

# QUAKERS, SLAVES AND THE FOUNDERS: PROFILING TO SAVE THE UNION

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## I. INTRODUCTION

Racial and religious profiling is inconsistent with a fundamental tenet of Fourth Amendment doctrine. In most circumstances, law enforcers must possess fact-based, particularized suspicion before they seize or search a person or property.<sup>1</sup> The inconsistency between the constitutional requirement of individualized suspicion and reliance on group identity to justify seizures and searches is accentuated by the Justice Department's recently published definition of profiling:

“Racial profiling” at its core concerns the invidious use of race or ethnicity as a criterion in conducting stops, searches and other law enforcement investigative procedures. It is premised on the erroneous assumption that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of another race or ethnicity.<sup>2</sup>

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<sup>1</sup> For the leading critique of the role of fact-based suspicion, see Thomas Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483 (1995).

<sup>2</sup> Civil Rights Div., U.S. Dep't of Justice, Guidance Regarding the Use of Race by Federal Law Enforcement Agencies (June 2003) [hereinafter Guidance], available at [http://www.usdoj.gov/crt/split/documents/guidance\\_on\\_race.htm](http://www.usdoj.gov/crt/split/documents/guidance_on_race.htm).

If the Constitution requires fact-based, individualized suspicion to justify seizures and searches, it is easy to understand the Justice Department's position that, without more, a person's race, religion, ethnicity or alienage cannot supply the factual basis for a constitutional search or seizure. No logical relationship exists between any of these characteristics and the commission of crimes.

Yet searches and seizures based upon these impermissible grounds occur, and the phenomenon is not new. Constitutional history provides provocative examples of racial and religious profiling in every century of the nation's existence. Group profiling did not originate with the well-known examples from the first half of the twentieth century: the incarceration of Japanese Americans during World War II and the "Palmer raids" directed against European immigrants two decades earlier. The examples of "profiling" discussed in this article originated with the Founders.<sup>3</sup>

The first example occurred during the Revolutionary War, when the Congress authorized the seizure and lengthy incarceration of Quakers suspected of being British sympathizers precisely because they were Quakers. These individuals were seized without any showing that in fact they were in fact aiding or even supporting the enemy, and no hearing was ever held (either before, during or after the incarceration) to determine the validity of these seizures. Even more remarkably, twenty of the seized men were "exiled" to Virginia, where the group was held captive for almost eight months. The captivity ended, in part because the immediate crisis had ended, in part because of incessant agitation by the captives, their families, friends and supporters and in part because many leaders on the American side worried about the long term consequences of allowing seizures without proper justification. The relatively sparse historical record of these events demonstrates that the principals—including John Adams and other leaders of the new government—recognized that these seizures could be justified

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<sup>3</sup> The term "profiling," of course, was not used by the Founders.

only by the exigencies of war.<sup>4</sup>

The second example—laws justifying the seizure of people alleged to be runaway slaves—is more complex in its origins and scope. It originated with the political compromises that preserved slavery in the original constitutional scheme, compromises justified by the exigencies of the time and the hazards of nation building. The Framers included the Fugitive Slave Clause in Article IV of the Constitution,<sup>5</sup> and soon acted to implement it with legislation. The Second Congress enacted the Fugitive Slave Act of 1793, which ostensibly ensured that slave owners could recover their human property.<sup>6</sup> In practice, the effort to recover fugitive slaves generated the crudest forms of what today we would label as racial profiling.<sup>7</sup> Opposition to slavery, coupled with fears that the crude standards of proof employed by slave catchers led to the enslavement of free blacks living in Northern and border states, produced resistance to enforcement of the federal law.

One by-product of this resistance was the Fugitive Slave Act of 1850—an even more odious statute that was an essential element of the Compromise of 1850, the historic congressional attempt to resolve with political means the intractable national crises flowing from slavery.<sup>8</sup> Supporters of slavery, and many opponents as well, asserted that the nation's very survival depended upon effective federal legislation enforcing the rights of slave owners to recapture runaway slaves.<sup>9</sup> The 1850 statute was necessary, they argued, to preserve the United States from dissolution, and perhaps from civil war.<sup>10</sup>

Both the seizure of Quakers during the Revolution and the enforcement of laws permitting seizures of blacks alleged to be runaway slaves were justified as necessary responses to threats to the very existence of the nation.<sup>11</sup> As a result, these early

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<sup>4</sup> See discussion *infra* Part II.

<sup>5</sup> U.S. CONST. art. IV, § 2, cl. 3.

<sup>6</sup> See *infra* notes 100-31 and accompanying text.

<sup>7</sup> See discussion *infra* Part III.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

examples of what we would label today as religious or racial profiling have implications for the current debate about profiling in the "war on terror."

The September 11, 2001 terrorist attacks resurrected religious and racial profiling from the scrapheap of discredited constitutional doctrines to which it had only recently been discarded. On the eve of September 11, a broad consensus had emerged in the United States that racial profiling was both morally wrong and ineffective as a law enforcement technique.<sup>12</sup> One measure of the scope of this consensus is that only weeks after his inauguration, President Bush attacked racial profiling in an address before a joint session of Congress. His position was straightforward: racial profiling by law enforcement officials is "wrong and we will end it in America."<sup>13</sup>

This critique of racial profiling focused upon traditional enforcement of the criminal and traffic laws. September 11 changed that focus. In the wake of the mass murders committed by Islamic terrorists from the Middle East, the almost universal condemnation of racial profiling fragmented, and the Bush Administration (and others) argued in favor of the use of profiling to combat terrorism.<sup>14</sup>

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<sup>12</sup> Guidance, *supra* note 2; see David Chen, *Westchester Executive Urges Law Banning Racial Profiling*, N.Y. TIMES, May 10, 2001, at B6 (discussing the legislative debate in Westchester County to ban racial profiling to avoid issues that arose from the use of this police tactic in New Jersey); Lori Montgomery, *Racial Profiling in Maryland Defies Definition*, WASH. POST, May 16, 2001, at A1 ("Since 1999, 10 states including Maryland have enacted laws requiring data collection [to find evidence of racial profiling]; three more passed laws to eliminate racial profiling."); Solomon Moore, *Race Profiling Suit Challenges CHP's Tactics*, L.A. TIMES, May 28, 2001, at B1 (discussing a class action suit in which police are being accused of using racial profiling as a mechanism to stop drug trafficking; also discussing the increase in racial profiling suits in various other states); Maria Newman, *400 Protest Racial Profiling, but Few Top Officials Hear*, N.Y. TIMES, May 17, 2001, at B5 (reporting a rally at the State House in New Jersey protesting racial profiling by police).

<sup>13</sup> See, e.g., Guidance, *supra* note 2.

<sup>14</sup> See Mark Z. Barabak, *America Attacked*, L.A. TIMES, Sept. 16, 2001, at A1 (citing U.S. poll in which sixty-eight percent of the people questioned supported "allowing law enforcement to randomly stop people who may fit the profile of suspected terrorists"); Maura Dolan, *Terrorism May Shift Jurors' Attitudes*, L.A. TIMES, Oct. 19, 2001, at B2 (stating that "[o]nce-promising civil rights lawsuits over racial profiling no longer look so promising" after the events of 9/11); Wil-

The new Justice Department guidelines on racial profiling implement seemingly contradictory positions by prohibiting profiling in some contexts but encouraging its use in the “war against terror.” The guidelines prohibit racial profiling for federal officials engaged in “traditional law enforcement” activities, but “do not affect current Federal policy with respect to law enforcement activities and other efforts to defend and safeguard against threats to national security or the integrity of the Nation’s borders.”<sup>15</sup> When federal law enforcement officers are “investigating or preventing threats to national security or other catastrophic events (including the performance of duties related to air transportation security), or in enforcing laws protecting the integrity of the Nation’s borders,” they may consider both race and ethnicity “to the extent permitted by the Constitution and laws of the United States.”<sup>16</sup> The Justice Department asserts that because the terrorist threat to the nation’s security is so great even the rigorous strict scrutiny standard of constitutional review permits the use of race, ethnicity or alienage to fight terrorism.<sup>17</sup>

This is functionally the same argument used to justify the “profiling” of Quakers and runaway slaves at the Founding and during the succeeding decades. In this article, I draw several broad lessons from these early and seminal examples of reli-

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liam Glaberson, *Racial Profiling May Get Wider Approval by Courts*, N.Y. TIMES, Sept. 21, 2001, at A16 (stating that more judges may authorize racial profiling after events of 9/11); Serge F. Kovaleski, *A Wide, Aggressive Probe Collides with Civil Rights; Innocent People May Face Questioning, Experts Say*, WASH. POST, Sept. 15, 2001, at A14 (quoting various terrorism experts who say that racial profiling is necessary to “narrow the pool of suspects”); Norah Vincent, *Commentary; Whining and Wailing Won’t Win a War*, L.A. TIMES, Nov. 1, 2001, at B13 (commenting that racial profiling of Arab-American men on flights is a “necessary and rational precaution”).

<sup>15</sup> See, e.g., Guidance, *supra* note 2.

<sup>16</sup> See *id.*

<sup>17</sup> See *id.* (citing decisions by the Supreme Court and the lower federal courts establishing that the impermissible use of race or religion as considerations in law enforcement decisions violates equal protection rights and that all racial classifications must be measured against the strict scrutiny standard, but also asserting that “the legality of particular, race-sensitive actions taken by Federal law enforcement officials in the context of national security and border integrity will depend to a large extent on the circumstances at hand”).

gious and racial “profiling.” Two lessons seem particularly relevant to our current situation. First, to paraphrase a bumper sticker, “profiling happens.” The use of “profiling” during crises dating from the time of the nation’s creation confirms that during a military or political crisis discrete groups who can be linked to the crisis are likely to be subjected to discriminatory law enforcement techniques—including seizures that do not satisfy normal legal or constitutional norms. Second, both examples of “profile”-based seizures were ultimately ended in part because members of the affected groups and their supporters objected and in some instances resisted. If the first conclusion suggests a rather fatalistic response to profiling in times of crisis, the second contains important lessons for how the polity should respond to those who oppose discriminatory government profiling in the midst of crises.

For if history teaches that in the midst of crises—when the future course of events remains unknown—those charged with preserving the nation will resort to drastic tactics unacceptable in more placid and tranquil times, then it also teaches that opposition to these tactics is essential if democratic values and mechanisms are to survive the crises. Those arguing in favor of abstractions like liberty and freedom are unlikely to prevail with a populace facing more concrete threats, like invading armies, civil war or weapons of mass destruction. But the struggle to define and enforce our constitutional norms is an ongoing process, and that process is aided by, and may depend upon, the actions of those who resist expansion of government power at the very time when it seems to be most needed. The first historical example demonstrates that the nature of the crisis affects how “profile”-based seizures are used, but also how vocal and persistent opposition may affect the course of government conduct.

## II. THE VIRGINIA EXILES

The war did not go well for the American rebels during much of 1777. By late August, Philadelphia—the largest city in the thirteen states, the capital of Pennsylvania and the home of Congress—was threatened by an imminent military invasion by

the British army.<sup>18</sup> When Congress received documents suggesting that a meeting of Quakers in Spanktown, New Jersey (Spanktown papers) might be spying for the British,<sup>19</sup> it referred the matter to a committee of three, which included John Adams and Richard Henry Lee.<sup>20</sup> That committee reported to Congress that since the beginning of the war the "conduct and conversation" of a number of Quakers demonstrated that they were "disaffected to the American cause," and were inclined "to communicate intelligence to the enemy, and in various other ways to injure the counsels and arms of America."<sup>21</sup>

Congress approved two resolutions proposed by the committee. The first "earnestly recommended to the Supreme Executive Council of the State of Pennsylvania" (Council) that it seize eleven Quakers named in the report, "together with all such papers in their possession as may be of a political nature."<sup>22</sup> The only specific fact cited by Congress in support of this recommendation was a single "seditious publication," dated December of 1776, and signed by a prominent Philadelphia Quaker, John Pemberton.<sup>23</sup> The second resolution recommend-

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<sup>18</sup> By late August 1777, General Howe's troops had sailed into the Chesapeake Bay and landed in Maryland and were marching upon Philadelphia. For an account of the military campaign written by a member of the revolutionary generation, see 2 DAVID RAMSAY, *THE HISTORY OF THE AMERICAN REVOLUTION* 342-56, 411-12 (Lester H. Cohen ed., 1990).

<sup>19</sup> In late August, General Sullivan sent documents to Congress that allegedly were seized from a British agent. See Letter from General Sullivan to Congress (Aug. 25, 1777), reprinted in THOMAS GILPIN, *EXILES IN VIRGINIA* 61-63, 118-19 (1848). These papers contained information about troop strength, movements and other military information. The source of these documents allegedly was a Quaker meeting in Spanktown, New Jersey. The validity of these documents is open to question. The Spanktown Quaker meeting may not have even existed, and the documents appear to be dated before some of the reported events had occurred. See ARTHUR J. MCKEEL, *THE RELATION OF THE QUAKERS TO THE AMERICAN REVOLUTION* 178 (1979). Whether legitimate or fraudulent, these documents served as the catalyst for the subsequent actions by Congress and the Pennsylvania authorities.

<sup>20</sup> Congressional Report (Aug. 28, 1777), reprinted in GILPIN, *supra* note 19, app. at 261.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*, reprinted in GILPIN, *supra* note 19, app. at 262. Delaware was included in this initial recommendation.

<sup>23</sup> *Id.*

ed that the other states "apprehend and secure all persons, as well among the people called Quakers as others, who have in their general conduct and conversation evidenced a disposition inimical to the cause of America . . ."<sup>24</sup> Congress cited no facts, evidence or proof justifying the proposed seizure of any individuals by the other states.

The absence of proof, or even specific allegations, of conduct supporting the British was particularly significant in the context of the Quaker religion's doctrine on war. Many Quakers refused to support the American war effort, and many were at least sympathetic to the British cause.<sup>25</sup> There can be little doubt that some Quakers opposed the Revolution because it threatened their economic and political self-interest.<sup>26</sup> But there also can be no doubt that, for many, opposition to the hostilities derived from a commitment to pacifism rooted in religious doctrine that militated against active support for either side in the war.<sup>27</sup> Failure to support the American mili-

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<sup>24</sup> *Id.*, reprinted in GILPIN, *supra* note 19, app. at 262.

