Law in War, War as Law

Brigadier General Joseph Holt and the Judge Advocate General's Department in the Civil War and Early Reconstruction, 1861–1865

Joshua E. Kastenberg

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Preface

Few authors successfully conclude a project without substantial help from their friends and this author is no exception. Cheryl Chasin a student of the Civil War par excellence, and two of my judge advocate brethren, Eric Merriam and Robert Preston provided their encouragement, insight, and proof-reading skills over a period of several years. In the aftermath of the attacks on September 11, 2001 the Civil War experiences of the Judge Advocate General's Department — now in the United States Air Force called the Judge Advocate General's Corps — were studied not for trivial interest or merely to capture heritage, but rather because many of the arguments in Congress and in the federal courts were made with the idea that much of what was lawful in the Civil War should be lawful today. Seldom, however, did those arguments detail or analyze what actually occurred, or did the people doing the debating and advising conduct significant historic research. Some diligent attorneys and scholars succeeded in doing this, but most did not. To the extent time permitted, several career judge advocates and civil service attorneys did try to uncover the historic record beyond the generalities often presented by political appointees. This book benefitted from hundreds of those discussions, as it did from my discussions with the then Deputy Judge Advocate General of the United States Air Force Judge Advocate General's Corps, Major General Charles Dunlap. It also could not have been completed without the extraordinary help of the staff at the Manuscripts Reading Room of the Library of Congress.

I have been lucky in my military career to have served alongside of conscientious professional officers and non-commissioned officers in each of the service Judge Advocate General's Corps, and in particular those who answered the call and deployed to Iraq and Afghanistan. I am thinking of six captains and non-commissioned officer paralegals in particular, who spent part of a year with me in Iraq. Each of them in their own way inspired me to complete this book. That said, the mistakes in this book are mine, and mine alone. And while I truly thank them, I dedicate this book to my daughter Elinor, who is now nearing three, for the simple reason that I love her.

Abbreviations

JSMP	John McAlister Schofield
MDHS	Maryland Historical Society
MoHS	Missouri Historical Society
OR	The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies
PAL	Papers of Abraham Lincoln
PDWL	Papers of Daniel Webster Whittle
PEB	Papers of Edward Bates
PES	Papers of Edwin Stanton
PFJP	Papers of Fitz John Porter
PJH	Papers of Joseph Holt
PNPB	Papers of Nathaniel Prentiss Banks
PRJ	Papers of Reverdy Johnson
PWHS	Papers of William Henry Seward
PWTS	Papers of William T. Sherman

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1.

Introduction

In early May 1886, Congressman William Peters Hepburn of Iowa argued to the House of Representatives to disband the Judge Advocate General's Department. A Civil War veteran and loyal Republican, his reasoning had to do with the system of executive branch review of courts-martial. He complained that there was no appellate court jurisdiction over courts-martial and that the determination of the fairness of courts-martial was a function vested only in the Judge Advocate General, the Secretary of War, and ultimately the President. To Hepburn, this very construct stood as a barrier to due process in military law. Hepburn's ire stemmed not only from his own Civil War experiences. He had been admitted to the bar since 1854 and believed that courts-martial were bereft of due process. But mostly Hepburn was disgusted with the executive branch's conduct in a recent highly publicized court-martial.[1]

Four years earlier, the Army court-martialed its Judge Advocate General, Brigadier General David Swaim for frauds against the government and conduct unbecoming an officer and a gentleman. Swaim first became associated with the Judge Advocate General's Department during Reconstruction, when, while serving as a junior infantry officer in Mississippi, he argued to a federal judge the executive branch's constitutional authority to arrest and detain a newspaper publisher without trial. The local judge advocate was absent and Swaim had been admitted to the Ohio bar prior to the war. With the Judge Advocate General's permission and Congressman James Abram Garfield's lobbying, Swaim was temporarily appointed as the judge advocate to the District of Mississippi. The newspaper publisher had authored "incendiary articles," against the military's administration of Mississippi. The federal judge agreed with Swaim's argument and eventually the case came before the Supreme Court which upheld the executive branch, though on different grounds than Swaim initially argued. Swaim's success caught the Judge Advocate General's attention and resulted in his transfer into the Judge Advocate General's Department.[2]

Seventeen years later, in his own court-martial Swaim was sentenced to be removed from the army's payrolls for twelve years and then allowed to retire. The court-martial did not sentence him to imprisonment or dismissal from the Army. As a result, Swaim was allowed to retire in his rank and collect a pension, albeit after a twelve-year hiatus. Unsatisfied with the leniency of the sentence, President Chester Alan Arthur ordered the officers on the court-martial to reconsider the sentence three times, hoping for a more severe

1. For a detailed overview of Congressman Hepburn's biography, see, John E. Brigg's, *William Peters Hepburn* (Iowa City: State Historical Society of Iowa, 1919).

