RICE UNIVERSITY

CONFEDERATE MILITARY JUSTICE: A STATUTORY AND PROCEDURAL APPROACH

by

JEFFREY DWIGHT PEPPERS

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF ARTS

Thesis Director's signature:

Houston, Texas

May 1976
ABSTRACT

CONFEDERATE MILITARY JUSTICE: A STATUTORY AND PROCEDURAL APPROACH

JEFFREY DWIGHT PEPPERS

The Confederate States of America developed a highly sophisticated and effective system of military justice and only reverses on the battlefield prevented them from improving their system to an even greater extent. Adopting a set of Articles of War and Army Regulations which the United States Army had used since its inception, the Confederacy soon discovered that their adopted system was not effective when used with the lack of communications and discipline that faced the Confederate army.

To combat the inefficiencies of their transplanted military justice system, the Confederate Congress, acting on recommendations from General Robert E. Lee, organized a military court system with professional personnel and specific duties and posts for a great efficiency.

Because of the circumstances facing the Confederate States few records were kept and there were no books or documents produced explaining, discussing or otherwise
illuminating the subject of Confederate military law. Therefore, most of this thesis had to be statutory, organizational or procedural in nature, using official Confederate documents, Army regulations and the semi-official *Vade Mecum*. Piecing these rules, regulations and procedures together, I have tried not to produce any new theories, but rather I have tried to put all of the material in one place in an organized form.
I owe very much to very many people, so many that most will have to go unnamed. My parents, of course, deserve much of the credit for my education in general and for this thesis in particular. Professors Hyman and Vandiver from Rice University and Professors Herget and Douglass from Bates College of Law have assisted me immeasureably in the production of this work and for their help I thank them. Mr. and Mrs. William C. Blackstone have been both friends and advisors to me during my years at Rice and Bates and without their help and guidance none of this work would have been possible. Last, but certainly not least, Susan Weihrich has always shown the faith in and patience with me necessary to push me through to the conclusion of my programs. Her contribution has, by far, been the greatest.
# TABLE OF CONTENTS

I. Historical Backgrounds of American Military Jurisprudence  
   A. Early Military Law and Tribunals 1  
   B. Early American Military Law and Tribunals 5  

II. Confederate Courts-Martial and Courts of Inquiry 7  
   A. Introduction 7  
   B. Courts of Inquiry 9  
      1. Organization of Courts of Inquiry 10  
      2. Procedure of Courts of Inquiry 12  
      3. The Case of Commodore Josiah Tattnal, C.S.N. 15  
   C. Courts-Martial 17  
      1. Organization and Jurisdiction of Courts-Martial 17  
      2. Punishments 25  
      3. Procedure 28  
   D. Review and Execution of Sentence 33  

III. Military Courts 37  

IV. The Judge Advocate 48  
   A. The Trial Judge Advocate 48  
   B. The Judge Advocate General 57  

V. Conclusions 60  

VI. Diagram 63  

VII. Footnotes 64  

VIII. Bibliography 78
A. Early Military Law and Tribunals

"Richard, by the grace of God, King of England, Duke of Normandy and Aquitaine, and Earl of Anjou, to all his subjects about to proceed by sea to Jerusalem, greeting. Know ye, that we, with common consent of fit and proper men, have made the enactments, underwritten. Whoever shall slay a man shipboard, he shall be bound to the dead man and thrown into the sea. If he shall slay him on land he shall be bound to the dead man and buried in the earth. If anyone shall be convicted, by means of lawful witnesses, of having drawn out a knife with which to strike another, or shall strike another so as to draw blood, he shall lose his hand. If, also, he shall give a blow with his hand, without shedding blood, he shall be plunged in the sea three times. If any man shall utter disgraceful language or abuse, or curse his companion, he shall pay him an ounce of silver for every time he so abused him. A robber who shall be convicted of theft shall have his head cropped after the manner of a champion, and boiling pitch shall be poured there on, and then the feathers of a cushion shall be shaken out upon him, so that he may be known, and at first land at which the ship shall touch, he shall be set on short. Witness myself, at Chinion."

This early attempt at maintaining discipline and control over a military force may appear barbaric at first reading, but when considering in the context of the civil law in England at this same time it is difficult to ascribe the
harshness of the "machinations of the military mind." Most civil crimes were punishable by death, mutilation or disem-bowelment. The importance of Richard's decree lies in the fact that it was the first attempt to separate military from civil law. True, there existed some military law in Europe before the fall of the Roman Empire, but this existed only as an extension of the feudal law adopted from the Tuutonic tribes by the Romans under Alexander Severus. After the fall of the Roman Empire, the conquering Huns, Goths, Franks, Vandals and Lombards spread this feudal law throughout the European continent. William I brought this feudal law to England in 1066. Richard's decree served as the point of separation between civil and military law.

Following the classic pronouncement of Richard I in 1190, successive Articles of War were issued by royal fiat or royal delegation as occasion required. Only a few of these are important to the study of American military law. In 1385 Richard II proclaimed Articles of War comprising twenty-four paragraphed items governing not only the conduct of soldiers but providing in detail for the division of the arms and mounts of those taken prisoner. Similar military codes establishing separate military tribunals are to be found in other European countries at an early date. The first French
ordinance of military law dated back to 1378 and the first German *Kriegsartikel* to 1487. Other celebrated Articles of War were those of the Franks under Emperor Charles V in 1532, of the Netherlands in 1590, of Louis XIV in 1651 and 1665, of Peter the Great in 1715 and of Empress Maria Teresa in 1768. Perhaps the most elaborate and detailed were the famous Articles of War issued in 1621 by King Gustavus Adolphus of Sweden. These contained one hundred and sixty-seven articles, a number of which, by their careful provisions for court procedure, indicated concern for what is now characterized as due process of law. Early British interest in the rudiments of military "due process" was evidenced by some of the provisions in the Prince Rupert Articles of 1672, in the English Military Discipline of James II of 1686, in the Articles of James II of 1688.

The English Parliament first directly entered the field of military law with the passage of the Mutiny Act. It was finally adopted in the time of William III in 1689 as a result of the mutiny and desertion of Scottish troops adhering to the Stuart cause in the rebellion of 1686. Its purpose was to deprive the crown of any army for more than one year at a time by limiting army appropriations and the authority to define and punish military offenses to one year.
Thereafter, annual mutiny acts were passed which made mutiny and desertion punishable by court-martial, but left all other matters affecting discipline to regulation by royal prerogative as before, thus sanctioning the then existing Articles for the government of the British Army. Thus military law in time of peace did not come into existence in statutory form until the passage of the Mutiny Act. The system of governing troops in time of war by Articles of War issued under royal prerogative continued from the Conquest until superseded by corresponding statutory power in 1803. All earlier British ordinances and Articles of War remained in force only during the service of the troops for whose government they were issued and ceased to operate upon the conclusion of peace.

Although remaining relatively unchanged in matters essential to discipline, new editions of Articles were issued from time to time, especially during the last half of the eighteenth century. For example from 1766 to 1776 seven sets of British Articles were issued. It is clear, however, that throughout British history in time of war, from the Conquest to the American Revolution, military laws and tribunals entirely separate from civilian laws and courts have been employed to administer justice in the armed forces.
B. Early American Military Law and Tribunals

The substance of the original American Articles of War has been traced to the Code of Gustavus Adolphus of 1621 and to the British Articles of 1774. The first Articles of War drafted on American soil for American troops were those adopted by the Provisional Congress of Massachusetts Bay on April 5, 1775, for observance by Massachusetts troops. They consisted of fifty-three articles and spoke of "the duty we owe ... to the king." These were followed by Articles enacted June 30, 1775, by the second Continental Congress consisting of sixty-nine articles. The preamble recited that "His Majesty's most faithful subjects ... are reduced to a dangerous ... situation by ... the British minister ... and oppressive acts of the British Parliament ..." Sixteen additional articles were enacted November 7, 1775.

On September 20, 1776, American Articles of War consisting of eighteen sections each containing from two to seventeen articles were enacted by the Continental Congress. This revision was made at the suggestion of General Washington. The work of revision was performed by a congressional committee composed of John Adams, Thomas Jefferson, John Rutledge, James Wilson and R.R. Livingston. This document
was the first to speak of "... the respective Armies of the United States" and omitted all reference to the Crown.20

In a period of eighteen months patriots had transformed the British military legal system into an American institution considered to be appropriate for the government of an Army of freemen fighting for freedom. American courts-martial had already become recognized agencies of American justice. John Marshall, then a twenty-two year old captain-lieutenant of infantry, was at Valley Forge in the bitter fall of 1777, appointed "Deputy Judge Advocate in the Army of the United States," in addition to his other duties.21 Thus John Marshall was a party to the shaping of American military law more than ten years before there was a Supreme Court of the United States and more than twenty years before he became Chief Justice of the United States.

Other pre-constitutional developments in the Articles of War are worthy of note. By Congressional resolution of May 27, 1777, the general or commander-in-chief was given power to pardon or mitigate punishments authorized by the Articles of War.22 The most important of other amendments made was accomplished by congressional resolution on May 31, 1786, reducing the required membership of courts-martial.23 It was the Articles of 1776 plus these amendments which
continued in force at and after the adoption of the Constitution. It should be observed from the very beginning American Articles of War have been wholly statutory products of congressional exercise of legislative power and that the jurisdiction of American courts-martial has always been exclusively criminal.

