Andrew Johnson, the Freedmen's Bureau, and the Problem of Equal Rights, 1865–1866

By Donald G. Nieman

During the summer and fall of 1865, as the newly created Freedmen's Bureau commenced its operations, one of the chief concerns of its officials was providing freedmen with legal protection. Antebellum southern state law had discriminated harshly against free blacks, and in the Civil War's aftermath functionaries of the provisional governments created in the rebel states by Presidents Abraham Lincoln and Andrew Johnson stood ready to apply this law to the freedmen. State officials' willingness to enforce discriminatory law, however, was not the only reason they posed a threat to blacks. Since southern law-enforcement and judicial officials shared the racial phobias of their white neighbors, it was likely that they would deal summarily with blacks accused of crime but prove reluctant to bring to justice whites accused of crime against blacks. This combination of discriminatory law and discriminatory administration of justice threatened blacks. Not only would it lend the imprimatur of law to white claims of black inferiority, but it would deny blacks the legal protection necessary to support freedom.

The attempts of bureau officials to shield freedmen from discriminatory law and prejudiced officials ran afoul of presidential Reconstruction policy. In the eight months between his accession to the Presidency in April 1865 and the convening of the Thirty-ninth Congress in December, Andrew Johnson sought to revive state governments in the rebel states and to convince northerners that these governments were worthy of restoration. In doing so, Johnson used his immense authority to mold bureau judicial policy in such a way that it would complement and further his plan of Reconstruction. Rather than give bureau officials free rein to try cases involving blacks, he encouraged them to surrender such cases to state courts if state officials agreed to ease legal discrimination against blacks. Although General Oliver Otis Howard, the commissioner of

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the bureau, initially cooperated with Johnson, he quickly learned that, regardless of southerners' willingness to expand blacks' civil rights, law-enforcement and judicial officials continued to deny justice to freedmen. Consequently, by late autumn the commissioner sought congressional legislation that would guarantee freedmen both equal rights and unbiased legal forums in which to vindicate those rights.[1]

Because Johnsonian Reconstruction policy involved rapid restoration of civil government in the South, bureau officials never had the luxury of acting without reference to state officials. When the war ended Unionist civil governments created by Lincoln existed in Louisiana, Arkansas, and Tennessee. Upon assuming the Presidency in mid-April Johnson permitted these governments to stand and within the next month began to restore civil government in the eight remaining rebel states. On May 9 he announced that Francis Harrison Pierpont, who had headed an Alexandria-based Unionist regime throughout the war, was the legitimate governor of Virginia. Less than three weeks later, on May 29, he named William Woods Holden provisional governor of North Carolina and in the following month and a half appointed provisional governors for South Carolina, Georgia, Florida, Alabama, Mississippi, and Texas. Moreover, Johnson's revival of civil government reached down to the grass roots. In Louisiana, Arkansas, and Tennessee law-enforcement and judicial officials either functioned at the end of the war or were elected or appointed by provisional governors during early summer. In the other eight rebel states Johnson permitted his gubernatorial appointees to provide their states with provisional

[1] Although a number of scholarly treatments of the Freedmen's Bureau have appeared in recent years, none have attempted thorough analysis of bureau judicial policy. See John H. Cox and LaWanda Cox, "General O. O. Howard and the 'Misrepresented Bureau'," *Journal of Southern History*, XIX (November 1953), 427–56, especially 452–53; George R. Bentley, *A History of the Freedmen's Bureau* (Philadelphia, 1955), 152–68; John A. Carpenter, *Sword and Olive Branch: Oliver Otis Howard* (Pittsburgh, 1964), *passim*; William S. McFeely, *Yankee Stepfather: General O. O. Howard and the Freedmen* (New Haven and London, 1968), *passim*. Similarly, students of early Reconstruction policy and politics have neglected this area despite its relevance to the civil rights question. See Eric L. McKitrick, *Andrew Johnson and Reconstruction* (Chicago, 1960), *passim*; LaWanda Cox and John H. Cox, *Politics, Principle, and Prejudice, 1865–1866: Dilemma of Reconstruction America* (Glencoe, Ill., and London, 1963), *passim*; William R. Brock, *An American Crisis: Congress and Reconstruction, 1865–1867* (New York and London, 1963), *passim*; Michael L. Benedict, *A Compromise of Principle: Congressional Republicans and Reconstruction, 1863–1869* (New York, 1974), *passim*. One exception is Michael Perman, *Reunion Without Compromise: The South and Reconstruction: 1865–1868* (Cambridge, Eng., 1963), 140–42. However, Perman, whose main concern was southern response to presidential and congressional Reconstruction policy, merely noted that the bureau did transfer jurisdiction to state courts in several states. He did not explore the relationship between Johnson and bureau officials that led to the transfer. Moreover, he did not examine the distinction that bureau officials came to make between legal rights and fair administration of justice and the role that this played in shaping Reconstruction legislation.

civil administrations by appointing such officials as judges, justices of the peace, sheriffs, mayors, and constables.[2]

If these men were successful in asserting authority over the freedmen, blacks would undoubtedly find it difficult to obtain justice. Even if southern officials dealt with freedmen in an unprejudiced manner, the laws they would enforce discriminated harshly against free blacks. Before the war many states restricted the movement of free blacks and prohibited them from practicing certain trades. In a number of states apprenticeship statutes gave judges greater discretion in binding out black children than white children and afforded black apprentices less protection than their white counterparts. Most states also punished free blacks more severely than whites for a number of crimes and permitted state officials to hire out free blacks who were unable to pay fines or court costs. Perhaps the harshest discrimination against free blacks, however, was in the area of testimony. In none of the rebel states except Louisiana could free blacks testify in any case involving a white person. And since blacks were often the only persons willing to testify against whites who committed crimes against blacks, the exclusion of their testimony left unfortunate black victims vulnerable to white malefactors. These discriminatory laws remained on southern statute books at the end of the Civil War, and since Johnson did not direct provisional governors to set them aside, it was likely that state officials would enforce them against the freedmen.[3]

Faced with the revival of civil government in the South and the

[2] McKitrick, *Andrew Johnson*, 122–28; Edward McPherson, *The Political History of the United States . . . During the Period of Reconstruction . . .* (Washington, 1871), 8–9; James D. Richardson, comp., *A Compilation of the Messages and Papers of the Presidents, 1789–1897* (9 vols., Washington, 1896–1899), VI, 312–16, 318–31; Thomas S. Staples, *Reconstruction in Arkansas, 1862–1874* (Gloucester, Mass., 1964 [1923]), 73–84; Joe G. Taylor, *Louisiana Reconstructed, 1863–1877* (Baton Rouge, 1974), 58–62; Benjamin F. Perry, *Reminiscences of Public Men with Speeches and Addresses* (2d ser., Greenville, S. C., 1889), 248–49; General Thomas H. Ruger to William Holden, August 11, 1865, Andrew Johnson Papers (Manuscript Division, Library of Congress, Washington, D.C.); Charles W. Ramsdell, *Reconstruction in Texas* (Austin, 1970 [1910]), 59; Walter L. Fleming, *The Civil War and Reconstruction in Alabama* (New York, 1905), 350–53; James W. Garner, *Reconstruction in Mississippi* (New York, 1901), 77–80; Hamilton J. Eckenrode, *The Political History of Virginia During the Reconstruction* (Baltimore, 1904), 31.

