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“To This Tribunal the Freedman Has Turned”: The Freedmen’s Bureau’s Judicial Powers and the Origins of the Fourteenth Amendment

Hon. Bernice B. Donald

Pablo J. Davis

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“To This Tribunal the Freedman Has Turned”: The Freedmen’s Bureau’s Judicial Powers and the Origins of the Fourteenth Amendment

Hon. Bernice B. Donald and Pablo J. Davis***

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This much abused bureau has . . . done more for the administration of justice, for the maintenance of order, for the security of person, liberty, and property, than an army costing tens of millions of dollars. . . . To this tribunal the freedman has turned for protection, for justice, for security.

Senator Henry Wilson (R.-Mass.), Feb. 1, 1866.¹

If it be asked whether the creation of such a tribunal within a State is warranted as a measure of war, . . . [a]t present there is no part of our country in which the authority of the United States is disputed . . . Undoubtedly the freedman should be protected, but he should be protected by the civil authorities . . . His condition is not so exposed as may at first be imagined.

President Andrew Johnson, Veto Message, Second Freedmen's Bureau Act, Feb. 19, 1866.²

INTRODUCTION

As the horror of the Civil War drew to a close, leaving more than a half-million dead³ in a population of only 30 million inhabitants, a tremendous toll of physical and psychic devastation, a president assassinated, and secession and slavery both defeated, a monster rampaged through the South. Confederate General Wade Hampton, the scion of a powerful South Carolina slaveholding family,⁴ conjured visions of a grotesque and dreadful leviathan: "The war which was so prolific of monstrosities, new theories of republican government, new versions of the Constitution . . . gave birth to nothing which equals in deformity and depravity this 'Monstrum horrendum informe ingens.'"⁵ The Democratic

* United States Circuit Judge, United States Court of Appeals for the Sixth Circuit.

** Of Counsel, Dinsmore & Shohl LLP; Law Clerk to the Hon. Bernice B. Donald, United States Court of Appeals for the Sixth Circuit, 2017–18; J.D. cum laude, The University of Memphis Cecil C. Humphreys School of Law; Ph.D., History, and M.A., History, The Johns Hopkins University; M.A., History, Columbia University; B.A., History, cum laude, University of Maryland, College Park.

1. CONG. GLOBE, 39th Cong., 1st Sess. 3057 (1866).

2. Andrew Johnson, *Veto Message*, Second Freedmen's Bureau Act (Feb. 19, 1866), AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=71977> [<https://perma.cc/7BXA-6PPR>] (last visited July 11, 2018).

3. JAMES M. MCPHERSON, *ORDEAL BY FIRE: THE CIVIL WAR & RECONSTRUCTION* 487 (1992).

4. *Wade Hampton II*, S.C. ENCYCLOPEDIA, <http://www.scencyclopedia.org/sce/entries/hampton-wade-ii/> [<https://perma.cc/KBV7-W3U2>] (last visited July 11, 2018).

5. James M. McPherson, *Afterword*, in *THE FREEDMEN'S BUREAU & RECONSTRUCTION: RECONSIDERATIONS* 343, 344 (Paul A. Cimbala & Randall M. Miller eds., 1999). The Latin phrase, from the description of the monster

Party made a central issue of attacking the “fabulous monster,” upon which they looked “with a religious though insane horror.”⁶ Gideon Welles, President Johnson’s staunchly anti-Reconstruction Secretary of the Navy, spoke of it as an appalling “engine . . . a governmental monstrosity.”⁷

What was this “monster” and why was it so widely hated? It was not the occupying Union Army, nor the former slaves, now freedpeople, nor even the Republican Party, but rather a federal government agency that had been in existence for barely one year: the Bureau of Refugees, Freedmen, and Abandoned Lands, known as the Freedmen’s Bureau (“Bureau”). George B. Shanklin, a Democratic Congressman from Kentucky, strikingly expressed the singular place given to this entity as a paramount symbol of evil for postwar White Southerners: advocating for the prompt restoration of political rights to participants in the Confederate cause,⁸ Shanklin envisioned the benefits of such a policy: “harmony and prosperity [restored] . . . to a distracted country; the military removed to the frontier and coast; and, *above all, the Freedmen’s Bureau*, the manufacturer of paupers and vagabonds, the fruitful source of strife, vice and crime, dispensed with, and an exhausted treasury relieved from the burden of its support.”⁹

Polyphemus in the *Aeneid*, can be translated as “horrible, deformed, gigantic monster.” DIG. LIBRARY, TUFTS U.: VIRGIL, AENEID, III.658, transl. Theodore C. Williams, <http://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.02.0054> [<https://perma.cc/CJ7Z-DLF4>] (last visited July 9, 2018).

6. John & LaWanda Cox, *General O.O. Howard and the “Misrepresented Bureau,”* 19 J. S. HIST. 427, 445–46 (1953).

7. CLAUDE G. BOWERS, *THE TRAGIC ERA: THE REVOLUTION AFTER LINCOLN* 101 (1957) (quoting GIDEON WELLES, *DIARY*, Vol. II 433 (1911)). In this hugely influential—and highly readable—work, originally published in 1929, Bowers painted the Reconstruction years in bleak tones as “the reign of the carpetbagger,” *id.* at 540, in which “the Southern people literally were put to the torture,” victims of “the despotic policies” of “daring and unscrupulous men The evil that they did lives after them,” *id.* at ii. In addition to the language of monstrosity, critics also painted the Bureau in satanic terms: White Southerners were seen to view the Bureau as “a diabolical device for the perpetuation of the national government’s control over the South, and for the humiliation of the whites before their former slaves.” WILLIAM A. DUNNING, *RECONSTRUCTION POLITICAL & ECONOMIC* 33–34 (1907).

8. REPORT ON MEMPHIS RIOTS & MASSACRES, H.R. Rep. No. 101, 39th Cong., 1st Sess. at 41–43 (1866).

9. *Id.* at 44 (emphasis added).

Born out of the chaos of war, the Freedmen's Bureau was a unique entity created by Congress within the War Department shortly before Lincoln's death, Johnson's assumption of the presidency, and the war's end.¹⁰ Congress charged the Bureau with assisting the freedmen in their transition from slavery to free labor and, later, citizenship. The almost inconceivably vast scope of its duties included emergency relief, education, medical care, transportation, administering confiscated or abandoned lands, implementing and overseeing a new system of agricultural labor contracts, and more.¹¹ The Bureau's task has been characterized as nothing less than "creating a new way of life for American Negroes, most of whom lived in the South and had been slaves."¹² But, fashioning that "new way of life" could not help but involve and affect White Southerners also, reshaping the long-established, hierarchical relationships of domination they had exercised over African-Americans. Whites, therefore, would have quite a lot to say about the Bureau's work.

Of the Bureau's many fields of action, however, none stirred up as much hostility as its judicial functions.¹³ W.E.B. DuBois, the pioneering

10. AVERY CRAVEN, *RECONSTRUCTION: THE ENDING OF THE CIVIL WAR* 57–58 (1969).

11. One legal scholar has observed that the Bureau:

operate[d] in a wholly new frontier of American law. For the first time, the federal government would operate directly in the personal lives of a large body of citizens: it would review private contracts, settle labor and property disputes, operate schools, and even serve as a licenser of marriages. These activities were virtually, if not entirely, unknown before—and some of them since—within what the Framers had called the general government.

John M. Bickers, *The Power to Do What Manifestly Must Be Done: Congress, the Freedmen's Bureau, and Constitutional Imagination*, 12 *ROGER WILLIAMS U. L. REV.* 70, 87 (2006). For key works on the Bureau, see: W.E.B. DUBOIS, *THE ILLUSTRATED SOULS OF BLACK FOLK* (Eugene F. Provenzo, Jr. ed., Paradigm Publishers 2005) (1903 as *THE SOULS OF BLACK FOLK* 1903); PAUL S. PEIRCE, *THE FREEDMEN'S BUREAU: A CHAPTER IN THE HISTORY OF RECONSTRUCTION* (Haskell House Publishers 1971) (1904); W.E.B. DUBOIS, *BLACK RECONSTRUCTION IN AMERICA 1860-1880* (1935); GEORGE R. BENTLEY, *A HISTORY OF THE FREEDMEN'S BUREAU* (1955); WILLIAM S. MCFEELY, *YANKEE STEPFATHER: GENERAL O.O. HOWARD & THE FREEDMEN* (1968); DONALD G. NIEMAN, *TO SET THE LAW IN MOTION: THE FREEDMEN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS 1865-1868* (1979); *THE FREEDMEN'S BUREAU & RECONSTRUCTION: RECONSIDERATIONS* (Paul A. Cimbala & Randall M. Miller eds., 1999).

12. MCFEELY, *supra* note 11, at 20.

13. PATRICK W. RIDDLEBERGER, *1866: THE CRITICAL YEAR REVISITED* 64 (1979).

African-American sociologist and early historian of the Bureau, referred to “administer[ing] justice between man and former master”¹⁴ as “[t]he most perplexing and least successful” of the Bureau’s tasks.¹⁵

This Article explores the Freedmen’s Bureau as a significant part of the context of the Fourteenth Amendment’s enactment. It does so by looking at the Bureau’s judicial powers, and their grant, exercise, and political effects. The Article will proceed in four parts: Part I briefly considers the Bureau’s wartime genesis. Part II, concerned mainly with events in 1865, looks at the exercise of the Bureau’s judicial powers under its original statute and the ongoing battles over jurisdiction. Part III, concerning events mainly in 1866, explores the political fight over the proposed Second Freedmen’s Bureau Act, which led to a complete break between Congressional Republicans and President Johnson. Part IV will offer brief concluding thoughts, relating issues revealed in Parts II and III to the broader question of the Bureau’s connection with the Fourteenth Amendment.

I. WARTIME GENESIS OF THE BUREAU

Although a Congressional statute formally created the Freedmen’s Bureau, in actuality, the agency arose out of the chaotic and violent reality of the Civil War. Indeed, it is fair to say that African-American men, women, and children created what would become the Freedmen’s Bureau when they risked everything for freedom, seeking refuge from slavery behind Union lines. This section addresses how escape from slavery interacted with military necessity and politics to bring about the establishment of the Bureau.

14. DUBOIS, *BLACK RECONSTRUCTION*, *supra* note 11, at 225.

15. DUBOIS, *SOULS*, *supra* note 11, at 49. Legal historians Harold M. Hyman and William M. Wiecek capture the haphazard way Congress forced judicial duties on the Bureau, as an outgrowth of wartime exigencies forcing “ill-prepared military men” to shoulder tasks as humble as “fire prevention and sewage disposal” but also “the resolution of complex civil relationships, including criminal justice and commercial transfers.” HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835–1875* 244 (1982).

A. Forerunners

From its very beginning, a war purportedly unrelated to slavery¹⁶ inescapably brought the Union Army face-to-face with that institution and the people in bondage to it: “[N]o sooner had the [Union] armies . . . penetrated Virginia and Tennessee than fugitive slaves appeared within their lines. They came at night, when the flickering camp-fires shone like vast unsteady stars along the black horizon . . . a horde of starving vagabonds, homeless, helpless, and pitiable.”¹⁷

Initially, Union Army officers ordered that slaves who had fled to their lines be delivered to local authorities for return to their masters.¹⁸ General Benjamin Butler, ironically a Democrat who had been against the war, appears to have been the first to perceive the self-defeating nature of this policy.¹⁹ In the case of three fugitive slaves, for example, whose owner commanded a Virginia militia company, their return “would enhance the strength of the enemy.”²⁰ The Virginian sent an emissary who argued that because the Union denied the right of secession, Butler could not withhold the slaves’ return. Butler retorted, “But you say you have seceded, so you cannot consistently claim them. I shall hold these negroes as *contraband*

16. No such pretense existed on the Confederate side: Vice-President Alexander H. Stephens proclaimed in his “Cornerstone Speech” at Savannah on March 21, 1861: “Our new Government is founded . . . , its cornerstone rests, upon the great truth that the negro is not equal to the white man; that slavery, subordination to the superior race, is his natural and moral condition.” *Cornerstone Speech*, CONFEDERATE STATES OF AM. CONST., <http://www.csaconstitution.com/p/alexander-h.html> [<https://perma.cc/78Y7-YS6J>] (last visited July 11, 2018). Meanwhile, Frederick Douglass tirelessly urged the Union to make the conflict “an abolition war” for not only moral, but also strategic reasons. Frederick Douglass, *Cast Off the Mill-Stone*, DOUGLASS’ MONTHLY (Sept. 1861), available at <http://teachingamericanhistory.org/library/document/cast-off-the-mill-stone/> [<https://perma.cc/NT7E-DE5W>] (last visited July 11, 2018).

