competing theories of title restores to view the constitutional stakes of Johnson's pardoning that *Klein* later made difficult to see.

A reader of this Article might reasonably ask: really? Fifty-six pages about the persnickety details of *title* to comprehend the dynamics at work in Reconstruction? And the answer is: yes. The title question was antecedent. Before anyone could answer whether the President's

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[334] *See* Cong. Globe, 42d Cong., 3d Sess. 970 (1873).

[335] *See* Cong. Globe, 42d Cong., 3d Sess. 971 (1873).

[336] *See* Cong. Globe, 42d Cong., 3d Sess. 509 (1873).

[337] *See* 6 JOHN BAKER, THE OXFORD HISTORY OF THE LAWS OF ENGLAND, 1483-1558 at 159-61 (2003) (on the Court of the Exchequer).

[338] *See* Cong. Globe, 42d Cong., 3d Sess. 976 (1873).

[339] The claims continued well into the twentieth century. *See* CHAPMAN W. MAUPIN, DIGEST OF THE DECISIONS OF THE COURT OF CLAIMS, THE SUPREME COURT, THE CIRCUIT COURT OF APPEALS, AND THE CIRCUIT AND DISTRICT COURTS, IN SUITS AGAINST THE UNITED STATES iii (1907). The cases were revived without any statute of limitations in 1911. *See* Judicial Code of 1911, ch. 231, § 162, 36 Stat. 1087, 1139 (1911).

pardon restored property, whether land could be redistributed to freedpeople, or which tribunal had authority to hear a claim, that person first had to decide what interest remained after seizure. That is why what appeared to be disputes over administrative authority were, at a deeper level, disputes about property doctrine. To trace these disputes over title is not to lose sight of Reconstruction's larger political history. It is to recover one of the forms that political argument assumed. It is also to reckon with what fighting on that terrain cost freedpeople, who understood what was at stake but had no entry point into the technical idiom through which it was being decided. Historians rightly pay attention to the profound constitutional changes wrought by the Reconstruction Amendments and the radical political and social upheaval ushered in by a formal commitment to the principle of racial equality in the United States. But theories of title — no less than theories of constitutional meaning — bore directly on some of Reconstruction's most significant political questions. However important their consequences, battles about how far the pardon extended and whether property redistribution was possible or merely illusory were fought on technical grounds. They sounded in the register of doctrine even when the stakes were constitutional.