[3] Ira Berlin, *Slaves Without Masters: The Free Negro in the Antebellum South* (New York, 1974), 225–27, 316–40; Marina Wikramanayake, *A World in Shadow: The Free Black in South Carolina* (Columbia, S. C., 1973), 59, 63–64, 67–68; John H. Russell, *The Free Negro in Virginia, 1619–1865* (Baltimore, 1913), 103–107, 116–17, 149; J. Merton England, "The Free Negro in Ante-Bellum Tennessee," *Journal of Southern History*, IX (February 1943), 50–51; David Y. Thomas, "The Free Negro in Florida Before 1865," *South Atlantic Quarterly*, X (October 1911), 341–43; Ralph B. Flanders, "The Free Negro in Ante-Bellum Georgia," *North Carolina Historical Review*, IX (July 1932), 259–62; Henry E. Sterkx, *The Free Negro in Ante-Bellum Louisiana* (Rutherford, N. J., 1972), 170–77, 187–88; John H. Franklin, *The Free Negro in North Carolina, 1790–1860* (Chapel Hill, 1943), 63–64, 86–95, 128–29.

threat that this posed to freedmen, bureau officials sought to prevent state courts from trying cases involving blacks. In late May 1865 Howard convened a board of assistant commissioners (the men who would direct bureau operations at the state level) in Washington. On May 30, at the conclusion of this meeting, he issued a circular which, among other things, authorized assistant commissioners to assume jurisdiction of cases to which blacks were parties. Assistant commissioners, the circular stipulated, might authorize agents to try cases involving freedmen when state courts were not functioning or when state judges and magistrates "disregard the negro's right to justice before the law, in not allowing him to give testimony . . . ."[4]

Although the May 30 circular gave bureau officials authority to intervene in matters of justice, it imposed definite limitations on such intervention. Under the terms of the circular agents could try cases only as long as state officials refused to permit freedmen to testify against whites. Therefore, if judges received black testimony but covertly denied freedmen justice, the bureau would lack authority to remove cases from state courts. Moreover, the circular did not require that state officials grant freedmen equality before the law. As soon as state officials agreed to receive black testimony they could resume jurisdiction of cases involving freedmen and, if they chose, apply discriminatory statutes not related to testimony.[5]

It is impossible to say with certainty why Howard's circular was so narrowly drawn, but it is likely that Johnson was responsible. The limited scope of the circular was at odds with Howard's oft-demonstrated concern for providing freedmen with equal rights, and thus it suggests that Howard did not have free rein in drafting it. Moreover, Johnson's close supervision of the formulation and promulgation of the circular and the way in which the circular complemented presidential Reconstruction policy lend credence to the argument that the President was responsible for the limited authority conferred by the circular.

Howard did not write in correspondence during his tenure with the bureau or later in his memoirs that he was dissatisfied with the circular. However, it is unlikely that, left to his own devices, he would have been content to work merely for removal of discrimina-

[4] New York *Times*, May 26, 1865, p. 4; Circular No. 5, Bureau of Refugees, Freedmen, and Abandoned Lands (cited hereinafter as BRFAL), May 30, 1865, Records of the Bureau of Refugees, Freedmen, and Abandoned Lands (cited hereinafter as RBRFAL), Microcopy 742, reel 7. I have relied heavily upon the records of the commissioner and the several assistant commissioners of the bureau, which are located in Record Group 105 of the National Archives of the United States. In my notes I identify microfilmed records by microcopy number and reel number. Manuscript material (which includes the records of several assistant commissioners) is identified by state and volume or file box number.

[5] Circular No. 5, BRFAL, May 30, 1865, RBRFAL, M-742, reel 7.

tory testimony statutes. During early summer of 1865 he repeatedly displayed a desire to obtain complete legal equality for blacks. "*Equality before the law is what we must aim at,*" he exclaimed to a subordinate in mid-June. "*I mean, a black, red, yellow or white thief should have punishment . . .* without regard to *the color of his skin.*" Later that month, when he learned that General Alfred Terry, commander of the Department of Virginia, had issued an order declaring that all state law discriminating against free blacks had died with slavery and the slave code, Howard obtained one hundred copies of the order and sent them to bureau and military officials in the South. "I like the letter and spirit of the order," he noted, "and wish that it were universal."[6] Nor did Howard merely talk about equal rights. In June and July he struck at discriminatory regulations developed by military men and local officials that required freedmen, on pain of being hired out, to carry passes when away from their places of employment.[7]

That the circular complemented presidential Reconstruction policy also suggests Johnson's involvement. The President's paramount objective was speedy restoration of the rebel states. To this end, he authorized provisional governors to supervise election of delegates to conventions that would revise old or draft new state constitutions. Johnson stipulated that the governors, after the conventions had done their work, should hold elections for state and local officials, state legislators, and United States senators and representatives. He hoped that state conventions would meet in late summer and early fall and that regularly elected governments would be in office by late autumn. Then when Congress met in December it could complete the process by admitting members-elect from the former rebel states.[8]

Johnson realized, however, that until northern public opinion became convinced that southerners accepted the results of the war, Congress, controlled as it was by northern Republicans, would not consummate the restoration process. Consequently, during the summer of 1865 he encouraged provisional governors and state constitutional conventions to act in such a way as to indicate to

[6] Howard to Captain Charles Soule, June 21, 1865, RBRFAL, M-742, reel 1; Terry to Howard, July 1, 1865, Oliver Otis Howard Papers (Bowdoin College Library, Brunswick, Maine); General Order No. 77, Department of Virginia, June 23, 1865, Department of Virginia and North Carolina, Vol. 52, United States Army, Continental Commands, 1821–1920, Record Group 393 (National Archives, Washington, D.C.; cited hereinafter as RG 393, NA).

[7] Colonel Joseph S. Fullerton to Colonel Orlando Brown, June 15, 1865; Howard to Edwin M. Stanton, July 18, 1865, RBRFAL, M-742, reel 1; General Order No. 129, War Department, July 25, 1865, reprinted in General Order No. 9, BRFAL, Alabama, August 11, 1865, RBRFAL, M-809, reel 17.