17. DUBOIS, *BLACK RECONSTRUCTION*, *supra* note 11, at 31. In fact, even before soldiers shot the first shots at Ft. Sumter, “four slaves stole into Fort Pickens, Florida . . . in the misapprehension that northern troops had been stationed there to grant them freedom.” BENTLEY, *supra* note 11, at 1.

18. HYMAN & WIECEK, *supra* note 15, at 247; *see also* BENTLEY, *supra* note 11, at 1 (noting that the commanding officer of Ft. Pickens handed the four fugitives over to the city marshal for return to their owners).

19. BENTLEY, *supra* note 11, at 1; *see also* DUBOIS, *BLACK RECONSTRUCTION*, *supra* note 11, at 63; MCPHERSON, *supra* note 3, at 266.

20. BENTLEY, *supra* note 11, at 1.

of war.”²¹ The term caught on, and the “contrabands” policy was entrenched as de facto Union Army policy, then incorporated into a law signed by President Lincoln in August 1861.²² Secretary of War Cameron wrote in late 1861 that the African-American fugitive slaves “constitute a military resource, and being such, that they should not be turned over to the enemy is too plain to discuss.”²³ Butler’s innovation brought about the close contact of many escaped slaves with operations of the Union Army, planting the seed of what would become the Freedmen’s Bureau—and one could not find a better example of history’s irony. It was all unplanned, and apparently the furthest thing from President Lincoln’s mind, as he dared not alarm slaveholders in non-seceding border states like Missouri and Kentucky by adhering to a policy of welcoming escaped slaves.²⁴

As the war went on, the scattered appearance of fugitive slaves finding their way into Union lines became a flood.²⁵ This influx posed both a humanitarian and military challenge, as large numbers of freedmen bringing up their rear or massed on the fringes of military camps affected army units’ mobility and resources.²⁶

To meet these challenges, military leaders improvised an array of solutions, or what DuBois referred to as a series of “strange little governments” or “experiments.”²⁷ The most famous of these “rehearsals for Reconstruction”²⁸ occurred on the South Carolina Sea Islands beginning with the United States Navy’s occupation of Port Royal in November 1861, when planters abandoned their lands en masse.²⁹ The 10,000 remaining slaves drew on a long tradition of organizing their own labor, and began organizing under the supervision of Northern

21. *Id.* at 1–2 (emphasis added).

22. MCPHERSON, *supra* note 3, at 266.

23. DUBOIS, SOULS, *supra* note 11, at 33.

24. MCPHERSON, *supra* note 3, at 161–62. When the embattled General John Frémont attempted to turn around his dire position in Missouri by decreeing, in August 1861, the emancipation of slaves belonging to Confederate sympathizers, the order “stirred up a hornet’s nest.” *Id.* Lincoln forced Frémont to backtrack on the measure, and for this and other reasons, relieved him of his command soon thereafter. *Id.*

25. DUBOIS, SOULS, *supra* note 11, at 37.

26. ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877 57 (1988); DUBOIS, SOULS, *supra* note 11, at 37.

27. DUBOIS, SOULS, *supra* note 11, at 36–37, 40–41.

28. See WILLIE LEE ROSE, REHEARSAL FOR RECONSTRUCTION: THE PORT ROYAL EXPERIMENT (1964).

29. FONER, *supra* note 26, at 51.

missionaries, teachers, and other reformers.³⁰ The “Port Royal experiment” received military recognition late in the war, in the form of General William Tecumseh Sherman’s Field Order No. 15 “reserv[ing] for the settlement of the negroes made free by the acts of the war”—including Lincoln’s 1863 Emancipation Proclamation—“[t]he islands from Charleston, south, the abandoned rice fields along the rivers for thirty miles back from the sea, and the country bordering the St. Johns river, Florida.”³¹ Other “experiments” included General Lorenzo Thomas’s plan to lease plantations along the Mississippi to loyal Northerners, who would then hire freedmen as laborers under Army-imposed rules.³² In overseeing African-American labor, however, the Army maintained many of the similar customs of the old system, including strict discipline and punishment of vagrancy.³³

The Army’s handling of freedmen’s labor highlighted a fundamental tension and uncertainty that would persist after the war’s end. The single most far-reaching outcome of the Civil War was to end a legal regime that enabled some human beings to hold others as property—chattel slavery.³⁴ That much was known, but little more. The end of slavery “raised as many questions as it answered.”³⁵ As a northern traveler pithily remarked, the country stood poised between a “great contest of arms just closed, and . . . [a] still greater contest of principles not yet terminated.”³⁶ The questions at the heart of Reconstruction—involving the status of the former Confederate states and their new relation to the Union—“raised constitutional problems of almost metaphysical subtlety.”³⁷ But the “greater contest of principles”

30. *Id.* at 51–54.

31. *Special Field Orders, No. 15* (Jan. 16, 1865), FREEDMEN & SOUTHERN SOC’Y PROJECT, <http://www.freedmen.umd.edu/sfo15.htm> [<https://perma.cc/EZ2M-K792>] (last visited July 11, 2018); OLIVER OTIS HOWARD, AUTOBIOGRAPHY, II, 191 (1908).

32. FONER, *supra* note 26, at 57. Thomas M. Conway devised another system, as he was “in charge of some 90,000 Negroes, 50,000 of whom lived on 1,500 farms managed by Conway’s Bureau of Free Labor” during the last year of the war. BENTLEY, *supra* note 11, at 57.

33. FONER, *supra* note 26, at 58–59.

34. *Id.* at 1–7, 11.

35. *Id.* at 35.

36. JOHN T. TROWBRIDGE, THE SOUTH: A TOUR OF ITS BATTLE-FIELDS AND RUINED CITIES iii (1866).

37. Norman W. Spaulding, *The Discourse of Professionalism During the Civil War & Reconstruction*, 46 WM. & MARY L. REV. 2001, 2076 (2005) (quoting DAVID DONALD, THE POLITICS OF RECONSTRUCTION, 1863–1867 55–56 (1965)).

was the transformation of slaves into freedmen, and freedmen into citizens, raising problems of overwhelming difficulty. The Freedmen’s Bureau would be forced to confront them.

B. Creation of the Bureau

Shortly after the Emancipation Proclamation, Representative Thomas Eliot, Republican of Massachusetts, proposed the creation of a Bureau of Emancipation, but the bill did not progress.³⁸ Subsequently, in June 1864, a committee of inquiry, which Secretary of War Stanton empaneled, endorsed the idea of a “temporary bureau for the ‘improvement, protection, and employment of refugee freedmen.’”³⁹

Where in the federal government that “temporary bureau” would be located became a point of contention. When Eliot first proposed such a measure, Congress favored the Treasury Department because, in part, its control of abandoned lands in the South seemed a logical fit with assistance to the freedmen.⁴⁰ Sumner, the Senate sponsor of the later bill, also favored the Treasury Department.⁴¹ In the end, however, the successful legislation placed the agency within the War Department.⁴² This placement had important consequences for the Bureau, both positive and negative. The principal logic behind the choice appears to have been fiscal and pragmatic, as Congress appropriated virtually no funds for the Bureau, but allowed it to take advantage of the ready-made scaffolding the military offered—in effect “coloniz[ing]” the Union Army’s “resources, personnel, and discipline.”⁴³

The First Freedmen’s Bureau Act (“First Bureau Act”), which Congress enacted on March 3, 1865, was both vague and broad in its grant of authority. Its enacting clause began:

That there is hereby established in the War Department, to continue during the present war of rebellion, and for one year thereafter, a bureau of refugees, freedmen, and abandoned lands, to which shall be committed, as hereinafter provided, the supervision and management of all abandoned lands, and the

38. DUBOIS, SOULS, *supra* note 11, at 40; BENTLEY, *supra* note 11, at 20.

39. DUBOIS, SOULS, *supra* note 11, at 37–38.

40. BENTLEY, *supra* note 11, at 39–43.

41. *Id.* at 40–41.

42. NIEMAN, *supra* note 11, at xiv.

43. Robert C. Lieberman, *The Freedmen’s Bureau and the Politics of Institutional Structure*, 18 SOC. SCI. HIST. 405, 434 (1994) (citations omitted).

control of all subjects relating to refugees and freedmen from rebel states, or from any district or county within the territory embraced in the operations of the army, under such rules and regulations as may be prescribed by the head of the bureau and approved by the President.⁴⁴

The ill-defined, impossibly vast scope of its charge—the “all subjects relating to” language—was not the only difficulty surrounding the Bureau’s birth; the chronological sweep of events posed its own challenges. In early March 1865, when the First Bureau Act became law, the end was clearly near for the Confederacy—Charleston had surrendered just two weeks earlier,⁴⁵ and the Confederate government was desperate enough to seriously consider enlistment of African-Americans as soldiers.⁴⁶ The First Bureau Act’s “sunset provision,”⁴⁷ therefore, meant that the clock was ticking loudly on the Bureau from the very beginning.

Moreover, the scale of the agency was hardly proportionate to its responsibilities. The Bureau’s basic structure was simple. At the top was its commissioner, a position filled by General Howard throughout the Bureau’s existence.⁴⁸ Below the commissioner were the assistant commissioners, generally one per state.⁴⁹ The commissioner and assistant commissioners were the only Bureau personnel to receive separate salaries; other than those positions, Congress provided for no salaries “other than regular Army pay.”⁵⁰ The Bureau was not merely simple in structure—it was also thinly staffed; for all the Republican commitment to the freedmen and to the transformation of the former Confederate states, those legislators seemed to want “Reconstruction-on-the-cheap.”⁵¹ With

44. FIRST FREEDMEN’S BUREAU ACT, *reprinted in* THE AMERICAN NATION: PRIMARY SOURCES 91–92 (Bruce P. Frohnen ed., 2008).

45. MCPHERSON, *supra* note 3, at 471–73.

46. *Id.* at 477–78.

47. “[T]here is hereby established in the War Department, to continue *during the present war of rebellion, and for one year thereafter*, a bureau of refugees, freedmen, and abandoned lands . . .” FIRST FREEDMEN’S BUREAU ACT, *reprinted in* THE AMERICAN NATION, *supra* note 44, at 91 (emphasis added).

48. MCFEELY, *supra* note 11, at 4.

49. HOWARD, *supra* note 31, at 215.

50. MCFEELY, *supra* note 11, at 65.

51. HYMAN & WIECEK, *supra* note 15, at 444; *see also* NIEMAN, *supra* note 11, at 3–4.

some 550 agents—plus some 350 clerks—for the entire South at its peak, the Bureau had faint hope of fulfilling its vast mission.⁵²

The Bureau presence was mostly limited to state capitals and the principal county seats.⁵³ Absent special circumstances, agency personnel would rarely visit, much less police, the smaller, rural communities, and it was in such communities where most of the South’s population lived.⁵⁴ One freedman’s harrowing account underscored the remoteness of the Bureau: he trekked 60 miles on foot to the nearest Bureau agent to lodge a complaint against a planter, only to be captured en route by a group of armed white men.⁵⁵

Bureau agents, functioning locally at the county level, were crucial figures. Commissioner Howard and the assistant commissioners may have articulated policy and issued orders, but the agents were the key players in day-to-day implementation, and were the face of the Bureau to local Whites and African-Americans alike. Howard referred to the local agents with awe and empathy as “a magistrate with extraordinary judicial power—overseer of the poor of all classes in his district, agent to take care of abandoned lands, and required to settle, in a few days, the most intricate questions with reference to labor, political economy, &c, that have puzzled the world for ages.”⁵⁶

Assignments also far outnumbered the agents, with one agent typically assigned to one, two, or three counties and tens of thousands of freedpeople, often unaided and with a hostile White population surrounding the assignment.⁵⁷ A South Carolina agent recalled, “Consider the absurdity of expecting one man to patrol three thousand miles and make personal visitations to thirty thousand Negroes.”⁵⁸ It was the comparatively rare agent fortunate enough to “ha[ve] a horse and a clerk

52. HYMAN & WIECEK, *supra* note 15, at 444; *see also* NIEMAN, *supra* note 11, at 11–15.

53. HYMAN & WIECEK, *supra* note 15, at 444; NIEMAN, *supra* note 11, at 11–15.

54. HYMAN & WIECEK, *supra* note 15, at 444.

55. Affidavit of Edward Smith (July 30, 1866), *Documents from Freedom: A Documentary History of Emancipation, 1861-1867*, FREEDMEN & SOUTHERN SOC’Y PROJECT, <http://www.freedmen.umd.edu/ESmith.html> [<https://perma.cc/HBK7-LNSF>] (last visited July 11, 2018).

56. DUNNING, *supra* note 7, at 30.

57. MARY FARMER-KAISER, *FREEDWOMEN & THE FREEDMEN’S BUREAU: RACE, GENDER & PUBLIC POLICY IN THE AGE OF EMANCIPATION* 20 (2010).

