

Informal Justice: The Confederate Attorneys General, 1861-1865

As the Union strangled the supply chain of the Confederate Army led by General Robert E. Lee during the Siege of Petersburg, President Jefferson Davis asked his Attorney General George Davis for one more opinion: If, and if so how, the terms of surrender agreed to by Confederate General Joseph E. Johnston and Union Major General William Tecumseh Sherman should be ratified by the Confederate President.¹ Consistent with the dominant Confederate interpretation of the Confederate States of America and the United States of America constitutions, Attorney General Davis noted the Constitution to be a compact among sovereign states that may be terminated only by a sovereign state. Davis's acknowledgement underpinned the Southern rationale for secession, as each successive seceding state asserted their sovereign right to repudiate the United States Constitution. As Davis continued though, he admitted the fragility of such beliefs and suggested that the perils of war "overrode all constitutional theories" and so he declared, "I am unhesitatingly of the opinion that the Convention ought to be ratified."² President Davis followed his Attorney General's opinion and used his office as the President of the Confederate States of America to surrender all the armies of the Confederacy.

Despite the extraordinary circumstances that spurred the writing of the last opinion, the opinion Davis issued was similar in structure, tone, and style to the 217 other extant opinions issued by the office of the Attorney General during the Civil War. For the tenure of the Confederate States of America, four individuals—Judah P. Benjamin, Thomas Bragg, Thomas Hill Watts, and finally George Davis—served as the Attorney General. Wade Keyes served as alternatively as the Assistant Attorney General and the interim-Attorney General, between

¹ George Davis, "Opinions of George Davis," in *Opinions of the Confederate Attorneys General*, ed. Rembert Patrick (Buffalo: Dennis & Co., 1950) 580-581.

² Davis, *Opinions of the Confederate Attorneys General*, 583.

appointments to the office.³ The office of the Attorney General took on special significance within the apparatus of the Confederate federal government because of the Confederate legislature's inability to come to a compromise on the seating of a Supreme Court. The Constitution of the Confederate States of America authorized a Supreme Court with the same language as Article Three of the Constitution of the United States of America.⁴ With only mild debate, the Provisional Confederate Congress passed a judicial act to make real the constitutional mandate to establish a Supreme Court. On March 11, 1861 the Provisional Congress approved, and Jefferson Davis signed, the first Confederate Judiciary Act, officially titled "An Act to Establish the Judicial Courts of the Confederate States of America."⁵ Since the Act specified the Court must begin on January 20 of each year, the consensus of the legislature was that the Supreme Court could not be organized until 1862.

The delay proved to be fatal to the actual seating of a Supreme Court since no consensus would emerge again on the Supreme Court's role in the South until 1865. The Judiciary Act identified the Confederate Supreme Court as simply a collection of "all the District Judges, a majority of whom shall be a quorum."⁶ The unusual composition of the Supreme Court resulted from an early compromise among the legislators in the Provisional Congress. Rather than not give the Supreme Court appellate jurisdiction over state courts, legislators agreed instead to make the Court a combination of all the district court judges. This compromise appeased critics, like South Carolina Fire-Eater William Yancey, who feared an independent Supreme Court

³ Rembert Patrick, *Jefferson Davis and His Cabinet* (Baton Rouge: Louisiana State Press, 1944) 298, 311.

⁴ With the exception of the phrase "Confederate States" both clauses are identical: "Section I. (I) The judicial power of the Confederate States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office."

⁵ William M. Robinson, *Justice in Grey: A History of the Judicial System of the Confederate States* (Cambridge: Harvard University Press, 1941) 46.

⁶ Robinson, *Justice in Grey*, 420.

would disrupt state sovereignty.⁷ Belying the concerns of states' rights' Southerners, the Confederate district courts had largely remained the same in personnel and operation as when they were United States district courts. The Savannah district court in Georgia went as far as to just cross out "United" in the phrase United States of America and write above it "Confederate" in all of their pre-printed forms.⁸ The interchangeability of the petitions is indicative of the manner in which the district courts continued to operate the same as they had before secession. In addition, the judges and lawyers remained the same which is significant insomuch as they had been trained in American law schools or by American lawyers and learned American precedents, laws, and traditions. The possibility these district court judges could have been organized into a Supreme Court was strong given the small size of the Confederacy in March, 1861. If seated in March, 1861 there would have been a total of seven justices and a quorum would have been only four justices.

The feasibility of the compromise declined once President Abraham Lincoln requested military assistance from all of the upper South states after the battle at Fort Sumter on April 15, 1861.⁹ Portending the coming secession, all of the upper Southern states refused to offer aide or personnel. Within five weeks Virginia, Arkansas, Tennessee, and North Carolina all seceded and joined the Confederate States of America.¹⁰ This expanded the judges designated by the Judiciary Act to serve as Supreme Court justices to thirteen. President Davis did not think this expansion would be particularly useful and, moreover, realized that given the Confederate desire to expand quickly, the Supreme Court would similarly grow. Further complicating the matter

⁷ David Heidler and Jeanne Heidler, "Courts, C.S.A.," in *Encyclopedia of the American Civil War: A Political, Social, and Military History*, (New York: W.W. Norton & Company, Inc., 2002) 507.

⁸ Savannah District Court petitions. Southeastern National Archives. Atlanta, GA. RG21 U.S. District Court Southern District of Georgia, Savannah, Confederate States, Misc. Papers, Box Nos. 1, 2, 3, 5.

⁹ James McPherson, *Battle Cry of Freedom: The Civil War Era* (Oxford: Oxford University Press, 1988) 276.

¹⁰ McPherson, *Battle Cry of Freedom*, 282-5.

was that the district judges had normal judicial proceedings to tend to in their own jurisdictions; forcing them to come to Richmond throughout the year would functionally shut down federal judicial work in their home districts.¹¹

Without recording a vote or debating the resolution, The Provisional Confederate Congress, on July 31, 1861, passed, and President Davis signed, a bill suspending the organization of a Supreme Court until the First Confederate Congress could make a decision regarding its status.¹² The lack of debate and the decision not to include the vote on the resolution in the minutes of the meeting demonstrates the extent to which the make-up of the Congress shifted as elections in the South were held for the Confederate Congress. The elections for the permanent Congress were scheduled for November 6, 1861.¹³ Before the popular election of representatives, the provisional legislators were more concerned with the enormous task of creating the workings of a day-to-day government. After the election, newly elected Southern congressional representatives began to embed political calculations into each vote and the debate over the Supreme Court became a battleground over states rights, the national character of the Confederacy, and the legacy of United States' laws and customs within the new Confederate States of America. Congressional debate over the Confederate Supreme Court flared tempers to the breaking point; in the March 1862 Congressional hearings on the topic of the formation of a Supreme Court, Georgia Senator Benjamin Hill struck Yancey with a glass inkwell, cutting Yancey's face. Hill proceeded to throw a glass tumbler at Yancey before fellow senators restrained him.¹⁴

¹¹ Heidler and Heidler, *Encyclopedia of the American Civil War*, 507. See also: Robinson, *Justice in Grey*, 197.