[8] Richardson, comp., *Messages and Papers*, VI, 312–16, 318–31; Perry, *Reminiscences*, 247.

northerners that the South was worthy of restoration. As conventions neared, he urged governors to use their influence to secure repudiation of ordinances of secession, abolition of slavery, and ratification of the Thirteenth Amendment by the state conventions.[9] When the question of repayment of the Confederate debt arose in the Alabama, North Carolina, and Georgia conventions he promptly urged provisional governors in those states to work for repudiation.[10]

Although Johnson viewed the question of black testimony in a similar light, he refused to deal with it in the straightforward manner with which he dealt with repudiation of secession and abolition of slavery. While he did not understand that many northerners had come to support equal rights for blacks,[11] he did realize that northerners might be critical of the South's exclusion of blacks from the witness stand because exclusion made it difficult for freedmen to obtain legal protection. Consequently, Johnson was willing to permit the bureau to try cases involving blacks as long as southern officials refused to admit them to the witness stand.[12] And in late autumn 1865, when the first southern legislature met and failed to permit blacks to testify against whites, he intervened and caused the legislators to reconsider their action.[13] However, throughout the summer and early fall Johnson refused to encourage southern governors to press conventions on the issue and even dodged inquiries from southerners regarding his stand on the testimony question.[14]

Johnson chose to deal with the testimony issue obliquely. Rather than openly urge southerners to reform their law of testimony, he sought to use the Freedmen's Bureau to prod them into permitting blacks to testify against whites. By permitting the bureau to try cases involving blacks as long as state officials refused to receive black testimony, Johnson believed that he would encourage southerners, eager to rid themselves of bureau interference, to admit blacks to the witness stand. If southerners did so, they would demonstrate their goodwill toward the freedmen and convince

[9] See for example Johnson to William L. Sharkey, August 15, 21, 25, 1865, Johnson Papers; Leroy P. Walker to Lewis Parsons and Benjamin Fitzpatrick, September 18, 1865, Lewis Eliphalet Parsons Papers (Alabama Department of Archives and History, Montgomery, Ala.).

[10] Walker to Parsons and Fitzpatrick, September 18, 1865, Parsons Papers; Johnson to William W. Holden, October 18, 1865, Johnson Papers; Perman, *Reunion Without Compromise*, 75–77.

[11] Cox and Cox, *Politics, Principle, and Prejudice*, 151–71.

[12] Johnson examined and approved the May 30 circular before Howard promulgated it. See Circular No. 5, BRFAL, May 30, 1865, as reprinted in Circular No. 2, BRFAL, Louisiana, July 14, 1865, RBRFAL, Louisiana, Vol. 28. For Johnson's continuing support of the circular see R. D. Mussey to William Wallace, August 22, 1865, Johnson Papers.

[13] Johnson to Sharkey, November 17, 1865; Johnson to Benjamin G. Humphries, November 17, 1865, Johnson Papers; William C. Harris, *Presidential Reconstruction in Mississippi* (Baton Rouge, 1967), 132–35.

[14] Parsons to Johnson, September 23, 1865; J. P. Pryor to Johnson, October 10, 1865, *ibid.*

northern public opinion and congressional Republicans that the rebel states were worthy of restoration.[15]

The timing of the circular and Johnson's involvement in its drafting further suggest that the President was responsible for its limited grant of authority. On May 25 Howard held an organizational meeting of his board of assistant commissioners but declined to begin discussion of bureau policy until he and his subordinates met with Johnson the next day. "No . . . action was taken [at the meeting]," a New York *Times* reporter noted, "as it was deemed advisable that the commissioners should consult the President, with a view to the conduct of the bureau before proceeding further."[16] Given Howard's desire to formulate bureau judicial policy and his reluctance to act without presidential approval, it is likely that the commissioner asked Johnson about the bureau's authority to adjudicate cases involving freedmen when he and his subordinates met with the President on May 26. And given Johnson's concern for rapid restoration of civil government in the rebel states (which he demonstrated three days later in his North Carolina proclamation), the President undoubtedly did not want the bureau to exercise unlimited jurisdiction. Consequently, it is likely that Johnson authorized the bureau to try cases involving freedmen as long as state officials refused to receive black testimony. By doing so, he would not only encourage southerners to expand blacks' civil rights and thereby convince northerners of the South's willingness to treat blacks as free men, but he would also establish a definite limit on the bureau's authority to interfere with state officials.

The restrictions the circular imposed did not seriously impair the bureau's ability to exercise jurisdiction over cases involving blacks during the summer of 1865. Many states went without regularly appointed judges and magistrates until June or later, and when state judicial officials did open their courts the vast majority of them honored state laws prohibiting blacks from testifying against whites. Consequently, assistant commissioners authorized agents to try minor cases involving freedmen and to turn serious cases over to military authorities for trial by military commission. Even in Louisiana, where state law permitted blacks to testify against whites, the assistant commissioner ignored the limitations of the May 30 circular and authorized his agents to try cases involving blacks if state officials in any way denied justice to the freedmen. Only in South Carolina and Georgia, where army provost courts tried such cases, were bureau officials unsuccessful in asserting jurisdiction over cases involving freedmen.[17]

[15] Perman, *Reunion Without Compromise*, 70, makes this point.

[16] New York *Times*, May 26, 1865, p. 4.

[17] Donald G. Nieman, "To Set the Law in Motion: The Freedmen's Bureau and the Legal Rights of Blacks, 1865–1868" (unpublished Ph.D. dissertation, Rice University, 1975), 23–38.

Although most assistant commissioners sought to prevent state courts from trying cases involving blacks, General Wager Swayne, the assistant commissioner for Alabama, sought to transfer jurisdiction in such cases to the civil authorities. In late July, less than a fortnight after his arrival in Montgomery, Swayne met with Governor Lewis Eliphalet Parsons to discuss the legal status of Alabama blacks. The assistant commissioner urged Parsons to issue an order suspending those portions of the state code that discriminated against free blacks, particularly the provision concerning black testimony. However, Parsons feared that if he dispensed with these discriminatory laws extremists would exploit the issue to gain election to the constitutional convention and produce a constitution unacceptable to the North. Consequently, he refused to grant Swayne's request. On August 4 the assistant commissioner responded by issuing an order inviting state judges and magistrates who were willing to grant blacks equal rights to serve as judicial agents of the bureau.[18]

Swayne's order was well received by Alabama politicians. On August 18 Parsons, overcoming his misgivings, issued a public statement urging state judicial officials to accept Swayne's offer, and throughout August and early September many state judges and magistrates informed Swayne they were willing to serve as bureau judicial agents.[19] Moreover, the state constitutional convention, which met on September 12, lent its support to Swayne's policy. By an overwhelming majority the convention passed an ordinance requiring state judges and magistrates to serve as judicial agents of the bureau.[20]

Swayne's action may have pleased Alabama politicians, but several assistant commissioners were highly critical of his decision to surrender jurisdiction of cases involving blacks to state courts. In early September Clinton Bowen Fisk, the assistant commissioner for Tennessee, warned Howard that blacks would receive justice only if bureau and military officials continued to try cases involving blacks. Indeed, he contended that in the short time in which Swayne's policy had been in effect Alabama officials had used their authority to try cases involving blacks "as a means of re-enslaving instead of guarding the liberties of the freedmen." Virginia assistant commissioner Orlando Brown criticized the notion, which lay at the heart of Swayne's policy, that blacks would be able to obtain

[18] Swayne to Parsons, July 29, 1865; Swayne to Howard, July 31, August 7, 21, 1865, RBRFAL, M-752, reel 17; General Order No. 7, BRFAL, Alabama, August 4, 1865, RBRFAL, M-809, reel 17.