58. *Id.* at 20–21.

to help with the responsibilities of office,” and even rarer to have Union troops nearby for protection and assistance with enforcement or arrests.⁵⁹

W.E.B. DuBois’s “sociological imagination”⁶⁰ captured the difficult context facing the freedmen and the Bureau charged with aiding them: “Here at a stroke of the pen was erected a government of millions of men” and women emerging from centuries under a “peculiarly complete system of slavery” and who “now, suddenly, violently, . . . come into a new birthright, at a time of war and passion, in the midst of the stricken, embittered population of their former masters.”⁶¹ DuBois’s observation is of paramount importance, placing in stark relief the complex, highly charged feeling-state of White Southerners at the time the freedmen were beginning to assert their rights as free men and women, and as citizens of the United States.

For all the antipathy of White Southerners towards the Bureau and its agents, it should be noted that some agents did not exactly keep a professional distance from White Southern society. General Clinton B. Fisk, assistant commissioner for Tennessee, complained that Washington imposed upon him agents not of his choosing, and that some proved not only prejudiced against African-Americans, but also easy prey to the flattery of a planter’s dinner invitation and the “attentions and smiles of his fair daughters.”⁶² To the extent that Bureau agents adopted such attitudes, they may have exemplified a fascination among many White Northerners for the mythology of the Southern planter elite.⁶³

59. *Id.* at 20.

60. Eugene F. Provenzo, Jr., *Introduction: Courage & the Sociological Imagination: W.E.B. DuBois’s The Souls of Black Folk*, in DUBOIS, SOULS, *supra* note 11, at xiii.

61. DUBOIS, SOULS, *supra* note 11, at 40.

62. TROWBRIDGE, *supra* note 36, at 338. *But see* DAN T. CARTER, WHEN THE WAR WAS OVER: THE FAILURE OF SELF-RECONSTRUCTION IN THE SOUTH, 1865-1867 214 (1985) (cautioning against reading too much into Bureau officials’ “acceptance of invitations to deer hunts and plantation dinners”).

63. DUBOIS, BLACK RECONSTRUCTION, *supra* note 11, at 35 (1935) (noting that many Northerners “abased” themselves and “flattered and fawned” over the planter elite, with its “leisure for good breeding and high living”). DuBois observed caustically that many elite planters were just a generation or two removed from origins as humble as those of immigrant-stock Northerners, but that these latter, “hardworking, upwardly mobile . . . folk,” were the sort who “not only ‘love a lord,’ but even the fair imitation of one.” *Id.* at 34–35.

II. THE BUREAU’S ORIGINAL JUDICIAL POWERS

As with the creation of the agency itself, the Bureau’s judicial functions arose under the exigencies of the war and its aftermath. This section examines the improvised nature of this aspect of the Bureau’s work, its ill-defined statutory basis, and its shifting fortunes under the First Bureau Act.

A. Judicial Powers Under the First Freedmen’s Bureau Act

The First Bureau Act did not grant the agency express judicial authority, but the authority was inferred from the broad “all subjects relating to . . . freedmen” language.⁶⁴ From the beginning, however, disputes over the labor contracts the Bureau oversaw demanded immediate attention.⁶⁵ Amidst the postwar crisis of Southern agriculture, these disputes between freedmen and planters formed the core of the agency’s early judicial docket.⁶⁶

Just two weeks after assuming his post as Commissioner of the Bureau, Howard issued an order requiring his assistant commissioners to adjudicate difficulties where at least one party was African-American.⁶⁷ This document, Circular No. 5, became the first operational expression of the Bureau’s judicial functions. The circular provided, in relevant part:

In all places where there is an interruption of civil law, or in which local courts, by reason of old codes, in violation of the freedom guaranteed by the proclamation of the President and laws of Congress, disregard the negro’s right to justice before the laws in not allowing him to give testimony, the control of all subjects relating to refugees and freedmen being committed to this bureau, the Assistant Commissioners will adjudicate, either themselves or through officers of their appointment, all difficulties arising between negroes themselves, or between negroes and whites or Indians, except those in military service, so far as recognizable by military authority, and not taken cognizance of by the other

64. FIRST FREEDMEN’S BUREAU ACT (1865), *reprinted in* THE AMERICAN NATION, *supra* note 44, at 91–92.

65. *See* HOWARD, *supra* note 31, at II, 251.

66. *See id.* As Howard saw it, the Bureau had to find a way to successfully adjudicate these labor-contract disputes, or the South would face the real possibility of “race wars” and “starvation.” *See id.*

67. BENTLEY, *supra* note 11, at 152.

tribunals, civil or military, of the United States.⁶⁸

The circular thus set up two triggers for Bureau jurisdiction: either (1) “where there is an interruption of civil law”; or (2) where “local courts, by reason of old codes, in violation of the freedom guaranteed by the proclamation of the President and laws of Congress, disregard negro’s right of justice before the laws *in not allowing him to give testimony*.”⁶⁹ This rule was in some senses a quite narrow jurisdictional assertion, for African-Americans’ “right to justice before the laws” could be “disregard[ed]” in other ways than simply excluding their testimony.⁷⁰ The phrase “disregard the negro’s right to justice,” contained at least the seed of a larger assertion of Bureau jurisdiction and imposition of a higher requirement of the state courts. For the moment, however, the Bureau’s focus was on the admissibility of African-Americans’ testimony in state courts.⁷¹

Undoubtedly, the right of an African-American to give testimony did not always translate into being effectively heard. A Freedmen’s Bureau agent in Virginia reported on a trial of a white defendant accused of horse theft in the County Court, where:

[O]n the first day the Court refused to admit Negro testimony, though the case clearly comes under the statute admitting such testimony; on the second day [defense] Counsel again attempted to introduce Negro testimony and pressed the matter so strongly that the Court admitted it *but I am satisfied placed no weight upon it*.⁷²

68. Freedmen’s Bureau, Circular No. 5, § VII, in REP. OF COMM’R OF BRF&AL, H.R. Doc. 11, 39th Cong., 1st Sess. 45 (Dec. 1, 1865).

69. *Id.* (emphasis added). The circular’s use of the preposition “in” is telling, as it virtually equates the denial of justice with the prohibition on African-American testimony. *See id.*

70. *Id.*

71. Typical of the Bureau’s focus on this issue was the first act of Brigadier General Davis Tillson on arriving in Memphis in July 1865 to establish the Bureau’s Memphis subdistrict. STEPHEN V. ASH, *A MASSACRE IN MEMPHIS: THE RACE RIOT THAT SHOOK THE NATION ONE YEAR AFTER THE CIVIL WAR* 22 (2013). Tillson met with the city’s mayor to find out whether local courts accepted African-American testimony on learning that Tennessee law forbade it, he set up a Freedman’s Court in the city. *Id.*

72. Lt. Hiram Hunt to Bvt. Brig. Gen. O. Brown (Sept. 30, 1866), *Records of the Assistant Commissioner for the State of Virginia*, FREEDMEN’S BUREAU

Nevertheless, although the admission of African-Americans' testimony hardly exhausted all of the rights to which the freedmen, seconded by their Republican allies, were entitled, it was not exactly a trivial right. Noah Swayne, a Justice of the United States Supreme Court, illustrated its importance by noting that "where a white man was sued by a colored man, or was prosecuted for a crime against a colored man, colored witnesses were excluded. This in many cases involved a denial of justice. Crimes of the deepest dye were committed by white men with impunity."⁷³

Tellingly, the language of Circular No. 5 framed the acceptance or refusal of African-American testimony. Indeed, Howard consistently painted the testimony issue as vital: "The work of my officers in obtaining recognition of the negro as a man instead of a chattel before the civil and criminal courts took the lead; we took the initiative in influencing the South in its transition into the new order of things."⁷⁴ Although the Bureau's attention was focused on instituting contractually based labor arrangements to stabilize postwar agriculture, Howard saw the Bureau's judicial efforts as representing "the first active endeavor to put the colored man or woman on a permanent basis on a higher plane."⁷⁵

Several Southern states actively resisted the requirement of African-American testimony, even though relenting on that issue would have allowed them to avoid Bureau jurisdiction.⁷⁶ President Johnson, realizing the cost of a hard line on this issue in the Southern states, pressured the states to relent.⁷⁷ In Mississippi, for instance, Johnson was successful, as the legislature revised its ban on African-American testimony by allowing it in cases where at least one party was African-American.⁷⁸

Howard's recollection of the beginnings of the Bureau's judicial activity highlights the improvised quality of the procedures that were developed, as well as the general's naïve faith in good will and reasonableness. Howard described meeting with a group of planters near Charlottesville, Virginia, some of whom expressed confusion or

ONLINE, <http://www.freedmensbureau.com/virginia/crimcases5.htm> [<https://perma.cc/6T3H-MHLJ>] (last visited July 11, 2018) (emphasis added).

73. *United States v. Rhodes*, 27 F. Cas. 785, 787 (Cir. Ct., D. Ky. 1866).

74. HOWARD, *supra* note 31, at II, 251.

75. *Id.*

76. NIEMAN, *supra* note 11, at 72–74.

77. Brooks D. Simpson, *Ulysses S. Grant & the Freedmen's Bureau, in THE FREEDMEN'S BUREAU AND RECONSTRUCTION: RECONSIDERATIONS* (Paul Alan Cimbala & Randall M. Miller eds., 1999); *see also* NIEMAN, *supra* note 11, at 73.

78. NIEMAN, *supra* note 11, at 74.

hopelessness at the prospect of obtaining freedmens' labor.⁷⁹ Others asked what would prevent laborers from simply leaving a crop unharvested, or puzzled over how to make contracts with freedmen.⁸⁰ Howard recounted how, after hearing planters' concerns, he addressed them:

"Gentlemen, no one of us alone is responsible for emancipation. The negro *is free*. This is a fact. Now cannot we blue-eyed Anglo-Saxons devise some method by which we can live with him as a free man?" I then made a suggestion. "Suppose for all minor cases, say within one or two hundred dollars of value, we organize a court. My agent being one member may represent the Government; the planters of a district can elect another, and the freedmen a third. In nine cases out of ten the freedmen will choose an intelligent white man who has always seemed to be their friend. Thus in our court so constituted, every interest will be fairly represented."⁸¹

Howard reported that the planters, "pleased" and "astonished to find [him] a friend and not an enemy, . . . said with feeling: 'General, why didn't you come down here before?'"⁸²

Shortly thereafter, three-judge courts on this model were initiated in that locale and throughout Virginia; the tribunals were made up largely of Bureau officers or agents, but tribunals also incorporated civilians onto the courts.⁸³ These tribunals, often known as "Freedmen's Courts," heard relatively minor matters, civil and criminal, with "the power as to punishment . . . limited to not exceed \$100 fine, or thirty days' imprisonment."⁸⁴ Tribunals referred capital crimes, other felonies, and

79. HOWARD, *supra* note 31, at II, 251–52; *see also* James Oakes, *A Failure of Vision*, 25 CIVIL WAR HIST. 66, 68–69 (1979) (noting a political candidate's urging the acceptance of African-American testimony lest "the military courts and Freedmen's Bureau take [such testimony], and jurisdiction is lost").

80. HOWARD, *supra* note 31, at II, 252.

81. *Id.*

82. *Id.*

83. *Id.* Astonishing as it may seem, one of the Freedmen's Court judges in Virginia was none other than pro-slavery ideologue George Fitzhugh. Fitzhugh was famous for his Antebellum writings extolling plantation slavery as a positive good and condemning what he saw as the coldly commercial coercion of Northern industrial society. *See* GEORGE FITZHUGH, *SOCIOLOGY FOR THE SOUTH: OR THE FAILURE OF FREE SOCIETY* (1854); GEORGE FITZHUGH, *SLAVES WITHOUT MASTERS* (1857).

84. HOWARD, *supra* note 31, at II, 252.

property disputes to state courts if in operation, or to a federal court or military commission.⁸⁵

As with the various relief and labor experiments which gave rise to the Freedmen’s Bureau, so the exercise of the Bureau’s judicial powers was subject to ad hoc arrangements differing from state to state. One of the more notable special arrangements occurred in Alabama, which used single-judge courts. The initiative came from General Wager Swayne, assistant commissioner for Alabama.⁸⁶ General Swayne approached the provisional governor of Alabama with an offer: the Bureau would allow civilian magistrates to act as Bureau judges, provided the magistrates allowed African-American testimony. The condition was significant, and meant the arrangement was not the same as giving jurisdiction over African-Americans’ cases to the civil courts—Alabama law barred state courts from admitting such testimony.⁸⁷

The Governor encouraged magistrates to accept appointments under Swayne’s terms, noting:

[T]he alternative was having courts composed of strangers, with no recognized rules of procedure, and without appeal. Very soon Swayne was able to report that acceptances of Bureau judgeships were coming in “as fast as the mails permit.” And he had no difficulty getting his particular kind of Bureau courts established throughout Alabama.⁸⁸

Howard approved the arrangement, “believing it to be necessary to test the civil judges as to their disposition to do justice to the freedman.”⁸⁹ In December 1865, the Bureau reported to Congress that “[f]avorable reports have come from nearly every quarter of [Alabama],” though noting reports of “grave abuses” from the northern part of the state.⁹⁰ Unfortunately, experience would show that “grave abuses” were more than isolated exceptions, and that circumstances hardly warranted the Bureau’s stepping aside in deference to state justice.

