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### James Oakes's Treatment of the First Confiscation Act in Freedom National: The Destruction of Slavery in the United States, 1861-1865

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# ESSAY

## James Oakes's Treatment of the First Confiscation Act in *Freedom National: The Destruction of Slavery in the United States, 1861–1865*

ANGELA M. PORTER\*

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## INTRODUCTION

In his work, *Freedom National: The Destruction of Slavery in the United States, 1861-1865*, James Oakes provides an overview of several Civil War era legal instruments regarding enslavement in the United States. One of the statutes he examines is *An Act to Confiscate Property Used for Insurrectionary Purposes*, passed by the Thirty-Seventh Congress in August, 1861. This law, popularly known as the First Confiscation Act (FCA), is one of the several "Confiscation Acts" that contributed to the weakening of legal enslavement during the War. Fortunately, scholars have contextualized and deemphasized President Lincoln's role as the "Great Emancipator" by examining the works of Congress during the War and by shifting focus to the actions of the enslaved, as they emancipated themselves by fleeing Confederate states. However, many scholars tend to mirror their treatment of Lincoln in the Confiscation Acts by either spreading historical falsehood or twisting the congressional narrative with hyperbole. Some historians overstate the intent and legal effect of the Confiscation Acts, and in *Freedom National*, Oakes is one of those historians.

The purpose of this Essay is to examine Oakes's treatment of the First Confiscation Act through a review of congressional sources. After looking at the congressional debates and other evidence from the War, scholars must hold Lincoln and Civil War historians accountable for their statements; statements that can be misleading and damaging to desired historical accuracy. We are all attempting to uncover the truth about this oft-mentioned era of American history. In our highly-racialized society, where the history of enslavement in the United States remains deeply significant, close scrutiny of the historical narra-

tive is necessary. It is for these reasons, that I respectfully offer this critique of Oakes's narrative surrounding the FCA.

## I. BACKGROUND: OVERVIEW OF THE FIRST CONFISCATION ACT

The popular name "First Confiscation Act" refers to a statute that was officially entitled "An Act to confiscate Property used for Insurrectionary Purposes."<sup>1</sup> The portion of the statute that is relevant for purposes of this Essay is Section 4, which addresses the confiscation of what I will call "slave property." In its final form, Section 4 of the FCA is as follows:

Sec. 4. *And be it further enacted*, That whenever hereafter, during the present insurrection against the Government of the United States, any person claimed to be held to labor or service under the law of any State, shall be required or permitted by the person to whom such labor or service is claimed to be due, or by the lawful agent of such person, to take up arms against the United States, or shall be required or permitted by the person to whom such labor or service is claimed to be due, or his lawful agent, to work or to be employed in or upon any fort, navy yard, dock, armory, ship, entrenchment, or in any military or naval service whatsoever, against the Government and lawful authority of the United States, then, and in every such case, the person to whom such labor or service is claimed to be due shall forfeit his claim to such labor, any law of the state or of the United States to the contrary notwithstanding. And whenever thereafter the person claiming such labor or service shall seek to enforce his claim, it shall be a full and sufficient answer to such claim that the person whose service or labor is claimed had been employed in hostile service against the Government of the United States, contrary to the provisions of this act.

APPROVED, August 6, 1861.<sup>2</sup>

### A. Overview of the Act's Passage

For readers unfamiliar with the details of the Act's congressional treatment, it is necessary to review its timeline. On July 8, 1861, the *House Journal* indicates that it was resolved that "the Committee on the Judiciary be . . . instructed to prepare and report to this House a

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1. H.R. JOURNAL, 37th Cong., 1st Sess. (1861).

2. An Act to Confiscate Property Used for Insurrectionary Purposes (First Confiscation Act) Ch. 60, 61 12 Stat. 319 (Aug. 6, 1861) (the section is labeled: "When claims to persons held in service and labor to be forfeited").

bill for a public act to confiscate the property of all persons . . . who have taken up arms . . . against the government of the United States.”<sup>3</sup>

On July 15, 1861, Senator Lyman Trumbull (R-Ill.) introduced “a bill . . . to confiscate property used for insurrectionary purposes . . . [.]” and the bill was read and referred to the Committee on the Judiciary.<sup>4</sup> On July 20, 1861, Mr. Trumbull referred the bill (known as S. 25) to confiscate property used for insurrectionary purposes to the House and reported it with an amendment.<sup>5</sup>

Then, on July 22, the Senate as a “Committee of the Whole” considered the bill.<sup>6</sup> Mr. Trumbull, at this time, individually introduced an additional section—Section 4, the section relevant to this Essay—which sought to discharge the enslaved<sup>7</sup> from service if they had been used by rebels in the war and if they had crossed into Union lines.<sup>8</sup> The amendment read:

And be it further enacted, That whenever any person claiming to be entitled to the service or labor of any other person, under the laws of any State, shall employ such person in aiding or promoting any insurrection, or in resisting the laws of the United States, or shall permit him to be so employed, he shall forfeit all right to such service or labor, and the person whose labor or service is thus claimed shall be thenceforth discharged therefrom, any law to the contrary notwithstanding.<sup>9</sup>

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3. H.R. JOURNAL, 37th Cong., 1st Sess. 44 (1861).

4. S. JOURNAL, 37th Cong., 1st Sess. 42 (1861); *see also* CONG. GLOBE, 37TH CONG., 1ST SESS. 120 (1861) (“Mr. Trumbull asked, and by unanimous consent obtained, leave to introduce a bill (S. No. 25) to confiscate property used for insurrectionary purposes; which was read twice by its title, referred to the Committee on the Judiciary, and ordered to be printed.”).

5. S. JOURNAL, 37th Cong., 1st Sess. 69 (1861).

6. *Id.* at 70.

7. Throughout this Essay, I, like many Africana scholars, employ the term “the enslaved” rather than the word “slave.” Slave tends to dehumanize the subject and affirm the idea that persons could be seen as less than human (i.e., property); whereas “the enslaved” emphasizes that the subjects of the conversation were actually people—enslaved Africans and their descendants—who found themselves in the horrific condition of enslavement. Additionally, “slave” has come to connote desensitized images of specifically African American people, but “enslavement” conjures a broader, international idea in our minds and fosters the realization that American enslavement is analogous to other instances of commonly-loathed enslavement in the world. I acknowledge that the phrase can be grammatically cumbersome and passive in a stylistic sense; however, I still prefer to use it in order to signify an effort to change the way we talk about enslavement in the United States. I still use the term “slave-owner” in this essay, due to my own current inexperience and, in turn, lack of a better term or phrase that addresses the aforementioned concerns. *See, e.g.,* HAKI R. MADHUBUTI, BLACK MEN: OBSOLUTE, SINGLE, DANGEROUS?—THE AFRIKAN AMERICAN FAMILY IN TRANSITION 73, 166, 207, 237, 263 (1991) (using the term “enslaved” throughout).