¹² Robinson, *Justice in Grey*, 421.

¹³ Jefferson Davis, *A Short History of the Confederate States of America*, (New York: Belford Company Publishers, 1890) 130.

¹⁴ Eric Walther, *William Lowndes Yancey and the Coming of the Civil War*, (Chapel Hill: University of North Carolina Press, 2006) 359. On a 9-8 vote, Yancey was censured by the Confederate Congress rather than Hill due to his alleged incitement of the outburst.

The evident tension between the two opponents contributed to the failure of the Confederate Congress to resolve the disagreement. Although the senators disagreed on the number of judges, the salary of the judges, and who should have the power to appoint judges, the issue that ultimately stymied further agreement was Section 45, which gave the Confederate Supreme Court appellate jurisdiction over all state courts with respect to its Constitution and congressional laws, just as the United States Supreme Court had over state courts with respect to similar issues. The appellate jurisdiction was a settled judicial matter in United States ever since the 1816 United States Supreme Court decision *Martin v. Hunters Lessee*.¹⁵ From a pragmatic standpoint, it is difficult to imagine how disputes are settled in a world in which there is not appellate jurisdiction over state courts when they decide issues of federal statutory or constitutional law. What if Georgia declares conscription unconstitutional while a Tennessee court declares it constitutional? What happens when a Mississippi citizen is detained in South Carolina for a violation of federal law that a Mississippi court has struck down? How does the federal government enforce a tariff that Texas nullified but Arkansas obeys? Although these are questions that have no good answer in a world without appellate jurisdiction over federal issues, states-rights proponents, led by Senator Yancey, refused to compromise and legislators eventually tabled further consideration of the topic.

Confederate Attorneys General and Their Opinions

The Confederate States of America negotiated and renegotiated many contested topics in its five years of existence, including the legality of taxation, the proper status of slaves, and the applicability of United States precedent and norms to the execution of Confederate laws. The

¹⁵ At issue in *Hunters Lessee* was the disputed title to land in Virginia; the Virginia Supreme Court ruled that United States Supreme Court had misinterpreted the treaty. Writing for the Court, Justice Story reversed, holding that the United States Supreme Court had appellate jurisdiction over state courts in all matters relating to national laws or treaties. The case established federal review of state court decisions when there was a federal law, right, or issue involved.

Confederate Attorneys General straddled the nexus of these issues, mediating and deciding disputes among the President of the Confederacy, his cabinet, district courts, and state representatives. The five Attorneys General disagreed significantly on their role within the confederacy. Some scholars have used this disagreement to suggest the Attorneys General did not act as a stand-in for the Supreme Court.¹⁶ Such work, however, does not delineate between the stated preferences of the opinion-writer and the actual function of the opinion, the difference between prescriptive and descriptive opinions, the normal spectrum of philosophical differences among decision-makers, including judges, and how the opinions were received by those who solicited them. Attorney General Thomas Watt's oft-cited statement that the law gave his office no authority to settle facts actually supports the thesis that the Attorney General acted as a de-facto Supreme Court.¹⁷ The United States Supreme Court typically only takes appellate cases in order to settle legal disputes. The resolution of factual disputes is left to the fact-finder, usually the trial court (or jury), and are not upset by an appellate court unless considered "clearly erroneous." Additionally, he had framed his quote as him resisting the urge to use the office as a Supreme Court tribunal.¹⁸ Such resistance implied a contemporary viewpoint of the Attorney General's office as the de-facto Supreme Court within the Confederate States of America.

The statute creating the Confederate office of the Attorney General differed slightly from the similar statute creating the office of the Attorney General in the United States. The Confederate act, approved on February 21, 1861, mandated the Attorney General to represent the Confederate federal government in any case before the Supreme Court as well as to, "to give his

¹⁶ Conrad James, "The Confederate States Department of Justice," *The Journal of Confederate History*, Vol. 1, Issue 2 (1989)153. See also: Marshall DeRosa, *Confederate Constitution of 1861: An Inquiry Into American Constitutionalism*, (Columbia: University of Missouri Press) 77.

¹⁷ James, "The Confederate States Department of Justice," 152.

¹⁸ Deveraux Cannon, "The Confederate States Supreme Court," *Confederate States Bar Association Journal* (December 1987)7.

advice and opinion upon questions of law, when required by the President of the Confederate States, or when requested by any of the Heads of Departments, touching any matters that may concern their Departments on subjects before them.”¹⁹ The United States Attorney General, authorized by the Judiciary Act of 1789, is similarly empowered except for the phrase “touching any matters that may concern their Departments on subjects before them.” The additional language is significant. First, the Confederate Provisional Congress typically adopted the language of the corresponding United States statute verbatim, tweaking only the word “United” or any provisions dealing with slavery, taxation, and other controversial topics. Second, the language adopted a significantly wider jurisdiction for the Attorney General as it permitted them to consult on any topic merely “touching” a concern of another department. The Confederate Attorneys General made full use of this formal difference in the absence of a Supreme Court, exceeding the bounds of the United States Attorney General or what future-Senator Yancey imagined to be their role.

The historiography of the Confederate Attorneys General is amorphous and patched together primarily by historians of the Confederacy without a consideration of their implications on other topics in Southern and United States history. There has only been one book-length work published in the past one hundred years to use the opinions as more than a cursory source. Three articles have cited the opinions extensively but two of these articles did not adequately place the opinions in their historical context. Such a limited historiography implies that historians are either unaware of the rich primary source material of the extant opinions or historians do not value the contribution of the role the Attorneys General played in the Civil War, their

¹⁹ Wade Keyes, “Opinions of Wade Keyes,” in *Opinions of the Confederate Attorneys General*, ed. Rembert Patrick (Buffalo: Dennis & Co., 1950) 37. See also: Rembert Patrick, “Introduction,” in *Opinions of the Confederate Attorneys General* (Buffalo: Dennis & Co., 1950) fn. 3.

implications on the history of Civil War causation, or Confederate legal history.²⁰ The physical text of the opinions have a vexed past. After President Davis abandoned Richmond on April 2, Confederate officials, afraid of the documents being used as evidence in any trial in which they were charged with treason, burned government records wholesale, without regard to their content or significance. Confederate Major Felix Gregory de Fontaine grabbed a fistful of documents and tucked them away.²¹ De Fontaine had previously written a pro-South history of the lead-up to the Civil War titled *A History of American Abolitionism Together with a History of the Southern Confederacy* in 1861. After the Civil War ended though, he moved to New York City where he died of pneumonia in financial straits in 1896.²² Before his death, he made an ill-fated attempt to solicit subscribers so he could afford to publish the papers as “The Missing Records of the Confederate Cabinet.”²³ After his death, the New York Public Library purchased the records from his estate for \$500 but did not catalogue them until 1934. They were transcribed and published in 1950 with the help of Southern historian Rembert Patrick.²⁴ Although the possibility remains that not all opinions were saved from the burning barrel by de Fontaine, the chronological range from 1861 to 1865, and the fact that no other opinions have surfaced elsewhere, suggests he may have been successful in rescuing them all.

