THE UNIVERSITY OF CHICAGO

JOSEPH HOLT
JUDGE ADVOCATE GENERAL (1862-1875)
A STUDY IN THE TREATMENT OF POLITICAL PRISONERS BY THE UNITED STATES GOVERNMENT DURING THE CIVIL WAR

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With the evacuation of Fort Sumter, the Government of the United States was confronted with the prospect of a Civil War for which it had made no preparation. Men in high position, watching its coming with consternation, had taken thought for little else than schemes of compromise to ward off the impending catastrophe. In the emergency created when hostilities became suddenly inescapable, President Lincoln gave orders, in advance of the authorization of Congress, for certain measures of preparation. One of the most essential in his view, after an army, was the suspension of the writ of habeas corpus along the route connecting Washington with Philadelphia and New York, and later its suspension in troubled areas in the border States. Of what moment was an army to him if he couldn't get it to the capital, or if he couldn't prevent the spread of secession across the border until his army was ready to meet and check the movement?

Thus it was that in the border States the President, in some instances, and subordinate military officials in

others, arrested numbers of citizens whose hostility to the Union preparations for the war was particularly dangerous because of the divided state of public opinion. Many of these prisoners were guilty of active obstruction, but many more were taken merely to prevent an innate disloyalty from expressing itself in deed. They were seized without warrant and withdrawn from the State to be confined in federal fortresses.

Arrests were made in Baltimore of the Mayor for opposition to General Dix's command there, and of members of the State legislature, thought to be in favor of taking Maryland out of the Union.[1] George Wallace Jones, a native of Iowa, who was just returning from the United States embassy in Bogota, was arrested in New York on December 19, 1861, on a warrant from Secretary of State William H. Seward, who a few days before had welcomed him with friendliness and something of cordiality on his arrival in Washington.[2]

In September three prominent Kentuckians were taken

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1. Marshall, pp. 253, et seq.
2. Cf. Parish, George Wallace Jones, for this case. Jones had letters in his possession which, on discovery, were pronounced treasonable by the authorities. One of them, addressed to Jefferson Davis (Parish, pp. 61-63), had been written before he had learned of the beginning of hostilities between the North and South. In it he reviewed the span of his public life, explaining his political stand at such a moment of crisis as the election of Lincoln, for whom he voted in the hope that he "would proclaim his total dissent from the mad schemes of his

from their homes after midnight,--Reuben T. Durrett, former editor of the Louisville Courier, Charles S. Morehead, ex-governor of the State, and Martin W. Barr, telegraphic agent of the Associated Press for the Southern States. The warrant for their arrest, which had been issued to the United States Marshal by a justice of the peace, stipulated that they be taken before the nearest judge having jurisdiction to try them for treason. Marshal Sneed, however, found it advisable to convey his prisoners across the river to the neighboring state of Indiana for safe keeping. Acting under order to

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Abolition supporters." A portion of his letter follows: "I tremble at the thought of receiving other despatches, etc., lest they shall announce the existence of civil war. My prayers are regularly offered up for the reunion of the States and for the peace, concord and happiness of my country. But let what come to pass, you may rely upon it, as you say, that neither I nor mine will ever be found in the ranks of our (your) enemies. May God Almighty avert civil war, but if unhappily it shall come, you may (I think without doubt) count on me and mine, and hosts of other friends standing shoulder to shoulder in the ranks with you and other Southern friends and relatives whose rights, like my own, have been disregarded by the Abolitionists. I love Iowa and Wisconsin, for the honors conferred by them on me, and because I always served them faithfully, but I will not make war with them against the South whose rights they shamefully neglected. Nor will I ever sanction any effort to coerce the South to submit to the North in reference to a question (Slavery) with which the North has no right to interfere and that too in a palpable violation of the Constitution of my country--the treaty with France--the law of God himself and every principle of justice, reason, and the experience of the world.... May God bless you, your family and your own Sunny South, which (I) will still hope and pray shall be re-united to the cold North."

Jones was taken to Fort Lafayette and confined in a solitary casemate, where he remained for two months until his discharge by direction of Secretary of War Edwin M. Stanton on February 22, 1862.

report immediately all arrests made for "treason or other offenses involving the stability and integrity of the Government,"[1] he notified the Secretary of War of the arrests. The three were then taken into custody by the military authorities and removed to Fort Lafayette.[2]

Soon after their affest, appeals were made by leaders of the loyal movement in Kentucky to secure their release. Motives of public expediency were urged in these instances, rather than protests against their having been wrongfully arrested. They were discharged after confinement for periods of two and one-half months,--Durrett on an oath of allegiance engaging neither to enter any of the states in insurrection nor to communicate with anyone therein without permission from the Secretary of State,[3] the other two on parole not to render aid and comfort to the enemy.[4]

Many objections were raised to the release of Durrett and Morehead. In contradiction to the contention that they would remain harmless for the future, Joseph Holt, a leader

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1. Return of Marshal Sneed to the writ of habeas corpus in U.S.A. vs. Charles Morehead. O.R. II, ii, p. 816.
2. Secretary Cameron to Gov. Morton, Sept. 20, '61. O.R. II, ii, p. 806. The charges against the prisoners were as follows: Burrett was accused of "disloyalty to the United States Government while acting editor of the Louisville Courier, and with having written and had published in that paper editorials of most treasonable character." The charge against Morehead was of "actively (engaging) in stirring up and promoting the rebellion ....by corresponding with the enemy and doing other acts which in law (amount) to treason."
3. Geo. D. Prentice to Lincoln, Sept. 24, '61. O.R. II, ii, p. 807.
4. O.R. II, ii, p. 825, for Morehead's release; ibid., p. 828, for Barr's.

of the Union cause in Kentucky, urged the President in the strongest terms not to free Durrett, who "would take the oath (of allegiance) if necessary on his knees, and would stab the Government the moment he rose to his feet."[1] General Leslie Coombs protested against the efforts to free Morehead. "He did not advise," declared Coombs, "he stimulated the invasion of Kentucky by his misrepresentations."[2] Lincoln's rule in these instances was to release the prisoners on the recommendation of two Kentuckians, James Guthrie and James Speed.[3]

President Lincoln was loathe to resort to arbitrary procedure against individuals even where he believed other means inadequate to meet the necessity. However, he first found the suspension of the writ of habeas corpus advisable in the spring of 1861 to prevent the secessionist legislature of Maryland from assembling and cutting off the Federal Capital from its people and its armies. If he permitted the law to take its usual course, he had no means of preventing these acts, but by withholding the privilege of the writ he could arrest the men and keep them as prisoners. In this dilemma Lincoln ordered that the commanding general "watch and await their action" and if it transpired that they were

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1. Holt to Lincoln Sept. 25, 1861. O.R. II, ii, p. 808.
2. Coombs to Lincoln, Nov. 12, 1861. Ibid., p. 818.
3. Lincoln to Sec. of State, Oct. 4, 1861. Ibid., p. 809: "The Kentucky arrests were not made by special direction from here."

arming their people against the United States, he should "adopt the most prompt and efficient means to counteract (it), even if necessary to the bombardment of their cities, and, in the extremest necessity, the suspension of the writ of habeas corpus."[1]

Even before the convening of Congress in July, however, objections were raised to the legality of the measure. The case of Merryman, lieutenant of a secessionist drill company, arrested in Maryland, provided Chief Justice Taney with the opportunity to pass upon the legality of suspension by the President. Since General Cadwallader refused to release the prisoner to the court, it had no occasion to inquire into and pronounce on the merit of the arrest, and, through it, on that of hundreds of others made since the beginning of hostilities. All that was left, therefore, to Justice Taney was the mere declaration of his opinion that "the President, under the Constitution of the United States, cannot suspend the privilege of the writ of habeas corpus, nor authorize a military officer to do it." That Congress alone had that power, was the interpretation he derived from the clause of the Constitution authorizing the suspension of the writ, although its ambiguity permitted others to believe the power was given to the President. The constitutional question thus

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1. Order to Gen. Scott, Apr. 25, 1861. Works, VI, pp. 255-256.

raised by the court was taken up by distinguished lawyers from many quarters who argued it with a great show of skill on both sides.[1]

That the courts would not collectively favor such interference with their time-honored remedy for oppression was anticipated by President Lincoln. For suspension of the writ there was little precedent. It had been once successfully resorted to in a critical emergency in Rhode Island and upheld by the court, but many disturbances in the life of the nation, such as the Whiskey Insurrection and the Burr Conspiracy, had been quieted by the processes of civil justice. The tendency of American as well as of Anglo-Saxon law had been in general opposed to extraordinary judicial processes.[2]

On the other hand, the situation confronting Lincoln was a serious one. In Missouri and Kentucky, where the Union cause had officially triumphed against secession, the military authorities still felt the insecurity of their position in the face of widespread and active Southern sympathy. The expulsion of the Confederates from the soil of Kentucky in the fall did not put an end to the continued enlistment of

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1. Among those supporting the President's prerogative were Reverdy Johnson and Horace Binney. Cf. Rhodes, III, p. 439, n. 1, and Horace Binney, The Privilege of the Writ of Habeas Corpus under the Constitution.
2. Randall, pp. 144-147, presents a discussion of the tendency of American law in this respect.

Confederate troops within the state. The young men flocked to the side which seemed to offer most of romance and adventure,[1] and the constant threat of invasion stimulated Secessionists in the state to bolder efforts against the order so insecurely established. It was obviously not in the power of the courts to handle a situation like this, unless it be agreed to allow disloyal men to spy and plot and be taken, if possible, only after the damage had been done, tried before judges reflecting too often the prevailing sentiment of the community and acquitted by juries sympathizing with the deed. The Administration felt that the machinery of the courts "seemed.... designed not to sustain the Government but to embarrass and betray it,"[2] and wished to define and maintain its policy of prevention independent of judicial control in those instances where measures of repression were necessary. The districts marked out by the President for this more summary treatment were few in number although within them military arrests were numerous. In all other localities, however, ordinary civil justice held sway.

Because the constitutional question had been raised, Congress, too, like the Court, approached the President's policy of arrest and imprisonment from the point of view of his power to suspend the writ of habeas corpus. That power,

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1. Coulter, p. 147.
2. O.R. II, ii, p. 222.

considered separately, was unquestionably guaranteed to the government in either of its branches, but was destined to acquire its reputation from its use by the President, since he had assumed it. Thus inextricably joined to the one constitutional question was the other of its justification in practice.

In his message to the extra session of Congress in July, Lincoln incorporated a legal justification of his right to suspend the writ of habeas corpus together with a hint as to its necessity. The obstructive tactics of disloyal men in the border states must be met by prompt, if in some degree arbitrary, repression. But necessity alone did not commend the action to him; it had a constitutional basis in the power given by the Constitution for emergencies. It is true that that document is not explicit as to which branch of the government was to exercise the power, but, as Lincoln concluded, since "the provision was made for a dangerous emergency, it cannot be believed the framers of the instrument intended that in every instance the danger should run its course until Congress could be called together, the very assembling of which might be prevented, as was intended in this case, by the rebellion."[1]

Thus in addition to its responsibility for furnishing

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1. Works, VI, p. 310.

the necessary legislation for war, Congress was faced with the task of determining its attitude towards the distribution of power between the Executive and Legislature made by the President while it was not in session. It could not pursue its claims to a greater share in the power of conducting the war apart from the question of the merit of the Executive program as such, without the risk of sacrificing issues of greater for those of lesser import.

On its presentation this issue seemed destined for prompt settlement, and that along the lines of the President's adoption. For this purpose a joint resolution was introduced into the Senate on July 5, the second day of the session, "to approve and confirm certain acts of the President of the United States for suppressing insurrection and rebellion," among which acts was cited his suspension of the privilege of the writ of habeas corpus. The resolution was discussed and approved on its first reading, but within a week an uncertainty as to the attitude toward the war policy embodied in it had diminished its first popularity.--Would its passage imply acceptance by Congress of the principle that the President could act in the future, as in this case, independently of them and then receive their authorization of acts already performed?[1] --Furthermore, did they approve of the

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1. Cf. Sellery, for a discussion of the meaning of the enacting clause of the resolution.

policy of arrest and imprisonment unrestrained by the action of the writ of habeas corpus? Subsequent debate revealed their unpreparedness to treat the issues involved as a unit and to determine a policy accordingly.

From the Democratic party in Congress a conscious hostility to the prosecution of the war as embodied in the President's acts appeared at the start. Against his suspension of the writ of habeas corpus they directed their efforts as the first stroke in their attack on his policy of military arrest. Adopting the issue in the form which it had been given in discussion outside of Congress, they seized upon the plea of unconstitutionality to advance their more fundamental opposition.[1] These tactics reacted unfortunately upon

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1. The constitutional argument is peculiarly unfitted to convey the true character of the opposition aroused by such a measure as the suspension of the writ of habeas corpus, although, of course, in relation to all measures of vital moment in the social and political development of a people the value of the constitutional viewpoint inheres always in its connection with social and moral conviction. The instinctive distrust of any interference with long-established and, as in this case, traditional guarantees of liberty,--an impulse quite apart from any constitutional question as to how and by whom such interference can be made--is illustrated in the debate in the House of Representatives on the bill to suspend the writ introduced at the instigation of President Jefferson in 1807. Cf. Annals of Congress, 9th Cong., 2d sess., pp. 402-426. Here the question discussed was whether the danger to public safety was sufficient to warrant the suspension of the writ; the constitutional issue as to whether the act itself fell within the province of the President or of Congress was not raised in this instance; what constitutional discussion there

Republican conduct. By following the argument impulsively, they failed to realize the real threat of the opposition. In sympathy with the President's acts, which were no more drastic than those they were contemplating--and often by their expressed statements not drastic enough--his party fell into step with Democrats in arguing whether they were constitutional or not, a procedure certain to lend encouragement to their strange allies--to what end, they did not stop to consider.

With the disappearance of Republican enthusiasm for it, the resolution dragged along to the close of the session. And as the pressure of legislation resulted in a complexity of bills embodying constructive measures for the conduct of hostilities, a further reason arose for neglect of a resolution aiming merely to authorize acts already performed. In the words of Senator Fessenden, "When we brought in also bills of very great importance, that it was absolutely essential to pass at this session, Senators made fight upon this, and they asked us with a great deal of shrewdness, 'Why not proceed with legislation that (had) some practical result? Why be pushing this? Why not give us time on this?'"[1]

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was centered rather upon the effect such a precedent would have upon the future practice of the nation. In this form, however, the constitutional question is most nearly allied to the question of liberty and right of the citizen, and reveals the true basis for constitutional argument in general.

1. Globe, 37th Cong., 1st sess., p. 453. The other measures listed in the joint resolution were subsequently attached as a rider to the miscellaneous appropriation bill and passed. Cf. Globe, 37th Cong., 1st sess., appendix.

In the course of the debate Senator Lyman Trumbull of Illinois emerged as leader of the Republican opposition to the resolution. His voice had not been heard as yet in reference to this subject, but it was now raised to present the question in a new form. In Trumbull's mind had arisen a distinction between confirming the President's act and merely authorizing it with the understanding that the act fell within the province of the legislature which was now delegating power to perform it to the President. It was the latter course that Trumbull intended for Congress.

With this end in view he introduced a bill incorporating his principle; it authorized military commanders to suspend the writ at their own discretion. With this formulation of the old issue, the question of individual liberty was relegated to a subordinate place. Trumbull was little concerned with this more distressing aspect of Executive procedure; to him all constitutional guarantees of liberty were secured if the suspension of the writ of habeas corpus were made legally, that is, by Congress. But he resorted in argument to the injustice of imprisoning citizens, about whom the Republicans were no more vitally concerned than was he. Hundreds of civilians had been arbitrarily treated, was his contention, not because the writ of habeas corpus was suspended, but because this action was not taken by the legally constituted authority, Congress. The present state of affairs, however, amounted in his mind to a denial of the right

of freedom from arbitrary imprisonment guaranteed to every citizen by the Constitution. If not the Republicans, at least the Democrats, alive to injustice in many quarters, responded eagerly when he touched upon the real motive for their opposition, although his solution was totally unacceptable to them.

Trumbull's bill, however, provided even less of a guarantee for independence of the civil from the military authority than did the President's policy which it was designed to supplant. By conferring comprehensive powers on military commanders in the field to provide for government by martial law of territories "in a state of insurrection and war," a bolder delegation of power than that contemplated by the joint resolution, it was subject to as great--if not greater--abuse of personal liberty. For Trumbull, however, it had the merit of making legal any arbitrary acts performed with its sanction. It would have supplanted an arbitrary executive by a legal legislative despotism. Furthermore, it would have deprived the President as Commander-in-Chief of the control of his subordinates in the field by transferring it to Congress.

Trumbull's course was thus calculated to find support from Democrats by his attack on oppression of civilians, and from Republicans by his elevation of military power; two features mutually irreconcilable except in unitedly opposing the President's policy. However, his appeal to each group

was momentary only; when he finished speaking against Executive right to imprison citizens, the Democrats responded by a vigorous attack on his bill,--and as for the Republicans, they were as yet somewhat bewildered by the prospect of instituting a legal system so much more arbitrary than the illegal system in force.

The issue which Trumbull had raised was greater than simply that of the right to suspend the privilege of the writ of habeas corpus or to arrest citizens. He had brought to the fore the question of where the power to conduct the war was lodged, with the legislative or executive branch of the government. By capitalizing the doubt which attached to Executive suspension of the writ so as to prevent a last minute rally from Republicans to defend the President from the Democratic chrage of unconstitutionality, he had raised the war powers issue--not between the minority and majority in Congress, but between the majority party and the President. This issue had been fastened upon the war legislation essential to the success of the national arms; with the habeas corpus problem the contest was to open.

Although unready to provide the sanction of law for arbitrary authority, Congress gave some thought to the problem of checking disloyal activities by law, and passed on the last day of the session a Conspiracies Act providing fine and imprisonment for those "who conspired to overthrow the

government."[1] This measure supplemented the existing law of treason, interpreted in the courts to consist of an overt act of war against the United States, by making it possible to punish those who only conspired to encourage hostilities. The law of treason applied to all of the soldiers levying war against the United States in the Confederate armies, but the humanitarian and practical obstacles to its application in these instances induced the government to adopt the method of holding them for exchange as prisoners of war. For lesser crimes in furtherance of the rebellion, however, when they were committed not by Confederate soldiers but by civilians--often residing in the non-seceded states, it was essential to furnish some additional degree of legal control.

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1. U. S. Statutes at Large, XII, p. 284.

CHAPTER II

THE QUESTION OF THE CONTROL OF POLITICAL PRISONERS

During the fall recess of Congress, Senator Trumbull matured a scheme of action calculated to assert Congressional control of the war. The earliest of Republicans to discover his opposition to the leader of his party, he was at the same time of all senators in a position to know best the ability of the man whose policy it was his opportunity to judge. Trumbull had been a political friend of Lincoln's in Illinois. Their membership in the same party had brought them frequently together; it had made them, on one occasion at least, rivals. To Trumbull had fallen the greater share of political honors; he had held executive and legislative offices in his state, had been a justice of the supreme court of Illinois, and as a U. S. Senator had won recognition among his colleagues for his leadership of the new forward-looking anti-slavery party. Very likely he had given little thought to the man who had made him Senator six years earlier, except as a shrewd country lawyer with a stock of popular stories, or a good party manager with a gift for manipulating men. On Lincoln's promotion above him to his position of high responsibility, Trumbull, with his greater experience, could not adjust himself readily to the task of finding statesmanlike qualities in his erstwhile fellow-worker. He saw the hesitation, and the caution, with which Lincoln surveyed the delicate and conflicting

situations, and deplored the lack of "confidence in himself and (of) will necessary in this great emergency."[1] Lincoln meant well "and in ordinary times would have made one of the best of Presidents," but as leader "during a great civil war he lacked executive ability, and that resolution and prompt action essential to bring it to a speedy and successful close."[2]

The only course left to a Senator desirous of saving the Union was to secure to Congress the power necessary for putting down rebellion. From his position as a leader in the Senate--and chairman of the Committee on Judiciary--Trumbull could watch zealously over the war power and guard it from executive encroachment,[3] while Senators Zachary Chandler and Benjamin F. Wade--his companions in opposition--boldly challenged Lincoln and his unsuccessful generals in the Committee on the Conduct of the War.

Meanwhile, since Congress had proven unable to define its position on his suspension of the writ of habeas corpus, Lincoln put his policy into effect during the fall and winter. He authorized the suspension of the writ in Missouri,[4] and although he refrained from suspending it in Kentucky where the utmost caution in management was essential, he permitted

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1. Trumbull to M. C. Lea, Nov. 5, '61. Quoted in White, p. 171.
2. Lyman Trumbull to Walter Trumbull, undated, quoted in White, p. 430.
3. Stephenson, p. 204.
4. Nov. 20, '61. O.R., II, i, p. 230.

the arrest of suspected persons and their imprisonment without trial. The supervision of arrests fell generally to the State Department, but the Secretary of War assigned the prisoners to military forts and arranged the conditions of confinement.[1] The drastic effort to keep these states from joining the Confederacy provoked a certain amount of criticism in each of the disturbed localities, but by the nature of the case, these districts were hostile to his policy on general grounds. Among the loyal men even of these states who were making a desperate fight to capture their state machinery, the action of the military authorities was welcomed and often petitioned for, although in some instances discouraged for its effect on public opinion in their communities.[2] But arbitrary arrests were also made in New York and the New England states, where the danger of treasonable influences upon the regular administration of justice was not so great. The Democratic party made an issue of this violation of constitutional liberty in its fall conventions.

During this autumn excitement engendered by the progress of the war added to the difficulties of the Administration. The promulgation of Fremont's premature order for the emancipation of slaves in the military district of Missouri and

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1. Cf. Return of Marshal Sneed to the writ of habeas corpus in U.S.A. vs. Charles Morehead. O.R., II, ii, p. 816. Cf. above, p. 4.
2. Letters in the Holt Papers from T. S. Bell, James Speed, and others in Kentucky reflect this attitude from men of conservative sentiment.

its ungracious withdrawal, revealed the indifference with which a voluble part of the North regarded border state susceptibilities and legal limitations in the matter of freeing the slaves. An impatient country learned with dismay that the discouraging "quiet on the Potomac" had at last been broken by defeat in a skirmish at Ball's Bluff, and that McClellan had refused to move against Johnston, encamped opposite him, although winter was coming on. The anxiety over the size of the public expenditure was increased by rumors of gross waste of funds and possible corruption in the awarding of contracts by the War Department.

The stress of these and kindred emotions was upon Congress when it convened in December. A vindictive note burst forth in its opening sessions over expulsions of members and motions for reprisals against Confederates, an opportune moment for striking a spark of dissatisfaction or sounding a note of warning against the current methods of carrying on the war.

Congress had in the previous session entered upon the task of adjusting the law to the hostile activities of disloyal citizens which fell short of the charge of treason by passing the Conspiracies Act. But while this Act provided the basis for numerous indictments, it did not prove sufficiently definite to lend itself to successful application in the courts. Congress therefore passed a further measure fixing penalties

for conviction in a United States court on the charge of "giving aid and comfort to any existing rebellion or insurrection." This provision was then inserted, as section two, in a comfiscation bill under discussion.

Unfortunately this problem of the extension of the criminal code to meet the requirements of war was evolved only incidentally to the determination of policies of greater immediate interest to Congress. Combined as it was with the consideration of confiscation and emancipation, it was slighted or only weakly grasped in debate and never comprehensively formulated. Trumbull's preoccupation with the more truculent issues was evidenced at the start. Intent on striking a timely blow in forging the issue of war powers for Congress, he stood up immediately after the initial business had been performed on the first morning of the session to give notice of his intention to introduce a bill featuring confiscation and emancipation.[1] Although a confiscation act had been passed at the extra session, a further measure to penalize traitors who were slave-holders coincided with a recently intensified war spirit and was calculated to appeal to the body of Northerners most remote from slaveholding--those who had been opposed to slavery on principle and whose own property interests could not be affected by the threat to it.