Under its power "to make Rules for the Government and Regulation of the land and naval Forces" Congress has perpetuated and from time to time changed the Articles of War. The first United States Congress by Act of September 29, 1789, recognized the existing military establishment and provided that the troops thus recognized should "be governed by the rules and articles of war which have been established by the United States in Congress assembled, or by such rules and articles of war, as may hereafter by law be established."

The Articles of War of 1806 consisting of one hundred and one articles superseded all other enactments on the subject and reverted to consecutive numbering without division into sections. These Articles, except for minor amendments, remained in force until 1876, thus withstandng the tests of the War of 1812, the Mexican War, the Civil War and part of the Indian Wars. During the War of 1812 four articles were amended, during the Seminole wars three were amended and one added and in the Civil War seventeen articles were amended and eight added.
CHAPTER II

CONFEDERATE COURTS-MARTIAL AND COURTS OF INQUIRY

A. Introduction

When the last shots had been fired in Charleston harbor and, at Fort Sumter, Major Anderson had lowered his flag, the fledgling Southern Republic found herself in need of an army for the defense of the homeland against invasion from the North. While the South did not suffer from a dearth of talent, having summoned almost half of the available officer strength from the North, organization of this strength was to present a problem right up to Lee's surrender in April, 1865. Because of the professional nature of her officer corps, the Confederacy adopted, for the most part, the organizational and procedural methods of the United States Army and Navy.

That Congress should have power "to make rules for the government and regulation of the land and naval forces" was one of the provisions of both Provisional and Permanent Constitutions of the Confederate States of America which was taken verbatim from the United States Constitution. Under this clause, the Provisional Congress adopted the
Articles of War and the Army regulations of the United States with a few modifications not affecting military courts. The heritage of the Confederacy was a long and proud one having been adopted from the military practice of the United States which had been borrowed from that of England which in turn had originated in Rome before Christ. As each had passed on to the next modifications and refinements, so had the Confederate States.

Military jurisdiction in the forces of the United States in 1860 - 1861 was exercised through three classes of tribunals: (1) courts-martial, (2) courts of inquiry, and (3) military commissions and provost courts. It is with the first two classifications which military law is concerned. These two classes, courts-martial and courts of inquiry derived their authority from the Congressional rules in this the United States and in the Confederate States as well. Jurisdiction of the last class, military commissions and provost courts, found its source in the law of occupation of enemy territory, an element of international law; and when sitting at home, in the right of national self-determination and self-protection, commonly called martial law. Generally speaking, jurisdiction of courts-martial, commissions and provost courts was, to a certain extent,
concurrent, depending upon the order of the appointing or convening authority. Neither military commissions nor provost courts were mentioned in the Confederate Articles of War or the Army Regulations; and the Confederate States made no use of military commissions and only limited use of provost courts. Apparently, the operation of provost marshals in a non-military manner was particularly obnoxious to the general populace of the Confederacy. Accordingly, on June 11, 1862, the War Department prohibited their taking cognizance of civil cases. As a matter of fact, one of the last acts of the Confederate Congress in 1865, before it was forced to flee Richmond, was "to abolish the office of all officers engaged in discharging the duties of provost marshals, except within the lines of an army in the field."

B. Courts of Inquiry

In the European armies of the period, the authority for courts of inquiry was an incident to the royal prerogative. This, of course, was not the case in the Union or Confederate armies. In the American experience these courts were provided for by law.
1. Organization of Courts of Inquiry

The 91st Article of War directed that courts of inquiry "shall consist of one or more officers, not exceeding three," and a judge advocate, or recorder, to reduce their evidence and proceedings to writing. Courts of inquiry were also conferred with the power to summon witnesses and to examine them under oath. Witnesses could not, however, give their opinions as to the merits of a particular case unless asked expressly to do so. Under the same Article the accused was permitted to interrogate and cross-examine all witnesses produced by the court so as to investigate fully the circumstances surrounding the event in question.⁷

Proceedings of the courts of inquiry were to be delivered to the commanding officer who convened the court after first being authenticated by the signature of the Judge Advocate and the president of the court. These proceedings could be used in evidence before a court-martial in all cases not capital, and not ending in the dismissal of an officer, provided oral testimony could not be produced. Courts of inquiry could be ordered only at the request of the accused or by order of the President of the Confederate States. If the court were requested by the accused, it could be convened by either the commander-in-chief of an army or by the officer commanding a military department.⁸
Courts of inquiry were designed chiefly to investigate and inquire into circumstances surrounding a questioned event. In this respect the court of inquiry operated much as a judicial court, summoning and examining witnesses. Courts of inquiry could not, however, pronounce sentence or even express an opinion on the merits of a case, unless requested to do so by the convening authority of a court-martial. No opinion of a court of inquiry could be made public and the members of a court of inquiry were prohibited from sitting on any general court-martial growing out of their proceedings as a court of inquiry.

An accused had a right to be present at an examination and, if ordered, was obliged to make an appearance. The accused, however, could waive this right and decline to take part in the proceedings. Should the accused have appeared he could not be forced to incriminate himself and the court would not allow questioning in this vein.

Both the accused and accuser were entitled to representation by counsel before a court of inquiry. Each could represent himself or be represented by an officer of his own choosing. The court would appoint an officer upon request since it was in the furtherance of justice to have circumstances fully disclosed before the court in an orderly
fashion to determine whether there were just grounds for a court-martial.\textsuperscript{11}

It was common for courts of inquiry, in both the Union and Confederate armies, to sit with closed doors.\textsuperscript{12} This was, however, at the discretion of each court except where ordered by the convening authority. In either case, it was the duty of the court of inquiry "to examine into the nature of any transaction, accusation, or imputation against any officer or soldier."\textsuperscript{13} The particular object for which the court was convened was contained in the order convening the court along with any particular instructions concerning reports of the proceedings or opinions on the merit of the case. Courts of inquiry were obliged to follow their convening orders to the letter and were not competent to depart from them.\textsuperscript{14}

2. Procedure of the Courts of Inquiry

The mode of the proceeding, within certain limits, was determined by each individual court. When this was done both the complainant and accused were called in and the subject of the examination was stated by the Judge Advocate.\textsuperscript{15} Either party may then challenge for cause because the investigation, whether accompanied by the opinion of the court or
not, could have affected either the reputation of the accused or the public interest. The right to challenge for cause was exercised at the discretion of the court.\textsuperscript{6}

Although trial by court-martial was limited to between the hours of eight in the morning and three in the afternoon,\textsuperscript{17} there was no such restriction upon the proceedings of the court of inquiry.

Because of its nature as a preliminary hearing, there was no right for the accused to demand copies of the proceedings nor were there any provisions for supplying the accused with any copies of the proceedings or any other documents.\textsuperscript{18}

An officer accused before a court of inquiry was not under arrest, except when circumstances warranted it. Contempts from military persons, however, could be punished as if they were before a court-martial.\textsuperscript{19} For such an offense the court could direct the arrest of an officer or confinement of a soldier or non-commissioned officer.\textsuperscript{20} In the case of contempt before the court of inquiry by a civilian, the court did not have the same remedies as a court-martial.\textsuperscript{21} The only remedy available to the court of inquiry was an appeal to the civil court and, in the meantime, expulsion of the offender from the presence of the court.\textsuperscript{22}
Courts of inquiry could be reassembled whenever necessary, the witnesses recalled, and new questions put to them with a view toward collecting all information necessary for a proper inquiry. Courts of inquiry were not governed by the rules of a court-martial where differences in needs and practice had been established.\(^{23}\)

A military statute of limitations of two years was established for courts-martial.\(^ {24}\) This prohibition rests on the same broad principle which underlies all statutes of limitation whether civil or military -- that of preventing fraudulent accusations and stale demands, which, because of lapse of time or loss of evidence, might be impossible either to refute or defend. This statute of limitations, of course, applied to courts of inquiry as well,\(^ {25}\) especially when not instituted at the request of the accused. The reason for this was that there would be no reason for a preliminary hearing if a court-martial could not be convened.

By Act of the Confederate Congress, approved April 21, 1862, it was provided that any officer convicted of drunkenness before a court of inquiry could be cashiered, suspended or publicly reprimanded. Under this act the courts of inquiry were only to collect the evidence and report the facts to the Secretary of War. The courts were not to pronounce sentence in any case.\(^ {26}\)
Finally, the court had the discretion of whether to publish the proceedings of their sessions. This they could do if justice or public interest demanded.\textsuperscript{27} Courts of inquiry were dissolved by the same authority which convened them.\textsuperscript{28}

3. The Case of Commodore Josiah Tattnall, C.S.N.

The court of inquiry which was convened for the purpose of determining the responsibility of Commodore Josiah Tattnall for the loss of the ironclad C.S.S. \textit{Virginia} was both the most celebrated court of inquiry of the Civil War and the most illustrative. The case drew the attention of Thomas Hill Watts, Attorney-General of the Confederate States, who issued an official opinion on the procedure to be followed by a court of inquiry.