²⁰ The book-length work is: William M. Robinson, *Justice in Grey: A History of the Judicial System of the Confederate States* (Cambridge: Harvard University Press, 1941). The articles include: Conrad James, “The Confederate States Department of Justice,” *The Journal of Confederate History*, Vol. 1, Issue 2 (1989), Deveraux Cannon, “The Confederate States Supreme Court,” *Confederate States Bar Association Journal* (December 1987), and David P. Currie, “Through the Looking-Glass: The Confederate Constitution in Congress, 1861-1865,” *Virginia Law Review* Vol. 90, No. 5 (September 2004). Also, for a brief consideration, see: Marshall DeRosa, *Confederate Constitution of 1861: An Inquiry Into American Constitutionalism*, (Columbia: University of Missouri Press)

²¹ James A. Hayt, “The Confederate Archives and Felix G. DeFontaine,” *The South Carolina Historical Magazine*, Vol. 57, No. 4, (1956): 199-200.

²² Patrick, *Opinions of the Confederate Attorneys General*, xv.

²³ Patrick, *Opinions of the Confederate Attorneys General*, xv.

²⁴ Patrick’s transcription of the opinions arose from his use of the documents in his doctoral dissertation on Jefferson Davis’s cabinet. Later, as a professor and chair of the history department at the University of Florida, he oversaw extensive efforts to make Confederate-era documents more accessible to researchers and students.

This paper argues the opinions' chief importance is that they demonstrate that the five Attorneys General wielded the supreme federal judicial power of the South throughout the Civil War. Unlike the opinions issued by the United States Attorneys General which were intended to just set and follow departmental law, the Confederate Attorneys General made a substantial contribution to the creation and execution of legal precedents and norms within the Confederate federal government. The 218 opinions written by the Confederate Attorneys General can be located generally into one of three categories: First, a standard Attorney General opinion that gave straightforward advice on a topic, per the request of the Executive Department's head. This type of opinion is similar to ones written by Edward Bates and James Speed, the United States Attorneys General during the Civil War. Second, the opinions that respond to the head of a Department but that go further than advice to advance a specific decision which has the effect of ruling a state law unconstitutional or otherwise fulfilling a duty typically done by the judicial branch of the government. Third, an opinion in which the Attorney General advised a district or state court on a matter currently pending in front of the court. This type of opinion explicitly exceeded their statutory authority and is the strongest evidence that they operated as a supreme court-like tribunal in the absence of a Confederate high court. All three types of opinions were written in an analogous way to opinions written by judges inasmuch as they cited legal precedent, acknowledged limited jurisdiction, and crafted legal solutions that were commensurate with the case or controversy at hand. More importantly, the opinions were respected and obeyed as if they were judgments by a supreme court. The legitimacy of the Confederate Attorney General's office was the source of its authority, just as the effectiveness of any judiciary rests in its ability to garner and maintain legitimacy in the eyes of those whom it has jurisdiction over.

Among implicating other issues, understanding the Attorneys General as the functional Supreme Court of the Confederate States of America contributes to an ongoing discussion of the causes of the Civil War. Historian James McPherson has gone as far as to assert that few professional historians would believe the ardent belief in states' rights motivated the South to secede or fight the Civil War.²⁵ McPherson delineated professional historians, who have largely coalesced around the Slave Power explanation of the Civil War, from the "Sons of Confederate Veterans and other Southern heritage groups" and the historians who make similar arguments.²⁶ The states' rights explanation still holds significant staying power outside of academic circles and has only receded from the forefront of academia in the past thirty years. So, work must be done to refute an emphasis on the singularity of states' rights as a cause of the Civil War on whatever terms academics advance the thesis today.

Florida Atlantic University Professor Marshall DeRosa has been particularly adamant in advancing his states' rights thesis to the Civil War. DeRosa uses the legal history of the Confederacy to argue the "so-called American Civil War" was actually a war of Northern aggression against the law-abiding South. DeRosa is aware of the existence of the Attorneys General opinions and cursorily cites them in his first book.²⁷ His second book *Redeeming American Democracy: Lessons from the Confederate Constitution* begins with a line-by-line analysis of the Confederate Constitution, identifying every instance it deviates from the United States Constitution. From these differences, DeRosa concluded that the diffuse central power embodied by the Confederate Constitution was closer to the intent authors of the United States

²⁵ James McPherson, *This Mighty Scourge: Perspectives on the Civil War* (Oxford: Oxford University Press, 2009) 7.

²⁶ McPherson, *This Mighty Scourge*, 7. In addition to DeRosa, William Robinson's work reflects a deeply-held belief in the pastoral, glorious South.

²⁷ Marshall DeRosa, *Confederate Constitution of 1861: An Inquiry Into American Constitutionalism*, (Columbia: University of Missouri Press) 163 fn. 42.

Constitution than the antebellum jurisprudence. Further, this constitutional explication is used to support his thesis that the Civil War was a “Constitutional Crisis” precipitated by Northern war interests.²⁸ His work begs a number of questions: If secession is treason without an overriding cause to make it a noble act, what was the cause for Southerners? If it was states rights, and not slavery, the question must be asked: States rights to what end?

Besides being good history, current events today heightens the importance of examining Southern legal history to adequately respond to claims by DeRosa. Although the current Tea Party is not a Southern heritage group in the manner McPherson imagined, there are a large number of Americans who are likely to latch on to arguments DeRosa presents because his conclusions legitimate positions they would like to advance. The current debate over the proper manner to celebrate the one hundred and fifty year anniversary of secession has re-opened this discussion. It is particularly charged as the pro-South interests have invoked the mantle of the Tea Party to assert the importance of states’ rights, while ignoring slavery.²⁹ Understanding the ways in which the lived experience of the Confederacy reflected the pragmatic realization that consolidated, federal power mattered more in wartime than a quixotic quest for unadulterated states rights, helps to render the modern so-called “states righters” an historical footnote. This

The primary flaw in DeRosa’s work is his failure to examine the ways in which formal legal structures, like a written constitution, were actually manifested in a society. The Attorneys General opinions are useful source for illustrating this point within the Confederate States of America. Even conservative Attorney General George Davis’s last opinion makes this point:

²⁸ Marshall DeRosa, *Redeeming American Democracy: Lessons from the Confederate Constitution* (Gretna: Pelican Publishing, 2007) 15. DeRosa goes as far as to advocate secession today as a viable check on what he perceives as the growing power of the current federal government. The central thesis of his text is that the Confederate Constitution offers a model of governance that is both more reflective of the United States Constitution’s authors’ visions and that is better equipped to preserve states’ rights even today.

²⁹ Katharine Seelye, “Celebrating Secession Without the Slaves,” *NYTimes.com*, November 29, 2010. <http://www.nytimes.com/2010/11/30/us/30confed.html?src=me&ref=us> (accessed November 30, 2010).

