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## Cotton, Clemency, and Control: United States v. Klein and the Juridical Legacy of Executive Pardon

Heather L. Clancy  
Gettysburg College  
Class of 2015

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# Cotton, Clemency, and Control: United States v. Klein and the Juridical Legacy of Executive Pardon

## **Abstract**

When the guns of war fell silent in 1865, Americans throughout the reunited states grappled with the logistics of peace. At virtually every turn lay nebulous but critical questions of race, class, allegiance, and identity. More pragmatic legal stumbling blocks could also be found strewn across the path to Reconstruction; some of them would ensnare the healing nation for decades to come. Among their number was notorious Supreme Court decision *United States v. Klein* (1872). Born on July 22, 1865 out of a small debate over the wartime seizure of Vicksburg cotton stores, *Klein* quickly evolved into a legal behemoth. In its tangles with the separation of powers, the presidential power of pardon, and the supremacy of the executive in judicial matters, *United States v. Klein* would ultimately amount to the very poster child of the snowball effect at work in Reconstruction law. Widely forgotten or overlooked today, the decision of *United States v. Klein* nonetheless stands as one of the most crucial battles of the American Civil War era.

## **Keywords**

US v Klein, Clemency, Executive Pardons, Salmon Chase, Confiscated Property, Confederacy, Abraham Lincoln, Reconstruction, Law

**COTTON, CLEMENCY, AND CONTROL:  
*UNITED STATES V. KLEIN* AND THE JURIDICAL  
LEGACY OF EXECUTIVE PARDON**

Heather Clancy

On January 29, 1872, Chief Justice Salmon Portland Chase rose from the bench to deliver one of his final Supreme Court majority opinions.<sup>1</sup> Flanked by the white columns and red backdrop of the court chamber on that January day, Chase peered out from under bushy white brows to solemnly address his audience. For several tense minutes he intoned the court's ruling until finally concluding tersely that sometimes brevity is the most appropriate rhetorical choice and coming to a concise close. By the time that Chase took his seat again, the aging justice had played his part in deciding one of the most charged moments in American legal history. Despite its humble origins as a wartime compensation claim dispute over cotton, this 7-2 Supreme Court decision of *United States v. Klein* would come to strongly reinforce the separation of powers, crippling a congressional statute intended to limit presidential pardoning clout and reaffirming the supremacy

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<sup>1</sup> Chase would spend his last day as Supreme Court Justice hardly more than a year later, dying suddenly in New York on May 7, 1873 at the age of 65. A writer for the San Francisco *Daily Evening Bulletin* sang Chase's praises on the evening of his passing, remarking that although the Chief Justice had been plagued by "broken health" in his later years, he nonetheless stood as "an upright Judge, and a statesman who has become illustrious in the history of his country."

of the executive in judicial matters. Thus was offered one of the most overlooked but critical legal verdicts of the American Civil War era.

The story of *United States v. Klein* begins nearly a decade before its conclusion, with the passage of Congress's Abandoned and Captured Property Act of March 12, 1863. As extended by a second act on July 2, 1864, the legislation "authorized a recovery in the court of claims for the proceeds of property captured and sold by the military authorities without judicial condemnation after July 17, 1862, and before March 12, 1863."<sup>2</sup> In passing the act, Congress enabled owners of property that had been seized in the course of the war to claim whatever proceeds had been gained from the sale of the confiscated property.<sup>3</sup> John A.

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<sup>2</sup> This summary of the Abandoned and Captured Properties Act can be found under the General Index entry for the act in *United States Supreme Court, United States Supreme Court Reports, Volumes 98-101* (Rochester, NY: The Lawyers Co-Operative Publishing Company, 1901), 1087.

<sup>3</sup> "1. Under [the Abandoned and Captured Properties Act] a party preferring his claim in the Court of Claims, need not, where he has purchased in good faith, prove the loyalty of the person from whom he bought the property whose proceeds he claims. . . .

2. The vendor is a competent witness to support the claimant's case, if he never had any claim or right against the government, and is not interested in the suit. . . .

3. In a claim under this act, the Court of Claims may render judgment for a specific sum as due to the claimant.

4. Claimants under the act are not deprived of its benefits because of aid and comfort *not* voluntarily given to the rebellion.

