

The Limits of Sovereignty: Property Confiscation in the Union and the Confederacy During the Civil War

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Review

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Property and the Law in the Confederacy

Among the thousands of political and military histories of the Civil War, its battles, leaders, soldiers, nurses, plantation wives, horses, weapons, blockade-runners, spies, new technologies, slave narratives, railroads, photographers, mapmakers, and red-clay eaters, few scholars have addressed the intrinsically relevant questions of how the war affected private property interests of individuals who did not cleave to the government's agenda in ways appropriate, or what the constitutional authority of the government was to extinguish those property interests as punishment for disloyalty. In a republic built upon the platform of ordered liberty, in which the notion that all citizens were possessed of natural rights that included the rights to live free and own property, the question demanded pre-eminence when the legislature undertook action to extinguish such natural rights.

Daniel W. Hamilton has authored a significant tome that addresses these questions in an intelligent and comprehensive manner. He focuses on the First and Second Confiscation Acts of the United States Congress, and the Sequestration Act of the Confederate Congress. Hamilton explores a subject that by contemporary standards is taken as a foregone conclusion—that the government's power to confiscate property is very narrowly limited, and which beyond the principle of eminent domain (for which just compensation must be paid), exists solely as a punishment for individual crimes and can be applied only by the courts. In the North the confiscation acts were made largely irrelevant by Lincoln's announcement of the Emancipation Proclamation (his administration would be too well-occupied defending and implementing that revolutionary policy, to spend very much time attempting to carry out an incomprehensibly

unwieldy and difficult Second Confiscation Act). However the debate over the Second Confiscation Act occupied most of the time and energy of the Thirty-Seventh Congress whose Members considered the act of critical importance (2-3). Hamilton points out that The confiscation debates reveal a relatively rare moment in American legal history when competing property ideologies were subject to fierce, explicit, and open debate, not primarily between academics, but among legislators and with the property of millions at stake (3). And the author concludes that In a time of exuberant and transformative change, when it came to the confiscation of enemy property, Congress, surprisingly, restrained itself (4).

In the Confederacy, on the other hand, the judiciary—seldom considered in the history of the southern rebellion—was remarkably active in its enforcement of the Confederate Sequestration Act. Hamilton argues that scholars have focused largely on the inability of the Confederacy to create a Supreme Court. This has led some historians to minimize, or dismiss entirely, the work of the Confederate judiciary as a whole. With the federal judiciary minimalized, and the state court system playing the central role, Hamilton suggests that the whole system of property confiscation, especially in a Confederacy where individual rights and limited government were so highly valued, would be expected to meet with resounding failure. However, Hamilton informs us that Confederate confiscation proved a huge success. During the war a remarkably demanding confiscation regime was imposed on a mostly willing citizenry by the Confederate courts. . . . All citizens were required to inform the government of any enemy property of which they were aware, whether in their possession or anybody else's, imposing a clear legal obligation to inform on one's neighbors (6).

In perhaps the most compelling portion of his monograph, Hamilton details the positions of the three different groups of legislators in the U.S. Congress who waged the lengthy battle to determine the form of confiscation that the government would conduct against rebels. For all of its many accomplishments, the Thirty-Seventh Congress spent but a relatively brief amount of its time and energy on such sweepingly progressive legislation as the enactment of the first federal income tax, the first uniform national currency, and the first federal military draft in American history. They spent much less time than one might expect before enacting three pieces of legislation that created massive public land grants—the Homestead Act, the Pacific Railway Act, and the Land Grant College Act (three enactments primarily responsible for opening up the American West, transforming the national economy, and providing for the

widespread construction of public universities). But none of these debates came close to occupying as much of Congress's attention, or proved to be nearly as divisive, as the attempts to pass the Second Confiscation Act. Hamilton provides a surgically precise history of legislative confiscation in America, with its precedent in the Revolutionary War when a great deal of Loyalist property was confiscated by legislative fiat, without recourse to the courts for individual trials (2).