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1. Globe, 37th Cong., 2d sess., p. 1.

The next day in speaking on the bill, he urged in strong terms the constitutional right of Congress to conduct the war.[1]

The constitution properly interpreted, he maintained, gave to Congress ample power to do everything necessary to put down rebellion without any need for a resort to the plea of necessity. Thus "the authority of the Army in the suppression of an insurrection to seize, imprison, or shoot the insurgents, to desolate the country they occupy, to seize and appropriate for the time being their property and free the persons they hold in bondage, is as simple and complete under the Constitution as that of a Court in peaceful times to arrest, imprison, try, and execute a murderer." This was what it meant to make war by law. The picture might not allure, but the fact of its legality softened something of its arbitrary outlines for Trumbull.

Trumbull gave here the keynote to his theory of the validity of Congressional war power. The importance of his emphasis on legality formed the only consistent bond between his very evident radicalism in regard to confiscation and emancipation, and his tendency to take a decidedly conservative view of the arrest and imprisonment of disloyal civilians. His logic was not vitiated if his measures did not harmonize

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1. Globe, 37th Cong., 2d sess., pp. 18-19.

in content; the chief point at issue was to secure to Congress the right to determine the policy of the war, even if in a single instance circumstances forced it to veer from the radical--to Trumbull the true--path, and to adopt the conservative point of view in opposition to the President. Thus as the session advanced he was willing to support in the matter of the political prisoners a practice which he persistently opposed in relation to the procedure of confiscation, a resort to the courts. He wanted property adjudged confiscable according to the procedure in admiralty cases, but persons were to be adjudged disloyal in the ordinary civil courts. The one, because he "would just as soon think of impanneling a jury when our armies met to know whether we should kill the enemy that was shooting upon us, as of impanneling a jury to know whether we can take his real estate;"[1] the other, not because of any more sacred right to constitutional protection but because to deny to these persons a resort to the courts was the outgrowth of the illegal suspension of the writ of habeas corpus by the President.

Trumbull's confiscation bill was not adopted, but the measure which passed Congress on July 17, 1862, instituted a procedure which was in the main a common law remedy, providing trial by jury where either side in a suit should demand it.[2]

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1. Globe, 37th Cong., 2d sess., p. 2170.
2. Randall, p. 285, note 21.

The Senate substitute bill, strenuously urged by Trumbull, would have set up a special board of commissioners to enforce confiscation.

However, the bill to settle the fate of political prisoners, for which Trumbull was sponsor in the Senate, was chiefly remarkable for its provisions turning over the prisoners made by the military authorities to the courts. The bill came from the House and represented the desire of that body to let the citizens of the United States "know they are the subjects of care of their representatives," and to make law "as well for the protection of the Executive as for the protection of the citizens."[1] One of its sections authorized the President to suspend the privilege of the writ of habeas corpus in an emergency, but two other sections deprived him and the military authorities of the power to keep any prisoners taken as a result of such suspension more than a specified length of time. These provisions were in detail: that a list of political prisoners should be furnished by the Secretaries of State and War to the district and circuit court judges in order that the prisoners might be discharged on an order from the judge if they were not indicted by the next session of the grand jury meeting in their districts. Punishment by fine and imprisonment was provided for officers failing

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1. Bingham of Michigan, in the House of Represemtatives, Globe, 37th Cong., 2d sess., p. 3105.

to obey the judge's order. In case the secretary failed to furnish the required list within five days after the passage of the act any citizen could by petition obtain the discharge of the prisoner upon the same terms.

With the appeal to the Constitution uniting two such antagonistic methods of procedure as Trumbull seemed willing to sponsor in these instances, the surmise that his eagerness for Congressional control of the war was an attack upon the President's position in general rather than upon any particular use he had made of the war power, hardly needs the confirmation given it in the ensuing debate. But the increasing bitterness of invective launched against Lincoln by Trumbull and his associates was recognized on the floor of the Senate. Beginning his campaign against the Executive policy for political prisoners with a resolution introduced early in the session directing the Secretary of War to furnish information "whether in the loyal States of the Union, any person or persons (had) been arrested and imprisoned and (were) now held in confinement by orders from him or his Department, and, if so, under what law said arrests (had) been made, and said persons imprisoned," Trumbull explained that the purpose of this move was to secure information in order to regulate the thing by law. But forced to defend it from Republican protests that such arrests were necessary to curb the activities of disloyal men and traitors, Trumbull answered with a

direct attack upon the whole course of the Administration in making arrests, but particularly in states like New York, or Maryland, or Connecticut, where there was no incurrection. As in his criticism of suspension by the Executive of the writ of habeas corpus,[1] he expressed concern over the violation of personal liberty: for the Executive to assume for himself and his subordinates the power to decide who was innocent and who was guilty was the "very essence of despotism....What are we coming to if arrests can be made at the whim or caprice of a cabinet minister? Do you suppose he is invested with infallibility so as always to decide aright? Are you willing to trust the liberties of the citizens of this country in the hands of any man, to be executed in that way? May not his order send the senator from Connecticut or myself to prison? Why not? Why may not the commanding general of your Army to-morrow say, 'take the President of the United States and confine him at Fortress Monroe,' and if he is asked why he did it, may he not answer, 'just because I could--because I had the power?'"

But in planning to redress this abuse of power, Trumbull was more solicitous to make arrest constitutional than to free citizens from all arrest whatsoever. He proposed to remove the arbitrary quality from the act by ren-

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1. Cf. above, ch. I.

dering it constitutional. Trumbull did not envisage the possibility of a constitutional despotism.

The effect of this move of Trumbull's on the Republicans was not impressive. They remained unconvinced. All but three of them thought it likely to brew mischief for the Administration in its conduct of the war. The Democrats, however, urged it as a legitimate attempt to check the outrages against the Constitution and laws on the part of the Government. This very Government took upon itself to upbraid the revolting states for violating these same laws and Constitution,--"a very sad and revolting spectacle."[1] Was Trumbull's a policy for Republicans or for Democrats? It was obviously an appeal to Extremists of both parties, making for such a union as his experience in the summer session had seemed to promise.

Indeed, from the ranks of the moderate Republicans, came the charge that Trumbull's opposition to the Administration had an ulterior motive. Oliver Browning, Trumbull's colleague from Illinois and Lincoln's friend, compared him with former Senator John C. Breckinridge of Kentucky, now serving the Confederacy, who "spent the whole of his time and the whole of his talents during the last session to fix upon the Administration the charge of tyranny, usurpation, lawless-

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1. Latham of California. Globe, 37th Cong., 2d. sess., p. 95.

ness of action, and disregard of all constitutional guarantees for the rights of citizens!"[1]

That the weakness in Trumbull's policy was to arouse keen opposition from Republicans of various shades before they should ever become reconciled to it, was evident when debate opened in the Senate on the House bill to suspend the writ of habeas corpus, release prisoners, etc. Criticism was immediately levelled at the two sections relating to the discharge of prisoners. Senator Wilson of Massachusetts moved to strike them from the bill, fearing they would result in "a jail delivery of traitors."[2] He also detected in them a "censure on the Secretary of State and the Secretary of War." But Senator Howe pointed out the real discrepancy in the bill. It was, he declared, a contradiction in terms. "It seems to me very evident that either the first two sections ought to be stricken out, or the last section (providing for the suspension of the writ of habeas corpus) ought to be," he said. "The last section completely defeats and destroys every particle of vitality in the first two sections.... This bill, in the first section, assuming that the

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1. Globe, 37th Cong., 2d. sess., p. 97. Cf. also Senator Dixon's remark in the debate on the confiscation bill: "The Senator from Illinois has, at last, unmasked himself as an opponent of this Administration....I have thought for some time that he was an opponent of the Administration." Ibid., p. 2973.
2. Ibid., p. 3359.

prisoner is rightfully confined, and therefore that he has no right to the writ of habeas corpus, provides that he may apply to the court for an order, and not for a writ, and without a hearing, without a trial, without an examination, he shall be discharged....Is not the effect of the whole act, acknowledging the right of the President to suspend the writ of habeas corpus, which is the time-long remedy for persons restrained of their freedom contrary to law, and creating a new remedy which will discharge the prisoner in spite of the suspension of the writ of habeas corpus?"[1] Sumner had an interesting interpretation of the bill the opposite of Trumbull's:[2] "The moment any court has proceeded under the first two sections of this statute, and the person is about to be discharged, he may be met at the door of the prison by the suspension of the writ of habeas corpus as regards him, and be returned." Trumbull declared that the bill meant that "the writ of habeas corpus may be suspended for the time being, but it (is) not intended to be perpetual."[3]

Wilson's motion to strike out these sections was lost by only one vote. Out of nineteen to preserve them seven votes were Republican, not a great many won to Trumbull's side, but enough in this instance when joined to the Demo-

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1. Globe, 37th Cong., 2d sess., pp. 3361-3362.
2. Ibid., pp. 3385.
3. Ibid., p. 3385.

cratic support of the provisions in question. However, the bill as a whole was prevented from coming to a vote in this session by Wilson's motion. Although Trumbull's object had failed, he was not discouraged from planning a future attempt to pass the bill through the Senate; he had, at any rate, been able to stir up enough Republicans to prevent the majority from modifying the bill so as to support the President's policy and destroy his own.

It was not very long after the opening of this second session of Congress that President Lincoln began to understand the nature of the opposition developing in the Senate. As early as December it had become apparent to close friends that the President was aware of Trumbull's efforts to form a powerful Radical opposition to his conservative policy.[1] Displeased with the popular condemnation of the apparently arbitrary authority exercised by the State Department,[2] he began the work of modifying his policy so as to commit the least oppression and engender the least criticism. On February 14th, he transferred control of the prisoners to the War Department. By the same order he released all "political" or "state" prisoners then held in custody who should subscribe to a parole "engaging them to render no aid

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1. Joshua F. Speed to Holt, Dec. 8, '61. Holt Papers, v. 31.
2. Cf. Marshall, p. xiii, for the anecdote about Seward and his bell.

or comfort to the enemies in hostility to the United States," and to those who should keep their parole he granted "an amnesty for any past offences of treason or disloyalty which they (might) have committed."[1] This modification of his policy he made because he thought he detected a favorable change of public opinion, whereby "apprehensions of public danger and facilities for treasonable practices (had) diminished with the passions which prompted heedless persons to adopt them."[2] Two commissioners[3] were appointed to examine prisoners, administer the oath, and discharge those qualified for release. In this way many prisoners obtained their freedom,[4] and the President was left to consider what provision he should make for those to be confined in the future, by order of the War Department.

Aside from Lincoln's distrust of the Radical policy in Congress, and his determination not to yield to it on the issue of the War Power as embodied in the program of emancipation and confiscation,[5] he found it further impossible to allow Congress to modify his policy with regard to political prisoners in the manner provided for in the bill under dis-

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1. Rhodes, III, p. 558.
2. Proclamation of Amnesty to Political or State Prisoners. Works, VII, pp. 100-104.
3. John A. Dix and Edwards Pierpont.
4. Rhodes, III, p. 558.
5. Cf. Stephenson's discussion of this aspect of the war powers issue between Lincoln and Congress, in chs. XX-XXII.

cussion. By compelling the submission of a list of prisoners to the district judges the fate of those included in it would be decided by those very courts whose machinery, according to the Secretary of War, seemed to the Executive department designed to embarrass and betray the Government.[1] The President's experience warranted his belief that the courts would free the majority of the prisoners--all those for whom his policy was particularly designed, men whose activities while dangerously obstructive to the success of the war were yet not such as to provoke punishment by law. That judges, too apparently susceptible to the hostility of their environment, should be trusted to decide fairly between activities contrary to law and those which were not, was to Lincoln unthinkable, even should they recognize the power of Congress to delegate to him the task of suspending the writ of habeas corpus. But Lincoln was further unprepared to allow prisoners to be released by virtue of that distinction. The preventive nature of his policy had been its most important feature. If he could only have men arrested and imprisoned on definite charges, his task would be much more difficult, and accusations tending to inflame public excitement, only too readily aroused, would have frequently to be published. If this bill should pass Congress--and the gathering strength of the oppo-

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1. O.R. II, ii, p. 222.

sition warned him of the wisdom of being prepared for such an eventuality--he would have to find some way of maintaining his power to keep in prison for indefinite terms men whose disloyal activities rendered their freedom temporarily dangerous to the progress of the war.

While the President was puzzling over this situation in Washington, certain precedents were being established by one[1] of the military commanders in the field which were to influence Lincoln in formulating a new course of procedure towards persons of disloyal proclivities. Whereas Congress during the year and a half of the war had been concerning itself with the arbitrary arrest and imprisonment of disloyal citizens of loyal states, General Halleck in Missouri had adopted a method of treating a certain class of these Confederate sympathizers, which was to prove susceptible of extension into a more general policy towards the whole class. The commander of an army in the field has frequently to encounter hostile activities dangerous to the success of his army's operations which do not come from the legitimate armed force of the enemy. The men performing these acts are, for lack of a better classification, still citizens. Marauders, bridge-burners and the like had to be dealt with

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1. General Butler in the Department of the Gulf also resorted to this procedure on one occasion. Cf. below, page 34, note 1.

by the army when caught, but since they were not enrolled in the Confederate service, they were not entitled to the treatment of prisoners of war. They fell rather into the category of guerrillas, a kind of belligerent ignored by the law of nations. But that the heinousness of their offence was heightened by the idea of their being disloyal citizens was shown by the character of the charge against them: usually "treason" followed by the proper specification,-- "marauder," "bridge-burner," etc., an example of the kind of mental confusion wrought by a civil war.[1]

It was this double-edged character of their crimes which rendered these offenders susceptible to the kind of treatment which could serve as a precedent to be used against the political prisoners. The fact that they were, like guerrillas, responsible for acts obviously military in character and outlawed because not performed by the legitimate armed forces of the enemy, removed the possibility that the country would protest their being dealt with by the military authorities. They were subjected to martial law, which in a case of this kind was conceded jurisdiction by the law of war. Thus, their cases were not considered by Congress in connection with the suspension of the writ of habeas corpus. But

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1. The same necessity caused General Butler in the Department of the Gulf to order the trial by military commission of enlisted men of the Confederate service who had broken the parole granted them by a Union commander. These prisoners had by their act forfeited their right to be held as prisoners of war and exchanged, and had put themselves

legally they were citizens of the United States, especially when citizens of a state still formally within the Union, and when not enrolled in the Confederate army. From this point of view they were entitled to claim from their government the benefit of that protection guaranteed to its citizens by the Constitution and laws. When, however, the government happened to be the one whose life they were aiming to destroy in order that they might withdraw from it, their claim would tend to appear absurd. But was it different in principle from the claim of other prisoners charged with hostile acts of a less obviously military character? Was it not only different in kind? If martial law could be applied to one class, was there any reason why its use could not be logically extended to include the other?

This distinction is from the viewpoint of common sense far-fetched. Congress, for instance, probably never recognized the similarity. It never provided specifically for punishment for marauders and never seriously criticised their trial by military tribunals.[1] Of course the Confiscation and Conspiracies Acts, in referring to those giving aid and

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in a special and punishable category. But for purposes of the discussion they are removed from the others, as, although their cases are similar, they are more closely associated with the Confederate army and not so clearly "citizens" of the United States. Cf. O.R. II, iii, p. 616.

1. Cf. chapter IV for Henry Winter Davis' unsuccessful amendment in the session of 1864-1865.

comfort to the rebellion and conspiring to overthrow the Government, would cover the case by their indefinite terms, but unless Congress intended to countenance control of this offense by the military authorities, it should have made some adequate provision for it, as it did for the offense of spying.[1] However, if a distinction is logically tenable, even though fine-spun, it may form a competent basis for action. If criticism did not attach to the punishment by martial law of military offences, then martial law could safely be applied wherever a military cast could be fixed on a given offence.

Of the two laws of war, martial law is the more indefinite. It is indeterminate in jurisdiction, unlike the military law enacted and clearly defined by statute. It is rather the common law of war, recognized as consisting of the decrees of the military commander for the region he governs, and hence also indefinite as to content. With its greater flexibility, it commended itself to the situation in hand, and General Halleck had recourse to it in bringing to trial the wandering bands of armed marauders that beset the path of his army. The tribunal chosen was therefore the military commission, the vehicle of martial law as the court

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1. The spy, whether a citizen or not, was subjected to the jurisdiction of a general court martial by act of Feb. 13, 1862. U. S. Statutes at Large, II, p. 371.

martial is of military law.[1]

But if martial law was to be adopted as a precedent and extended in application so as to be used upon political prisoners, it was necessary to secure its recognition in the cases already experimented upon. In March, 1862, one of these came to the office of the Judge Advocate of the Army in Washington for review. This was then the central office for the review of cases tried by departmental military courts. Major John F. Lee was Judge Advocate, having held the office since the close of the Mexican War. His hesitation to accept the responsibility of admitting the validity of the application of martial law and countenancing the precedent set, appeared in the opening paragraphs of his report, where merely detailing the facts of the case: The prisoner was tried, Lee asserted, "before a species of tribunal instituted by General Halleck at St. Louis and styled a military commission."

One Ebenezer Magoffin had been tried on two charges:[2] first, for killing and murdering a sergeant when not "a

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1. Halleck was acting consistently with a suggestion contained in a General Order of the War Department of Aug. 26, '61, requiring the strict enforcement of the 57th article of war prohibiting correspondence with the enemy, and extending its application to all persons who were thus engaged whether belonging to the army or not. There is no evidence that this order was enforced until a later period dealt with in this paper. Cf. Gen. Order #67, Gen. Ords. 1861. A.G.O.
2. Record Book, J.A.G.O., I, pp. 285-289.

legitimate belligerent," and second, for violating his parole not to resume arms against the United States. Each charge is based upon the conception that the accused was not a belligerent entitled to the treatment accorded persons taken in like circumstances who were legitimately enrolled in the Confederate service. The central point of the first charge is the phrase "not being a legitimate belligerent;" if he had been one he would not have been accused of murder for killing a United States soldier. The second charge embodied the same necessity of depriving the man who broke his oath of the privilege of treatment as a recognized Confederate combatant.

The accused raised the question of the court's right to try him. He was, he pleaded, a citizen of the state of Missouri and as such should be answerable only to the courts of the state, courts open and free to try and punish. And Judge Advocate Lee, after consideration of the power of martial law to extend jurisdiction over him to the military authority, dismissed it, and agreed with the defendent that the court had no jurisdiction.

In considering the question of the court's right to try the prisoner, Judge Advocate Lee found it justified only from the point of view of public law--that "a public enemy in arms is liable to be proceeded against according to the laws of war; an inhabitant of a country under martial law

is liable to the erde, or system, which the conqueror having driven out the laws and tribunals of the country, may proclaim and establish. "This," he asserted, "I understand to be the foundation of martial law--to be recognized as valid, in that state of thing, because arbitrary power is better than anarchy, and any law than no law." But without considering the validity of the defendant's argument that martial law could not be applied in a state where the courts were open, Judge Advocate Lee revealed his opposition to the use of martial law by refusing to allow a resort to it on any terms. "I do not understand that our Government recognizes that state of thing," he declared, "or will base any system of Executive orders and proceedings upon such theory or principle. Then," he concluded, "under our municipal laws, State or Federal, these proceedings are of no validity--Military comissions are not a tribunal known to our laws; and military commanders have no power to inflict death except by sentence of court martial."

It was evident that under Major Lee the Judge Advocate's Office did not favor the application of martial law. But the President, in critical need of a determined policy to give him a renewed hold on political prisoners, was turning his attention to this code for a solution of the problem Congress was shaping for him. He saw the possibilities in General Halleck's course. By adopting the idea of trial by

a military tribunal for military offences, he could apply it to cases where there was a less obvious, perhaps, but often more real threat to military success--where the act, in effect, would be in the nature of a conspiracy or an intent to engage in hostile activities. If he could gradually increase the number of persons subject to a military trial, he would be establishing a precedent which would maintain for the executive authority the power to decide the fate of political prisoners--whether they were to be held or discharged. Then the courts could neither release prisoners held by executive authority nor pronounce adversely upon a power so long exercised and so necessary in the President's judgment to the conduct of the war.

In the last week of June fearful news reached Washington of the fate of the long awaited offensive against Richmond upon which so much faith had been centered. The splendid army transported to the Peninsula in April had been repulsed within the very sight of the spires of Richmond; the fate of the Union appeared to hang in the balance until word came that the army was neither to be destroyed nor forced to surrender. Only military success could relieve the President from intolerable pressure from the Committee on the Conduct of the War, the Radicals in Congress, and Stanton and Chase in the cabinet;[1] only by a great victory could he

demonstrate to a skeptical English Government that he deserved the support it was at that moment threatening to give his enemy. Failure at this moment forced Lincoln to devise other means to extricate himself from his bewilderment. Surely there must be some way of receiving advice without yielding to that of the Radicals,--a way to keep his independence and yet win battles.

The first step in his supreme effort was a request of state governors for help in raising a new levy of 300,000 militia for three years' service. The care with which he undertook this task revealed the President's determination to make it successful and his concern lest active discontent somehow operate to hinder it. He did not dare make a public appeal to the country, presenting frankly his need for the new force, for fear that "a general panic and stampede" would supplant the depression which had settled on the people with the news from the battlefield.[2] If agitators in the border states opposed this draft as they had opposed all other war measures of the Administration, they must be stopped by recourse to arrests, a tedious necessity indeed for one who realized the harm they were causing in Kentucky, yet one which could not be dropped in the face of such an emergency

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1. All of whom suspected McClellan of "treachery" and were importuning Lincoln to supersede him.
2. Cf. Lincoln to Seward, Rhodes, IV, p. 55: "I expect to

as Lincoln expected. He put into effect a decision which he had reached independently of his military advisers, namely, to sweep them aside and install General Halleck as General-in-Chief with headquarters in Washington.

General Henry Wager Halleck was somewhat unduly credited with the recent successes of the western army. He was, moreover, an experienced officer, which Stanton, Wade and Chandler were not. In addition to the practice of the soldier he bore the reputation through his books of understanding the theory and law of warfare. Lastly, he was responsible for the policy that the President had determined to adopt in connection with the projected draft, the use of the military comission to check activities of civilians endangering military operations. With the help of Halleck Lincoln drafted the plan which was to enable him to meet the demand of Congress without forfeiting the substance of his control, a maneuver he deemed more than ever necessary in view of the opposition to enlistment which had sprung up in several states.[1]

If he introduced his new policy skillfully, the President need not defy the Radical party in Congress. To oppose

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maintain this contest until successful, or till I die, or am conquered, or my term expires, or Congress or the country forsakes me; and I would publicly appeal to the country for this new force, were it not that I fear a general panic and stampede would follow, so hard is it to have a thing understood as it really is."

1. In Pennsylvania and Wisconsin open violence ensued upon the efforts to raise the quota. Cf. Rhodes, IV, pp. 164-165.

their policy in fact, he would not have to oppose it as embodied in legislation. While accepting the measures intended to affect his control of prisoners, he could render them harmless wherever necessary by substituting military for civil trials on the basis of martial law. By waiting until after Congress had adjourned to announce his policy he would protect it from Radical criticism within the senate chamber, and outside of it as well, in view of an approaching congressional election. He might secure further immunity by the advantage he expected to obtain over the Radicals by the publication of his emancipation proclamation, also after the adjournment of Congress. By this act he expected to detach from the Radical coalition the active group of Abolitionists;[1] if he could not by his program for the treatment of political prisoners create a rift in the temporary alliance between Trumbull and the Democrats--and he did not believe in such a possibility even through submission to Trumbull.--he could at least choose a man to carry his plans into effect who had the confidence of Conservatives and War Democrats who were kept in a state of constant annoyance at signs that he was "going over" to the Radicals. In Kentucky, this misapprehension amounted to a danger. The crescendo of protest against the Government's methods begun almost simultaneously

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1. Cf. Stephenson, ch. XXV.

with the abandonment of her neutrality, caused the President on July 13 to warn Halleck, "They are having a stampede in Kentucky. Please look to it."[1] Stanton admonished General Jere T. Boyle to make arrests in future only where good cause existed or strong evidence of hostility to the Government, but Lincoln could not give up all arrests, even for the immediate future. He must conciliate Kentucky as he could.