Tattnall was in command of the \textit{Virginia} when she was destroyed to prevent her capture by advancing Federal troops on May 11, 1862. Although Tattnall had been given no alternative to scuttling the \textit{Virginia}, public outcry forced President Jefferson Davis to order a court of inquiry. This court was convened on May 22, 1861, and condemned Tattnall for his actions, dismissing him from service. This decision was overruled by Watts and the Confederate States Navy general court-martial which later tried Tattnall gave him an honorable acquittal.\textsuperscript{29}
In his opinion to Stephen Mallory, Secretary of the Confederate States Navy, Attorney-General Watts shed some light on the powers and procedures of a lawful court of inquiry.

"Courts of Inquiry, under our law, have no right to try and determine a case: they merely state facts, and do not give their opinion unless expressly required to do so in the order convening them. The order convening this Court of Inquiry, requires the Court to inquire into the fact connected with the destruction of the steamer Virginia and report the same, together with their opinion as to the necessity of destroying her, and particularly whether any and what other disposition could have been made of the Vessel? ... By the law authorizing Courts of Inquiry, any party, whose conduct shall be subject of inquiry, shall have permission to cross-examine the witnesses. In the order convening this Court, no specific inquiry is required to be made of the conduct of any particularly party. ... The fact of his cross-examining the witnesses cannot make him a party defendant to the proceeding. The Court has no authority to pronounce any judgment against him or to inflict any punishment." 30

Although this was a naval court of inquiry and the Confederate States Navy operated under its own Articles of War and regulations, 31 those Articles and regulations pertaining to courts of inquiry were identical in all major aspects. The court of inquiry in the case of Tattnall was therefore representative of most courts of inquiry in both the Confederate Army and Navy.
C. Courts-Martial

Courts-martial, in the Confederate Army, were divided into three categories: (1) general courts-martial, (2) regimental and (3) garrison courts-martial. For the purposes of this study, these final two classes, regimental and garrison courts-martial, will be combined into a single class, called special courts-martial, since the jurisdiction and organization of these courts were identical.

1. Organization and Jurisdiction of Courts-Martial

The power to appoint courts-martial was derived directly from the Act of the Confederate Congress establishing "Rules and Articles for the Government of the Confederate States." This code dealt directly with the composition and convening of these courts. According to the 65th Article of this Act, any general officer commanding an army or colonel commanding a separate detachment could, when necessary, appoint a general court-martial, if the officer with the power to convene the court was the accuser or prosecutor, then the President of the Confederate States would appoint the court. This power lie with the President at all times because of his position as commander-in-chief of the army.
Under the terms of the 64th Article of War, general courts-martial were to consist of from five to thirteen officers, but was not to consist of less than thirteen unless the unit would suffer by their absence. Members detailed to the court took place in the court according to their rank; the officer holding the highest rank was to serve as president of the court. No president was to be appointed.\textsuperscript{35}

The same act establishing general courts-martial also provided for courts of lesser authority and power called garrison and regimental courts-martial or special courts-martial.\textsuperscript{36} Under this provision every officer commanding a regiment or corps was empowered to appoint a court consisting of three commissioned officers to try all cases not capital. Likewise, officers commanding garrisons, forts, barracks or other posts where troops of three different corps were stationed were empowered to assemble such courts and to decide upon their sentences.\textsuperscript{37}

Authority to convene and appoint courts-martial could only be exercised by the officer upon whom the power had been bestowed.\textsuperscript{38} As a consequence of this, when an army is assembled only the commanding general could convene a courts-martial and in military departments only the officer
commanding had such power. That officer could in no instance hold a rank lower than colonel.\textsuperscript{39}

As mentioned above no general court-martial could consist of less than five members, but on occasion the court's membership did exceed the thirteen officer maximum. These additional members could take no official part in the proceedings, but could express their opinions in closed court meetings. The purpose of these supernumeraries was to fill any vacancies which might arise on the court thus presenting any unnecessary delay.\textsuperscript{40} There were some officers who, while qualified to fill the post of Judge Advocate, could not sit as members of the court because they held no official rank. This class included surgeons, quartermasters, paymasters and chaplains. Cadets, brevetted to commissioned officer, could be detailed as a member of a court, however.\textsuperscript{41} The rank of the officers was a matter of discretion of the appointing authority, who was often guided by the rank of the accused and the importance of the charges.

Whenever the Confederate States Marine Corps was operating with the land forces, the senior officer of both corps was to be the appointing authority and members of both corps were entitled to membership on the court.\textsuperscript{42} This was not the case with either the militia or the Confederate States
Navy. While both were subject to Rules and Articles of War and therefore to courts-martial, these Rules and Articles required such courts to be composed entirely of either naval or militia officers. 43

By the Act of February 17, 1864, the Confederate Congress broadened the convening authority for general courts-martial to include generals commanding cavalry forces not under the direct and immediate control of an army and to include any officer commanding a separate command or detachment. 44 An Act of March 4, 1865, included generals commanding State reserves as convening authorities for the trial of military offenses committed by the young boys and old men under their command. 45

There was no restriction as to jurisdiction made in the Article of War which created general courts-martial. 46 Jurisdiction under the Articles of War extended to all officers and enlisted men in the service of the Confederate States of America, whether in the Regular Army, Provisional Army, State reserves or the militia. 47 Additionally, "all officers, conductors, gunners, mattroes, drivers, or other persons whatsoever, receiving pay or hire in the service of the artillery, or corps of engineers," were subject to the jurisdiction of the court-martial. 48 Likewise, "sutlers and retainers to the camp, and all persons whatsoever,
serving with the Armies of the Confederate States in the field, though not enlisted soldiers" were under court-martial jurisdiction.\textsuperscript{49}

It was the practice of general court-martials to take notice only of those cases which could not be handled by the inferior courts.\textsuperscript{50} In determining what particular jurisdiction should attach in different cases, three factors were often considered: (1) the punishment to be pronounced, (2) the rank of the accused, and (3) the offense charged.\textsuperscript{51} According to the 65th Article of War, special courts did not have jurisdiction over either capital offenses or commissioned officers. That same Article also provided that the inferior courts could not inflict fines exceeding one month's pay, nor imprison nor put to hard labor any non-commissioned officer or soldier for a period longer than one month.\textsuperscript{52} If the degree of punishment were greater a general court-martial would have to handle it, if lesser or equal then an inferior court could take cognizance of the case.

In \textit{Military Law}, William C. DeHart listed several classes of offenses exclusively within the jurisdiction of a general court-martial. These classes were followed by both the Union and Confederate Armies. The classes were: (1) those which were expressly committed to their jurisdiction, (2)
those against which punishments are set exceeding the authority of the inferior courts, (3) those which demand severe punishment beyond the authority of the inferior courts, and (4) those which are within the authority of inferior courts, but demand instant action.\textsuperscript{53}

The general rule as to the jurisdiction of special courts-martial was that they possess jurisdiction over all offenses committed by non-commissioned officers and soldiers "which infract the ordinary proprieties of military service, as irregularities and disorders which are not of a serious and grave description, besides such specific offenses as are named in the Articles of war as subject to their authority."\textsuperscript{54}

Once a court was formed no authority could interfere with its proceeding. Although the court could ask instructions of the convening authority, it was not forced to heed those instructions.\textsuperscript{55} Once convened, the court-martial, whether special or general, could be dissolved only by the authority who convened it. Once the prisoner had been arraigned, the court had to proceed to a final judgment unless illness or death of its members reduced its membership below the requisite number or the health of the prisoner made prosecution of the case impracticable.\textsuperscript{56} If a seat on
the court became vacant, the court was adjourned until such time as that member could return or was replaced. If the seat became permanently vacant, the court could proceed if not below the requisite number of members.\textsuperscript{57} The time and place of the meetings could be changed only by an order from the convening authority.\textsuperscript{58}

Responsibility that the proper form and procedure was used fell to the president of the court. The president could also adjourn the court from day to day, although other members had the right to object. If the court was to be adjourned longer than one day, a vote of the membership of the court was necessary. No further powers were delegated to the president, whose vote carried no more weight than that of the ordinary members.\textsuperscript{59}

Court was closed on order of the president either upon motion of the Judge Advocate or upon request of one of the court's members. Deliberations were always closed and court was open at the discretion of its members.\textsuperscript{60}

Authority conferred upon courts-martial for the punishment of contempt extended to all persons, civilian and soldier alike. The 79th Article of War provided that no person shall use "menacing words, signs, or gestures in presence of a court martial, or cause any disorder or riot, or disturb
their proceedings, on the penalty of being punished, at the discretion of the said court martial."61

Where a contempt was committed before a general court-martial, that court could immediately pass judgment on the offender without regard to rank. If a commissioned officer was found in contempt of a special court, however, the court could not award any punishment, but rather could only arrest the offender and report the facts to the proper authority.62

It was considered the duty of the court-martial to clear the court for the reading of the charge and the arraignment of the prisoner. This mode of procedure, said DeHart, "could never militate against the interests of the accused, and might save much useless trouble and individual responsibility."63

A vote was taken on each question until a majority, or such number as was required for the decision was obtained. This decision, when announced by the court, bound the minority.64 Majority vote decided all questions except the findings and sentence in particular cases, as in capital offenses, where a two-thirds vote was necessary.65

Courts-martial were obligated to consider all charges brought by the convening authority against the accused. The court was bound only to those charges which were brought to its notice by plea, however.66
2. Punishments

The award of punishment was, for the most part, necessarily left to the discretion of the court. Because of the great tendency to abuse this type of discretion, two checks were placed on this power of the court: (1) the reviewing authority, whose duty it was to correct every abuse of power by returning the case to the court for reconsideration or by disapproving the proceedings in their entirety and (2) the responsibility of the individual members of the court. Some articles of war specified punishments for their violation. These the court was obliged to obey. In cases where there was no specific punishment authorized the court was to exercise its discretion in awarding an equitable punishment.