<sup>25</sup> The response of Quakers to the hostilities was far from uniform. A small number of Quakers fought on the American side. See 2 RAMSAY, *supra* note 18, at 628. On occasion, Quakers cared for injured or wounded combatants. On the other hand, Philadelphia Quakers refused to provide supplies, such as blankets, for use by the American army. See, e.g., Letter from Philip Schuyler to John Pemberton (May 17, 1777), in 7 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, at 89-90 (Paul H. Smith ed., 1981); Letter from Philip Schuyler to George Washington (May 18, 1777), in 7 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, *supra*, at 90.

<sup>26</sup> See *infra* note 45 and accompanying text. Criticism of the Quakers' material success was not uncommon in the 1770s. For example, on the eve of the Revolution, the committeemen of the Pennsylvania Assembly issued a petition stating "that People *sincerely* and *religiously* scrupulous are but few in Comparison to those who upon this Occasion, as well as others, make *Conscience a Convenience*" and "[a] very considerable Share of the Property of this Province is in the Hands of People professing to be of tender Conscience in military Matters." JACK D. MARIETTA, THE REFORMATION OF AMERICAN QUAKERISM, 1748-1783, at 227 (1984).

<sup>27</sup> The Pennsylvania Constitution adopted in September 1776 provided expansive protection for the exercise of religious beliefs:

That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding . . . [n]or can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments . . . [a]nd that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case



tary effort did not necessarily translate into active support for the British.

This idea was rejected by supporters of the seizures, who accused the Quakers of hypocritically hiding their support of the King behind claims of Christian doctrine.<sup>28</sup> For example, General Sullivan condemned Quakers in his letter conveying the Spanktown Papers to Congress: "The paper Referred to puts it beyond Doubt . . . That those people under pretence of worshipping the Deity Employ their time in Collecting Intelligence for the Enemy . . . being always Covered with that Hypocritical Cloak of Religion under which they have with Impunity So Long Acted . . ." <sup>29</sup>

By August 31, 1777, Congress had conveyed its recommendations to the Pennsylvania Council, which quickly appointed twenty-five men, "together with such other persons as they shall call to their assistance,"<sup>30</sup> to arrest "such persons as are deemed inimical to the cause of American liberty."<sup>31</sup> The Council's order expanded to forty-one the number of individuals

interfere with, or in any manner controul, the right of conscience in the free exercise of religious worship.

PENN. CONST. of 1776, Declaration of Rights, art. II, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS 3082 (Francis Newton Thorpe ed., 1909).

<sup>28</sup> *See, e.g.*, Letter from Henry Laurens to John Lewis Gervais (Sept. 5, 1777), *in* 7 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, *supra* note 25, at 614 ("The calling God who is the fountain of truth, or the quoting his Holy Scriptures, which are the Oracles of Truth, to witness a Lie, or any Species of deceit is blasphemy. And to such men as we have in view it may very fairly be retorted 'they wrest the holy Scriptures to their own damnation.'").

<sup>29</sup> Letter from John Sullivan to John Hancock (Aug. 25, 1777), *in* 1 LETTERS AND PAPERS OF MAJOR-GENERAL JOHN SULLIVAN, CONTINENTAL ARMY 443-44 (1930).

<sup>30</sup> Pennsylvania Council, Minutes of the Supreme Executive Council of the Commonwealth of Pennsylvania (Sept. 1, 1777), *reprinted in* GILPIN, *supra* note 19, app. at 263. In this passage, the council's order, dated September 1, 1777, seems equivalent to the hated writs of assistance employed by British law enforcers in the decades leading up to the Revolution. Those writs permitted private citizens who enlisted to assist in enforcement of the writs. *See, e.g.*, M.H. SMITH, THE WRITS OF ASSISTANCE CASE 29 (1978) ("It was not new in England that a generality of persons, public and private alike, should be obligated to assist in the enforcement of law and the promotion of good order.").

<sup>31</sup> Pennsylvania Council, *supra* note 30, *reprinted in* GILPIN, *supra* note 19, app. at 263.

identified for seizure but also failed to specify instances of wrongdoing or present evidence supporting the charges of disloyalty. Exercising a level of discretion that today would be labeled as arbitrary, the Council's agents seized people they suspected of being British sympathizers and incarcerated them in Philadelphia's Mason's Lodge.<sup>32</sup>

The arrestees immediately sent the Pennsylvania Council and the Congress a series of written protests that they called remonstrances, in which they argued that their seizures violated both their natural rights and rights protected by the Pennsylvania state constitution, which had been adopted only twelve months earlier.<sup>33</sup> Of particular relevance here, Section X of the Pennsylvania Constitution's Declaration of Rights limited searches and seizures in language that foreshadowed the Fourth Amendment:

That the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure, and therefore warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are contrary to that right, and ought not to be granted.<sup>34</sup>

The captives argued vehemently that the Council's order violated the natural rights of "freemen"<sup>35</sup> and was a "general

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<sup>32</sup> Pennsylvania Council, Minutes of the Supreme Executive Council of the Commonwealth of Pennsylvania (Sept. 2, 1777), reprinted in GILPIN, *supra* note 19, app. at 264 (describing searches and seizures in "official" reports).

<sup>33</sup> See *infra* notes 35-37 and accompanying text.

<sup>34</sup> PENN. CONST. of 1776, Declaration of Rights, art. X, reprinted in 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 27, at 3083.

<sup>35</sup> This analysis found consistent rights and rules in the new state constitution, natural law, English common law and tradition:

We apprehend that no man can be lawfully deprived of his liberty without a warrant from some persons having competent authority, specifying an offence against the laws of the land, supported by oath or affirmation of the accusers, and limiting the time of his imprisonment, until he is heard, or legally discharged, unless the party be found in the actual perpetration of a crime. Natural justice, equally with law, declares that the party accused should know what he is to answer to, and have an oppor-

warrant<sup>36</sup> expressly prohibited by the new Pennsylvania Constitution from which the Council “derive[d] all your authority and power.”<sup>37</sup> The order gave the “messengers” executing it “unprecedented . . . latitude,” authorizing them “to search all papers belonging to us, upon a bare possibility that something political may be found, but without the least ground for a suspicion of the kind.”<sup>38</sup> It required the seizure of Quakers’ papers, “without limiting the search to any house or number of houses, under colour of which every house in the city might be broken open.”<sup>39</sup> The order permitted indefinite detention “without interposing a judicial officer between the parties and the messenger.”<sup>40</sup> The Quakers concluded (with a rhetorical flourish consistent with the hyperbolic political style common to the era) that the “warrant . . . [was] a more flagrant violation of every right which is dear to freemen, than any act which is to be found in the records of the English Constitution.”<sup>41</sup>

No student of the history of English searches and seizures would be likely to agree that the Council’s order was as unique as the Quakers claimed, but the order did contain terms likely

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tunity of showing his innocence.

Letter from Arrestees at Philadelphia Freemasons’ Lodge to the President and Council of Pennsylvania (Sept. 4, 1777), *reprinted in* GILPIN, *supra* note 19, at 78 (citing both sections IX and X of the state constitution in a remonstrance).

<sup>36</sup> The captives’ correspondence and petitions make the same points repeatedly. The order authorizing their seizure was

a general warrant, specifying no manner of offence against us, appointing no authority to hear and judge whether we were guilty or innocent, nor limiting any duration to our confinement. Nor was this extraordinary warrant more exceptionable in these respects, than in the powers given to the messengers to break and search not only our own, but all the houses their heated imaginations might lead them to suspect.

Arrestees at Philadelphia Freemasons’ Lodge, *An Address to the Inhabitants of Pennsylvania* (1777) [hereinafter *Address to Inhabitants*], *reprinted in* GILPIN, *supra* note 19, at 88.

<sup>37</sup> Letter from Israel Pemberton, John Hunt and Samuel Pleasants to the President and Council of Pennsylvania (Sept. 4, 1777), *reprinted in* GILPIN, *supra* note 19, at 75.

<sup>38</sup> Letter from Arrestees at Philadelphia Freemasons’ Lodge, *supra* note 35, *reprinted in* GILPIN, *supra* note 19, at 79.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*, *reprinted in* GILPIN, *supra* note 19, at 79-80.

<sup>41</sup> *Id.*

to strike the contemporary reader as unusual.<sup>42</sup> In response to the early remonstrances from the captives, and at the urging of Congress, the Pennsylvania Council gave a majority but not all of the Quakers the opportunity to avoid formal seizure by swearing an oath of loyalty to Pennsylvania and agreeing to confine themselves voluntarily in their homes and promising not to correspond with the enemy.<sup>43</sup> A number of Quakers complied with these conditions and were released or exempted from captivity, reducing the population of prisoners to twenty.<sup>44</sup>

If this appears to be special treatment, it was. Many of those in custody were prominent and influential not only within the Quaker community, but also within the larger world of Pennsylvania business and politics. Congress recognized that these were not ordinary criminals to be tossed into a Pennsylvania prison.<sup>45</sup> In its initial recommendation that the Pennsyl-

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<sup>42</sup> The most comprehensive history of the subject remains William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning, 602-1791* (1990) (unpublished Ph.D. dissertation, Claremont Graduate School).

<sup>43</sup> Letter from T. Matlack, Secretary, to the Inhabitants of Pennsylvania (Sept. 9, 1777), reprinted in GILPIN, *supra* note 19, at 111-12. The oath or affirmation prepared by the council stated: "I do swear (or affirm) that I will be faithful and bear true allegiance to the Commonwealth of Pennsylvania, as a free and independent State." Letter from Timothy Matlack, Secretary, to William Bradford (Sept. 5, 1777), reprinted in GILPIN, *supra* note 19, at 85.

<sup>44</sup> Seventeen were Quakers, three were not. Congressional Resolution (Sept. 8, 1777), reprinted in GILPIN, *supra* note 19, at 42.

<sup>45</sup> Before the Quakers reformed the Pennsylvania prison system, prisons were overcrowded, all prisoners were indiscriminately housed in the same rooms (i.e., there was no separation between the sexes or between different types of criminals) and alcohol was freely sold. In 1788, the Society of Friends sent an account to the Pennsylvania legislature detailing these defects in the prison system and advocating, most importantly, "solitary confinement [and] hard labour." HARRY ELMER BARNES, *THE EVOLUTION OF PENOLOGY IN PENNSYLVANIA 86-87* (1968). In their reforms,

[t]he Friends introduced rigid severity into the prison for those who had forfeited the right to benevolent clemency. Just as mildness was to be a persuasive factor in the reform of the budding criminal, so was drastic solitary confinement to deter by its rigors the dense and calloused malefactor from further crime.

ORLANDO F. LEWIS, *THE DEVELOPMENT OF AMERICAN PRISONS AND PRISON CUSTOMS, 1776-1845*, at 38 (Patterson Smith 1967) (1922). The Quakers developed the Walnut Street Jail in 1795, which was a reformed prison system that espoused the Quaker imprisonment ideals. In advocating this system, the Society of Friends

vania authorities seize Quakers, Congress resolved "that the persons so seized be confined in such places and treated in such manner as shall be consistent with their respective characters and the security of their persons."<sup>46</sup> Similarly, although the Pennsylvania Council viewed their task as arresting "persons dangerous to the state,"<sup>47</sup> the Pennsylvania authorities also concurred that people of the detainees' social status deserved extra considerations: "Congress recommends it, and we wish to treat men of reputation with as much tenderness as the security of their persons and papers will admit. . . . [the] Council would not without necessity commit many of the persons to the common jail or even to the state prison."<sup>48</sup>

Here we discover one of the profound differences between the "profiling" of these Quakers and profiling observed in later cases. These men were not members of a minority of the weak and disenfranchised. These men were prominent in the business, political and religious lives of the new nation's leading city.

This prominence should not, however, be confused with universal popularity. The correspondence from several members of Congress reveals an anti-Quaker animus that appears, at least in some instances, to reflect prejudice against the group. The letters of two of the leading revolutionaries, who also were members of the committee of three appointed by Congress to determine whether Philadelphia Quakers should be seized, are revealing. An example of the more vitriolic language maligning Quakers appears in a letter from John Adams to his wife, Abigail:

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urged the Legislature that "solitary confinement to hard labor and a total abstinence from spirituous liquors will prove the means of reforming these unhappy creatures." BLAKE MCKELVEY, *AMERICAN PRISONS: A STUDY IN AMERICAN SOCIAL HISTORY PRIOR TO 1915*, at 5-6 (Patterson Smith 1968) (1936).

<sup>46</sup> Congressional Report (Aug. 28, 1777), reprinted in GILPIN, *supra* note 19, app. at 262.

<sup>47</sup> Pennsylvania Council, *supra* note 30, reprinted in GILPIN, *supra* note 19, app. at 263 (emphasis omitted).

<sup>48</sup> Pennsylvania Council, Order (Aug. 31, 1777), reprinted in GILPIN, *supra* note 19, at 72-73; see also Letter from Timothy Matlack, Secretary, to William Bradford (Sept. 4, 1777), reprinted in GILPIN, *supra* note 19, at 77; Address to Inhabitants, *supra* note 36, reprinted in GILPIN, *supra* note 19, at 90.

