

The Historical Society of the Courts
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The David A. Garfinkel Essay Prize

Slave. Contraband.
Soldier. Citizen.

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The Historical Society of the Courts of the State of New York annually sponsors the David A. Garfinkel Essay Competition. The Society launched this essay competition in 2008 with the generous funding of Gloria and Barry Garfinkel. SUNY and CUNY Community College students from around the State are invited to write an original essay on a specified topic of legal history.

This year, the topic is THE BLUE AND THE GRAY: NEW YORK DURING THE CIVIL WAR. In 1867, Court of Appeals Judge Francis M. Finch wrote a poem entitled “The Blue and the Gray” and it immediately struck a chord with the American public. For many years after the war, the poem was read at the grave-side of Civil War soldiers during Memorial Day ceremonies.

The Society was launched in 2003 by its Founder, former Chief Judge Judith S. Kaye, with the mission of preserving the legal and judicial history of New York. It seeks to foster public appreciation and a better understanding of the rich legacy of the New York courts, the legal profession, and their contributions to the State and the nation.

Slave. Contraband. Soldier. Citizen.

In 1928, a biographer of Ulysses S. Grant made the claim that "the American negroes are the only people in the history of the world, so far as I know, that ever became free without any effort of their own . . . They had not started the war nor ended it. They twanged banjos around the railroad stations, sang melodious spirituals, and believed that some Yankees would soon come along and give each of them forty acres of land and a mule."¹ Pushed out by the embrace of national reconciliation was the memory of the African American soldier and their rights to citizenship that they earned through their service. A total of 180,000 would volunteer in the Union armies and navy and 40,000 would give their lives to the cause of freedom. Citizenship and a chance for a future were what they were fighting for—to break the bonds of slavery and become citizens of the nation that was partially built upon their labor and was divided by that very institution which enslaved millions. This cause would drive them to countless acts of courage and valor on battlefields in every theatre of war. From all over they would come. Some, literate young men who had only known freedom, others, escaped slaves. Most wore blue and some wore grey, and brother would fight brother. They would see the spark of the equality that they sacrificed for snuffed out in less than a generation and a new enslavement in the form of poverty, intimidation, segregation and discrimination for 100 years after the war ended.

Upon the eve of the Civil War, America was flourishing and ever-expanding. The Louisiana Purchase had opened up millions of acres of new land to the west for settlement and the roots of Manifest Destiny were rapidly growing in the American psyche. Ominously looming over it all was the dark cloud of slavery. The United States, by 1860, had more than 31 million people within its borders, of which almost 4 million were living in bondage. Slavery had been a divisive issue from the very founding of the nation. Citizens debated these important questions:

would slavery be allowed into the new territories of the U.S. and thus be a part of the nation's future? Would it be contained where it existed and hopefully die a natural death? Would it be settled through fratricide? Compromises were drafted and deals were struck, but these would prove to be too little to stop the coming tempest of war. John Brown, the famous and radical anti-slavery crusader, warned before his execution in 1859, "You may dispose of me very easily. I am nearly disposed of now. But this question is still to be settled, this Negro question, I mean; the end of that is not yet. You had better- all you people at the South- prepare yourselves for the settlement of this question."²

The issue came to a head in 1860 with the election of Abraham Lincoln in November, followed by the subsequent secession of South Carolina from the Union in December. Ten other southern states would follow South Carolina during the early months of 1861. War had finally come. Whites north and south rushed to the call for volunteers and blacks on both sides wanted the same opportunity. In the case of the South it was mostly personal servants who would be brought to war by their masters. But land-owning and sometimes even slave-owning free blacks in places like New Orleans, who wanted to defend what they had earned from an invading force, also volunteered with the hope of achieving more equality. The formation of free black militia units, like the Louisiana Native Guards, was rejected by white southerners who were firmly opposed to the idea of armed blacks.³

In the North, the war was not yet about slavery to many whites. It was more a noble fight to preserve the union, but to blacks, this war was about freedom and breaking loose from the bonds of enslavement. The problem for African Americans who wanted to enlist was that, since 1792, blacks had been barred from service in the U.S. Army⁴ and, not wanting to lose the four slave-holding border states that remained loyal to the Union—Missouri, Kentucky, Maryland and