8. S. JOURNAL, 37th Cong., 1st Sess. 70–71 (1861); *see also* CONG. GLOBE, 37th CONG., 1ST SESS. 218–19 (1861) (stating that Mr. Trumbull introduced the bill individually).

9. S. JOURNAL, 37th Cong., 1st Sess. 71 (1861).

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The additional section was added by a vote of thirty-three yeas to six nays.<sup>10</sup> After this, the bill passed in the Senate.<sup>11</sup> The next day (July 23), the House reported that the Senate had passed the bill.<sup>12</sup> Then, on August 3, an amended version of the bill passed in the House with sixty yeas to forty-eight nays.<sup>13</sup> Section 4 was amended by the House to read:

*Sec. 4. And be it further enacted*, That whenever hereafter, during the present insurrection against the Government of the United States, any person claimed to be held to labor or service under the law of any State, shall be required or permitted by the person to whom such labor or service is claimed to be due, or by the lawful agent of such person, to take up arms against the United States, or shall be required or permitted by the person to whom such labor or service is claimed to be due, or its lawful agent, to work or to be employed in or upon any fort, navy-yard, dock, armory, ship, intrenchment [sic], or in any military or naval service whatsoever, against the Government and lawful authority of the United States; then, and in every such case, the person of whom such labor or service is claimed to be due shall forfeit his claim to such labor, any law of the State, or of the United States, to the contrary notwithstanding.<sup>14</sup>

On August 5, the Senate considered the House's version of the bill.<sup>15</sup> Finally, on August 6, Mr. Bingham reported from the committee that they had examined the bill and found it duly enrolled. Thus, the *Act to Confiscate Property Used for Insurrectionary Purposes* was presented to the President and signed into law.<sup>16</sup>

## II. CRITIQUE OF JAMES OAKES'S TREATMENT OF THE FIRST CONFISCATION ACT

James Oakes provides a history of the FCA. He does a good job constructing a narrative that gives readers an idea of the key players in Congress, the points of congressional debate, and the chronology of that debate. However, Oakes also infuses the narrative with depic-

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10. *Id.*

11. *Id.*

12. H.R. JOURNAL, 37th Cong., 1st Sess. 132 (1861).

13. *Id.* at 232–35; see also CONG. GLOBE, 37th CONG., 1ST SESS. 426 (1861) (“Message from the House”).

14. CONG. GLOBE, 37th CONG., 1ST SESS. 427 (1861).

15. *Id.* at 434.

16. S. JOURNAL, 37th Cong., 1st Sess. 192 (1861); CONG. GLOBE, 37th CONG., 1ST SESS. 454 (1861).

tions of the Republican psyche as intently oriented toward the goal of emancipating the enslaved and providing for their freedom. He expands these depictions into his assessment of the overall intent and effect of the Act. Because of this, a few aspects of his narrative are misleading.

A. Oakes Inaccurately Discusses the “Discharge” Language of the FCA and Mischaracterizes the Nature of the Debate Surrounding that Language

When Oakes discusses the version of the FCA that included the “discharge” language (i.e., Trumbull’s original amendment), he paraphrases to characterize the FCA draft’s “discharge” as “emancipation.” For example, in his book, Oakes writes: “[M]asters ‘forfeited’ their claim to the labor of ‘persons held in service,’ and those persons would be ‘discharged’ from any further obligation to their masters. They were emancipated.”<sup>17</sup> While this is what the draft of the Act seems to say, Oakes really reads into this “discharge” language in the draft and gives it an inappropriate amount of attention.

It is important to contextualize the “discharge” portion of the FCA. Oakes seems to characterize the debates as a fight for the almighty “discharge” language to stay in the bill. In reality, changing the language was uneventful; the Committee on the Judiciary simply changed the entire Section 4 and little was said about the word “discharge” specifically.

On August 3, 1861, the House amended the bill to completely replace the section that Trumbull originally proposed (Section 4). The amendment (also provided above) was recorded in the debates as follows (and I emphasize the key areas):

The PRESIDENT *pro tempore* laid before the Senate the amendment of the House of Representatives to the bill (S. No. 25) to confiscate property used for insurrectionary purposes; which was to strike out the fourth section of the bill, and insert the following in lieu thereof:

*Sec. 4. And be it further enacted*, That whenever hereafter, during the present insurrection against the Government of the United States, any person claimed to be held to labor or service under the law of any State, shall be required or permitted by the person to whom such labor or service is claimed to be due, or by the lawful

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17. JAMES OAKES, FREEDOM NATIONAL: THE DESTRUCTION OF SLAVERY IN THE UNITED STATES, 1861–1865, at 122 (2013).

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agent of such person, to take up arms against the United States, or shall be required or permitted by the person to whom such labor or service is claimed to be due, or its lawful agent, to work or to be employed in or upon any fort, navy-yard, dock, armory, ship, in-trenchment [sic], or in any military or naval service whatsoever, against the Government and lawful authority of the United States; then, and in every such case, *the person of whom such labor or service is claimed to be due shall forfeit his claim to such labor*, any law of the State, or of the United States, to the contrary notwithstanding.<sup>18</sup>

Notice that the word “discharge” has disappeared from the section. If it was so important—if the crux of the bill was to emancipate the enslaved (and not to prevent their return)—then losing that language would likely have been a disappointment to those who favored the bill for its emancipatory features, especially to Lyman Trumbull, who introduced Section 4 individually. But this is not the case at all. In fact, Senator Trumbull, who individually introduced Section 4, urges the Senate to adopt the new version (*sans* the “discharge” language).<sup>19</sup> Moreover, he praises the House’s version and says that it basically states the same thing as his original:

Mr. TRUMBULL. I move that the Senate concur in the House amendment. It limits the bill which we passed, and confines it, in this respect, to persons actually employed in military service. *I think the section as we passed it meant substantially the same thing, but this makes it more definite.*<sup>20</sup>

After his comment, the Senate tabled the discussion, and on August 5, 1861, they took it up again. After having two days to examine the House’s amendment and elimination of the word “discharge,” Senator Trumbull was still eager for its adoption. In fact, he wanted the Senate to simply hurry up and approve Section 4 as amended: “[Several Senators:] Will it lead to debate? [Mr. TRUMBULL:] I hope not. I trust the Senate will concur in the amendment of the House of Representatives. It limits the fourth section of the bill so as to avoid an objection which the Senator from Kentucky had.”<sup>21</sup>

Immediately following this conversation, the Senate voted and concurred in the amendment; there was no substantive debate.<sup>22</sup>

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18. CONG. GLOBE, 37th CONG., 1ST SESS. 427 (1861) (emphasis added).