Hamilton shows how a powerful group of radicals, led by Senator Lyman Trumbull of Illinois, chairman of the important Senate Judiciary Committee and sponsor of the bill that would become the Second Confiscation Act, championed the passage of legislation calling for the permanent seizure of all the real and personal property of anyone who continued to take up arms in rebellion or continued to give the rebellion aid or comfort' (31). He described the conservative attack on confiscation, led by Trumbull's fellow Illinoisan Orville Browning, who declaimed, A state of war does not justify the civil power in abrogating constitutions, nor in violating the rights of persons or property (41). With the battle joined, and as the debate moved into the spring of 1862, it became increasingly clear that a number of important Republicans were not comfortable with Trumbull's bill and that it was not going to pass easily. And the position propounded by conservatives had already begun to take shape even before the Civil War, argued effectively by Chief Justice John Marshall in decisions such as *Fletcher v. Peck*, and in the writings of a number of legal theorists who had begun to posit that it was a fundamental function of the state to protect individual property rights, not to extinguish them. This had led to the emergence of a doctrine of vested rights which included, at its heart, the notion that the lines between legislative and judicial authority over property must be tightly drawn (46).

In the most interesting chapter of the book, Hamilton introduces us to The Moderate Coup. At the height of the debate between the radicals and the conservatives, Senator John Sherman of Ohio injected a new element into the battle. He introduced a substitute bill on the Senate floor (since he couldn't possibly get the Trumbull-led Judiciary Committee to seriously consider it) that significantly changed the scope of the proposed confiscation legislation by limiting its application to only those Confederate civil and military officials whose rank would mark them as leaders of the rebellion. That in itself would not have taken the heart out of the radical confiscation bill. But Sherman's bill mandated judicial proceedings before seizure could be done legally, a serious

blow to the radical notion that legislative confiscation could take place. A great deal of squabbling in the debate took place in the early summer over the question of how extensively the courts would be able to employ *in rem* proceedings, allowing them to take jurisdiction based on the venue of the property to be forfeited and not on the presence of the offender being charged.

In the middle of July the legislation may have been moving close to passage when Daniel Clark of New Hampshire introduced an explanatory resolution to be appended to the Confiscation Act. It provided, in part: Nor shall any punishment or proceeding under said act be so construed as to work a forfeiture of the real estate of the offender beyond his natural life (75). It was the invocation of the Article I, Section 9 prohibition in the constitution against the enactment of any bill of attainder. Bills of attainder were a device by which the King had historically been able to attain the family of a wrongdoer so as to collect his damages from people other than the offender. The permanent seizure of a person's property extinguishes not only their claim in the property, but also the future interests of any heirs as well. Clark made it clear that he did not support the resolution but had been authorized to say that if it was passed then President Lincoln would sign it. Clark had been tapped by the White House to deliver an important message to the Congress: the president considered the legislation to be a bill of attainder and therefore unconstitutional. However if legislators would simply agree to include this explanatory statement (which effectively made the legislation meaningless) then the chief executive would forego doing something he almost never did—veto an act of Congress. When Lincoln weighed in on the question of confiscation, he did so very clearly, taking the same position that Browning and the conservatives had stated from the beginning. As he did on so many occasions, Lincoln had employed his wisdom to puncture the balloon of legislative confiscation before it ever had the opportunity to take flight. And he had done so while appearing seeming to support the legislation by signing it into law, once the resolution had passed.

If there is one thing that this reviewer would take issue with in Hamilton's otherwise very fine treatise, it is that if legislation had passed and been enforced in anything close to its original form, it might have very well set a precedent for government actions in future wars to destroy and demean the citizen's right to dissent. The doctrine of vested rights was not so well-established by 1861, that it could not have been dismantled by overwhelmingly Republican Congress intent upon punishing treason by the most powerful weapon it could wield. A United States government focused on retribution could have stripped the

property-owning class of the South of its wealth for generations. The significant bitterness experienced by a defeated South might have been increased exponentially over what actually did occur in the years after the war. It is not inconceivable that in the war-torn wasteland that the South was in the spring of 1865, the possibilities of guerrilla warfare, terrorism, and lingering hatred for many years might have ruled the day, and an entire section of the nation left impoverished into the twentieth century.

David E. Long is professor of history at East Carolina University. Trained as a lawyer and a historian, he has authored numerous works on Abraham Lincoln and the Civil War era, including The Jewel of Liberty: Abraham Lincoln's Re-election and the End of Slavery (1994).