## Clancy

Klein, acting administrator for the estate of Vicksburg Collector of Customs Victor F. Wilson, would act in accordance with the passing of the new act when he applied in the Court of Claims for proceeds owed Wilson “for cotton and interest due . . . and for refund of duties and internal-revenue tax.”<sup>4</sup> The 664 bales of cotton in question (amounting to \$125,300 USD in claims) had been seized from Wilson’s warehouse by Confederate troops in the summer of 1863 during Grant’s siege of Vicksburg.<sup>5</sup> The

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5. But voluntarily executing, even through motives of personal friendship, the official bonds of quartermasters or commissaries of the rebel army, was giving such aid and comfort. . . .

6. The mere taking possession of a city by the government forces was not a ‘capture’ of all the cotton in it, within the meaning of the act.”

United States Supreme Court, *Cases Argued and Adjudged in The Supreme Court of the United States, December Term, 1869* (Washington, DC: William H. Morrison, 1870), 817.

<sup>4</sup> Victor F. Wilson died intestate—without a will—on July 22, 1865, only a few short weeks after the last Confederate troops surrendered to Union forces. Wilson would be survived by his widow Jane Wilson (d. 1878) and his children Ann Wilson, Jane “Jeanie” Wilson, Ellen Wilson, Victor F. Wilson, Jr., Catherine Wilson, and Robert Wilson. United States Supreme Court, “United States, Appt., v. John A. Klein, Surviving Admr. of Victor F. Wilson, Deceased” in *United States Supreme Court Reports, Volumes 78-81* (Rochester, NY: E.R. Andrews Printing Company, 1912), 519-527. Victor F. Wilson family information courtesy of Ancestry.com

<sup>5</sup> This sum of \$125,300 would amount to more than \$2.36 million today once adjusted for inflation. (Calculation curtesy of “Inflation Calculator,” <http://www.davemanuel.com/inflation-calculator.php>.)

troops then took the cotton and “without his license or consent” relocated it to “the various defenses of the town, to protect it [the cotton] against the approaches and assaults of the Union army.”<sup>6</sup>

The Confederate plan backfired, however, and the bales were discovered and subsequently sold by the victorious Union forces, with proceeds from the sales going to the United States Treasury. The situation was further complicated with a development on December 8, 1863, when President Abraham Lincoln issued a proclamation offering pardon to any individual who had supported or fought for the so-called Confederate States of America—including full restoration of property rights—so long as the individual was able and willing to take the oath of allegiance to the United States.<sup>7</sup> Victor F. Wilson would take eager advantage of this offer, taking the oath of allegiance only weeks later on February 15, 1864. After the war ended, Klein submitted a claim for the 664 bales of cotton to the Court of Claims on December 26, 1865. In 1866 the suit was brought before the court for \$125,300, at which time the court ruled in favor of Wilson’s estate.<sup>8</sup>

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<sup>6</sup> United States Supreme Court, *Digest of the United States Supreme Court Reports: U. S. vols. 1-206* (Rochester, NY: Lawyers Co-Operative Publishing Co., 1908), 3.

<sup>7</sup> Dictionary.Law.com defines an executive pardon as using “the executive power of a Governor or President to forgive a person convicted of a crime, thus removing any remaining penalties or punishments and preventing any new prosecution of the person for the crime for which the pardon was given.”

<sup>8</sup> United States Supreme Court, “United States, Appt., v. John A. Klein, Surviving Admr. of Victor F. Wilson, Deceased,” *United*

## Clancy

It was only later revealed that Wilson had received surety—guarantee of imbursement—in the form of two Confederate bonds, one signed on August 11, 1862 for brigade quartermaster John H. Crump and the other in 1863 for an assistant commissary. This acceptance of Confederate bonds was a development that brought the sincerity of Wilson’s 1864 oath of allegiance into question. The court ruled that Klein himself “did give aid and comfort to the rebellion and the persons engaged therein, and did not at all times consistently adhere to the United States.” The ruling did state, however, that Wilson’s children were minors during the war and “never gave comfort to the rebellion.” Wilson, likewise, “did adhere to the United States” during the period in question, his pardon having “[relieved] him from any charge of disloyalty on account of his having become surety.” On May 26, 1869, the Court of Claims ruled that Wilson’s estate was entitled to receive the full \$125,300 and so decreed the entirety of the amount to Klein to administer to Wilson’s estate.<sup>9</sup>

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*States Supreme Court Reports, Volumes 78-81* (Rochester, NY: E.R. Andrews Printing Company, 1912), 519-527.