Since the general court-martial was the highest form of military tribunal it was authorized to impose whatever punishment the facts demanded, ranging from death to the slightest fine. Capital punishment was authorized, however, only for such offenses specifically named in the law.

The following offenses were punishable by death at the discretion of the court: (1) inciting a mutiny, (2) failure to suppress a mutiny, (3) desertion in time of war, (4) persuading others to desert, (5) sleeping on sentinel, (6) giving false alarms, (7) doing violence to any person
in camp, (8) misbehavior in the face of the enemy, (9) making known the password, (10) giving intelligence to the enemy, and (11) compelling the surrender of any fort or garrison. In only one, giving intelligence to the enemy, was the death penalty mandatory. Punishment by flogging could be awarded only in the case of desertion. Award was limited to fifty lashes and only a general court could award.

Suspension of commissioned officers could be directed by a general court-martial according to the nature of the offense. This punishment was at the discretion of the court and could only direct that the officer be suspended from his command and in addition suffer the loss of pay and emoluments. Reprimands and admonishments were a much more common form of punishment awarded to officers than suspension. These punishments were allowed by long continued custom rather than by express provision or law.

An officer could be dismissed or cashiered for any offense, but was mandatory in the case of falsifying certificates of absence or drunkenness on duty. In addition, the Articles stated that an officer dismissed for cowardice would have publication of his offense had in local newspapers. Officers could further be barred from holding any official office at all, but this only in extreme cases.
Officers could be reduced to the ranks for two offenses, embezzlement and hiring another to do his duty. These cases could be handled by either special or general courts-martial and were the exception to the rule that officers could not be tried by special courts. Non-commissioned officers could suffer the same punishments for these offenses in addition to corporal punishment.

Fine and imprisonment were the most common forms of punishment handed down by military courts. In addition, hard labor was sometimes awarded in conjunction with imprisonment. Flogging could be awarded at the discretion of the court, but not in conjunction with imprisonment. Flogging however, was limited to soldiers; non-commissioned officers and officers were first reduced in rank and then flogged in extreme cases. Other than this non-commissioned officers were considered on the same level as soldiers for punishment purposes.

Generally speaking then, the punishments most commonly meted out to officers have been shown to have been admonitions or reprimands; suspension from rank and forfeiture of pay; cashiering or dismissal from the service. Those usually awarded against enlisted soldiers were confinement; flogging; forfeiture of pay and allowances; marking by letter on the
hip, reprimands, and drumming out of the service. The punishment of death could be awarded against any soldier or officer, but only by a general court-martial and only for the previously listed offenses.

3. Procedure

After the court-martial had been convened and the oaths administered, it was the duty of the Judge Advocate to read the charges to the Court. It was then the duty of the court to examine the charge and decide as to the court's jurisdiction and the sufficiency of the charge. If sufficient objections were raised, the court resubmitted the charge to the convening authority. If it appeared to the court that the charge was manifestly erroneous, it was within its power to reject it. The prisoner also had the right to object to a loosely worded charge as did the Judge Advocate. If the charge was found to be sufficient, the prisoner was presented with a list of witnesses which were to be called for the prosecution. At this same time, the prisoner submitted a list of his witnesses to the Judge Advocate, whose duty it was to summon these witnesses.

The regular hours for the meeting of the court-martial was fixed between eight in the morning and three in the
afternoon. No legal proceeding could be held otherwise, unless by order of the convening authority.

"Order and decorum" was at all times maintained, the court accomplishing this by invariably meeting behind closed doors. After reading the name of the accused and the charge, the Judge Advocate admitted the witnesses into the court.

Although preemptory challenges were not permitted, the accused could then challenge any and all members of the court for cause. The Judge Advocate could never be challenged, although he had the duty to challenge members of the court on behalf of the convening authority.

At this point the court and Judge Advocate were sworn in if a sufficient number of officers still sat on the court. If the defendant had any motions for postponement they were then made. Grounds for postponement were illness of the prisoner, non-availability of a witness or lack of time in preparing the case. The prisoner was to retain counsel if he so desired. This counsel was of limited use, however, since he was not able to converse with the court during the proceedings, although he could read written legal arguments into the record.
After the charge had been read, the prisoner made his plea -- either to the jurisdiction of the court, to the insufficiency of the charge, guilty or not guilty. If his answer was not guilty it was duly entered by the Judge Advocate, who then cleared the court of all witnesses except his first. The Judge Advocate often made a preliminary statement before calling his first witness, but this was not a necessity.

Witnesses were examined in a way similar to those in a civil court. Cross-examination was allowed and examination could be in the form of either interrogatory or narrative. If a witness could not leave his sickroom, the court could adjourn and remeet in the witness's presence. Military persons were obligated to attend as witnesses, but not so civilians. If their testimony was required a deposition before a justice of the peace was acceptable so long as both prosecutor and accused were present.

After the testimony was recorded in the proceedings of the court it was often read back to the witness to insure its correctness. Witnesses could, at any time before the resting of the case by the prosecution, be recalled. When all of the evidence in support of the charges had been presented, the prosecution closed its case. At this point no further evidence could be admitted.
At this point the defense was commenced, although the defendant could move for a delay to permit him to better prepare his case. The same order was followed in the presentation of the defendant's case as was followed in the case of the prosecution. At the conclusion of his case the defendant had the right to address the court either personally or through his counsel.

The Judge Advocate, or prosecutor, had the right to address the court at the conclusion of the defendant's concluding remarks. He was frequently granted a delay to facilitate the proper preparation of his statement. This concluded the trial, but before a judgment or sentence was announced, the defendant had the right to enter a plea in arrest of the judgment of the court. This plea usually alleged some defense or mitigating circumstance which would prevent the court from entering a judgment against the defendant because of his insanity, compulsion or ignorance of the law. Drunkenness was viewed as a voluntary form of incapacity and was therefore not a defense to prosecution. These pleas were seldom employed, but rather used as a defense in the course of the trial. If the defendant waived his right to plead, the court cleared the courtroom for its deliberation. As mentioned before, a simple
majority was necessary for a conviction on all but capital offenses where a two-thirds vote was necessary. Each member having an equal vote, the vote was taken beginning with the lowest ranking officer. Every verdict was announced as unanimous to maintain secrecy. On occasion, special verdicts were returned as opposed to a general verdict. The distinction was that with a special verdict the defendant could be acquitted of particular parts of a charge and guilty of other while with a general verdict, a simple guilty or innocent was returned.

It was common with a finding of not guilty for the court to censure the prosecutor if his motive in bringing charges was founded in hostility. Occasionally a defendant would be found guilty of a lesser offense or extenuating circumstances would be uncovered. The court was free to take notice of these. The court was not limited to a single vote, but could continue to deliberate until a majority was reached.

A court-martial was not, as in the case of a civil tribunal, obliged to complete the verdict before separating; but could adjourn from day to day to consider their finding and sentence. All members of the court, however, must be present at the deliberations. Once a conviction had been
decided, no member of the court could be excused from voting on a punishment regardless of his vote on the matter of conviction. As in the case of the verdict, votes were taken until a majority was reached.\textsuperscript{131}

Recommendations of clemency to the commanding general were made by the court in special cases. This was not an act of the court and was not made part of the record of the proceedings. This recommendation, since it was not an official act, could come from an individual member of the court.\textsuperscript{132}

Prior to the final adjournment, the members of the court could modify or reverse the sentence agreed upon. This, however, had to be reflected in the final copy of the proceedings forwarded to the convening authority.\textsuperscript{133}

D. Review and Execution of Sentence

"No sentence of a general court martial shall be carried into execution until after the whole proceedings shall have been laid before the officer ordering the same, or the officer commanding the troops for the time being; neither shall any sentence of a general court martial, in time of peace, extending to the loss of life, or the dismissal of a commissioned officer, or which shall, either in time of peace or war, respect a general officer, be carried into execution, until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President for his confirmation or disapproval, and orders in the case."\textsuperscript{134}

As stated in the 65 Article of War no sentence of death or dismissal of an officer in time of peace or sentence against
a general officer, at any time, could be executed without a review by the commanding officer or President, respectively.