85. *Id.* at II, 252–53.

86. The general’s father was United States Supreme Court Justice Noah Swayne. *See supra* note 73 and accompanying text.

87. BENTLEY, *supra* note 11, at 153–54.

88. *Id.*

89. REP. OF COMM’R OF BR&AL, H.R. Doc. 11, 39th Cong., 1st Sess. 23 (Dec. 1, 1865).

90. *Id.*

B. Cession and Reassertion of Jurisdiction

In the summer and early fall of 1865, Bureau policy pointed towards deferring to the jurisdiction of state courts.⁹¹ The key reason seemed to be the willingness of those state tribunals to allow African-American testimony.⁹² Abolitionist Wendell Phillips faulted Howard for so readily ceding jurisdiction and thus “put[ting] the freedmen into the jaws of the tiger,” to which Howard responded that “secur[ing] the negro’s testimony in the Southern courts” was “a long step gained” and that “[j]ustice in time w[ould] work itself clear.”⁹³

Even in Texas, a state marked by exceptional violence towards freedmen and hostility to the Bureau, Howard urged the assistant commissioner to “promote mutual good will among blacks and whites, by a spirit of fairness.”⁹⁴ The Bureau seized on even modest successes, such as the case of a white man convicted for killing a Negro in Mississippi and sentenced to a year’s imprisonment.⁹⁵ The assistant commissioner reported to Howard that although it was “perhaps more than probable that the punishment awarded in this case was inadequate,” there was reason to:

trust[] that the conviction in this case wholly on negro testimony and the excellent sentiments promulgated by Judge Campbell will be the *good seed* which will germinate at no distant day into the full fruition of perfect protection of the civil rights of the negro by the civil tribunals of this state.⁹⁶

As the fall of 1865 wore on, though, Howard grew uneasy with the cession of jurisdiction to state courts. When particularly egregious cases of injustice towards freedmen occurred in a state or part of a state, the Bureau “sporadically exercised its right to reestablish its judicial authority over whites as well as blacks.”⁹⁷ This shift of authority might have involved removal of a particular case from a state court, or the wholesale reassertion of Bureau jurisdiction and the reopening of Bureau courts. Most commonly, however, assistant commissioners relied on provost-

91. NIEMAN, *supra* note 11, at 103–04.

92. *Id.*; see also HOWARD, *supra* note 31, at II, 253–55.

93. HOWARD, *supra* note 31, at II, 254.

94. Cox & Cox, *supra* note 6, at 455 (internal quotation marks omitted).

95. *Id.* at 455–56 (citing Gen. T.J. Wood to Gen. Howard, Sept. 27, 1866).

96. *Id.* (emphasis added).

97. Oakes, *supra* note 79, at 72–73 (quoting REP. OF COMM’R OF BR&AL, H.R. Doc. 11, 39th Cong., 1st Sess. 22 (Dec. 1, 1865)).

marshal courts to handle cases referred by Bureau agents.⁹⁸ Agents reported such conditions, for instance, in Arkansas and Virginia; Bureau courts were reopened in three counties of the latter state.⁹⁹

In most cases in which an assistant commissioner authorized such intervention, however, the commissioner relied on the provost courts to handle all cases that local agents referred. As provost courts were more accessible to freedmen, accepted black testimony, and eliminated many of the institutional barriers which prevented blacks from even getting into a civil court, they were often the only ready source of justice upon which freedmen could rely.¹⁰⁰ Even Howard had his reservations about them, however, noting that some provost-court officers, "having the infectious prejudice against the negro, have discriminated very much against his interest, and meted out . . . punishments in no way commensurate with the offenses."¹⁰¹

In Alabama, assistant commissioner Swayne's initial optimism gave way to bitter disappointment, as he "found the Alabama legislators anything but fair and just. He said: 'The vagrant law of Alabama operates most iniquitously upon the freedmen. In terms, the law makes no distinction on account of color, but in practice the distinction is invariable. . . .'"¹⁰² In the end, Swayne became aware of so many grievances against the Bureau courts staffed by state magistrates that he was forced to reopen regular Bureau courts in a number of places.¹⁰³ In some places, Howard reported that restoring Bureau courts was necessary "to prevent open revolt by negroes against evident legal persecution in State courts."¹⁰⁴

As it became clear that Southern state governments were according African-Americans merely the "bare forms" of due process, assistant commissioners began to reassert Bureau jurisdiction.¹⁰⁵ For instance, the assistant commissioner for Texas ordered local agents to try cases in which freedmen had been denied justice, stating that he was "powerless to get Justice" for them in Texas state courts.¹⁰⁶ In September 1866, Howard

98. *Id.*

99. HOWARD, *supra* note 31, at II, 286–87.

100. *See* NIEMAN, *supra* note 11, at 9–11.

101. Oakes, *supra* note 79, at 72–73 (quoting REP. OF COMM'R OF BR&AL, H.R. Doc. 11, 39th Cong., 1st Sess. (Dec. 1, 1865) at 22).

102. HOWARD, *supra* note 31, at II 251–56.

103. *Id.* at II, 287.

104. *Id.* at II, 251–56.

105. BENTLEY, *supra* note 11, at 158.

106. *Id.* (emphasis added).

issued orders directing local agents in operating Bureau courts “should you now have any, or have occasion under the law to re[e]stablish them.”¹⁰⁷

As the first partial year of Bureau operations drew to a close, the uncertainty of the agency’s future loomed for both the agency and the freedmen it served. Howard told Congress that “[t]he government has set the slaves free and bound itself to make that freedom an undisputed fact,” and reported that African-Americans “of any considerable intelligence pleaded earnestly for the continuance of the bureau, as [their] only hope of justice.”¹⁰⁸ He argued for the necessity of the Bureau until “the hostility against the government shall have more completely subsided, till free labor shall have become more palatable, and till the *rights of negroes to full protection by the laws* become more generally believed in than now appears.”¹⁰⁹ Howard also noted that the agency’s work had been “much hampered by the instructions of the President himself, who had now gradually drifted into positive opposition to the Bureau law—a law that he was bound by his oath of office to execute.”¹¹⁰

III. THE BATTLE OVER THE SECOND FREEDMEN’S BUREAU ACT

Against the backdrop of growing presidential opposition to the Bureau, the agency’s direct experience of the difficulties freedmen faced in Southern courts, and the imminent expiration of the First Bureau Act, Congressional Republicans moved late in 1865 to place the Bureau on a more secure footing.¹¹¹ This section examines the hostile terrain on which the Bureau operated, both with the White House and in Southern courthouses and state houses, tracing the main lines of the battle for a Second Bureau Act.

A. Challenges to the Bureau’s Judicial Powers

Through late 1865 and early 1866, the Bureau faced many grave problems relating to the exercise of its judicial functions. One major difficulty was the enactment of overtly discriminatory legislation towards freedmen in Southern states—the so-called “Black Codes”—Southern state legislative measures enacted beginning in late 1865 to control

107. *Id.* at 159.

108. REP. OF COMM’R OF BR&F&AL, H.R. Doc. 11, 39th Cong., 1st Sess. 33 (Dec. 1, 1865).

109. *Id.* (emphasis added).

110. HOWARD, *supra* note 31, at II, 280.

111. NIEMAN, *supra* note 11, at 106–15.

freedmen.¹¹² Mississippi and South Carolina were the first states to implement Black Codes; not coincidentally, the two states with the largest African-American populations, in fact unique in the United States in having African-American majorities.¹¹³

General Wood, Mississippi's assistant commissioner, reported that "[s]everal of the statute laws of this State in reference to the negroes are very objectionable," and went on to enumerate examples.¹¹⁴ Wood termed "unjust, oppressive, and unconstitutional" Mississippi statutes prohibiting African-Americans from bearing arms without a special license, prohibiting African-Americans from buying or leasing real property except in incorporated towns or cities, and requiring all African-Americans to enter into a labor contract by the 10th of January of each year.¹¹⁵ Wood even pointed disapprovingly to "[t]he statute that makes the negro a competent witness in all cases in which one or both of the parties are negroes," reasoning that "[s]ince the negro is a competent witness . . . in cases in which a white person is either plaintiff or defendant and the other party a negro, no reason can be perceived why the colored person should not be a competent witness when both parties are white persons."¹¹⁶

Perhaps a greater problem from the Bureau's standpoint was legislation in other states that did not overtly discriminate, but that had a discriminatory intent or that courts applied unequally to Whites and to African-Americans. After the contentious rollout of Mississippi's and South Carolina's codes, subsequent statutes in other states tended to "ma[k]e no reference to race, to avoid the appearance of discrimination and comply with the federal Civil Rights Act of 1866. But it was well understood, as Alabama planter and Democratic politico John W. DuBois

112. *Id.* at 72–73.

113. FONER, *supra* note 26, at 199–200. According to the 1870 Census, South Carolina's African-American population was 415,814, representing 58.9% of the total population of 705,606; the corresponding figure for Mississippi was 444,201, or 53.6% of a total population of 827,992. Calculated from Ninth Census—Volume I. THE STATISTICS OF THE POPULATION OF THE UNITED STATES 3, 5 (1872). In large part because of these demographics, the White elites of both states had historically shown the greatest anxiety about controlling their African-American populations. Regarding planter attitudes in South Carolina, see PETER H. WOOD, BLACK MAJORITY: NEGROES IN COLONIAL SOUTH CAROLINA FROM 1670 THROUGH THE STONO REBELLION (1974).

114. ANNUAL REP. OF THE SEC'Y OF WAR 56 (1866) (Report of Gen. T.J. Wood).

115. *Id.*

116. *Id.* Wood asserted that the law actually harmed Whites more than African-Americans. *Id.*

later remarked, that ‘the vagrant contemplated was the plantation negro.’”¹¹⁷ Textual equality concealing practical inequality was not always lost on Bureau officials, as when General Swayne noted how Alabama’s nominally nondiscriminatory “vagrant law . . . operat[ed] most iniquitously upon the freedmen.”¹¹⁸ Legislators enacted laws regarding debtors, laborers, and loiterers in many states, and courts chiefly—or exclusively—enforced them against African-Americans.¹¹⁹

Discriminatory legislation could sometimes pale in the face of other difficulties. For the Bureau, one of the most serious was the constant threat, and frequent reality, of arrest and even prosecution of agents for acts carried out pursuant to their official duty.¹²⁰ The Joint Committee on Reconstruction, which drafted the Fourteenth Amendment, reported in the Spring of 1866:

[O]fficers of the Union army on duty, and northern men who go south to engage in business, are generally detested and proscribed. Southern men who adhered to the Union are bitterly hated and relentlessly persecuted. In some localities prosecutions have been instituted in State courts against Union officers for acts done in the line of official duty, and similar prosecutions are threatened elsewhere as soon as the United States troops are removed. All such demonstrations show a state of feeling against which it is unmistakably necessary to guard.¹²¹

In Florida, General J.G. Foster reported that Tallahassee police, emboldened by the President’s growing hostility to the Bureau, were arresting Freedmen’s Bureau and Army officers “for trifling causes.”¹²²

Criminal and civil prosecutions were one way of deploying state legal machinery against the Bureau—and legislation could incite such harassment. The Kentucky Legislature, for instance, made the enforcement of a Freedmen’s Court judgment a felony,¹²³ and the Circuit

117. FONER, *supra* note 26, at 201.

118. HOWARD, *supra* note 31, at II, 287.

119. See Oakes, *supra* note 79, at 71.

120. REP. OF JOINT COMM. OF RECONSTRUCTION, at XVII–XVIII (Apr. 30, 1866); David Achtenberg, *With Malice Toward Some: United States v. Kirby, Malicious Prosecution, and the Fourteenth Amendment*, 26 RUTGERS L.J. 273, 301 (1995).