Delaware—President Lincoln was in no hurry to upset the status quo. Blacks in many northern states were not going to let this hold them back. In Ohio and Massachusetts, free blacks petitioned for a repeal of laws that prevented them from enlisting in the state militias, but because of a lack of public support, the measure would not even be voted on.⁵ Free blacks in Cincinnati, Ohio proposed a "Black Brigade" and began to organize for the defense of the city, but again the white population of the city rejected this and the police shut it down, shouting, "We want you damned niggers to keep out of this; this is a white man's war."⁶ But they would not be kept out. In New York City the same scene played out. When a group of free blacks began to organize a "military club" where they would drill and prepare for future military service, the police again shut it down with a warning that they would not be able to protect them if they happened to be assaulted by an angry mob.⁷

When Lincoln's own Secretary of War, Simon Cameron, proposed in late 1861 that blacks be allowed to enlist in the Union forces, public opinion and the president himself were opposed to black enlistment. Cameron was removed as Secretary of War by Lincoln a few months after the suggestion was made.⁸ It now appeared that the traditional routes to recruitment were closed to the tens of thousands of blacks who were eager to fight for the Union. While giving a speech in January of 1862 concerning the war, Frederick Douglass lamented: "we are striking the guilty rebels with our soft white hand, when we should be striking with the iron hand of the black man."⁹

While opposition to black soldiers was strong amongst most northerners, and bottom-up efforts made by African Americans at volunteering for service were rebuked, some Union commanders and politicians saw the value in accepting and courting black recruits. In May of 1861, near Fortress Monroe, Virginia, a group of three escaped slaves made their way to the

Union camp under the command of General Benjamin Butler. The owner of these slaves later contacted Butler and demanded the return of his property. Upon hearing that the slaves were being used to construct Confederate fortifications in the area, Butler refused to return them on the grounds that he was "not obligated to return property to a foreign government" and that these escaped slaves were contraband of war. The now ex-slaves were put to work by the Union army and given pay.¹⁰ This paved the way for Congress to pass the Confiscation Act in August 1861, which provided the Union government with the "authority to seize any property used to aid the rebellion and to free slaves working for the Confederacy." In July of 1862, Congress would take it a step further and pass the 2nd Confiscation Act, which freed all slaves who had masters serving in the Confederate army.¹¹

Butler would, nearly a year later, in the spring of 1862, introduce radical plans for freeing southern slaves. He would not only free slaves and pay them to work as laborers for the Union army, he would now also recruit blacks to fight for the Union. Hundreds of men answered the call and filled the ranks of the 1st, 2nd and 3rd Louisiana Native Guards regiments, who would soon find themselves in fierce fighting at Port Royal, Louisiana, and Olustee, Florida.¹² In May of the same year, Union general David Hunter, while acting as commander of the Department of the South, would issue a controversial field order that declared all slaves free in the states of Georgia, Florida, and South Carolina. Hunter used these freemen to form the short-lived 1st South Carolina Regiment before the federal government rejected his emancipation order and disbanded the fledgling black regiment.¹³ General John C. Fremont would see his emancipation efforts in Missouri also rebuked by the Federal government.¹⁴ Just to the west in Kansas, which had recently been admitted to the Union as a free state in 1861, Senator and ardent abolitionist James Lane saw the value in the recruitment of African Americans as soldiers. Lane used his

power as commander of the Kansas State Militia to raise the 1st Kansas Colored Volunteer Regiment despite opposition from Lincoln's new Secretary of War Edwin Stanton. On October 29, 1862, the ex-slaves and now soldiers of the 1st Kansas would get their chance to prove their worth as soldiers at the battle of Island Mounds in Missouri. This earned them a place in history as the first black unit to strike a blow to the Confederacy.