According to the Confederate Constitution and its philosophical underpinnings, only a state should be permitted to authorize the dissolution of the Confederacy. Still, the exigencies of war put President Jefferson Davis into a position where formal structures mattered less than political and military urgency.³⁰ The importance of examining the opinions is to understand the space between the ideals of its leaders and the day-to-day reality of life within the Confederacy.

The first Confederate Attorney General was Louisiana attorney Judah P. Benjamin. Writing from Montgomery, Alabama on April 1, 1861 Benjamin responded to a letter from the Secretary of the Treasury Christopher Memminger. The text of Memminger's letter has not survived but an analysis of the opinion explicitly names the question, which is: Did the act of Congress to exempt certain commodities from a tariff exempt lemons, oranges, and walnuts? Although less explicit, the opinion suggests Memminger does not believe the items are exempt. As Secretary of the Treasury, one of his chief responsibilities would have been to ensure adequate revenue and the United States Tariff Act of 1857 was primarily a tariff to raise revenue than exert a protectionist influence.³¹ Benjamin began his opinion by discussing the history of the tariff, with a particular emphasis on the Confederate legislature's decision to alter the language while adopting the Tariff Act. Their alteration exempted a number of specific commodities, as well as "all agricultural products in their natural state."³² In Benjamin's reading, the matter hinged on the definition of "agriculture"; if agriculture was characterized by being specifically cultivated by humans, then oranges and lemons were exempt per a reading of the legislature's exemptions. Benjamin argued that both etymologically and in common use,

³⁰ Davis, *Opinions of the Confederate Attorneys General*, 581-3.

³¹ Patrick, *Opinions of the Confederate Attorneys General*, 2. See also: Cynthia Clark Northrup and Elaine C. Prange Turney, *Encyclopedia of Tariffs and Trade in the United States: The Encyclopedia* (Westport: Greenwood Publishing Group, 2003) 106. Pursuant to Confederate law, all United States laws were kept in place unless they violated the Confederate Constitution or were specifically changed or disavowed.

³² Judah Phillip Benjamin, "Opinions of Judah Benjamin," in *Opinions of the Confederate Attorneys General*, ed. Rembert Patrick (Buffalo: Dennis & Co., 1950) 3.

agriculture did indeed mean to be cultivated by humans rather than simply wildly grown. With this settled, Benjamin concluded that oranges and lemons were exempt from tariffs and that walnuts were not since farmers picked them from wild trees while farmers specifically planted and cultivated orange and lemon trees.³³

Attorney General Benjamin indicated some reluctance coming to this conclusion, and noted, “I know that the construction I give to the law reaches much farther than is at first apparent. . . My plain duty is to construe what they have said, not what I may suppose they *would* have said, if their attention had been called to this special question.”³⁴ This conclusion is important because Benjamin admitted he had constructed an interpretation of the law and because he arrived at a conclusion that weakened the stance of the federal government. Benjamin was a strong advocate for a strong federal government. In what the Chicago Tribune described as a “violent speech,” he had declared within weeks of this opinion that the Confederacy ought to wage a war of invasion and seek to exterminate the North.³⁵ Despite the heavy cost such a war would entail, and the readily apparent wishes of Secretary Memminger, he declined to allow the tariff to extend to oranges and lemons. Still, this opinion falls squarely within the bounds of a standard-issue Attorney General opinion. He interpreted the law properly, despite his own personal objections, and did not order a solution beyond asking the legislature to clarify their position. Importantly, Secretary Memminger had not actually begun collecting a tariff on oranges and lemons so Benjamin did not settle an actual dispute but simply gave a legal opinion.

In contrast, from Richmond, Virginia on July 8, 1861, Benjamin acknowledged the receipt of a letter dated June 19 from Secretary of War Leroy Pope Walker. Among Southerners favoring secession, taxation was a particularly vexing issue since it was quite unpopular but

³³ Benjamin, *Opinions of the Confederate Attorneys General*, 4-5.

³⁴ Benjamin, *Opinions of the Confederate Attorneys General*, 5. Original emphasis.

³⁵ Chicago Tribune. “Matters in Dahomey.” Chicago, IL, April 29, 1861. p. 3.

ultimately necessary for the nascent government to raise funds needed to wage a war. Attorney General Benjamin inserted himself into the fray and took upon himself another entangling topic: Tensions between the leadership of the state militias with the political leadership of the Confederate federal government. Walker graduated from the University of Alabama and studied law at the University of Virginia. Upon returning to Alabama after graduating, he became one of the foremost lawyers in Alabama and was among Alabama's fiercest proponents of secession.³⁶ His reliance on Benjamin, despite his own significant legal qualifications, indicated he needed the authority of an ostensibly neutral outsider to adjudicate the controversy; if he had done it himself, the states may have objected on the basis he was biased in favor of his own power. His letter to Benjamin demonstrated the legitimacy of the Attorney General's office as a judicial authority and indicates that even states respected this authority when deliberating on highly charged topics.

The crux of the disagreement between Secretary Walker and the Confederate state governors concerned who had the right to appoint the replacement officers of the volunteer forces. Benjamin immediately observed the phrase "volunteer forces" to be overly vague and without definition in either the Confederate Constitution or the acts authorizing military force.³⁷ Instead of volunteer forces, the laws in question referred to either militia forces or the Confederate army. Benjamin observed that Confederate law additionally permitted the federal government to take control of militia forces, but specifically reserved to the states the right to name officers.³⁸ Having settled his reading of the law, Benjamin said it was simple then to determine who had the legal right to appoint officers: If the force in question was a militia, then the governor or state legislature had the power. If, on the other hand, it was a Confederate army,

³⁶ Patrick, *Opinions of the Confederate Attorneys General*, 6, fn5. See also:

³⁷ Benjamin, *Opinions of the Confederate Attorney General*, 18.

³⁸ Benjamin, *Opinions of the Confederate Attorney General*, 18-19.

then the federal government retained the power. He did acknowledge such simple distinctions were complicated by the “so many laws” passed on the topic, making it difficult to ascertain if a particular group of soldiers were in fact militia or not.

Attorney General Benjamin went on to advise Secretary Walker that he would “cheerfully advise” him to the status of a particular group if Walker asked in the future. The offer to further adjudicate the contested power to appoint officers indicates Benjamin’s expansive interpretation of his powers as the Confederate Attorney General. In this matter, he not only clarified a question of law but settled a dispute between state officials and the federal government and solicited further work by offering to settle the matter with more specific information. This opinion is an example of the second type of opinion, one that goes beyond the simple clarification of a law and instead settles an actual dispute in a tangible manner. The last opinion Judah Benjamin issued was on September 2, 1861. Afterwards, he was appointed and confirmed as the Secretary of War and later the Secretary of State for the Confederate States of America.³⁹ In the interim, Assistant Attorney General Wade Keyes took over the duties of the office of the Confederate Attorney General. He had a starkly different view of the responsibilities and purview of the office than did Benjamin and this was reflected in the opinions he wrote, as much as it was in the opinions he refused to write.