[19] Circular letter, BRFAL, Alabama, August 18, 1865, *ibid.*, reel 6; Swayne to Howard, August 28, 1865, RBRFAL, M-752, reel 17.

[20] Fleming, *Reconstruction in Alabama*, 364.

justice in state courts if they possessed the right to testify against whites. ". . . is it probable," he asked, "that these justices would give such testimony its proper weight, especially where their white neighbors are a party in the suit?" Samuel Thomas, Mississippi's assistant commissioner, argued similarly that since white judges and jurors would disregard testimony offered by blacks Swayne's policy "would defeat the very objects for which the Bureau was laboring."[21]

Although several bureau officials were highly critical of Swayne, Howard supported Swayne's action and encouraged other assistant commissioners to pursue a similar course. Upon returning to Washington in early September after a month's vacation in Maine Howard sent copies of Swayne's order of August 4 and Parsons's endorsement of it to each assistant commissioner. In an accompanying letter he praised Swayne's policy and directed other assistant commissioners to "endorse any action that will secure the same plain recognition of the rights of the Freedmen."[22] Moreover, Howard sought to enlist the support of provisional governors in Virginia and North Carolina for a plan similar to Swayne's. On September 13 he sent Governor Holden a copy of Swayne's order and Parsons's endorsement and suggested that Holden make a similar arrangement with North Carolina bureau officials. A week later, when he visited Richmond, he met with Governor Pierpont and offered to permit Virginia judges and magistrates to act as judicial agents of the bureau if they were willing to apply to freedmen the same laws that governed whites.[23]

Pressure from the White House was perhaps the crucial factor in Howard's decision to support Swayne. In the course of frequent and lengthy meetings with the President during the first week in September, Howard learned of Johnson's dissatisfaction with bureau land policy. Not only did Howard, acting on orders from the White House, quickly reverse bureau land policy, but in the weeks that followed he sought to avoid conflict with Johnson on other matters as well.[24] In mid-September he decided to dismiss Louisiana assistant commissioner Thomas W. Conway, who, though zealous in his concern for black rights, had alienated state officials and the President.[25] And throughout September and October he repeatedly urged assistant commissioners to cooperate with provisional

[21] Fisk to Howard, September 2, 1865; Brown to Howard, September 8, 1865; Thomas to Howard, September 21, 1865, RBRFAL, M-752, reels 14, 13, 22.

[22] Washington *Evening Star*, September 1, 1865; Howard to assistant commissioners, September 6, 1865, RBRFAL, M-742, reel 1.

[23] Howard to Holden, September 13, 1865, Howard Papers; Howard to Johnson, September 21, 1865, RBRFAL, M-742, reel 1.

[24] On Howard, Johnson, and bureau land policy see McFeely, *Yankee Stepfather*, 84–135.

[25] Fullerton to General Absalom Baird, September 20, 1865, RBRFAL, M-742, reel 1.

governors. ". . . I wish to . . . do as the President wishes," he informed the assistant commissioner for South Carolina, "that is work with the Provisional Governors for the promotion of good order and good government."[26] Given this newfound concern for cooperation with Johnson, Howard probably viewed Swayne's policy as a way to bring the bureau into line with Johnson's attempt to restore civil government in the South and avoid further conflict with the President.

There are indications, however, that Johnson played an even more direct role in shaping Howard's decision. Determined to return governance of the South to the civil authorities as rapidly as possible, Johnson no doubt applauded Swayne's policy. He probably believed that because Swayne's course induced Alabama judges to receive black testimony it would complement his own Reconstruction policy. The experiment initiated by Swayne would associate black testimony with respected Alabama natives and thereby reduce resistance of white Alabamians to repeal of the state's discriminatory testimony statute by the state convention or legislature. In addition, Johnson probably thought that if Alabama politicians admitted freedmen to the witness stand, politicians in other states would follow suit. And if there was a general movement to repeal discriminatory testimony statutes, he realized that it would help convince northerners the South was willing to treat freedmen justly. Consequently, it seems likely that during the course of his meetings with the commissioner in early September Johnson approved Swayne's action and encouraged Howard to implement a similar policy in other states.

Howard's correspondence with Johnson later in the month supports this assumption. After meeting with Pierpont and offering to permit state judges and magistrates to serve as bureau judicial agents, Howard reported the results of the conference to Johnson in a brief letter, the wording of which indicates that the two men had discussed the matter previously. "I have had a conference with the Governor, Dept. Commander and Assistant Commissioner. The utmost harmony exists between [*sic*] them," he wrote. "The Governor declines the recognition of his Courts as *Freedmens* Courts for the present . . . ."[27] If the two men had not discussed the return of jurisdiction to state officials earlier, Howard would have found it necessary to go into greater detail in order to explain what he was about. Moreover, the very fact that the commissioner reported the outcome of the meeting to Johnson and subsequently provided the

[26] Howard to General Rufus Saxton, September 12, 1865; Howard to General Eliphalet Whittlesey, October 5, 1865, *ibid.*

[27] Howard to Johnson, September 21, 1865, *ibid.*

President with a copy of Pierpont's letter declining to permit Virginia judges to serve as judicial agents of the bureau suggests that Howard was acting at Johnson's behest.[28] Apparently, he felt compelled to assure Johnson that he was doing his best to transfer jurisdiction to the civil authorities and that state officials bore responsibility for his lack of progress.

Johnson's encouragement, however, was not the only reason Howard sought to transfer jurisdiction to state courts; the configuration of American governmental-legal institutions also influenced his decision. By late summer 1865 Johnson's program of Reconstruction was progressing smoothly, and it appeared that Congress would find senators and representatives-elect from the rebel states seeking admission when it met in December. Because most of the Republican politicians who would control Congress gave little indication of fundamental opposition to presidential policy, Howard assumed Congress would accept Johnson's handiwork and complete the restoration process.[29] Restoration of the rebel states to their traditional relations with the Union would end justification for martial law in the South and destroy the authority of bureau and military officials to try cases involving freedmen. And if this occurred mid-nineteenth-century American federalism dictated that freedmen would have to look primarily to state law and state courts for legal protection.[30]

Consequently, Howard believed that the bureau should use its authority to reform state law and thus provide freedmen with the wherewithal to protect themselves when federal officials were no longer able to do so. Like Johnson he believed that if state officials took the lead in granting freedmen equal rights in state law and permitted them to testify against whites, southern public opinion would be receptive to the change. If so, state legislatures, which would meet in the fall, would be likely to improve blacks' legal status, better enabling freedmen to obtain justice in state courts. " . . . it is a recognition of the rights of the freedmen to justice," he wrote enthusiastically to Fisk in early September while defending Swayne's policy, "and the principle once firmly established, and

[28] Pierpont to Brown, October 7, 1865 (copy), Johnson Papers.

[29] Benedict, *Compromise of Principle*, 108–16; Max Woodhull to General John Sprague, October 9, 1865; Woodhull to Colonel Thomas Osborn, October 10, 1865; Woodhull to Orville Jennings, October 20, 1865, RBRFAL, M-742, reel 1.