19. *Id.*

20. *Id.* (emphasis added).

21. *Id.* at 434. I will discuss the “Senator from Kentucky[’s]” concern shortly.

22. *See id.*



From this history, one could conclude that “discharge” was not the primary intended goal of the FCA; rather, “forfeiture” of the rebel slave-owner’s right to his or her slave property was the main concern. This idea is also reaffirmed by Congress’s later Confiscation Acts, which were more focused on emancipation; those Acts would not be necessary if the FCA was meant to ensure expansive emancipation. However, Oakes insists on examining the FCA in a vacuum and focusing on the “discharge” language in its drafts as a notion that its central purpose was emancipation. He does this further by explaining the omission of the “discharge” language—which in itself is a mischaracterization; the word “discharge” was not the only thing missing from the new Section 4—the entire section looked different after it had been revised.

Moreover, Oakes, with no authority<sup>23</sup> depicts omission of the “discharge” language as some sort of recognition by “[a] number of Republicans” that only the President could actually discharge the enslaved from their service because “emancipation was strictly *military*.”<sup>24</sup> He writes:

A number of Republicans believed that because it could be constitutionally justified only as a “military necessity,” emancipation had to be the work of the president, acting in his capacity as commander in chief. *Congress could specify the “persons” whose labor would be “forfeited,” but once the federal government had taken control of the “persons” so forfeited, only the president could take the additional step of “discharging” slaves from any further service to their masters.* If emancipation was strictly *military*, it had to be done by the commander in chief. *To alleviate such concerns the wording of Trumbull’s amendment was changed at the last minute.*

In the bill’s final form, masters would still “forfeit” their claim to the service of a slave. But *instead of declaring that forfeited slaves were henceforth “discharged” from service*, the revised version prohibited any master from reclaiming any slave who “had been employed in hostile service against the Government of the United States.”<sup>25</sup>

Oakes isn’t very clear about the inner workings of “military necessity” in this chapter, but he seems to pose it as a separation of powers issue. This narrative makes it seem as though the House’s

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23. Oakes does not cite to any source to bolster his theory that military necessity was discussed. See OAKES *supra* note 17, at 137 (2013).

24. *Id.*

25. *Id.* (emphasis added).

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amendment (specifically its omission of the word “discharge”) was carefully motivated by thoughts on “military emancipation,” and does not include anything about Trumbull’s thoughts that the amendment was a positive change and almost immaterial to the heart of the bill.

Furthermore, upon reading the House debate surrounding the amendment, there is no such evidence that the amendment was motivated by a military necessity theory.<sup>26</sup> Rather, the debate reflects what Trumbull later summarized: that the bill was amended to address the concerns of the “Senator [really, the Representative] from Kentucky.” That Representative was Mr. Charles A. Wickliffe, a Union Whig from Kentucky who feared that Section 4 of the FCA would allow for a situation in which his own slave property could be taken; Wickliffe thought that the FCA, as then-drafted, would affect *Union* slave-owners’ right to their slave property in a scenario where an enslaved person had been kidnapped and forced into labor by the rebels.<sup>27</sup> The answer was that both the original and amended Section 4 provided that only the rebel rights were affected by the bill. As an answer to this concern, Mr. Kellogg of Illinois, one of the drafters of the revised version, noted his own motivations in the revision, saying that he “endeavored by [his] amendment so to modify the bill that it shall be understood by the country as not affecting the institution of slavery in the States.”<sup>28</sup>

The only moment when the “discharge” language seems to have been specifically addressed in the House was during the August 2nd House debates when Kellogg proposed to strike out the following sentence in the bill: “And the persons whose labor or service is thus claimed shall be thenceforth discharged therefrom, any law to the contrary notwithstanding.”<sup>29</sup> He advocated replacing that line with: “And such claim to service or labor shall be confiscated.”<sup>30</sup> Yes, this replacement lacks the “discharge” language. Kellogg explicitly said that his replacement would amend only the original bill and not the newly

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26. See CONG. GLOBE, 37th CONG., 1ST SESS. 409, 410, 431 (1861) (providing House debates on the bill and showing lack of mention for military necessity or deference to Executive power).

27. See *id.* at 410. “I desire to ask the chairman of the Committee on the Judiciary whether it is the design of this bill to confiscate the property of citizens in persons described there *where they may be found at labor of any description which can be connected with war*, except the carrying of arms? Suppose my negroes—I being a national man and a Union man—are taken without my leave and against my consent, to drive teams and carry provender to the rebel army: are my negroes to be confiscated?” *Id.* (emphasis added).

28. *Id.* at 411.

29. *Id.* at 410.

30. *Id.*

revised version of Section 4 that was simultaneously being offered. However, at this point in the debate, as a point of parliamentary procedure, Kellogg could not make the amendment to the original bill until the House first voted on the question of adopting the larger revised version of Section 4.<sup>31</sup> Thus, his amendment proposing to strike the “discharge” line and replace the “discharge” language was out of order.

The debates continued on the Committee on the Judiciary’s revised Section 4. Because the revised version was brought by the committee, we are unsure of their motives and rationale for presenting language lacking “discharge,” aside from Bingham’s statements and Trumbull’s summary regarding the reasons for the revision that I’ve already stated (i.e., that the language of the revised version was more exacting and clarified that the bill would only apply to the enslaved used in war by *rebels* and not the border states). Who knows the particular motives for deleting the “discharge” language in the revision? There is nothing—at least not in the debates—to indicate that the reason was deference to the Executive and “military necessity,” as Oakes posits.

To be fair, the House debate on revised Section 4 did continue and included the expression of other various views and points, such as (1) the belief that Congress could not legislate with regard to enslavement at all, (2) the belief that the amendment was useless because the enslaved ought to be treated just like other confiscated property anyway, (3) a discussion of the theory of forfeiture for treason as applied to slave property, (4) the application of the Constitution to the rebels, and (5) bill of attainder concerns implicated by the prospect of divesting title beyond someone’s lifetime.<sup>32</sup> However, the debates contain only a little with regard to “military necessity” or deference to presidential/executive power.