Individual African Americans were not without their own ways of attaining freedom. In the spring of 1862, a Charleston, South Carolina slave by the name of Robert Smalls was working as assistant pilot on the Confederate steamship *The Planter*. The ship was crewed by slaves and commanded by two white Confederate naval officers. One night, while the officers were ashore, Smalls led the rest of the crew in a daring escape attempt. Smalls and crew proceeded to pilot the ship out of the harbor and straight into the Union blockade. Smalls managed to get past the Confederate forts without arousing suspicion, and quickly raised the white flag, surrendering the vessel to the Union navy, declaring, "Good morning, sir! I've brought you some of the old United States guns, sir!"¹⁵ Smalls would go on to be elected to the South Carolina Senate, and then to the United States House of Representatives.

By late 1862 the war had reached new unimaginable levels of bloodshed. The horrific battles that year, at Antietam, Maryland and Shiloh, Tennessee, had witnessed death beyond anything seen in America before. Lincoln knew that he could not continue the war as just a struggle to preserve the Union. Following the Union victory at Antietam in September of 1862, Lincoln was prepared to finally take the step to change the face of the war; on January 1, 1863, he signed the Emancipation Proclamation: ". . . All persons held as slaves within said designated states [The Confederacy] . . . are and henceforward shall be free." The four slave states that remained loyal to the Union were exempt until 1865, when the 13th Amendment would free all

slaves in the entire United States. Not only did the Emancipation Proclamation pave the way to completely ending slavery in the U.S., it also opened the gate for the enlistment of African Americans by declaring "that such persons of suitable condition, will be received into the armed service of the United States." Lincoln had now struck a blow to the Confederacy by finally welcoming the thousands of willing African Americans to the Union cause, and delegitimized the cause of the South as well. By making the Union cause the cause of freedom over slavery, he greatly deterred England and France from ever recognizing the Confederacy as a nation and possibly lending them support.

In January of 1863, Governor John Andrew of Massachusetts was handed the authorization to raise what would become the 54th Massachusetts Volunteers. Frederick Douglass was immediately championing the necessity of black enlistment and participation and although he himself was too old to enlist, Douglass's sons, Charles and Lewis, would enlist in the 54th. To fill the ranks, men would come from 22 states, the District of Columbia, Nova Scotia and even the West Indies. So much rode on their success that they had to be above and beyond average soldiers. A third of the volunteers would be turned away because of high physical standards and all but two were literate, which was much higher than many of their white comrades. Robert Gould Shaw, the 25-year-old son of prominent Boston abolitionists, and veteran of the 2nd Massachusetts, was selected to lead the regiment. Although blacks were now officially allowed to join the fight, the officers of nearly every unit would be white and the 54th was no exception to this, although they were careful to select officers with abolitionist leanings.¹⁶

Though African Americans could now volunteer for the Union army, they were not going to be treated equally and pay quickly became an issue. When the 54th was initially mustered in,

they were informed that they would receive \$13 a month, the same pay received by white soldiers. Instead, the black troops would be given only \$10 a month, followed by a subtraction of \$3 a month to pay for their clothing and equipment, leaving them with an insulting \$7 a month.¹⁷ Upon learning this, the men of the 54th and Governor Andrew were outraged. The 54th refused to accept the lower pay, and continued to out of principle, even after the Governor offered to make up the difference with money from the state treasury.¹⁸ They would serve without pay for eighteen months, until June of 1864, when Congress granted equal pay to U.S. Colored Troops and retroactively reimbursed the previous pay discrepancy.¹⁹

Not only were there issues of unequal treatment toward African American soldiers, but they often faced greater risk in and out of battle than white troops. A misconception that blacks were somehow more resistant to tropical diseases than whites ran throughout the Union command, which meant that often black troops were sent to fight in hostile deep southern environments. Ironically, because many African Americans were new to army life, they were unexposed to many of the "camp diseases" such as typhoid or cholera, and due to their particular vulnerability to these diseases, an outbreak would take an especially high toll on the black soldiers.²⁰ African American troops were also at a higher risk in battle because in many instances, Confederate troops were not interested in taking blacks as prisoners of war.