You will see by the Papers inclosed, that We have been obliged to attempt to humble the Pride of some Jesuits who call themselves Quakers, but who love Money and Land better than Liberty or Religion. The Hypocrites are endeavouring to raise the Cry of Persecution, and to give this Matter a religious Turn, but they cant succeed. The World know them and their Communications. Actuated by a land jobbing Spirit, like that of William Penn, they have been soliciting Grants of immense Regions of Land on the Ohio. American Independence has disappointed them, which makes them hate it.<sup>49</sup>

In a letter to Patrick Henry, Richard Henry Lee's language was a bit more measured in tone, but its substance was as caustic:

The Quaker m[otto] ought to be "Nos turba sumus" for if you attack one, the whole Society is roused. You will see by the inclosed *Testimonies* a uniform, fixed enmity to American measures, which with the universal ill fame of some capital persons, has occasioned the arrest of old Pemberton and several others, to prevent their mischievous interposition in favor of the enemy at this critical moment when the enemies army is on its way here . . . They have taken infinite pains, according to custom, to move heaven and earth in their favor, and have transmitted copies of their indecent remonstrances over the Country. . . This day Congress have proposed that the Quaker Tories should be sent forthwith to Stanton in Augusta, I hope you will have them well secured there for they are mischievous people.<sup>50</sup>

Whether deserved or not, Adams's and Lee's hostility towards the Philadelphia Quakers was palpable, and seems to exemplify the attitudes that would lead to "profiling" of a disliked religious minority during a time of crisis. Nonetheless, this was not a powerless minority like slaves or immigrants. The readiness, in some cases the eagerness, of leaders of the

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<sup>49</sup> Letter from John Adams to Abigail Adams (Sept. 8, 1777), in 7 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, *supra* note 25, at 627.

<sup>50</sup> Letter from Richard Henry Lee to Patrick Henry (Sept. 8, 1777), in 7 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, *supra* note 25, at 637.

national and state governments to seize men of social and economic significance without regard to accepted legal requirements only emphasizes how government can act against any minority identifiable with the adversary in times of crisis. Facing an extraordinary threat, the Founders were willing to employ extraordinary measures against powerful members of the larger society. That the government conduct was justified by the crisis is a theme repeated throughout the documentary record of these events.<sup>51</sup>

Congress's initial recommendation that the Pennsylvania Council seize Quakers, for example, began with an instrumentalist justification:

Whereas the States of Pennsylvania and Delaware are threatened with an immediate invasion from a powerful army, who have already landed at the head of Chesapeake Bay; and whereas the principles of policy and self-preservation require that all persons who may reasonably be suspected of aiding or abetting the cause of the enemy may be prevented from pursuing measures injurious to the general weal . . . .<sup>52</sup>

Correspondence from members of Congress sounded the same theme. Henry Laurens of South Carolina defended the peremptory seizures: "If the Law of necessity will not justify us in the Act of confining notorious Enemies of the State when that State is actually invaded . . . ?"<sup>53</sup> James Lovell of Massachusetts argued that "the Safety of the Union called for it."<sup>54</sup> Not surprisingly, John Adams penned an emotional, yet eloquent, description of the crisis:

The Moments are critical here. We know not, but the next will bring Us an Account of a general Engagement begun—and when once begun We know not how it will end, for the Battle is not always to the strong. The Events of War are

<sup>51</sup> See, e.g., GILPIN, *supra* note 19.

<sup>52</sup> Congressional Resolution (Aug. 25, 1777), reprinted in GILPIN, *supra* note 19, app. at 259.

<sup>53</sup> Letter from Henry Laurens to John Lewis Gervais (Sept. 5, 1777), in 7 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, *supra* note 25, at 612-13.

<sup>54</sup> Letter from James Lovell to Joseph Trumbull (Sept. 7, 1777), in 7 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, *supra* note 25, at 625.

uncertain. All that We can do is to pray, as I do most devoutly, that We may be victorious—at least that We may not be vanquished. But if it should be the Will of Heaven that our Army should be defeated, our Artillery lost, our best Generals kill'd, and Philadelphia fall into Mr. Howes Hands, still America is not conquered.<sup>55</sup>

Within days of their initial seizures, the twenty remaining captives were carried against their will out of Philadelphia to Virginia, where they were held in custody for nearly eight months. Throughout this extended captivity, the Quakers, along with family members and supporters, repeatedly petitioned Congress and the Pennsylvania Council for their release.<sup>56</sup> Over time, these pleas gained strength from three developments.

First, by spring 1778, General Howe had evacuated his troops from Philadelphia, where they had spent a more comfortable winter than the rebel army suffering at Valley Forge, and had begun his initial actions in the campaign of 1778. The military crisis used to justify the seizures had abated.

Second, two of the Quaker prisoners died while in captivity in Virginia. Both deaths occurred in March 1778, and within weeks the survivors were released. The first death resulted in part from the relative leniency of their captivity. While in Virginia, the exiles were not confined to a jail or prison. They were housed in private residences and, although suffering the indignity of being forced to pay for their own food and lodging,<sup>57</sup> the conditions of captivity were relatively civilized.<sup>58</sup> They

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<sup>55</sup> Letter from John Adams to Abigail Adams (Sept. 8, 1777), in 7 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, *supra* note 25, at 627.

<sup>56</sup> For examples of the persistent efforts by the prisoners, their families and their supporters to persuade Congress and the Council to order their release, see GILPIN, *supra* note 19, at 82-88, 125-26, 198-200, 209, 216, 221-23, 229-30, app. at 279-81.

<sup>57</sup> Pennsylvania Council, Minutes of the Supreme Executive Council of the Commonwealth of Pennsylvania (Apr. 6, 1778), reprinted in GILPIN, *supra* note 19, app. at 279 ("Ordered, That the whole expense of arresting and confining the prisoners sent to Virginia, the expenses of their journey, and all other incidental charges, be paid by the said prisoners." (emphasis omitted)).

<sup>58</sup> This did not preclude Quaker petitions complaining about the conditions of confinement. See, e.g., The Journal of the Friends in Exile in Virginia (Nov. 2,



were allowed to receive and entertain visitors<sup>59</sup> and for much of their captivity were allowed to take long walks<sup>60</sup> and even ride horses in the neighboring countryside.<sup>61</sup>

While on a walk in early February 1778, Thomas Gilpin caught a cold from which he never recovered. His condition worsened for nearly a month, and he died on March 2, 1778. Gilpin's death added to the continuing pressure for release of the prisoners because their captivity now could be characterized as so inhumane that it had caused the death of a man held in custody on but flimsy charges and who had never been given a hearing on the charges or the legitimacy of his seizure. On March 16th, two weeks after Gilpin's death, Congress (which having fled Philadelphia itself was sitting in Yorktown) passed a resolution calling on the Pennsylvania Council to arrange for the release of the prisoners.

The Council did not act immediately, and another death occurred before the prisoners were freed. John Hunt suffered a disease that required amputation of his leg, a terrible procedure in a time before surgical anesthetics. The surgery took place on March 22nd, and he was dead by March 31st. By the second week of April 1778, the Council responded to continuing pressure, including Congress's resolution, and commenced the process by which the prisoners would be released.<sup>62</sup> On April 10, 1778, the Council "read and considered" a petition from the prisoners' relatives and friends written after Gilpin's death (but

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1777), reprinted in GILPIN, *supra* note 19, at 182 ("We have experienced great inconvenience at being very much crowded at our landlord's . . ."). Many of the complaints had to do with the cost of being forced to pay for their own imprisonment. *Id.*

<sup>59</sup> *Id.*, reprinted in GILPIN, *supra* note 19, at 175.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* Three of the original prisoners were not Quakers. In mid-February 1778, one of them, Thomas Pike, simply rode off from Winchester, presumably to return to Philadelphia. James Pemberton wrote a rather laconic account of the event: "In the evening, I had cause to suspect that Thomas Pike had eloped, having left us this morning under a pretence of going to Isaac Zane's ironworks, and were informed he did not go there." *The Journal of the Friends in Exile in Virginia* (Feb. 16, 1778), reprinted in GILPIN, *supra* note 19, at 208.

<sup>62</sup> Pennsylvania Council, Minutes of the Supreme Executive Council of the Commonwealth of Pennsylvania (Apr. 8, 1778), reprinted in GILPIN, *supra* note 19, at 218-19.

before they could have learned of Hunt's demise). The petition is representative of many of the pleas sent on the prisoners' behalf over the months of their captivity:

We, the afflicted and sorrowful wives, parents, and near connexions of the Friends in banishment, at and near Winchester, think ourselves bound by the strongest ties of natural affection, sympathy, and regard, to request you, that you suffer Christian charity and compassion so far to prevail in your minds as to take off the bonds of those innocent and oppressed Friends, and entreat you not let the ruin of such . . . to lie at the door of a people professing the tender and compassionate religion of Christ . . . .

The melancholy account we have lately received, of the indisposition of our beloved husbands and children, and that the awful messenger—death—had made an inroad on one of their number, (Thomas Gilpin,) to the unspeakable grief and irreparable loss of an amiable wife and children, hath deeply affected our minds, and divers of our families are in a distressed situation. We therefore ardently desire you to make the case your own. . . .<sup>63</sup>

One could understand if Congress and the Council were tempted to terminate the Quakers' captivity simply to obtain relief from these relentlessly verbose and self-righteous petitions. But there was another, more important, reason to release the prisoners. Once the crisis had abated and the imprisonment had become more distasteful with the deaths of the two Quakers,<sup>64</sup> objections to these incarcerations and the precedent they established became more effective than they had been earlier in the crisis. These objections had been raised not only by the captives' family and friends, but also by some political and military leaders. In some of them, one senses a concern that if government could subject these Quakers to lawless seizures,

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<sup>63</sup> Letter from the Prisoners' Relatives and Friends to the Congress, Board of War, President and Council, and Assembly of Pennsylvania (Apr. 10, 1778), reprinted in GILPIN, *supra* note 19, app. at 279-80.

<sup>64</sup> The captives themselves believed that it was "more than probable" that the two deaths helped prompt the political authorities to grant their relief. See *The Journal of the Friends in Exile in Virginia* (Apr. 13, 1778), reprinted in GILPIN, *supra* note 19, at 220.

then anyone—even members of Congress—could be next.

We have no transcripts of the congressional debate about the seizure of Quakers, but letters written by members reveal that objections were raised to the plan from the beginning. For example, only days after Congress approved the seizures recommended by its committee of three, Henry Laurens complained about the length of the congressional debate:

Five hours debating one Silly point whether certain persons chiefly Quakers who have given the Strongest proofs which in these times can be expected of their avowed attachment to the cause of our Enemies, who have peremptorily refused to take an Oath or affirmation of Allegiance to the State or to give a parol to the Executive power, should have a hearing in their own defence.<sup>65</sup>

Congressman Lauren's position was clear. The evidence implicating the Quakers was sufficient in the context of the military crisis to cast the Quakers as enemies, so no hearing to judge the validity of the charges was necessary, and debating the issue was a waste of time. But it is evident that other members of Congress disagreed. In the midst of a military crisis they treated the question of the captives' legal rights as important enough to devote five precious hours to debating the issue. And that was not the end of the congressional debate.

In a letter written a week later, Congressman Henry Laurens stressed the time pressure facing Congress. "Genl Howe . . . must be stopped this night or tomorrow morning he will be on our Skirts. We are all now talking of adjourning to the Country."<sup>66</sup> Nonetheless, the previous day Congress again had spent hours debating the plan to incarcerate the Quakers and other "disaffected" people:

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<sup>65</sup> Letter from Henry Laurens to John Lewis Gervais (Sept. 5, 1777), in 7 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, *supra* note 25, at 612. It is reasonable to infer that the debate occurred on August 28, 1777, the day the committee of three's seizure recommendations were approved.

<sup>66</sup> Letter from Henry Laurens to John Lewis Gervais (Sept. 9, 1777), in 7 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, *supra* note 25, at 636. Congress did flee Philadelphia, eventually settling in Yorktown for much of its period of exile.

It was mortifying to sit from 11 o'clock to ½ past 6 without respite, spend four hours of that time wrangling a point which I think had employed us five days before . . . the business relative to the Quakers & other self disaffected, where it might have been ended & in the manner in which it ought to have been ended in five minutes from the very outset, by recommending to confine at an appointed place Stanton in Virginia, all the mischievous & active ones who shall refuse to take the Oath or affirmation of Allegiance to the State.<sup>67</sup>

Yet even at the moment of crisis, Congressman Laurens, who had called the congressional debate “silly,”<sup>68</sup> acknowledged the dangerous precedent this action represented. “You know Men have been Seized & confined because their going at large was judged by the Executive power to be dangerous to the State. A dangerous Rule I confess this would be in days of tranquility, but you well know it is absolutely necessary for the Safety of each State in our present Circumstances.”<sup>69</sup>

Once the “present circumstances” had changed, concerns about the seizures prevailed, and by mid-April, the remaining Virginia exiles had begun the journey back to Philadelphia. On April 27, 1777, the Council (which had fled Philadelphia and was meeting in Lancaster) “discharged” them from captivity.<sup>70</sup>

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<sup>67</sup> *Id.*, in 7 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, *supra* note 25, at 633. It is difficult to determine the number of congressmen on each side of the debate. Laurens wrote, for example, “You will be again surprized when I tell you that during the important debates on the Subjects of borrowing money & removing Enemies from our bosoms we have Seldom seen more than twenty members upon the floor, & more than once, business has been interrupted by want of members (9 States) to make a Congress.” *Id.*, in 7 Letters of Delegates to Congress, 1774-1789, *supra* note 25, at 634. Despite his apparent disgust at the time spent on the issue, in another letter even Laurens faulted Congress for acting “upon the spur of the occasion. All these & many better things ought to have been done if necessary, with more deliberation & consequently with more decency.” See Letter from Henry Laurens to Lachlan McIntosh (Sept. 1, 1777), in 7 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, *supra* note 25, at 586 (referring, apparently, to seizure and exile of other political figures as well as seizure of Quakers and their papers).

<sup>68</sup> See *supra* note 65 and accompanying text.

<sup>69</sup> Letter from Henry Laurens to John Lewis Gervais (Sept. 5, 1777), in 7 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, *supra* note 25, at 613.