The proceedings of the court having been submitted to the reviewing authority, it was incumbent that that authority make a careful and complete study of the record. If all was discovered to be in order, the sentence was confirmed. The reviewing authority had to decide whether there was any error which violated the rights of the prisoner. He had either to accept the record as a whole or reject it as a whole.\textsuperscript{135}

If the reviewing officer rejected the record and sentence he had several choices as to his next step. More often than not the reviewing authority would resubmit the proceedings to the court with recommendations. If the court agreed with the modifications they would so modify; if not they would resubmit the record to the reviewing authority. At this point the reviewing authority could either dismiss the charge or mitigate the sentence.\textsuperscript{136} A reviewing authority even if the President, could not alter or commute the sentence.\textsuperscript{137} This was the only method of review for the proceedings of a general court-martial. Sentences and findings of general courts-martial were not reviewed by other courts.\textsuperscript{138}

This was not the case with the findings of special courts-martial. The Articles of War provided that if either party
was dissatisfied with the decision of the special court an appeal could be made to a general court-martial. If upon this second hearing the appeal appeared to be groundless, the appellant could be punished at the discretion of the court. This was to prevent spurious appeals.139

Appeals to a general court were treated as trials de novo140, therefore all evidence and testimony had to again be presented. Procedurally, this hearing was exactly like the first except at the conclusion of the case the court decided: (1) whether the appellant had substantiated his grievance and (2) whether the appeal was groundless or not.141 The findings of this court was not appealable nor was it reviewed by a convening authority.
CHAPTER III

MILITARY COURTS

These formal and seemingly effective methods of organization and procedure of the Articles of War and Army Regulations had served the peacetime army of the United States well from 1806 until the outbreak of the Civil War. As a matter of fact, Federal forces did not replace these procedures and rules until 1874. The Union Army, however, was a well-disciplined, well-equipped and organized force; Confederate forces were not. There was adequate evidence to support the observation that the Confederates were the best of fighters and the worst of soldiers.

Take, for example, the case of Private Napier Bartlett of the Washington Artillery, attached to the Army of Northern Virginia. Private Bartlett was charged with one of the most serious offenses that could be imagined in an army at war; he had fallen asleep at his post. Despite the gravity of his offense Private Bartlett was tried before a special court-martial, which was empowered only to impose a sentence of thirty days confinement at hard labor or a fine of one month's pay. Private Bartlett could present little evidence to
substantiate his plea of not guilty and was consequently sentenced to police his company's quarters every day for thirty days, in addition to being debarred the privilege of leaving camp under any consideration for the same period of time.\textsuperscript{2}

Sentence in the case of Private Bartlett was strikingly out of proportion to the gravity of the offense. Under published regulations he might have been given the death penalty.\textsuperscript{3} Private Bartlett gave effective illustration of the consequences of easy sentencing. Within six months of his first offense, it became necessary to haul him again before court-martial, on charges of feloniously taking away one of the government's horses and remaining absent without leave for an entire night.\textsuperscript{4}

The leniency shown to Bartlett was apparently not out of harmony with early practices of Confederate courts-martial, however. Judicial sessions held in Corinth subsequent to Shiloh treated the offense of desertion with such lightness as to draw from General Beauregard the following rebuke: "In those cases in which the charge of desertion has been established by the testimony ... the sentence of the court is wholly inadequate to so grave an offense. In the future the General Commanding will not approve of such trivial punishment."\textsuperscript{5}
This tendency toward over-lenienty was perhaps a factor contributing to the supplementation of the court-martial system in the fall of 1862, but the change came mainly from considerations growing out of the Antietam campaign. The jurisdiction of courts-martial did not adequately cover, except where martial law was declared, offenses committed by stragglers beyond the boundaries of military encampments. Such cases were supposed to be tried by civil courts, but the effectiveness of these civil courts was severely hampered by the invasion of Maryland and the evacuation of the civilian population. Consequently, crimes could be committed by roving soldiers with relative impunity. Then also, in the purely military realm, courts-martial were not adapted to the conditions of an active campaign, such as in the Antietam operation. Time could not be taken out in the midst of operations for the convening of a court. Witnesses and officers to sit on the court were also difficult to obtain. Delay incident to assembling and hearings, followed by review of findings by commanding officers in some cases, impeded the swiftness of action that was necessary to maintain and preserve discipline. In particular, the wholesale straggling that masked the Maryland campaign presented a situation demanding immediate action which was impossible under the existing system.
These considerations moved Lee, in September, 1862, to request remedial action of Jefferson Davis. Lee recommended the establishment of a new type of military tribunal, a permanent court in each army corps. On September 11, 1862, President Davis sent a special message to Congress on the subject. He pointed out that the courts-martial, "being limited to the consideration of offenses defined by the Rules and Articles of War," could not take notice of "a great variety of outrages against private rights," which, under ordinary circumstances, "would be turned over to the civil courts for trial. In a foreign country or where the courts cannot hold session, this is impossible, and in the case of a marching army would, for obvious reasons be ineffectual. The witnesses, whose testimony is indispensable to conviction, would generally follow the march of the army and be out of the reach of the courts." 

Davis' message was referred to the Senate Committee on the Judiciary, which returned Bill No. 106, "to organize military courts to attend the Army of the Confederate States in the field, and to define the powers of such courts." The bill passed the Senate promptly and got through the House with few amendments. It was approved by the President on October 9, 1862.
This act provided for the organization of one military court in each army corps, to be composed of three judges with the rank and pay of colonels of cavalry and one judge advocate with the rank and pay of captain of cavalry. These officers were appointed by the President by and with the advice and consent of the Senate; but the President was authorized to fill any vacancy which occurred during the period of time Congress was on vacation, pending confirmation at the next session. The courts themselves were authorized to appoint one provost marshal, with rank and pay equal to that of the judge advocate, and one clerk. Each member and officer of the court was required to take "an oath well and truly to discharge the duties of his office to the best of his skill and abilities, without fear, favor or reward, and to support the Constitution of the Confederacy."10

Every military court was required to attend the corps to which it was assigned and to always be open for the transaction of any business. Corps commanders were ordered to furnish their courts with suitable quarters and to assign an officer to act as judge advocate pro tem in case of the regular officer's inability or absence. The court was empowered to adopt and enforce rules for the conduct of business and for the trial of cases, to punish for contempt, to secure
the attendance of witnesses, and to enforce and execute its orders, sentences and judgments. Its final decisions and sentences were subject to review, mitigation and suspension by the corps commander in the same instances as were the decisions of the courts-martial. The President had concurrent and superceding powers of suspension and pardon over the decision of military courts according to the Confederate Attorney-General.11

When the case was closed it was sealed and sent to the office of the Adjudant and Inspector General for filing.12 Every officer responsible for the arrest of an officer in the corps, under the rank of brigadier general, was required to file an arrest report with the judge advocate to insure a speedy trial.13

Jurisdiction of these military courts extended to all offenses recognized under the Rules and Articles of War and the customs of war, to all offenses defined as crimes by the laws of the States or of the Confederate States, and to certain common law offenses when committed beyond the territorial limits of the Confederate States; and was limited to the military establishment below the grade of brigadier general and to prisoners of war. Where the State or Confederate law prescribed punishment or imprisonment, or both, the
court was authorized, in its discretion, to substitute any other punishment less than death; but as to penalties laid down by the Rules and Articles of War, the court was bound to strict implementation.14

This Act had an additional and far-reaching effect on Confederate jurisprudence. According to an Opinion issued by Attorney-General Thomas Hill Watts to Secretary of War James A. Seddon on May 7, 1863, this Act established a "Confederate Law," of which there was not prior to the passing of that Statute. His rationale was that Congress could not make State laws punishable by either national courts or military courts "as State offenses." He also reasoned that Congress would not legislate unconstitutional statutes.

Therefore, according to Watts, the only rational answer was that the Act of October 9, 1862, made all State offenses, offenses against the Confederate States of America.15

The establishment of military courts did not inhibit the appointments of courts-martial by the proper authority, though it became the tendency to vest more and more exclusive jurisdiction in the hands of the military courts. Thus, under the Act of October 13, 1862,16 and a resolution of May 1, 1863,17 exclusive authority was vested in the military courts to try all prisoners of war and persons captured with the enemy who
were suspected of any connection with attempts to introduce counterfeit money into the Southern economy and of fomenting servile disorder. For attempting to undermine the monetary structure the penalty was death by hanging, and the domestic labor force, death or such other punishment as the court might direct.

The Confederate Secretary of War, in his annual report of November 26, 1863, reported that the military courts had been found to operate beneficially on the morals of and efficiency of the Army. They have dispensed with the necessity of such frequent details of officers from their regular duties for courts-martial, and from their disconnection with the rivalries and interests of the line, as well as their larger experience and superior qualifications have generally secured a larger measure of satisfaction to their judgments.16

He also pointed out a few deficiencies which became the basis for a series of Acts and amendments during the next session of Congress, designed to increase the efficiency of the military courts.