As his policy shaped itself as a whole in his mind, Lincoln hoped that it would appear to be an improvement over the old practice of indiscriminate arrest and confinement, even though he refused to hand over his prisoners to the courts. With arrests made henceforth largely upon the basis of active disloyalty and tried by military tribunals wherever the evidence proved sufficiently definite, he looked forward to a drastic diminution in the numbers of those kept in indefinite confinement on vague charges. All of these he would himself discharge periodically, with the end of each specific era of excitement. Could he not anticipate an abatement of hostility in Kentucky with the appointment of a loyal Kentuckian to carry out this policy?

The month of August saw a reorganization of the Judge Advocate's Office, in accordance with the law passed by Congress creating the position of Judge Advocate General and

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1. Works, VII, p. 275.

defining his duties.[1] On the 8th, an order from the War Department directed all United States marshals and police authorities to arrest persons "engaged, by act of speech or writing, in discouraging volunteer enlistments, or in any way giving aid and comfort to the enemy, or any disloyal practice against the United States."[2] These cases were to be reported to Major Levi C. Turner, associate judge advocate. This officer had been appointed on July 31st to carry on the preliminary work of examining prisoners taken under this order and to release those not intended for trial. For five weeks a process of examining and releasing prisoners upon their taking an oath of allegiance was steadily conducted.

On September 24th, after the meeting of Democratic conventions in the states, Lincoln issued a proclamation announcing his new policy to the country.[3] It suspended the writ of habeas corpus throughout the United States. Two features of the proclamation of the 24th marked a turning point in the treatment of civilian prisoners. One was the unprecedented extent of the territory affected; the other, the declaration that all persons "discouraging volunteer enlistments, resisting militia drafts, or guilty of any dis-

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1. Statutes at Large, ch. CCI. Act of July 17, '62. Described further in chapter IV, below.
2. Globe, 37th Cong., 3d. sess., p. 1215.
3. Two days earlier the Preliminary Proclamation of Emancipation had appeared.

loyal practice, affording aid and comfort to rebels against the authority of the United States" would be liable to be tried by military courts.[1] This clause of the proclamation called for a policy radical in the measure of control it afforded the military and Executive branch of the government. Whereas the War Department had before rested content with confining those arrested, now it announced its intention of trying certain of these men in its own courts.

The classes selected for trial of this sort are noteworthy. In the confiscation bill just passed by Congress, to give "aid and comfort to....rebellion" was made a punishable crime. In the proclamation of the 24th, the vague phrase "giving aid and comfort" was applied definitely to the specific acts of "discouraging volunteer enlistments (and) resisting militia drafts," but was linked also with the more general charge of "guilty of any disloyal practice." Congress had naturally intended the trial of these cases by the regular procedure of civil courts; the President brought them under martial law and assigned them to military tribunals.

Lincoln entrusted the execution of his project to a new official in the War Department, Joseph Holt of Kentucky, recently appointed Judge Advocate General of the Army, to replace John F. Lee, retired.

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1. For the text of the proclamation, see the appendix.

CHAPTER III

THE APPOINTMENT OF JOSEPH HOLT AS JUDGE ADVOCATE GENERAL

Joseph Holt was born at the old family home in Holt, Kentucky, in 1807.[1] His father, John Holt, practiced law in Elizabethtown until forced by frail health to retire. Joseph went to school in the neighborhood of his home until about the age of fourteen, when his father sent him up to the older part of the state to St. Joseph's and Centre Colleges.[2] In 1828 he in turn opened a law office in Elizabethtown and won a name for oratory in competition with many notable rivals. This was the year of Jackson's triumphant election, and Holt zealously entered the service of the Democratic party, attaining a degree of influence when just past voting age. Four years later he moved to Louisville and became prosecuting attorney, an office for which he developed a genius that directed the bent of his later career. His fame as prosecutor soon transcended his reputation as advocate. Ben Hardin, who two years later was to invite the young man into partnership,

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1. For the sketch of Holt's life to 1860, I have used five sources: i) a narrative furnished by a relative; ii) a clipping from the Louisville Courier-Journal of August 8, 1894, contained in Durrett Scrap Book, vol. 32; iii) clipping from the Cincinnati Journal, date unknown, in Harrison Papers, and, iv and v) two brief sketches of Holt's life in Harrison Papers, one in the handwriting of W. M. Merrick.
2. Courier-Journal, Aug. 8, '94.

described to a friend a scene he had just witnessed in the courthouse. Questioned as to what was going on within, the old man replied grimly: "Joe Holt is astride the rainbow, butting his head against the stars, and as a consequence, there is going to be a hanging in this town before long."[1] Holt resigned, after holding the office two years, as a result of a petition, it is said,[2] since no man whom he prosecuted stood a chance for his life. The connection with gruff Ben Hardin was an advantageous one for young Holt, but the lure of the new South soon tempted him to settle his accounts and move off with his young bride to win his fortune on the frontier.

In 1835, he moved to Vicksburg, Mississippi, where the abundant litigation that accompanied the development of this new cotton region made him rich in the course of four or five years. There he found that his fame as orator had preceded him, due mainly to an eloquent convention speech he had made the previous summer in support of Richard M. Johnson for vice-president. He straightway began to add to this reputation by his encounters with such a renowned opponent as S. S. Prentiss. There was nothing sparkling in Holt's

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1. Courier-Journal, Aug. 8, '94.
2. Narrative.

courtroom presence, as in Prentiss'; it was the driving force of his sincerity that gave to his delivery such power over his audiences. He mad use of sarcasm rather than of wit. While Prentiss kept the courtroom amused and fascinated by his humor and his boldness, causing his hearers to forget his argument in the glamor of his personality, Holt spellbound the jury by the crushing weight of evidence he could bring to bear on the case.[1]

Holt lived a quiet life in Mississippi, devoting himself to his career, mixing little with his fellows. Despite his failure to convince these early Mississippians by the well-worn democratic method that he knew that they were as good as he was, he had the opportunity to refuse an appointment by the legislature to the United States Senate.[2]

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1. Testimony of J. C. Harrison. Clipping from Cincinnati Journal, undated, in Harrison Papers.
2. The story as told by Harrison to the Cincinnati Journal correspondent is as follows: "Why, sir, once they had a deadlock in the Missippi Legislature on electing a United States senator, and neither faction would give way one inch. At last they sent a delegation to me and said that both sides had agreed to vote for Mr. Holt, if they had assurances from him that he would accept the place. They wanted me to go see him and find out if he would accept. I said to them: 'Gentlemen, this is a delicate position for me to occupy. You know Mr. Holt as well as I do. Go and ask him yourselves.' Their spokesman said: 'No, d---n him! We don't like him, and won't ask him. He never comes about us, and we don't want to have anything to do with him. He will suit the people, and we can unite the party on him, and will send him to the senate if he'll have it, but we won't go to him and ask him to take the position.' I thought it was too good a thing for Holt to lose on a punctilio, so I

Holt was on the road to making a big financial success of his law practice and loathe to leave it under such considerations. Also he was in frail health, and retired in 1842,[1] returning to Louisville to recuperate from tuberculosis, from which his wife had died. He was then in his thirty-fifth year.

Holt lived quietly in Louisville, where he married again--this time the daughter of Governor Wickliffe. He took little part in public affairs other than to lend his efforts at rare intervals to the furtherance of Democratic campaigns. His eloquence had lost none of its fervency in his seclusion; he spoke on the prosaic issues of the day in the florid periods favored by the fifties, compounded of classical allusions and denunciations as vivid as ever spurred a jury to convict. In the campaign of 1852 he warned his audience against the elevation of the military power that

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went to hunt him up. I met him on the street and told him what the committee had said to me. He listened with his eyes cast down and marked on the ground with the toe of his boot while I was talking. When I got through he thought awhile and, raising his head, said that it was out of the line of his profession and he thought he saw his way clear to success at the law, and would not accept the place. He said not a word of thanks to the man who offered it, and in fact didn't seem to think of it as an exceptional honor at all. He is the only man I suppose in the United States who ever refused a seat in the senate when he could get it." - Cincinnati Journal, Harrison Papers.

1. Louisville Courier-Journal, Aug. 8, 1894, substantiated by Foote, pp. 38-45. Harrison, some twenty years later gives 1840 for Holt's retirement. Cf. Harrison Papers, clipping.

would ensue from the election of the Whig candidate, General Winfield Scott, to the presidency, in terms--it is true--that he would not have used against the military power after 1862, but with utmost sincerity at the time. These breathe an admiration for American institutions, as he understood their spirit, so profound as never to allow him to waver in his allegiance to them.

> With you, human despotism is but a nursery tale. Its grim and phantom form may have served to amuse you or startle your childhood's hours, and around your fireside of a winter's night, the story of its atrocities may, many a time, have stirred your manly spirits to indignation; but most of you, have never been in those foreign lands, the dungeons of Europe, and beheld them crowded with patriots, whose only crime is, that they loved the land that gave them birth, better than the tyrants that despoiled it. You have never been on board of those prison-ships, which from time to time, leave European shores, transporting these patriots by multitudes, a thousand leagues across the sea, and casting them upon inhospitable caosts, where, far from kindred and country, in poverty and brokenness of heart, they lay themselves down to die. You have never examined those instruments of torture, to be found in the prisons of the old world, and still but too often used, on which every arm that strikes a blow for human rights, is liable to be wrung and broken.--You have not walked through European capitals, and seen them filled with the spies of the Government, pursuing your footsteps to every place of business and of pleasure, noting your minutest actions and catching with greedy ears, the breathings of your most secret thoughts. If you had looked upon this picture, you might have some appreciation of your own political blessings, and of what, unhappily, other nations are deprived. But you may learn something of the value of these blessings, by what they cost--the blood of, as I verily believe, the noblest band of martyrs that ever drew a sword or put their trust in the God of battles.--It was not gold or silver or precious stones that bought them--they are altogether above the price of the treasure that perisheth. Could

> the inhabitants of Spain, of Italy, of Austria and of Russia, coin your California mines into one great offering, and lay it humbly at the feet of their Kings and Princes, they could not purchase from them one free press, nor could they, with all that gold, buy the privilege of holding one such public meeting as we hold here tonight. You may estimate the worth of these blessings also, by what the good and the truly great of all climes and ages, have been willing to pay for them. 1.

In 1856 he entered into the campaign to such purpose that a large share of the credit fell to him when the vote of Kentucky was found to have been Democratic for the first time in many years in a presidential election. He moved to Washington, and the following year decided to accept the appointment of Commissioner of Patents offered him by President Buchanan, whose acquaintance he had made in Louisville in the days of the firm of Hardin and Holt. He became Postmaster General in 1859. When South Carolina seceded and put the allegiance of many officers of the Administration to a severe test, Holt was a member of the Cabinet of the United States.

Once secession had become a fact, men of all parties in the North hesitated to put their convictions to the test. Now that the emergency had arrived, many circumstances conspired to complicate the issue. The North was by no means unanimous in its desire to save the Union by force of arms.

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1. Speech of Joseph Holt. Delivered at a Democratic Meeting held at the Court House in the city of Louisville, on the evening of the 19th of October, 1852. pp. 13-14.

Horace Greeley in the columns of the Tribune in November[1] deplored the vain effort to pin the Union together with bayonets; Henry Ward Beecher held that it would "be an advantage for the South to go off."[2] In Kentucky the typical border view reconciled the extremes of the radical Southern with radical Northern presumptions. The people of this state appreciated the misunderstanding of each section by the other, and discounting the extravagances of each, worked indefatigably for a compromise in the spirit of their tradition. Kentucky's policy found many supporters in the North as well as in the South;[3] Thurlow Weed, great Republican politician, backed by William H. Seward, author of the slogan, "irrepressible conflict," urged it upon the Republican president-elect. But Lincoln, unconvinced of the necessity, adopted the more intransigeant course of the faction that believed in uncompromising adherence to the party principles which had triumphed at the polls, and by December Greeley had with entire seriousness made himself the spokesman of this group. Theirs was "the only true, the only honest, the only safe doctrine."[4]

But when compromises failed, ignorance of the South and the extent of secession remained. Most men, like Holt,

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1. November 19, 1860. Quoted in Rhodes, III, p. 140.
2. Rhodes, III, p. 141, note 2.
3. Cf. Coulter, ch. II, for Kentucky's efforts to avert secession and the attitude of a large part of the North and South. Also, cf. Scrugham.
4. Rhodes, III, p. 166.

fell back upon the belief that secession was a conspiracy forced upon unwilling people by unscrupulous leaders. Their course, however, was not made clearer by habits of political thinking indulged in for two generations. A doctrine inherent in the thought of the past seventy years, and of late given stress by Southerners, assumed that a State could not be coerced by the Federal Government. But convinced that a State must not be allowed to secede and destroy the nation, those who bore the responsibility of maintaining the Union turned to the Constitution and the laws to find some clause that told how to stop it.

The worst of this bewilderment found lodgment in Buchanan's Cabinet, whose members belonged to a party repudiated at the November polls. They were in sympathy with the demands of the South even when believing whole-heartedly in the Union. States rights was a dogma generally accepted where the right of secession was denied. Several of these men were to define their allegiance in terms of their State and so to disregard the claims of the government whose offices they held. But even persons harboring a national loyalty were far from having a positive program.

The best that Attorney General Jeremiah S. Black could provide by way of solution to the President's dilemma was to fall back upon a negative doctrine of self-defense. In how far was the President empowered to execute the laws in a

seceded state?--He has the right, Black said, "to take such measures as may seem to be necessary for the protection of the public property,"[1]--for example, to send a force into the forts in Charleston harbor. The President might also, by the act of 1795, call forth the militia "whenever the laws of the United States may be opposed, or the execution thereof obstructed in any State, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the power vested in the marshals." But when the militia is called out for this purpose, "it can do no more than what might and ought to be done by a civil posse, if a civil posse could be raised large enough to meet the same opposition;" that is, the militia would be called out at the request of the State to aid federal officers, the judges, district attorneys, and marshals, in compelling obedience to the laws. Anything beyond this would be making war upon the State and wholly illegal. In South Carolina, the federal officials had resigned, there were no courts to issue judicial process and no ministerial officers to execute it. "In that event troops would certainly be out of place." The rule established by Black was that measures of defense were permissible, but that to take the offensive amounted to "coercion."

Black's opinion was delivered on November 20, 1860,

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1. Opinions of the Attorney's General, IX, p. 516.

some two weeks before South Carolina had passed her ordinance. With the appearance in Washington of South Carolina's commissioners to treat for independence, a line of demarcation appeared in the cabinet between those trying to force the President into humiliating submission to South Carolina's demands, and those who wished him to maintain a course more consonant with national dignity. At length three members joined in forcing the President to refuse further concessions. On the last day of the year, Buchanan was compelled to adopt the modification of his policy prepared by Black, now Secretary of State. This was concurred in by Edwin M. Stanton, Attorney General, and Joseph Holt, who was made Secretary of War[1] when John B. Floyd resigned, charging that the government had violated its solemn pledges to the Southern Commissioners by adopting Black's program. Within five minutes after his appointment, it is reported,[2] Holt had called General Scott to the War Department and had made plans with him for provisioning Fort Sumter, which were executed January 5th when the Star of the West set sail for Charleston harbor.

The growth of Joseph Holt into an outstanding "Union man," honored throughout the North for his stanch loyalty at a time of national crisis, took place between the months

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1. First ad interim, and later, permanently.
2. Nicolay and Hay, III, p. 96.

of November 1860 and of March 1861. The influence of events upon that evolution was marked. The resolute Secretary of War, who relieved the patriot Anderson at Sumter and dismissed the traitor Twiggs in Texas, was a man whose connections and sympathies had heretofore been largely Southern, but when Holt was confronted with the issue of national loyalty, his Kentucky Unionism, fortified by the responsibilities of his position in the national Administration, constrained him to cast his lot with the North. Still he had to adjust previous habits of thought to the new course, to forget many of the old associations and revise much of the old faith.

In relation to the Southern position on the questions of states rights and coercion, Holt had always maintained the conventional border State view. In the year before, as Postmaster General, he had upheld the opinion of the Attorney General of the state of Virginia in regard to the suppression of incendiary material sent through the mails.[1] The material referred to was Abolitionist. The state law forbidding its postmaster to receive such documents for circulation was declared constitutional and not inconsistent with the federal act. The opinion of the local Attorney General to which Holt thus gave his sanction was far-reaching on the subject of states rights in this particular case. It posited the

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1. The New Reign of Terror in the Slaveholding States, for 1859-60.

theory that if there is a conflict "between the postal regulations of Congress and this law of Virginia, it is because the former have transcended their true constitutional limits, and have trenched upon the reserved rights of the State. In such a case the citizen, though a Postmaster, must take care to obey the legitimate authority, and will not be exempt from the penalty of the State law by reason of any obligation to perform the duties of a Federal office, which are made to invade the reserved jurisdiction of the State in matters involving her safety and her peace."

By implication, if not in words, Holt approved this challenge. His disgust with Abolitionism, moreover, was couched in terms of such bitter condemnation as to justify the belief of his friends and political associates that his hatred of the fomentors of the doctrine "went further....than either policy or Christian charity would have warranted."[1] "The people of Virginia," Holt asserted, "may not only forbid the introduction and dissemination of such documents within their borders, but if brought there in the mails, they may, by appropriate legal proceedings, have them destroyed. They have the same right to extinguish firebrands thus impiously hurled into the midst of their homes and altars, that a man has to pluck the burning fuse from a bombshell which is about

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1. An undated memorandum in James Buchanan's handwriting, published in J. B. Moore's edition of Buchanan's Works, XII, p. 93, ed. note.

to explode at his feet."[1]

If Holt had felt the injustice of Abolitionist agitation forcibly, his objection to the policy of coercion was expressed with as much vehemence. In November, 1860, he wrote a letter which found its way, against his will, into the columns of the Pittsburgh Chronicle. The people of the North, the letter read, "have been taught that they are responsible for the domestic institutions of the South, and that they can be faithful to God only by being unfaithful to the compact they made with their fellow-men. Hence those liberty bills which degrade the statute books of some ten of the free States, and which are confessedly a shameless violation of the Federal Constitution in a point vital to her honor. We have here presented from year to year the humiliating spectacle of free and sovereign States, by a solemn act of legislation, legalizing the theft of their neighbor's property. I say THEFT, since it is not the less so because the subject of the despicable crime chances to be a slave, instead of a horse or a bale of goods....I am still for the Union, because I have yet a faint, hesitating hope that the North will do justice to the South, and save the Republic before the wreck is complete. But the action must be prompt. If the free States will sweep the liberty bills from their

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1. The New Reign of Terror. The first sentence of the quotation from the word "may" to the end, is italicized in the pamphlet.

codes, propose a convention of the States, and offer guaranties which will afford the same repose and safety to Southern homes and property enjoyed by those at the North, the impending tragedy may yet be averted, BUT NOT otherwise."[1] No wonder that Southern readers were convinced that Mr. Holt "could never have entertained the idea of coercing the South."[2] Yet this trust in Holt's conduct was expressed in the last of January 1861, after he had for a month been pursuing a course that filled the North with new hope. Again the word went the round from a friend in South Carolina that "Mr. Holt says he is not for coercion."[3]

On entering the War Department, Holt took up the immediate responsibility of directing the activities in the Charleston harbor forts. His official instructions enjoined Major Anderson to keep strictly within the limits of defensive warfare, to "avoid by all means compatible with the safety of (his) command, a collision with the hostile forces by which (he was) surrounded."[4] When the peace conference called by Virginia met in February, Holt saw a further motive for maintaining a scrupulously defensive attitude. At the same

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1. As quoted by Montgomery Blair in a speech at Clarksville, Md., on Aug. 26, '65. Cf. Blair, The Rebellion.... Where the Quiet Lies.
2. R. N. Gourdin to Holt, Jan. 27, '61. Holt Papers, v. 27.
3. Huger to Holt, Jan. 29, '61. Holt Papers, v. 27.
4. O.R. I, i, p. 182.

time he sanctioned any step necessary to maintain the Federal position at the fort. "If ....you are convinced by sufficient evidence that the raft of which you speak is advancing for the purpose of making an assault upon the fort, then you would be justified on the principle of self-defense in not awaiting its arrival there, but in repelling force by force on its approach."[1] This was the scope of action considered legitimate by Black's opinion of November 20th. It was the "protection of the public property" allowed by the Constitution, and, as a defensive measure, did not amount to making war upon a state, which was "coercion" and illegal.

On January 14, Holt wrote to his old law partner of the Vicksburg days, James O. Harrison, now of New Orleans, to reassure him on the score of President Buchanan's policy in regard to coercion. The letter held a new note, however, which was not calculated to extinguish completely his friend's anxiety. "The thought of employing force to oblige a state to remain in the Union," he informed Harrison, has "never been entertained by the President or any member of his cabinet. He has held as I do, that it is his duty to protect the public property in his charge as well as he can. But this principle is now virtually an abstraction, since, with two or three exceptions, the arms, and forts of the United

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1. O.R. I, i, p. 182.

States have been seized throughout the South by bodies of lawless men, and are now held or disposed of at the will of the captors. No effort to regain them will be made. No act on the part of the government at all hostile or aggressive will occur. It will not permit the handful of brave men in Fort Sumpter (sic) to be massacred by the South Carolinians, who have declared they will give them no quarter. But this garrison stands and will continue to stand strictly on the defensive, and if a collision takes place, it will be the wanton and guilty act of South Carolina."[1] Just as he was firm in regard to his responsibility towards Federal property, his sympathy with the South was less pronounced than formerly. "I concur with you that the South was determined to separate from the North. The public men of the South have been from the days of Mr. Calhoun, laboring to accomplish this result. The fruit is at last ripe and treasonable hands are pressing it upon our lips. If there was a will, there would be a way for the settlement of this unhappy controversy. But nothing short of a Southern Confederacy, will satisfy those who hold the reins of this revolution. They will succeed. The union is passing away, like a bank of fog before the wind. But the fate of the South will be that of Sampson. She will pull down the temple, but she will perish amid its ruins.... Since

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1. Holt to J. C. Harrison, Jan. 14, '61. Harrison Papers.

writing the foregoing, I observe that a band of marauders from Alabama have seized upon the Navy Yard, etc., at Pensacola, Florida. This work is as much national in its character as is the Capitol itself, and I confess, that were I president, I would no more submit to this lawless outrage, than I would submit to the occupation of the Capitol."[1]

It was now the Secessionists who were bent on destroying the Union; the author of the letter in the Pittsburgh Chronicle whose strictures on the "reckless and cruel aggressions of the North,"[2] had so warmed the hearts of his old Southern associates in November, was now officially responsible for the maintenance of the defensive attitude to which he had committed the government. He was in a position to realize that the North was not--officially--aggressive towards the South, and was in danger of turning his wrath with the same intensity against the section harboring the aggressors.