2. William R. Robie, "The Court Martial of a Judge Advocate General: Brigadier General David G. Swaim (1884)," 56 *Military Law Review* (1972), 211–212. The specific case he argued was captioned, *Ex parte McCardle*, 73 U.S. 6 Wall. 318 (1867). The Supreme Court case of the same name is found at 74 U.S. 506 (1868).

penalty. Arthur's order was, at the time, a lawful action, though today it would violate the Constitution's prohibition against double jeopardy. In seeking to dismantle the Department, Hepburn referred to Swaim's case arguing, "I condemn a system of law which permits the President of the United States to send back to a court-martial twice over their findings and judgment and make another one conform to his ideas of proper punishment."[3]

Hepburn was soon joined by Congressmen Edward S. Bragg, a Wisconsin Democrat and Civil War veteran who in 1865 sat in judgment of Henry Wirz, the commandant of the notorious Andersonville prisoner of war camp, and Joseph Wheeler an Alabama Democrat and veteran of the Confederate Army who rose to the rank of cavalry general. Bragg and Wheeler used the debates to publicly denounce Brigadier General Joseph Holt, the Army's Judge Advocate General during most of the Civil War, notwithstanding the fact Holt had retired thirteen years earlier. Their attack included a blistering indictment of Holt's conduct in the court martial of Union General Fitz-John Porter, tried in 1863, as well as the 1865 trial of Mary Surratt, a women accused of conspiring with John Wilkes Booth to murder President Lincoln. Such attacks on Holt's character had been the norm in the half decade after the war, but had subsided by the late 1870s.

An attack on Holt's character was not what Hepburn intended, and he distanced himself from Wheeler and Bragg. Instead, Hepburn defended Holt. His arguments, he counseled the House of Representatives, were solely based on a lack of fairness in the adjudication of courts-martial to which Holt bore no blame. Yet, the fact that thirteen years after Holt's retirement, and twenty-two after Surratt's execution, the retired Judge Advocate General was once more at the center of a Congressional debate was telling as to the power he once possessed in fighting to preserve the Union and destroy slavery. In exercising his authority, he aided, and sometimes oversaw, the destruction of many lives and reputations.[4]

I

This treatise is a study on our military law in wartime; and more specifically the jurisdictional expansion of the United States military law during the Civil War, to include the arrests and trials of civilians. It concentrates on an often neglected source of the expansion of military law, Joseph Holt, the Judge Advocate General and those serving under him, both in the Union Army's fielded forces, and, in what became known as the Bureau of Military Justice. Together, these men formed the Judge Advocate General's Department. Lawrence M. Friedman, one of the late twentieth century's prominent legal historians, aptly observed that legal history is far more than the passage and enforcement of laws; it is also about the people on both ends of the process. This book is written with Friedman's view of legal history. It does not cover all of battles, trials, or internecine struggles which occurred during the war, but it does analyze the Judge Advocate General's Department's role in many of these events.[5]

Admittedly, the expansion of military law over the nation's citizenry did not occur without Congress' action. On July 17, 1862, Congress authorized Lincoln to appoint,

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3. The substance of these debates and their extracts are found in the *Army Navy Journal*, May 15, 1886, 857.