A portion of the executive power discussion during the debate, for example, comes from Representative George H. Pendleton, who discussed the Warrant Clause and referred to the “[extant] provision in this bill which says it shall be the duty of the President to cause the property to be seized . . . .”<sup>33</sup> He only says this as reference to the bill,

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31. *See id.*

32. *See id.* at 411–13. The bill of attainder concerns were some of the same ones raised by President Lincoln in his Second Confiscation Act veto letter. The bill of attainder concerns were raised by Representative Crittendon from Kentucky.

33. *Id.* at 413.

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not to make a point about executive power lacking in the bill.<sup>34</sup> Pendleton's main concern was that the FCA be clear in its application only to rebel states and that property in other states be properly seized only with a warrant. As a result, Pendleton<sup>35</sup> presented an amendment to Section 3 of the bill, not Section 4, and in his proposal, he advocates for presidential appointment of officers to seize property in states where there are no tribunals, as opposed to private citizen seizure of property.<sup>36</sup> While this is related to Section 4, it doesn't explain a change to its language regarding "discharge" of the enslaved. And even if it did apply to Section 4, this is no reason for omitting "discharged," as the concern would only be about *who* is discharging, not the act of discharging itself.

Republican Representative Diven<sup>37</sup> answered Pendleton's concern by pointing out how preposterous congressional confiscation efforts were:

Do you propose to send your marshals to the seceding States with process to seize and condemn the rifled cannon and munitions of war? Every man sees the absurdity of that proposition. These munitions of war, if taken at all, are to be taken by the force of war. War has its own laws . . . . We cannot affect them by any statutes we can pass.<sup>38</sup>

Diven's rebuttal does not comport with Oakes's characterization—executive power and military necessity motives for changing the "discharge" language. Here, Diven, a Republican, is speaking out against the entire idea of confiscation, arguing that the laws of war in the past did not allow for confiscation at all. This is not the same as saying that confiscation can only be done by the President. Diven had an issue with the entire FCA, and with respect to the enslaved, he advocated for taking them as prisoners of war.<sup>39</sup>

There was certainly talk about the laws of war, international law (citing Vattel) about not returning an oppressed people to their oppressor, military power, and even a philanthropic duty to rescue the

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34. *Id.*

35. Democrat from Ohio.

36. CONG. GLOBE, 37th CONG., 1ST SESS. 413 (1861) ("[I]n the States where the judicial tribunals are not in operation, where it may be said that warrants cannot be issued, the seizure shall only be made by officers appointed under the hand of the President and the seal of the United States . . . . I now offer the following amendment by way of a substitute for the third section of the bill.").

37. Republican from New York.

38. CONG. GLOBE, 37th CONG., 1ST SESS. 413 (1861).

39. *Id.* at 414.

oppressed during war; all of these issues were voiced by Radical Republican Thaddeus Stevens during his speech during the August 2nd House debates.<sup>40</sup> However, this entire discussion was about the bill and Section 4 as a whole, not the omission of the “discharge” language. And it certainly was not about legislative restraint or deference to the Executive.

Oakes should provide a more detailed and clear explanation of the “military necessity” discourse that was supposedly happening in Congress during the FCA deliberations—either at the committee level or during the larger assembly debates. He should also provide a precise citation for his proposition that the “discharge” language was omitted because of military necessity or executive power concerns, because nothing in a thorough reading of the debates indicates its truth. Oakes must be more exacting in telling his story about these debates and specific reasons for amendments.

#### B. Oakes Overemphasizes the Goals and the Effect of the FCA

“This was not confiscation; it was emancipation—immediate and uncompensated—of some but not all slaves.”<sup>41</sup>

There are several things wrong with this assertion. First, Section 4 *was* viewed as confiscation, at least by some Republicans, regardless of the fact that the confiscated property was slave property. Second, while some Congressmen did believe that the FCA entitled the enslaved to their freedom, it is not clear whether that “emancipation” was “immediate.” And finally, Oakes exaggerates the effect of the FCA because he mischaracterizes the implementation of the statute. I will discuss each of these problems in turn.

##### 1. Contrary to Oakes’s Depiction, Section 4 Was in Fact Viewed as Confiscation, at Least by Some Republicans

Republican<sup>42</sup> Representative from Illinois, William Kellogg,<sup>43</sup> drafted the House’s amendment to Section 4 (which became the final version). His viewpoint certainly differed from Oakes’s. Kellogg be-

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40. *Id.*

41. OAKES, *supra* note 17, at 119.

42. BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774-2005, at 1367 (“KELLOGG, William, a Representative from Illinois . . . elected as a Republican to the . . . Thirty-Seventh Congress[ ] . . .”) (emphasis added).

43. Not to be confused with William Pitt Kellogg.

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lieved that Section 4 of the FCA was indeed confiscation, and he expressed this belief during the House debate on August 2, 1861:

If a citizen of the United States commits high treason, or any other great crime known to the law, it is competent for the United States Legislature . . . to provide for the forfeiture and confiscation of the offender's property. And it is because he is a criminal before the law that I propose that his horses, his houses, his lands, his mules, his cannon, yea, his right to service in another, *shall be confiscated . . .*<sup>44</sup>

Assuming *arguendo* that the FCA did not attempt confiscation of the enslaved, Oakes still misleads with his language, because the FCA's "emancipation" was limited, and Oakes should qualify the term as such. The limited nature of the FCA's emancipatory provisions was shown by Senator Pearce's argument against the FCA draft, in which he characterized the FCA as "limited and qualified":

[I]t will not be surprising to the Senate if those who come from the section of the country in which I reside should be a little sensitive at anything which proposes, as this amendment does, *an act of emancipation, however limited and qualified*.<sup>45</sup>

Oakes even cites Pearce's argument but does not cite the part of his speech referring to the "limited and qualified" nature of the FCA's "emancipation" that occurred sentences before.<sup>46</sup> Oakes's work would benefit from his providing his definition of "freedom" and "emancipated." Under the prevailing interpretation of those concepts, he at least needs to qualify what this purported "freedom" really looked like in the minds of the Congressmen.

### 2. Oakes Is Likely Too Eager in His Characterization of the FCA's Purported "Emancipation" as "Immediate"

While some Congressmen did believe that the FCA entitled the enslaved to their freedom, it is not clear whether that "emancipation" was "immediate." Rather, there seemed to be some sort of intermediate court process contemplated but never fully addressed by Congress in the FCA. Pearce, for example, contemplated a court process when lamenting the FCA's lack of detail. He argued that the FCA was weak because there was no enforcement mechanism and no judicial

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44. CONG. GLOBE, 37th CONG., 1ST SESS. 411 (1861) (emphasis added).