The first two opinions he issued were an attempt to establish strict boundaries for the office, something Keyes did not feel Benjamin did a good enough job doing. In response to a query by Secretary Memminger, Keyes refused to answer the question. The letter, and therefore the specific question, is not extant. The only clue Keyes gives to the content of the letter is that it was originally a dispute between an “E. Belo of Salem, N.C.” and Memminger. Edward Belo

³⁹ Robert Douthat Meade and William C. Davis, *Judah P. Benjamin: A Confederate Statesman* (Baton Rouge: LSU Press, 2001) 179-80.

founded and ran a sizable iron mill in Salem during the Civil War and so, is likely the subject of the letter.⁴⁰ Given the often tenuous financial situation of the Confederate federal government, and their constant need for arms, the dispute likely centered on a payment or supply issue. While he refused to answer the inquiry, Keyes wrote, “The questions contained in the letter are questions of private right which belong to the Courts.”⁴¹ The idea that it was a “private right” question and belonged to the Courts likely surprised Secretary Memminger since Benjamin had seemed more than willing to engage similar questions earlier in the year. The closest previous analogue is when Benjamin found in favor of a private mail contractor in a dispute between the contractor and the Post-Master General John Reagan.⁴² Keyes’ refusal to adjudicate the dispute and that he chose his first two opinions to indicate this shift signals how important it was to him. Keyes refusal is important since it seemed to contradict the statute that created his office.

By November, 1861 the Confederate Congress confirmed Thomas Bragg as Attorney General and Wade Keyes returned to his position as an assistant. The first opinion Bragg wrote attempted to resolve a dispute of “private right,” similar in all regards to the one Wade Keyes had steadfastly refused to interject the office into previously. The now-Secretary of War Benjamin asked a two-pronged question: First, is the government responsible to return safely impressed property? Second, is the government responsible for compensating the owner of an impressed slave who was killed accidentally on a railroad car?⁴³ Bragg answered both questions quickly. His interpretation of the “rules and articles of War” is such that the government is only responsible for compensating owners of impressed property if the property is “any horse, mule,

⁴⁰ Forsyth County Digital Project. “Belo Home,” <http://www.digitalforsyth.org/photos/stories/belo-home> (Accessed October 10, 2010).

⁴¹ Keyes, *Opinions of the Confederate Attorneys General*, 40.

⁴² Keyes, *Opinions of the Confederate Attorneys General*, 23.

⁴³ Thomas Bragg, “Opinions of Thomas Bragg,” in *Opinions of the Confederate Attorneys General*, ed. Rembert Patrick (Buffalo: Dennis & Co., 1950) 51.

ox, wagon, cart, boat, sleigh or harness.”⁴⁴ He concluded that since a slave was not on that list, and a slave was someone’s property, that the government did not need to compensate the aggrieved party. Sensing there may be public dissatisfaction with the opinion, he noted at the end that the solution to this problem was legislative rather than judicial and that the legislature could amend the law to include more types of property.⁴⁵ On face, this opinion may be a routine use of the office insomuch as Bragg gave Secretary Benjamin an opinion on the legality of matter related to the Department of War. Why would Benjamin seek out Bragg’s opinion on such a routine question though? Didn’t Benjamin’s experience as a lawyer and Attorney General prepare him to answer the question, or at least understand the implications for his office? It is possible that Bragg actually settled the matter, much as an arbiter or judge had been. Both parties agreeing to defer to the Attorney General is a potential explanation to understand Secretary Benjamin’s request for the decision.

In the shortest opinion issued by the Attorneys General, Bragg followed-up a conversation with President Davis about pardons and noted the United States Supreme Court case *United States v. Wilson* required that the pardon be delivered to the person being pardoned and that the person must accept the pardon.⁴⁶ Although the circumstances of the opinion are not clear, the opinion is significant in that it cited United States precedent as he addressed the president of the Confederacy and the President confined his actions by following such precedent. Bragg wrote his last opinion on March 19, 1862. In it, he responded to Secretary of the Navy Mallory’s inquiry concerning the divvying up of prize money for the Ship Ariel they had recently captured. The applicable United States law called for a percentage of the money to go to each class of sailors on board the ship. Each class of sailors would then split the money equally

⁴⁴ Bragg, *Opinions of the Confederate Attorneys General*, 52.

⁴⁵ Bragg, *Opinions of the Confederate Attorneys General*, 53.

⁴⁶ *United States v. Wilson*, 32 U.S. 7 Peters 150-163 (1833)

among themselves.⁴⁷ The problem had arisen though that while there were five sailors of the fourth class, there was only one sailor among the fifth class. Under current law, the single fifth class soldier would receive a significant sum of money, exceeding the fourth class soldiers since they were required to divide the money equally. Bragg resolved the conflict between the sailors in two parts. First, he concluded that the law has been correctly interpreted as presented and so, under the law, the single fifth class soldier was entitled to a large sum of money. Second, he acknowledged that such a decision is pragmatically “unsatisfactory” to him so he pursued further arguments to perhaps find a loophole.

To this end, Bragg found that indeed United States law did apply to the Confederate situation. As he observed, “The Act of the Provisional Congress of the 9th February 1861, continued in force in the Confederate States all the laws of the United States...not inconsistent with Constitution of the Confederate States.”⁴⁸ Further, the Act of March 1861 that organized the Confederate Navy adopted all of the laws that pertained to the United States Navy, with the same caveat that it did so unless the laws contradicted the Confederate Constitution. As he somberly concluded, “To that law, it seems to me, you must adhere and distribute the money in classes, whether they be large or small as I have already stated.”⁴⁹ Bragg’s tenure as Attorney General did not last long and he only issued eight opinions. The chief significance of his opinions is that he firmly asserted the applicability of United States law and, like Benjamin, maintained an expansive reading of the types of conflicts the Attorney General could adjudicate. These two characteristics are important in light of the final two Attorneys General who built upon that foundation in order to express their determination to use the office as a functional supreme court in the absence of one in the Confederate States of America.

⁴⁷ Bragg, *Opinions of the Confederate Attorneys General*, 68.

⁴⁸ Bragg, *Opinions of the Confederate Attorneys General*, 69.

⁴⁹ Bragg, *Opinions of the Confederate Attorneys General*, 69.

After Thomas Bragg resigned as Attorney General, President Davis appointed Thomas Hill Watts to succeed him in April, 1862. Watts served until he left to be governor of Alabama in October, 1863. In his time as Attorney General, he wrote more opinions than any other Confederate Attorney General. He was also the most outspoken in his belief that the Attorneys General acted as a judicial tribunal in lieu of a Supreme Court.⁵⁰ Watt's May 22, 1863 opinion is particularly stark in its assertion of judicial power. The opinion, written by Watts at the behest of Secretary of War James A. Seddon, attempted to ascertain whether or not a variety of Executive branch employees named in the letter were entitled to a raise pursuant to an October 13, 1862, Act of Congress that had raised the salaries of all Executive branch appointees living in Richmond, Virginia, making under a certain dollar amount. Watts concluded that none of the employees named by Secretary Seddon were entitled to raises. Anticipating Seddon's dissatisfaction with the decision, Watts argued, "Except by a species of Judicial Legislation, entirely beyond my power and duty, I could not include in the benefits of the Act, the persons who cases are now presented to me."⁵¹ Watts invoked the judicial mantra of interpretation to avoid culpability for not constructing the law in a manner pleasing to Seddon. Additionally, he referred to any potential activism on his part as "judicial legislation," in an example where he is clearly the judiciary. After this, Watts argued the Confederate Constitution separated the powers into three different branches, the executive, the legislative, and the judicial. The legislature can make or repeal laws but cannot interpret the law, according to Watts. On the other hand, the "Judicial Department" is assigned to declare "*what the law is.*"⁵² Having said this, he declared, "The Attorney-General is acting in the Capacity of a Judge and must be governed by the same

⁵⁰ Patrick, *Opinions of the Confederate Attorney General*, xx.