An Act of May 1, 1863, had already allowed the President to appoint a military court in each geographical military department as well as in mobile army corps.17 He was authorized, by an Act of February 16, 1864, to establish a court in each cavalry division in the field and one in each State in a military department.18
In addition to increasing the number of courts, the February amendments also made it possible for the Secretary of War to reassign judges and judge advocates according to the needs of the service, and even permitted him to transfer the court in toto from one corps to another or to any other unit in the Army. Consequently, during the last year of the war, the commissions of judges and judge advocates ceased to show upon which particular court they were to serve. Additional elasticity was provided by empowering the corps and departmental commanders to detail field officers as members of the courts in their commands whenever any regularly appointed judges should be disqualified or unable to attend because of illness.

A few months later Congress passed an amendment of dubious value. The Confederacy, plagued as always by too few men, was in a process of combing its government and forces for additional men for field duty. It occurred to Congress that there might be a few able-bodied men "hiding" in the shadows of the military court system. The right of the courts to appoint their own provost marshals and clerks was revoked and the Secretary was forced to appoint disabled officers and men of the Invalid Corps to fill these positions.
The jurisdiction of the military courts was extended to include, as courts of inquiry, all complaints of drunkenness in the Army, civilians as well as officers being competent to prefer charges. It was not necessary that specific instances be proved, but it was sufficient to show that the accused was guilty of "intemperate habits." The organizational jurisdiction of the courts of the corps was extended to the entire army. Brigadier and major generals were made amenable to the courts of their units. Thus, all persons subordinate to the corps or departmental commander, who was normally a lieutenant general, were now subject to the military courts. With this broad extension of jurisdiction, it seemed reasonable for the Confederate Congress to reconstitute the army commander as the reviewing officer.

This final provision seemed, to General Lee, to return military justice to the point it had been at in the fall of 1862. The new law had destroyed one of the chief advantages of the military court over the court-martial. Lee complained, in a letter to Seddon, that his staff should not be burdened with the work of reviewing court proceedings. He urged that the corps commanders be reinstated as the final authority, and offered to draft a law which would "embody the principal features that experience had shown should characterize the
Military Courts." Seddon replied that the legislation in question was passed contrary to his recommendations and promised that he would attempt to procure legislation at the next session of Congress that would more closely conform to Lee's views.

At the next session Congress agreeably passed the legislation recommended by Seddon, permitting army commanders to delegate their powers of review to commanders of those subordinate units to which military courts were attached. This Act also authorized military courts and courts-martial, in cases of acquittal, to announce the findings at the conclusion of the trial and to cause the immediate release of the accused without awaiting the action of the reviewing authority. During the second session of the Second Congress the power of review was further decentralized. The commander of reserves in each state was authorized, under certain circumstances, to refer offenders under his command to a convenient military court for trial, and to review the proceedings -- except those involving the death penalty, which was referred to the President, or, in the trans-Mississippi, to the department commander. In all eighteen pieces of legislation were enacted relating to the organization, jurisdiction or powers of military courts.
CHAPTER IV

THE JUDGE ADVOCATE

A. The Trial Judge Advocate

Rules and principles which existed for the selection and guidance of the judge advocate were chiefly customs of the service. The Articles of War required only that the office of judge advocate be filled by "some fit person." The leading expert in the field of military law, DeHart, gave a more detailed explanation of the qualifications for the post:

"It is generally conceded that for a proper discharge of this office there is needed qualifications and attainments of more than ordinary possession; that as the duties are multifarious and highly important, and therefore responsible, there should be corresponding ability; a fitness in a word, only to be derived from experience and knowledge of military life, its laws, customs, and modes of discipline, together with a competent acquaintance with the principles and maxims of criminal jurisprudence, and by which the proceedings in the ordinary law courts of the country are regulated."2

The single most important element in the attainment of justice was judged to be the proper selection of a fit and able judge advocate. It was argued that appointment of anyone directly from civilian life to judge advocate was objectionable, because it was necessary that the person filling that position should have high ability in both legal and military spheres.3
The judge advocate was the law officer of the court. In addition, he was required to prosecute for the government. It was upon his advice and opinions that the members of the court chiefly relied to discharge their duties. Because of this responsibility there was some discussion as to the judge advocates' liability for damage to others because of mistake or error in judgment.

As in the case of civil attorneys, the judge advocate had no liability for mistake of judgment or mere error, but he was, like his civilian counterpart, bound to do his duties to the extent of his abilities. If he was found guilty of gross neglect, he would have been liable for any damages to the injured party.4

In a precedent established in the court-martial of Captain McKenzie, U.S.N., who, in 1843, was accused of murder on the high seas, it was held that the judge advocate could not receive aid from other counsel, other than as legal advisers. In the McKenzie case, friends of the murdered Midshipman Spencer were not allowed to hire two prominent civilian attorneys to aid the judge advocate in the prosecution of McKenzie.5
In cases where it is necessary to have the assistance of the accuser of person who has suffered by the conduct of the accused, all that can be insisted is, to ask of the court permission for such person to remain, after being examined as a witness, to who reference may be made for information or particulars of the offense charged. And if a person bringing an accusation against anyone in the army or navy is not himself an officer in either, he can only appear in court as an informer or witness.  

Next the duties of the judge advocate will be considered, and in connection with them, the rights of the judge advocate. This element will be divided into first, duties of the judge advocate prior to trial and, secondly, those duties directly concerned with the conduct of the trial in his position as law officer of the court.  

As soon as the judge advocate received a copy of the convening order, he examined the charges which accompanied the order. In some cases only the barest discussion was available to the judge advocate, in which case he was forced to investigate the charges himself. If he found the charges to be insufficient he would return them to the convening authority for supplementation. If sufficient, the judge advocate would properly frame them for presentation to the court and the accused. It should be remembered that although the prisoner could not legally demand a copy of the charges it was to the judge advocate's advantage to supply such,
because if the prisoner were to obtain a copy from another source, discrepancies may have inhibited the conduct of the court.  

Few soldiers in the Confederate army could read or write so it was often the duty of the judge advocate to visit the place of confinement of these soldiers to read and explain the charges to them. In doing this the judge advocate was exercising another portion of his responsibility, that of counsel for the prisoner, in addition to preventing the perpetration of an injustice. With recruits especially, or very young soldiers, apprehended at a distance from the station to which they were assigned, and often without any previous investigation assigned to the guard-house, under charge of desertion, this procedure was very effective and desireable.

The next step for the judge advocate was summoning the witnesses for trial. The usual procedure was to append a list of prosecution witnesses to the charges so the accused would have notice. The judge advocate would also receive a list of the witnesses the accused wished to call. Summoning witnesses was, more or less at the discretion of the judge advocate. The usual rule was that no witness would
be called at the expense of the government unless the ends of justice clearly required it. This discretionary power was subject to review by the court for proper cause.\textsuperscript{11} Examination was not restricted to those witnesses whose names appeared on the lists, so long as those called were legally competent. It was more expedient, however, to include the names of all those witnesses to be called on the judge advocate's list.\textsuperscript{12}

No particular form was required for summoning witnesses. Until late in the war judge advocates did not have the power to summon civilian witnesses, but their depositions could be taken if both accuser and accused were present.\textsuperscript{13} In the case of military witnesses it was only necessary for the judge advocate to advise the commanding officer, or War Department, of the names of the witnesses required. The proper instructions for their attendance would be issued by those authorities.\textsuperscript{14}

Finally, in preparation for the trial, the judge advocate would normally prepare a brief of his presentation, before the court, of his case. It was his duty to present the issues and prepare his arguments before the court in accordance with his instructions from the convening authority.\textsuperscript{15} Lastly, it was the duty of the judge advocate to arrange for a proper meeting place for the court.\textsuperscript{16}
The judge advocate appeared in court in three distinct characters. First, as an officer of the court to copy proceedings and administer oaths. Second, as the adviser to the court in legal and procedural matters, and third, as prosecutor.17 His duties as an officer of the court were, of course, proscribed by the court according to their desires as to the conduct of the court. In the other two characters, however, the court had no voice in the conduct of the judge advocate. He was allowed to act according to his own judgment and discretion.18

In his role as prosecutor it was difficult for him to assist the prisoner as he did during pretrial. If the judge advocate did assist the prisoner it was secondary to his duties as prosecutor at all times. His duty to the accused existed mainly in restraining the accused from incriminating or prejudicing himself. The judge advocate could neither advise the accused on particulars of defense nor frame questions for him nor cross-examine the prosecution's witnesses, but, outside court, the judge advocate could advise the accused of the best general means of conducting his defense. In court, the judge advocate could examine or cross-examine from memoranda supplied by the accused in the form of written interrogatories. The accused could further request that the
judge advocate select only those interrogatories he deemed necessary from the supplied list and frame the questions in his own words.  

It was conceded by most contemporary authorities that both sides were at least entitled to the opinion of the judge advocate both inside the court and outside.

As an officer of the court and representative of the government at general courts-martial, the judge advocate was not subject to challenges. Further, he could be absent at anytime during the proceedings without invalidating the proceedings upon his return.