121. REP. OF JOINT COMM. OF RECONSTRUCTION, at XVII–XVIII (Apr. 30, 1866).

122. See HYMAN & WIECEK, *supra* note 15, at 422 (quotation omitted).

123. Achtenberg, *supra* note 120, at 301 n.209 (citing An Act to Amend the Criminal Law, ch. 766, § 2, 1865 Ky. Acts 60 (Feb. 17, 1866)). One of the

Court in Paducah, McCracken County, Kentucky declared the Bureau unconstitutional.¹²⁴

David Achtenberg has documented the legal harassment of Bureau agents in Kentucky.¹²⁵ In addition to the cases mentioned above, the Harrison County Circuit Court held the Freedmen's Bureau illegal and the acts of its agents tortious, while the Bourbon County Court declared the Freedmen's Bureau Act inapplicable to Kentucky and all its actions void.¹²⁶ While Bureau agent John Graham was travelling through rural Kentucky to investigate reports of outrages that armed groups of White "Regulators" committed, an innkeeper told Graham that had he known Graham was with the Bureau, the inn would have denied him lodging at any price.¹²⁷ He also advised Graham to conceal his identity as a matter of life and death.¹²⁸

Early in 1866, General Ulysses S. Grant, General in Chief of the Army, took a severe view of such vexatious action; on January 12, 1866, he issued General Orders No. 3, entitled, "To protect loyal persons against improper civil suits and penalties in late rebellious states."¹²⁹ The order's protections extended to officers and soldiers of the U.S. Army, which would have included most Bureau agents; "and all persons thereto attached, or in any wise thereto belonging, subject to military authority," which would have included the rest; to "loyal citizens or persons" charged with offenses against rebel forces during the war; and persons charged with occupying abandoned lands or plantations pursuant to governmental order.¹³⁰ Although the title of the order referred only to "improper civil suits and penalties," its text clearly included the criminal sphere, with its directive to "issue and enforce orders protecting from *prosecution or suits* . . . and . . . from any penalties or damages that may have been or may be pronounced or adjudged" the categories of persons specified.¹³¹

The final clause of Grant's order may have been of even greater import to the Bureau's judicial work: "protecting colored persons from

arguments wielded by the Bureau's enemies in Kentucky was that, because that state did not secede, the Bureau had no lawful jurisdiction there. *See id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 304–05.

128. *Id.*

129. Gen. Grant, General Orders No. 3 (Jan. 12, 1866), in 16 PAPERS OF ULYSSES S. GRANT 7–8 (John Y. Simon ed., S. Ill. Univ. Press 1988).

130. *Id.*

131. *Id.* (emphasis added).

prosecutions in any of said States charged with offenses for which white persons are not prosecuted or punished in the same manner or degree.”¹³² This final clause would mean African-Americans would be militarily protected from prosecutions to which Whites were not subject, or to discriminatorily harsh punishments for offenses for which Whites *were* subject to prosecution. Thus, Grant attempted to place firm ground under the Bureau’s jurisdiction, where the operation of state criminal courts fell unequally heavily on African-Americans.

As strong of a position as Grant took in General Orders No. 3, legal harassment was not the only threat hanging over Bureau personnel and pro-Union Whites in the South generally; the harassment could also take the form of outright violence. Even under Union Army occupation, pro-Union White Southerners had to keep a low profile. For example, a Memphis cotton-mill owner sympathetic to the Union told a Congressional committee that he “would no more think of raising a United States flag on [his] mill than [he] would of putting a match” to it; to fly the stars and stripes over the property would invite its certain destruction.¹³³

One particularly shocking case was the murder of Lieutenant J.B. Blanding, the Bureau agent in Grenada, Mississippi, when “a man stepped out from an alley, and fired upon him three times” in April 1866.¹³⁴ Before his death, Blanding gave a detailed description of the perpetrator, however, no suspect was ever apprehended.¹³⁵ In fact, Howard heard reports of a “brutal outrage” committed against “a citizen who denounced the murder.”¹³⁶

Brevet Major General T.J. Wood, commanding officer for Mississippi, noted the abundance of “lawless men” around Grenada, leaving the citizens vulnerable to “outrage,” and reported his unsuccessful hunt for “the assassin of Lieutenant J.B. Blanding, . . . foully murdered while on duty in the [Freedmen’s] Bureau.”¹³⁷ Most unsettling was the implication of the local population in helping the killer elude capture. Despite the efforts of military forces and detectives, and even the governor’s cooperation, the Secretary of War noted:

132. *Id.* at 7–9.

133. REPORT ON MEMPHIS RIOTS & MASSACRES, H.R. Rep. No. 101, 39th Cong., 1st Sess. at 244 (1866).

134. O.O. Howard to U.S. Grant (July 3, 1866), in 16 PAPERS OF GRANT, *supra* note 129, at 228–29.

135. *Id.* at 229.

136. *Id.*

137. ANNUAL REP. OF SEC’Y OF WAR 53 (1866).

[I]t has been impossible to arrest the murderer. Who he is is very well known, but it is not known whether he is skulking in the trackless swamps of this State, or has fled to some other. The facility with which this information could be communicated to him by his confederates in crime has so far rendered abortive all the efforts for his arrest.¹³⁸

Another egregious case was that of Captain C.C. Richardson, formerly the Bureau agent in Thomasville, Georgia.¹³⁹ Richardson fined a man named Lightfoot “for his unmercifully beating a freedman in his employ.”¹⁴⁰ Lightfoot, outraged at the fine, proceeded to shoot Richardson, wounding him.¹⁴¹ In later years, Howard recalled the broad wave of violence against Bureau and military officers, and Blanding’s case in particular:

The deliberate murder . . . of a worthy officer, . . . and attempts upon the lives of other men who had been faithful and fearless in the discharge of their delicate and dangerous duties, gave rise to increased anxiety everywhere and seemed to necessitate an increase of military force.¹⁴²

The Bureau thus found itself dealing with hostile local surroundings, thin resources, and an unsympathetic Executive, to say the least. Over time, the latter factor would only intensify.

B. Battle over the Second Bureau Act

Lyman Trumbull, a relatively conservative Republican Senator from Illinois, authored the first iteration of the Second Freedmen’s Bureau Act, S. 60 (“Second Bureau Act (I)”), and its companion legislation, the Civil Rights Act of 1866, S. 61. President Johnson would veto the Second Bureau Act (I), as well as the Civil Rights Act of 1866. Congress, however, would fall just short of overriding the veto of the Second Bureau Act (I). Although ultimately unsuccessful, the Second Bureau Act (I) is

138. *Id.*

139. Gen. O.O. Howard to Gen. U.S. Grant (July 3, 1866), in 16 PAPERS OF GRANT, *supra* note 129, at 228–29.

140. *Id.*

141. *Id.*

142. HOWARD, *supra* note 31, at II, 289. *See also* HYMAN & WIECEK, *supra* note 15, at 424–25. (“If [Army and Bureau] officials were not protected[,] their capacity to protect [freedpeople] was severely qualified.”).

remarkable and worth examining for its radicalism and its application of lessons gleaned from the First Bureau Act. Moreover, the presidential veto of the Second Bureau Act (I) had important political consequences relevant to the Fourteenth Amendment.

First, the Second Bureau Act (I) replaced the war's-end-plus-one-year time limit on the First Bureau Act with an indefinite extension of the Bureau's operation.¹⁴³ The new bill also provided express authority for judicial matters, a topic unmentioned in the First Bureau Act, with Sections 7 and 8.¹⁴⁴ The language establishing the Bureau's jurisdiction was remarkably broad, especially compared to Grant's Circular No. 5, which had asserted jurisdiction only "where there is an interruption of civil law" or the local courts refused to accept African-Americans' testimony.¹⁴⁵ The new bill's jurisdictional provision specified:

[W]henever in any State or district in which the ordinary course of judicial proceedings has been interrupted by the rebellion, and wherein, in consequence of any State or local law, ordinance, police or other regulation, *custom, or prejudice*, any of the civil rights or immunities belonging to white persons . . . are refused or denied to freedmen . . . , or wherein they or any of them are subjected to any other or different punishment, pains, or penalties, for the commission of any act or offence, than are prescribed for white persons committing like acts or offences, it shall be the duty of the President of the United States, through the Commissioner, to extend military protection and jurisdiction over all cases affecting such persons so discriminated against.¹⁴⁶

The bill went on to enumerate the "civil rights and immunities," the denial of which would give rise to jurisdiction:

[T]o make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to have full and equal benefit of all laws and proceedings for the security of person and estate, including

143. Second Freedmen's Bureau Bill, § 1 (1865), *reprinted in* THE AMERICAN NATION, *supra* note 44, at 94.

144. *Id.*

145. Freedmen's Bureau, Circular No. 5, § VII, *in* REP. OF COMM'R OF BRF&AL, H.R. Doc. 11, 39th Cong., 1st Sess. 45 (1865).

146. Second Freedmen's Bureau Bill, § 6 (1865), *reprinted in* THE AMERICAN NATION, *supra* note 44, at 94 (emphasis added).

the constitutional right of bearing arms.¹⁴⁷

The list thus included, but went far beyond, the right to give testimony and the issue of jurisdiction under the First Bureau Act. In addition, the list was identical to the one set forth in the Civil Rights Act.¹⁴⁸

Of particular note is that the second clause of Section 7 expressed the denial of “civil rights or immunities” as being “in consequence of any State or local law, ordinance, police or other regulation, *custom, or prejudice*.”¹⁴⁹ Circular No. 5, in contrast, simply referred to “interruption of civil law” or places where “local courts, by reason of old codes, . . . disregard the negro’s right to justice . . . in not allowing him to give testimony.”¹⁵⁰ It is true that the Second Bureau Act (I) placed the “[interruption] of judicial proceedings . . . by the rebellion” and the “[refusal or denial] of any of the civil rights or immunities belonging to white persons” in the conjunctive, whereas Circular No. 5 placed its two pertinent phrases in the disjunctive.¹⁵¹ Nevertheless, the “custom or prejudice” language potentially effected a broadening of jurisdiction, arguably giving the Bureau cognizance of unequal application of state enforcement, rather than only of formally discriminatory statutes.

Furthermore, Section 8 of the Second Bureau Act (I) provided for an important enforcement power:

[A]ny person who, under color of any State or local law, ordinance, police, or other regulation or custom, shall, in any State or district in which the ordinary course of judicial proceedings has been interrupted by the rebellion, subject, or cause to be subjected, any negro, mulatto, freedman, refugee, or other person, on account of race or color, or any previous condition of slavery or involuntary servitude, or for any other cause, to the deprivation of any civil right secured to white persons, or to any other or different punishment than white persons are subject to for the commission of like acts or offences, shall be deemed guilty of a misdemeanor, and be punished by fine not exceeding one thousand dollars, or

147. *Id.*

148. Civil Rights Act (1866), *reprinted in* THE AMERICAN NATION, *supra* note 44, at 99–101.

149. *Id.* (emphasis added).

150. Freedmen’s Bureau, Circular No. 5, § VII, *in* REP. OF COMM’R OF BRF&AL, H.R. Doc. 11, 39th Cong., 1st Sess. 45 (1865).

151. *Id.*

imprisonment not exceeding one year, or both¹⁵²

The section went on to impose a duty on Bureau personnel “to take jurisdiction of” and try “all offences committed against . . . this section, and also of all cases affecting negroes, mulattoes, freedmen, refugees, or other persons who are discriminated against in any of the particulars mentioned in the preceding section of this act.”¹⁵³ The contrast between the breadth and explicit nature of this jurisdictional grant with the vagueness of the First Bureau Act¹⁵⁴ could not have been more striking.

One of the more disputed provisions in the Second Bureau Act (I) was its assertion of military jurisdiction over Bureau agents.¹⁵⁵ The actual jurisdictional expansion this provision entailed was minor, because most Bureau agents were Army officers, already subject to military jurisdiction.¹⁵⁶

The Second Bureau Act (I) was twinned with the Civil Rights Act of 1866. Senator Trumbull authored both of these “sibling legislative actions,”¹⁵⁷ and Congress reported them out of the Joint Committee on Reconstruction simultaneously.¹⁵⁸ The author conceptualized them jointly, and their sponsors saw them as complementing one another.¹⁵⁹ Legal scholar James W. Fox, Jr. characterized the relationship between the two bills this way: “While the Civil Rights Act declared and protected citizenship, the Freedmen’s Bureau developed citizenship.”¹⁶⁰ In addition, the Second Bureau Act (I) applied to the former Confederate states, while the Civil Rights Act was national in scope.

152. Second Freedmen’s Bureau Bill, § 8 (1865), *reprinted in* THE AMERICAN NATION, *supra* note 44, at 94.

153. *Id.*

154. *See supra* note 44 and accompanying text.

155. Second Freedmen’s Bureau Bill, § 2 (1865), *reprinted in* THE AMERICAN NATION, *supra* note 44, at 93.

156. Bickers, *supra* note 11, at 93.

157. James W. Fox, Jr., *Democratic Citizenship & Congressional Reconstruction: Defining & Implementing the Privileges & Immunities of Citizenship*, 13 TEMP. POL. & CIV. RTS. L. REV. 453, 466 (2004).

158. MCFEELY, *supra* note 11, at 232.

159. *See id.*; *see also* NIEMAN, *supra* note 11, at 109–11.