<sup>70</sup> See Pennsylvania Council, Minutes of the Supreme Executive Council of the

The events surrounding their release provided the captives with evidence of opposition from leaders outside Quaker circles. For example, on their journey from Virginia back to Philadelphia they met with General Gates, who reportedly told them “[i]f I had been in Philadelphia at the time of your being arrested and sent into exile, I would have prevented it.”<sup>71</sup>

Perhaps the most direct evidence of worries about the precedent established by the seizures is expressed in a letter sent by the Council to Congress in March, more than a month before the captives’ release. The Council requested that Congress authorize the prisoners’ release because the crisis in Philadelphia had eased and because “the dangerous example which their longer continuance in banishment may afford on future occasions has already given uneasiness to some good friends to the independency of these States.”<sup>72</sup>

This letter seems to capture the Founders’ position on “profiling”—here based on religion—as a justification for searches and seizures in a time of crisis. Faced with a direct threat to the survival of the fledgling nation, national and state political leaders were willing to conduct searches and seizures in violation of common law precedents and written constitutional rules requiring adequate particularized suspicion, an oath or affirmation, and decision making by a neutral magistrate. They were willing to confine people for extended periods of time without a hearing, primarily because the captives were members of a particular religious minority believed to favor the enemy.

Yet all of this was not done easily or without debate. Even at the height of the crisis, members of Congress objected to

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Commonwealth of Pennsylvania (Apr. 27, 1778), reprinted in GILPIN, *supra* note 19, at 231.

<sup>71</sup> The Journal of the Friends in Exile in Virginia (Apr. 19, 1778), reprinted in GILPIN, *supra* note 19, at 227. One of the group’s leaders, Israel Pemberton, asserted that, by the time of their release, “we have at length obtained from the Council a tacit acknowledgment of the injustice of our banishment . . . .” *Id.*, reprinted in GILPIN, *supra* note 19, at 199.

<sup>72</sup> Minutes of the Continental Congress (March 10, 1778), reprinted in GILPIN, *supra* note 19, app. at 277 (emphasis omitted) (quoting a letter from the Executive Council of Pennsylvania).

government conduct violating the Quakers' procedural and substantive legal rights. Once the crisis had eased—not ended, because the war dragged on for another half decade—national and state leaders hurried to end the worrisome precedent. As much as these events might suggest that the Founders were cavalier about rules against unwarranted searches and seizures, they also reveal a powerful commitment to rules protecting liberty from government overreaching.

These events support the conclusion that in times of profound crisis “profiling happens.” But that is not the only lesson. Another is that advocacy on behalf of the captives' rights affected the course of events. Unlike the Japanese-American detainees who were held captive until the end of World War II, the Virginia exiles were not held in custody for the remaining years of the conflict, although the war was being waged on American soil, not thousands of miles away. The Quakers' relatively quick release is attributable, in part, to the relentless efforts by the captives and their supporters to persuade political leaders that the seizures violated fundamental rights: freedom of religious belief, the right to due process and the right to be free from arbitrary and unjustified seizures. The scope of the latter right was at the heart of the most savage “profiling” in the nation's history.

### III. RUNAWAY SLAVES

If racial profiling “concerns the invidious use of race or ethnicity as a criterion in conducting stops, searches and other law enforcement investigative procedures,”<sup>73</sup> it is hard to imagine a cruder example than the one contained in this nineteenth century advertisement offering rewards for the capture of runaway slaves:

\$300 REWARD is offered for the apprehension of negro woman, REBECCA JONES and her three children, and man ISAIAH, belonging to W.W. Davidson, who have disappeared since the 20th inst. The above reward will be paid for the apprehension and delivery of the said Negroes to my Jail, by

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<sup>73</sup> Guidance, *supra* note 2.

the attorney in fact of the owner, or the sum of \$250 for the man alone, or \$150 for the woman and three children alone.  
 feb. 1 WM. W. HALL, for the Attorney<sup>74</sup>

This description of the fugitives literally describes every Negro man, woman and child. Consider just a few of the omitted details: age, height, weight, gender of the children and any other identifying physical characteristics. Race is the only essential criterion for becoming a suspect. All Negro men, women and children were potential suspects and potential victims of seizures by slave hunters.

The history of slavery in this country supplies numerous examples of advertisements for runaways.<sup>75</sup> Many, perhaps most, included more descriptive details than did the one offering a reward for Rebecca Jones.<sup>76</sup> But it is unnerving to read

<sup>74</sup> Runaway Slave Advertisement (Feb. 1, 1856), *reprinted in* WILLIAM STILL, *THE UNDERGROUND RAILROAD* 337 (Johnson Publishing Co., Inc. 1970) (1871).

<sup>75</sup> See JOHN HOPE FRANKLIN & LOREN SCHWENINGER, *RUNAWAY SLAVES* app. 1, at 297-300, app. 7, at 328-32 (1999) (showing examples of runaway slave advertisements and a table depicting number of ads in selected newspapers in various states); 1 *RUNAWAY SLAVE ADVERTISEMENTS: A DOCUMENTARY HISTORY FROM THE 1730S TO 1790* (Lathan A. Windley ed., 1983) (giving compilation of runaway slave advertisements from Virginia and North Carolina); *STEALING A LITTLE FREEDOM: ADVERTISEMENTS FOR SLAVE RUNAWAYS IN NORTH CAROLINA, 1791-1840* (Freddie L. Parker ed., 1994); STILL, *supra* note 74; Runaway Slave Notice (1854), *reprinted in* WILLIAM H. WILLIAMS, *SLAVERY AND FREEDOM IN DELAWARE, 1639-1865*, at 164 (1996) (showing example of a runaway slave notice).

<sup>76</sup> See Runaway Slave Advertisement, N.C. MINERVA & RALEIGH ADVERTISER, Oct. 25, 1816, *reprinted in* FRANKLIN & SCHWENINGER, *supra* note 75, at 209 (advertising search for "a NEGRO MAN, named FRANK, pretty stout, one strait scar on his cheek passing from the under part of the ear towards the corner of the mouth, of a common dark color, something of a flat nose, a short, round chin, and a down look, about 26 or 27 years of age. Had on, brown yarn homespun Pantaloons, striped homespun waistcoat, and a white yarn round-about."); Runaway Slave Advertisement, *THE STAR* (Raleigh), Jan. 10, 1811, *reprinted in* *STEALING A LITTLE FREEDOM: ADVERTISEMENTS FOR SLAVE RUNAWAYS IN NORTH CAROLINA, 1791-1840*, *supra* note 75, at 398 (advertising search for a runaway named Jack, stating, "he is of a middle size, about five feet five or six inches high, and about 30 years of age; he has a down look, speaks slow when spoken to, and the whites of his eyes are inclined to be red, has a surley look and is considerably knock-kneed. His dress, when he went away, consisted of a pair of mixt pantalons, a blue broad cloth waistcoat, and a short coat made of Negro cotton dyed brown, and a cotton shirt."); Runaway Slave Advertisement, VA. GAZETTE, Oct. 15-22, 1736, *reprinted in* 1 *RUNAWAY SLAVE ADVERTISEMENTS: A DOCUMENTARY HIS-*

advertisement after advertisement containing descriptions that would permit slave catchers extraordinary discretion in their seizures of alleged runaways. Even when advertisements included descriptions, the details often were too general to provide anything recognizable as “particularized suspicion.” For example:

\$200 REWARD.—Ran away from the subscriber, living on the York Turnpike, eight miles from Baltimore city, on Sunday, April 11th, my negro man, JACOB, aged 20 years: 5 feet 10 inches high; chestnut color; spare made; good features. I will give \$50 reward if taken in Baltimore city or county, and \$200 if taken out of the State and secured in jail so that I get him again.

WM. J. B. PARLETT<sup>77</sup>

RAN AWAY—\$500 REWARD.—Left the Tobacco Factory of the subscriber, on the 14th inst., on the pretence of being sick, a mulatto man, named ELIJAH, the property of Maj. Edward Johnson, of Chesterfield county. He is about 5 feet 8 or 10 inches high, spare made, bushy hair, and very genteel appearance; he is supposed to be making his way North. The above reward will be paid if delivered at my factory.

RO. J. CHRISTIANS.<sup>78</sup>

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TORY FROM THE 1730S TO 1790, *supra* note 75, at 1 (describing runaway Will as “a lusty well-set Fellow, with a yellow Complexion; one of his middle Fingers has been hurt, and so by that Means is larger than the other; he has a large Scar on the Top of one of his Feet. Had on, when he went away, an Oznabrig Shirt, a Pair of Crocus Breeches, a Manx-cloth Wastcoat, and a Worsted Cap”); Runaway Slave Advertisement (April 18, 1857), *reprinted in* STILL, *supra* note 74, at 115 (describing Richard, a runaway, as “thirty years old, but looks older; very short legs, dark, but rather bright color, broad cheek bones, a respectful and serious manner, generally looks away when spoken to, small moustache and beard (but he may have them off). He is a remarkably intelligent man, and can turn his hand to anything. He took with him a bag made of Brussels carpet, with my name written in large, rough letters on the bottom, and a good stock of coarse and fine clothes, among them a navy cap and a low-crowned hat.”); Runaway Slave Advertisement (1854), *reprinted in* WILLIAMS, *supra* note 75, at 164 (describing runaway as having “rather trim buil[d] . . . thin lips, white teeth, rather flat nose, white eyes and rather blacker than ordinary” and wearing a “dark Cassimere dress frock coat”).

<sup>77</sup> Runaway Slave Advertisement, BALTIMORE SUN, 1858, *reprinted in* STILL, *supra* note 74, at 476.

<sup>78</sup> Runaway Slave Advertisement, 1857, *reprinted in* STILL, *supra* note 74, at



\$300 REWARD.—Ran away from the subscriber, from the neighborhood of Town Point, on Saturday night, the 24th inst., my negro man, AARON CORNISH, about 35 years old. He is about five feet ten inches high, black, good-looking, rather pleasant countenance, and carries himself with a confident manner. He went off with his wife, DAFFNEY, a negro woman belonging to Reuben E. Phillips. I will give the above reward if taken out of the county, and \$200 if taken in the county; in either case to be lodged in Cambridge Jail.

October 25, 1857

LEVI D. TRAVERSE<sup>79</sup>

Although containing more details than the advertisement for Rebecca Jones, it is important to recognize how much latitude these descriptions provided to slave catchers. The most significant identifying characteristic in these advertisements is skin color: “chestnut color,” “mulatto,” “black.” Although nuances of pigmentation were important in a world of race-based slavery,<sup>80</sup> each of these hues was exhibited by many people, and observers might disagree about which nuanced classification applied to a particular person. The age, height and build (spare made) estimates also described many people. The other

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157. One really must marvel at the slave owner’s credulity. If the topic were not so awful, it would almost be quaint to read that Elijah escaped “on the pretence of being sick.” One doubts the pretense and assumes that Elijah was sick of being a slave. Similarly, it took little insight to arrive at the unremarkable conclusion that the runaway is “supposed to be making his way North.”

<sup>79</sup> Runaway Slave Advertisement, CAMBRIDGE DEMOCRAT, Nov. 4, 1857, reprinted in STILL, *supra* note 74, at 88.

<sup>80</sup> See, e.g., FRANKLIN & SCHWENINGER, *supra* note 75, at 214.

Although at times the precise color of the runaway was not stated and “negro wench” or “negro fellow” could describe a person of mixed origin, 70 percent of the runaways in the early period were either black or their skin was so dark that readers of runaway newspaper advertisements would assume they were.

*Id.*

[I]f “negro” was used with no additional information on color, the runaway was considered black; if no color was indicated, the runaway was also cited as black. Since owners were quick to point out those of mixed racial origin even when they used the term “negro” (i.e., “negro mulatto”), this method, which gives a color designation to all slaves in the RSDB [the authors’ “Runaway Slave Database”], is probably relatively accurate.

*Id.* at n.\*.

qualities cited, "good features," "very genteel appearance" and "good-looking, rather pleasant countenance, . . . confident manner" are fundamentally subjective. Even in the nineteenth century, "good looking" was in the eye of the beholder.<sup>81</sup>

As unsettling as it is to read these advertisements offering rewards for the capture of runaway human property described primarily by their race, it is just as unnerving to recognize that slave catchers pursuing these runaways were justified not just by the laws of the slave states, but also by a statute passed by the Second Congress and by a specific constitutional provision crafted by the Framers. The Fugitive Slave Clause<sup>82</sup> contained in Article IV of the Constitution arose out of a crisis, but not a crisis of war or terrorism. It was the product of the crisis facing those trying to craft a new system of government in 1787 out of the political and economic failures of the Articles of Confederation. The kind of racial profiling embodied in the fugitive slave advertisements was authorized by political compromises reached at the Constitutional Convention.

Some elements of the Framers' political compromises concerning slaves and slavery are well-known.<sup>83</sup> Slaves, referred to as "other persons," were counted as three-fifths of a person

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<sup>81</sup> As noted above, many advertisements provided more details, like scars and other injuries, or even details about the escapees' clothing. See, e.g., advertisements discussed *supra* note 76.

<sup>82</sup> U.S. CONST. art. IV, § 2, cl. 3. Because of the Framers' euphemistic references to slavery in the Constitution, the text refers to those "escaping from labour," and not fugitives from slavery. Nonetheless, the provision is commonly referred to as the Fugitive Slave Clause. *Id.*

<sup>83</sup> This became a key argument during the debate over the proposed Fugitive Slave Act of 1850. Responding to Senator Dayton of New Jersey, Senator Pratt of Maryland argued:

[W]hat was [sic] the relative positions of the slave States and the Federal Government at the time of the formation of this Constitution? Why, sir, Maryland was a sovereign [sic] State then . . . So were all these States. Well, the Constitution is a simple treaty, or agreement on the part of those States to give up a part of their respective sovereign rights for the purpose of forming a General Government. . . . Maryland was then as sovereign as Mexico is now. She would not have entered into this treaty with the General Government, it is possible, but for this obligation [enforcing property rights of slave owners] assumed by the Government.

CONG. GLOBE, 31st Cong., 1st Sess. app. at 1240 (1850) (remarks of Sen. Pratt of Maryland on August 21, 1850).

for purposes of apportioning direct taxes and representation in the House of Representatives.<sup>84</sup> Congress was prohibited from ending the slave trade—“[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit”—before 1808.<sup>85</sup>

But these were not the only concessions designed to induce the slave states to cede part of their sovereignty to the new national government.<sup>86</sup> The Constitution’s Fugitive Slave Clause was adopted to protect slave owners from the economic losses they experienced when slaves escaped to northern states, where both the residents and state laws might impede the owners’ efforts to reclaim the runaways.<sup>87</sup> The Constitution declared:

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

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<sup>84</sup> U.S. CONST. art. I, § 2, cl. 3. For the background of the compromises about the three-fifths apportionment and the 1808 limit on ending the slave trade, see Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* 20-24 (1978).