<sup>9</sup> Readers may find it intriguing to learn that the case of the 664 bales of stolen cotton was not the first of Wilson’s wartime misfortunes. On September 5, 1862, it was reported in the *Vicksburg Evening Citizen* that previous day’s shelling of the city and its port had resulted in a shell striking Wilson’s residence. The shell “entered the northwest corner [of the house], and from thence to the cellar, where it exploded, tearing things to pieces generally, and coming out at the top of the building.” United States House of Representatives, “Claims Arising Under the Captured and Abandoned Property Act” in *United States*

On April 30, 1870 the Supreme Court would decide a parallel case to *United States v. Klein* in the form of *United States v. Padelford*. Like Klein, Edward Padelford had abandoned his stores of cotton due to wartime chaos and “having participated in the rebellion had taken the amnesty oath.” He then approached the Court of Claims in the hopes of regaining the value of his lost cotton. The court ruled that Padelford’s swearing of the oath of allegiance to secure the presidential pardon had effectively negated his participation in the late rebellion, making him eligible to claim the value of his lost cotton. Lawyers representing the United States then appealed the *Padelford* case before the Supreme Court, only to be defeated again by the powerful presidential

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*Congressional Serial Set, Issue 3269* (Washington, DC: U.S. Government Printing Office, 1894), 2; United States Supreme Court, “United States, Appt., v. John A. Klein, Surviving Admr. of Victor F. Wilson, Deceased” in *United States Supreme Court Reports, Volumes 78-81* (Rochester, NY: E.R. Andrews Printing Company, 1912), 520; United States Court of Claims, *Reports from the Court of Claims Submitted to the House of Representatives, Volume 12* (Washington, DC: W.H. and O.H. Morrison Law Books Publishers, 1877), 729; Charles C. Nott and Samuel H. Huntington, *Cases Decided in the Court of Claims of the United States at the December Term 1871; and the Decisions of the Supreme Court of the United States in All the Appealed Cases from 1865 to May 1872* (Washington, DC: W.H. and O.H. Morrison Law Books Publishers, 1873), vii-viii; *The Philadelphia Inquirer*, “Appointments, etc.,” June 23, 1865; United States Supreme Court, “*United States v. Klein*” [80 U.S. 128 (1872)], in *United States Reports: Cases Adjudged in the Supreme Court, Volume 80* (Washington, DC: U.S. Government Printing Office, 1872), 132.



## Clancy

pardon. Ultimately, the Supreme Court would rule in the favor of Edward Padelford, affirming the Court of Claims decision.<sup>10</sup>

Three months after the decision of *United States v. Padelford*, on July 12, 1870 the progression of *United States v. Klein* would be forced to diverge significantly from *United States v. Padelford*'s trajectory when Congress passed what became known at the time as the Drake proviso to the General Appropriations Act of 1870, prohibiting the use of a presidential pardon in applying for sale proceeds in the Court of Claims:

*Provided*, That no pardon or amnesty granted by the President, whether general or special, by proclamation or otherwise, nor any acceptance of such pardon or amnesty, nor oath taken, or other act performed in pursuance or as a condition thereof, shall be admissible in evidence on the part of any claimant in the Court of Claims as evidence

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<sup>10</sup> United States Supreme Court, "*United States v. Klein*" [80 U.S. 128 (1872)] in *United States Reports*, 132, 143; United States Supreme Court, "*United States v. Padelford*" [76 U.S. 531 (1869)].

<https://supreme.justia.com/cases/federal/us/76/531/case.html>; United States Supreme Court, *The Supreme Court Reporter*, Volume 15 (St. Louis: West Publishing Co, 1895), 170; *The Saturday Review of Politics, Literature, Science and Art*, "The President and Congress," December 22, 1866. Published in *The Saturday Review of Politics, Literature, Science and Art Volume 22* (London: Spottiswoode and Co., 1866).

in support of any claim against the United States, or to establish the standing of any claimant in said court, or his right to bring or maintain suit therein...