If he was unaware that his struggle to formulate a constructive policy of governmental action led in this direction, the situation did not escape Southern observers. His friends recognized the significance of his alignment with

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1. Holt defended his language in this letter in 1865 as having been meant "to impress the minds of others, and thus to accomplish something--even though it might be little--in the direction of a movement for the repeal of those laws, adopted in many of the Northern States, known as "personal liberty bills," ....Holt, Reply to Montgomery Blair, 1865.
2. R. N. Gourdin to Holt, Jan. 27, '61. Holt Papers, v. 27.

the new element in the Administration; Secessionists and Nationalists recognized it. Harrison told him that the people in the South were imputing to him "all the courage and force which the Cabinet displayed." But Harrison still believed, strangely enough, that his friend's letter was a "vindication" of the charge,[1] although in a letter of the following day he deplored the occupation of Forts Sumter and Pickens, which appeared to him "an act of hostility in itself, under cover of which Lincoln would proceed to actual hostilities."[2]

The Secessionist journal, the Washington Union, greeted the announcement of the confirmation by the Senate of Holt's appointment at this period with the statement: "We regret this nomination and its confirmation, because it will be regarded by the South as an avowal by the present Administration of a coercion policy, and because it will certainly encourage the Black Republicans to anticipate, by six weeks, their career of lawless aggression."[3] This editor's condemnation of Holt's policy is explained by his remark as he left Washington for Montgomery: "I denounced, as it deserved, the stealthy despatch of the Star of the West to carry Federal soldiers to reinforce Fort Sumter, devised by General Scott,

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1. R. N. Gourdin to Holt, Jan. 27, '61. Holt Papers, v. 27.
2. J. O. Harrison to Holt, Jan. 23, '61. Holt Papers, v. 27.
3. Quoted by the Washington Chronicle (daily morning), Sept. 21, '65.

and executed by Mr. Holt." At the same time Holt's name brought cheers in a Northern city celebrating the patriotism of another Kentuckian, Major Anderson.[1]

However, with his new attitude a new conception of the term "coercion" was developing. "Coercion" implied force used to compel a member of the body politic exercising its legitimate right of withdrawal. If a state was transcending its legitimate rights and encroaching upon property rights that were strictly federal, the act of compelling it to stop ceased to be "coercion." Or, if on the other hand, popular usage continued the term "coercion" in this connection, it then ceased to be a wicked policy. Something else must be substituted in its place as a reassurance to the South; the North does not mean to "subjugate" the South--"subjugation" was the bogey the South had been fighting, whether under the name "coercion" or a different one. It was necessary that Holt change his terms because it was growing clear to him--and to the North through his official acts--that maintenance of the essential firmness towards the rebellious South involved coercing them. So he had moved on to a position in advance of his old.

This evolution in Holt's opinion had occurred by the end of March. In the months that intervened between Holt's

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1. Moore, I, (Diary), p. 10.

acceptance of his new responsibilities towards Buchanan's Administration and the inauguration of Lincoln, its course was accelerated by many incidents in the swift march of events: the withdrawal of Southern Senators and Congressmen, the formation of the Confederacy, the deliberations with General Scott over a plan for the defense of Washington, cabinet meetings with Black and Stanton, the failure of the Peace Conference.

The time came when one of two divergent roads had to be taken. The difficulties involved in Holt's choice were formidable. Besides the ties of friendship he would have to sever those of family. From Yazoo, Mississippi, Robert S. Holt wrote his brother in terms of mingled anxiety and regard, urging him to keep faith with the South. In Kentucky his family, including his Mother, were unwilling to adopt the cause of the Union with him.

The bitterness with which Holt turned to the path which he must take to maintain his faith had very few alleviations, only a growing attachment to his new cause,--duty converted into enthusiasm. Having cast aside everything that he had or had hoped for in the past, he set out at the end of his term of office, to find his place in the political world. Given his experience of the last few months, continued participation in public affairs was an imperative need for him. Only in that direction lay hope of the recognition

necessary to restore his belief in himself. He wanted to feel that at least one section of the country trusted his work, and had learned to depend on it even while the other condemned it. It was before the Southern portion of his audience, naturally, that Holt felt the most immediate need to vindicate himself. The South was lost to him, and the sting of that knowledge challenged his pride. It sent him to the support of the North with something of the fury of the scorned added to the zeal of the convert.

The Lincoln Administration was installed on March 4th. On April 12th South Carolina's troops fired on Fort Sumter. President Lincoln issued a proclamation calling for 75,000 volunteers for three months' service, in accordance with the Act of 1795. He commanded the combinations opposing the execution of the laws "to disperse and retire peaceably to their respective abodes within twenty days." To provide for the adoption of further measures should the present ones prove inadequate to suppress the rebellion, Lincoln summoned Congress to meet in extra session on July 4th.

The President was gravely concerned with the problem of border state loyalty in the months which immediately followed. Nowhere could Holt render better service to the new Administration than by joining in the struggle to keep Kentucky in the Union. Deeply attached as Kentucky had always been to the Union, her citizens had hesitated to join either

of the groups, North or South, whom they judged responsible for the present unnecessary rupture. Their choice to remain independent of the belligerents straining at each other across Kentucky's borders, had led them to adopt an attitude of neutrality difficult to maintain. A small but energetic group of men, among whom was the President's close friend, Joshua F. Speed, were leading a spirited contest for control of the legislature. Although the advocates of a middle course had so far triumphed over partisans of secession or of war against the South, all men could see that a choice between the two positions was inevitable, and the Unionist group was sturdily forcing the issue against the policy of unfriendly Neutrality. To his friends in this group, Holt wrote letters of encouragement, revealing the terms on which he proposed to confront the South. The ensuing conflict was to be "a war on crime and criminals, which cannot be lost sight of without incurring the risk of becoming, in the judgment of the world, criminals ourselves."[1] On May 31st, he addressed a long letter to Joshua Speed, in which he outlined the defense of the Federal position on which the summer's campaign in Kentucky was to be waged.[2] The Lincoln Administration, he declared, had sought a peaceful solution of the difficulties

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1. Holt to James Speed, May 16, '61. O.R. II, vi, p. 31.
2. Holt to Joshua Speed, May 31, '61. Moore (Doc.) pp. 283-292.

between the sections, which had given alarm to conspirators trying to win over the border states, determining them to precipitate a collision of arms with the Federal authorities. Was the South being "subjugated" by a war which it had begun? --Absurd. "The army will go South--if it does--as friends and protectors, unless wicked and bloodthirsty men shall unsheath the sword." Wicked and bloodthirsty men of the Confederacy, in other words. "It would not do to let the South alone; they openly spurn all guarantees and assurances." They are "determined to break up the Union. " With the situation thus defined, he spoke favorably of the promptness and fearlessness with which the President met his responsibility, although his measures might be open to criticism in some detail "when adopted under pressure of such terrible necessity. The man who criticised, thought Holt, "was probably disloyal before any measures were undertaken."

He approached the subject of Kentucky's neutrality skillfully, first intimating surprise that there were those in his native state who could think of such a position. "I must say, in all frankness, and without desiring to reflect upon the course or sentiments of any, that, in this struggle for the existence of our government, I can neither practice nor profess nor feel neutrality. I would as soon think of being neutral in a contest between an officer of justice and an incendiary arrested in an attempt to fire the dwelling over

my head; for the government whose overthrow is sought, is for me the shelter not only of home, kindred and friends, but of every earthly blessing which I can hope to enjoy on this side of the grave." He took the most generous view of Kentucky's Unionism: "If, however, from a natural horror of fratricidal strife, or from her intimate social and business relations with the South, Kentucky shall determine to maintain the neutral attitude assumed for her by her legislature, her position will still be an honorable one, though falling far short of that full measure of loyalty which her history has so constantly illustrated.

But Neutrality, he believed, was an ineffectual weapon that would bungle the task it was meant to accomplish. In analyzing the late acts of the State executive, he found them consistent, not with a condition of neutrality, but rather with one of aggressive hostility. "The troops of the Federal Government have as clear a constitutional right to pass over the soil of Kentucky as they have to march along the streets of Washington; and could this prohibition be effective, it would not only be a violation of the fundamental law, but would, in all its tendencies, be directly in advancement of the revolution, and might, in an emergency easily imagined, compromise the highest national interests. I was rejoiced that the legislature so promptly refused to endorse this proclamation as expressive of the true policy of the

state. But I turn away from even this to the ballot-box, and find an abounding consolation in the conviction it inspires, that the popular heart of Kentucky, in its devotion to the Union, is far in advance alike of legislative resolve and executive proclamation."

Union workers in Kentucky eagerly availed themselves of Holt's advocacy of the national cause, welcoming such radical propaganda from one who was at once a respected Kentuckian and a Democrat in politics. Orders poured in from various cities for copies of his letters by hundreds and thousands.[1] But in his belief in the Union-at-any-price, Holt was more advanced than local leaders; they could follow him in the conviction that Kentucky must remain in the Union, but they were far from favoring the use of strong measures by the Federal Government to keep her there.

On his return to Kentucky in July he made two speeches, one at Louisville,[2] the other at Camp Jo Holt[3] across the river in Indiana, again declaring emphatically against Neutrality and for support of a President "heroically struggling to baffle the machinations of ....most wicked men."[4] His

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1. Joshua F. Speed to Holt, June 18, '61. Holt Papers, v. 29. 1000 copies were ordered by Mr. Haycroft of Elizabethtown; 8000 were being distributed in the first and second districts of Louisville; 500 were ordered by a lady.
2. Holt, The Fallacy of Neutrality. July 13, '61. Also, Holt to Joshua F. Speed, Holt Papers, v. 29.
3. Joshua F. Speed to Holt, July 31, '61. Holt Papers, v. 29.
4. Holt, The Fallacy of Neutrality, p. 6.

Louisville speech pictured the future that Kentucky must anticipate unless she took active part in maintaining the Union. "If this rebellion succeeds it will involve necessarily the destruction of our nationality, the division of our territory, the permanent disruption of the republic. It must rapidly dry up the sources of our material prosperity, and year by year we shall grow more and more impoverished, more and more revolutionary, enfeebled, and debased. Each returning election will bring with it grounds for new civil commotions, and traitors, prepared to strike at the country that has rejected their claims to power, will spring up on every side. Disunion once begun will go on and on indefinitely, and under the influence of the fatal doctrine of secession, not only will states secede from states, but counties will secede from states also, and towns and cities from counties, until universal anarchy will be consummated in each individual who can make good his position by force of arms, claiming the right to defy the power of the government. Thus we should have brought back to us the days of the robber barons with their moated castles and marauding retainers. This doctrine when analyzed is simply a declaration that no physical force shall ever be employed in executing the laws or upholding the government, and a government into whose practical administration such a principle has been

introduced, could no more continue to exist than a man could live with an angered cobra in his bosom. If you would know what are the legitimate fruits of secession, look at Virginia and Tennessee, which have so lately given themselves up to the embrace of this monster. There the schools are deserted; the courts of justice closed; public and private credit destroyed; commerce annihilated, debts repudiated; confiscations and spoliations everywhere prevailing; every cheek blanched with fear, and every heart frozen with despair; and all over that desolated land the hand of infuriated passion and crime is waving, with a vulture's scream for blood, and sword of civil war. And this is the Pandemonium which some would have transferred to Kentucky."

At Camp Jo Holt he reassured the soldiers on the subject of "startling steps, seemingly smacking of absolute authority, which the Administration might be forced from time to time to take.... This terrible emergency, with all its dangers and duties, was foreseen by the founders of our Government, and by those who subsequently administered it, and it must make laws for itself."[1] But lest his conservatism be called in question, he favored "affording every reasonable guarantee for the safety of Southern institutions, which the honest convictions of the people--not the conspirators--of

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1. Moore, II, pp. 451-2.

the South may demand, whenever they shall lay down their arms, but not till then."[1] Through this belief that the people of the South had been deluded into secession, he established a consistency between his new attitude and his old friendship for the South, an adjustment not altogether satisfactory to himself and not sufficient to conceal from others the novelty of his present way of thinking.

The none-too-conservative cast of Holt's reputation, however, was startlingly confirmed by the receipt of a telegram on August 9th from the Michigan Senators, Zachary Chandler and Kinsley S. Bingham, inviting him to join a party of Senators celebrating the close of the Congressional session on Lake Superior.[2] Holt was at Niagara making his plans for a tour of the Northeast to try what measure of favor he could arouse touside of Kentucky. He refused the proffered association of the Radicals Senators; in reflection his affiliation with the Conservative group appeared clearer, more inevitable to him.[3]

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1. Louisville speech, July 13, '61. Holt, The Fallacy of Neutrality, p. 7; also, Moore, II (Doc.), p. 299.
2. Chandler, Bingham, Ward to Holt. Holt Papers, v. 29.
3. I have no conclusive evidence for my belief that Holt did not accept this invitation. However, in view of his desire for a connection with the Conservative party in Kentucky, I find it difficult to suppose that he would have jeopardized that connection to the extent of publicly associating with conspicuous Radicals like Chandler and the other Senators who would make up the party. Holt had time to make the trip to Lake Superior and to

The temper of Chandler, Wade, and Trumbull, unleashing their scorn on Southerners and Rebels, was not offensive to Holt. But in the border states Holt was not ready to apply a goad to alienate hard-pressed loyalists. He understood the need of conciliation there, where confiscation and emancipation, in current favor with the Radicals, might strike the true and the untrue alike.[1] Of the two, border state men detested more the idea of emancipation, since to free slaves in the rebellious states would be only the first step towards losing their own. The policy of confiscation had reference to property in general used in aid of the rebellion but included a partial emancipation of slaves; the act passed in the extra session of '61 providing that the claims of owners should be forfeited to the slaves they had required to do any sort of military service against the United States Government[2] was opposed by border state representatives fearful that Congress would proceed to follow up such a precedent by emancipating gradually all slaves in the Confederacy. Per-

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arrive in Boston by the end of the month, but a letter from David Clark in the Holt Papers, v. 57 (August 23, 1867), recalling the writer's ride with Holt from Niagara to Montreal in the summer of 1861, suggests that Holt went directly from Niagara and did not make the through trip from Lake Superior.

1. Holt believed the confiscation act of 1861 a measure of necessity, but he wrote Lincoln protesting against Fremont's proclamation. Cf. Holt to Lincoln, Sept. 12, 1861, O.R. II, i, p. 768.
2. Rhodes, III, p. 464.

sonal contact with Radicals only impressed upon Holt more forcibly the division between Radical and Conservative, so marked in the session of Congress just ended, and the necessity for leadership for the moderate factions behind which they could group as a party,--with the benefit of unity and a workable program. Was Holt the man to take the lead?

The last of the month found him in Boston and New York, quickening the New England and Middle State pulse as he had fired the feebler spirit of the Border States. His reception was as gratifying as a Kentucky patriot might desire. Leading citizens and Chambers of Commerce circulated petitions requesting him to address them.[1] At railroad stops on his way across Massachusetts he appeared on the platform to speak a few words to eagerly attentive crowds that had gathered, or to receive bursts of applause.

His speeches were designed to put heart into those needing encouragement over the prospect of the war, which after the fiasco at Bull Run gave harassing promise of developing far more serious proportions than had been anticipated in May and June. Enthusiasm had perforce settled down to the dreary business of preparations for a protracted conflict, no one knew how protracted in the late summer of '61. Holt

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1. Boston Evening Transcript, Aug. 29, '61.

urged upon those doubting the war an attitude of sturdy support. He had received letters from leaders waging an uphill fight for the Union cause in these sections. On August 17th, the Democratic State Committee of Maine sent word that their late Convention had split in two over the question of passing a resolution favoring a very limited support of the war. The loyal delegates had thereupon withdrawn, held their own convention, made their nomination, and passed loyal resolutions "to sustain the government in all constitutional measures to suppress rebellion and protect the Union."[1] They invited Holt to speak to the people before the election on September 9th, together with Andrew Johnson of Tennessee. P. M. Wetmore, of the Union Defence Committee of the Citizens of New York wrote: "Our State Democratic Convention has given us a good deal of uneasiness--but the proceedings today are more encouraging. The leaders may forsake us but the rank and file are true. Both the City and the State will stand by the flag."[2]

To these audiences Holt swelt on the simple issue of the war--he extolled the Union and denounced traitors, speaking as one prepared to give up all for the cause, in an appeal to the patriotism latent in every man before him.

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1. Democratic State Committee of Maine to Holt, Aug. 17, '61, Holt Papers, v. 29.
2. Wetmore to Holt, Sept. 5, '61. Holt Papers, v. 30.

On this plane Holt was peculiarly qualified to dwell, because of the recognized integrity of his public service. The sincerity of his plea gripped all of his hearers.[1]

Speaking at Irving Hall in New York City, he recounted the struggles of the Union men of his state.[2] "He pledged (Kentuckians)....to show, should the Secessionists appeal from the election to the sword, that they carried bullets, as well as ballots in their pockets." "By striking illustration and denunciation"[3] he exposed "the treason once prevalent in the Cabinet, and later in the departments, and among citizens. The men in the North who gave aid and comfort to the enemy, who advocated their cause, or strove to sow dissensions among loyal men, who dissuaded citizens by insidious arguments from entering the army, were more vitally the foes of the country than if they were in the Confederate service. With treason as his theme, he gave consideration to measures for stamping it out: "Stringent steps too have been taken in the treatment of spies and men otherwise disloyal outside of the public service, and the country has not only

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1. A. S. Mitchell of the New York Times wrote: "All the other city papers have spoken in warm terms of your speech, and it may gratify you to know, because your speech in my opinion largely contributed to it, that on the day after its delivery the subscriptions to the National Loan in New York City ran up to over $800,000, and on the day succeeding to nearly as much." Mitchell to Holt, Sept. 5, '61. Holt Papers, v. 30.
2. Speech of Hon. Joseph Holt of Kentucky at Irving Hall, New York, September 3, 1861.
3. N. Y. Trib., Sept. 4, '61.

approved but has warmly applauded what has been done. The rebel clamor against the suspension of the action of the writ of Habeas Corpus has not disquieted anybody's nerves. The popular intelligence fully comprehends that the Constitution and the laws were established to perpetuate the existence of the Government, and not to serve as instruments for its overthrow by affording immunity to crime and perfect freedom of action to traitors. It may be safely assumed and declared that neither the private fortune nor the personal freedom of any man or set of men can be permitted to stand in the way of the safety of a republic upon whose preservation depend the lives, the fortunes, and liberties of more than twenty-six millions of people. The Union must be preserved and the rebellion must be suppressed, and the country will sustain the Administration in the assumption and unhesitating exercise of all powers absolutely necessary for the accomplishment of these ends."[1]

He closed on a softer note, recurring to his policy of continued friendship with the people of the South as distinct from the "band of conspirators" in whose toils they struggled. To deliver the people of the South was the purpose of the war, and support of the President whose loyalty and determination were unquestioned, a condition of its success.

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1. Moore. X (Doc.), p. 27.

Holt had given in this speech the sum of his thought on the national issue. Its temper might appear more akin to the severity of the Radicals than to the moderation of the President whose praise he pronounced so enthusiastically at the climax of his speech. But in ideal it followed Lincoln's policy noticeably. Each emphasized the need of conciliating the South, although the President could think of Southerners as erring brethren without the "conspirators" delusion, and each believed in firmness in weeding out disloyalty where it interfered with the prosecution of the war in the North--in other words, in the suspension of the writ of habeas corpus.

Holt was to achieve more influence as a national than as a local figure. By the end of his eastern tour such a forecast might have been hazarded. By his preoccupation with the national significance of the Conservative movement in the Border States, he anticipated by four months Joshua Speed,[1] who in that interval was expending his energies on the specialized problems arising out of conditions in the immediate radius of Kentucky. Speed was becoming thoroughly grounded in the narrowly border state type of Conservatism before attempting to broaden it so that it might serve as a more general program to offset the Radical doctrine. But the problem of creating a national conservative party con-

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1. Joshua Speed's letter to Holt of Dec. i, '61. Holt Papers, v. 31.

tained peculiar and tragic difficulties the full force of which was not apparent in 1861. Holt realized that the President was the truw leader of the Conservative movement, that to create a party local leaders must force that realization upon the rank and file of moderate men in their localities. But with his aloofness from local political conflicts he could not fully share the provincial distaste for measures felt to transcend the needs of Union, the same measures against which he himself had often in the past raised his voice. To men in the thick of the border state struggle, the mere question of loyalty versus disloyalty was of such dominating importance, that all further issues were regarded with an impatience often degenerating into pettishness.[1] Holt with his nationalized viewpoint, feeling too little of this irritation, had no firm hold on local sentiment, and without influence derived from an office held in Kentucky, for which he had little inclination, his grasp was destined to remain insecure.

He believed the Confiscation Bill a necessity,[2] though he sensed with quick dismay the danger to Kentucky Unionism in Fremont's proclamation of emancipation in Missouri. But

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1. Cf. Hugh Campbell to Holt, July 24, '62: "The President has yielded to the pressure of the most destructive party that the country has ever known, and we now find ourselves fighting for emancipation and confiscation!" Holt Papers, v. 32. And cf. James S. Rollins to Holt, Dec. 7, 1861: "I think the holy patriotic men of the border slave states should speak out their voice in a way not to be mistaken." Holt Papers, v. 31.
2. Holt to Lincoln, Sept. 12, 1861. O.R., II, i, p. 768.

though he wrote to the President to advise its repudiation, it is improbable that he comprehended the quality of Lincoln's courage in taking the step. The President issued his first defiance to Radicalism just when it stood supported by the eager acclaim of all anti-slavery enthusiasts. True, the future strength of militant Radicalism with its determination to crush the Administration was as yet unrevealed, but the individual tendencies of its earliest champions--Trumbull, Wade, and Chandler--should have suggested to Moderates the danger of forcing the President to alienate them too abruptly without a Conservative following to fall back upon. Failure to distinguish between the President and the Radicals only postponed an alliance between Lincoln and the Conservatives and gave him no help in resisting Radical pressure. However, where local leaders were proving indifferent or hostile, Holt was instinctively furthering the President's policy. He admired its general features and justified the special instance of preventive arrests and suspension of the writ of habeas corpus, but all without the ability to carry Kentucky along with him. Many men from different sections of the country, with growing confidence in him, wished that he might have a place in the Administration where he could influence its acts in the direction of moderation. Even Joshua Speed, Lincoln's friend, believed that Holt might expect "the highest office in the gift of the nation" by 1864.[1]

Holt was the type of Conservative whom Lincoln saw the need of attaching to his following if he were to pursue a non-factional course through the war--a moderate Democrat, ready to compromise something in practice to achieve a temperate policy. Holt was, however, not likely to be able to bring many border state Democrats with him. The faith of Unionist Democrats in these states that they could oppose the Administration while supporting the war was but too clearly revealed by their conduct during its first year. However, the attempt to counteract this hostility to his policy was worth Lincoln's effort if only for its effect upon Conservatives of a more sympathetic standpoint.

Lincoln had made known his desire to take Holt into the national service by the close of 1861.[2] Holt had word in December from Joshua Speed in Washington that the President intended to recognize him "in some form commensurate with the service (he had) rendered the country in its hour of peril."[3] When it was known that Simon Cameron was to resign from the War Department, Holt was Lincoln's choice for the office.[4] But Edwin F. Stanton, Holt's former colleague in Buchanan's Cabinet and a man much like him in point of view,

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1. Joshua Speed to Holt, Dec. 8, '61. Holt Papers, v. 31.
2. Loc. cit.
3. Loc. cit.
4. Loc. cit.

though without Holt's recent prominence in the public eye, was the choice of the Radicals and of some of the members of the Cabinet. Lincoln yielded his wish, and Holt waited his opportunity, spending much of his time in Washington, learning to regard Stanton with a generous admiration,[1] which deepened in time to a warm friendship. These two dropped into the habit of talking over the problems of the war, just as of old when with Jeremiah Black they had met to plot out Buchanan's tactics. Holt appealed to Stanton to hold to the Conservative program[2] at a time when the Radicals were annexing the Secretary to their Committee on the Conduct of the War.[3] Moderates throughout the country who relied on Holt's judgment were inspired with confidence in Stanton's ability because of his friend's manifest confidence in him.[4]

During the winter Holt accepted commissions from the government to investigate conditions in the quartermaster's department in Missouri, to audit claims brought against it, and the like. He had as much of the public confidence as ever; some men still looked to see him made Secretary of War--in place of Stanton now. When in the summer plans were adopted for reorganizing the work of handling political pris-

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1. Cf. many expressions of his regard in Holt Papers for the period.
2. Cf. Holt to Stanton, Feb. 27, '62. Stanton Papers, v. 4.
3. Stephenson, chapter XXI, and especially p. 234.
4. T. S. Bell to Holt, May 18, '62. Holt Papers, v. 33.

oners, Lincoln saw a chance to use Holt to fill a position *which he might wish to extend comprehensively in scope. His* new policy would cause less apprehension under the management of a Conservative, than under a man of known Radical inclination. Holt was thus finally attached to the Was Department to work under Stanton as Judge Advocate General.