<sup>85</sup> U.S. CONST. art. I, § 9, cl. 1. Apparently the slave states did not trust this constitutional prohibition to protect the slave trade. Article V establishes the procedures for amending the Constitution, but expressly commands that, before 1808, “no Amendment . . . shall in any Manner affect the first . . . Clause[] in the Ninth Section of the first Article.” *Id.* art. V.

<sup>86</sup> “[W]ithout the adoption of [the Fugitive Slave Clause] the Union could not have been formed.” *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 611 (1842) (Story, J.). Seven justices published opinions in *Prigg*. Five of them, including Justice Story, recognized the importance of this element of the compromises that preserved slavery in the new democracy. See FEHRENBACHER, *supra* note 84, at 42; see also CONG. GLOBE, *supra* note 83, app. at 1240 (remarks of Sen. Pratt of Maryland on August 21, 1850).

<sup>87</sup> This was the accepted view of the importance of the Fugitive Slave Clause in the nineteenth century legal and political debates, even in northern states with personal liberty laws adopted to limit the activities of slave catchers. See, e.g., *Johnson v. Tompkins*, 13 Fed. Cas. 840, 852 (E.D. Pa. 1833) (“[The] foundations of the government . . . rest on the rights of property in slaves.”); *Wright v. Deacon*, 5 Serg. & Rawle 62, 63 (Pa. 1819) (“[I]t is well known that our southern brethren would not have consented to become parties to a constitution . . . unless their property in slaves had been secured.”). But see FEHRENBACHER, *supra* note 84, at 25 (disputing commonly asserted position “that without the clause the Constitution would have failed”).

the Party to whom such Service or Labour may be due.<sup>88</sup>

How the Clause was to be enforced was unclear. Slaves fled from bondage before 1787, and they continued to escape after the Constitution was ratified. Opponents of slavery in the northern states were unlikely to "deliver up" runaway slaves or free blacks to slave hunters making a claim that "Service or Labour" was "due." Yet the Fugitive Slave Clause provided no guidance about how it was to be enforced. Five years after ratification, the Second Congress passed legislation intended to implement the Fugitive Slave Clause.<sup>89</sup> Passage of the 1793 Fugitive Slave Act<sup>90</sup> (1793 Act) apparently was triggered by a notorious incident that occurred around the time of ratification. During the critical legislative debates over the 1850 Fugitive Slave Act, Senator Winthrop narrated one version of those events:

In the year 1788 or 1789 a free negro, residing in the State of Pennsylvania, named John, was kidnapped by three white men from the State of Virginia. These three white men were indicted for the crime; and as they had fled to the State of Virginia, they were demanded by Governor Mifflin, of Pennsylvania, under the instigation of the abolition society of that State, over which, if I mistake not, Benjamin Franklin about that time presided. The Governor of Virginia . . . decided that there was no law for carrying into effect that clause of the Federal Constitution just then going into operation, under which fugitives from justice were to be surrendered. He therefore refused to deliver up the three white men indicted as having kidnapped a free negro. Governor Mifflin, soon after, communicated these facts to General Washington, then President of the United States, who communicated them to Congress, and upon this communication the law of 1793 was based.<sup>91</sup>

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<sup>88</sup> U.S. CONST. art. IV, § 2, cl. 3. This clause was nullified by the Thirteenth Amendment.

<sup>89</sup> A Committee of the House of Representatives produced a fugitive slave bill as early as November 1791. THOMAS D. MORRIS, *FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780-1861*, at 19 n.74 (1974).

<sup>90</sup> Act of Feb. 12, 1793, ch. 7, §§ 3, 4, 1 Stat. 302.

<sup>91</sup> CONG. GLOBE, *supra* note 83, app. at 1585 (remarks of Sen. Badger of

Senator Winthrop's tale embodies a number of elements common to the conflicts over the capture of runaway slaves that persisted from ratification of the Constitution until the Civil War. First, opponents of slavery claimed that a free man had been illegally kidnapped and enslaved. One of the recurring complaints leveled by anti-slavery activists was that enforcement of the fugitive slave laws frequently led to the greatest injustice; free men, women and children were captured illegally, then sold into bondage.<sup>92</sup> To label this profiling—people impressed into slavery because of their race—is accurate, although the crime is far more horrific than the twentieth century label suggests.

Second, the dispute was between Pennsylvania and Virginia, two of the states on the borders of free and slave territory. Although acts of civil and uncivil disobedience impeding the recovery of runaway slaves occurred in northern states as far flung as Massachusetts and Iowa,<sup>93</sup> disputes commonly arose among the border states.<sup>94</sup> Opposition in Pennsylvania to the

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North Carolina on August 19, 1850); see also FEHRENBACHER, *supra* note 84, at 40 ("The act of 1793 resulted instead from a quarrel between Pennsylvania and Virginia over criminal extradition."); Paul Finkelman, *The Kidnapping of John Davis and the Adoption of the Fugitive Slave Law of 1793*, 56 J. S. HIST. 397 (1990). But see MORRIS, *supra* note 89, at 19 (asserting the dispute arose out of Virginia's refusal to extradite to Pennsylvania three men accused of murdering four Delaware Indians).

<sup>92</sup> See MORRIS, *supra* note 89, at 33-34, 53-58.

<sup>93</sup> See, e.g., *Daggs v. Frazer*, 6 F. Cas. 1112 (D. Iowa 1849) (No. 3583); *Kauffman v. Oliver*, 10 Pa. 514 (1849); see also FEHRENBACHER, *supra* note 84, at 57 (discussing court decisions in various northern states, including Massachusetts, Connecticut, New York and Pennsylvania).

In the Senate debate over the Fugitive Slave Law of 1850 on August 19, 1850, Senator Winthrop of Massachusetts referred to a publication that described the outcome of *Daggs v. Frazer*:

In an action brought in the United States district court of the southern district of Iowa, by Ruell Daggs, of Clark county, Missouri, plaintiff, against Elihu Frazier and four other defendants, for harboring, concealing, and preventing the arrest of plaintiff's slaves, who had absconded into Iowa, the jury found a verdict for the plaintiff of \$2,900.

CONG. GLOBE, *supra* note 83, app. at 1585.

<sup>94</sup> See, e.g., CONG. GLOBE, *supra* note 83, app. at 1240 (remarks of Sen. Pratt of Maryland on August 21, 1850) (explaining how Kentucky, Maryland and Virginia had a direct interest in the debate over the proposed Fugitive Slave Act,

activities of slave catchers from Virginia (or Maryland) was a continuing source of conflicts.<sup>95</sup> Later, disputes often arose involving attempts to seize slaves from Kentucky who had fled to Ohio.<sup>96</sup>

Third, these disputes involved public and private actors. Both the Fugitive Slave Clause and the 1793 Act empowered slave owners, bounty hunters and other private actors to seize people alleged to be runaway slaves. Yet the most important events in the history of disputes concerning runaway slaves frequently involved efforts by advocates on both sides of the issue to enlist the support of their state governments.<sup>97</sup> Frequently, antislavery activists in Pennsylvania and other northern states would utilize state laws and enlist the aid of politicians, law enforcers and courts in their efforts to obstruct slave catchers.<sup>98</sup> Similarly, government actors in Virginia and other

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while slave owners from "South Carolina, Mississippi, and Georgia can seldom lose their servants, and are not consequently interested in the amendment").

<sup>95</sup> For example, the Supreme Court's important decision interpreting the 1793 Act and the Fugitive Slave Clause, *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), invalidated Pennsylvania's 1826 Personal Liberty Law, which had been used to convict Prigg, a slave catcher, of kidnapping. See MORRIS, *supra* note 89, at 42-53.

<sup>96</sup> See, e.g., *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861); *Strader v. Graham*, 51 U.S. (10 How.) 82 (1850).

<sup>97</sup> See, e.g., FEHRENBACHER, *supra* note 84, at 18.

In the circumstances, then, the antislavery tendencies of the Revolutionary decades were not inconsiderable and amounted to a new departure. State after state took steps to end the African slave trade, though effective enforcement proved to be another matter. Abolition of slavery itself was achieved in New England and Pennsylvania, and it seemed only a matter of time in New York and New Jersey. Further south, the revulsion against slavery was in large measure confined to expressions of hope for eventual abolition. But Virginia in 1782 gave strong encouragement to private manumissions by removing earlier restrictions upon them, and both Maryland and Delaware subsequently followed her example. . . . By the 1790s, abolition societies had appeared in every state from Virginia northward, with prominent men like Benjamin Franklin, John Jay, and Alexander Hamilton in leading roles. And the climax came in 1787 when slavery was prohibited in the Northwest Territory with scarcely a dissenting vote.

*Id.*

<sup>98</sup> See MORRIS, *supra* note 89, at 8-12 (discussing both reliance on common writs and analogous legislation in efforts to free alleged slaves in northern states).

southern states would protect residents accused of violating the personal liberty laws of a northern state.<sup>99</sup>

Fourth, partisans on both sides of the issue argued about whether authority to enforce the Fugitive Slave Clause of the national Constitution was vested in the states, the national government or both. The Supreme Court decided this issue almost twenty years before the Civil War. In the famous case, *Prigg v. Pennsylvania*,<sup>100</sup> it determined that enforcement authority was vested in the federal government, but like many of the Court's controversial decisions, it failed to produce a consensus. Years later, slavery's opponents still argued that the high court had simply been wrong.<sup>101</sup>

Finally, both sides could find support from among the Founders. Senator Winthrop invoked two of the most important Founders, Franklin and Washington, and pointedly placed Franklin in the abolitionist camp. Senators supporting passage of a stronger Fugitive Slave Act in 1850—a law crafted to eliminate a variety of impediments raised against slave catchers in northern states—also could rely on individual Founders. Senator Badger's description of the Framers' relationship to the 1793 Fugitive Slave Act is instructive:

[T]his act was passed by the contemporaries of the framers of the Constitution, by men familiar with all the discussions which preceded its adoption, and that among them were many members of that Convention which framed the Consti-

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<sup>99</sup> See, e.g., Paul Finkelman, *Sorting Out Prigg v. Pennsylvania*, 24 RUTGERS L.J. 605, 618-20 (1993).

<sup>100</sup> 41 U.S. (16 Pet.) 539 (1842).

<sup>101</sup> See CONG. GLOBE, *supra* note 83, at 481 (remarks of Daniel Webster of Massachusetts) ("I have always been of the opinion, that it was an injunction upon the States themselves."); see also FEHRENBACHER, *supra* note 84, at 25. Fehrenbacher concluded that:

Placement of the fugitive-slave clause in Article Four, rather than in Article One, suggests that it was designed as a limitation on state authority and not as an extension of federal power and responsibility. That is, the purpose was to guard against personal-liberty laws [enacted by the States], rather than to provide for a national fugitive-slave law. The very language of the clause seems plainly directed at the states, not at Congress.

*Id.*; see also *infra* notes 111, 124-25 and accompanying text.

tution; among them were many eminent members of that body. To name no other, Mr. Madison was one. These men, in passing the act of 1793, recognized in the provision of that clause of the Constitution this duty as imposed upon the Government of the United States; and they passed an act founded upon that supposition, and defensible upon no other.<sup>102</sup>

The statute had received overwhelming votes of support in both houses of Congress,<sup>103</sup> which included Madison<sup>104</sup> and other members of the founding generation.<sup>105</sup> In practice, the 1793 Act encouraged slave catchers to seize people based solely on their race.

### A. *The Fugitive Slave Act of 1793*

Reading the text of the statute removes any doubts about its purpose, or the power it ceded to slave owners and their agents to exercise an expansive version of the common law power of an owner to recover private property.<sup>106</sup> The statute's central provisions are so antithetical to contemporary conceptions of legal equality that they warrant quotation. Section 3 of the Act empowered slave catchers to seize people in the free states and carry them into slavery:

SEC. 3. And be it also enacted, That *when a person held to labour* in any of the United States, or in either of the territories on the northwest or south of the river Ohio, under the

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<sup>102</sup> CONG. GLOBE, *supra* note 83, app. at 1594-95 (remarks of Sen. Badger of North Carolina on August 19, 1850). The Senator's specific claim was that the Supreme Court's holding in *Prigg* (that the Fugitive Slave Clause vested exclusive authority in the federal government to enforce slave owners' property rights) was correct.

<sup>103</sup> See 2 ANNALS OF CONG. 630, 640, 860-61 (1789).

<sup>104</sup> As a slave owner, politician and advocate of republican theories, Madison was forced into contradictory positions. See, e.g., THE FEDERALIST No. 54 (James Madison); see also DREW R. MCCOY, THE LAST OF THE FATHERS: JAMES MADISON & THE REPUBLICAN LEGACY 22-23, 109-110, 230-34, 244-46, 260-63 (1989).

<sup>105</sup> The Ordinance of 1787 had prohibited slavery in the territories, but assured the right of slave owners to pursue and capture runaway slaves. This compromise apparently was based upon work by a committee in the Congress as early as 1785. See MORRIS, *supra* note 89, at 16 & nn.65-66.