[30] On nineteenth-century federalism see Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," *Stanford Law Review*, II (December 1949), 9–15; Fairman, *Reconstruction and Reunion, 1864–88*, Vol. VI, Pt. I, of Paul A. Freund, ed., *History of the Supreme Court of the United States* (New York and London, 1971), 1120–23, 1156. On the impact of federalism on citizenship and the rights of individuals see Harold M. Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* (New York, 1973), 425–26.

incorporated in the laws of the state, the results in time, can hardly be other than satisfactory . . . ."[31]

In the weeks after September 6 several assistant commissioners surrendered jurisdiction of cases involving blacks to state courts. Samuel Thomas on September 20 drafted a general order inviting Mississippi judges and magistrates who informed him of their willingness to grant blacks equal rights to try cases involving freedmen. Four days later Thomas sent a member of his staff to Jackson to inform Provisional Governor William Lewis Sharkey of the order and to request that he issue "such instructions [to judges and magistrates] as will remove all necessity for Freedmen [*sic*] Courts . . . ." In response, Sharkey ordered state judicial officials to receive black testimony "in all cases involving the rights of freedmen." Although Sharkey's proclamation did not go as far as Thomas wished, the assistant commissioner feared that he would not be supported by the White House if he refused to transfer jurisdiction to the state courts until Sharkey had ordered state officials to grant blacks equal rights. Consequently, regardless of whether judges and magistrates had agreed to admit blacks to the witness stand or to grant them equal rights, Mississippi bureau officials permitted them to resume jurisdiction of cases involving freedmen. Indeed, by late October the return of jurisdiction had proceeded so far Thomas informed his subordinates that, henceforth, they would permit state officials to try all cases involving freedmen.[32]

Bureau officials in Louisiana also quickly responded to Howard's endorsement of Swayne's policy. On September 23 Thomas Conway issued a circular offering to allow judges and magistrates who pledged their willingness to receive black testimony to try cases to which blacks were parties. The same day he sent a copy of the circular to Provisional Governor James Madison Wells and asked that he issue a public statement encouraging state officials to accept the bureau's offer. Wells, however, refused to issue such a proclamation, pointing out that Louisiana law already permitted blacks to testify against whites. Bureau officials, he asserted, should assume that state judges and magistrates would honor state law; if a few officials proved unworthy of trust, he would reprimand them or remove them from office. Although Wells refused to encourage judges and magistrates to comply with Conway's circular, most bureau agents responded to the circular by permitting judicial officials who received black testimony to try cases involving freedmen. And in late October Joseph Scott Fullerton, Conway's succes-

[31] Howard to Fisk, September 9, 1865, RBRFAL, M-742, reel 1.

[32] Thomas to Howard, September 23, 29, 1865, RBRFAL, M-752, reel 22; Thomas to Sharkey, September 24, 1865 (quotation from this letter); General Order No. 13, BRFAL, Mississippi, October 31, 1865, RBRFAL, M-826, reels 1, 28.

sor, informed Louisiana agents that since state law permitted freedmen to testify against whites they should permit state courts to try all cases involving blacks.[33]

Although they did not go as far as bureau officials in Alabama, Mississippi, and Louisiana, assistant commissioners in several other states moved to limit bureau judicial activity. On September 27, less than a week after Pierpont refused to direct Virginia judges and magistrates to serve as judicial agents of the bureau, Orlando Brown issued an order restructuring bureau courts in such a way as to involve civilians in bureau judicial activity. Rather than merely permitting bureau agents or army provost marshals to try minor cases involving blacks, as he had done during the summer, Brown ordered agents to invite blacks and whites to select representatives to join them in adjudicating such cases. Moreover, as agents implemented the order, the assistant commissioner, eager to secure the cooperation of prominent Virginia whites who would be offended if blacks sat, ruled that freedmen must select whites to serve as their representatives on the three-man tribunals. Brown's restructuring of the bureau courts did not end the bureau's exercise of judicial authority in the Old Dominion, since the new courts operated under the auspices of the bureau and military commissions continued to try serious cases involving freedmen. However, given the uncooperativeness of state officials, the policy demonstrated the newfound concern of bureau officials for transferring administration of justice to southern citizens.[34]

In Georgia Assistant Commissioner Davis Tillson cooperated with the provisional governor and the constitutional convention in appointing magistrates and other civilians to try minor cases involving freedmen. Tillson, who did not come to Georgia until late in September, initially indicated that he would not transfer administration of justice to the civil authorities. Late in October, however, after receiving verbal instructions to the contrary from Howard, he requested Provisional Governor James Johnson to direct justices of the peace to serve as bureau agents.[35] Johnson refused to honor Tillson's request but passed the assistant commissioner's letter on to the state constitutional convention which was then in session. Several days later Tillson traveled to Milledgeville, where he addressed the convention and pressed delegates to act on his suggestion to Johnson. After meeting with members of the convention Tillson

[33] Conway to Howard, September 23, 26, 29, 1865; Conway to Wells, September 26, 1865; Wells to Conway, September 27, 1865, RBRFAL, M-752, reel 21; Circular No. 24, BRFAL, Louisiana, October 30, 1865, RBRFAL, Louisiana, Vol. 28.

[34] Circular No. 89, BRFAL, Virginia, September 27, 1865, RBRFAL, Virginia, Vol. 33; Lieutenant H. B. Scott to Captain T. F. P. Crandon, November 3, 1865, *ibid.*, Vol. 12.

[35] Tillson to Howard, October 5, 1865, and Tillson to E. M. Stanton, November 15, 1865, RBRFAL, M-752, reel 20; Tillson to Johnson, October 25, 1865, RBRFAL, M-798, reel 1.

agreed to appoint as bureau agents men nominated by their county's delegation to the convention, and the convention passed a resolution encouraging those whom Tillson appointed to serve. In the convention's aftermath Tillson appointed 244 civilian agents and authorized them to try minor cases involving freedmen as long as state courts refused to receive black testimony.[36]

In Florida Assistant Commissioner Thomas Ward Osborn developed a policy which, though more limited in scope, was similar to that Swayne had implemented. Throughout the summer and fall Provisional Governor William Marvin had refused to appoint civil officials, preferring instead to leave local administration and law enforcement in the hands of military officials. In early November, however, members of the state constitutional convention, eager to rid the state of bureau and military courts, petitioned the governor to appoint law-enforcement and judicial officials and adopted an ordinance permitting freedmen to testify in any case in which at least one party was black. Marvin responded to the convention's request with a proclamation authorizing those officials who held office at the end of the war to resume their positions.[37] Moreover, less than a week later Osborn invited probate judges and justices of the peace to serve as bureau agents and try minor cases involving freedmen. The assistant commissioner not only required magistrates acting as bureau agents to receive black testimony but demanded that they apply to freedmen the same laws that governed whites. He also stipulated that military officials continue to try all felonies (regardless of whether they involved whites or blacks). Although Osborn offered only limited jurisdiction to state officials, Marvin encouraged magistrates to accept the assistant commissioner's invitation. As a result, large numbers of Florida probate judges and justices of the peace soon began trying minor cases involving freedmen.[38]

Although assistant commissioners in several states succeeded in ending or limiting bureau judicial activity, the result of the experiment proved disappointing to bureau officials. In encouraging assistant commissioners to convince provisional governors to direct judges and magistrates to serve as judicial agents of the bureau, Howard had hoped to prod state officials to grant blacks equal

[36] Milledgeville (Ga.) *Southern Recorder*, October 31, 1865; Tillson to Howard, November 1, 1865, RBRFAL, M-752, reel 20; Circular No. 4, BRFAL, Georgia, November 15, 1865, RBRFAL, M-798, reel 34; Alan Conway, *The Reconstruction of Georgia* (Minneapolis, 1966), 77.