45. *Id.* at 219.

46. OAKES, *supra* note 17, at 126.

means for determining whether the southerners governed by it were loyal or rebel:

You have made no provision for the ascertainment of the facts by the courts, and the declaration of a legal sentence by any tribunal. You rest upon the general provision of the section that they shall be discharged from service and labor. Now, sir, where and by what court would you have that sentence declared, and by what authority enforced?<sup>47</sup>

That “emancipation” was not “immediate” under the FCA is supported by the House debates on the bill in Congress, which contemplate that the formerly enslaved would be entitled to their freedom, but not immediately. Rather, some sort of court process seemed to be required:

Mr. BURNETT. The use of a slave, by authority of the owner, in any mode which will tend to aid or promote this insurrection, will entitle that slave to his freedom.

Mr. BINGHAM. Certainly it will.

Mr. BURNETT. Now we understand each other, I ask the gentleman whether this bill is not to be construed by the executive authorities of the Government?

Mr. BINGHAM. No, sir; *I undertake to say that this provision is like many others now standing upon our statute-books subject to judicial decision.* It is simply an act which may become the subject of adjudication in the courts *as between the owner of a person so employed and the person so claimed.*<sup>48</sup>

While it is unclear whether this solely means judicial review was anticipated or whether claims would have to be settled in court before true freedom was granted to the enslaved, this conversation at least hints at some sort of court process. Arguably, it contemplates that after the war, a slave-owner may seek to adjudicate a claim to a formerly enslaved person in court, and the court could then decree that the formerly enslaved is entitled to his or her freedom. What should happen *during* the war is still left unanswered.

### 3. Oakes Overstates the FCA's Implementation and Activities Occurring on the Ground After Its Passage

Oakes exaggerates the effect of the FCA because he mischaracterizes the implementation of the statute as if it really did pro-

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47. CONG. GLOBE, 37th CONG., 1ST SESS. 219 (1861).

48. *Id.* at 410 (emphasis added).

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vide for emancipation, when in fact, on the ground and by Cameron's orders, the Act was implemented in a way that indicates the formerly enslaved were placed in some sort of status-limbo in Union camps. Oakes's chapter treats the FCA on two levels: he conducts an analysis of the law itself and what it does in theory, and then he provides his assessment of what the law actually did in reality. Perhaps Oakes is correct that the FCA "emancipated" (not "forfeited" or "confiscated") the enslaved *in theory*—based on its plain language and without regard to what many Congressmen said they intended the law to say. However, when looking at what the FCA did in practice, Oakes largely ignores what was actually happening on the ground: the military was mainly following its own agenda—keeping the enslaved around, utilizing them as aides, and resigning to determine their status at a later date.

Oakes writes that "[W]ithin a year of its passage, tens of thousands of slaves had been *freed* by the First Confiscation Act."<sup>49</sup> The problem here is that Oakes does not provide his definition of the word "free." Rather, he seems to conflate the Generals and the Executive Branch's stance in *refusing to return the enslaved to slave-owners* with the idea of freedom. Oakes's full quote reads: "Slaves coming into [General George McClellan's] lines *were not returned to their owners*, whether their owners happened to be loyal or not. Within a year of its passage, tens of thousands of slaves had been *freed* by the First Confiscation Act."<sup>50</sup>

Just because there was no affirmative measure to return the "contrabands" to their owners doesn't mean there was an affirmative measure to "free" those "contrabands." Rather, there was likely a "limbo" between the two actions; the formerly enslaved who came to Union camps likely remained in those camps and worked for the Union.<sup>51</sup> The Union could use them and then later determine their status.<sup>52</sup> Their ties with southern rebels were severed, but their status in the Union was not expressly established by the FCA.

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49. OAKES, *supra* note 17, at 143 (emphasis added).

50. *Id.* (emphasis added). Note that my critique only encompasses the credit Oakes gives to the FCA; Oakes's phrasing here states what the FCA in fact did. My critique is not meant to ignore that many of the enslaved had achieved freedom on their own, not as "contrabands" fleeing to Union camps, but as enslaved peoples fleeing their condition to no place in particular. Other formerly enslaved people had freed themselves by simply running away, not to Union camps but elsewhere. This type of freedom cannot be accredited to Congress or the Executive; this was a freedom achieved by the enslaved themselves.

51. See discussion *infra* regarding the *Serial Set*.

52. See discussion *infra* about Cameron's communication to army generals.



The FCA likely provided for the generals to keep the enslaved in their camps, not return them, and have them work for the Union. Furthermore, the formerly enslaved were likely not told to just go free in the Union; this was likely impractical for all parties involved (for both the formerly enslaved and for the Union generals).<sup>53</sup> Furthermore, there was a fear of the formerly enslaved simply coming into the Union and living among the Northerners, as Republican Senator Ten Eyck once stated: “*God knows we do not want [the newly freed persons] in our section of the Union.*”<sup>54</sup>

Additionally, the practice of keeping the formerly enslaved in the camps during the war and not simply releasing them in the Union is supported by (1) Cameron’s letter to General Butler and (2) reports from Generals as to what was happening on the ground: Oakes brings in Secretary Cameron’s instructions to General Butler about how to handle the contrabands, but he uses this for the wrong point. He focuses on Cameron’s emphasis that *all* coming into Union lines—not just those enslaved employed by disloyals—were subject to the FCA. Oakes then concludes that Cameron expanded the reach of the FCA and provided for general “emancipation.” The point he loses from the Cameron quote is its implicit description of the “emancipation” that Oakes so eagerly punctuates. That emancipation is limited because of Cameron’s conclusion that the Union would sort out the status of the formerly enslaved later on: “‘*Upon the return of peace,*’ Cameron explained, ‘Congress will doubtless properly provide for all the persons thus received into the service of the Union and for just compensation to loyal masters.’”<sup>55</sup>

From this quote, one can first conclude that the formerly enslaved were “received into service,” not discharged from their reality of laboring for others. It appears that Cameron contemplated a reality wherein the formerly enslaved remained in Union camps to work, not to go live a free existence in the Union states. Second, Cameron seems to think that after the war, the legal status of these formerly enslaved persons could be ascertained and slave-owners could be compensated. This scheme would require the formerly enslaved to be readily located for determination of their status; it does not imply that

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53. For the formerly enslaved, recapture by slave-owners was a threat that could be solved by remaining in Union camps, and for the Union troops, it was often advantageous to use reasonable numbers of “contrabands” as labor in their camps and as scouts in the war.