160. Fox, Jr., *supra* note 157, at 467. Mark Graber has argued that the Second Bureau Act (I) sought to develop citizenship by providing freedpeople with the goods—primarily land—and services—primarily education—necessary to enable their transition to effective citizenship. Mark A. Graber, *The Second Freedmen’s Bureau Bill’s Constitution*, 94 TEX. L. REV. 1361, 1362–63, 1367 (2016).

The bills were also interwoven in their enforcement mechanisms. The Civil Rights Act made the Bureau part of the Act’s enforcement mechanism:

[T]he district attorneys, marshals, and deputy marshals of the United States, . . . [and] *the officers and agents of the Freedmen’s Bureau*, . . . are hereby, specially authorized and required . . . to institute proceedings against all and every person who shall violate the provisions of this act, and cause him or them to be arrested and imprisoned, or bailed [for trial in such federal court] as by this act has cognizance of the offence.¹⁶¹

The Civil Rights Act also specified the right to remove to federal court any civil suit or criminal prosecution charging any person for “any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act *or the act establishing a Bureau for the relief of Freedmen and Refugees*, and all acts amendatory thereof.”¹⁶² The “amendatory thereof” language clearly contemplated the Second Bureau Act (I), which Trumbull also drafted and presented simultaneously to the Senate. Thus, legislation would impose on the Bureau a federal statutory duty to apprehend and prosecute violators of both the Civil Rights Act—“this act” under Section 4—and of the Freedmen’s Bureau Act, so specified in Section 3.¹⁶³

The Freedmen’s Bureau, then, was not an isolated entity but part of a larger statutory scheme. In *United States v. Rhodes*, an 1866 case concerning the Civil Rights Act, Justice Swayne spoke of a complex “machinery” of which the Bureau was a key component.¹⁶⁴ Writing for the court, Swayne reviewed the Civil Rights Act section by section, noting the assignment of Freedmen’s Bureau agents, along with district attorneys, marshals, and other officers, of the duty to institute proceedings against persons violating the Act, and declared: “It is incredible that all this machinery, including the agency of the [F]reedmen’s [B]ureau, would have been provided, if the intention were to limit the criminal jurisdiction conferred by the third section to colored persons, and exclude all white persons from its operation.”¹⁶⁵ Just as the Second Bureau Act (I)

161. Civil Rights Act of 1866 (1866), § 4, *reprinted in* THE AMERICAN NATION, *supra* note 44, at 99–100 (emphasis added).

162. *Id.* § 3, *reprinted in* THE AMERICAN NATION, *supra* note 44, at 99 (emphasis added).

163. *Id.* §§ 3–4, *reprinted in* THE AMERICAN NATION, *supra* note 44, at 99–100.

164. *United States v. Rhodes*, 27 F. Cas. 785 (Cir. Ct., D. Ky. 1866).

165. *Id.* at 787.

contemplated a far greater enforcement power in the Bureau's hands, making it more effectively part of the vast "machinery" Justice Swayne alluded to, the agency earned the implacable enmity of the President and his allies.

C. Johnson's Veto

On February 19, 1866, President Johnson vetoed the Second Bureau Act (I).¹⁶⁶ The message accompanying Johnson's veto was long, closely if at times contradictorily argued, and fierce in its denunciations of the legislation.¹⁶⁷ Johnson objected to the Bureau's "greatly enlarged powers" under the bill, railing against the necessity of the bill when the First Bureau Act "ha[d] not yet expired," the expense it would incur, and the vast field it would open for patronage and corruption.¹⁶⁸ Johnson also questioned the constitutionality of the measure when the states affected were unrepresented in Congress.¹⁶⁹

But the President's heaviest fire was directed at the judicial provisions, which he asserted meant "a system of military jurisdiction" that he "c[ould] not reconcile . . . with the words of the Constitution."¹⁷⁰ Johnson went on to quote the Grand Jury Clause of the Fifth Amendment and the Speedy Trial and Jury Clauses of the Sixth Amendment.¹⁷¹ Johnson denied the need for military or Bureau tribunals because "[a]t present there is no part of our country in which the authority of the United States is disputed"—and because it would "disturb the commerce and credit and industry of the country" to "declar[e] to the American people and to the

166. Johnson, *supra* note 2.

167. *Id.* The tension, excitement, and strong feelings surrounding the message are well described by historian Claude G. Bowers. BOWERS, *supra* note 7, at 102. One can sense the high pitch of feeling surrounding the Second Bureau Act (I) in Kentucky Democrat Garret Davis's sardonic proposal: following Senate passage of the bill, Davis proposed that it be renamed, in part,

[a] bill . . . to promote strife and conflict between the white and black races; and to invest the Freedmen's Bureau with unconstitutional powers to aid and assist the blacks, and to introduce military power to prevent the Commissioner and other officers of said bureau from being restrained or held responsible in civil courts for their illegal acts.

CONG. GLOBE, 39th Cong., 1st Sess. 421 (1866).

168. Johnson, *supra* note 2.

169. *Id.*

170. *Id.*

171. *Id.*

world that the United States are still in a condition of civil war."¹⁷² Johnson also quoted "by local law, custom, or prejudice" from the jurisdictional language in Section 7.¹⁷³ Although he did so without specific comment, the context for the quotation was language inveighing against the "great[ly] enlarge[ment]" of Bureau powers.¹⁷⁴

The President scathingly denounced the procedural aspects of Bureau and military adjudication.¹⁷⁵ He decried the lack of a jury or "any fixed rules of law or evidence" in "trials having their origin under this bill," which he termed "arbitrary tribunals" from which there "[a]y no appeal."¹⁷⁶ Overall, Johnson's message amounted to a complete repudiation of the Bureau.¹⁷⁷

Johnson's veto stunned Republicans in Congress, who had not expected such a response.¹⁷⁸ White Southerners and Democrats generally greeted the response with enthusiasm.¹⁷⁹ The subsequent Senate vote fell two votes short of the two-thirds majority needed to override the veto.¹⁸⁰ Possibly radicalized by the substance and manner of the President's veto of the Second Bureau Act (I), however, in early April, Congress overrode Johnson's later veto of the Civil Rights Act and enacted the Bureau's companion bill into law—marking the first "enact[ment] [of] a major piece of legislation over a President's veto."¹⁸¹

The presidential veto of the Second Bureau Act (I) was a political watershed, "precipitat[ing] the final and irreparable break between the President and the Republican Congress."¹⁸² Republican politicians and press witheringly denounced Johnson, and the President responded with his "swing around the circle," a defiant and ill-starred whistle-stop tour of

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. FONER, *supra* note 26, at 247.

178. *Id.*

179. Bowers describes "a great crowd ma[king] merry at Cooper Union in New York, where Seward and Raymond spoke aggressively in defense of Johnson's policies." BOWERS, *supra* note 7, at 103; see also Eric Schnapper, *Affirmative Action & the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 786 (1985).

180. FONER, *supra* note 26, at 247.

181. *Id.* at 251.

182. Schnapper, *supra* note 179, at 771; Hans Trefousse, *Andrew Johnson & the Freedmen's Bureau*, in *THE FREEDMEN'S BUREAU & RECONSTRUCTION: RECONSIDERATIONS* 15 (Paul A. Cimbala & Randall M. Miller eds., 1999).

multiple cities whose low point featured the President's denunciation of Radical Republican leaders as traitors every bit as ignominious as the secessionists.¹⁸³ The veto marked a "before and after" moment, setting the stage for the overthrow of the President's "Restoration" policy by Congressional Reconstruction.¹⁸⁴

As 1866 wore on, Freedmen's Bureau officials found themselves the frequent targets of prosecution for attempting to enforce the 1866 Civil Rights Act.¹⁸⁵ This was ironic in view of the Act's express object of protecting Bureau and other officials from such prosecution, by enabling removal to federal courts. Section 3 of the Act provided, in relevant part:

[I]f any suit or prosecution, civil or criminal, has been or shall be commenced in any State court . . . against any officer . . . or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act . . . such defendant shall have the right to remove such cause for trial to the proper district or circuit court.¹⁸⁶

D. *War, Peace, and Milligan*

On April 2, 1866, Johnson issued a proclamation¹⁸⁷ declaring that a state of insurrection no longer existed in 10 of the 11 states of the former Confederacy—Texas being the lone exception. "There now exist[ed]," the President declared, "no organized armed resistance of misguided citizens or others to the authority of the United States" in those states, "and the laws can be sustained and enforced therein by the proper civil authority, State or Federal."¹⁸⁸ What that meant for the continued exercise of federal power in the South remained a puzzle. Although the President declared that "standing armies, military occupation, martial law, military tribunals, and the suspension of the writ of habeas corpus" were inconsistent with a

183. *Id.* Apparently provoked by a heckler's shout of "Hang Jeff Davis," Johnson asked—presumably rhetorically—"Why not hang Thad Stevens and Wendell Phillips?" See MCPHERSON, *supra* note 3, at 517; see also RIDDLEBERGER, *supra* note 13, at 219.

184. See FONER, *supra* note 26, at 247.

185. Achtenberg, *supra* note 120, at 301.

186. Civil Rights Act of 1866, § 4.

187. President Johnson, *Proclamation No. 153, Declaring the Insurrection in Certain Southern States to be at an End (Apr. 2, 1866)*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=71987> [<https://perma.cc/4RCV-NPU8>] (last visited July 11, 2018).

188. *Id.*

state of peace, he did not at first explicitly end such measures.¹⁸⁹ Moreover, it was not clear how the proclamation bore on the Freedmen’s Bureau in light of the Texas exception. The proclamation, which the President did not issue until late afternoon, apparently came as a surprise to Johnson’s cabinet.¹⁹⁰

On the very next day, in what historian Brooks D. Simpson sees as very likely not mere happenstance, the Supreme Court announced its decision in *Ex parte Milligan*, although it did not release the full opinion until the year’s end.¹⁹¹ The Court announced in *Milligan* that the military commission in question had no jurisdiction over the civilian defendant because of the availability of civil courts at the relevant time.¹⁹²

Contemporaries widely saw the case as directly implicating federal policies on the administration of justice in the South, although Justice Davis, who wrote for the Court in *Milligan*, famously remarked that “[n]ot a word [was] said in the opinion about [R]econstruction & the power is conceded in insurrectionary States.”¹⁹³

Certainly Johnson saw *Milligan* as applying in the former Confederate states; he expressly cited the decision in December 1866 when he ordered the Bureau to cede jurisdiction in the notorious Virginia case of Dr. James L. Watson.¹⁹⁴ Enforcement officials accused Watson of the cold-blooded murder of an African-American in November, apparently because he took offense to the African-American’s attempt to pass Watson’s carriage.¹⁹⁵ An examining court composed of five county magistrates discharged Watson, but General John M. Schofield, Virginia’s Bureau assistant commissioner, invoking the Second Freedmen’s Bureau Act, ordered Watson’s arrest, to be bound over for military trial—even disregarding a habeas corpus writ from the Richmond Circuit Court.¹⁹⁶ When *Milligan* became public, the *Richmond Dispatch* jubilantly proclaimed that the decision had left “not one inch of ground upon which the commission can base a claim of jurisdiction.”¹⁹⁷ Johnson, through Virginia State Attorney

189. Simpson, *supra* note 77, at 15.

190. *Id.*

191. *Id.*; NIEMAN, *supra* note 11, at 146.

192. Simpson, *supra* note 77, at 15.

193. *Id.* at 21–22. It should be noted that Justice Davis made the comment in personal correspondence at a later date. *Id.*

194. BENTLEY, *supra* note 11, at 163.

195. *Id.*

196. *Id.* The Act invoked by Schofield was the one enacted into law over the president’s veto in July 1866. See *infra* Part III.E.

197. Bickers, *supra* note 11, at 93.

General Stanbery, ordered Watson's release on the ground that *Milligan* precluded a military trial.¹⁹⁸

But Howard was circumspect about whether *Milligan* truly precluded the Bureau from taking cognizance of a case like Watson's, for two reasons. First, because *Milligan* ruled out "military trials of civilians where civil courts were open *and in the proper and unobstructed exercise of their jurisdiction*"; and second, because *Milligan* was a case which took place in Indiana, and therefore the case might not have been applicable to former Confederate territory.¹⁹⁹ Stanbery, on the other hand, interpreted *Milligan* to imply that:

[A] Reconstruction commander had only a power "to sustain the existing frame of social order and civil rule, and not a power to introduce military rule in its place. In effect, it is a police power to be used only when the state failed to perform." And the President, not the on-the-scene commander, would decide if state nonperformance existed.²⁰⁰

Johnson's maneuvering to undercut Bureau jurisdiction, in the meantime, proceeded apace. On May 1, 1866, the President directed Secretary of War Stanton to issue General Orders No. 26, which stated that from that point forward, where civil courts were functioning, civilians would no longer be "brought before military courts-martial or commissions" but rather "committed to the proper civil authorities."²⁰¹ In placing so minimal a condition for the exercise of state-court jurisdiction—after all, the requirement merely that "civil tribunals [be] in existence which can try them,"²⁰² without more, was easily satisfied—Johnson left even the issue of African-American testimony out of the equation, to say nothing of more egregious violations of equal justice.²⁰³

On the very day that Stanton issued his General Orders No. 26, Memphis erupted into what would become a three-day rampage of murder and other crimes against freedmen, an irony that would be difficult to

198. BENTLEY, *supra* note 11, at 167.

199. *Id.* at 164 (emphasis added). Justice Davis's clear, if later, disavowal of the applicability of *Milligan* to the former Confederate states furnishes at least some ground for supporting Grant's reading of the situation. See Simpson, *supra* note 77, at 21–22.