The judge advocate, or a person appointed to act as such, was the only person who could appear as prosecutor. He therefore had the problem of presenting all of the facts to the court in a concise and orderly fashion despite any personal feelings he may have had. At the same time he owed several duties to the accused. He could not ask leading questions or allow self-incrimination. He also exercised responsibility for the rights of the accused in his position as adviser to the court. The judge advocate was bound to deliver his opinion to the court on matters legal and procedural and to put the court on their guard against any deviation from any essential or necessary form in their proceedings or a violation of material justice in their final
judgment and sentence.27 Although the judge advocate could not enter a dissent in the form of a protest upon the record of the proceedings should the court disregard his opinion, he could insert the opinion delivered by himself to the court so the error could be brought before the review of the convening authority or the commanding general.28

When the court was considering the sentence, the judge advocate could offer no opinion. He was not responsible for the punishment adjudged. After the sentencing, however, the judge advocate could give his opinion as to any error or illegality involved with the sentence. Finally, it was required that the judge advocate sign the findings and record of the proceedings after the president of the court to authenticate them.29 These records were then forwarded to the Secretary of War and commanding general according to the Articles of War.30

It should be remembered that anyone found guilty by a regimental court had the right to request that the case be reviewed by a general court-martial.31 The duties and responsibilities of the judge advocate on appeal were identical to those in the original proceeding. He still served in three separate and distinct positions.32
The duties of the judge advocate before a court of inquiry were, to a certain extent, similar to his discharge before a court-martial, but much more limited. These duties, moreover, were more varied by the instructions he received from the court and the particular subjects which were to be investigated.

Having prepared the case for investigation, the duty of the judge advocate was to summon the witnesses required, and give proper notice of time and place of meeting. He did not act as prosecutor, but rather administered oaths and examined witnesses brought before the court. It was his duty to assist the court in a full and honest inquiry into all subjects ordered to be investigated. Although not the prosecutor, he was still the legal adviser to the court of inquiry, bound to advise the court on all matters legal and procedural and to object to the admission of all improper evidence.

The judge advocate of a court of inquiry was not sworn to secrecy as before a court-martial, but simply to record impartially and accurately the proceedings of the court, and the evidence adduced before it. He had the duty to object to and challenge any member of the court on the behalf of the accused. As in the case of courts-martial, the judge
advocate of a court of inquiry was to summon witnesses desired by both the government and the accused, remembering that no witness could be summoned at the expense of the government unless it was necessary to the ends of justice. As in the case of a court-martial, the judge advocate signed the record to authenticate it.

B. The Judge Advocate General

Copies of the proceedings of all courts-martial, special and general, were forwarded to the War Department in Richmond for review under cover marked "Judge Advocate." There was, however, no officer designated "Judge Advocate General." In December, 1861, the post of assistant secretary of war was created to review courts-martial proceedings. Only two men held this position during the course of the war. Professor Albert T. Bledsoe, professor of law at the University of Virginia, held the position until September, 1862, when he was succeeded by Judge John A. Campbell of Alabama, a graduate of West Point and a former Justice on the Supreme Court of the United States.

In November, 1863, the Secretary of War recommended, to Jefferson Davis, the creation of a post of judge advocate general to review the proceedings of courts-martial, courts
of inquiry and military courts, the number of which had grown astronomically. Davis, in turn, recommended the creation of this post to Congress, but no action was taken.

In the meantime, the adjutant general, in order to more effectively handle the business conducted through his bureau, created several offices to facilitate specialized treatment. One of these offices was that judge advocate's office. This position was held by Major Charles Henry Lee, assistant adjutant general, until the end of the war. It was Major Lee who prepared *The Judge Advocate's Vade Mecum*, which served as the manual for the conduct of business before military tribunals. Although published unofficially in 1863, Lee's word was considered to be the official expression of military jurisprudence.

The Secretary of War repeated his recommendation for the formal creation of a judge advocate general's office in the adjutant general's bureau in his report to Davis of April 28, 1864. In addition, he recommended the creation of a judge advocate general's corps for examination of proceedings at the several headquarters of military departments and field armies. Once again Davis passed the recommendation on to Congress.
Some action was taken on this occasion by the House of Representatives and the House Committee on Military Affairs was ordered to report on the expediency of creating the judge advocate general's corps or of creating more reviewing authorities by allowing the commanding general to delegate his authority to review these cases. No action was ever taken on this committee's report or upon a bill introduced by Miles of South Carolina to create the post of judge advocate general. These were the last attempts to Congress to create either the post of judge advocate general or a judge advocate general's corps. Time was running out for the Confederacy.

There is some evidence of the creation of judge advocate general posts in several military departments and in State reserve organizations, but only unofficially. One acting judge advocate general even went so far as to prepare a manual entitled *The Duties of a Judge Advocate in Trial Before a General Court-Martial.*
The American Civil War was perhaps the first modern war of major proportions. Over two million men struggled and fought on the American continent supported by economies directed entirely toward waging war. Organization was a problem from the very beginning for the Confederate States. They were forced to start from scratch in organizing their forces and in preparing rules and regulations for their government. Fortunately, the Confederates could borrow basic features from their Federal counterparts, but improvisation was also necessary because of the problems inherent to a nation organizing an army made up of illiterate and independent soldiers.

Despite the difficulties presented by these inferiorities and the problem of communications, the Confederacy achieved a high degree of sophistication in their military jurisprudence. After discovering that their borrowed forms for military tribunals would be ineffective for their rag-tag armies, they supplemented courts-martial with military courts, a system which proved exceedingly effective. As a matter of fact, it
was not until 1968 that the United States Army followed the example of the Confederacy and formed permanent military courts for trial and appeal.

When pressed for manpower, the Confederate Congress was forced to either dismantle the court system or replace its personnel with members of the invalid corps. By choosing the latter course, the Congress showed wisdom for they realized that their armies needed the discipline afforded by the system more than anything else.

Had the Confederacy been less pressed for time toward the end, there is evidence that they would have attained a degree of sophistication which would have far surpassed that of the Federal forces. The establishment of a post of judge advocate general and a judge advocate general's corps for the more efficient dispersion of justice was one of the more important advancements made in the area of military jurisprudence. Had the Confederacy had more time to consider this implementation they would have made an even greater contribution than they did by organizing a military court system.

Even though, in the end, the four-year experiment of the Confederate States of America was a failure, there were a great many "gifts" it left to the American experience. The
heritage of the Confederate military forces is a proud and glorious one with many fine examples of strategy and organization far advanced in sophistication. One such advancement was in the area of military justice. Many of the elements of the Confederate military justice system have only recently been adopted by the United States military establishment and many others have formed the basis of amendments to the American military justice system for years. So although their tattered flags were sheathed long ago, the soldiers clad in homespun grey are still remembered in the halls of military justice.
COURT MARTIAL

Members
11 9 7 5 3 1 PRESIDENT 2 4 6 8 10 12

Supernumerary

Interpreter
Prisoner
Counsel

Judge Advocate

Witness

Prosecutor

Prosecutor's table
FOOTNOTES

CHAPTER I


2 Radin, Anglo-American Legal History, 236, 237, 278, 279 (1936).

3 2 Blackstone, Commentaries (Cooley ed.), 45-46 (1899).

4 Reprinted in 2 Winthrop, appendix 4-7.

5 Munson, Military Law, 5 (1923).

6 Reprinted in 2 Winthrop, appendix 8-23.


8 Reprinted in 2 Winthrop, appendix 24-25.

9 Reprinted in 2 Winthrop, appendix 26-37.


11 Davis, op. cit. at p. 339.

12 Munson, op. cit. at p. 6.

13 Davis, op. cit. at p. 340.

14 Winthrop, American Military Law and Precedent (2d ed.), 19 (1920).


16 Winthrop, op. cit. at p. 21.
Reprinted in 2 Winthrop, appendix 76-78.

Davis, op. cit. at p. 342.

Winthrop, op. cit. at p. 22.

Id. at p. 79-92.


Davis, op. cit. at p. 342.

Winthrop, op. cit. at p. 23.

Id. at p. 22.

Id. at p. 21.

Id. at p. 107.

U.S. Constitution, Article I, §8, clause 14.

Statutes-at-Large, 95-96 (1789).

Statutes-at-Large, 359 (1806).

Winthrop, op. cit. at p. 23 and Davis, op cit. at p. 343.

Munson, op. cit. at p. 7.
CHAPTER II

1Robinson, Justice in Grey, 359 (1941).

2Id. at p. 360.

3Jones, A Rebel War Clerk's Diary, 166 (1891).


5Act of March 6, 1865 (S. 191). Reprinted in 7 Journal of the Congress of the Confederate States of America 1861-1865, 707 (1905). (hereinafter cited as 7 JC 707.)

6DeHart, Military Law, 272 (1864).

791st Article of War for the Army of the Confederate States of America. (hereinafter cited as 91st Article of War.)

892d Article of War.


10Id. at p. 82.

11DeHart, op. cit. at p. 276.

12Id. at p. 277.

1391st Article of War.

14Lee, op. cit. at p. 82.

15Id. at p. 83.

16DeHart, op. cit. at p. 279.

1776th Article of War.

18Lee, op. cit. at p. 83.
19Id. at p. 83.

2076th Article of War.

21DeHart, op. cit. at p. 278.

22Lee, op. cit. at p. 83.

23Id. at p. 84.

2488th Article of War.