4. Id.

5. See e.g. Lawrence Friedman, *Law in America, A Short History* (New York: Random House, 2002), 1–19.

with the Senate's advice and consent, a Judge Advocate General, "to whose office shall be returned for revision, the records and proceedings of all courts-martial and military commissions and where a record shall be kept of all proceedings had thereupon." The term, "military commission," at a minimum expanded the military's jurisdiction over civilians in the rebelling states, but in reality the jurisdictional expansion ultimately included citizens in the Union.[6]

One year later, Congress expanded court-martial jurisdiction over common law offenses such as murder, robbery, and rape. Prior to the Civil War, the military's jurisdiction, even over its own soldiers, did not cover such offenses unless there were no functioning civil courts and the crimes "directly prejudiced good order and military discipline." The military traditionally had only concerned itself with military offenses such as desertion, conduct unbecoming an officer and gentleman, mutiny, and other uniquely military offenses. This meant that the more than two million men in blue uniforms found themselves subject to court-martial jurisdiction for almost every codified offense in the nation's law books. With the enlargement of military jurisdiction over routine common law offenses, more and more civilians came under its control. The expansion also occurred as the Union's war efforts moved from a war to kindly preserve itself into a "hard war." Holt desired this change, indeed he lobbied for it, because he viewed the Civil War as a life and death struggle for the Constitution's survival.[7]

To be sure, Judge Advocate General Joseph Holt has been written about in hundreds of books, law articles, and newspaper columns. He was a very controversial, and often, very hated man. Much of this hatred originated in his transition away from his prewar ideology of Jacksonian Democracy. Holt's former political allies found this transition a personal treason. Even political alliances made during the war resulting from Holt's transition crumbled after Lincoln's death. Orville Hickman Browning, Lincoln's confidant and a one-time Illinois senator who initially admired Holt, became one of many politicians disaffected with him, recording that the judge advocate general carried secrecy and vindictiveness to obnoxious extremes.

Holt was principled, dedicated to the preservation of the Union, and over time, both the abolition of slavery and the elevation of blacks to equality of citizenship under the law. This was a remarkable evolution of a man who was reared in a slave owning family and had, on the eve of the war, disdained abolitionists. Importantly, Holt was not the only judge advocate general during the conflict. He followed Major John Fitzgerald Lee, a politically conservative career officer and relative of Robert E. Lee, and Major James Meline, who served in the position for a very brief and inconsequential tenure. Prior to his forced retirement, John F. Lee enjoyed support from Holt's eventual wartime political enemies within the Union, which, in some cases affected the workings of the Judge Advocate General's Department.[8]

But this treatise is not a biography of Joseph Holt, though he has the central place within it. There were a small number of men serving in the Judge Advocate General's De-

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6. Act of July 17, 1862, ch. 201, sec. 5, 12 Stat. 598. The same act also authorized one judge advocate for each army in the field. See also, Thomas O' Brien and Oliver Diefendorf, *General Orders of the War Department Embracing the Years 1861, 1862 and 1863: Adapted Specifically for the Use of the Army and Navy of the United States* (New York: Derby & Co, 1864), 348.

7. Act of March 3, 1863, 12 Stat. 736, sec. 30 (1863). See also, William Winthrop, *Military Law and Precedents* (Washington DC: War Department, 1920 reprint), 666–668. Winthrop's treatise became the influential military law book through both World Wars and is still cited by the federal courts.

8. Theodore C. Pease ed., *Diary of Orville Hickman Browning,* Vol. II, entry for March 23, 1865, (Springfield, IL: Trustees of the Illinois State Historical Library, 1925–1933), 14 and entry for July 28, at 209.

partment—President Abraham Lincoln nominated thirty five who entered the Department with Congressional approval to be exact—and this treatise is also about them: their pre-war personal backgrounds, political beliefs, military experience, actions during the war, and most importantly, how they influenced the war's outcome as well as shaped the early period of Reconstruction. It also includes the backgrounds and actions of several others who served as judge advocates on a temporary or "*ad hoc*" basis, but were not legislatively appointed as such. The overwhelming majority of courts-martial conducted during the Civil War were tried by *ad hoc* judge advocates; officers serving in the line of the Army who were selected on a temporary basis by their commanders to the duty. Commanding generals appointed a few judge advocates to long term staff officer positions where they performed the same duties as their legislatively appointed counterparts. These men served a unique role in adjudicating both courts-martial (trials of soldiers) and military commissions (military trials of civilians), as well as overseeing the implementation and enforcement of martial law. Officers serving as judge advocates not only performed these sweeping duties they also took part in the formation of an "American Law of War."