<sup>106</sup> See MORRIS, *supra* note 89, at 3-4.



laws thereof, shall escape into any other of the said states or territory, the person to whom such labour or service may be due, his agent or attorney, is hereby empowered to seize or arrest such fugitive from labour, and to take him or her before any judge of the circuit or district courts of the United States, residing or being within the state, or before any magistrate of a county, city or town corporate, wherein such seizure or arrest shall be made and upon proof to the satisfaction of such judge or magistrate, either by oral testimony or affidavit taken before and certified by a magistrate of any such state or territory, that the person so seized or arrested, doth, under the laws of the state or territory from which he or she fled, owe service or labour to the person claiming him or her, it shall be the duty of such judge or magistrate to give a certificate thereof to such claimant, his agent or attorney, which shall be sufficient warrant for removing the said fugitive from labour to the state or territory from which he or she fled.<sup>107</sup>

The statute authorized private slave catchers to cross state boundaries to enforce a slave owner's alleged property rights in one state by seizing a person residing in another. Slave catchers could seize any person. The statute allowed the captor to obtain a certificate from a judicial officer authorizing him to take the alleged slave across state lines. If the slave catcher bothered with this procedure, the Act abandoned common procedural protections for the rights of those captured as criminals.<sup>108</sup> The seized person was not entitled to trial by jury, was not guaranteed the right to testify<sup>109</sup> and oral testimony was permitted to prove the claim of ownership.<sup>110</sup> As a result, if a hearing was held the case might be decided on *ex parte* proof from the captor. The law imposed no statute of limita-

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<sup>107</sup> Act of Feb. 12, 1793, ch. 7, § 3, 1 Stat. 302, 302-05 (second and third emphasis added). Like Article IV of the Constitution, the 1793 Act also enacted provisions concerning fugitives from more traditional criminal justice.

<sup>108</sup> Escaping from slavery was in itself a criminal act under the laws of the slave states. See *infra* notes 112-13 and accompanying text.

<sup>109</sup> See, e.g., FEHRENBACHER, *supra* note 84, at 35 ("[N]o southern state permitted a slave to testify against a white person.").

<sup>110</sup> The loose, "ex parte" evidentiary provisions of the Act were a recurring target of antislavery activity in the nineteenth century. See, e.g., MORRIS, *supra* note 89, at 34, 44.

tions, so the capture could occur years or even decades after the person allegedly had escaped.<sup>111</sup> Finally, although legal process was permitted, the law did not explicitly require the bounty hunter to take the captive before a judge or magistrate to secure a certificate.<sup>112</sup>

"The act was in fact an invitation to kidnapping, whether as a result of honest error or easily contrived fraud."<sup>113</sup> As a practical matter, the statutory authority to seize people suspected of being slaves condoned racial profiling because in the eighteenth and nineteenth centuries the presumption in the slave states was that a person's status as slave or free was linked to race. An opinion by a justice of the Virginia Supreme Court declared, for example:

In the case of a person visibly appearing to be a negro, the presumption is, in this country, that he is a slave, and it is incumbent on him to make out his right to freedom: but in the case of a person visibly appearing to be a white man, or an Indian, the presumption is that he is free, and it is necessary for his adversary to shew [sic] that he is a slave.<sup>114</sup>

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<sup>111</sup> The facts of *Prigg v. Pennsylvania* provide a poignant example. The alleged fugitive slaves had lived as free people for several years in Pennsylvania before the heir of the former owner sent slave catchers to capture her "inherited property." Finkelman, *supra* note 99, at 610-11. For a description of the people involved, see *id.* at 605, 609-11.

<sup>112</sup> See, e.g., CONG. GLOBE, *supra* note 83, app. at 1587 (remarks of Sen. Chase of Ohio on August 19, 1850) (disputing assertion by southern Senators that federal law permitted private seizures without resort to legal proceedings, but asserting that this often happened in border states like Ohio).

<sup>113</sup> FEHRENBACHER, *supra* note 84, at 41.

<sup>114</sup> *Hudgins v. Wright*, 11 Va. (1 Hen. & M.) 134, 141 (1806) (Roane, J.). Two opinions were issued in the case. Both judges accepted the existence of a rebuttable legal presumption that a person's status as free or slave was determined by race. See *Hudgins*, 11 Va. (1 Hen. & M) at 137, 139 (Tucker, J.).

From the first settlement of the colony of Virginia to the year 1778 . . . all negroes, Moors, and mulattoes . . . brought into this country by sea, or by land, were SLAVES. And by the uniform declarations of our laws, the descendants of the females remain slaves, to this day, unless they can prove a right to freedom, by actual emancipation, or by descent in the maternal line from an emancipated female.

All white persons are and ever have been FREE in this country. If one evidently white, be notwithstanding claimed as a slave, the proof lies on the party claiming to make the other his slave.

In the South, blacks were presumed to be slaves<sup>115</sup> unless they could prove otherwise.<sup>116</sup> Enforcement of fugitive slave laws had the practical effect of applying this presumption in other states, as well as assisting in the enforcement of state laws making it a crime to leave the owner's custody.<sup>117</sup> Thousands of slaves committed that crime.<sup>118</sup> Slave owners and their agents relied upon not only the laws of the slave states but also upon the 1793 Act and the Fugitive Slave Clause to justify seizures of black men, women and children.<sup>119</sup>

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*Id.* (emphasis omitted).

<sup>115</sup> Eventually, southern states began to impose the same legal infirmities on free blacks as slaves. "[T]his meant that free Negroes were subject to search without warrant . . ." FEHRENBACHER, *supra* note 84, at 62.

<sup>116</sup> See *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 669 (1842) (McLean, J., dissenting) (asserting that, in the states "where slavery is allowed, every coloured person is presumed to be a slave; and on the same principle, in a non-slave holding state, every person is presumed to be free without regard to colour").

<sup>117</sup> See Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2068-69 (1993); see also CONG. GLOBE, *supra* note 83, app. at 1238 (remarks by Sen. Pratt of Maryland on August 20, 1850) ("The Legislature of Maryland had passed a law making it a felony for a slave to escape from his master.").

<sup>118</sup> See, e.g., *supra* note 75 (listing examples of works depicting the experiences of runaway slaves).

<sup>119</sup> In the years following the enactment of the 1793 Act, at least two states, South Carolina and Louisiana, enacted laws permitting the capture of free blacks who arrived in their ports on boats (typically as crew members). Their only "crime" was arriving in the state as a free black. The captive would not be released from custody until the vessel sailed from the port, and only if the master of the vessel paid a charge imposed for the cost of the imprisonment. If the fee was not paid, the free black crew member could be sold into slavery. See CONG. GLOBE, *supra* note 83, app. at 1586 (remarks of Sen. Winthrop of Massachusetts on August 19, 1850) (referring to these laws as permitting seizure "without any charge of crime, and without any examination except to ascertain the color of their skin"); *id.* app. at 1587 (remarks of Sen. Butler of South Carolina on August 19, 1850) (asserting that South Carolina's law "is rarely put into operation; and yet it may be a salutary law to be held *in terrorem* over this class of persons"); *id.* app. at 1674-77 (explanation by Sen. Winthrop on September 28, 1850) (appending to the records statutes, affidavits and other records documenting the seizure of free black crew members under these state laws).

The southern mistreatment of free blacks took other forms. See, e.g., FEHRENBACHER, *supra* note 84, at 35-36.

The fear of insurrection was also reflected in southern hostility to free Negroes, who were widely regarded as a subversive influence on slaves, by their example if not by any actual intent. With increasing severity,

Opposition in the North to the capture of slaves sometimes took the form of civil disobedience, including mob violence to rescue the captives.<sup>120</sup> The 1793 Act included a separate section that prohibited interference with slave catchers, and not only permitted the slave owner to sue for damages, but also for a significant statutory penalty to be collected from those who had rescued or concealed the alleged slaves "for the benefit of such claimant."<sup>121</sup>

The 1793 Act's procedural and evidentiary requirements were so loose that they "gave rise to the kidnapping of free blacks."<sup>122</sup> The threat of these kidnappings prompted many northern states, most notably Pennsylvania, to enact "personal liberty laws" to protect free blacks,<sup>123</sup> which were enforced in state courts, before and after the Supreme Court's decision in *Prigg v. Pennsylvania* held that the states could not enact laws designed to obstruct the recovery of runaway slaves.<sup>124</sup>

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most of the slaveholding states endeavored to eliminate this dangerous social element by forbidding or discouraging manumission; by compelling manumitted slaves to leave the state; by prohibiting the immigration of free blacks from other states; and by subjecting the resident free black population to additional restraints and disabilities amounting virtually to persecution.

*Id.*

<sup>120</sup> See, e.g., MORRIS, *supra* note 89, at 156-57.

<sup>121</sup> The 1793 Act specifically provided:

That any person who shall knowingly and willingly obstruct or hinder such claimant, his agent or attorney in so seizing or arresting such fugitive from labour, or shall rescue such fugitive from such claimant, his agent or attorney when so arrested pursuant to the authority herein given or declared or shall harbor or conceal such person after notice that he or she was a fugitive from labour as aforesaid, shall, for either of the said offences, forfeit and pay the sum of five hundred dollars. Which penalty may be recovered by and for the benefit of such claimant, by action of debt, in any court proper to try the same; saving moreover to the person claiming such labour or service, his right of action for or on account of the said injuries or either of them.

Act of Feb. 12, 1793, ch. 7, § 4, 1 Stat. 302, 305.

<sup>122</sup> Finkelman, *supra* note 99, at 622-23.

<sup>123</sup> *Id.* at 623-24.

<sup>124</sup> Among the ways that the 1826 Pennsylvania Personal Liberty Law "obstructed" the rights of slaveholders and slave catchers were: (1) It restricted private self-help by authorizing issuance of a warrant for the seizure of the alleged fugitive slave that could only be executed by the appropriate sheriff or constable.

In *Prigg*, a majority of the Justices agreed that “Congress had exclusive power to regulate the rendition of fugitive slaves.”<sup>125</sup> Justice Story’s majority opinion confirmed that the Fugitive Slave Clause “manifestly contemplates the existence of a positive unqualified right on the part of the owner of the slave, which no state law or regulation can in any way qualify, regulate, control or restrain.”<sup>126</sup> Story’s opinion later concluded that “the owner of a slave is clothed with entire authority, in every state in the Union, to seize and recapture his slave, whenever he can do it, without any breach of the peace or any illegal violence.”<sup>127</sup> The Fugitive Slave Clause guaranteed slave owners’ property rights “to the same extent” in every state,<sup>128</sup> and therefore a slave owner must “have the right to

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(2) The warrant could only be issued if the person seeking it produced both his own oath or affirmation and the affidavit, certified under oath, of the alleged owner. The affidavit had to include details supporting the claim that the seized person was a slave owned by the claimant. (3) It repealed the right of private “reception” permitted under a 1780 state law. (4) The certificate permitting removal of the seized person into slavery could only be issued by a judicial officer, and the evidentiary requirements for adequate proof were not as loose as those enacted by Congress in the 1793 Act. For example, the Pennsylvania statute established a period of time for the alleged fugitive to gather evidence in opposition to the claim against him. MORRIS, *supra* note 89, at 51-52 (citing 1826 Pa. Laws 150-55). Each of these requirements simply imposed some elements of due process to an inherently inequitable process.

<sup>125</sup> Finkelman, *supra* note 99, at 630.

<sup>126</sup> *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 612 (1842).

<sup>127</sup> *Prigg*, 41 U.S. (16 Pet.) at 613.

<sup>128</sup> The Supreme Court’s decision in *Prigg* confirmed “the involvement of the federal government in the protection of slavery.” FEHRENBACHER, *supra* note 84, at 43. As a result, the decision attempted to impose the most noxious form of race-based “profiling” in the free states. The Court concluded that the Fugitive Slave Clause

gave every slaveholder the “positive, unqualified right” to recapture a slave by private effort anywhere in the Union, and to do so without interference from any quarter, provided that no breach of the peace were committed. This right of self-help, said Story, was universal in the slaveholding states, and the fugitive-slave clause made if equally effective in all the free states. The slaveholder, in short, carried the law of his own state with him when he pursued a fugitive into a free state. The implications of such extraterritoriality were startling . . . [The] ruling had the effect, for instance, of compelling free states to accept the slave-state principle that a Negro or mulatto was a slave unless he could prove otherwise.

seize and repossess the slave, which the local laws of his own state confer upon him as property . . . .<sup>129</sup>

When the Justices decided *Prigg* in 1842, if they expected—or even hoped—that the decision would help ameliorate the festering sectional disputes about the capture of fugitive slaves, they were wrong. Courts, legislatures and citizens in the north continued to obstruct enforcement of the 1793 Act.<sup>130</sup> The decision in *Prigg* did not end, and perhaps encouraged, private individuals and groups to resist seizures of blacks by slave catchers.<sup>131</sup> By 1850, enforcement of the 1793 Act had become so difficult that southern politicians demanded a stronger fugitive slave law as an essential ingredient of any solution of the political conflicts that were ripping the nation apart.

### B. *The Fugitive Slave Act of 1850*

The Fugitive Slave Clause in the Constitution and the 1793 Act were products of a crisis of creation. The Fugitive Slave Act of 1850 (the 1850 Act) was the product of a crisis of disintegration. By the end of the 1840s, sectional conflict over slavery encompassed a range of issues, and none was more volatile than conflict over the recapture of fugitive slaves.<sup>132</sup>

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*Id.* at 44.

<sup>129</sup> *Prigg*, 41 U.S. (16 Pet.) at 613.

<sup>130</sup> See, e.g., Finkelman, *supra* note 99, at 664 (“State judges refused to hear cases under the law, state legislatures barred enforcement of the law, and few fugitives were returned after *Prigg*.”).

<sup>131</sup> See, e.g., CONG. GLOBE, *supra* note 83, app. at 1588 (remarks of Sen. Butler of South Carolina on August 19, 1850) (“I concur with the Senator from Ohio [probably Chase] in this: That since the decision in the case of . . . Pennsylvania *vs. Prigg*, there has been less security for slave property escaping into free States, than there was before . . . .”); *id.* app. at 1238 (remarks of Sen. Pratt of Maryland on August 20, 1850).