CHAPTER IV

THE JURISDICTION OF THE MILITARY COMMISSION

The War Department's new project for maintaining control of political prisoners was more arbitrary, doubtless, than the old practice which it was designed to supersede. But Lincoln believed that some exercise of summary methods to restrain treason was necessary for the success of his cause, regardless of the danger to his popularity, as long as his generals could not win victories. If he could not have military success, he must take measures to defend his armies against desertion and obstruction to the draft. When the emergency should have disappeared, Lincoln believed that the remedy would disappear with it. He could not take much stock in talk of his despotism. He knew that a President is responsible to the people and can be brought to task by them. He preferred a Presidential to a Congressional dictatorship, if needs be, as involving less risk to the Constitution.

It was possibly more irregular from the legal standpoint to bring men who were arrested before a military commission for trial than to remain content as before with arrest alone, but in comparison with the indefinite confinement that was the corrolary of the old system, a trial, even if by the military, seemed more just. This generation had

yet to learn the difference between the procedure of military and of civil law in its application to offenses outside of the disciplinary routine of the army. Military justice must perforce aim at efficiency, whereas civil justice has first consideration for the protection of the accused. But when the President had recognized the greater certainty of conviction attained by the former method, he was not comparing its inherent characteristics with those of civil law. He adopted it in despair at the possibility of securing a proper trial by the other method. But although he used it to strengthen his position against the attack of Congress, he never allowed himself to forget that he was aiming to defeat vindictiveness in the Radicals. Curiously enough, he was using his dangerous device to secure an ultimate gentleness--under his direction it would make part of a course of action of far greater flexibility than characterized the policy of his opponents. He looked forward patiently to winning the country over to this point of view.

To Joseph Holt, prosecutor, although a zealous Conservative, now at the head of the Judge Advocate General's Office, the President entrusted his venture. With Holt, Lincoln believed that his control of the prisoners, the crux of the problem, was safe. Holt was sternly, even rigidly, honest, and the sincerity of his belief in subordinating everything to the business of national success was comforting

to the embarrassed Executive. If Lincoln should find it necessary to restrain on occasion the impetuosity of his Judge Advocate General, he relied upon another trait by which he, of all men, could not fail to be impressed. The man appeared to him to be ready to forget his own career in his work for the country. Lincoln believed he saw in Holt a quality of selflessness--an outward projection of his own quality--and he argued from the willingness to remain subordinate possibly a greater degree of flexibility than existed.

The orders issued by the War Department in August had introduced the new régime, providing that men who were arrested were to be brought to trial, even as Congress and the Democrats had demanded if not by the method they had stipulated. Although the Democrats further condemned arrest except by civil process, the new design provided safeguards against abuse.

Accordingly, while special provost marshals were busy inquiring into and reporting treasonable practices, in conformity with the order of August 8,[1] arresting all persons "engaged, by act of speech or writing, in discouraging volunteer enlistments, or in any way giving aid or comfort to the enemy, or any disloyal practice against the United States,"

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1. Globe, 37th Cong., 3d. sess., p. 1215.

Judge Advocate Turner directed that all officials concerned with making arrests should henceforth proceed only "upon (his) express warrant, or by direction of the military Governor of the State."[1] He investigated cases and determined the procedure for each of those arrested in the District of Columbia and the adjacent counties of Virginia, or issued warrants to the provost marshals for the arrest of those reported to him by the Provost Marshal of Washington and the military governor of the District of Columbia. Those whom Turner did not recommend for trial were designated for discharge. On November 22, prisoners who had not been tried or were not held for trial by a military commission were released in fulfillment of Lincoln's original plan.[2] Meanwhile Joseph Holt, as Judge Advocate General was occupied in building up a theory of martial law which would permit a military trial outside of the immediate radius of Washington for disloyal persons accused of treasonable practices. Through the Judge Advocate General's Office the President could secure control of the trials of prisoners by a process to be introduced cautiously but capable of modification to meet future emergencies. This office would provide a legal justification for the application of martial law according to the President's

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1. O.R. III, ii, pp. 525-526. September 8, '62. Also in Stanton Letter Book, v. 6, p. 83.
2. General Order #193. O.R. II, iv, pp. 746-747.

proclamation.

The act of Congress establishing the office of Judge Advocate General[1] constituted it his duty to "receive, revise, report upon, and have recorded the proceedings of the courts-martial, military commissions, and courts of inquiry of the armies of the United States." By this process of review and revision, the Judge Advocate General at once unified the procedure throughout the separate military departments under his supervision and created precedents for local judge advocates to follow; by his reports to the Secretary of War and to the President, he influenced the formation of Executive policy. In addition, he kept in direct touch with local judge advocates through a steady correspondence with the, notifying them of desirable policies to follow as well as instructing them on technical points of law and procedure.

The jurisdiction of the military commission established by the proclamation of September 24 was founded on martial law. But when Holt came into office the use of the military commission as a tribunal was not officially recognized. Former Judge Advocate Lee had deprecated its use in those instances where it had been employed to remedy the legal limitations upon the jurisdiction of a court-martial, but had offered no alternative for the cases which indubitably

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1. Statutes at Large, ch. CCI.

required military control. Evidences that the Administration through its reorganized war department intended to develop this most adaptable of military tribunals had been numerous in the late summer months. The President in his orders and proclamations of August had seized eagerly upon the Congressional recognition bestowed upon them in the legislation of the session just terminated.[1] And in creating the Judge Advocate General's position, Congress had placed military commissions under his supervision along with courts-martial.

Holt took up the work of reviewing cases where Judge Advocate Lee had left it. In reviewing a case four days after taking office,[2] the Judge Advocate General upheld, where Lee had denied, the military commission. He approved military commissions as a matter of principle, the length of their existence in the service and their adaptability to its wants and emergencies convincing him that they ought not to be now ignored.[3] Lincoln was at the time giving consideration to the question, and with Holt's recommendation before him sustained the jurisdiction in this case.[4]

Holt said nothing in this report of martial law, but he nevertheless based his decision upon it. The trial

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1. Statutes at Large, ch. CCI.
2. September 8, 1862.
3. Record Book, J.A.G.O. I, p. 344.
4. O.R., II, iv, p. 662.

under review occurred August 26th, in the period following the order of August 8th directing the activity of the provost marshals. The charges against the prisoner, Sely Lewis, were of smuggling goods through the lines and of violating the 57th article of war prohibiting correspondence with the enemy. These were "disloyal practices" undoubtedly, and so, Holt ruled, triable by military commission under the executive order.

But "disloyal practices" was a vague term, as Holt was well aware,--so vague and broad that all crimes in war time might be brought under its caption. To determine what were disloyal practices in the sense of the proclamation by which the President announced his policy on September 24th, was the next and gravest of the Judge Advocate General's concerns.[1] The charges recognized by Holt were numerous and varied, but throughout two principles always guided him in their selection: first, that they were military offenses, and second, that they did not belong, at least exclusively, to any other jurisdiction.

Not all military offenses--or offenses aimed at impairing the validity of the military service or its success in

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1. Holt even suggested on the 29th of September to Stanton that it might be safer to amend the proclamation in the interests of clarity than to risk objection that the procedure had been summary. He wished thus "to place the authority of the commission beyond all question now and hereafter." Record Book, J.A.G.O. I, pp. 362-363.

the field--were subject to military jurisdiction. It was the uniform interpretation of the articles of war[1] that they applied only to persons enlisted in the army or connected with it in field or camp, and not to civilians. But General Halleck's rule had extended their jurisdiction from persons to offenses. This rule, issued while Halleck was in command of the Department of the Missouri that "many offences which, in time of peace, are civil offences, become, in time of war, military offences and are to be tried by a military tribunal, even in places where civil tribunals exist,"[2] pointed to a situation which was inducing the recognition of the so-called "military offense" per se, as distinguished from the offense committed by a "military person."

A military offense can be committed by either civilians or military persons. Over all the persons connected with its own army the military authority at Washington had exclusive and unquestioned jurisdiction for these offenses. But that leaves a residuum of military offenses committed by civilians or by military persons connected with the rebel army, and these crimes and misdemeanors were accorded jurisdiction under several constitutional and statutory provisions. There was first the high crime of treason, for which the Constitu-

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1. "Rules and articles for the government of the armies of the U.S." Act of April 10, 1806. U. S. Statutes at Large II, p. 371.
2. Gen. Ord. Jan. 1, 1862, cited in Digest of the Opinions of the J.A.G., 1868, p. 229.

tion guarantees a civil trial with proper safeguards. But it was the policy of the United States Government, adopted during the war, not to bring men to trial for treason. However, those accused of lesser crimes than treason were subjected to trial and punishment, not only by the executive orders described above,[1] but by acts of Congress recently passed, thus creating possibilities for a conflict of jurisdictions with which Holt had to cope.

The Conspiracies Act of July 31, 1861, and the Confiscation Act of July 17, 1862, provided trial in a United States court on charges of conspiring to overthrow or oppose by force the authority of the government of the United States, and of giving aid and comfort to the rebellion. Thus the civil courts were given jurisdiction over a class of offenses which President Lincoln shortly afterward ordered tried by military commission.

These statutes and his order of August 8, 1862, established conflicting jurisdictions, unless the President was justified by martial law in transferring crimes which had just been created by statute from the civil to the military court. Without martial law there would have been no attempt to interfere with the arrangements of civil jurisdiction, but assuming the necessity of securing stricter control by the

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1. In chapters II and III.

military authority of military offenses, might not a military commission take over for the emergency the duties of the particular civil court? The civil court need not lose its powers indefinitely by yielding them to the military commission, a tribunal without permanent constitution like the court-martial, representing rather the need of the moment for special organisation. Could this policy of the President's be maintained in practice? Whether or not it could, depended upon how Joseph Holt in the Judge Advocate General's Office succeeded in translating it into sound legal theory--such as Congress would be willing to permit.

Holt's work is to be judged, then, by his success with these two aspects of his problem, his ability to secure a wider acceptance of the idea of the "military offense" and to obtain control of it for the military arm even where another jurisdiction existed.

The Government had in the beginning, as has been pointed out,[1] defined the military offense in terms of resistance to, or obstruction of, the draft. The violent opposition to the President's call upon the loyal states for volunteers--the immediate occasion for the adoption of the new policy--had manifested itself in "speeches, writings, and diverse acts of disloyalty and hostility to the Government, giving aid and comfort to the enemy."[2] Some few trials were held on these

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1. See order of Aug. 8, 1862, and Proclamation of Sept. 24, '62, cited above.

charges, but many more were for numerous other disloyal practices, such as, smuggling goods through the lines and attempting to smuggle goods through them, violating the 57th article of war prohibiting correspondence with the enemy, furnishing arms to the enemy in Memphis, a region in the military occupation of the United States, and breaking the oath of allegiance, given in parole. All of these acts were military offenses recognized by the general law of war.

In handling the question of a conflict of jurisdiction, Holt was careful to keep martial law supplementary to the civil or municipal law. Wherever there existed a statute providing jurisdiction for an offense, he respected that jurisdiction as long as there was no especial reason for challenging it. Wherever martial law held sway by virtue of an executive order or proclamation, he interpreted strictly the grant of authority and placed corresponding limits upon it. On December 9, 1862, he advised the discharge of a prisoner in respect for "the spirit, if not the precise terms of the General Order" of November 22d, releasing prisoners with certain exceptions. "It (was) not alleged that he (had) committed any of the offences enumerated in the 3d section of that order, and ....the ordinary civil tribunals of New Mexico (were) open for his trial."[3] He condemned

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1. Stanton Papers, vol. 8. On the back of the mss. is written "Deposition of Edwin M. Stanton."
2. Holt to Major General Halleck. Dec. 9, '62. Record Book, J.A.G.O., I, p. 455.

the suggestion that jurisdiction could be transferred from the civil court to a military commission merely because of the inconveniences attending an investigation of the charges by the civil court. But while conservative in this respect, the precedent that the Judge Advocate General was establishing gave surprising flashes of radicalism where it concerned his classification of a military offense,--as for instance in allowing the jurisdiction of a military commission for the offense of uttering very disloyal sentiments (after taking the oath of allegiance).[1]

The launching of the new policy, however, brought no immediate relief to the Administration. The Democratic party made strong gains in the November elections, with "arbitrary arrests" again one of the leading counts in their denunciation of the unconstitutional management of the war. The failure to recover military prestige had forced Lincoln to postpone until after the elections the wholesale release of prisoners taken under his recent orders.[2] In fact, soon after taking office, Holt found it necessary to consult the President about the numerous cases of desertion from the army. Kentucky continued to protest military usurpation in defiance of her laws,[3] and to threaten popular uprisings to "drive the

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1. Holt to the President. Feb. 4, '63. Letter Book, J.A.G.O., II, p. 22.
2. See above, p. 89.
3. Quoted in Coulter, p. 155, from Crittenden Mss. XXVII. 5640. 5641. Geo. Robertson to Crittenden.

Yankees from her soil."[1]

Holt, in carrying into effect the executive policy, had identified himself with the Administration. Where the President had become involved in a contest with his Radical opponents in Congress, Holt was engaged in fencing with one wing of the grou--Trumbull's wing. In political controversy he maintained the Administration view as nearly as he could fit himself to it. A letter to Hiram Barney,[2] Collector of the Port of New York, written on the eve of the election, expressed his confidence in the President, but appealed for support of the war on the terms of Kentucky Unionists who argued that the fight was with the Black Republican party and not with the government.[3] As a Kentuckian, Holt could appreciate the patriotism inherent in this principle and hope to transform it into a belief in the good faith of the Presidejt, without fearing to subject his loyalty to doubt.

"A controversy with the President of the United States has (nothing) to do with the question of loyalty to our country in the midst of such a struggle as this," he declared, and Unionists applauded. But Holt had not learned patience from his association with the Administration; his views on

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1. Quoted in Coulter, p. 154, from R. J. Breckinridge Mss., L. B. Todd to R. J. Breckinridge.
2. N. Y. Times, Nov. 13, '62.
3. Quoted in Coulter, p. 36, from Archibald Dixon's speech at Paducah, Mar. 9, '61. Also printed in Globe, 37th Cong., 2d sess., app. (p. 76).

military operations reflected Stanton, to whose influence he was, of course, more subject, through propinquity and temperament, than he was to Lincoln's. "If those who are in front will not go forward," he wrote, "the public safety will demand that they be assigned positions in the rear." He advocated "an immediate, bold and aggressive move upon the enemy--following up every blow struck, and gathering the fruits of every victory gained." The message of the letter so appealed to Barney and one or two friends for its "timeliness" that they secured permission to print it, but reflection as to the immediate effect of isolated passages like the foregoing which seemed to condemn the prosecution of the war caused them ultimately to delay its appearance until after the election returns had been made.[1] Holt's reference to McClellan had too much the sound of Radical propaganda. His disapproval of McClellan was as well known to his circle of friends as was Stanton's more active hostility, and his conviction of General Fitz John Porter in the court martial trial of January, 1863, endeared him to all enemies of Porter's unpopular commander. McClellan was just then bearing the brunt of Radical vindictiveness towards the President. Silenced as to any direct attack upon the President during the campaign, leading Radicals had plotted to increase his

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1. Barney to Holt, Nov. 7, '62. Holt Papers, v. 35.

discomfort by petty expedients. Horatio Seymour, leader of the Democratic faction in New York, held the Extremists responsible for the Republican policy, while reiterating the opposition of his party to Lincoln.[1]

In his official capacity, Holt pursued a moderate course in interpreting national policies, adapting himself to radical measures as the Administration took them up. In his review of cases arising under the Confiscation Act of 1862, he insisted that the full benefits of the "complete amnesty for the past" contained therein should be guaranteed to those desirous of availing themselves of it.[2] In the matter of desertion from the army, on the other hand, he was not moved to forbearance. A statement of his belief to the President that in view of the large number of cases, some stern fate ought to be meted out to those in hand in order to dissuade others by example, drew from Lincoln the mild suggestion, "Deal gently with those leg cases, Judge, for no doubt many a pair of cowardly legs has run away with a valiant heart."[3]

However, Holt relaxed on whit of his interest in extending, where he could without scruple, the jurisdiction of the military commission. When Congress met for the short

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1. In a speech at Utica, following his election as Governor. N. Y. Times, Nov. 13, '62.
2. Record Book, J.A.G.O., I, p. 405. Nov. 6, '62.
3. Narrative of Joseph Holt by a relative.

session of the winter of '62-'63, it made some modification in the problem for Holt. The period thus brought to a close had seen the institution of martial law on the basis of the President's proclamation through the trial of a relatively small number of cases, and the release on November 22 of those prisoners who on examination proved eligible for it, either because the charges against them were outside the sphere of martial law or too indefinite for trial, the President established the right of the Executive department to direct the destinies of political prisoners.

This Congress enacted three measures which affected the method of trying civilians for military offenses. The first, passed on February 25, 1863,[1] provided penalties in a civil court on a charge of corresponding with the enemy, an offense which the fifty-seventh article of war made punishable by court martial when committed by a soldier. The other two were signed on the last day of the session, March 3, 1863. The first was the Conscription Act, providing civil trial for "enticing, or attempting to procure or entice, a soldier .... to desert, and for resisting the draft or obstructing or assaulting any officer making the draft."[2] The second, popularly known as the Habeas Corpus Act, included the provisions of the bill relating to the control of political

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1. Globe, 37th Cong., 3d sess., appendix (pp. 198-199).
2. U. S. Statutes at Large, XII, p. 731, sections 24 and 25.

prisoners which Trumbull had tried hard to pass in the last month of the previous session.[1] In the first of these clauses, the President was authorized to suspend the writ of habeas corpus, but he was prevented by the other two from keeping those who were arrested in prison for an indefinite length of time. At intervals of twenty days lists of State prisoners must be furnished by the War Department to the circuit and district courts, which were to discharge them upon their taking the oath of allegiance if no indictments had been found against them by the grand juries.

The last two bills were pushed through by the Republican majority over an uncompromising Democratic opposition. Powell of Kentucky and Saulsbury of Delaware led in the Senate in a bitter recapitulation of all the acts of the Administration party since the beginning of the war--legislative and executive. They were followed, with greater mildness, by the rank and file of Democratic and Unionist members in their hostility to the conscription and habeas corpus bills.[2] This wholesale opposition, owing much of its boldness to the Democratic victories in the recent Congressional elections, was sufficient to drive the Republicans to act as a majority party. Radical critics of the President, finding themselves

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1. Cf. above, chapter I.
2. The habeas corpus bill passed by a party vote of 24 to 13. Globe, 3d sess., 37th Cong., p. 1208; and the conscription bill, without a recorded vote.

a minority group, were bestirring themselves with renewed activity outside of the chambers,[1] and subduing their clamor within.

Throughout the debates there was a curious failure to give notice to the progress of the executive policy. Still unable to comprehend the constructive side of Lincoln's plan, the Senate forged ahead, determined to beat him at a game he had already abandoned. As their antagonism grew, they became more unable to understand their adversary's moves. Sumner had tried at the end of the last session to amend the bill to prevent judges from issuing the certificates of discharge as well as the writ of habeas corpus when that writ was suspended. The result of his amendment would have been to nullify the purpose of the bill and remove the threat to Lincoln's policy, but when the bill was again taken up in the following session, Sumner admitted uncertainty as to the effect of his amendment. "I believe that prisoners have been discharged since which would change the effect of the modification," he said,[2] and withdrew it. Sumner was no better informed as to the extent of the release of November than was Richardson, a Democrat, when he asked Trumbull if it were not true that all prisoners had been released and if so

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1. E.g., their attack on Seward's position in the cabinet, Dec. 19, 1862.
2. Globe, 3d, 37th, p. 102.

what effect the bill's provisions for discharging them would have. Trumbull in his turn revealed his ignorance as to whether or not there was such an order, but replied that the bill would meet, in that event, all future cases.

The Democrats were more alive than were the Republicans to the practice of holding trial by military commission, but naively unaware of the fact that it represented a departure in policy. The opposition seemed rather to take exception to it as an unsatisfactory substitute for civil trials. The cases brought up in the discussion of Saulsbury's resolution in relation to Delaware prisoners were cases of "arbitrary arrest" by subordinate military officers, presumably often without any warrant from the war department. The case of Nathaniel Batchelder, arrested in New Hampshire for disorderly behavior during the draft proceedings in that state was used in illustration of the government's methods.[1] Senator Hale of the same state knew nothing of the case; Senator Clarke, his colleague, admitted having gone with the draft officials before the judge to represent the necessity of denying the petition for the writ of habeas corpus. Subsequently the war department released the prisoner on bond to appear when wanted for trial and to behave better while free. He said nothing of trial by military commission; the suggestion that

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1. Globe, 3d, 37th, p. 26.

Batchelder give bond for trial elicited no suspicion that the trial might be of any sort other than the kind that traditionally followed upon arrest, although Congress was aware of course that these military arrests seldom led to civil trials. Senator Bayard, of Delaware, presented the brief for the Democrats:[1]

> You may be arrested by officers, unknown to the law, indefinite in numbers, on offenses unknown to the law, not described, for disloyal practices, which may mean anything that an executive officer pleases....if the proclamation of the President of the 26th of September be carried out ....when that executive authority has practically and openly asserted the right to hold persons for an indefinite period of time without investigation, without public trial ....

Senator Sherman of Ohio, Republican, an opponent on constitutional grounds of the President's right to suspend the writ of habeas corpus and a thorough-going believer in the constitutional liberty of the citizen, felt that the arrests had excited public opinion more from the manner in which the prisoners had been discharged, than from any sympathy with traitors. He offered an interesting recommendation: "When a man is arrested and is kept in custody and is denied the privilege of bail, let him at least have a military examination, to see whether his arrest was made on probable cause."[2] A military examination would be supplied by a

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1. Globe, 3d, 37th, p. 26.
2. Ibid., p. 30.

military commission.

Sherman's safeguard for the arreested citizen would not have conciliated Senator Powell, Democrat, who like former Judge Advocate Lee recognized no law of war in this country but the articles of war,[1] which did not authorize summary military courts to try civilians. The opposite view was expressed by Morrill of Maine, Republican:[2]

> The laws of war are the law of the land ....not the Articles of War as the Senator from Kentucky says, but the principles of war, as defined by international law, govern us. That is our state today and our condition today, and in that sense it is the higher law; it is the law above the Constitution and above all laws; it is the law of our life and the law of our existence today, the ultimo ratio.

But even though it had eluded criticism from Congress the Administration found itself confronted by a momentarily more serious attack from another quarter. The Supreme Court of Wisconsin at its January term[3] passed unfavorably upon the right of the President to "suspend the writ of habeas corpus, to punish by sentence of court martial for offences against the laws of war, and even for acts not made offences by any law of Congress, but named in the President's order of September 24, "a complete characterization of the executive policy, even though it blundered technically in naming a

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1. Globe, 3d, 37th, p. 37.
2. Ibid., pp. 62-63.
3. 1863.

court martial in place of a military commission. Congress alone had the power to suspend the writ of habeas corpus, decided Judge Dixon, and in regard to the additional features of the executive policy, he denied the President's right to authorize them in "Wisconsin, or any State where the civil authorities are able, by ordinary legal process, to preserve order."[1] Lincoln met this pronouncement with manifest dismay; if the judiciary were to deny him the necessary authority for his policy, he would be confronted with the very unpleasant alternative of surrendering the position so steadily maintained, or of becoming the arch despot that some of his Radical opponents would have him. It was now nearly two years since Chief Justice Taney in answer to a petition for a writ of habeas corpus[2] had made a similar declaration regarding his power to suspend it, but so anxious was the President for the sanction of legality to a power that he sincerely believed he possessed, that he contemplated bringing the Wisconsin case before the Supreme Court for review at its present term.[3] From this course he was dissuaded by the earnest counsel of Attorney General Bates.[4] Bates believed as con-

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1. Quoted from Judge Dixon's decision, by the Annual Cyclopedia, 1863.
2. In the case of Merryman. Cf. Annual Cyclopedia, 1861.
3. Four of the judges of the Court were Lincoln's appointees.
4. Bates to Stanton, Jan. 31, '63. (Marked confidential). Stanton Papers, vol. 10.

fidently in the President's right to the contested authority as did Lincoln himself, but he foresaw the possibility of an adverse decision, and its power to coerce the President who had invoked it.