⁵¹ Thomas Hill Watts, "Opinions of Thomas Hill Watts," in *Opinions of the Confederate Attorneys General*, ed. Rembert Patrick (Buffalo: Dennis & Co., 1950) 272.

⁵² Watts, *Opinions of the Confederate Attorneys General*, 273. Original emphasis.

rules which govern Judges...The meaning of the law must be ascertained, by examining each part of it, and the expression of Opinion by the Legislators...cannot be received as evidence of its construction.”⁵³ Watts’ method reasoning made clear he viewed himself and the office he held to be judicial in nature. The ultimate effect of such reasoning in the absence of a supreme court was that he wielded the supreme judicial authority in the Confederacy.

The last opinion Thomas Watts wrote concerned the relation of the Confederacy to the United States.⁵⁴ Among all of the opinions, this one is unique insomuch as its purpose is not immediately apparent and that it concerned a criminal matter. The Secretary of Treasury ostensibly solicited the opinion on a matter of legal jurisdiction. The defendant Barque Rawlins was charged with outfitting a ship to “import Africans to be held as slaves within the United States.”⁵⁵ The United States began the process of prosecuting him in Florida before Florida seceded from the Union. The Confederacy continued to prosecute him afterwards. Watts seemed perplexed about his potential involvement in the case, but soon observed that he “will not shrink from expressing my Opinion on the grave question” although he admitted he does not believe his opinion should “control the Judgment of the Court.”⁵⁶ Watts offered a novel interpretation in his opinion. He began by acknowledging two important facts: Florida, as was standard among the seceding states, adopted all previous laws that were not in contradiction to the new Confederate Constitution or specific acts of legislation, and the Confederate Florida legislature ordered that all pending legal matters before the District Court of the United States in Florida “shall remain unimpaired, and provision shall be made by law for the transfer thereof to the District Courts of

⁵³ Watts, *Opinions of the Confederate Attorneys General*, 274.

⁵⁴ Watts, *Opinions of the Confederate Attorneys General*, 339.

⁵⁵ Watts, *Opinions of the Confederate Attorneys General*, 339.

⁵⁶ Watts, *Opinions of the Confederate Attorneys General*, 339.

Florida.”⁵⁷ With this, the District Court in Florida continued their prosecution of Rawlins as it was still against the law to outfit a ship to import slaves to the Confederacy. Watts suggested that Rawlins should be released by the Confederacy because he committed a crime before it was illegal to do so in Confederate territory. Watts noted the law included no *ex post facto* clause that would make a prosecution of Rawlins possible in Florida. He went on to point out that the Confederate state of Florida does not consider herself a successor to the Union state of Florida, just as the Confederate States of America do not consider themselves the mere successors of the United States of America.

It is likely that Attorney General Watts inserted himself into the judiciary proceeding with the intent of influencing the outcome. A supreme court may influence the direction of lower courts in more ways than just overruling them or issuing a decision. Here, Watts signaled his intent to a lower court in order to sway their outcome. The Attorneys General often used this type of power during their brief existence. In the district court in Savannah, Georgia, for example, the clerk corresponded regularly with Assistant Attorney General Wade Keyes. Only two letters are extant in the district court’s archived materials from 1861 to 1865 but both signal a familiarity and candor that suggest their contact was not infrequent or insignificant. In a letter dated July 16, 1864 Wade Keyes wrote acknowledged the receipt of the letter from the district court judge’s clerk and wrote that the Attorney General believed the matter was entirely up to the district court judge.⁵⁸ The fact that the clerk solicited the opinion of the Attorney General, and with a nonchalance that suggests it is a regular consultation, suggests that the district court relied upon the Attorney General to make decisions, just as a district court would take direction from a

⁵⁷ Watts, *Opinions of the Confederate Attorneys General*, 340.

⁵⁸Letter from Wade Keyes to W.L. Daniels. Southeastern National Archives. Atlanta, GA. RG21 U.S. District Court Southern District of Georgia, Savannah, Confederate States, Misc. Papers, Box No. 3.

supreme court. This is further supported by the attached post-script to the letter which read: “P.S. The Attorney General instructs me to add that as far as his sanction is necessary he gives it.”⁵⁹ Legally, the Attorney General’s sanction is actually never needed for a district court judge to proceed in either the United or Confederate States of America. The assertion suggests that there had been times when the Attorney General did not give his sanction and had altered the decision making process of the district court judge.

In the time between Watts’s resignation to run for governor of Alabama and the confirmation of George Davis, Wade Keyes again took control of the office. Unlike the last time, Keyes took a significant stand and declared Virginia state law unconstitutional and a “nullity.”⁶⁰ Virginia passed laws on March 12 and October 31, 1863 prohibiting the production or sale of hard liquor within the state.⁶¹ Before the state legislature passed the laws, the Confederate federal government had contracted with a factory in Virginia to produce liquor to supply the military. Virginia’s state courts had ordered state law enforcement officials to seize the property used to produce the alcohol for the military and, without the intervention of a higher court, there was going to be a military stand-off between the state militia and the federal military forces.⁶² Keyes concluded that the necessary and proper clause of the Confederate Constitution authorized the Confederate federal government to make any law or contract that was necessary and proper to fulfill any other of their enumerated powers, including the raising of an army.⁶³ The state law prohibiting the fulfillment of a Confederate military contract was therefore unconstitutional.

⁵⁹ Letter from Wade Keyes to W.L. Daniels. Southeastern National Archives. Atlanta, GA. RG21 U.S. District Court Southern District of Georgia, Savannah, Confederate States, Misc. Papers, Box No. 3.

⁶⁰ Keyes, *Opinions of the Confederate Attorneys General*, 363. In law, declaring something to be a nullity is to declare that it never properly existed in the first place.

⁶¹ Patrick, *Opinions of the Confederate Attorneys General*, 363, fn. 8.

⁶² Keyes, *Opinions of the Confederate Attorneys General*, 361-2.

⁶³ The Confederate Constitution’s Article 1, Section 8, Clause 18, gave Congress the authority: “To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the Confederate States, or in any department or officer thereof.”

Keyes offered other examples, including a hypothetical law against the production of munitions or uniforms. In both cases, if a state disagreed with the use of the Confederate military they could exert control over it, if permitted to regulate military contracts. Wade Keyes's opinion overturning the decision of a state court staved off a fight between the state militia and the federal military.