Confederate Secretary of War James A. Seddon issued a statement regarding black soldiers: "we ought never to be inconvenienced with such prisoners . . . summary execution must therefore be inflicted on those taken." Disturbing incidents resulted in which African American soldiers were murdered as they attempted to surrender or after they already had. One of the largest of these was the Fort Pillow Massacre in 1864. Confederate troops under the command of Nathan Bedford Forrest captured the fort, and white Union prisoners witnessed the slaughter of black

soldiers after they had surrendered.²¹

Back east near Boston, during the spring of 1863, the 54th trained rigorously to prove themselves equal to any white regiment, and their chance would come in late May when they shipped south into the very heart of the Confederacy. On July 18, the 54th would see its first major action when they were ordered to lead the Union assault on Fort Wagner, which guarded Charleston harbor. Though the 54th did not manage to capture the fort, the attack would go down in history. They would show the world that black troops could and would fight as well as white troops, but at a high cost. The 54th would suffer 272 killed, wounded or missing in the assault.²² Among the dead that day was their Colonel, Robert Gould Shaw, who was killed leading his troops over the walls of the fort. He would be buried after the battle by the Confederates in a mass grave with his men. For their bravery, 14 members of the 54th Massachusetts would receive the Medal of Honor; among those was Sgt. William Carney. Carney, upon seeing the color bearer of the regiment shot down, seized the flag and took it all the way to the walls of the fort despite taking wounds to the chest, legs and arm. When Union troops withdrew from the attack, Carney ensured that the flag made it safely back, saying, "The old flag never touched the ground, boys."²³

Colonel James S. Brisbin of the 5th Colored Cavalry would write of the valor of his men following the Battle of Saltsville, Virginia:

The point to be attacked was the side of a high mountain, the rebels being posted half way up behind rifle-pits made of logs and stones to the height of three feet. All being in readiness, the brigade moved to the attack. The rebels opened upon them a terrific fire, but the line pressed steadily forward up the steep side of the mountain until they found themselves within fifty yards of the enemy. Here Colonel Wade (6th U.S. Colored Cavalry) ordered his force to charge, and

the negroes rushed upon the works with a yell, and after a desperate struggle carried the entire line, killing and wounding a large number of the enemy and capturing some prisoners. There were 400 black soldiers engaged in the battle, 100 having been left in the valley to hold horses. Out of the 400 engaged, 114 men and 4 officers fell killed or wounded. Of this fight I can only say that the men could not have behaved more bravely. I have seen white troops fight in twenty-seven battles and I never saw any fight better. At dusk the colored troops were withdrawn from the enemy's works which they had held for over two hours with scarcely a round of ammunition in their cartridge boxes. On the return of the forces those who had scoffed at the colored troops on the march were silent. Nearly all the wounded were brought off, though we had not an ambulance in the command. The negro soldiers preferred present suffering to being murdered at the hands of a cruel enemy. I saw one man riding with his arm off, another shot through the lungs, another shot through both hips. Such of the colored soldiers as fell into the hands of the enemy during the battle were brutally murdered. The negroes did not retaliate, but treated the rebel wounded with great kindness, carrying them water in their canteens and doing all they could to alleviate the sufferings of those whom the fortunes of war had placed in their hands.²⁴

African American soldiers were proving, on battlefields across the war, that they could fight as courageously as any white soldiers. The bloodshed would continue, ever fiercer and more brutal, for nearly another two years until Lee's surrender to Grant at Appomattox on April 9, 1865, and African American troops were involved in nearly every theatre of war. By war's end there would be nearly 180,000 African American soldiers in the Union Army, comprising 10 percent of the total forces.²⁵

The Union was victorious, but ahead lay the equally difficult task of bringing the nation

back together, rebuilding the South, which had been utterly devastated, and the question of full emancipation and its ramifications. The 13th Amendment, passed on January 31, 1865, had unlocked the bonds of slavery across the entire United States, and there were now four million people free and facing an incredibly uncertain future. Frederick Douglass voiced his concerns: "You say you have emancipated us. You have, and I thank you for it. But what is your emancipation . . . when you turned us loose, you gave us no acres. You turned us loose to the sky, the storm, to the whirlwind, and worst of all you turned us loose to the wrath of our infuriated masters."²⁶