54. CONG. GLOBE, 37th CONG., 1ST SESS. 219 (1861).

55. OAKES, *supra* note 17, at 139 (emphasis added).

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they were allowed to freely move about the Union because at a later date, there would be loose ends to tie up with respect to their status. Thus, according to Cameron's statement, if anything, the formerly enslaved were in some sort of legal limbo to be finalized at a later date. This was not the end of the story, and this was not the grand emancipation Oakes seems to envision.

There are also examples of what was really happening on the ground that suggest that the formerly enslaved were often put to work in the war effort, not released with their free papers. A good way to see what was happening on the ground during the war is to examine the *United States Congressional Serial Set*.<sup>56</sup> Report No. 108 of the *Serial Set*, entitled *Conduct of War, Part III*, contains transcriptions of interviews about "returning slaves."<sup>57</sup> The interviews included here all took place months after passage of the FCA.

Several of these interviews provide a look into what was happening to the formerly enslaved who crossed into Union camps. For example, in an April 15, 1862 interview by Congressman John Covode with Lieutenant Joseph L. Palmer, Jr., Palmer explains that the people seeking refuge in his camp were being used as guides and scouts and were not returned to the slave-owners who visited his camp.<sup>58</sup> Another interview was conducted around the same time<sup>59</sup> with General Daniel E. Sickles on April 10, 1862.<sup>60</sup> The interviewer states: "We have been directed by the House of Representatives to inquire into the treatment of contrabands coming within your lines. What has been the custom of dealing with them in your division, so far as you know and have observed?"<sup>61</sup> The General explains that when he found the contrabands to be "intelligent and well behaved," he kept them in his camp and used them as scouts and guides.<sup>62</sup> He affirms that the contrabands were both useful and loyal to his regiment.<sup>63</sup> He

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56. *U.S. Serial Set*, LIBR. OF CONGRESS: AMERICAN MEMORY, <http://memory.loc.gov/ammem/amlaw/lwss.html> (last visited Sept. 22, 2012). This publication began in 1817. *Id.*

57. *See generally id.* It is important to note that several of these interviews indicate that Generals were not following the FCA or another statute called the Additional Article of War because they were actually returning the formerly enslaved to their "masters."

58. *See* S. REP. NO. 108, at 643 (1862).

59. April 10, 1862.

60. S. REP. NO. 108, at 632 (1862).

61. *Id.*

62. *Id.* at 632-33.

63. *See id.* at 641. This portion of the interview addresses the concern that the slaves may be disloyal to the Union army. It also affirms the idea that the fugitive slaves had military value and were extremely useful to the Union, and shows that many soldiers were reluctant to follow orders requiring surrender of the fugitive slaves to their former owners:

also mentions that he declined to return slaves to claimants (slave-owners) who applied for their return.<sup>64</sup>

What can be usefully gleaned from all of this? At the very least, Oakes's characterization that the FCA in fact "freed" many of the enslaved is misleading because their actual condition was not "freedom" as many readers would think of it; that type of freedom did not come until later, and it was not because of the implementation of the FCA.

C. Another Problem with Oakes's Overall Treatment of the FCA:  
He Makes It Seem as Though Republicans Had  
Humanitarian Concerns in Mind

Throughout his chapter on the FCA, Oakes's tone suggests that the civil war Republicans, in passing the FCA, had a humanitarian goal and sought to promote the enslaved from "property" to "person." However, upon examining the debates, it seems that the impetus for the Act was to prevent rebels from using the enslaved as a military advantage.

Oakes writes that "[The Republicans] knew the slaves wanted to be free, and they knew the slaves needed the army to secure their freedom."<sup>65</sup> He also states that "Trumbull's wording [of Section 4] was not accidental. At least since the *Somerset* case in the 1770s, the opponents of slavery insisted on the legal distinction between slaves as 'property' and slaves as 'persons.'"<sup>66</sup> Oakes's statements here depict the FCA as an antislavery measure and not a strategic military response.

However, Trumbull's speech introducing Section 4 (when he seeks to amend the Confiscation Bill on July 22, 1861 to add the relevant "emancipatory" portion to it), suggests that antislavery concerns

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Question. Do you know of any instance where [the contrabands] have been treacherous to the Union cause?

Answer. No, sir; not one. They exhibit the greatest alacrity and pleasure in showing us in any way in their power. They will submit any privation, perform any duty, incur any danger . . . They gave us information of the position of the enemy's force . . . a service upon which it would be difficult to fix a price. These services rendered by these men are known to the soldiers, and contribute, I presume, largely to the sympathy which they feel for them, and to the strong . . . irrepressible disinclination they feel when called upon to witness their surrender.

*Id.* at 643.

64. *Id.* at 633.

65. OAKES, *supra* note 17, at 144.

66. *Id.* at 120.

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were secondary to the main goal of preventing the return of the enslaved used in battle:

I am glad the yeas and nays are called to let us see *who is willing to vote that the traitorous owner of a negro shall employ him to shoot down the Union men of the country*, and yet insist upon restoring him to the traitor that owns him. I understand that negroes were in the fight which has recently occurred [Bull Run]. I take it that *negroes who are used to destroy the Union, and to shoot down the Union men by the consent of traitorous masters, ought not to be restored to them*. If the Senator from Kentucky is in favor of restoring them, let him vote against the amendment.<sup>67</sup>

This introductory speech shows that the main focus of the forfeiture of slave property provision of the FCA was to avoid having to give the enslaved back to the rebels who had used them in battle, and this concern had arisen from the Bull Run fiasco.

Senator Wilson also reaffirms avoiding returning the enslaved to the rebels as the main goal of adopting the section: “[I]f traitors use bondmen to destroy this country, my doctrine is that the Government shall at once convert those bondmen into men that cannot be used to destroy our country . . . .”<sup>68</sup> As a final example of the emphasis on preventing rebel use of the enslaved over emancipation itself is a speech from Republican Senator John C. Ten Eyck, which reads:

Saturday last I voted in the Judiciary Committee against the amendment, for two reasons: first, I did not believe that persons in rebellion against this Government would make use of such means as the employment of persons held to labor or service in their armies; secondly, because I did not know what was to become of these poor wretches if they were discharged. God knows we do not want them in our section of the Union. But, sir, having learned and believing that these persons have been employed with arms in their hands to shed the blood of the Union-loving men of this country, I shall now vote in favor of that amendment with less regard to what may become of these people than I had on Saturday.<sup>69</sup>

Here, Mr. Ten Eyck, a Republican, explicitly tells us that his motives for wanting to adopt the bill are to ensure that the rebels cannot use the enslaved in battle. He is also explaining that he is disregarding what will be done with the enslaved after they are taken from the

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67. CONG. GLOBE, 37th CONG., 1ST SESS. 219 (1861) (emphasis added).