[37] *Senate Executive Documents*, 39 Cong., 1 Sess., No. 26 (Serial 1237, Washington, 1866), 206–208, 217.

[38] Circular No. 9, BRFAL, Florida, November 15, 1865, in General John Foster to Osborn, December 15, 1865; Osborn to Howard, November 30, December 31, 1865, RBRFAL, M-752, reel 20.

rights. As the fall progressed, however, he realized that southern politicians were willing to move no further than was absolutely necessary in expanding blacks' civil rights. In Alabama and Mississippi, for example, assistant commissioners had demanded that judges and magistrates apply to blacks the same laws they applied to whites. But Governors Parsons and Sharkey, in their public statements, merely directed judges and magistrates to receive black testimony in cases in which at least one party was black. Consequently, while many judges pledged to grant blacks equal rights, a number received black testimony but enforced other laws that discriminated against blacks.[39] Moreover, when state legislatures began to meet in October and November bureau officials learned that while legislators grudgingly granted blacks the right to testify against whites, they nevertheless coupled this reform with discriminatory and repressive legislation designed to keep freedmen under the thumb of whites.[40]

It was, however, the persistence of unredressed violence against blacks rather than the failure of southern politicians to grant blacks equal rights that most disillusioned bureau officials. Violence against freedmen had been common during the summer, but many bureau officials had assumed that it would subside as civil and military officials restored order to the war-torn South.[41] Yet violence against blacks persisted long after Johnson's provisional governments were established. "That . . . outrages [against freedmen] are of lamentably frequent occurrence," admitted the conservative Swayne in early September, "is apparent from . . . the incontestible evidence of negroes who present themselves at the military agencies of this Bureau having been shot, stabbed, or otherwise severely injured."[42] Not only did violence persist, but in many places it actually increased. Throughout the summer and fall of 1865 rapid demobilization of the army greatly diminished the number of troops on duty in the South, and as troops withdrew from localities violence against blacks spread apace. "The withdrawal of troops has, in every instance, been the signal for the perpetration of the grossest outrages on the negroes," the agent at Natchez, Mississippi, reported.[43] Indeed, in a number of places

[39] Circular letter, BRFAL, Alabama, August 18, 1865; Swayne to Parsons, October 10, 1865, RBRFAL, M-809, reels 6, 1; Thomas to Howard, September 29, 1865, RBRFAL, M-752, reel 22.

[40] Theodore B. Wilson, *The Black Codes of the South* (University, Ala., 1965), 61–80.

[41] See for example Thomas to Howard, July 29, 1865, RBRFAL, M-826, reel 1.

[42] Swayne to Alabama judges and magistrates, September 9, 1865, RBRFAL, M-809, reel 1.

[43] Major George Reynolds to Captain J. H. Weber, November 4, 1865, RBRFAL, M-826, reel 11. For additional evidence of this see Captain Henry Sweeney to Thomas, November 5, 1865, RBRFAL, Arkansas, Vol. 5; Major W. L. M. Burger to General Rufus Saxton, October 25, 1865, Department of the South, Vol. 15, RG 393, NA.

bureau agents, fearing for their own lives, refused to remain on duty without troops to support them.[44]

In the face of this violence southern officials failed to provide redress to the freedmen. In some localities, particularly in parts of Louisiana and Mississippi, formidable outlaw bands were responsible for much violence against freedmen, and, even if they were willing to do so, local officials often lacked the ability to bring these desperadoes to justice.[45] However, assaults and murders perpetrated by normally law-abiding citizens were much more common and posed a greater threat to blacks' security. Yet because southern whites viewed violence as an acceptable means of race and labor control, white sheriffs, magistrates, judges, and jurors often proved unwilling to mete out justice to whites who committed acts of violence against blacks. In this situation the problem was not that state officials refused to admit blacks to the witness stand or denied them equal rights. Rather, state law-enforcement and judicial officials deprived freedmen of substantive justice through inaction, unfair rulings, and prejudiced verdicts.[46]

Although Howard had initially urged assistant commissioners to return jurisdiction of cases involving freedmen to state courts, he began to have second thoughts by late autumn. In September he had not been particularly eager to permit state judges to try cases involving blacks, but pressure from the White House and the political situation had led him to do so. And this initial lack of enthusiasm meant that he would not be at all reluctant to repudiate the policy if it proved unsuccessful. As he toured the South in late October and early November and conferred with bureau and military officials he learned that violence against blacks was pervasive and that state officials were too often unwilling to provide redress to the freedmen. He realized that even if blacks possessed equal rights, they would find it difficult to obtain justice if they had to enforce these rights in state courts. Moreover, Howard's understanding of the limitations of equal rights convinced him that the national government should provide freedmen legal protection until state officials were willing to grant them substantive justice as

[44] Captain Julius Clark to Lieutenant D. G. Fenno, November 15, 1865; G. N. Carruthers to Fenno, November 18, 1865, RBRFAL, Louisiana, Box 2.

[45] Lieutenant Colonel Martin Flood to ?, September 20, 1866, *ibid.*, Vol. 2; Lieutenant M. Reed to General J. W. Sprague, January 10, 1866, RBRFAL, Arkansas, Box 1; G. N. Carruthers to Lieutenant D. G. Fenno, November 18, 1865, RBRFAL, Louisiana, Box 2; Captain Silas May to Colonel A. P. Bestow, May 21, 1866, RBRFAL, M-752, reel 28.