Furthermore, Republican Missouri Senator Charles D. Drake's proviso asserted that acceptance of such a pardon amounted to evidence that the pardoned individual did in fact provide support to the Confederacy and was therefore ineligible to recover sale proceeds. By even requesting a pardon, the Drake proviso claimed, an individual admitted his own guilt. As a result, Wilson's acceptance of Lincoln's pardon in 1862 would be reason enough to categorize Wilson's estate as ineligible to receive the proceeds from the sale of the 664 bales of cotton seized in Vicksburg. The ripples of this kind of *ex post facto* presidential pardon limitation had chafed public opinion as far away as Britain, with one British journalist calling such legislation "a revolutionary measure, and the retrospective effect of the change [a] violation of natural justice." On the basis of the new 1870 statute, the United States government appealed the increasingly convoluted claims case to the Supreme Court. The Supreme Court then accepted *United States v. Klein* to be the seventeenth of almost forty for review and trial during that session, setting the date for its argument as April 21, 1871, only to be held under advisement until October of the same year.<sup>11</sup>

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<sup>11</sup> United States Supreme Court, "*United States v. Klein*" [80 U.S. 128 (1872)], in *United States Reports*, 133; "The President

## Clancy

On January 29, 1872, nearly a full seven years after the Civil War's conclusion, the United States Supreme Court ruled in favor of John A. Klein and by extension the estate of the late Victor F. Wilson. When Chief Justice Chase rose and delivered the court's opinion, he not only ruled in favor of Klein and Wilson but also in favor of the presidency's executive pardoning power. The court ruled both that the General Appropriations Act of 1870's Drake proviso was unconstitutional and that Congress had exceeded its constitutionally-allotted legislative power by attempting to dictate a judicial branch decision. Furthermore, the court ruled that Congress had also encroached on the executive branch's domain in passing a statute intended to restrict the power of the executive's constitutional pardoning power. In an opinion delivered by T.D. Lincoln, J.M. Carlisle, and others on behalf of the appellee that was later recorded in Volume 80 of the Supreme Court Reports, it was forcefully asserted that "If [the president's] acts are liable to be controlled, modified, annulled, or defeated by Congress, the division of powers in this government is a chimera and a delusion."<sup>12</sup> Their sentiments are echoed perfectly in an

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and Congress," *The Saturday Review* [London], December 22, 1866; "Washington," *The New York Herald*, April 24, 1871; "Constitutionality of the Civil Rights Bill," *The Philadelphia Inquirer*, April 28, 1871.

<sup>12</sup> Justices Samuel F. Miller and Joseph P. Bradley opposed the majority opinion in *United States v. Klein*. Presenting the dissenting opinion for the two was Miller, who argued that the key issue at hand was that the Supreme Court honor the original intent of the Abandoned and Captured Property Act: "to restore the proceeds of such property to the loyal citizen, and to transfer

*Atlanta Daily Sun* article of March 8, 1873 that utilized the language of abolition when it forcefully maintained that “This power to grant pardon and amnesty is vested by the Constitution in the President alone. It cannot be fettered by legislation.” The volatility of sentiment regarding the case held by those involved in and monitoring its progress simply cannot be overlooked.<sup>13</sup>

Press coverage of *United States v. Klein* was as diverse and spirited in opinion as that surrounding the question of presidential pardon. One article originally printed in *The New York World* was reprinted in Atlanta on March 14, 1872. In it, the author reflected on the decision’s relationship with the Constitution’s Fourteenth Amendment, adopted several years earlier on July 9, 1868. In the view of the *New York World* author, the wording of the amendment’s

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it absolutely to the government in the case of those who had given active support to the Rebellion. . . . Can it be inferred from anything found in the statute that Congress intended that this property should ever be restored to the disloyal? I am unable to discern any such intent.” For Justice Miller, the question of Wilson’s loyalty was laid to rest by Wilson’s traitorous acceptance of Confederate bonds. *United States Supreme Court*, “United States, Appt., v. John A. Klein, Surviving Admr. of Victor F. Wilson, Deceased”, 521; *United States Supreme Court Reports, Volumes 78-81* (Rochester, NY: E.R. Andrews Printing Company, 1912), 526-527.

<sup>13</sup> *United States Supreme Court*, “United States, Appt., v. John A. Klein, Surviving Admr. of Victor F. Wilson, Deceased”, 521; *United States Supreme Court Reports, Volumes 78-81* (Rochester, NY: E.R. Andrews Printing Company, 1912), 521; *The Atlanta Daily Sun*, “The Morrill Amendment, Speech of Rep. Erasmus W. Beck, of Georgia” March 8, 1873.