It had been Holt's policy, until the appearance of the first of the new statutes on February 25th, 1863, so to shape his definition of martial law that it would sanction the trial of all prisoners arrested upon charges--those who had committed real acts of hostility or had made an attempt to commit such. Those others, prisoners arrested upon mere suspicion if disloyalty were to be kept in prison untried with the same round of examination and discharge upon oath as heretofore. But the habeas corpus act threatened automatic release for these prisoners at intervals of twenty days. Even without this check, however, the other two acts, the Conscription Act and the Act to prevent correspondence with the enemy would have greatly narrowed the jurisdiction of the military commission. The direction in which Holt must work to build up his definition of martial law was thus determined by these statutes.

Holt's first task, after Congress had adjourned on March 3, was to discover whether the Habeas Corpus Act had made an end of the régime of martial law established by the President's proclamation of September 24, 1862. Did it authorize the suspension of the writ for the future only and

thereby annul previous suspensions? On reflection, Holt found this question a hard one to answer; Congress itself had despaired of fixing the meaning of the enabling clause after a confused discussion in the extra session of 1861.[1] Since it had taken no notice of the régime of martial law which the proclamation had instituted, Holt suspected that Congress had intended by the Act to have all the prisoners taken discharged by the courts. Regardless of whether they were subject to trial by military commission, Congress evidently intended that all be treated as were prisoners against whom there were no definite charges, but who were held in custody merely for precaution against their possible disloyalty. But as the executive policy had been evolved to defeat that very interpretation, Holt contented himself with inaction for the time being. He failed to send the lists at the expiration of the twenty day period, but in continuing military trial he strove to give no immediate offense by recommending a violation of one of the new jurisdictions created by the Conscription Act and the Act to prevent correspondence with the enemy. When an opportunity arose he intended to reconstruct a theory of martial law to meet the new conditions.

The Judge Advocate General began modestly with a statement of the application of the articles of war. The uniform

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1. Cf. Sellery for a discussion of this subject.

interpretation, and that favored by recent legislation, he reported on April 20, was that they referred to military persons, except when the civil courts of a district were closed, and in the absence of martial law.[1] His concession to civil jurisdiction included a reservation for an automatic application of martial law where the civil courts could not function--a reservation always present in his decisions and often resorted to; also a further reservation in his use of the phrase by way of reinforcement "in the absence of martial law," to allow leeway for its revival on a larger scale in case of need.

In distinction to the "articles of war," the "laws of war," on which an increasing number of charges were based, still afforded a field of action for martial law. These were not rules established by statute and therefore self-limiting as were the articles, but formed the basis, rather, of the common law of war derived from the custom of civilized nations as belligerents. They were unwritten largely, but on April 24, 1863, the Adjutant General's Office published a compilation prepared by Francis Lieber. Lieber had often conferred in an informal way with Holt during his study of the many phases of this law, and interested himself in its application to the problems of the Government.[2] The code was

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1. Letter Book, J.A.G.O., II, p. 187.
2. Cf. Lieber to Holt, Feb. 22, '63; Feb. 23, '63, and other letters in Holt Papers, v. 37.

revised by a Board of Officers and published by order of the President for the information of all concerned, under the title "Instructions for the Government of the Armies of the United States in the Field."[1]

A large number of charges were worded: "violation of the laws of war," or more commonly, "violation of the laws and customs of war." The flexibility of this classification afforded a wide scope for creating offenses, depending upon the terminology used to describe the act. Any number of specifications were grouped under this charge, although it was generally used for acts of guerrilla warfare, burning bridges, or breaking the oath of allegiance to engage in these maneuvers. Occasionally, however, it was used conveniently to elude other classifications, as when the act of aiding soldiers to desert was designated "forging soldiers' discharge papers,"[2] thus allowing for a military rather than a civil trial under the provisions of the Conscription Act.

On May 9, Holt gave his sanction to the establishment of martial law in the Department of the Ohio by confirming a trial by military commission for violation of General Burnside's Order No. 38, an order that in political consequences was second to none issued during the war. Holt classified

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1. Gen. Ord. #100, A.G.O. 1863. Also, in McClure, Digest of the Opinions of the Judge Advocate General, p. 462, n. 3.
2. May 12, '63. Letter Book, J.A.G.O., II.

it as merely declaratory of the laws of war. This order, which gave rise to the notorious Vallandigham arrest, was neither a departure from the policy of the War Department nor a particularly radical feature of it in the principle it embodied. But it was couched in terms more extravagant than the carefully technical language of the Judge Advocate General's Office, and it blundered upon a victim so prominent among the enemies of the Administration as to cause it serious embarrassment.

The order declared that "hereafter all persons found within our lines who commit acts for the benefit of the enemies of our country will be tried as spies or traitors, and, if convicted, will suffer death."[1] After the classes of persons cited as coming under the jurisdiction of the order was the statement: "The habit of declaring sympathies for the enemy will be at once arrested, with a view to being tried as above stated, or sent beyond our lines into the lines of their friends. It must be distinctly understood that treason, expressed or implied, will not be tolerated in this Department." Had the prohibition against "declaring sympathies for the enemy" been restricted by some further clause such as "with the purpose of discouraging enlistment in the Union

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1. Gen. Ord. #38. Headquarters Dept. of the Ohio. April 13, '63. O.R. I, xxiii, pt. 2, p. 237.

army," or "with the intent of obstructing the efforts of the Government to bring the war to a successful issue," the order would have harmonized legally with the policy pursued by the Judge Advocate General. Without an "intent," the case would fall into the category of mere arrest for prevention--without trial. It required the hostile intent to make of the expression of sympathies, an act, and the Judge Advocate General had used the modifying clause showing "purpose" to that effect. But when Burnside's order was invoked in the case of Clement L. Vallandigham, Congressman and leader of the extreme Democratic, or Copperhead, faction in the country, it was applied with that interpretation.[1] Holt sanctioned the order in its application to two other men, presumably charged with one or more of the specifications which cited real acts of disloyalty,[2] for the penalty was death, and in connection with the Vallandigham case the Administration concerned itself closely, while allowing the trial proceedings to take their course, to prevent any interference by the civil authorities.[3]

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1. Cf. the charge against him: "Publicly expressing, in violation of General Orders No. 38, from Headquarters Department of the Ohio, sympathy for those in arms against the Government of the United States, and declaring disloyal sentiments and opinions, with the object and purpose of weakening the power of the Government in its efforts to suppress an unlawful rebellion. Trial of Vallandigham, p. 11.
2. Holt to the President, May 9, '63. Letter Book, J.A.G.O., II, p. 315.
3. Cf. Lincoln to Stanton, May 13, '63, Stanton Papers, v. 12: "Since parting with you I have seen the Secre-

Clement L. Vallandigham, member of the House of Representatives from Ohio, had made a public address before a large group of citizens on May 1, 1863, at Mount Vernon, Ohio, in which he contended vehemently that the war was not being waged for the preservation of the Union, that peace might have been honorably obtained months before, and that the Government had plans on foot for depriving the people of their liberties, their rights and privileges under the Constitution. Arrested and brought to trial before the military commission, he was sentenced to "be placed in close confinement in some fortress of the United States ....during the continuance of the war." Immediately thereafter, his counsel applied to Judge Leavitt of the Circuit Court for a writ of habeas corpus. Before taking action on the petition, the Judge notified General Burnside of the proposed action and gave him opportunity to appear in court or to send word why the writ should not in his judgment be granted. Vallandigham's counsel objected to the irregular course adopted in this instance, holding that the General should have been summoned into court with his prisoner in person. For the rest, he appealed for the release of his client on the ground

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taries of State and the Treasury, and they both think we better not issue the special suspension of the Writ ....of Habeas Corpus spoken of--Gov. Chase thinks the case is ....before Judge Levett (sic), and the writ will probably not issue ....and that in no event, will Swain commit an imprudence."

that the military authorities had no right to keep him, citing the Act of March 3, 1863, and pointing to the fact that the President had not availed himself of the power granted by this Act to suspend the writ of habeas corpus. General Burnside's defense of his course was not one that had received the sanction of the Judge Advocate General's Office in Washington. It made no appeal to law, but merely declared emphatically the necessity of treating citizens like soldiers in a time of civil war. The General maintained that he had been acting upon his authority as Commander in the Department of the Ohio, and by making no mention of martial law, permitted the inference that he did not have to draw upon that irregular source of military power. Thereupon the counsel for the defense also ignored martial law and answered Burnside's argument with the reminder that the articles of war are for the government of the army and do not embrace the case of citizens, who are further protected in their personal liberty by certain well-known amendments to the Constitution. Judge Leavitt and Burnside's counsel followed on the same ground,--that the General had power vested in him as a subordinate of the President, first to make the arrest, and second, according to the decision of the judge, to order that a military commission make an examination or review of Vallandigham's offense.[1]

Thus was the Habeas Corpus Law of March 3, 1863, tested in its application to the government's policy. That policy was justified on the basis of the extraordinary power of the Executive to do everything necessary to put down rebellion, rather than on the contention of the Judge Advocate General's Office that in time of war martial law gave a legal sanction to the trial of military offenses in military courts.

The argument of Mr. Aaron Perry, General Burnside's counsel, touched upon the question of whether the proclamation of September 24, 1862, was still valid after the passage of the Habeas Corpus Act, and illustrated the prevailing uncertainty. "I have no knowledge," he said, "that it has been withdrawn or superseded, otherwise than as a matter of inference from the act of Congress. If it remains in force, it ends this application. I choose rather not to rely upon it.... If the President had authority to issue such a proclamation, and has not rescinded it, nothing can be more clear than that Congress had no power to rescind it. But I do not choose to embarrass the discussion by relying upon a document which there is plausible ground to suppose Con-

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1. That this was the view of the role of the military trial held by Lincoln is evidenced by his statement that Vallandigham's case was one of preventive arrest, and his assertion that "no punishment was meted out to these" aside from what was necessary for prevention." Letter to Erastus Corning, June 12, '63, Works, VIII, pp. 298-314.

gress might not have considered in force." Mr. Perry was, as he said, uninstructed by the military authorities, but his estimate of the force of the proclamation was not unlike the one later to be adopted by the Judge Advocate General's Office. When, however, he named the accused a prisoner of war, he fell into an error which that office never quite succeeded in dissipating.

The attitude of the press and of Congress was as lenient or indifferent in the matter of the military trial as the court had been. Even the Democratic newspapers failed to discuss this feature as distinct from the arrest.[1] Democratic and Republican politicians were more interested in the case as a test of the relative strength of their respective parties. For them the immediate issue was overwhelmed beneath the greater one of supporting the war or looking towards

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1. Cf. New York Herald for May 8, '63, and New York World for May 11, '63. The New York Times, supporting the War party, contains an interesting speculation as to the classification of the offense: "Nor is the precise character of his (Vallandigham's) offence yet stated--whether it was in violation of that section of the Conscription bill which makes penal all counseling calculated to thwart or embarrass that measure--or whether it was in contravention of the stringent General Order No. 38." It continues: "The Executive branch of the Government has been clothed by Congress with every power necessary to the maintenance of its authority; and the people have a right to expect that this authority will be the most strenuously vindicated where it has been the most injuriously defied." May 8, '63. The New York Tribune, while stating its opposition to Vallandigham, thought it more expedient to let him go free. May 15, '63.

peace.[1]

The magnitude of the issue was at the same time a danger and a safeguard to Lincoln. The Democrats, jubilant over the popular indignation which they had succeeded in provoking, were stimulated to hope for a successful opposition by pursuing an independent course. Their attitude as revealed during the summer and fall forecast Horatio Seymour's rejection of Lincoln's final offer of an Administration-Democratic alliance. But, on the other hand, Lincoln was relieved of any immediate fear of Radical activity. Not that Radicals were prone to be provoked at the Democratic short-sightedness; on the contrary, they could now, without fear of results, oppose the President on any forthcoming issue. But for the moment it was impossible for them to desert their cause, turn their backs upon the party's standards and join the enemy just for the momentary pleasure of disconcerting their commander-in-chief. The executive policy was strengthened by their neutrality at a moment of crisis. And a further comfort was forecast by that decision, and probably revealed to the President's keen gaze,--the necessity of tacit acceptance in the winter Congressional session of the Government's action and of the policy it involved.

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1. For Lincoln's careful presentation of the issue, cf. "Letter to Erastus Corning and Others," June 12, '63, cited above. Works, VIII, pp. 298-314.

In the midst of the excitement over the Vallandigham episode, the Judge Advocate General attacked his real problem. Three months after the promulgation of the Habeas Corpus Act, he sent to the Secretary of War a list of prisoners, with the statement that the delay of some nine weeks beyond the twenty day period specified in the Act could not "affect the privileges of the Prisoners in question," because of the provision in the third section whereby a prisoner could obtain his discharge by an application to the judge made by himself or his friends."[1] Concerning the interpretation of the Act itself, Holt professed his bewilderment, due, as he remarked, to the carelessness of its framing. But with all his hesitation, he had made up his mind to adopt the view most consistent with the policy of the Judge Advocate General's Office. "In consideration of the exigencies of the service," as he said, "the act was strictly construed....and the lists were not inclusive of all the prisoners enumerated on the prison rolls." Where those cases were "clearly triable by Court Martial or Military Commission and ....(were) being everyday thus tried, and readily disposed of," he did not "generally" include them in the lists.

Such, he said, were "cases of Prisoners arrested as 'guerillas' or 'bush-whackers' or as being connected with or

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1. Letter Book, J.A.G.O., II, pp. 552-554.

aiding these. So too of those arrested for communicating intelligence to the enemy in the sense of the 57th Article of War, and of those taken as spies. It is not believed that it was intended in the Act to invite attention to cases of persons charged with purely military offenses, or of persons suffering under sentences of military tribunals."

These offenses which Holt expressly reserved for military trial were largely "purely military offenses" where no conflicting jurisdiction had been provided by legislation. And among these, but without special mention, were other cases which were not purely military offenses in the degree that "bush-whacking" was,--cases like that of Vallandigham, but which could be given a military cast by the addition of an intent hostile to the war. However, among these reserved offenses, was one for which another jurisdiction was provided when committed by a civilian--violation of the 57th article of war. In the case of this offense, he felt the keenest reluctance in surrendering to the civil authorities, but it was not until later that he actually sanctioned its submission to military jurisdiction.

Where, however, the charge of aiding desertion and obstructing the draft, as provided for in sections 24 and 25 of the conscription act, was made, Holt relinquished the case to the civil authorities. His displeasure in the matter was expressed to Col. Fry, the Provost Marshal General:[1]

> For the inefficiency of the instrumentalities provided for repressing and punishing the disloyal practices by which the draft is sought to be resisted, Congress is alone responsible. The executive branch of the Government is powerless to apply a correction of the evil which was foreseen, and is now being encountered. If however the Commissioners mentioned should openly disregard their duty, and manifest in their decisions a shameless sympathy with the enemies of the Government, their conduct embracing the testimony and their judgment in the cases complained of, should be reported to the Secretary of War, in order that such action may be taken against such officers as may be possible under the circumstances.

In this state of things Holt was later to make a change.

On September 15, 1863, President Lincoln renewed his proclamation suspending habeas corpus, by virtue of the Act of March 3, 1863. He reiterated the offenses for which the writ was suspended and included again that of "resisting a draft, or for any other offense against the military or naval service,"[2] but omitted the mention of trial by military commission, as included in his earlier proclamation. This proclamation was not immediately used as a point of departure to stiffen the executive hold upon offenses not heretofore brought to trial by military commission, but very early a new rigor was noticeable in the practice recommended by the Judge Advocate General's Office. "Disloyal practices" on another charge but for the same act as violation of section 25 of the conscription act were brought to trial because

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1. Holt to Fry, Aug. 28, '63. Record Book, J.A.G.O., III, p. 502.
2. Works, IX, p. 122.

"subversive of military discipline."[1] A flagrant infraction of the 57th article of war in November drew from Holt the observation that "those who convey intelligence to the enemy are not to be found among officers and soldiers who are offering up their lives for the Government, but among demoralized and disloyal classes outside of the Army."[2] In order not to defeat the object of the grant of power over this class of offenders bestowed on the military authorities by the framers of the articles of war, he ruled, in a careful statement reviewing thoroughly the undeviating policy of the republic in former wars, that military offenses of this class when committed by civilians were amenable to trial by military tribunals. This rule, firmly upheld, would furnish the precedent for trying all classes of military offenses whatsoever that the Government was anxious to reserve for executive discretion. Halleck's rule of January 1, 1862, that "many offenses which, in time of peace, are civil offenses, become, in time of war, military offenses and are to be tried by a military tribunal even in places where civil tribunals exist," was invoked to support it, with a stronger emphasis

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1. Holt to the President, Oct. 27, '63. Record Book, J.A.G.O. IV, p. 275. A citizen sent a letter to a soldier "with the intention to produce dissatisfaction in the mind of the soldier, to seduce his loyalty, create discontent with his situation, and induce a want of confidence in the capacity and ability of his Military superiors."
2. Nov. 13, '63. Record Book, J.A.G.O., V, p. 291.

on the right of a military commission to try military crimes in war-time "even in places where the ordinary civil tribunals are open."[1]

But while tightening this phase of his military control, Lincoln took up, in December, that other, constructive phase of his policy which he never allowed to drop out of sight, to further which, indeed, he viewed all his other activities as humble means. Toward an ultimate clemency all the elements of firmness, of sternness even, in his official acts, contributed. When Congress convened in December, he laid before it a Proclamation of Amnesty and Reconstruction.[2] For all, with few exceptions, who should through an oath of allegiance accept the authority of the United States, a full pardon was offered, with restoration of all property rights except in slaves and where in property cases the rights of third persons should have intervened. Wherever in a Seceded State ten per cent. of those qualified to vote under the laws of 1860 should have subscribed to the oath, these persons should be empowered to set up a new State government.

This project attracted the embittered opposition of Congressional enemies for so long bereft of a real issue. Once again the Radicals had an opportunity to make an issue

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1. Cf. above, p. 93. The italics are Holt's. Holt to Burnside. Record Book, J.A.G.O., IV, p. 347.
2. Works, IX, pp. 218-223.

of the executive policy, particularly where it contravened or ignored the provisions of the Habeas Corpus act. The new Democratic members of this Congress had been chosen in 1862 on a platform of opposition to "arbitrary" arrests. The events of the spring and summer should have been instructive to minds already critical of the Administration; so convenient an illustration of the executive practice as the Vallandigham episode afforded might have been expected to spur them to sustain the law which they had recently passed. Since such a course was prevented by the furious activity of the Democrats, the issue remained dormant so far as the Republicans were concerned. The Radicals, unable to make use of an accusation, turned sullenly to the attack of the President's reconcstruction policy, while from the ranks of the moderate Republicans came a vindication of the President's habeas corpus policy. From a study of the Vallandigham case, Sherman had drawn the conclusion that a man may be subjected to trial by military authorities, not for talk however violent, but if he is aiding the public enemy "with the intent to contribute to and promote their cause."[1] In the House Henry Winter Davis was learning how to foster the Democratic hostility to the Administration with tactics too reckless for his Radical confreres in the Senate.

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1. Globe, 38th, 1st, pp. 3295-6.

Of equally comforting import to the Administration at this juncture was the decision of the Supreme Court in relation to the petition of Vallandigham for a revision of the sentence of the military commission which had condemned him. The Court announced its inability under the Constitution to grant it. The words of the Court, implying reluctance to interfere with the action of the Executive to suppress rebellion, allayed any immediate uneasiness on this score.[1]

With immunity from Congressional interference insured, the Judge Advocate General seized the opportunity to enforce a ruling which Stanton had for some time favored in relation to the offense of aiding desertion, namely that when committed in a fort which was the seat of Government, such as Washington, D. C., it was reserved for trial by a military commission.[2]

Holt's desire to establish military trial firmly in practice received added impulse in the course of the year. A reorganized Judge Advocate General's Office, now by act of

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1. A fragment of the decision reads: "Whatever may be the force of Vallandigham's protest, that he was not triable by a court of military commission, it is certain that his petition cannot be brought within the 14th Section of the act, and further that the court cannot, without disregarding its frequent decisions and interpretations of the Constitution in respect to its judicial power, originate a writ of certiori to review or pronounce any opinion upon the proceedings of a military commission. 1 Wallace, pp. 251-2.
2. Holt to Sec. of War, Feb. 25, '64. Record Book, J.A.G.O., VII, p. 252.

June 20, 1864, known as the Bureau of Military Justice, with enlarged personnel,[1] employed itself energetically during the summer in coping with the Copperhead menace to the draft in the Middle Western States. The proportions of this peril, centered in the secret society of the Sons of Liberty, or the Order of American Knights, was not lightly assessed by either the Bureau of Military Justice or perturbed Unionists, particularly after a comprehensive report on their activities and purposes had been published over the signature of the Judge Advocate General.[2] They were charged with activities embracing military treason against the Government to the extent of conspiring to levy underhanded war with secretly armed troops, to aid desertion from the army and obstruct the draft of soldiers into it,--and political treason embodied in activities of a character more vague, but possibly as keenly felt by a party weakened by internal rifts and fearful of the coming election.