25Lee, op. cit. at p. 84.


27Lee, op. cit. at p. 84.

28Id. at p. 85.

29The Opinions of the Confederate Attorneys - General 1861-1865 (Patrick ed.) 105 (1950). (hereinafter cited as Opinions.)

30Id. at p. 105-106.

31OR II: 724-725.

32Lee, op. cit. at p. 86.

33Act of March 6, 1861.

34Lee, op. cit. at p. 87.

3564th Article of War.

36Act of March 6, 1861.

37Lee, op. cit. at p. 88.

38DeHart, op. cit. at p. 6.

39Lee, op. cit. at p. 88.

40Id. at p. 89.
DeHart, op. cit. at p. 41.

68th Article of War.

97th Article of War.


Act of March 5, 1865.

65th Article of War.

97th Article of War.

96th Article of War.

60th and 87th Articles of War.

Lee, op. cit. at p. 91.

Id. at p. 92.

65th Article of War.

DeHart, op. cit. at p. 52.

Lee, op. cit. at p. 98.

Id. at p. 99.

Id.

Id.

Id.

DeHart, op. cit. at p. 93.

Lee, op. cit. at p. 100.

79th Article of War.

Lee, op. cit. at p. 101.
63 DeHart, op. cit. at p. 108.
64 Lee, op. cit. at p. 103.
65 87th Article of War.
66 Lee, op. cit. at p. 104.
67 Id. at p. 105.
68 Id.
69 Id.
70 7th Article of War.
71 8th Article of War.
72 20th Article of War.
73 23d Article of War.
74 46th Article of War.
75 49th Article of War.
76 51st Article of War.
77 52d Article of War.
78 53d Article of War.
79 55th, 56th, and 57th Articles of War.
80 59th Article of War.
81 99th Article of War.
82 84th Article of War.
83 Lee, op. cit. at p. 107.
84 Id. at p. 108.
85 14th Article of War.
86 45th Article of War.
87 85th Article of War.
88 Lee, op. cit. at p. 108.
89 39th Article of War.
90 48th Article of War.
91 Lee, op. cit. at p. 109.
92 DeHart, op. cit. at p. 291.
93 67th Article of War.
94 Lee, op. cit. at p. 110.
95 Id. at p. 111.
96 Lee, op. cit. at p. 114.
97 DeHart, op. cit. at p. 100.
98 Id. at p. 101.
99 Lee, op. cit. at p. 128.
100 Id. at p. 129.
101 Id.
102 Id.
103 Id. at p. 130.
104 Id.
105 Id. at p. 136.
106 Id.
107 Id. at p. 137.
108 Id. at p. 142.
109 Id. at p. 143.

110 Id.

111 Id. at p. 144.

112 74th Article of War.

113 Lee, op. cit. at p. 146.

114 Id.

115 Id.

116 Id.

117 Id.

118 Id. at p. 147.

119 Id.

120 9th Article of War.

121 Id. at p. 147.

122 DeHart, op. cit. at p. 169.

123 Id. at p. 150.

124 Id. at p. 154.

125 Id.

126 Id. at p. 153.

127 Id. at p. 154 and p. 155.

128 Id. at p. 155.

129 Id.

130 Id.

131 Id. at p. 158.
Id.

65th Article of War.

Lee, op. cit. at p. 160.

DeHart, op. cit. at p. 205.

Id. at p. 207.

DeHart, op. cit. at p. 267.

35th Article of War.

Lee, op. cit. at p. 180.

DeHart, op. cit. at p. 223.
CHAPTER III


346th Article of War.

4Wiley, op. cit. at p. 219.

5Id. at p. 220.

619 OR I:632.

72 OR IV:80-81.

8Robinson, op. cit. at p. 367.

9Act of October 9, 1862. Reprinted in 2 JC 452.

10Enabling Act, §2.

11Opinions, at p. 553-557.

122 OR IV:375-376.

13Id. at p. 377.

14Act of October 9, 1862, section 4, clause 36.

15Opinions, at p. 556-560.

162 OR IV:1003-1004.

17Act of May 1, 1863 (S. 56). Reprinted in 3 JC 417.


23 Id., clause 69.

24 Id., clause 77.

25 Id.

26 Id.

27 3 OR IV: 247.

28 Act of June 14, 1864, cl. 53 (S. 70). Reprinted in 4 JC 244.

29 Id., clauses 83 and 129.
CHAPTER IV

1 69th Article of War.

2 DeHart, op. cit. at p. 301.

3 Lee, op. cit. at p. 39.

4 Id. at p. 40.

5 Id. at p. 41.

6 DeHart, op. cit. at p. 320.

7 Lee, op. cit. at p. 43.

8 Id. at p. 45.

9 Id.

10 Id. at p. 46.

11 Id. at p. 45.

12 Id. at p. 46.

13 74th Article of War.

14 Lee, op. cit. at p. 46.

15 Id.

16 Id. at p. 47.

17 DeHart, op. cit. at p. 308.

18 Lee, op. cit. at p. 48.

19 Id. at p. 49.

20 Id.

21 Id. at p. 50.

22 Id. at p. 51.
23 Id.
24 69th Article of War.
25 Lee, op. cit. at p. 52.
26 Id. at p. 53.
27 Id. at p. 54.
28 Id. at p. 55.
29 69th Article of War.
30 90th Article of War.
31 35th Article of War.
32 Lee, op. cit. at p. 76.
33 Id. at p. 77.
34 93d Article of War.
35 Lee, op. cit. at p. 78.
36 Id.
37 Id.
38 Id.
39 Id. at p. 79.
40 Id.
41 Army Regulations (paragraph 877).
42 Robinson, op. cit. at p. 378.
43 2 OR IV:1002.
44 Robinson, op. cit. at p. 379.
45 Id.
463 OR IV:331-332.

477 JC 10-11.

48 Id. at p. 74.

49 Id. at p. 306.

50 Robinson, op. cit. at p. 379.

51 Id.
BIBLIOGRAPHICAL NOTE

As is usual in the preparation of a piece of historical inquiry, the materials dictated my approach. The length and extent prevented me from conducting a case by case study of Confederate military law; a study which would have been meaningless without an explanation of the organization and procedures. A nounative study was also ruled out by the lack of either contemporary or modern sources concerned with the system on that level.

By process of elimination this brought me to a statutory and procedural approach to the subject of Confederate military justice. On the subject of procedure DeHart and Charles Lee were complete. The trouble was in extracting the necessary elements of procedure from the author's frequent tangential discussions of matters civil and legal which were unconcerned with the subject of military jurisprudence.

There was no dearth of statutory material, but once again there was the problem of gleaning essentials from the chaff. Very few statutes passed or discussed by the Confederate Congress concerned themselves with military justice. The *Official Records* were helpful as always, containing every
dispatch, message and statute there was concerned with military law. Likewise the *Journal* of the Confederate Congress proved invaluable in my search for statutory material.

William Robinson, Jr.'s *Justice in Grey* proved to be both a blessing and a disappointment. Robinson provided me with the only not statutory discussion of military courts I could obtain. Although brief and non-extensive, Robinson's discussion gave me a point of departure and a guideline to follow. Robinson's discussion of the court-martial and court of inquiry systems, however, was disappointing. Frequently I found discrepancies between Robinson and the statutory or procedural materials presented in official sources. These discrepancies were most often in the form of generalities which may have been necessary considering the breadth of Robinson's study.

In generalizing the preparation of my thesis I must say that very little that was new was uncovered. No new theories have been propounded nor have any "lost" documents been "rediscovered." I feel, however, that the thesis has served at least three useful functions. First, I feel as though it has been prepared for use as a possible foundation for any further in depth study of Confederate military jurisprudence. Secondly, the thesis has gathered together materials that have
never before been brought together, for a more organized and systematized study. Finally, perhaps this study has displayed the sophistication and modern organization of the Confederate military juridiary. In addition, of course, this thesis has served the same purpose as all studies. It has served as a very exciting and educational experience for the author.
PRIMARY MATERIALS


*Public Laws of the Confederate States of America, Passed at the First Session of the First Congress 1862* (R. Smith: Richmond) 1862.
Public Laws of the Confederate States of America, Passed at the Second Session of the First Congress 1862 (R. Smith: Richmond) 1862.

Public Laws of the Confederate States of America, Passed at the Third Session of the First Congress 1863 (R. Smith: Richmond) 1863.

Public Laws of the Confederate States of America, Passed at the Fourth Session of the First Congress 1863-64 (R. Smith: Richmond) 1864.

Public Laws of the Confederate States of America, Passed at the First Session of the Second Congress 1864 (R. Smith: Richmond) 1864.

Regulations for the Army of the Confederate States (Randolph: Richmond) 1861.

Regulations for the Army of the Confederate States (Randolph: Richmond) 1862.

Regulations for the Army of the Confederate States (Randolph: Richmond) 1863.

Regulations for the Army of the Confederate States (Randolph: Richmond) 1864.

Regulations for the Army of the United States (Harper and Brothers: New York) 1861.

SECONDARY SOURCES


Jones, Samuel D. A Rebel War Clerk's Diary (Brown and Co.: New York) 1891.