## Clancy

third section proves convoluted in light of the *United States v. Klein* ruling. That third section reads as follows:

No person shall be a Senator or Representative in Congress, or elector of President or Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

When read alongside the majority opinion of *United States v. Klein*, the journalist argued, it might be interpreted that prior to the ratification of the Fourteenth Amendment, “all citizens were eligible to office, even though they might have participated in insurrection or rebellion, but that with the adoption of the amendment such classes as are named therein were rendered ineligible by reason of such participation.” Thus, it was Section 3 of the Fourteenth Amendment itself that had “imposed” disabilities, rather than merely outlined them for maximum Constitutional

clarity. As a result, Johnson's Proclamation 170 pardons of July 4, 1868 under the executive freedom of pardon reaffirmed under *United States v. Klein* became needlessly complicated, rendered meaningless in the face of an amendment that had defined punishment for a crime that had not even existed until its ratification. A writer for the *Georgia Weekly Telegraph* would respond some five days later on March 19, 1872, writing that although the author for *The New York World* held an argument that "seems conclusive," it was nonetheless one without pragmatic worth. "Congress will not acknowledge it, and the precise point is yet to be passed upon by the Federal courts." It would not do, he cautioned, to lose oneself in theory at a time when the nation so desperately required level-mindedness.<sup>14</sup>

The same *Georgia Weekly Telegraph* journalist continued on to provide one of the most vitriolic condemnations of the Drake proviso to the General Appropriations Act of 1870. The proviso was a spiteful example of postwar federal legislation, he raged, that

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<sup>14</sup> *The New York World*, "Does the Fourteenth Amendment Disqualify Anybody?" March 9, 1872. Reprinted under the same title in *The Atlanta Daily Sun*, March 14, 1872; "14th Amendment," accessed via Legal Information Institute, Cornell University Law School.

<https://www.law.cornell.edu/constitution/amendmentxiv>;  
Andrew Johnson, "Proclamation 170, Granting Pardon to All Persons Participating in the Late Rebellion Except Those Under Indictment for Treason or Other Felony," 1868.

<http://www.presidency.ucsb.edu/ws/index.php?pid=72270>;  
*Georgia Weekly Telegraph*, "An Interesting if not a Practical Question," March 19, 1872.

## Clancy

attempted to “convert into poison and venom, a constitutional act of Executive benignity.” This Congressional design to corrupt a “generous and merciful offer of pardon was the lowest example of legislative retribution for the late rebellion,” the author continued. There was no doubt in his mind that “the case is clear enough” and it would only be proper that the United States Supreme Court would stand in line with the executive platform of official magnanimity, ruling in favor of the deceased Victor F. Wilson. In agreement with him was a reporter for the *New York Herald* on January 30, 1872 who railed that “To repeal [the presidential pardon by way of the Drake proviso] would be a breach of faith not less cruel and astounding than to abandon the freed people whom the Executive had promised to maintain in their freedom.” Once again, a newspaper writer invoked enslavement and freedom to legitimize his argument, appealing to the kindly sentiments of his readers.<sup>15</sup>

The Supreme Court’s decision in *United States v. Klein* has had an impressively resounding and varied legal legacy. Although the case’s origins lay in a convoluted Civil War property dispute, its utility in debates far removed from its beginnings has been undeniable. In the 1980 *United*

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<sup>15</sup> *The New York Herald*, “United States Supreme Court: Important Decision Based Upon the Drake Amendment of the Appropriation Act of 1863—An Appeal to the Court of Claims by the Administrator to the Estate of a Pardoned Rebel—Congress and the Judiciary at Variance—The Chief Justice Claims Full Jurisdiction and Orders the Property to be Returned to the Suitor,” January 30, 1872.