Lincoln, the only man in the party to keep his judgment calm, was quietly dissipating the panic of distrust in his candidacy, insisting resolutely on keeping the Republican

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1. Holt was raised from a Colonel to a Brigadier General.
2. Official Report of the Judge Advocate General on the "Order of American Knights" or "Sons of Liberty," A Western Conspiracy in Aid of the Southern Rebellion. Oct. 8, 1864. Cf. also, letters in Holt Papers, v. 45, for the effect of this document.

helm. But his Secretary of War and Judge Advocate General, like many other men in responsible posts in those fateful late summer months, were inoculated by some of the virus of frenzy, and the "Indiana treason trials"[1] by military commission on sweeping charges, were the result. In the fall six leaders of the order were brought before a military commission convened at Indianapolis by order of General Hovey and tried under the direction of Judge Advocate Henry L. Burnett.[2] One of these cases, that of Milligan, was later to attract such attention by the civil authorities as to qualify decisively the development of the jurisdiction of the military commission. The charges brought against the accused were five, but all hinged on that of "Conspiracy against the Government of the United States," named first. Then followed: 2) "Affording aid and comfort to Rebels against the authority of the United States," 3) "Inciting Insurrection," 4) "Disloyal Practices," and 5) "Violation of the Laws of War,"--with several specifications under each. It was ruled by the judge advocate and decided by the court, against the plea of the defense, that five of the defendants could be tried jointly, since their offense was in the nature of a

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1. The record of these trials is contained in The Trials for Treason at Indianapolis, compiled by Benn Pitman.
2. For the record of the trials, cf. Pitman, Treason Trials.

conspiracy. This method of trial affected the treatment of evidence against the accused in a singular fashion. "Once having established the conspiracy," according to the judge advocate, "the acts of any one of the conspirators are liable to be brought in proof as evidence against any other member of the conspiracy. "This procedure he upheld in the absence of precedents, because, as he said, "this war has constantly been making precedents.... We do not act entirely in accordance with the common law, as recognized two centuries ago, but settle its principles, as applied to military offenses, and make precedants, in every case which we try in military courts. We make precedents in the government of the army, and in the military courts."[1]

Burnett, the judge advocate of this case, was not, like Perry in the Vallandigham case, without instruction from Washington. He spoke almost in the voice of Joseph Holt, in resting the jurisdiction of the court on the proclamation of September 24th, supported by the laws of war, "the military lex non scripta." The laws of war formed a category which appealed to the military mind for its convenience and its simplicity--once it had been evolved--but which was not so readily understood by civilians. The counsel for Milligan

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1. Pitman, Treason Trials, p. 79.

and his fellow conspirators now reminded the judge advocate, in the vein of Vallandigham's counsel, that the laws of war did not apply to citizens, thinking of the more definite "articles" of war in place of the more general "rules" of warfare in international usage. He refused to contemplate the application of martial law to Indiana where the courts were open, and after a survey of the nature and objects of the political society which is the United States, proclaimed the incompetence of the Government to establish martial law at all.[1] After asserting the constitutional guarantees of personal liberty, he objected to the jurisdiction of the military commission on points of fact, first that a statute of July 31, 1864[2] had defined conspiracies as offenses providing for their trial by civil courts, and second, that the act of March 3, '63, prevented the establishment of martial law. Burnett, for answer, supported martial law by pointing to the military offense as the Judge Advocate General had interpreted it, and maintained that Indiana was a theater of military operations. The attitude of Congress, he further pointed out, had been to strengthen the President's power to suspend the writ of habeas corpus, just as the proclamation of 1863 had confirmed the proclamation of 1862 in the matter

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1. Pitman, Treason Trials, p. 212.
2. This act is cited incorrectly. The act of Feb. 24, 1864, should be named in its place.

of suspension of the writ; the military courts, given jurisdiction before either the act of Congress or the later proclamation, had maintained that power without interruption.

Holt in reviewing the record of this trial, confirmed the jurisdiction of the commission on the ground that "the organization to which (the accused) were attached (was) of a military character"--that is, the offense bore a military character--"and the acts are charged to have been committed during a period of War, in the State of Indiana, a State within our military lines, and the theatre of military operations, and which had been and was constantly threatened to be invaded by the enemy,"[1] an extension of the principle applied to Washington when it was denominated a fort.

Having rendered the jurisdiction of the military commission concurrent in practice with the civil court, it but remained for Holt to announce it as a principle. This climax he reached in December of '64, when the Secretary of War upheld the decision that for cases of killing an officer in the act of obstructing an enrolment, contrary to the act of Feb. 24, 1864, a military commission had concurrent jurisdiction with the civil courts, even where the local courts were open.[2]

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1. Holt to Lincoln, Nov. 25, '64. Record Book, J.A.G.O., X, p. 648.
2. Holt to Capt. Wessels, Dec. 19, '64. Record Book, J.A.G.O., XI, pp. 287-8.

With this decision, the development of the executive policy was complete; the danger of a serious challenge from Congress had been rendered negligible by repeated failures to formulate any. Henry Winter Davis made a last attempt for the Vindictives to take up the mantle of Trumbull by combining with his stringent reconstruction policy, a protest in the interest of constitutional liberty against the President's policy, a synthesis very much in the spirit of Trumbull--with reconstruction substituted for confiscation and emancipation. On March 2, 1865, Davis secured the vote of the House on an amendment to the Miscellaneous Appropriation bill, forbidding the trial by military tribunals of any except those "actually mustered, or commissioned, or appointed in the military or naval service of the United States, or rebel emissaries charged with being spies."[1] His measure would even prevent the trial by military commissions of guerrillas.

The Senate voted to strike out the amendment.[2] On February 2d, a communication had been received from Secretary Stanton in answer to a resolution of Powell's, asking information as to whether the lists required from his office by the Act of March 3, 1863, had been furnished. Stanton returned to the Senate Holt's letter of June 9, 1863, accompanying his first and only list of these prisoners, and declared that he

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1. Globe, 38th, 2d, pp. 1323-1324. McPherson, p. 561.
2. Ibid., p. 1330.

had "no knowledge or information of any other persons held as State or political prisoners of the United States, by order or authority of the President of the United States, or of the Secretary of State, or of the Secretary of War, in any fort, arsenal, or other place, since the date of the report of the Judge Advocate General."

Stanton's statement is to be given the interpretation adopted by the Administration in regard to "political prisoners." None of those arrested on the charge of committing "military offenses" came under that classification in the meaning of the executive policy. The fact that this was the only list transmitted by Holt witnessed his unwillingness to allow the courts to pass upon the justifiability of the arrests made by the military authorities; even though these lists included only the cases which were not to be tried by military commissions, he preferred that such cases should be discharged by officials under the direction of the War Department.

The executive policy for the treatment of political prisoners had turned out to be in its culmination the creature of Holt, rather than of Lincoln,--of Holt under the influence of Stanton. If Holt had had to labor earnestly in the beginning to adapt himself to the measures of the Administration, he had long since learned how to devote himself singleheartedly to the interests of the Department to which he belonged,

carried often beyond the restricted purposes of the President in the control of the political prisoners. Holt, like Burnside in 1863, was responsible for an extravagance in the conspiracy cases of 1864 which was embarrassing to Lincoln. These sentences, needing the President's confirmation, went unexecuted. But when Lincoln's sudden death created a temporary panic throughout the North, the military commission with its machinery perfected for action stood ready to avenge the assassination of one who had been the only effective check upon its operation.

CHAPTER V

THE MILITARY COMMISSION IN POLITICS

With the announcement in the newspapers that the conspirators in the plot against the lives of the President and the chief officers of state were to be tried by a military commission, many men who had been moved only by condemnation of the deed paused to calculate the effect of this new phase of the situation. The Administration papers along with the opposition journals tended at first thought to oppose it. They expressed surprise that it should be adopted just as the end of armed resistance in "certain States" of the South was proclaimed, abjuring the necessity which could be the only justification of arbitrary military authority. Indisposed as they had always been to favor a resort to arbitrary rather than to judicial methods, these journalists had learned enough of the possibilities of military justice during the last year of the war to make them loath to support it at the inception of peace.

The Government's incentive for the military trial was its belief in a widespread plot in which others than the wretched men in custody were concerned. Testimony gathered from the confessions of these offenders and from many other witnesses convinced the Judge Advocate General that the leaders of the Confederacy were implicated,--Jefferson Davis,

Jacob Thompson, Clement C. Clay, Beverley Tucker, George N. Sanders, and William C. Cleary notably, but "other rebels and traitors ....harbored in Canada" as well. Besides Holt, whose susceptibility to suspicion of this sort had been demonstrated in his investigation of the Western secret societies, the cabinet and a large part of official Washington shared in this belief under the spell of the prevailing excitement. That the files of the Bureau of Military Justice contained evidence of Confederate complicity in a great and nefarious conspiracy, was a fact vouched for by Stanton and incorporated in President Andrew Johnson's proclamation of rewards for the arrest of the accused.

The seriousness of the charge was fully appreciated by the Republican press, if not by the politicians. It was able to perceive the danger from unfriendly public opinion, abroad as well as at home, if the charge were not clearly substantiated. But under the force of Democratic attack, a sudden change of tone indicated that these journals had sensed the popular approval of the innovation and come to the support of the dominant faction. Most rapid in its conformity was perhaps the New York Times. "We desire," its apology ran, "that the language used in discussing this subject in this journal yesterday, should not be understood as impeaching in any degree the motives of the government in the

action it has taken.... Extraordinary crimes deserve extraordinary measures."[1]

It was Stanton, rather than Holt, who drew unfavorable comment for his part in the project, although the initiative seems to have belonged to Holt and President Johnson, who signed the proclamation calling for the capture of the conspirators.

The trial opened on May 20, 1865.[2] The judge advocate for the occasion was Joseph Holt, with two assistant judge advocates, John A. Bingham, a member of the House of Representatives of some experience as a judge advocate, and Henry L. Burnett, who had been judge advocate for the trial of the Indiana conspirators in the previous year. The accused were charged with "maliciously, unlawfully, and traitorously, and in aid of the existing armed Rebellion against the United States ....on or before the 6th day of March, A.D. 1865, combining, confederating, and conspiring, together with one John H. Surratt, John Wilkes Booth, Jefferson Davis, George N. Sanders, Beverly Tucker, Jacob Thompson, William C. Cleary, Clement C. Clay, George Harper, George Yound, and others unknown, to kill and murder, within the Military Department of Washington, and within the fortified and in-

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1. New York Times, May 12, 1865.
2. For a full description of the trial, cf. DeWitt, The Assassination of Abraham Lincoln.

trenched lines thereof, Abraham Lincoln, late ....President of the United States, and Commander-in-Chief of the army and navy thereof; Andrew Johnson, then Vice-President of the United States aforesaid; William H. Seward, Secretary of State ....and Ulysses S. Grant, Lieutenant-General of the army of the United States aforesaid, ...and in pursuance of and in prosecuting said malicious, unlawful, and traitorous conspiracy aforesaid, and in aid of said Rebellion, afterwards,--to wit, on the 14th day of April, A.D. 1865, --within the Military Department of Washington ....together with said John Wilkes Booth and John H. Surratt, maliciously, unlawfully, and traitorously assaulting, with intent to kill and murder, the said William H. Seward, ...and lying in wait with intent maliciously, unlawfully, and traitorously to kill and murder the said Andrew Johnson ....and the said Ulysses S. Grant."[1] The seven offenders whom the Government was able to capture were then put through trial for their part in a conspiracy supposed to be engineered by greater minds, and four were sentenced to death, two to life imprisonment and one to imprisonment for seven years. Among the first four was a woman, Mrs. Mary E. Surratt, mother of the chief confederate of Booth. Her son's escape from the grasp

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1. For the charge and specification in full, cf. Pitman, Trial of Assassins, pp. 18-21.

of the Government had brought upon her a greater severity in prosecution than her guilt warranted. But the weakness in the justice meted out by this military commission lay not so much in the animus of the prosecution as in the unusual latitude granted it by the character of the tribunal. The opinions of the judge advocates, who were not only the prosecutors but the arbiters of the rules of the court and the expounders of the military law as well, exercised an undue influence upon the decision of the untrained military officers who sat in the place of judicial authority behind the long table. The counsel for the defense had no such advantage. They were limited to the scope of action permitted in ordinary criminal trials in civil courts, where the judgment was given on the basis of justice rather than of discipline, a distinction not appreciated by the public interested in the outcome of this trial. The editor who exclaimed, "Judge and jury we know; but Major Generals and Judge Advocates, not with swords in their hands, but with pens behind their ears, we do not know,"[1] touched upon a profound objection to the use of a military tribunal for purposes of civil justice.

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1. N. Y. Evening Post, May 10, 1865. From a clipping in Holt Papers, v. 47.

The arguments for the jurisdiction have then an academic rather than a dramatic interest. The precedent of the earlier conspiracy trial in Indiana against the Sons of Liberty held in regard to the Government's brief for the jurisdiction of the court as it did in the matter of the treatment of the evidence of conspiracy.[1] The combination of the laws of war, the lex non scripta, and the President's proclamation of September, 1862, made by Judge Advocate Burnett on that occasion, was permanently adopted by the Bureau of Military Justice as the defense of its submission of civilians to military jurisdiction. That Bingham to whom the prosecution was entrusted preferred the more substantial ground of the proclamation to the law of war was evidence of his greater familiarity with the methods of civil rather than of military justice. By rejecting the law of war, he was forced into the more arbitrary position that the President has a war power transcending the law of peace. "The Constitution," he declared, "confers upon the President the whole executive power; he is bound to take care that the laws be faithfully executed; he is Commander-in-Chief of the army and navy of the United States, and of the militia of the several States when called into the actual

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1. Cf. chapter IV, above.

service of the United States."[1]

Although Bingham rightly described the proclamation as establishing martial law over the entire Union whether the particular state or district were the theater of war or not, but its full potentialities had never been--for practical reasons--utilized. Although men were arrested in territories distant from army headquarters for "disloyal practices," notably for obstructing the draft, the difficulties of detailing army officers for service on a military commission made it impossible to try cases in districts where the danger was not great. The offense of the accused, the judge advocate added, was a "disloyal practice." Was it not aiding and abetting the insurgents to enter into conspiracy with them to kill and murder within the capital, which was an entrenched camp, the Commander-in-Chief, the Lieutenant-General, the Vice President and the Secretary of War?

The counter plea of Reverdy Johnson, counsel for Mrs. Surratt, likewise followed the traditional argument against the subjection of non-military persons to military tribunals, refusing to recognize "military offenses" not provided for by military law.[2] He attacked the idea, like a good Senator,

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1. Pitman, Trial of Assassins, p. 360.
2. Cf. Pitman, Trial of Assassins, pp. 251-263.

that the war power belonged to the President; Congress, he averred, would have had to establish such courts as these, and the two acts in pari materia passed during the rebellion had not authorized them. A "traitorous conspiracy," he further maintained, was the same charge as "treason," which under an express provision of the Constitution must be tried in the civil courts. "We learn that the very chief of the alleged conspiracy has been indicted and is about to be tried before one of these courts. If he ....is to be and can be so tried, upon what ground of right, of fairness or of policy, can parties who are charged to have been his mere instruments be deprived of the same mode of trial?"[1] And finally, he challenged the appeal to martial law in the District of Columbia, which had not been occupied as enemy's territory.

General Thomas Ewing, the junior counsel, opposed the judge advocate's appeal to the "common law of war." Such law, he maintained, is nothing but the will of the general, and is not made by the decision of the military court, a decision which is "advisory merely."[2] He closed with a prophecy of the condemnation of a future day upon such jurisdiction.

Features other than the jurisdiction of the commission

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1. Pitman, Trial of Assassins, p. 257.
2. Ibid., p. 265.

provoked only a slightly diminished hostility from the Democratic press. The relative secrecy of the proceedings--since a permit from the president of the tribunal was necessary for admission and only such parts of the proceedings were to be published as the judge advocate wished, the fetters on the prisoners, even on Mrs. Surratt, and the death sentence for the last named, insisted on by the judge advocate on the basis of exceedingly flimsy circumstantial evidence,--all helped to defame the reputation of the military commission for securing justice. But the case of Mrs. Surratt was only the most conspicuous feature of the trial because of her sex and obvious helplessness in the ruthless power of the tribunal. The method adopted for constructing the conspiracy hypothesis which was the peculiar feature of this court was little better than a conspiracy on the part of the Government itself to prove its formidable charge against its late enemies of the Confederacy. Testimony was garnered from innumerable persons of slight acquaintance with the men or proceedings they were branding. These informers had been swept wholesale into the net of the assiduous Lafayette C. Baker, confidential detective of the War Department, and pressed into service by insidious promises of immunity or hope of reward. Such testimony played its part in paving the way for the long confinement of Jefferson Davis

and Clement C. Clay, and caused many to despair of an Administration they had always opposed.

Holt's part in the trial was on the surface an inconspicuous one, although he was well understood to be the directive genius of the whole. However, his influence was not wholly behind the scenes. Points of law or procedure were referred to him as to the judge on a civil bench. At one point when Ewing objected to the introduction of proof that his client had served in the Confederate army, Holt, in support of its inclusion, exclaimed, "How kindred to each other are the crimes of treason against the nation and the assassination of its chief magistrate. When we show the accused bearing arms in the field against the government, we show him with an animus toward the government which relieves this accusation of much, if not all, of its improbability." But his meticulousness in regard to technicalities was manifested in his objection to the arrangement reached between the court and opposing counsel for dispensing with the reading of the record at each session. "If it should be known hereafter," he said, "in connection with this trial, that the Court departed from the usages of the service, and did not even have its own record read over, but trusted simply to the reporters for accuracy, it might go very far to shake the confidence of the country in the accuracy of

these reports, and would certainly leave an opening for criticism."[1]

With the pronouncement of the sentences by the court, the Judge Advocate General made out his report and took it to the President. Attached to the record, but unknown to the press or general public, was a petition signed by five of the nine members of the court asking for the remission of Mrs. Surratt's sentence of death to that of life imprisonment, on the ground of her sex. This action was the outcome of a struggle between the hesitant court and the prosecutors determined to make the woman pay vicariously for the escape of her more guilty son. Whether or not this document received the emphatic consideration of the president is a problem impossible of accurate solution. It was of far greater moment at a later period than it was then, but both men in that solitary conference were agreed upon the principle that Mrs. Surratt ought not to be excused on account of her sex, that such a precedent would, in fact, "amount to an invitation to assassins hereafter to employ women as their instruments, under the belief that if arrested and condemned they would be punished less severely than men."[2] With the fixing of the date of execution, the interview was at an end

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1. Poore, I, 224.
2. Quoted by James Harlen from Stanton in Vindication of Hon. Joseph Holt (1873).

The extravagance of the trial, expressive of the vindictive spirit with which victory had inspired the ardent North, confirmed the belief of Radicals in military trial for "treason," despite the excitement aroused against the execution of Mrs. Surratt. The evidence of the complicity of Jefferson Davis in criminal projects to introduce fire and pestilence into Northern military camps and civilian communities, which the trial had brought to light, enkindled the zeal of Radicals in proportion to its incredibility. The trial by military commission of Henry Wirz, accused of horrible barbarities towards Federal prisoners in the Confederate prison at Andersonville, was only another indictment of Davis through an ill-starred subordinate. Holt's activities were enjoying a prominence during this exaggerated period of the history of the military commission such as they had never known during the earlier, more restricted, phase, and he himself commanded a marked approval wherever Radical sentiment prevailed. Despite his pleasure at this popularity, however, he was at times beset with misgivings over the keen opposition voiced in other quarters to the recent procedure of the Bureau of Military Justice. He felt it even though he was contemptuous of its source.

That his course must be right in view of the enthusiasm it engendered, only served to prove that opposition arose from a factious antagonism to the cause of the Union and its

supporters, and in his more melancholy moods, he felt a personal sensitiveness to the malignity of the attacks. But while he talked to intimate friends of a wish to retire from all official position in June,[1] he was by no means discouraged from a zealous continuance of his duties in the fall, after a short respite at Saratoga Springs and a sample of public opinion had lightened his spirit.

In reporting the trial to the Secretary of War in November, Holt gave expression to the profundity of his belief in the military commission.

> These commissions, (he stated) originating in the necessities of the rebellion, had been proved by the experience of three years indispensable for the punishment of public crimes in regions where other courts had ceased to exist, and in cases of which the local criminal courts could not legally take cotnizance, or which, by reason of intrinsic defects of machinery, they were incompetent to pass upon. These tribunals had long been a most powerful and efficacious instrumentality in the hands of the Executive for the bringing to justice of a large class of malefactors in the service or interest of the rebellion, who otherwise would have altogether escaped punishment; and it had indeed become apparent that without their agency the rebellion could hardly, in some quarters, have been suppressed. So conspicuous had the importance of these commissions and the necessity for their continuance become that the highest civil courts of the country had recognized them as a part of the military judicial system of the Government, and Congress by repeated legislation had confirmed their authority and indeed extended their jurisdiction.
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> But it was not until the two cases under consideration came on to be tried by the military commission that its highest excellence was exhibited. It was

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1. Cf. T. S. Bell to Holt, June 2, '65. Holt Papers, v. 48.

> not merely in that it was unincumbered by the technicalities and inevitable embarrassments attending the administration of justice before civil tribunals, or in the fact that it could so readily avail itself of the military power of the Government for the execution of its processes and the enforcement of its orders, that its efficacy (though in these directions most conspicuous) was chiefly illustrated. It was rather in the extended reach which it could give to its testimony, that its practical and pre-eminent use and service were displayed. It was by means of this freedom of view and inquiry that the element of conspiracy, which gave to these cases so startling a significance, was enabled to be traced and exposed, and that the fact that the infamous crimes which appeared in proof were fruits borne by the rebellion and authorized by its head was published to the community and to the world. By no other species of tribunal and by no other known mode of judicial inquiry could this result have been so successfully attained; and it may truly be said that without the aid and agency of the military commission one of the most important chapters in the annals of the rebellion would have been lost to history, and the most complete and reliable disclosure of its inner and real life, alike treacherous and barbaric, would have failed to be developed. (1)

But meanwhile President Johnson's sympathies had veered in the direction of his great predecessor's. His clemency towards the South in the policy of reconstruction was well-established by the opening of Congress in December, and his effort to pursue a moderate course included the re-establishment of the privilege of the writ of habeas corpus throughout the North with the exception of Kentucky and the District of Columbia. In January he asked for and received from Attorney General James Speed an opinion that "trials for high treason cannot be had before a military tribunal."[2]

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1. Holt to Stanton, Nov. 13, '65. O.R. III, v, pp. 490-494.
2. O.R. II, viii, p. 844.

The rift between the President and Radicals which this session of Congress was to disclose marked the approach of the day when members of the Administration who had been in sympathy with both must choose between them. The necessity of his position, if not his temperament, was sufficient to keep Holt from joining the party of clemency to the South,-- the necessity of a position which, strangely enough, had originated to offset the intrigues of Radicals. The military commission was to take the place for which it was more inherently suited than it has been for the place it had so long and anomalously occupied in the conciliatory policy of Lincoln, when it became a weapon of the Radicals in the coercion of the South with the establishment of military rule.

But the prospect of capturing John H. Surratt and subjecting him to trial by the tribunal which had sentenced his mother and established his own guilty connection with the conspiracy, elicited surprisingly little activity from the War Department or the Bureau of Military Justice. Their pursuit of larger game, in the person of Jefferson Davis, was occasioning them an exhaustive expenditure of effort to produce testimony conclusive enough to fulfill the expectations they had established. To try its distinguished enemies by any method would, as the War Department knew, demand the happiest auspices for the elaboration of the charges and the establishment of the jurisdiction of the tribunal. The

Bureau of Military Justice was uneasy over the risk of jeopardizing its chances in this case by exposing the reputation of the military commission in the case of Surratt. No one but the most sanguine could deny that the fame of the court which found Mrs. Surratt guilty would depend in great measure upon the Government's ability to repeat its success in the trial of her son.

In the midst of these doubts, the serenity of the War Department was severely shaken by two incidents following closely upon each other,--the first, the discharge by the Supreme Court of Milligan and his co-defendants in the Indiana treason cases which had been appealed to that tribunal, and the second, the discovery of the perjury of the Government's chief witnesses against the Confederate leaders.

The sentences of the men convicted by the military commission at Indianapolis in the fall of 1864 for conspiracy against the United States had not been confirmed by Lincoln at the time of his death, but Johnson had ordered the execution of the condemned men for the 19th of May, 1865. Nine days before the date set, one of the three, Lambdin P. Milligan, petitioned the circuit court for discharge in accord with the terms of the Habeas Corpus Act, and the two judges, unable to agree, certified the questions involved to the Supreme Court. Milligan's sentence was then suspended by Johnson until June 2, but at the instigation of Justice

David Davis and Governor Morton of Indiana, it was commuted to imprisonment for life.[1]

The question of the jurisdiction of the military commission came up at the January term of the Supreme Court in 1866. The decision was adverse to the Government's policy. Judge Davis, one of Lincoln's appointees, ruled against the use of the military commission on any such theory of martial law as that advocated by the Government's counsel, James Speed, Benjamin F. Butler, and Attorney General Stansbury. After an ill-advised attempt to ground its action on the petitioner's being a prisoner of war, "as much ....as if he had been taken in action with arms in his hands,"[2] the Government turned to martial law for the basis of its power over offenses of this kind:

> But neither residence nor propinquity to the field of actual hostilities is the test to determine who is or who is not subject to martial law, even in a time of foreign war, and certainly not in a time of civil insurrection. The commander-in-chief has full power to make an effectual use of his forces. He must, therefore, have power to arrest and punish one who arms men to join the enemy in the field against him; one who holds correspondence with that enemy; one who is an officer of an armed force organized to oppose him; one who is preparing to seize arsenals and release prisoners of war taken in battle and confined within his military lines.
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> These crimes of the petitioner were committed within the State of Indiana, where his arrest, trial, and imprisonment took place; within a military district of a geographical military department, duly

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1. DeWitt, p. 154.
2. Ex Parte Milligan, 4 Wallace, p. 21.