68. *Id.* at 219.

69. *Id.*

rebels in order to quickly address the exigent circumstance caused by Bull Run.

Notably absent from these conversations is any humanitarian bent or any express motive to view the formerly enslaved as “persons” above “property.” Really, the only Republican who spoke during debate who drove home humanitarian motives was Thaddeus Stevens.<sup>70</sup>

D. Oakes Draws Too Much from the Use of the Word “Person” Over “Property” in the FCA

As discussed above, Oakes makes it seem as though use of the word “person” was so purposeful as to create a paradigm shift that the enslaved were no longer seen as property of others. However, he gives this too much pause. His narrative is inconsistent because he cannot avoid the truth seeping out of his quotes from the time; the reality is that Republicans and Democrats alike still viewed the enslaved as property.

The following statement by Oakes contributes to his property-to-person narrative: “Trumbull was being scrupulous, not ironic, when he referred to slaves not as ‘property’ but as ‘persons held in service.’”<sup>71</sup> Oakes also creates a debate in which slaves could not be considered both person and property: “The emancipation debate was not the only point at which the status of slaves as ‘persons’ *rather than* ‘property’ arose.”<sup>72</sup> Finally, Oakes provides a jumbled legal analysis of the person/property dichotomy with this quote:

But to slavery’s opponents the dual character of slaves as “property” under state law but “persons” under the Constitution was crucial. Slave emancipation was contained within a “confiscation” bill because under state law slaves were property, but the bill itself treated slaves as “persons held in service” because that’s how slaves were recognized in the Constitution. *In one sense the title of the law is misleading: it “confiscated” property, but it “emancipated” slaves.*<sup>73</sup>

The way in which Oakes discusses this asserts a false dichotomy; it ignores the possibility that the enslaved were often thought of as both persons and property.

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70. *Id.* at 414.

71. OAKES, *supra* note 17, at 120.

72. *Id.* at 121 (emphasis added).

73. *Id.* at 122 (emphasis added). Note that this paragraph is legally confusing in that it creates a difference in status of the enslaved depending on federal or state law. Oakes should expound upon this distinction.

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While later debates in Congress may have teased at the property/person issue (e.g. the SCA debates), the FCA debates show that that issue—if it was an issue at all at the time—was not grappled with here. The debates do not indicate a paradigm shift or any attempt at creating one. Oakes seems to wish that attempts at that noble paradigm shift occurred earlier in congressional history when they simply did not.

Even President Lincoln did not experience this paradigm shift of viewing the enslaved as purely persons during the time of the FCA. In fact, the President even viewed the enslaved as property at a time *later than the FCA*, as is shown in his Second Confiscation veto letter<sup>74</sup> in which he applied the property concept of escheat to the enslaved. As Nadine Mompremier described in her April 15, 2013 email message regarding Lincoln's veto letter: "[Lincoln] didn't believe that it was within Congress's power to free slaves, but rather ownership should be transferred to the [government] (just like other property) and then Congress [could] later decide if they want[ed] to free them."<sup>75</sup> This is the concept of escheat, one that is strictly concerned with *property* and the question of who holds title to that property. Lincoln's letter clearly states that:

It is startling to say that Congress can free a slave within a state; and yet if it were said the ownership of the slave had first been transferred to the nation, and that Congress had then liberated him [i.e., escheat], the difficulty would at once vanish . . . [As an example:] To the high honor of Kentucky, as I am informed, she has been the owner of some slaves by *escheat*, and that she sold none, but liberated all.<sup>76</sup>

This shows that Lincoln viewed the enslaved as a form of property, even months after the FCA was passed.

The property-to-person paradigm shift did not occur within the Republican party during the FCA debates either, where it should have begun. This is shown by the fact that Representative Thaddeus Stevens, the foremost of the humanitarian-focused Radical Republicans, even frames the FCA as operating within a slaves-are-property frame-

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74. See the discussion regarding Lincoln's veto letter in Nadine Mompremier's essay on the Second Confiscation Act.

75. E-mail from Nadine Mompremier, J.D., Howard University Sch. of Law, Class of 2013, to Robert Fabrikant, Professor, Howard University Sch. of Law, et al. (Apr. 15, 2013) (on file with author).

76. Letter from President Abraham Lincoln to Congress (July 17, 1862), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=69771>.

work when he refers to the laws of war.<sup>77</sup> Stevens says, “[I]f you were in a state of peace you could not confiscate the *property* of any citizen. You have no right to do it in time of peace, but in time of war you have the right to confiscate the *property* of a rebel.”<sup>78</sup>

Furthermore, the very forfeiture theory upon which Section 4 of the FCA relies subsumes that the “persons held in service” are property. Their status as property is a necessary element in their forfeiture. As Representative William Kellogg<sup>79</sup> of Illinois—a Republican<sup>80</sup> and the drafter of the House’s amendment to Section 4 (which replaced the “discharged” language with a whole new Section)—explained during the House debate on the amendment on August 2, 1861:

If a citizen of the United States commits high treason, or any other great crime known to the law, it is competent for the United States Legislature . . . to provide for the forfeiture and confiscation of the offender’s property. And it is because he is a criminal before the law that I propose that his horses, his houses, his lands, his mules, his cannon, yea, *his right to service in another*, shall be confiscated . . .<sup>81</sup>

Kellogg’s juxtaposition of “persons” in this list emphasizes that those “persons held in service” were simply considered a form of property that could be confiscated. This contradicts Oakes’s assertion that “[i]n one sense the title of the law is misleading: it ‘confiscated’ property, but it ‘emancipated’ slaves.”<sup>82</sup> No, at least according to Kellogg; the FCA and the amendment of Section 4 that he drafted indeed confiscated slaves, a *type* of property.

Oakes also neglects the context of the FCA. The word “person” was used in Section 4, which was added after several sections of the Act discussing property. “Person” could have been used as a word of clarity and precision to emphasize that the section sought to address “slave property” and not personal or real property. To this end, another Lincoln Scholar, John Syrett, in his book *The Civil War Confiscation Acts: Failing to Reconstruct the South*, states that Trumbull

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77. Oakes even acknowledges this on page 135 of his book by bringing in Stevens’s debate speeches.