In March 1865, the Freedmen's Bureau was established to aid newly freed slaves by providing teachers from the North to bring long withheld literacy to African Americans and distributing captured Confederate land to freedmen. The federal government at the time simply could not handle such an immense organization, so control of the Freedmen's Bureau would fall into the lap of the military, who was also assigned to provide the enforcement of reconstruction measures. General William T. Sherman, on January 16, 1865, issued Field Orders, No.15, which set aside 400,000 acres of coastal and riverbank land from Charleston, South Carolina to Jacksonville, Florida for the resettlement of slaves, allotting 40 acres per family. While the Freedmen's Bureau held much of this land, President Andrew Johnson would issue amnesty and pardons to many ex-Confederates, which put much of the land set aside for freed slaves back into the hands of its former owners. With little support from Congress, the Bureau and freedmen could do little to hold onto the land promised to them. The Freedmen's Bureau itself would eventually dissolve. Unpopular with whites and marred by scandals, it was eliminated in 1871.

African Americans also attempted to buy land for themselves. Black veterans would use their enlistment bounties to purchase land, either as individuals or as part of a group of veterans

who pooled their money together for some land. The problem was, money was extremely hard to come by for African Americans. The few that could raise enough money to buy land often found that white land owners were unwilling to sell or even rent to them. By this, they would keep blacks from being empowered economically and this would eventually lead to the feudal-like system of sharecropping.²⁷

On July 9, 1868, the 14th Amendment made "all persons born or naturalized" in the United States citizens and guaranteed protection from state or federal discrimination. The Freedmen were now citizens. But would they be allowed to vote? Legislatures North and South doubted the wisdom of allowing African Americans to vote and when black suffrage was put up to vote in Connecticut, Minnesota, and Wisconsin, it was defeated in all three states. In February 1870, the 15th Amendment gave the right to vote to all male citizens over the age of 21. It would seem that full citizenship had finally been attained by African Americans, but it was to be tragically short lived.²⁸

Southern whites and ex-confederates were vehemently opposed to measures implemented by the radical Republicans and reconstruction governments across the South, which enabled true African American citizenship. The 14th Amendment, which had granted equal protection from state and federal discrimination, had a tragic flaw; the legislation offered no protection from discrimination by private citizens or businesses. This would give birth to and protect the nearly century-long legacy of black segregation to come. The Civil Rights Act of 1875 attempted to fix the problem; it prevented the segregation of schools, transportation, juries and all forms of public accommodations. The bill passed with little enthusiasm in Congress, only to be struck down as unconstitutional by the U.S. Supreme Court in 1883, with the argument that the 14th Amendment specifically applied only to state- and federally-imposed segregation.²⁹

Reconstruction and the presence of thousands of Federal soldiers would give African Americans some protection of their rights as citizens. The North, however, was growing tired of reconstruction and was beginning to yearn for reconciliation and full national reunion by 1874. Anti-reconstruction Democrats would capitalize on public dissatisfaction toward Radical Republican reconstruction policies and surge on to their first House of Representatives majority in 18 years. An editor of the New York Tribune echoed Northern weariness with reconstruction, writing, "I have no sort of faith in a local government which can only be propped up by foreign bayonets. If negro suffrage means that as a permanency then negro suffrage is a failure." He would prove to be entirely accurate in his assessment. The messy election of 1876 led to the compromise of 1877 and the removal of Federal troops from the South to the western plains, ending reconstruction. The cover provided by Republican governments across the South for which African American citizenship needed to grow had completely collapsed. The right to vote was subsequently taken away from Southern blacks. Poll taxes and literacy tests at voting stations prevented many blacks from voting. Illiterate whites avoided these obstacles at the polls by being "grandfathered" in if their grandfather could vote. Intimidation and fear were also not beneath whites who wanted to see blacks kept as powerless second-class citizens. White supremacist groups like the Ku Klux Klan began to spread like a cancer across the South, and in later years, the North, with the purpose of spreading terror among African American communities. With blacks in the South unable to vote, nearly all African Americans were voted out of public office and with them went the political voices of millions for decades to come.³⁰