200. HYMAN & WIECEK, *supra* note 15, at 446 (quoting OPINIONS OF THE ATTORNEY GENERAL, XII, 182).

201. Simpson, *supra* note 77, at 16; ASH, *supra* note 71.

202. Simpson, *supra* note 77, at 16.

203. See NIEMAN, *supra* note 11, at 115–21.

miss.²⁰⁴ One historian said, with considerable understatement, that to "deem civil authorities ready to dispense justice to blacks when many of [those authorities] participated" in such egregious acts of violence as the Memphis Massacre "transcended rational thought."²⁰⁵

Grant did not understand General Orders No. 26 to undercut the jurisdiction of military commissions to protect African-Americans from the enforcement of discriminatory state laws, but he *was* concerned that it blocked the use of such commissions to prosecute serious crimes committed against African-Americans.²⁰⁶

Meanwhile, field agents continued to report unpunished outrages to Bureau leadership. In response, Grant issued a landmark directive: his General Orders No. 44, of July 6, 1866, directing commanders in the former Confederacy to arrest persons charged with crimes against officials as well as "citizens and inhabitants . . . , irrespective of color, in cases where the civil authorities have failed, neglected, or are unable to arrest and bring such parties to trial; and to detain them in military confinement until such time as a proper judicial tribunal may be ready and willing to try them."²⁰⁷

The rear-guard nature of Grant's order, pushing against the tide of presidential efforts to rein in the Bureau, was evident. Falling short of a reassertion of military or Bureau jurisdiction, the measure implied a provisional and remedial response to the failings of state courts.²⁰⁸ Despite its qualified and contingent language, Grant's order represented an unmistakable statement of the continued limitations of state systems of justice for the freedmen.²⁰⁹

Shortly thereafter, on July 30, 1866, a massacre erupted in New Orleans, just as horrific as the violent explosion in Memphis two months earlier; once more, the acts of both commission and omission implicated

204. Simpson, *supra* note 77, at 16–18.

205. *Id.* at 16.

206. *Id.* at 17.

207. Gen. Grant, General Orders No. 44 (July 6, 1866), in 16 PAPERS OF GRANT, *supra* note 129, at 228.

208. See NIEMAN, *supra* note 11, at 141–43. In some instances, Bureau officials used Grant's order aggressively, as with the arrest in South Carolina of a county sheriff and jailer following a jail fire in which the lone white inmate was released and the two dozen African-American inmates were left trapped to die in the blaze. *Id.* at 141. More common was the modest, but still palpable, use of the order to "prod state law-enforcement officials to proceed against persons who had committed crimes against freedmen." *Id.*

209. See *id.* at 141–43.

civil authorities in the outrages.²¹⁰ Just three weeks later, on August 20, 1866, Johnson further extended his “peace offensive” by Proclamation No. 157, declaring that the state of insurrection in Texas was at an end, and therefore “peace, order, tranquility, and civil authority now exist[ed] in and throughout the whole of the United States of America.”²¹¹

The President’s hostility to the Bureau—the “positive opposition” which Grant had observed as early as the end of 1865²¹²—helped make it a permanently embattled agency.²¹³ Not only did the President “transform[] his vetoes and other messages into public lectures on the evils of the very national policies that Congress had charged him to enforce,”²¹⁴ but measures such as his peace proclamations sowed uncertainty in Bureau and Army personnel as to their scope of authority on judicial matters.²¹⁵ On the day of Johnson’s second proclamation, for instance, a general in Florida asked whether the measure “deprived [the general] of the exercise of command” and of “martial law” where authority via federal statute and military orders came into conflict with the state government’s statute and action.²¹⁶

As the President’s measures shook the self-assuredness of Bureau leadership and agents, the measures also helped undermine the legitimacy of Freedmen’s Courts and related tribunals by striking at the heart of a court’s authority—its jurisdiction.²¹⁷ Presidential blocking of the Bureau’s judicial functions operated in tandem with the ongoing, low-level violence

210. ASH, *supra* note 71, at 185–86; MCPHERSON, *supra* note 3, at 516.

211. President Johnson, *Proclamation No. 157, Declaring that Peace, Order, Tranquillity [sic], and Civil Authority Now Exists [sic] in and Throughout the Whole of the United States of America (Aug. 20, 1866)*, AM. PRESIDENCY PROJECT <http://www.presidency.ucsb.edu/ws/?pid=71992> [<https://perma.cc/T6HP-ARG4>], (last visited July 11, 2018).

212. HOWARD, *supra* note 31, at II, 280.

213. For analogous instances from recent history of federal agencies under siege from hostile Executive or Congressional forces, see William Boyd, *Genealogies of Risk: Searching for Safety, 1930s-1970s*, 39 *ECOLOGY L. Q.* 895, 967, 980 (2012) (on changing political climate hostile to regulation generally and the EPA in particular); Sidney A. Shapiro & Randy S. Rabinowitz, *Punishment vs. Cooperation in Regulatory Enforcement: A Case Study of OSHA*, 49 *ADMIN. L. REV.* 713, 749 (1997) (on political expressions conveying “intense employer antipathy” to OSHA).

214. HYMAN & WIECEK, *supra* note 15, at 421.

215. See NIEMAN, *supra* note 11, at 115–21.

216. *Id.*

217. See Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 *VA. L. REV.* 1 (2011).

in many parts of the South. While the Bureau had a statutory foundation, it “had to rely on the Army for support if the courts proved to be inadequate,” as they frequently did—“and the bluecoats were themselves insecure.”²¹⁸ In attempting to carry out its judicial duties, then, the Bureau was like an army forced to fight a two-front war.

E. Second Version of the Act

Congress’s second attempt at a Second Freedmen’s Bureau Act (“Second Bureau Act (II)”) unfolded during May and June. The House and Senate reconciled their versions and Congress passed the bill on July 3, 1866.²¹⁹ The bill had key differences from the original vetoed by Johnson, including a two-year, rather than indefinite, extension of the Bureau’s life, and the omission of any reference to confirming freedmen’s title to lands expropriated by Sherman’s Sea Islands field order.²²⁰

With respect to the Bureau’s judicial powers, too, the Second Bureau Act (II) contained notable differences from the earlier version. Most significantly, the broad language that included “custom or prejudice” as among the causes of the denial of “civil rights or immunities” over which the Bureau could take cognizance, was now gone.²²¹ Instead, Section 14 of the Second Bureau Act (II) mandated Bureau jurisdiction:

[I]n every State or district where the ordinary course of judicial proceedings has been interrupted by the rebellion, and until the same shall be fully restored, and in every State or district whose constitutional relations to the Government have been practically discontinued by the rebellion, and until such State shall have been restored in such relations, and shall be duly represented in the Congress of the United States²²²

The new version enumerated the same list of civil rights and immunities as in the earlier version, and asserted jurisdiction where Congress imposed unequal penalties or punishments “because of race or color, or previous condition of slavery, other or greater than the penalty or punishment to

218. HYMAN & WIECEK, *supra* note 15, at 421.

219. HARPER’S WEEKLY, July 21, 1866.

220. Second Freedmen’s Bureau Act, § 1 (July 3, 1866), *reprinted in* WILLIAM H. BARNES, HISTORY OF THE THIRTY-NINTH CONGRESS OF THE UNITED STATES (1868).

221. *Id.* § 14.

222. *Id.*

which white persons may be liable by law for the like offense.”²²³ Its substantive provisions remained unchanged, but the jurisdictional assertion was perhaps more limited. Congress also dispensed with Section 8 of the Second Bureau Act (I), which mandated arrest and prosecution by the Bureau for violations of Section 7 by any person acting “under color of any State or local law”—an omission that amounted to a weakening of the Act’s enforcement mechanism.²²⁴

The second version of this bill also proved unacceptable to Johnson. He conveyed a shorter, but still adamant, veto message to Congress on July 16, 1866, which in effect incorporated by reference his veto message from the earlier bill.²²⁵ Johnson emphasized in vetoing the newer bill that the only conceivable basis for such legislation was in the constitutional war-making power:

Why should this war measure be continued beyond the period designated in the original act, and why in time of peace should military tribunals be created to continue until each “State shall be fully restored in its constitutional relations to the Government and shall be duly represented in the Congress of the United States?”²²⁶

For Johnson, the questions were rhetorical; he did not entertain the possibility that courts largely denied the freedmen justice in the Southern states.²²⁷ On the same day Congress received the veto message, Congress put the bill to a vote, and this time successfully overrode the veto.²²⁸ The contentious path taken by the legislation yielded a more modest Second Bureau Act (II), highlighting the many difficult political realities faced by the Bureau in its judicial aspect. The battle over the Bureau’s future was also a prelude to Congress’s outright takeover of Reconstruction policy in early 1867.²²⁹

223. *Id.*

224. *See* NIEMAN, *supra* note 11, at 143.

225. Johnson, *supra* note 2, ¶ 1 (July 16, 1866), <http://www.presidency.ucsb.edu/ws/index.php?pid=71982> [<https://perma.cc/3GR2-V9VK>].

226. *Id.* ¶ 2.

227. Trefousse, *supra* note 182, at 30–33.

228. NIEMAN, *supra* note 11, at 115.

229. *See* FONER, *supra* note 26, at 271–91.

F. The Bureau as Experience

In addition to its direct exercise of judicial authority, the Bureau also fulfilled informational functions, at times serving as a source of valuable insight into the operation of justice in the postwar South.²³⁰ Where state courts exercised jurisdiction over cases involving freedmen, Bureau agents were to attend trials and report on the impartiality of the proceedings.²³¹ Lieutenant George Cook, a Virginia Bureau agent, reported "as far as notified I have attended criminal trials in which freedmen were concerned in this [sub-district] during the last month."²³² He observed that "almost without exception where white[] persons have been parties the decisions" favored them; but where freedmen suffered assaults, "in not one instance has any satisfaction been given the freedman[.] [I]t is only by the most strenuous exertions that I can get Magistrates to hear the cases and the results of trials are so unfavorable as to make it better in most instances not to try the case."²³³

Another Bureau agent reported on two trials for horse theft, both resulting in convictions; a jury sentenced a white man to one year imprisonment, "while in the other case another jury (of course) sentenced the prisoner to five years."²³⁴ Still another Bureau agent reported despairingly of the chances for justice where African-Americans were victims of crime: "I have never yet known of an instance where a Justice of the Peace has recognized a white man to appear for indictment for an offense, no matter how grave, committed against a colored person. Complaints by the latter . . . are almost invariably slighted."²³⁵

230. REP. OF COMM'R OF BRF&AL, H.R. Doc. 11, 39th Cong., 1st Sess. 33 (Dec. 1, 1865). Howard reported to Congress that the Bureau was "a means of constant and reliable information essential to congressional and executive action." *Id.*

231. See NIEMAN, *supra* note 11, at 132–33.

232. *Records of the Assistant Commissioner for the State of Virginia*, *supra* note 72 at Lt. George V. Cook to Capt. R.S. Lacy (July 31, 1866), <http://www.freedmensbureau.com/virginia/crimcases2.htm> [<https://perma.cc/35T3-BCVJ>] (last visited July 11, 2018).

233. *Id.*

234. *Id.* at Lt. James Kestardin to Brig. Gen. O. Brown (May 31, 1866), <http://www.freedmensbureau.com/virginia/crimcases.htm> [<https://perma.cc/R6M7-C8L4>] (emphasis added).

235. *Id.* at Lt. W.T. DeKnight to Bvt. Maj. Gen. O. Brown (Oct. 31, 1866), <http://www.freedmensbureau.com/virginia/crimcases7.htm> [<https://perma.cc/NUW3-FBQZ>].