*States v. Sioux State of Indians* Black Hills claim, a Sioux Nation push for compensation for federal seizure of their ancestral lands stagnated in a quagmire of red tape. In the case, a 1978 *res judicata* waiver served as the 1871 Congressional Drake proviso had in *United States v. Klein*, complicating the court's decision.<sup>16</sup> Suspicions arose that the waiver was an attempt to overrule a 1942 Court of Claims decision in the Black Hills claim—a flagrant violation of the separation of powers if true. In the Black Hills case, Justice Harry Blackmun ultimately decided that holdings in *United States v. Klein* did not apply to the Black Hills discussion; the *res judicata* waiver lacked unconstitutional intent to dictate the judicial branch's decision, and it had liberating—rather than restrictive—effects on adjudication.<sup>17</sup>

Former president William Clinton made reference to *United States v. Klein* in his 2001 *New York Times* op-ed piece “My Reasons for the Pardons.” In the article, he defended certain pardons and commutations among the 140 and 36 he respectively made at the end of his presidency on January 20, 2001. Among those released were Marc Rich and Pincus Green, originally indicted in 1983 for racketeering and fraud. By harkening back to *United States*

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<sup>16</sup> *Res judicata*: “the thing has been judged,” meaning the issue before the court has already been decided by another court, between the same parties. Therefore, the court will dismiss the case before it as being useless. <Dictionary.Law.com>

<sup>17</sup> Edward Lazarus, “The Highest Court in the Land” in *Black Hills White Justice: The Sioux Nation versus the United States, 1775 to the Present* (Lincoln, NE: University of Nebraska Press, 1999), 394-396.



## Clancy

*v. Klein*, Clinton likely sought to legitimize his actions, reminding readers of the freedom that the case had granted presidents to pardon whom they chose and as they saw fit. *United States v. Klein* would make a prominent appearance again in 2008 with the legal debate *Exxon Mobil Corporation v. Federal Energy Regulatory Commission*, in which a dense legal tangle arose surrounding the Trans Alaska Pipeline System allowed by Congress in the Trans Alaska Pipeline Authorization Act, 43 U.S.C. § 1651. In the end it was concluded that the decision in *United States v. Klein* had no relevancy in “the administrative context, much less [in] an administrative ratemaking proceeding” as *Klein* only applied to entities invested with judicial power.<sup>18</sup>

Writings on the *United States v. Klein* decision have sprung up just as richly in the world of academia. These more recent analyses of the case have often been conducted from a background of legal training, however, focusing on the case’s utility in determining the outcome of modern court rulings rather than on the historical significance of *United States v. Klein*. Some, such as Martin H. Redish and Christopher R. Pudelski—professor of Law and Public Policy and law clerk, respectively—have made efforts to defend a political theoretical reading of the case that some have argued blows its true impact out of proportion, making a grand judicial gesture of reinforcing the separation of

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<sup>18</sup> William Jefferson Clinton, “My Reasons for the Pardons,” *New York Times*, February 18, 2001; *Exxon Mobil Corp. v. FERC*, 571 F.3d 1208 (DC Cir. 2009). [http://www.scotusblog.com/wp-content/uploads/2008/12/08-212\\_bio\\_petro.pdf](http://www.scotusblog.com/wp-content/uploads/2008/12/08-212_bio_petro.pdf).

powers out of what is merely a “relatively brief and cryptic post-Civil War decision.” Others have analyzed *United States v. Klein* in the shadow of the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008 (FISA Amendments Act of 2008), which established official procedure for “authorizing certain acquisitions of foreign intelligence,” including offering retroactive immunity by providing “standards and procedures for liability protection for electronic communication service providers who assisted the Government between September 11, 2001 and January 17, 2007, when the President's Terrorist Surveillance Program was brought under the FISA Court.” One such scholar is *Utah Law Review* editor Nate Olsen, who stressed in 2009 that the FISA Amendments Act of 2008 “is simply bad law” because it “relies on a power Congress lacks,” a conclusion that he reaches using *United States v. Klein* as precedent for the restriction of Congressional hegemony.<sup>19</sup>

In two articles by Associate Professor of Law Howard M. Wasserman of the Florida International

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<sup>19</sup> Martin H. Redish and Christopher R. Pudelski, “Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of *United States v. Klein*,” *Northwestern University Law Review* 100, no. 1 (2006): 437-464; Redish and Pudelski, 463; FISA Amendments Act of 2008. <https://www.govtrack.us/congress/bills/110/hr6304/text>; Office of Senator Kit Bond, “FISA Amendments Act of 2008,” *The Wall Street Journal*, June 19, 2008. <http://www.wsj.com/articles/SB121391360949290049>; Nate Olsen, “Congress and the Court: Retroactive Immunity in the FISA Amendments Act and the Problem of *United States v. Klein*,” *Utah Law Review* 1353 (2009): 1-20; Olsen, 7.