<sup>132</sup> A convention held at Milledgeville, Georgia to consider the Compromise of 1850 produced a series of resolutions intended to present the views of pro-Union Georgians. The threat that the dispute over fugitive slaves posed to the survival of the Union is captured in the fifth resolve. “That it is the deliberate opinion of this Convention, that upon the faithful execution of the Fugitive Slave Bill by the proper authorities, depends the preservation of our much loved Union.” The Georgia Platform, quoted in DOCUMENTS OF AMERICAN HISTORY 323 (Henry Steele Commager ed., 7th ed. 1963)

Secession by the slave states was an open threat, one raised frequently in the congressional debates that produced the 1850 Act and other elements of the Compromise of 1850.<sup>133</sup> For example, referring specifically to sectional conflict over enforcement of the 1793 Act, Senator Pratt of Maryland warned that “[w]hen that day shall arrive, and it seems to be fast approaching, then all our efforts here or elsewhere will not prevent a dissolution of the union . . . .”<sup>134</sup>

The Compromise of 1850 embodied Congress’s attempt to prevent that dissolution by resolving a cluster of questions linked largely by the issue of the future status of slavery as a protected form of property ownership. Would California, with its anti-slavery constitution, be admitted as a state? Would the slave trade, and even slavery itself, be abolished in the District of Columbia? Where would the borders of Texas be set, and would Texas be compensated for lost territory? How would slavery be handled—permitted, prohibited or left to the future decision by the residents—in the Utah and New Mexico territories? Slavery’s advocates and opponents feared that resolution

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<sup>133</sup> See, e.g., MORRIS, *supra* note 89, at 130 (“The . . . fear of an impending disruption of the Union by the secession of the slave states was to hang very heavily over the early deliberations of the Thirty-first Congress, which had to deal with the sectional crisis.”).

<sup>134</sup> Both abolitionists and slave owners called for dissolution of the Union. See, e.g., CONG. GLOBE, *supra* note 83, app. at 1591. Replying to earlier statements by Sen. Winthrop of Massachusetts, Sen. Pratt of Maryland agreed that:

there are people, both North and South, who desire the separation of this Union, and the destruction of the Federal Government. Those at the North have been actuated by a wish to abolish slavery, and their desire to destroy the Government proceeds from the proclaimed fact, on their part, that the Constitution of the United States protects the master in his right to his slave as property, and the consequent inability, on their part, to abolish slavery. This, then, is the fanatic notion of those persons at the North, who desire to destroy the Government of the country. Now, there is a class of persons at the South, who, for reasons the exact opposite of those which have induced northern men to entertain these opinions, look to the Government of the country with like aversion, and think that a dissolution of this Union would be of advantage to the South, because this description of property would be better protected under a separate southern government . . . .

*Id.*; see also *id.* app. at 1240-41 (remarks of Sen. Pratt of Maryland on August 20, 1850); *id.* app. at 1019 (remarks of Sen. Upham of Vermont on July 2, 1850).

of these questions would provide the other side with insurmountable political and economic advantages. No question was more portentous than the southern demand for a new fugitive slave law.<sup>135</sup>

The Senate debate is justifiably the focus of historical inquiry into the 1850 Act, not merely because of the momentous subject matter, but also because of the eminence of the participants. In a Senate replete with famous figures,<sup>136</sup> the proceedings are renowned as the last great debate in which the trio of Clay, Calhoun and Webster all participated. Clay introduced the proposal that formed the basis for the eventual compromise,<sup>137</sup> Webster delivered his last important speech as a senator, pleading for survival of the Union; Calhoun died within four weeks of making his last speech in the debate. The results of the Senate debate were a set of compromises that served as a penultimate legislative attempt to preserve the Union from collapse and perhaps civil war.

In the months of debate, which began in January 1850, and continued for most of the year,<sup>138</sup> no issue generated more heat than did the problem of fugitive slaves.<sup>139</sup> Final Senate debate over the proposed Fugitive Slave Act of 1850 began in mid-August.<sup>140</sup> Mason of Virginia led the debate for

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<sup>135</sup> See, e.g., FEHRENBACHER, *supra* note 84, at 160; SAMUEL ELIOT MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 571-73 (1965).

<sup>136</sup> Including William Seward, Stephen Douglas, Jefferson Davis, Sam Houston and Salmon Chase. Morrison, *supra* note 135, at 571.

<sup>137</sup> In his historic January speech, Clay proposed that California's admission as a free state could be offset by creation of the New Mexico and Utah territories without antislavery restrictions; Texas would be reduced in size, but would be compensated for its lost territory; the slave trade would be ended in the District of Columbia, but slave owners would receive the assistance of a tougher federal fugitive slave law. See *id.* at 571-72.

<sup>138</sup> See, e.g., FEHRENBACHER, *supra* note 84, at 161. ("Between July 31 and September 16, the Senate passed the compromise in six separate measures embodying the principal features of the original Clay resolutions. In no instance was the voting really close. The overall total of yeas was nearly double that of nays, with excessive abstentions on the New Mexico and fugitive-slave bills.")

<sup>139</sup> The various issues were referred to a committee, which proposed that most of the issues be lumped together into an omnibus bill—except the issues of fugitive slave legislation and the slave trade, which were to be debated and resolved separately. See, e.g., *id.* at 160.

<sup>140</sup> Debate over the issue of fugitive slaves was tabled during the spring, as



the South. His rhetoric was emotional, his arguments were inflexible.<sup>141</sup> On the first day of the final debates, Mason rejected any compromise on the South's primary demands on this issue. Mason laid the blame for the crisis squarely in the North. Nearly a decade after the Supreme Court had sought to impose legal order in its *Prigg* decision, Mason complained of continuing civil disobedience designed to thwart the recovery of runaway slaves. Slave owners and the southern states had been victims of northern malfeasance.

Sir, it has become a part of the history of the country, that, when a slave once escapes and gets within the limits of the free States, . . . you may as well go down into the sea, and endeavor to recover from his native element a fish which had escaped from you, as expect to recover such fugitive—I mean under existing laws. Every difficulty is thrown in the way by the population to avoid discovery of where he is, and after this discovery is made, every difficulty is thrown in the way of executing process upon him. And if you should succeed so far as to execute the process, then every difficulty is thrown in the way by armed mobs to prevent the fugitive being carried before the proper officer to take cognizance of the case. And, if you should perchance succeed in doing this, and an adjudication should be made, *I do not know of an instance, within recent years, where the fugitive was not rescued by violence from the hands of the officer by an armed mob, and the parties claiming him put in peril of their lives.*<sup>142</sup>

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the Senate grappled with the other issues involved in the Compromise of 1850, which were initially considered as part of an omnibus bill, which in turn was eventually cleaved into separate bills. Debate over the separate fugitive slave bill was renewed on Monday, August 19, 1850. See MORRIS, *supra* note 89, at 141-47 (discussing the Senate debate over the fugitive slave bill).

<sup>141</sup> During the early parts of the debate, Mason argued for an unlimited right of recapture by slave owners, claiming that no one else possessed the "right to interpose between the claimant and the fugitive, or to inquire whether the slave be his, or whether he is a slave at all, far less to molest or hinder him in the capture." See CONG. GLOBE, *supra* note 83, at 233-35. On the issue of fugitive slaves, even Clay appeared to be inflexible. For example, he called on the legislature "to make penal laws, to impose the heaviest sanctions upon the recovery of fugitive slaves, and the restoration of them to their owners." *Id.* app. at 123 (remarks of Sen. Clayton of Delaware on February 6, 1850).

<sup>142</sup> *Id.* app. at 1583 (remarks of Sen. Mason of Virginia on August 19, 1850) (emphasis added); see also *id.* app. at 1241 (remarks of Sen. Pratt of Maryland

Some northern senators were equally vehement in their sectional loyalty. When pressed by Senator Dayton of New Jersey, Mason clarified that his assertion that slave hunters had been thwarted in every "instance within recent years" encompassed a period of six to eight years—in effect, the period after *Prigg* had held that the national government, and not the states, had authority to enforce the Constitutional Clause and the 1793 Act. Dayton responded with an equal measure of sectional self-righteousness. Slave owners pursuing runaway slaves not only could obtain, but already had received, justice in northern courts. Mason's charges accusing people in the northern states of impeding enforcement of the 1793 Act were unjustified insults to a law-aiding people.

Not within the last six or eight years, the Senator says. Well, I have on a previous occasion given to the Senate three instances in my own State, and occurring within that number of years. We are a border State, and we are one of those unfortunate States which, in reference to this matter of fugitive slaves, are perhaps more troubled than any other; and I wish, so far as I am individually concerned, that the slave States had each and every one of them back again. They are a pest and an annoyance to us. Our people are everywhere disposed to give them up according to law, but according to law only. There have been three cases in New Jersey within the last six or seven years, and I think two of them within the last four or five years, in which slaves were given up under the finding of juries, and two of them under the finding of juries made up almost exclusively of Quakers. *Sir, there is no tribunal upon which you can rest your rights more safely than you can upon twelve citizens, sworn then and there at the time and in the place to render a verdict according to the law and evidence. . . .* Within the time suggested such verdicts have been rendered in the State of Michigan. There have been two such cases in Pennsylvania within the last two years; there have been similar cases in Indiana and Illinois. There have also

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on August 21, 1850) (asserting that "since abolition has become an active element in the political contests of the day, I do not know a single case in which the fugitive has been surrendered to his master").

been some two or three cases of the kind in Ohio, and I must think the instance referred to of the rescue by the mob is the exception, and that it is not the rule. Wherever a rescue has been made, and an action has been commenced, so far as I know, ample damages have been awarded and the amount paid.<sup>143</sup>

Dayton's comments illuminate the complexity of the dispute. Mason had attributed all blame for the conflicts over fugitive slaves to antislavery activists in the North; Dayton claimed the North was blameless. Yet he also acknowledged that eight years after *Prigg* northern states still were imposing procedural requirements, like trial by jury, that Southerners complained were used to impede the efficient completion of the private seizures authorized by law. By asserting that ample damages were paid when slave owners sued those who interfered with the recapture of runaways, Dayton acknowledged as well that northern activists continued to resist the capture of runaways. And in a comment with ironic implications for this paper, he implicitly characterized Quakers as people particularly opposed to slavery and the recapture of runaway slaves, yet still willing to decide cases in favor of the slave owner.

Finally, Dayton expressed a personal hostility to fugitive slaves that serves as a reminder of the ingrained prejudice exhibited by many in the North who opposed slavery. Unlike the Quakers seized during the Revolution, black slaves enjoyed no social status, no wealth, no political influence in the North. This was as weak and disadvantaged a minority as has ever lived in the nation. Whether free or slave, in the decades preceding the Civil War blacks were a group particularly vulnerable to profile-based seizures.

Yet southern senators dogmatically argued that free blacks never were kidnapped, only runaway slaves were ever seized, and seizures were always proper. Butler of South Carolina asserted, for example, that, although the lawful claims of slave owners in pursuit of fugitives had frequently been denied,

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<sup>143</sup> *Id.* app. at 1584 (remarks of Sen. Dayton of New Jersey on August 19, 1850) (emphasis added).

I venture to say that since the law of 1791, I may safely make the broad assertion that *not a single case has occurred* where a person has pursued and taken a fugitive, or a person as a fugitive, who was not his property, or the property of one for whom he was acting as an agent.<sup>144</sup>

This assertion prompted a vigorous debate that exposed the fundamental southern presumption in the debate about seizures of fugitive slaves—blacks were slaves and whites were free. Walker of Wisconsin reported an incident where the daughter of Irish parents was seized in Pennsylvania and held as a slave in Maryland, and Butler responded by asking “Was she white?”<sup>145</sup> Walker of Wisconsin immediately complained that the assertion that a white girl could be seized as a runaway slave was an idea that “seemed to excite his mirth.”<sup>146</sup> The idea that a slave could be white evidently was laughable to the South Carolina senator.<sup>147</sup>

Moments later, Senators Mason (Virginia) and Winthrop (Massachusetts) took over the debate of the question of whether free men ever were seized illegally in northern states by slave hunters. During these exchanges, Winthrop made a point (discussed earlier in this Article) that is central to understanding how the fugitive slave laws as they were interpreted by slave owners, slave hunters, southern law makers, judges and the Supreme Court in *Prigg*, justified a form of “profiling” based solely on race. Mason had pointedly questioned how anyone could know that a negro seized in a northern state could be free and not a slave. Winthrop replied: “In the first place, sir, our rule of presumption in Massachusetts is precisely opposite to that which I believe generally prevails in Virginia. We hold that every colored person is a freeman until he is

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<sup>144</sup> *Id.* app. at 1585 (remarks of Sen. Butler of South Carolina on August 19, 1850) (emphasis added).

<sup>145</sup> *Id.* app. at 1586 (remarks of Sen. Butler of South Carolina on August 19, 1850).

<sup>146</sup> *Id.* (remarks of Sen. Walker of Wisconsin on August 19, 1850).

<sup>147</sup> Walker also objected to Butler’s “mirthful rejoinder” on the grounds that “[w]e see many advertisements in the papers where the persons described as fugitives from slavery are represented as being so white that it will be difficult to detect them on that account.” *Id.*

proved to be a slave."<sup>148</sup>

This states the essential problem. The Constitution and the 1793 Act authorized seizures of people—who would be forced into slavery—when the ultimate justification for the seizures was the race of the captives. Much of the Senate debate focused upon the procedures that should be employed to protect the rights of the affected people. Northern senators offered amendments and arguments creating procedural rights for the alleged fugitives. Southern senators proposed legislation designed to protect the rights of slave owners.

Ultimately the South prevailed. The threat of dissolution of the Union weighed so heavily in the balance, particularly when measured against the interests of a generally powerless minority, that the Congress rejected attempts to enact a law providing even minimal due process for blacks seized as runaway slaves. Faced with the threat of secession (and perhaps civil war), lawmakers adopted measures designed to make it easier for slave catchers to obtain legal support for the recapture of runaways.<sup>149</sup>

During the debates, the Senate rejected proposed amendments that would have entitled captives to be tried by a jury, to have petitions for a writ of habeas corpus heard by a federal judicial officer, to have a uniform fee paid to the newly created federal commissioners who would decide the slave owners' claims, regardless of the outcome, and other measures consistent with fundamental notions of procedural justice. The result was a statute that attempted to abrogate any constraints on the capture of alleged runaway slaves and assured that federal officials would assist in the process of sending the captives south into slavery.

The 1850 Act included the following critical provisions. The Act created a new position of "commissioners" to be appointed in each federal circuit. These commissioners were granted the powers of "any justice of the peace, or other magistrate of any

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<sup>148</sup> *Id.* (remarks of Sen. Winthrop of Massachusetts on August 19, 1850).