78. OAKES, *supra* note 17, at 135 (emphasis added).

79. Not to be confused with William Pitt Kellogg.

80. BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774-2005, *supra* note 42, at 1367 (“KELLOGG, William, a Representative from Illinois . . . elected as a Republican to the . . . Thirty-Seventh Congress[ ] . . .”) (emphasis added).

81. CONG. GLOBE, 37th CONG., 1ST SESS. 411 (1861) (emphasis added).

82. OAKES, *supra* note 17, at 122.

added “persons” to the bill so that it was clear that slaves could be confiscated if used to further the insurrection.<sup>83</sup>

Using the word “persons” for distinction and specificity purposes also occurred earlier in history with the Three-Fifths Compromise in the Constitution.<sup>84</sup> Thus, use of the word “person” is not a reliable indicator of any paradigm shift because of examples like the Three-Fifths Compromise, which uses the word “person” to refer to the enslaved while simultaneously affirming their status as sub-human (i.e., “three-fifths of a man”). The Three-Fifths Compromise reads:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, *three fifths of all other Persons*.<sup>85</sup>

In the Three-Fifths Compromise, “person” was likely used instead of “property” so that it was clear that states would only get representation in Congress based on their population of enslaved Africans, not based on the number of chickens or couches or houses in the state. “Property” would be too broad in this context and would result in unintended legal ramifications.

Similarly, this choice of language occurred with the Fugitive Slave Clause<sup>86</sup> as a way of being precise. One could not use the word “property” in the Fugitive Slave Clause; it is too broad. The government did not intend to recapture all property (e.g., a vase) and ensure it was sent back to the southern owner after being lost in the north.

To conclude this property-to-person discussion, I issue a cautionary admonition: Historians should not be so quick to superimpose the lofty idea that a “property to person” paradigm shift happened suddenly and early in American history. That shift, at least in the legal realm, was likely not sudden, but gradual and erratic. By implying that this shift was occurring in Congress in 1861 during the FCA de-

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83. JOHN SYRETT, *THE CIVIL WAR CONFISCATION ACTS: FAILING TO RECONSTRUCT THE SOUTH* 4 (2011).

84. U.S. CONST. art. I, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIV.

85. *Id.*

86. The Fugitive Slave Clause reads: “*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 the Party to whom such Service or Labour may be due.*” U.S. CONST. art. IV, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIII (emphasis added).



bates, Oakes produces a narrative that, in its totality, is inconsistent and confusing.

E. Finally, Oakes's Timing Argument Is Flawed: The Date of Emancipation He Establishes (August 8, 1861) Is Disputable

The flaw with Oakes's backdating of when emancipation really began is that he draws upon Lincoln's silence, saying the silence is a ratification of (someone's) desire to emancipate. At one point, Oakes even affirmatively says that the Lincoln administration intended all along for thousands of slaves to be emancipated during the war:

[Thousands of s]laves who had refused to run with their masters had . . . voluntarily come into Union lines and were thereby emancipated . . . . There is no reason to doubt that this was the result the Lincoln Administration intended. Even before he was elected president, Lincoln had warned that if the slave states seceded, the federal government would stop enforcing the fugitive slave clause . . . .<sup>87</sup>

First, no portion of this quote is cited. Second, Oakes's inference seems to be based on the fact that (1) the War Department via Cameron directed General Butler not to return "contrabands" to enslavement, (2) Lincoln didn't object to Cameron's instructions, and (3) Lincoln had objected to Cameron's actions on other occasions.

While Oakes capitalizes on this silence, he disappoints because he does not forecast to Lincoln's future expressions of hesitation at emancipation. How does Oakes explain Lincoln's alleged intent that thousands of slaves would be emancipated simply by crossing Union lines in light of his veto letter sent to Congress amid deliberation of the Second Confiscation Act (SCA)? Oakes needs to contextualize the FCA and Lincoln's thoughts and implied "intent" with the SCA and his future express intent.

If the FCA was really an extensive measure to emancipate as Oakes seems to characterize it, and if Lincoln intended for the emancipation of thousands of slaves during the war *by means of the FCA*, why then does Lincoln later present so many objections to the SCA's method of emancipation?

Nadine Mompremier, in her research of the several drafts of the SCA and Lincoln's veto message, states that:

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87. OAKES, *supra* note 17, at 141.

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[Lincoln] didn't believe that it was within Congress's power to free slaves, but rather ownership should be transferred to the [government] (just like other property) and then Congress can later decide if they want to free them. But then he also continues by saying that he has no objection with Congress deciding in advance that they want to free the slaves. He also believes that it would be physically impossible for the [government] to return the slaves "persons" to actual slavery [because] there would be resistance to it, "which could neither be turned aside by argument, nor driven away by force."<sup>88</sup>

Even if Lincoln is merely objecting to the method of emancipation and not to emancipation itself, as Ms. Mompremier concludes, his concerns apply to the FCA's means as well. Under the escheat concerns he raises, the FCA still raises the same problem the SCA does. There is no real explanation for why Lincoln raised these concerns so much later, but in light of them, we cannot say—as Oakes does—that “there is no reason to doubt” that Lincoln intended for slaves to be emancipated in the way Oakes sees the FCA as having emancipated them. We cannot read contentment and hope into Lincoln's silence when there are later indicia of his discontent with similar congressional emancipatory methods.

Is it baffling that Lincoln was not speaking up during the time of the FCA, under my theory? Yes, it is. It is nonsensical that he would speak up only later. However, there are many other plausible explanations equally if not more likely than Oakes's. Maybe Lincoln was still developing a basis for his objections. Maybe his attention was elsewhere. Maybe other aspects of the war took priority, and the problem of emancipation was not at the forefront of his concern. Without any expression from Lincoln, any explanation is pure speculation. Oakes has not provided enough information to move the conclusions he draws from Lincoln's silence out of the realm of speculation. His conclusions are on equal footing with those just presented. He should acknowledge the speculative nature of his conclusions and avoid writing them so assuredly.

## CONCLUSION

The legal realm during the Civil War era was a confusing and complex one. Therefore, summarizing nineteenth century thoughts

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88. E-mail from Nadine Mompremier, J.D., Howard University Sch. of Law, *supra* note 75.

and debates about ideas surrounding emancipation and property confiscation must be done carefully. Oakes must be given due credit for attempting to construct an accurate narrative about some of these concepts. However, there are several areas to be improved upon in his exploration. Hopefully, this review will help all emancipation scholars get a little closer to the truth.