The increasingly large role the Attorneys General had in their role as the pseudo-Supreme Court continued after the Confederate Congress confirmed George Davis as its final Attorney General. Although not as prone to rhetorical outbursts as Watts and was similar in demeanor to Wade Keyes, Davis did not back down from Watt's interpretation of the role of the Attorney General in the Confederacy. His view of the office is made particularly stark in the opinion he issued on May 3, 1864 concerning the constitutionality of the Act of April 24, 1863 (colloquially known as the Tax Act). Again demonstrating the ongoing connection between the district courts and the Attorney General, Justice Edward J. Harden, a federal district court judge in Georgia, solicited Davis for advice concerning the constitutionality of the act. Davis offered a broad reading of the statute: The Act implied an ability to tax all income except the earnings of Army soldiers and naval sailors which it explicitly exempted. The Act taxed incomes below \$1,500 in the Confederacy at 1% per annum and larger incomes at 2% per annum. He wrote that the "universal scope of the law" was evident from the "explicit and imperative" language in the bill which he asserted were the exemptions.⁶⁴ He reasoned that if the legislature did not intend it to be universal, they would not have added specific exemptions. In this opinion, rather than

⁶⁴ George Davis, "Opinions of George Davis," in *Opinions of the Confederate Attorneys General*, ed. Rembert Patrick (Buffalo: Dennis & Co., 1950) 444.

referring Judge Harden to the political process, he went further and declared the law was “unconstitutional and illegal” since it taxed the salary of judges in the Confederacy.⁶⁵

He began with a discussion of the Federalist Papers, which in his reading, the taxation of judicial salaries is repugnant to the idea of an independent judiciary and unconstitutional given a strict textual reading of either the United States Constitution or the Confederate Constitution.⁶⁶ He then quoted a federalist who had argued that judicial compensation merited special attention since legislative control of a judge’s “subsistence” amounted to a power over a judge’s will.⁶⁷ He did not explicitly acknowledge the relationship between the Federalist Papers and the Confederacy, he merely assumed the two were relevant and connected again suggesting the deep connection Confederates felt to the United States Constitutional principles. Next, he wrote that the minimal nature of the tax did not make a difference: the power to tax, after all, was the power to destroy.⁶⁸ He argued no bright-line could distinguish a 2% tax from a 25% tax. After this, he launched into a discussion of the text of the Confederate Constitution. Article 3, Section 1: “The Judges, both of the Supreme and inferior Courts, shall hold their offices during good behavior, and shall, at stated intervals, receive for their services, a compensation which shall not be diminished, during their continuance in office.”⁶⁹ He asserted that a tax would constitute such a diminishment and so, was unconstitutional.

Attorney General Davis burnished his opinion by quoting the constitution of Pennsylvania which contained similar language and a related state Supreme Court case that

⁶⁵ Davis, *Opinions of the Confederate Attorneys General*, 444.

⁶⁶ Davis, *Opinions of the Confederate Attorneys General*, 444.

⁶⁷ Davis, *Opinions of the Confederate Attorneys General*, 444-6.

⁶⁸ Davis is ironically invoking the language of United States Supreme Court case *McCulloch v. Maryland*, in which the Court held the state of Maryland could not tax the federal bank operating in Maryland. The power to tax the bank, the Court argued, was the power to destroy the federal bank. This would have amounted to a state’s nullification of a federal law. Many Southern advocates of secession cited this case, and the broader argument of a national bank, as an unconstitutional expansion of the United States Constitution’s “necessary and proper” clause.

⁶⁹ The United States Constitution uses the word “time” in lieu of “intervals” but is otherwise the same.

invalidated a 2% tax on the judiciary.⁷⁰ His choice to cite the Pennsylvania constitution and court decision reinforces the thesis that the Attorneys General acted as a judicial authority since a judge, given similar circumstances, would seek out and cite relevant cases from other judiciaries. The second act of the Provisional Confederate Congress was to, “[c]ontinue in force all the laws of the United States, in force and in use in the Confederate States that existed before Abraham Lincoln’s election that did not contravene the Constitution of the Confederate States, until altered or repealed.”⁷¹ As such, turning to the Pennsylvania Supreme Court for direction would be a reasonable way to arrive at a decision as a Confederate judge. On the same day as his opinion on the constitutionality of the tax, Davis issued a second opinion on the proper role of the duties of the Attorney General’s office.⁷² In that opinion, he refused to answer an inquiry from a Tennessee official since it did not come by the request of the President or a Cabinet official. Again, this is similar to the reasoning of a federal judge: Each case and controversy must first be considered by the appropriate authority before being adjudicated by the highest federal authority. Although surviving correspondence indicates Davis flaunted the “President or Cabinet official” rule frequently, even he would not respond to an intra-state dispute without it first going before a proper judicial authority. And, as his letter to Justice Harden indicates, he was *not* reticent to offer advice to a district court, even though no a request from an executive branch official—much along the lines of an appellate court providing guidance to a lower court.

A Comparison with U.S. Attorneys General

Unlike the Confederate Attorneys General, the United States Attorneys General during the Civil War, Edward Bates and James Speed, acted primarily as administrators of their department rather than active participants in the interpretation and execution of the law. After

⁷⁰ Davis, *Opinions of the Confederate Attorneys General*, 445.

⁷¹ Watts, *Opinions of the Confederate Attorneys General*, 69.

⁷² Davis, *Opinions of the Confederate Attorneys General*, 442-3.

Congress placed the U.S. district attorneys and marshals under the leadership of the Attorney General when the Civil War began, the day-to-day operations of the Attorney General were primarily concerned with managing the elaborate apparatus of the justice system and the opinions they issued reflected this reality. In response to a letter by Pennsylvania attorney John S. Richards, Assistant Attorney General T.J. Coffey rebuffed Richards' request for Bates' opinion on a topic currently pending in front of a court and, in doing so, laid out Bates' view of the responsibilities and limits of his office. "We give," Coffey writes, "opinions only in cases where the advise [sic] is needed to direct the actions of officers of the government." He went on to conclude that since a court was already considering the issue, the Attorney General declined to give his opinion as it had "no authority" over judicial authority.⁷³ Although the letter does not reference the specific issue, it is clear that Attorney General Bates did not conflate his responsibilities with judicial matters currently pending before a court.