Agents' reports on proceedings in Southern civil courts were not always so bleak. Captain John O. Dwyer noted that in Caroline County, Virginia in September 1866, "there [were] but a few cases of Freedmen tried in the courts of this Co[unty]. In those cases they were dealt with more leniently than if they were white people, in[asmuch] as their ignorance of the law was in some instances taken for an excuse."²³⁶ An agent in Virginia reported that a Franklin County judge included, along with "the usual questions" at voir dire, the question: "will the fact of the prisoner being a Negro have any influence over your mind to prevent your dealing fairly and impartially with him?"²³⁷ The same Bureau agent who reported approvingly on the Franklin County judge's voir dire inquiry also noted that each of four defendant freedmen charged with larceny "was well defended by able Counsel [and] all were treated with impartiality [and] fairness and the Law respecting their testimony was carried out ably"; two of the four were acquitted.²³⁸

Sometimes an attorney noted the presence of a Bureau observer and even made an issue in a proceeding. In another Virginia trial, the attorney for a white man on whose complaint an African-American had been arrested and charged with stealing cotton from the white man, and who was assisting the prosecution, pointedly singled out the Bureau's representative.²³⁹ The attorney took great pains to note that "there was an '[e]missary' of the Federal Government . . . present for the purpose of reporting the proceedings," and he averred to the jury that "'the Yankees[,] in breathing this ethereal bubble of freedom in the whole race had but left them the happy alternative to either starve [and] go naked or steal."²⁴⁰ Therefore, counsel argued, the jury had "a solemn duty to make [a] severe example[]" of the accused; otherwise, "robbery, arson, rape[,] [and] murder would become the order of the day throughout the already devastated [and] oppressed South."²⁴¹

236. *Id.* at Capt. John O. Dwyer to Maj. James Johnson (Sep. 30, 1866), <http://www.freedmensbureau.com/virginia/crimcases6.htm> [<https://perma.cc/3RNJ-YAHV>].

237. *Id.* at Lt. W.T. DeKnight to Bvt. Maj. Gen. O. Brown (Oct. 31, 1866), <http://www.freedmensbureau.com/virginia/crimcases7.htm> [<https://perma.cc/NUW3-FBQZ>].

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* Apparently stunned at the court's allowing counsel to proffer such highly prejudicial arguments, the Bureau agent characterized it as "very unfortunate that a presiding Judge tacitly allows such language to find free

Bureau policy also mandated the compilation of certain kinds of information. For instance, Howard required that Bureau agents report atrocities to him through the assistant commissioners, under the general heading of "Outrages."²⁴² As the toll of violence continued through 1866, Grant responded to a request from the Senate by asking Howard to "'send [Grant] a list of authenticated cases of Murder, and other violence, upon Freedmen' and Union men in the South."²⁴³ The result, submitted in February 1867, was the Bureau's report on "violations of the Civil Rights Bill," documenting 400 "outrages committed on the freedmen" in 1866.²⁴⁴

Democrats, however, saw such compilations as purely political acts by Radical Republicans: the pro-Redeemer historian Claude G. Bowers mocked Massachusetts Senator "Henry Wilson, nervously running through his scrapbook" in search of yet "another 'Southern outrage.'"²⁴⁵ Gideon Welles discounted such reports as nothing more than "an omnium-gatherum of newspaper gossip."²⁴⁶ Nevertheless, some of the most valuable insights into the operation of Southern state and local courts comes from the observations of Bureau agents who were not exercising jurisdiction but rather observing and interceding on the freedmen's behalf in those courts.²⁴⁷

expression before him in his judicial capacity in a public Court of Justice," and that an officer of the federal government "present in the proper discharge of his incumbent duty ha[d] not the right to claim protection from or resent the indignity offered him personally or the Government through him as its (not secret) agent or otherwise." *Id.*

242. MCFEELY, *supra* note 11, at 200–01; see also *Freedmen's Bureau Records Relating to Murders and Outrages*, FREEDMEN'S BUREAU ONLINE, <http://www.freedmensbureau.com/outrages.htm> [<https://perma.cc/X3LU-U45A>] (last visited July 11, 2018).

243. RONALD C. WHITE, *AMERICAN ULYSSES: A LIFE OF ULYSSES S. GRANT* 439 (Random House 2016).

244. *Id.* Grant's belief, likely shared by Howard, was that the report would strengthen the hand of the Congressional Republicans in imposing their vision of Reconstruction. See *id.*

245. BOWERS, *supra* note 7, at 103 (quoting N.Y. WORLD, Feb. 24, 1866).

246. BENTLEY, *supra* note 11, at 165. Historian George Bentley, likewise declining to credit a genuine need for Bureau jurisdiction but rather ascribing the move to base political motives, observed that "the[] murders" of the victims of the New Orleans Massacre of July 1866 "made excellent Radical propaganda in [that fall's] elections [], and helped to justify the restoration of Freedmen's Bureau courts." *Id.* at 158.

247. WHITE, *supra* note 243, at 439.

The legislators who drafted the Fourteenth Amendment were undoubtedly cognizant of the fine-grained experience of Southern justice the Freedmen's Bureau obtained.²⁴⁸ The Joint Committee on Reconstruction realized the vulnerability not only of the freedpeople, but of the Army, and therefore the Bureau, in its report forwarding the draft amendment to Congress—underscoring the “bitter[] hat[red] and relentless[] persecut[ion]” of Union Army officers, including prosecutions in state courts.²⁴⁹

IV. THE BUREAU AND THE FOURTEENTH AMENDMENT

The Bureau was tightly interwoven with the Civil Rights Act as part of the enforcement machinery for the latter.²⁵⁰ As such, the Bureau was a central part of Congress's first attempt to place a statutory foundation under national citizenship, carrying rights the states were bound to respect. This concept lay at the heart of the Fourteenth Amendment, the text of which opens with a forthright statement of birthright—and naturalization—citizenship “of the United States and of the state wherein [persons] reside” and a prohibition on any state legislation or enforcement abridging, depriving, or denying any person of the rights of United States citizens.²⁵¹

It is also uncontroversial that the Fourteenth Amendment, at least in the citizenship section, had as a key purpose the constitutional reinforcement of the Civil Rights Act of 1866.²⁵² A similar logic plausibly applies to the Bureau, in part because it was so closely intertwined with the Civil Rights Act, and in part because Johnson's veto attacked the Second Bureau Act (I)'s constitutionality. At the time of Johnson's veto of the latter bill, Congress was debating an early draft of the Fourteenth Amendment, including the idea of “giving Congress enforcement authority similar to that now contained in section 5.”²⁵³

During the debates over the Fourteenth Amendment, Representative Frederick E. Woodbridge of Vermont addressed the question of whether statutory solutions were adequate to meet the challenges of according the freedmen full citizenship.²⁵⁴ Representative Woodbridge asked whether the “duty of the American people” towards the freedmen was satisfied by

248. See, e.g., *supra* notes 230–47 and accompanying text.

249. Rep. of Joint Comm. of Reconstruction, at xvii–xviii (Apr. 30, 1866).

250. *Supra* notes 157–65 and accompanying text.

251. U.S. CONST. amend. XIV, § 1.

252. Graber, *supra* note 160, at 1395; see also Schnapper, *supra* note 179, at 785.

253. Schnapper, *supra* note 179, at 785.

254. CONG. GLOBE, 39th Cong., 1st Sess. 1088 (Feb. 28, 1866).

“merely knock[ing] the shackles from their limbs” and leaving them nominally free but hungry, “without the power of attaining of those civil natural rights which make freedom not only a name but a power.”²⁵⁵ Woodbridge went on:

[I]t may be said that all this may be done by legislation. I am rather inclined to think that the most of it may be so accomplished. But the experience of this Congress in that regard has been most unfortunate. Sir, I cast no imputation upon the President of the United States. I believe him to be honest, able, and patriotic. And I pray to God that the sea of discord may become quiet But inasmuch as the President, honestly, I have no doubt, has told us that there were constitutional difficulties in the way, I simply suggest that we submit the proposition to the people, that they may remove these objections by amending the instrument itself.²⁵⁶

Woodbridge concluded by enunciating the Fourteenth Amendment’s object as giving Congress “the power . . . to enact those laws which will give to a citizen of the United States the natural rights which necessarily pertain to citizenship[,] . . . in whatever state he may be.”²⁵⁷ These were the central concerns of both the Second Bureau Act (I) and the Civil Rights Act of 1866.

Woodbridge stressed the idea of placing legislation designed to affirm and bolster the freedmen’s citizenship beyond the vagaries to which statutory law is subject, “by amending the instrument [the Constitution] itself.”²⁵⁸ The Republican majority in Congress, however, was also facing a tenacious and—at least by many—unexpected presidential effort to “obstruct[] the execution of laws.”²⁵⁹ A constitutional amendment would arguably put such legislation beyond the reach of an adversarial Executive. What raises this possibility above mere speculation is that it was precisely Johnson’s veto of the Second Bureau Act (I) that hardened the battle-lines between Johnson and the Congressional Republicans.²⁶⁰

The Bureau’s experience in the judicial realm also furnished information vital to Congress concerning discriminatory state laws, unequal enforcement of nominally nondiscriminatory laws, and perhaps

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. HYMAN & WIECEK, *supra* note 15, at 426.

260. *See supra* notes 166–86 and accompanying text.

worst of all, state law enforcement and state courts' non-prosecution of violent "outrages."²⁶¹ Though armed with guns and ostensibly shielded by the law, the Bureau shared in the vulnerability of the freedpeople at the end of a bitter Civil War that, presidential proclamations notwithstanding, arguably had not ended in 1865 and would not end for many years.²⁶² The Fourteenth Amendment's goal of securing a national citizenship, bringing with it rights inviolable by the states, was one that the difficult experience of the Bureau helped inform.

V. POSTSCRIPT

The Freedmen's Bureau courts represented a historic experiment—an attempt to establish a regime to administer justice to a disenfranchised and despised group of people during a hostile period in history, when the larger White Southern society believed them to be undeserving of freedom, human dignity, respect, and certainly equality. For a culture that extolled the virtue and propagated the narrative of white supremacy, according recently freed African-Americans the ability to testify in courts against Whites, or even exercise *de minimis* accoutrements of the qualities of citizenship, represented a threat to the social order White Southerners sought to restore and defend. The Southern civil courts, steeped in Southern cultural norms, accorded white supremacy priority over the rule of law. That overarching hegemony posed an existential threat to the independence of the Bureau courts. Regional cultural norms, combined with hostility from the federal Executive Branch as well as fractional support from Congress, amounted to a formula for anemic results, which left African-Americans vulnerable and exposed.

The experience of the Freedmen's Bureau courts exemplifies the challenge courts face to ensure justice in both peaceful and tumultuous times. Courts must assure unpopular causes, oppressed people, and racial and cultural minorities that during times of war and of peace, periods of protest and calm, and times of strong leaders who may be hostile to their rights, civilians can count on the courts to ensure justice and to protect the rule of law, without fear or favor. The actions of courts must withstand harsh scrutiny, in both the glaring light of the present and the cool light of hindsight. Today, African-Americans have the highest distrust in courts to

261. *See supra* Parts II.B, III.F.

262. *See FONER, supra* note 26, at 412–59.

deliver just and fair outcomes.²⁶³ Numerous studies have shown that unconscious negative stereotypes and racial bias still pervade our justice system at every level.²⁶⁴ Studying the functioning of Freedmen’s Bureau courts in the immediate aftermath of the Civil War provides an important foundation for further examination of where the country stands as a racially and ethnically diverse society 150 years after the ratification of the Fourteenth Amendment. In the 21st century, no less than amidst the ruins of this country’s great fratricidal conflict, courts must stand strong as a beacon of justice and equality for all.

263. See, e.g., Christopher Muller & Daniel Schrage, *Mass Imprisonment and Trust in the Law*, ANN. AM. ACAD. POLIT. S.S. (2013) (positing disproportionate, and growing, distrust of criminal justice system by African-Americans); Monica Anderson, *Vast majority of blacks view the criminal justice system as unfair*, PEW RES. CTR. FACT TANK (2014), <http://pewrsr.ch/Y0snl2> [<https://perma.cc/5D7S-8D6L>] (last visited July 25, 2018).

264. A substantial and growing body of scholarly research at the intersection of law, social psychology, sociology, and other disciplines amply documents the pernicious effects of such unconscious, or implicit, bias on legal decision-making. See, e.g., Adam Benforado et al., *Frames of Injustice: The Bias We Overlook*, 85 IND. L.J. 1333, 1339 n.28 (2010) (providing key bibliography of studies anchored in the “behavioral realism” school); Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 19–20 (2009) (finding, on review of multiple scientific studies, stronger predictive value, as to decision-making and other behaviors, of implicit than of explicit attitude scores); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012) (providing overview of implicit bias literature especially as bearing on both criminal and civil proceedings, and suggesting strategies to counter such bias on bench, in jury box, and in other key legal decision-making settings); Justin Levinson, *Forgotten Racial Equality: Implicit Bias, Decision Making, and Misremembering*, 57 DUKE L.J. 345 (2007) (documenting the effects of a civil plaintiff or criminal defendant’s race on the accuracy of recollection of facts by jurors).