> established by the commander-in-chief; within the military lines of the army, and upon the theatre of military operations; in a State which had been and was then threatened with invasion, having arsenals which the petitioner plotted to seize, and prisoners of war whom he plotted to liberate; where citizens were liable to be made soldiers, and were actually ordered into the ranks; and to prevent whose becoming soldiers the petitioner conspired with and armed others. (1)

This theory of power as vested in the military commander the court overruled. The test that Lincoln had desired had been invoked, but not as he had anticipated it. When the Court read its opinion at the December term, hostilities had been ended for over a year and a half, "the public safety was assured, and this question, as well as all others, (could) be discussed and decided without passion or the admixture of any element not required to form a legal judgment." What would have been the decision if the case had come up "during the late rebellion, (when) the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question," had been the point at issue for Lincoln and his subordinates who administered the executive military policy, with a view to meeting the test of legality where they could, and of suppressing the rebellion with the least violence to law.

Undeterred by the adverse view of the jurisdiction of the military commission held by the nation's highest

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1. 4 Wallace, p. 17.

judicial authority, the House of Representatives within less than a week passed a resolution directing the judiciary committee to inquire whether there was probable cause to believe that any of the persons named in the proclamation of rewards of May 3, 1865, were guilty as alleged, and whether legislation was necessary to bring them to trial. The debate on the resolution revealed the confidence of its sponsors in the possibility of offering proofs of Davis' guilt sufficient to "awaken a stronger and sterner demand for his punishment." In the pursuit of this evidence, however, the committee stumbled on a structure of lies and deceit so gross as to be an almost prostrating blow to Joseph Holt and the projects of the Bureau of Military Justice. Charles Dunham, alias Sanford Conover, the Government's most persuasive witness, had come to Washington for the end of the assassination trial in June of the year before, recommended by an editor of the New York Tribune, and had offered evidence gained as a spy on the Confederate agents in Canada, among whom he had moved under the name of James Watson Wallace. He had easily secured the confidence of the Judge Advocate General and been commissioned to round up the witnesses whom he promised could vouch for his charges, for which purpose he received on various occasions sums of money. Summoned before the committee of the House, three of these men confessed to being tools of Conover, that they

had been paid to learn and deliver the substance of depositions which he had written out for them. Conover appeared and denied the accusation on oath, but being allowed to go to New York to find other persons to establish his innocence, he made his escape from the officer having him in custody, and disappeared.

At a loss what to think of the disclosure made to him, the Committee appealed to the Judge Advocate General, and Holt, who had been informed of the confession by Judge Advocate Turner, acknowledged to the Committee that while there was nothing in the testimony of the persons he examined, "or in their manner calculated to excite doubt as to their truthfulness," nevertheless Conover's disappearance had left on his mind a strong impression that a most atrocious crime had been committed, under what promptings "he was unable to determine." Apparently undaunted by their predicament, the Committee reported in July that they had adduced sufficient evidence from documents found in the hands of rebel authorities to recommend the continuation of the work of investigation.[1]

Against this conclusion a minority report by Representative Rogers of New Jersey, contended that the Committee's conclusions were based on perjured evidence, annotated and

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1. Report No. 104, House of Representatives, 39th Cong., 1st sess., p. 29.

explained by Judge Advocate General Holt where it should have been sifted by the Committee working independently. Although in its report the Committee claimed to have discarded entirely the testimony of the perjured witnesses, Rogers condemned the trust put in the statements of Richard Montgomery, who had not been involved in the exposure of the Conover band, it is true, but whose pretensions to knowledge of the Confederate activities in Canada appeared on the surface very similar to those of Conover himself.

Roger's report was brief, and, as he himself admitted, bore signs of haste in preparation due to the inconveniences thrown in his way by his colleagues. But though far from exhaustive, it was a bitter indictment of Holt's conduct and motives in relation to the whole conspiracy as well as a challenge to the jurisdiction of the military commission.

> There is certainly nothing in (Mr. Holt's remarks) of the <u>amicus curiae</u> spirit, nothing of the searcher after truth, nothing but the avidity of blood of the military prosecutor.... The sending of an argument might be explained as the natural effect of that habit of directing verdicts acquired in the Bureau of Military Justice; but the sending of such an argument I feel compelled to attribute to a desire to place his own views so before the committee as to render investigation by them a mere matter of form; and I believe this was done to hide the disgraceful fact that the assassination of Mr. Lincoln was seized upon as a pretext to hatch charges against a number of historical personages, to blacken their private character, and afford excuse for their trial through the useless forms of a military commission, and through that ductile instrument of vengeance in the hands of power, murder them. (1)

He connected the fact of perjury with the methods employed by the Bureau.

> I do not say, (he continued) that 'Judge Holt' did himself originate the charges or organize the plot of the perjurers, because I do not know that he did; I merely say that a plot based on the assassination was formed against Davis, Clay, and others, and that the plotters did, and even yet, operate through the Bureau of Military Justice, and that the argument forwarded by Mr. Holt to the Committee on the Judiciary looked to me like a shield extended over the plotters--extended, it may be, from no personal animosity to Messrs. Davis, Clay, and the others--extended, it may be with a desire to save certain officers of the government from the charge of having been betrayed into the mistakes of a vague apprehension, the blunders of an excitement, which it was their province to allay or control, not to increase or share; but still extended over acknowledged, self-convicted, most wicked perjury; and the fact that Mr. Holt did himself pay moneys to more than one of them, to those who acknowledge they swore for money, may awaken suspicion that there was bribery as well as perjury--perhaps not conscious bribery, but the payment for false testimony was committed; though it may have been done innocently, it produced the usual effect of subornation of perjury. (2)
> ....Judge Holt himself was a witness before the committee. He of himself knew nothing of course; but he swore to his own opinions derived from the trustworthy testimony of the parties described, for whose testimony they say the judge paid them. (3)
>
> (And further:) Who originated this plot, and placed the government in so embarrassing an attitude? I cannot ascertain. The jealous secrecy and care exercised by the gentleman from Massachusetts (chairman of the committee) in keeping most of the documentary evidence from me for careful perusal, the secrecy attending every step of these proceedings, makes certainty on my part impossible as the authorship of

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1. Report No. 104, H of R, 39th Cong., 1st sess., p. 36.
2. Ibid.
3. Ibid., p. 39.

> these ill-linked perjurers; although I do not attribute the course of the committee towards me to any desire on their part to screen the authors, and I am so deeply impressed that there must be guilt somewhere that I earnestly urge upon the House an investigation into the origin of the plot concocted to alarm the nation, to murder and dishonor innocent men, and to place the Executive in the undignified position of making under proclamation charges which cannot, in the face of the accused, or even in their absence, stand a preliminary examination before a justice of the peace. (1)

Unfortunately for Holt, the document offered him a point of attack to vindicate his personal honor without detracting from the justice of the charge as a whole. He was sincerely wounded by the tone of the report while unable to appreciate its force. His motives had been impugned, and, conscious as he was that they were founded on the loftiest patriotism, he had yet to face bewilderedly the fact that someone thought they were fundamentally wrong--had been the cause of his blunder. And he became uneasy again about the hue and cry that the newspapers would raise and larger portions of the people come to believe. He turned gloomily back to the hypothesis that he had always been unpopular with the American people and began to compile his "Vindication."

The New York Herald began to publish letters of Holt's in conjunction with "fabricated" replies from the Conover gang in such wise as to make him appear obviously guilty

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1. Report No. 104, House of Representatives, 39th Cong., 1st sess., p. 40.

of gross bribery. He appealed to the President in September for a court in inquiry to establish his innocence, but was assured by Johnson that he did not need one. In November he published a pamphlet--not the first he had deemed necessary to meet the detraction of foes. A year before he had taken pains to denounce the injustice of an absurd reflection of Montgomery Blair's on his patriotism while in Buchanan's cabinet, in a document containing letters from Congressmen exculpating him.[1] Now he was advised by his friends in the Administration[2] to ignore the Rogers report, but his reply

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1. Holt, Reply to Blair.
2. Cf. W. W. Winthrop to Holt, Aug. 6, '66. Holt Papers, v. 53: Mr. Stanbury, the Attorney General, "expressed to me his view at some length and substantially as follows: That while he would not oppose your having authority to make the publication, if you "insisted" upon it, he was very strongly of opinion that such publication would be more injurious to you than beneficial; that it would expose you to much unpleasant and annoying criticism as having been deceived and led into important official action by a designing and unscrupulous man, whose statements, though seeming reliable and not improbable at the time they were made, carry with them, as they are read now (when the excitement is over) an air of improbability and deception--all of which is heightened by the excuses which he prefers for his shortcomings, his accounts of his travels and proceedings in the course of the investigations, calls for money, etc.

   That the report of Rogers, which he stigmatized as a disgraceful production was unworthy of a reply from you; and that, in his opinion, the very thing that Rogers and his friends most desired was a full public reply to their calumnies from you--out of which they could 'make capital.'

   That this was a matter in which, as he thought, your 'friends' were perhaps even 'better qualified to judge

came out in first installment in the editorial column of the friendly Washington Chronicle, addressed "to all loyal men: In the name of simple justice--which is all that I claim from friend or foe--your attention is respectfully invited to (the following) ....as presenting a perfectly truthful vindication of myself from the atrocious calumny with which traitors, confessed perjurers, and suborners are now so basely pursuing me." Subjoined to the article was his own letter to the public in which he reiterated his message to the committee and included letters of exoneration from leading Republicans.

The Radical press received Holt's "Vindication" with the enthusiasm due to his career and to its desire to confound treason. His friends, as friends will, hailed it as an invincible triumph of truth over base slander. Only his brother in Mississippi, with whom his relation had become rather strained, uttered the wish that "Jo" had not found it necessary to fix upon Jefferson Davis an accusation so irrelevant to his own defense as was the charge of participation in the assassination of Lincoln,[1] But the Radicals pressed

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than yourself' ....that 'he and Mr. Stanton' had talked the whole subject over, and both had agreed in the view--that much more would be lost than gained by the publication; that it would be received in a manner which would give you great annoyance, and subject you to be unpleasantly misunderstood and misrepresented, and at the same time not add to the estimate of your friends, who need from you no defence to a contemptible slander from such a source."

1. Robert S. Holt to Joseph Holt, Sept., 1866. Holt Papers, v. 53.

on the trail of guilt and Holt was carried with them--more reluctantly.

Their fierceness concentrated upon the "Traitor" in the White House. Suppressed rumors of Andrew Johnson's connection with the conspiracy began to be flaunted openly. At this juncture the offer of the Papal authorities to extradite the fugitive John Surratt furnished the Radical leaders with the chance to harry further the Administration with a trial for which it had shown itself so reluctant. These zealots failed only to realize which department of the Administration was responsible for the delay. Surratt arrived in February 1867 and was delivered over to the civil authorities without a remonstrance from the War Department, but, expecting a stern contest, the Bureau of Military Justice set all of its machinery in motion to assist the Attorney General's Office in the collection and preparation of the evidence. Its fears were justified. With the failure of the case followed by the failure of the impeachment proceedings, the "Great Conspiracy" of the Bureau of Military Justice petered out. Jefferson Davis was delivered over to the civil authorities for a brief detention and a belated triumph. There the matter ended for the public, and shortly for the chief actors. The use of the military commission in the trial of citizens was discarded, except in the States of the South for the protection and punishment of a civilian

population still under military rule.

But for Holt the controversy was not terminated. As a last bequest of the Surratt trial the chief issue of that earlier and now somewhat notorious verdict was raised--in a more fearful way for Holt than he could possibly have anticipated. A tardy disclosure of the recommendation of the court that clemency be shown Mrs. Surratt by commuting her sentence of death to one of life imprisonment, elicited from the President a denial that the petition had ever been shown him. Once more the scapegoat, Holt struck back, more blindly perhaps for his rising passion and the chronic suffering in his head. His political fortunes protected him once again from the immediate consequences of his controversy, and his reputation for veracity was guaranteed by the domination of his friends. But once again, also, polemics raged around a point which was not the question at issue, and Holt returned to the attack at intervals for the remainder of a long life, trying dismally to revive interest in a question which had dropped out of popular consciousness with the proceedings which had given it a transient importance.

Holding fast to his office throughout the trying period of his quarrel and open breach with the President, he at length resigned it in 1875 after all question of pressure had passed. He had served the War Department faithfully as Judge Advocate General, but his success in the trial of

Mrs. Surratt was destructive of his career. It was his misfortune that after he had skillfully established the jurisdiction of the military commission to protect the policy of Abraham Lincoln from defeat, a woman was accused of guilt at a time when a mere charge was fatal, and tried by a military commission to whose aid Holt brought all his powers of persuasion.

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Joseph Holt
Judge Advocate General (1862-1875)
A Study in the Treatment of Political Prisoners by the United States Government during the Civil War

Abstract of a Dissertation
Submitted to the Graduate Faculty
In Candidacy for the Degree of
Doctor of Philosophy

Department of History

By
Mary Bernard Allen

The purpose of this dissertation has been to make a study of President Lincoln's policy with regard to political prisoners, in its origins, its development, and its effect upon the general policy of the Administration during the war. Since Lincoln's relations with Congress were determined from the outset by a struggle for possession of the War Power granted by the Constitution, the attempt to relate the special problem of the control of political prisoners to the larger issue promised a revelation of the influences which determined the character of the War in the North. To understand the work performed by Joseph Holt in the Judge Advocate General's Office, a study has been made of his political attitudes and training, in order to discover not so much his capacity for the work entrusted to him as the reasons prompting his appointment to the office,--to obtain a suggestion, that is, as to what the office was intended to be. With that part of Holt's work relating to the political

prisoner which falls in the period after Lincoln's death, this study is concerned only as it reveals the character of the performance in the period previous to it, by a contrast which brings out tendencies held in check by the wisely restraining influence of the President. The final destruction of Holt's career is illustrative of the strength of the passions which shaped this last phase of the policy and which can be made to bear the responsibility more justly than can anyone of the men who were its chief puppets.

The reviews, decisions, and instructions to judge advocates, contained in the Record Books in the Judge Advocate General's Office in the War Department, and the correspondence contained in the Holt Papers in the Library of Congress comprise the chief sources for the Executive policy and the personal and political attitudes of Joseph Holt. The New York and Washington newspapers and an occasional clipping from a Kentucky paper have been used to find, where possible, the point of view of the country with regard to the significant steps in the formation of the policy, and the Congressional Globe to elicit the motives actuating Congress in its dealings with the President.

The suspension of the privilege of the writ of habeas corpus by President Lincoln was the occasion for the arrest and imprisonment by the military authorities of many thousands of citizens for disloyalty--in the border states especially,

but also as far away from the theater of hostilities as New York and New England. Opposition in Congress to this policy first centered on the question of the constitutionality of the suspension of the writ by the President, the Democrats making use of that issue to oppose suspension by any branch of the government, the Republicans showing division on the constitutional scruple. Senator Lyman Trumbull, representing the Radical group in the majority party, led the opposition to the President's policy in order that he might invest Congress with the war power. He was more concerned with this issue than with the question of personal liberty, but he sponsored a bill which conferred on the President the right to suspend the writ of habeas corpus at the same time that it prevented his keeping prisoners in custody. The bill provided for the discharge of the prisoners at the discretion of the courts on their taking an oath of allegiance. For this purpose the Secretary of War was required to forward lists of prisoners, at short intervals, to the judges of the federal courts of the districts in which the prisoners resided. Trumbull was unsuccessful in securing enough Republican support to pass his bill during the session of Congress ending in July 1862, but the near success of his efforts, combined with popular opposition to arrests, caused Lincoln to modify a policy which he felt that he could not surrender because of the troubled state of the country. His

fear of the intervention of the bench was based upon decisions adverse to his power to suspend the writ where in isolated instances the matter had been allowed to come before the courts.

In order to escape having to give up the practice of making arrests for disloyal and obstructive tactics when they threatened most harm through the approach of the projected draft, and yet to counteract somewhat the increasing vehemence of the opposition to military arrests, Lincoln proposed to establish a form of trial for those of the prisoners upon whom definite charges of military obstruction could be fixed. Such trial would be had before a military commission, the tribunal of martial law, and would be justified on the ground that a military offense had been committed. This departure in the Executive practice towards political prisoners was inspired by the procedure of the military authorities in the border states towards military offenses like bushwhacking and bridgeburning. Orders were issued from the War Department for the trial by military commission of men who had been taken for resisting or obstructing the draft and for "disloyal practices." Prisoners thus made in the vicinity of Washington were examined by an associate judge advocate appointed for the purpose and were put upon their trial where the charge merited it. This policy was formally announced by proclamation on September 24, 1862,

and a Judge Advocate installed in the War Department to work out its details and make it applicable to the whole country.

The man chosen for this task was Joseph Holt, a Kentuckian who had been a member of Buchanan's cabinet in the last months of that Administration. He had always been a Democrat in politics, and, although an ardent Unionist, had favored slavery and state rights. Throughout the first year of war he had done valuable work in Kentucky in helping to attach that state to the Northern cause. In his speeches throughout the country he had steadily upheld the President's course where arbitrary measures had been adopted to meet emergencies. Lincoln believed that by choosing Holt for Judge Advocate General he would secure a man not only fitted for the work but likely to receive the approval of Conservatives.

The first step in instituting the new policy was to establish the military commission as a recognized court for the trial of military offenses. Where Holt's predecessor, the Judge Advocate of the Army, had refused to allow the jurisdiction of such a tribunal, Holt himself spoke favorably of it, pointing out its possibilities for use in cases which were debarred by statute from the regular military tribunal, the court martial. The use of the military commission was justified by martial law, established by the

President's proclamation of the 24th. Under the new system a few trials were held and favorably reviewed by the Judge Advocate General. All prisoners who were not held for trial were released in November when the political situation had brightened. This release had the virtue of being adopted upon the initiative of the War Department instead of at the dictation of the courts as would have been the case had the bill for the discharge of political prisoners been passed at the last session of Congress. The Executive control of prisoners thus embraced a program of trial and of release, but both subject to the direction of the Executive department of the government.

But during the winter's session of Congress the bill for the release of prisoners came up again, and with certain modifications became law on March 3, 1863. The most important of these modifications was the authorization of the President to suspend the writ of habeas corpus when the emergency for it arose. Two other acts affecting the problem with which Holt was engaged were passed at this session. They were intended to adapt the law of treason to the existing emergency, and provided punishment in civil courts for two of the offenses which Holt had been aiming to attach to the jurisdiction of the military commission. These were, respectively, the act of corresponding with the enemy when committed by a civilian, and of aiding desertion or resisting or

obstructing the draft. Although these statutes withdrew the most serious of the disloyal practices from the jurisdiction of the military commission, Holt conscientiously respected their regulations where the civil courts of the district were open. Unless, however, he was to give up the Executive policy altogether, he had to find some loophole through which prisoners could be brought to trial before a military tribunal even where the courts were open. He clung, therefore, to the idea of reëstablishing martial law, while directing that prisoners should be turned over to the civil authorities for trial for the offenses named. But as to the effect of the Habeas Corpus Act, as the act to release political prisoners was named, Holt was unable to make up his mind immediately. Did it supersede the proclamation of September 24, 1862, by making an end of the régime of martial law, or did it, by ignoring the proclamation, only dictate the procedure for the ordinary régime of civil law? To bring his difficulty to an end, it became evident to Holt that he must secure some basis for the reëstablishment of martial law.

Shortly after the promulgation of the new acts, Holt began to confirm the holding of military trials for "violation of the laws of war," a charge which smacks patently of the military offense and could be brought under the jurisdiction of martial law, the "common law of war." An increasingly large number of trials were based on this charge and

several offenses which contributed to obstructing the draft were called by other names and brought into this category. Burnside's order no. 38, to which the Judge Advocate General gave his sanction, established martial law in a military department and justified trials by military commission of such offenders as Clement L. Vallandigham. The hearing on his petition for a writ of habeas corpus revealed the uncertainty of the Judge Advocate General's Office with regard to the validity of the proclamation of September 24th. The counsel for General Burnside cited it but argued the case on another ground--that of the constitutional War Power of the President and his generals. In the midst of this excitement Holt made known his interpretation of the relation of the Habeas Corpus Act to martial law. He sent to the War Department his list of prisoners for submission to the courts, but excluded from it the names of all prisoners who were under sentence of a military court or being held for trial before such a tribunal. By withholding civilians who could be given a military trial, Holt had secured the control of the War Department over a portion of the prisoners, but by deciding that it should be the last list he would ever forward, he maintained for the War Department the control that it had heretofore exercised over prisoners who were not held for trial but were to be released after an indefinite imprisonment. Thus the Habeas Corpus Act was

rendered null and void in this respect. On September 15, 1863, the President again suspended the writ of habeas corpus for resisting the draft, but without mentioning military trial. When Congress met in December, the development of the Executive policy which had taken place since the close of the last session passed unnoticed, a few remarks from Democrats on the old score of military arrests and the activities of provost marshals representing the full extent of their criticism of recent events. When the Supreme Court, to which the question of the jurisdiction of the military commission in the case of Vallandigham was certified, refused to pass upon the competence of amilitary court, nothing remained to hinder the attainment of the logical climax of the policy. In February of 1864 the exclusive jurisdiction conferred by statute for aiding soldiers to desert was set aside when the act was committed "at one of the forts composing the defences of the seat of government." In the summer of 1864 Judge Advocate Burnett in Indiana defended trial by military commission of men engaged in various acts of disloyalty against the United States government on the ground of martial law established by the proclamation of September 24, 1862, and Holt confirmed the sentence and procedure. In December of the same year the military commission was given concurrent jurisdiction with the local courts even where they were open in cases of aiding desertion or obstruct-

ing the draft.

During his term of office, Holt's development kept pace with the requirements of his work. Fitting himself as the need arose to the more radical measures of the Administration, he persisted in the attempt to win the Conservatives to a more hearty support of the President. But with the frowning recognition by the War Department of the adaptability of the military commission to the business of checking disloyalty, Holt was moved in his enthusiasm to encourage a greater latitude in its jurisdiction and procedure than Lincoln could approve. The trial of Copperhead leaders at Indianapolis in the summer of 1864 was remarkable for the degree of freedom it permitted in establishing a charge of widespread conspiracy. The death of Lincoln in the next year, afforded the Judge Advocate General the opportunity to ferret out the intricacies of another such conspiracy, the proportions of which, in view of the number and variety of persons and plots exposed at the trial, approached the gigantic. Jefferson Davis, the genius of all the plotters, was held for military trial on a charge compounded of all previously discovered conspiracies. Holt's popularity with Radicals transcended his expectations. A Congressional committee forged ahead with his campaign when he was beginning to display caution. Alike unheedful of the Supreme Court's denial of the jurisdiction of the military commission

in the case of Milligan and indifferent to the dilemma produced by the confessions of the chief witnesses of the Judge Advocate General's Office, it reported its belief in the truth of the accusations against Davis and its desire for his punishment.

The groups distrustful of the policy responsible for the recent events at first found it difficult to discover a basis for their opposition. But, sensing the strength of Holt's influence in forwarding military trials, they directed their criticism at him, although, unfortunately, the growing sharpness of their attack only confirmed his belief that it originated in a personal antagonism to himself. The bitterness of his rejoinders was augmented by the uneasiness which assailed him at the realization of his unpopularity in circles where he had formerly had friends--among Southerners and Democrats. His "Vindications," appearing at frequent intervals throughout the remainder of his official career, made little impression upon a public which had long since lost interest in the issue which had drawn them forth,--the question of the jurisdiction of the military commission.