By the close of the war, judge advocates served in Washington DC and in all of the major geographic and fielded army commands. There were hundreds of officers assigned as temporary or *ad hoc* judge advocates serving at the brigade, division and corps levels in the Union Army as well. They were responsible for overseeing the thousands of courts-martial and advising commanders on a myriad of legal matters. These individuals may have possessed a strong legal background or no legal knowledge at all. They ranged in quality from Harvard educated future president Rutherford B. Hayes to an alcoholic officer who repeatedly failed to swear witnesses to testify truthfully. How influential were these men? In the case of Holt and the legislatively appointed judge advocates, these men influenced the strategy of the war far beyond the normal authority of their rank. But they usually did so quietly, and without the credit that military historians accord general officers.

Civil War era cases such as the court martial of General Fitz John Porter, the military seizure of John Merryman, the military commission trials of Clement Vallandigham, the Sioux Indians in Minnesota, Henry Wirz, Mary Surratt, and Lambdin Milligan all shaped the direction of the Union's war strategy and post-war Reconstruction policies. Historically, these trials have been presented in a partisan light, and quite often backed by shoddy research as a result. Even the more modern dispassionate studies tend to focus on Lincoln, or secondarily, on Secretary of War Edwin M. Stanton. A study of the judge advocates during the Civil War and Reconstruction not only provides better context for these trials, it also brings clarity as to what actually occurred in the courtrooms, in the War Department, and in the White House in regard to the expansion of military and martial law. Such a study, to the best knowledge of the author, has never been published. Yet, the fact that the men serving in the Judge Advocate General's Department took part in, and indeed influenced, many of the critical events in the war merits it.

Any historic project on the role of the judge advocates and the expansion of military law requires a definition of "military law." The field of military law encompasses not only the military criminal law and disciplinary rules governing the nation's military forces, but also the Constitutional foundations of civil and military relations, as well as a large body of international law. Military law includes martial law as well. Indeed, from the beginning of the nation's founding, martial law was thought to have been part of the military law, and this view the founders inherited from Britain. What made martial law unique, however, is that it was often viewed as the will of a commanding general: a temporary law made without the customary constitutional processes. The Nation's Military law is, in effect, all

of the domestic and international law that affects the existence and efficiency of the military, as well as the military's place in the United States' democratic society.[9]

Having defined the parameters of military law in its normal peacetime state, it is well known that this body of law's jurisdiction grew to an unparalleled degree during the Civil War. The expansion of military law has never grown to the Civil War's extremes since 1868: not in World War I, not during the immediate aftermath of Pearl Harbor, not during the height of the Red Scare in the Cold War, and not during our present post-September 11, 2001 times. Joseph Holt welcomed this expansion and indeed pushed for it, because he felt it necessary to preserve the Constitution and the Union. He also found a team of judge advocates who were, for the most part, ideologically driven to support him.

Most of Holt's judge advocates came from the upper echelons of society. Although it was Lincoln who nominated judge advocates to Congress for the thirty-five legislated positions, Holt and Stanton placed their stamp of approval on most, and those they opposed were not nominated. Ultimately, the majority of judge advocates who served in the legislatively appointed positions as well those assigned by the geographic and Army commanders provided legitimacy to the Judge Advocate General's Department's wartime conduct for reasons analyzed throughout this study.

The judge advocates who were politically-minded prior to the war espoused Whig principles of a federal government involved in constructing the nation's infrastructure. As the Whig Party collapsed after 1852, a number of future judge advocates embraced free-soil ideology. While not all of the future judge advocates believed in equality—some of the younger judge advocates did—all found slavery both unconstitutional and immoral. Following a trend common among anti-slavery northerners, some judge advocates transitioned from Whig to Know-Nothing politics prior to becoming Republicans. By 1863 almost all of the men who entered into the Judge Advocate General's Department were Republicans, and radical ones at that.

They were educated at Harvard, Yale or other well-regarded universities in an era where most attorneys were admitted to the bar by studying under the tutelage of a practicing attorney, and then being quizzed on their legal knowledge by a sitting judge. Most of Holt's judge advocates were not only knowledgeable in criminal and civil law, constitutional law, international law, and how the government functioned. They were, by the outbreak of the war, practicing in these areas and producing scholarly advances in the law as well.[10]