<sup>149</sup> For many northerners, preservation of the Union was more important than concerns about the recapture of fugitive slaves. See MORRIS, *supra* note 89, at 135 (discussing Daniel Webster's position in the debate over the fugitive slave issue).

of the United States” in criminal matters,<sup>150</sup> and concurrent jurisdiction with district and circuit court judges over fugitive slave claims.<sup>151</sup> The explicit function of these new positions was to facilitate the use of federal law in the recovery of runaway slaves, although the Thirty-first Congress was as squeamish as the Framers about using the term “slave:”

[T]he Circuit Courts of the United States . . . shall from time to time enlarge the number of the commissioners, with a view to afford reasonable facilities *to reclaim fugitives from labor*, and to the prompt discharge of the duties imposed by this act.<sup>152</sup>

[T]he commissioners . . . *shall grant* certificates to such claimants, upon satisfactory proof being made, with authority to take and remove such *fugitives from service or labor* . . . to the State or Territory from which *such persons* may have escaped or fled.<sup>153</sup>

The new federal commissioners could issue warrants and other legal process, and also could “appoint . . . suitable persons . . . to execute all such warrants and other process.”<sup>154</sup> But warrants were not required for seizing alleged fugitive slaves. The statute encouraged slave owners or their agents to seize people without bothering to get warrants. The slave catchers could “pursue and reclaim such fugitive person, either by procuring a warrant . . . or by seizing and arresting such fugitive, where the same can be done without process . . . .”<sup>155</sup> In other words, no warrant was necessary in most cases.

Whether seized with or without a warrant, the captive faced a federal proceeding structured to favor the slave owner. For example, the Act not only directed the new category of federal officers—commissioners—to grant certificates “upon satisfactory proof” by the claimant, but also offered the Commissioners a material incentive to decide that adequate proof

<sup>150</sup> Act of Sept. 18, 1850, ch. 60, § 1, 9 Stat. 462, 462.

<sup>151</sup> *Id.* §§ 3-4.

<sup>152</sup> *Id.* § 3 (emphasis added).

<sup>153</sup> *Id.* § 4 (emphasis added).

<sup>154</sup> *Id.* § 5, 9 Stat. at 463.

<sup>155</sup> *Id.* § 6.

had been offered. Their fee was doubled in cases in which they ruled for the slave owner. In fugitive slave cases, the commissioners were to be paid a fee by the claimant of the alleged runaway. The fee was "ten dollars . . . in each case, upon the delivery of the said certificate to the claimant," but only "five dollars in cases where the proof shall not, in the opinion of such commissioner, warrant such certificate . . ."<sup>156</sup>

Contemporary doctrine recognizes that paying a judicial officer a higher fee for ruling against an accused person violates due process,<sup>157</sup> and so did northern senators who opposed this provision during the congressional debate more than 150 years ago. This provision was not an accident. It was included specifically to appease southern senators during the debate over the 1850 Act,<sup>158</sup> as were other rules enacted in the new law. Perhaps most significantly, the slave owner could "prove" his claim in an *ex parte* and summary proceeding. No jury was permitted, and a person declared a slave had no right of appeal.<sup>159</sup> The alleged fugitive even was prohibited from testifying.

Conversely, the slave owner could prove his claim that the captive was a slave simply by submitting an affidavit, deposition or "other satisfactory testimony, duly taken and certified by some court, magistrate, justice of the peace, or other legal officer authorized to administer an oath and take depositions *under the laws of the State or Territory*" from which the alleged slave had escaped.<sup>160</sup> In the alternative, the slave owner could

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<sup>156</sup> *Id.* § 8, 9 Stat. at 464.

<sup>157</sup> *Connally v. Georgia*, 429 U.S. 245 (1977) (declaring that paying judges higher fees in traffic court cases in which they ruled against the defendant than in cases in which they ruled for defendant was a violation of due process).

<sup>158</sup> CONG. GLOBE, *supra* note 83, app. at 1583 (noting that section 2 of the amendment to the bill offered by Senator Dayton on August 19, 1850 would have established a fixed fee of ten dollars for the commissioners in all cases regardless of outcome); *id.* app. at 1589 (reporting Senate vote rejecting the amendment).

<sup>159</sup> *See, e.g., id.* (noting that Senate rejected amendment to bill offered by Senator Chase that would have implemented various procedural protections for the alleged slave, including a jury trial); *id.* app. at 1589-90 (remarks of Senators Mason and Dayton) (debating the necessity or propriety of providing a right of appeal or right to seek a writ of habeas corpus by the alleged slave).

<sup>160</sup> Act of Sept. 18, 1850, ch. 60, § 6, 9 Stat. 462, 463 (emphasis added).

present evidence supporting his claim to a judge in the slave state, who could issue an authenticated transcript of the record of those proceedings. The fact record produced in this *ex parte* hearing in the slave state was binding in a subsequent federal hearing in a free state. That record was "full and conclusive evidence of the fact of escape, and that the service or labor of the person escaping is due to the party" claiming that the seized person was a runaway slave.<sup>161</sup>

The statute also adopted provisions designed to assist a claimant who had obtained a certificate from a federal commissioner or judge authorizing him to carry the captive back to slavery, both by confirming the right of the slaveholder to use force, and by enacting severe penalties for anyone obstructing the capture or return of the alleged runaway. The federal certificate authorized "such claimant, or his or her agent or attorney, to use such reasonable force and restraint as may be necessary, under the circumstances of the case, to take and remove such fugitive person back to the State or Territory whence he or she may have escaped . . ."<sup>162</sup> It imposed a fine of up to one thousand dollars, imprisonment of up to six months and civil damages of one thousand dollars for each slave who escaped or was freed, upon

any person who shall knowingly and willingly obstruct, hinder, or prevent such claimant, his agent or attorney, or any person or persons lawfully assisting him, her, or them, from arresting such a fugitive from service or labor, either with or without process . . . or shall rescue, or attempt to rescue, such fugitive from service or labor, from the custody of such claimant, his or her agent or attorney, or other person or persons lawfully assisting [them] . . . or shall aid, abet, or assist such person so owing service or labor as aforesaid, directly or indirectly, to escape from such claimant, his agent or attorney, or other person or persons legally authorized as aforesaid; or shall harbor or conceal such fugitive, so as to prevent the discovery and arrest of such person, after notice or knowledge of the fact that such person was a fugitive from service or la-

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<sup>161</sup> *Id.* § 10, 9 Stat. at 465.

<sup>162</sup> *Id.* § 6, 9 Stat. at 463.



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To ensure that relevant law enforcers would assist the slave owner, the Act required that marshals enforce all warrants or other legal process issued pursuant to the statute. Any marshal refusing to enforce the orders, or even failing “to use all proper means diligently to execute” them, would be fined one thousand dollars, which was paid to the slave owner, not to the government.<sup>164</sup> If an alleged slave escaped from the custody of a marshal, “whether with or without the [marshal’s] assent,” the marshal would be liable “for the full value of the service or labor of said fugitive.”<sup>165</sup>

The 1850 Act even gave those enforcing slave owners’ claims powers reminiscent of those exercised by government agents under the writs of assistance so despised in the pre-Revolutionary colonies.<sup>166</sup> To enforce the capture and return of a runaway, the new federal commissioners and their appointees had the authority to “summon and call to their aid the bystanders, or *posse comitatus* of the proper county, when necessary . . . and all good citizens are hereby commanded to aid and assist in the prompt and efficient execution of this law, whenever their services may be required . . . .”<sup>167</sup>

The Compromise of 1850 was just that; considering all of its elements, concessions were made by both northern and southern interests. But considered solely on its own terms, the 1850 Fugitive Slave Act amounted to a victory for slave owners and a legislative defeat for those opposed to the indiscriminate seizure of blacks in free states by slave hunters. The Act implicitly incorporated the southern presumption of slavery attached to race. It strengthened federal support for seizures based upon race so that Abraham Lincoln, who expressed support for the Compromise of 1850, would comment mordantly that the Fugitive Slave Act should be modified so that it would “not, in its stringency, be more likely to carry a free man into

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<sup>163</sup> *Id.* § 7, 9 Stat. at 464.

<sup>164</sup> *Id.* § 5, 9 Stat. at 462.

<sup>165</sup> *Id.* § 5.

<sup>166</sup> See *supra* note 30 and accompanying text.

<sup>167</sup> Act of Sept. 18, 1850, ch. 60, § 5, 9 Stat. 462.

slavery, than our ordinary criminal laws are to hang an innocent one."<sup>168</sup>

Whatever the likelihood that an innocent man would be hung in 1850, it seems beyond dispute that the other appalling crime did occur; free people were seized and carried into slavery. This was a process implicitly supported by federal law from the time of the Founders, who had been willing to accept slavery—and the loathsome methods used to hold people in servitude—in exchange for a new political system. One of those loathsome methods was the seizure of people because of their race. The Fugitive Slave Act of 1850 was appalling, in part because its lineage can be traced directly to the Founders.

#### IV. LESSONS

Elsewhere I have cautioned against crafting simplistic solutions for contemporary problems from complex legal histories.<sup>169</sup> That warning seems particularly apt for any effort to draw lessons for the current “war on terrorism” from events occurring more than two centuries ago. Nonetheless, the Founders’ willingness to seize members of a religious minority in the midst of a wartime crisis, and their willingness to permit seizures of members of a disfavored racial minority to avert political catastrophe, warrant our attention. If we do not attempt to divine literal rules from these events, they offer some useful—if not always reassuring—insights about how we might view government “profiling” of members of religious and racial minority groups in the midst of the present crisis.

For example, it is apparent that collectively the Founders of our constitutional scheme accepted some seizures based upon group identity as necessary responses to national crises. If we accord the Founders’ views any weight in twenty-first century constitutional analysis, then we must acknowledge that they accepted what we now label “profiling” as a legitimate response to nation-threatening crises.

Conversely, it is also apparent that even in the most dire

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<sup>168</sup> DAVID HERBERT DONALD, *LINCOLN* 181 (1995).

<sup>169</sup> See Morgan Cloud, *Searching through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1743-47 (1996).

circumstances, this differential treatment of minority groups roused opposition. As a hostile army marched upon the seat of government, some political leaders still challenged seizures justified by the detainees' membership in a disfavored and mistrusted religious minority. The subsequent release of the Quaker prisoners was in part the product of a widespread concern about government seizures that conflicted with legal norms protective of individual rights. It was also the product of agitation by the prisoners and their supporters, who argued relentlessly that these seizures violated fundamental rights and established legal rules.

As noted earlier, these events suggest several broad lessons we might draw from the Founders' behavior. First, these events suggest that profile-based seizures are justified in times of extreme crisis. Second, they confirm that opposition to government seizures based upon a person's group affiliation are consistent with our great democratic traditions and should be honored as patriotic acts.

Finally, the relatively brief captivity of the Quakers suggests that the use of these methods should be terminated as quickly as possible. This last "lesson" may be the most difficult for us to apply today, because its application depends in part upon how we define the crisis used to justify otherwise unacceptable government conduct.

While the treatment of the Quaker prisoners seems to confirm that acceptance of "profiling" by the founding generation was tempered by a commitment to substantive and procedural rights of liberty and conscience, the way they defined the nature and scope of the crisis also seemed to contribute to the decision to release these captives. Political decision makers apparently defined the crisis narrowly (the invasion of Philadelphia) not broadly (the larger war with England). Once the British army left Philadelphia, the narrow crisis was over, the threat posed by the religious minority was abated and release of the captives was feasible. This outcome might have been different if the crisis had been defined as the larger military campaign that lasted for many years. Like the Japanese Americans imprisoned during World War II, the Quakers might have been held until the war's completion. Viewed from the

perspective of this issue, the treatment of fugitive slaves supplies a very different example.

If the seizures of Philadelphia Quakers in 1776 were incidental to a transient crisis, the Fugitive Slave Clause and the 1793 Act were responses to disputes about slavery that would continue for seven decades and would be resolved only in a bloody war. Seizures of runaway slaves were woven into the fabric of the nation's economic, social, political and legal institutions. It became impossible to eradicate this type of "profiling" without eliminating slavery.

The lessons this suggests for the present are troubling. If the crisis used to justify profiling in the "war against terror" is defined as a particular set of terrorist crimes—the September 11 attacks—then the use of profiling should end with the passing of the immediate crisis, as it did with the seizure of the Philadelphia Quakers during the Revolution. But if the crisis is defined as a continuing, and perhaps endless, struggle against terrorist acts committed by Islamic radicals, then the national security profiling proposed in the Justice Department guidelines could be used for decades.

A decades-long struggle with Islamic terrorists suggests a temporal parallel to the nearly eight decades that passed between ratification of the Constitution's Fugitive Slave Clause and ratification of the Thirteenth Amendment. Throughout most of that period, slavery's defenders claimed that efforts to end slavery, or to obstruct the recapture of fugitive slaves, or even to oppose the continuation (and extension into new territories) of slavery, created a crisis that would destroy the Union. This seemingly interminable political crisis justified a brutal form of profiling that authorized the seizure of blacks alleged to be runaway slaves.

If history teaches us that we should not be surprised that profiling happens in times of crisis, it also teaches that we need not readily accept the claims of its defenders, whatever their purposes may be. This does not mean that all profiling is equivalent. The relatively brief and comparatively benign incarceration of Quakers by national and state authorities during the Revolution may be an example of religious profiling, but it is hardly comparable to the racial profiling of runaway slaves,

and surely neither example is directly comparable to current attempts to protect us from terrorist crimes of violence. But that does not mean that we are obligated to accept the claims of government officials pressing to use these methods.

Like the citizens of earlier generations, we are entitled to protect our nation from destruction by our enemies. But like our political ancestors, we are entitled to resist claims by government leaders that they must be granted extraordinary powers to carry out that mission. Like those ancestors, we face an unknown future. But we do know that our nation can survive only if we have the courage to fight for it when it is threatened. And we should know by now that liberty can survive the exercise of government power only if we have the courage to fight for it as well.