Bates directly contacted judges and judicial clerks more often than his Confederate counterparts but he did so in an exclusively administrative capacity. The opinions indicate he contacted both the Supreme Court and district courts to request briefs, censor marshals under his newly assigned authority, or to inform judges of changes within the offices of the applicable United States Attorney's office. In a March 13, 1862 opinion, Bates contacted district court judge Humphrey Leavitt to notify him of the potential misconduct by one of the marshals employed by the court. Bates acknowledged the extraordinary step of contacting a judge about the issue, although the opinion is silent as to the alleged crime, but he does suggest the contact is needed because the crime potentially impugns the appearance of judicial propriety the court

⁷³ Opinions of the United States Attorney General. Handwritten. (National Archives Microfilm Publication T969, No. 62) National Archives Building, Washington, D.C..

relies on for its authority.⁷⁴ Attorney General Bates also corresponded with the Supreme Court when he needed briefs or filings for cases he wanted to review personally. In these instances, he typically instructed his assistant to request the needed documents.⁷⁵

Bates also regularly managed his network of United States Attorneys, an administrative task that occupied the bulk of his opinions and letters. Bates exerted enormous influence over the U.S. Attorneys. Consistent with the idea of an agency head setting agency policy, he commonly instructed the Attorneys to commence legal proceedings and to stop or defer certain proceedings. When the Missouri U.S. Attorney James O. Broadhead began to prosecute General Nathaniel Watkins for crimes against the Union for his support and aid to Southern insurgents, Bates issued an opinion to Broadhead noting Bates' favorable personal relationship with Watkins and his conviction that Watkins had been misled briefly but is now a strong Union supporter. The implication of the letter is clear: Drop the charges. Confirming the influence Bates had on his subordinates, Broadhead dropped the prosecution, despite the public's keen support of it, and freed Watkins. Local Missourians were not as forgiving and burned the large Watkins estate to the ground. Despite his willingness to intervene in criminal matters, he did take the opportunity to exercise discretion at Seward's expense when the Secretary of State requested that Bates intervene in the prosecution of one of Seward's friends. Although the two maintained a cordial working relationship within President Abraham Lincoln's cabinet, they did not like each other personally and often were at odds on policy matters.⁷⁶ In the opinion, Bates acknowledged the request Seward submitted, along with the associated documents from the British government

⁷⁴ Opinions of the United States Attorney General. Handwritten. (National Archives Microfilm Publication T969, No. 47) National Archives Building, Washington, D.C..

⁷⁵ Opinions of the United States Attorney General. Handwritten. (National Archives Microfilm Publication T969, No. 16) National Archives Building, Washington, D.C..

⁷⁶ Doris Goodwin, *Team of Rivals: The Political Genius of Abraham Lincoln*, (New York: Simon & Schuster, 2005) 337-8.

attesting to the man's personal character and likely innocence, but made a semantic distinction: Seward's letter apparently used the word "pardon" to request the cessation of the prosecution rather than relying just on Bates' prosecutorial discretion.⁷⁷ Rather than seeing beyond the word choice, Bates lectured Seward on the Constitutional process of the pardon and noted that only the president of the United States had such powers. Ultimately, Bates declined to halt the prosecution.

Besides the administrative duties of the United States Attorney General, the office fulfilled an executive branch function by giving feedback and legal advice per the request of the president and other executive branch department heads. The topic of the slave trade occupied a significant amount of his attention, particularly as it related to the Union's efforts to cut off the illegal importation of slaves into the United States. After consulting with President Lincoln and various U.S. district attorneys about a bill, Bates suggested the bill "provided for every conceivable form of evasion which the ingenuity of those engaged in the trade can invent."⁷⁸ This type of consultation with Executive branch employees is explicitly allowed by the law and would fit precisely with the most conservative opinions issued by the Confederate Attorneys General during the same time period. The most well-known opinion Bates authored while in office directly conformed to the statutory duties of his office. Early in the Civil War, President Lincoln considered the need to suspend the rights of habeus corpus of people suspected of aiding or abetting the Southern cause. General George Cadwalader arrested and detained Maryland Congressman John Merryman for interfering with the railroads. Circuit court judge Roger Taney, also a member of the Supreme Court, issued a writ of habeus corpus which Cadwalader ignored

⁷⁷ Opinions of the United States Attorney General. Handwritten. (National Archives Microfilm Publication T969, No. 21) National Archives Building, Washington, D.C..

⁷⁸ Opinions of the United States Attorney General. Handwritten. (National Archives Microfilm Publication T969, No. 21) National Archives Building, Washington, D.C..

on Lincoln's orders. Lincoln had consulted Bates who interpreted the Constitution to give the President significant latitude in the putting down of rebellions and insurrections.⁷⁹ Despite the both the opinion's significance and controversy, he did not exceed the limits of his office when issuing such advice to another member of the executive branch.

After Abraham Lincoln's re-election in 1864, Edward Bates resigned due to concerns over his increasingly frail health. Lincoln appointed James Speed to replace him. Speed's opinions were much like Bates and did not stray from the duties of the office. The most controversial opinion Speed offered in office was also his shortest: In one sentence, Speed declared the legality of trying Lincoln's assassin in a military court rather than a civilian one.⁸⁰ From his home in Missouri, Bates expressed his outrage and wrote to President Andrew Johnson asking that the military courts be abolished entirely and calling Speed an "imbecile."⁸¹

Conclusion

Unlike in the Confederate States of America, the United States had established governmental bodies and lines of command to make decisions, along with a well-established stock of precedent the governmental bodies could rely on when making decisions. The difference between the Confederate and United States opinions then advances the thesis that the Confederate Attorneys General wielded the supreme judicial power within the Confederacy. Instead of arguing in front of judicial bodies, and directing others who did the same, the Confederate Attorneys General provided the intellectual depth and dynamism that helped to integrate the founding values of the Confederacy into the running of a large federal government during a full-scale war being fought within one's borders.

⁷⁹ Phyllis Raybin Emert, *Attorneys General: Enforcing the Law*, (The Oliver Press: Minneapolis, 2005) 38-40.

⁸⁰ Emert, *Attorneys General: Enforcing the Law*, 43.

⁸¹ Emert, *Attorneys General: Enforcing the Law*, 43-4.

George Davis's final balancing act as Attorney General came when he recommended the protocol for surrendering the armies of the Confederate States of America and set about the task of abandoning the office as quickly as possible. Despite the innocuous history of the opinions, they still resonate deeply today as a matter of history since they give insight into the day-to-day happenings of the federal government. The opinions demonstrate how problematic it is for scholars such as DeRosa to read documents and assert their truth without delving into their actual function in a society. Even as regional history has declined as the emphasis on rural and urban studies has increased, the stakes are significant in correcting and expanding the historiography of the opinions of the Confederate Attorneys General since the 218 opinions touch on so many different topics. The histories of confederate political philosophy, the compact theory of governance, Southern legal history, and Civil War causation are all implicated by the opinions. The Attorneys General were among the leading legal scholars of the secessionist generation and the opinions offer insight into their own thought processes and their interpretation of seminal events in Civil War history.

The judicial authority exercised by the Confederate Attorneys General varied depending upon the particular officeholder at the time but did steadily come to resemble the authority that would have been exercised by a supreme court. This shift was due, in a large part, to the increasingly complex world the Confederacy encountered as the euphoria of secession wore off and the reality of war set in. The correspondence between the Georgia district court and the Office of the Attorney General indicates that other leading contemporary judicial authorities relied on the office, something additional archival research throughout the South will hopefully further illuminate. The opinions of the Attorneys General demonstrate the pragmatic calculations

Confederate leaders made as the exigencies of forming a nation during a war collided with competing visions of a new national identity.

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