Some came from prominent families whose names were already embedded in American history: Knox, Eaton, Clinton, Winthrop, Burnett, Bolles, Joy, Wolcott, and Gray. Others achieved prominence in the law after the war's conclusion such as Henry H. Bingham who was brevetted general for his gallantry and courage in the 1864 Wilderness battles, and became one of the longest serving congressmen in American history. While four of the legislatively approved judge advocates had prewar military service, had the war never occurred, most would not have given a thought to serving in the army. And yet, when South Carolina militia fired on Fort Sumter, the men who later transferred into the Judge Advocate General's Department enthusiastically enlisted into the army not only to pre-

9. Joseph Story, *Commentaries on the Constitution of the United States* 5th ed. (Boston: Little Brown and Co. 1891), 1196–1197; see also, George B. Davis, *A Treatise on the Military Law of the United States*, 2nd rev. ed. (London: John Wiley & Sons, 1899), 1; for the classic British view of martial law, see William Blackstone, *Commentaries on the Laws of Great Britain*, William C. Jones, ed., Vol. I, (San Francisco: Bancroft & Whitney, 1915), [sec. 553], 568.

10. Lawrence Freidman, *The History of American Law*, 3d ed. (New York: Touchstone, 2005), 463–466.

serve the Union, but in some cases, to destroy the institution of slavery. This made them different from their uniformed brethren who enlisted largely to preserve the Union. Their ideological reasons for joining the fight also provide context to how far they pushed for the expansion of military law into civil society.[11]

As the war progressed, Holt and his judge advocates used the military law to preserve the Union, destroy slavery—the very institution which defined the Confederacy, and crush all enemies of the administration and its goals, including internal enemies. They also attempted to build a foundation of a colorblind legal system.

They did not, as their opponents often accused them, routinely and without conscience abandon the Constitution for expediency. To the contrary, their legal and professional positions while unique and in hindsight sometimes wrong, were usually developed through thoughtful consideration and had a basis. Partly, this is because the military law of the United States was unsettled. Holt and his judge advocates did not create the system of prosecuting and reviewing cases. Rather, they inherited a unique legal process within American jurisprudence. The nation's military law had been designed to discipline an army of 10,000 men at any given time and, in the rare instances when the federal government called the militia forward, a larger army. It was not designed to suppress a mass insurrection endangering the Union and the Constitution. Rather, the nation's military law was the backbone of maintaining the professionalism of the small force.[12]

In this vein, the alien character of the nation's military laws in the Civil War were little different than the nation's overall military policy. Russell Weigley, one of the Twentieth Century's preeminent military historians wrote of the Army prior to the war's outbreak, "when the professional officers led Americans to war, they would have to lead armed citizens, whatever their deficiencies, or lack the numbers to fight a serious war. But the professionals gave scarcely any thought to preparing for this fact by evolving a military doctrine designed to draw the highest usefulness from an armed citizenry." The same statement applies to the nation's military laws prior to the war.[13]

Although Holt masterminded the extreme expansion of military law, he acknowledged that it had little precedent. Looking back at the Civil War in 1884, Holt penned such an admission to James Buchanan Henry, President Buchanan's private secretary who was then in the process of compiling Buchanan's letters:

> Our political forefathers though wise in their generation do not appear to have been sufficiently acquainted with the capabilities of crime to foresee that possibility at some future day even the authorities of a state might be found in guilty complicity with a conspiracy against the national life and thus no provision whatever was made to meet so humiliating an emergency in our history.[14]

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11. There is a consensus that the majority of Union soldiers who volunteered did not do so for the purpose of emancipation. See e.g., James McPherson, *For Cause and Comrades: Why Men Fought in the Civil War* (New York: Oxford University Press, 1997), 19; Gerald F. Linderman, *Embattled Courage: The Experience of Combat in the American Civil War* (New York: Free Press, 1987), 82–110; and William Marvel, *Mr. Lincoln Goes to War* (New York: Houghton-Mifflin, 2006), 36–62.

12. John O'Brien, *A Treatise on American Military Laws and the Practice of Courts-Martial, With Suggestions for their Improvement* (Philadelphia: Lee & Blanchard, 1848), 25. Discussed in a later chapter titled, "The Law and Literature of Courts-Martial and Military Commissions," O'Brien was one of the leading military law scholars of his era.

13. Russell Weigley, *Military Thought from Washington to Marshall* (New York: Columbia, 1962), 78.

14. Joseph Holt to James Buchanan Henry, esquire, May 26, 1884 [Carl Brent Swisher collection, Box 15, LOC].