## Clancy

University College of Law, Wasserman further explores the value of the case in post-9/11 judicial hearings. There is a certain cult of *Klein*, argues Wasserman, which is largely unsubstantiated. In general, he asserts, the case “does little or no work, certainly not in non-pathological times.” The case’s true efficacy, Wasserman states, is instead in its historical role in “curbing the worst legislative excess,” a crucial one as he notes that “Congress (or at least individual members of Congress) may be willing to vote in favor of unconstitutional legislation, [especially] in pathological times, where the ordinary restraints are removed.” In the post-9/11 political climate of frenetic homeland security measures such as the FISA Amendments Act of 2008, Wasserman argues, *United States v. Klein*’s tempering of Congressional profusion is instrumental.<sup>20</sup>

Gordon Young likewise looked askance at hasty references made to *United States v. Klein* in his 1981 article “Congressional Regulation of Federal Courts’ Jurisdiction and Processes: *United States v. Klein* Revisited.” In it, he made reference to past cases and situations that had “invoked [*Klein*] for propositions on which it has little bearing other than its establishment of the legitimacy of an inquiry into Congress’ [*sic*] abuse of its power to regulate the federal

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<sup>20</sup> Howard M. Wasserman, “The Irrepressible Myth of Klein,” *University of Cincinnati Law Review* 79 (2010): 53-96; Howard M. Wasserman, “Constitutional Pathology, the War on Terror, and *United States v. Klein*,” *Journal of National Security Law and Policy* 5 (2011): 211-235; Wasserman, “The Irrepressible Myth of Klein,” 96; Wasserman, “Constitutional Pathology, the War on Terror, and *United States v. Klein*,” 234-235.

courts.” For instance, he outlined, the case had negligible relevance to contemporary cases involving busing, abortion, school prayers, and the Speedy Trial Act of 1974. Young even went so far as to liken *United States v. Klein* to the “unfortunate guests” of Procrustes, stretched mercilessly without reflection or remorse.<sup>21</sup>

For the American people, their four-year civil war would be the reaper of some 750,000 souls.<sup>22</sup> The conflict would rend the nation with violence and loss. By its end, it would remain for those who had survived to piece back

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<sup>21</sup> “Procrustes had an iron bed (or, according to some accounts, two beds) on which he compelled his victims to lie. Here, if a victim was shorter than the bed, he stretched him by hammering or racking the body to fit. Alternatively, if the victim was longer than the bed, he cut off the legs to make the body fit the bed’s length. In either event the victim died. Ultimately Procrustes was slain by his own method by the young Attic hero Theseus. . .” Encyclopædia Britannica Online, “Procrustes: Greek mythological figure.”

<http://www.britannica.com/topic/Procrustes>.

Gordon G. Young, “Congressional Regulation of Federal Courts’ Jurisdiction and Processes: *United States v. Klein* Revisited,” *Wisconsin Law Review* 1189 (1981): 1189-1262; Young, “Congressional Regulation of Federal Courts’ Jurisdiction and Processes,” 1261.

<sup>22</sup> This 750,000 statistic reflects historian J. David Hecker’s recent scholarship on the casualty figures of the Civil War, which utilized 1860 and 1870 census data to project how United States demographics might have appeared had the war not taken such a deadly toll. J. David Hacker, “Recounting the Dead,” *The New York Times*, Opinionator, 20 September 2011. <http://opinionator.blogs.nytimes.com/2011/09/20/recounting-the-dead/>.

## Clancy

together that which had been so viciously torn apart in the struggle for Union and freedom. Not unlike the endless heaps of horsehair used by army surgeons to suture closed the gaping wounds of those physically ravaged by the war, it would be postwar rulings and legislation that would stitch the war-torn nation back together after the guns fell silent in 1865. For decades the citizenry of the United States would continue to negotiate a peace that was in many ways more complicated than the violence which had preceded it. The Supreme Court case *United States v. Klein* would function as but a single step in the intricate process of mending the nation. Even so, its role was a crucial one, helping to define the utility and limits of executive magnanimity, reassert presidential power, and further highlight both the divides and intersections between the three branches of American government. In the aging colossal legal apparatus of the post-Civil War era, an unconsidered cog labeled *United States v. Klein* labors on.

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