African Americans in the United States would see their rights trampled on and their dignity denied. The Supreme Court would give legitimacy to segregation in *Plessy v. Ferguson*, with its infamous "separate but equal" legacy. Even the memory of African Americans in the

Civil War would be swept under the rug. Black veterans were not included in the brotherly embrace of old adversaries, who could respect one another and reminisce and mourn the fallen. Yet they would fight and die again. Be it on the Western plains in the Indian wars and across oceans in the Spanish-American War, the Philippine-American War, World War I, World War II, Korea and Vietnam, fighting for a country that still treated them as second-class citizens. It would not be until another generation, nearly 100 years later, continued the fight that they would finally possess the freedom promised to their forebears.³¹

Notes

1. James M. McPherson, *The Negroes Civil War* (New York: Ballantine Books 1991), p. xv.
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3. Jim Haskins, *Black, Blue and Grey: African Americans in the Civil War* (New York: Simon & Schuster, 1998), p. 24.
4. Freeman, Elsie, Wynell Burroughs Schamel, and Jean West, *The Fight for Equal Rights: Black Soldiers in the Civil War.* *Social Education* 56,2 (February 1992):118-120. (Revised and updated in 1999 by Budge Weidman.)
5. Haskins, p. 32.
6. McPherson, p. 22.
7. Haskins, p. 32.
8. Haskins, p. 42.
9. William S. McFreely, *Frederick Douglass.* (New York: W.W. Norton & Co., 1991), p. 213.
10. Haskins, p. 36.
11. Freeman, Elsie, Wynell Burroughs Schamel, and Jean West, *The Fight for Equal Rights: Black Soldiers in the Civil War.* *Social Education* 56,2 (February 1992):118-120. (Revised and updated in 1999 by Budge Weidman.) Haskins p. 39.
12. Haskins, p. 92, 50, 51.
13. Haskins p. 53.
14. Freeman, Elsie, Wynell Burroughs Schamel, and Jean West, *The Fight for Equal Rights: Black Soldiers in the Civil War.* *Social Education* 56,2 (February 1992):118-120. (Revised and updated in 1999 by Budge Weidman.)

15. McPherson, p. 159.
16. http://www.archives.gov/exhibits/featured_documents/emancipation_proclamation/Haskins
p. 54-58.
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19. Freeman, Elsie, Wynell Burroughs Schamel, and Jean West, The Fight for Equal Rights: Black Soldiers in the Civil War. *Social Education* 56,2 (February 1992):118-120. (Revised and updated in 1999 by Budge Weidman.)
20. Haskins, p. 103-105.
21. Haskins, p. 96, James McPherson, *Battle Cry of Freedom: The Civil War Era*. New York: Oxford university Press., 1988, p. 793.
- 22.. http://www.archives.gov/exhibits/american_originals/54thmass.html
23. Peter Burchard, "We'll Stand by the Union": Robert Gould Shaw and the Black 54th Massachusetts Regiment. New York: Facts on File, Inc., 1993, p, 92.
24. The War of the Rebellion: A compilation of the Official Records of the Union and Confederate Armies, Series I, Volume XXXIX. (Washington, D.C.: U.S. Government Printing Office, 1892)
25. Haskins, p. 114.
26. Who Built America? , p. 513.
27. James McPherson, *Ordeal by fire: The Civil War and Reconstruction*, New York: Alfred A. Knopf, Inc., 1982, p.398, 508, 506.

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Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*. New York: Harper & Row, 1988, p. 1148.

28. McPherson *Ordeal by fire*, p. 501, 512, 517.

29. McPherson *Ordeal by fire*, p. 576, 577.

30. McPherson *Ordeal by fire*, p. 593, 594, 603. Haskins, p. 120.

31. David W. Blight, *"Race and Reunion: The Civil War in American Memory*, The Belknap Press of Harvard University Press, 2001, p. 9.