[46] Colonel C. Cadel to Henly Brown, December 5, 1865, RBRFAL, M-809, reel 1; Major George D. Reynolds to Captain J. H. Weber, November 4, 1865, RBRFAL, M-826, reel 11; Major T. S. Free to Thomas, November 1, 1865; Swayne to Howard, November 28, 1865; Osborn to Howard, December 8, 1865, RBRFAL, M-752, reels 22, 19, 20.

well as equal rights. "The time has not come for the Government to surrender its authority in any State I visited," he warned Henry Wilson, chairman of the Senate Military Affairs Committee, after returning to Washington. "The minds of [southern] white men have been so long enslaved by prejudice that it will require time and education to bring them to a respectable degree of enlightenment."[47]

The shifting political situation also encouraged Howard to repudiate the policy of returning jurisdiction to state courts. In early September, when he had endorsed Swayne, Congress had not been in session, and the Republican response to presidential policy had not crystallized. However, as the autumn progressed Republicans not only began to suggest that Johnson was moving too rapidly in his attempt to restore the rebel states, but in state elections in a number of northern states Republicans soundly defeated Democrats who supported Johnson's program. On November 18, less than a week after Howard had returned to Washington, Schuyler Colfax, the Speaker of the House, sounded the keynote of congressional policy in an address to a group of Washingtonians. While not overtly critical of Johnson's policy, Colfax emphasized that it would not be wise for Congress to move precipitately in completing the restoration process. Indeed, Congress would not admit members-elect from the rebel states, he predicted, until it enacted legislation that would protect the blacks' newly won freedom. Because moderate and conservative Republican editors applauded Colfax's speech and newspapers of all persuasions reported that Congress would not seat members-elect from the rebel states, Howard was certain that Republican legislators would come to the aid of the freedmen. "There is quite a change of sentiment here [Washington] . . . ," he noted optimistically four days after Colfax's speech, "since the greater influx of Northern men and since the elections."[48]

Howard, still wary of arousing Johnson's ire, did not view the change in political climate as a signal to order assistant commissioners who had surrendered jurisdiction to state officials to resume adjudication of cases involving freedmen. Congressional Republicans' views on Reconstruction, however, did lead him to look to Capitol Hill for sufficient authority to provide justice to the freedmen. The statute creating the bureau did not specifically authorize bureau officials to try cases involving freedmen, and Congress's silence had left bureau officials at Johnson's mercy on the matter of

[47] Howard to Wilson, November 25, 1865, Howard Papers. For other evidence of Howard's change of attitude see Howard to Edwin M. Stanton, October 21, 1865; Colonel Max Woodhull to Tillson, November 24, 1865, RBRFAL, M-742, reel 1.

[48] Benedict, *Compromise of Principle*, 117–33; New York *Times*, November 19, 1865, p. 4; Howard to Saxton, November 22, 1865, RBRFAL, M-742, reel 1.

jurisdiction.[49] In the absence of legislative provisions to the contrary, Johnson, as head of the executive branch, was free to decide whether or not bureau officials could try cases involving freedmen and, if he decided to permit them to do so, to dictate the conditions under which they exercised jurisdiction. Conferences with the President and observation of presidential policy had convinced Howard that Johnson was not likely to give bureau officials greater judicial authority than that conferred by the circular of May 30. Consequently, he believed it imperative that Congress specify and expand bureau judicial authority or authorize federal courts to try cases involving freedmen.

In his first annual report, which he drafted after completing his tour of the South, Howard suggested that Congress enact legislation removing cases involving freedmen from the purview of state courts. Until white southerners' hostility toward the freedmen subsided, he believed, blacks would find it difficult to obtain justice in courts run by native whites. He warned that even if southern legislators expanded blacks' civil rights, white law-enforcement and judicial officials would deny blacks substantive justice. "Where legislation is constrained, as it now is in the southern States . . . , there is danger of the statute law being in advance of public sentiment," he explained, "so that where there is the most liberality ill consequences would be likely to result if [federal] government protection should be immediately withdrawn." Consequently, Howard not only recommended that Congress extend the life of the bureau (which the Freedmen's Bureau Act of 1865 had stipulated would terminate one year after the end of the war), but also that it establish "Freedmen's United States courts" to try cases involving blacks.[50]

In addition to mentioning the problem of injustice in his report, Howard pressed the matter in discussions with leading members of Congress. As congressional Republicans drifted into Washington in late November and the first session of the Thirty-ninth Congress convened in early December, he met with such Republican leaders as Henry Wilson, Thomas Dawes Eliot, Charles Sumner, and Lyman Trumbull to discuss with them conditions in the South and policy alternatives. Indeed, during the first month of the session Trumbull, who chaired the powerful Senate Judiciary Committee and was engaged in drafting civil rights legislation, spent several evenings at bureau headquarters. There he conferred with Howard on freedmen's affairs and examined letters and reports from bureau

[49] *The Statutes at Large . . . of the United States of America*, XIII (1866), 507–509; cited hereinafter as *Statutes at Large*.

[50] *House Executive Documents*, 39 Cong., 1 Sess., No. 11 (Serial 1255, Washington, 1865), 23, 32–33.

officials in the South. Although Howard discussed other aspects of bureau operations with these men, one of his prime concerns was encouraging legislative leaders to enact measures that would provide freedmen with legal protection.[51]

The two pieces of civil rights legislation that emerged from Congress in 1866 reflected Howard's understanding of the limitations of equal rights. Many congressional Republicans, their attention riveted on the repressive black codes already enacted by legislatures in South Carolina and Mississippi and pending in other southern legislatures when Congress met, seem to have been concerned merely with forcing southerners to grant basic equality in civil rights to blacks.[52] But after meeting with Howard and examining correspondence in bureau files, Trumbull realized that even if blacks possessed equal rights state officials could covertly deny them justice. As a result, when Trumbull drafted the Freedmen's Bureau Act of 1866 and the Civil Rights Act he sought to guarantee freedmen impartial administration of justice as well as equal rights.[53]

Although Trumbull's Freedmen's Bureau bill dealt with other aspects of bureau operations as well, it sought to define blacks' civil rights and provide bureau officials with authority to protect those rights. The bill provided that blacks in the rebel states were entitled to "any of the civil rights . . . belonging to white persons," including the rights to contract, to commence lawsuits, to testify in courts of law, and to own and convey real and personal property. In addition, it stipulated that the rebel states must provide freedmen "full and equal benefit of all laws and proceedings for the security of person and estate" and that they must punish black and white criminals in the same manner. The bill also empowered bureau officials, acting "under such rules and regulations as the President . . . shall prescribe," to guarantee freedmen these rights. It authorized bureau agents to try and punish state officials who denied blacks "any civil right secured to white persons." Moreover, it provided that they might try cases involving freedmen who were denied their rights by "any State or local law, ordinance, police or

[51] Howard to Wilson, November 25, 1865; Trumbull to Howard, January 4, 1866; Howard to J. K. Chapin, January 6, 1866; C. H. Howard to Trumbull, February 8, 1866, Howard Papers; Carl Schurz to his wife, December 5, 1865, in Joseph Schafer, ed., *Intimate Letters of Carl Schurz, 1841–1869* (Madison, Wis., 1928), 354; Howard, *The Autobiography of Oliver Otis Howard* (2 vols., New York, 1907), II, 280.

[52] *Congressional Globe*, 39 Cong., 1 Sess., 39 (December 13, 1865), remarks of Henry Wilson; *ibid.*, 503–504 (January 30, 1866), remarks of Jacob M. Howard; *ibid.*, 1123–25 (March 1, 1866), remarks of Burton C. Cook; *ibid*, 1151–55 (March 2, 1866), remarks of M. Russell Thayer; *ibid.*, 1293–94 (March 9, 1866), remarks of Samuel Shellabarger.

[53] Trumbull clearly evidenced this understanding in his comments on a civil rights measure that Henry Wilson introduced early in the session. *Ibid.*, 42–43 (December 13, 1865).

other regulation, custom, or prejudice." By giving the bureau authority to intervene when state officials denied freedmen their rights through "prejudice" as well as discriminatory statute Trumbull's bill would enable bureau officials to cope with the problem of discriminatory administration of justice.[54]

Trumbull's second measure, the Civil Rights Act, applied throughout the United States and was designed to pick up where the bureau bill left off. Because the grant of authority under the Freedmen's Bureau bill rested on the assumption that the rebel states remained subject to martial law until Congress seated members from those states, it necessarily limited the bureau's exercise of judicial authority to the rebel states and stipulated that it should cease when Congress restored them. Therefore, Trumbull drafted the Civil Rights Act, which rested on the Thirteenth Amendment, to protect blacks' civil rights in the border states and in the rebel states after Congress had restored them.[55] Using virtually the same language he had used in the bureau bill, he stipulated that no state could deny any person basic equality of civil rights on account of race and authorized United States district courts to try and punish state officials who violated that prohibition. The statute also provided that individuals denied equal rights in state law or unable in practice to enforce their rights in state courts might have their cases tried in the federal courts. Like its companion measure, the Civil Rights Act thus offered a remedy to those denied justice by the covert action (or inaction) of state law-enforcement and judicial officials as well as by discriminatory statutes.[56]

Ironically, on February 21 Congress failed to override Johnson's veto of the bureau bill (which Trumbull had designed to provide protection for blacks in the immediate future) but enacted the Civil Rights Act over a presidential veto six weeks later. As a result, it was not until mid-July, six months after passage of the Civil Rights Act, that congressional Republicans enacted a bureau bill. Although the July bill was a product of Thomas D. Eliot's House Committee on Freedmen's Affairs, it contained civil rights provisions similar to those in Trumbull's bureau bill. Like its precursor, the Eliot bill granted freedmen the same rights as whites to contract, to commence lawsuits, to testify, and to own and convey property, and it stipulated that blacks be subject to the same criminal laws as whites. It also provided—in language reminiscent of Trumbull's bill—that freedmen were entitled to "full and equal benefit of all laws and proceedings concerning personal liberty, personal secur-

[54] For the text of the bill see McPherson, *Political History*, 72–74; quotations on p. 74.

[55] *Cong. Globe*, 39 Cong., 1 Sess., 319–20 (January 19, 1866), 474–75 (January 29, 1866), remarks of Lyman Trumbull.

[56] *Statutes at Large*, XIV (1868), 27–30.

ity, and the acquisition, enjoyment, and disposition of estate, real and personal . . . ."[57]

Most important, however, the July bill sought to give the bureau authority to try cases involving freedmen when state officials denied justice to blacks. Unlike Trumbull's bill, it did not authorize the bureau to try and punish state officials who denied freedmen equal rights. But it did direct the President to prescribe "rules and regulations" giving the bureau jurisdiction "over all cases and questions concerning the free enjoyment of such immunities and rights" as the bill conferred on freedmen. Because the bill spoke broadly of guaranteeing blacks "free enjoyment" of their rights, it would enable the bureau to assert jurisdiction when state officials denied freedmen their rights either through discriminatory statutes or discriminatory administration of justice.[58]

Although Howard believed the two measures would enable the bureau to provide freedmen legal protection, he might have anticipated problems in using them to that end. Because the Freedmen's Bureau Act gave the bureau broad judicial authority, it seemed to offer blacks readily accessible and impartial legal forums in which to vindicate their rights. However, by granting the President authority to "prescribe" the "rules and regulations" under which the bureau might exercise jurisdiction, it permitted Johnson to maintain considerable influence over bureau judicial policy. And given Johnson's bitter opposition to federal protection of civil rights, this threatened to forestall vigorous activity by the bureau to secure justice for the freedmen. If Johnson was dilatory in approving regulations to govern bureau judicial activity or insisted upon regulations that made bureau interference with state officials difficult, he could effectively tie the bureau officials' hands. In fact, when Howard in late 1866 drafted a circular in accordance with the act to expand the judicial authority of the bureau, Johnson refused to approve it.[59]

Similarly, enforcement of the Civil Rights Act was difficult. In the first place, it relied upon the cumbersome process of bringing cases before the already overburdened federal courts to redress injustice. This might prove feasible if there were few cases of injustice or if (as Trumbull suggested during debate on the measure) enforcement of the act in a few instances would encourage southerners themselves to mete out justice to freedmen in order to

[57] LaWanda Cox and John H. Cox, "Andrew Johnson and His Ghost Writers: An Analysis of the Freedmen's Bureau and Civil Rights Veto Messages," *Mississippi Valley Historical Review*, XLVIII (December 1961), 460–79; Benedict, *Compromise of Principle*, 155–68; *Cong. Globe*, 39 Cong., 1 Sess., 2772–80 (May 23, 1866), remarks of Thomas D. Eliot; *Statutes at Large*, XIV, 173–77 (quotation on p. 176).

[58] *Statutes at Large*, XIV, 173–77; quotations on p. 177.

[59] *Ibid.*; Nieman, "To Set the Law in Motion," 221–25.

prevent federal intervention. But given the scope of unredressed violence against blacks and the willingness of southerners to use violence to maintain white supremacy, it would probably be inadequate. Secondly, since the statute spoke of removing cases to federal courts if individuals were unable to obtain justice in state courts, it raised the possibility that federal judges would make individuals exhaust the remedies available under state law before they would assume jurisdiction. And if this happened freedmen would experience interminable delays in obtaining justice. Thirdly, unless federal judges were unwilling to overturn jury verdicts—something that judges were traditionally unwilling to do—the act would fail to deal with a major source of injustice. Finally, the United States attorneys and judges who would play the key role in enforcing and interpreting the act were for the most part southerners and Johnson appointees. Many of them would be unsympathetic to the act and therefore neither interpret it broadly nor enforce it vigorously.[60]

Congress's civil rights legislation thus seemed to arm bureau officials with defective weapons for providing freedmen with legal protection. During 1865 bureau judicial policy had suffered because of its vulnerability to presidential manipulation. Under Johnson's direction Howard had narrowly defined the authority of bureau officials to try cases involving freedmen and had urged subordinates to surrender jurisdiction if provisional governors agreed to grant blacks equal rights. He soon realized, however, that regardless of the willingness of southerners to expand the civil rights of blacks, hostile law-enforcement and judicial officials could easily subvert those rights in practice. Howard's insight into the nature of these injustices played an important role in the enactment by Congress of two civil rights measures designed to guarantee impartial administration of justice and equal rights for freedmen. Yet because the Freedmen's Bureau Act did not eliminate presidential influence, it failed to go to the root of the problem. During 1866 Johnson used his authority to block expansion of bureau jurisdiction, thus forcing bureau officials to depend on the Civil Rights Act as the sole means of providing legal protection for freedmen. Because of the cumbersome remedy it offered and its vulnerability to narrow interpretation, however, the Civil Rights Act proved unworkable. At the end of 1866 bureau officials were no better able to provide the freedmen with legal protection than they had been a year earlier.

[60] For an analysis of the problems that ultimately undermined the effectiveness of the Civil Rights Act see Nieman, "To Set the Law in Motion," 209–20.