"SELF-PRESERVATION IS THE SUPREME LAW": STATE RIGHTS VS. MILITARY NECESSITY IN ALABAMA CIVIL WAR CONSCRIPTION CASES

INTRODUCTION

Why did the Confederate States of America lose the Civil War? One theory that has gained much attention (and some criticism) is that the Confederacy "[d]ied of State Rights."[1] Frank L. Owsley, for years a history professor at Vanderbilt University and later at the University of Alabama, advanced this thesis in his 1925 book *State Rights in the Confederacy*. Owsley writes, "There is an old saying that the seeds of death are sown at our birth. This was true of the southern Confederacy, and the seeds of death were state rights. The principle . . . was [the Confederacy's] chief weakness."[2] He goes on to say that those who so strongly pushed for state rights in the Confederacy "destroyed all spirit of co-operation . . . between the states and the Confederate government, and, at times, arrayed local against central government as if each had been an unfriendly power."[3] Owsley points to themes such as local defense, impressment of property, and conscription in order to support his claim that the states of the

1. FRANK LAWRENCE OWSLEY, STATE RIGHTS IN THE CONFEDERACY 1 (Peter Smith 1961) (1925).
2. *Id.*
3. *Id.* at 2.

Confederacy were too concerned with their own independence to be focused on the larger joint effort of winning the war against the Union.

Even though Owsley's ideas were initially well-received, they have come under close scrutiny. Stanford University history professor Don Fehrenbacher states that "[h]istorians . . . are no longer disposed to accept the thesis of Frank L. Owsley that the Confederacy 'died of state rights.'"[4] Beringer, Hattaway, Jones, and Still put it this way: "Although the state-rights interpretation of Confederate defeat still has prominence . . . one notes less and less substantive discussion of it as the years go by."[5]

Questions remain about Owsley's thesis, which nearly ninety years of continuing research have not definitely answered: Could the Southern states have been more unified? Could the states have put aside their individual aspirations in order to support the Confederacy as a whole? Were certain branches of the Southern state governments so committed to not becoming subservient to the Confederacy that they acted in their own state's interest even when it meant harming the overall war effort? It is this last question that this Note will address; and it will do so by looking at how the judicial branch of one state handled the issue of military conscription. The published opinions from the Alabama Supreme Court provide a unique opportunity to examine how one branch of government felt about the interaction between military necessity and state rights. The court's opinions on the issue of conscription should indicate whether military necessity was of primary concern (by choosing to enforce Confederate conscription orders) or whether the ideal of state rights was foremost (by refusing to enforce Confederate conscription of Alabama men).

This Note intervenes in the state rights debate. It contends that in the area of military conscription, the Alabama Supreme Court generally supported the Confederacy's power to conscript state citizens and that the court did not bend to pressure from "state rights purists" who would have them find that Alabama was not under the authority of the Confederate government when that government called Alabama's men to military service. This contention is in contradiction to Owsley's claim that the Confederacy "[d]ied of State Rights." At least in this narrow subset—the supreme court of one deeply committed state—the problem was not state rights. The Alabama Supreme Court, across a broad spectrum of cases, granted the Confederate government the power to conscript, reconscript, and deny deferrals. Certainly, there are many areas outside of the Alabama Supreme Court where state rights might have held sway. This Note concedes that this is a narrow area of examination and that Owsley's theory may survive on other grounds. This Note makes also no claim as to

4. DON E. FEHRENBACHER, CONSTITUTIONS AND CONSTITUTIONALISM IN THE SLAVEHOLDING SOUTH 80–81 (1989).

5. RICHARD E. BERINGER ET AL., WHY THE SOUTH LOST THE CIVIL WAR 443 (1986).

how the executive or legislative branches of the Southern states dealt with military conscription. There very well may have been executive and legislative frustration of the Confederate war effort in the area of conscription, but this Note does not delve into those subjects. Instead its primary purpose is simply to point out that the highest court in Alabama understood the military exigencies of the time and dealt with conscription according to that understanding.

This Note brings together the major issues that the Alabama Supreme Court faced when dealing with challenges to Confederate conscription. Part I lays the foundation for the debate by first describing the scholarly arguments on this subject. The first subpart of Part I includes a discussion of Owsley, his contemporaries, and later scholars. The final subpart of Part I describes the legal character of the Southern courts (at the time of the Civil War) and how this led them to decide the way they did. The remainder of the Note examines the major conscription issues that were brought before the high court for consideration (the constitutionality of conscription, state militias, exemptions from service, and substitution for service). Part II examines each issue individually by exploring cases that are illustrative of that particular issue. The opinions of the court will indicate the justices' unwillingness to sacrifice the military effort in order to protect a strict form of state rights. Finally, the Note will conclude by using the opinions of the court on the conscription issues to draw conclusions about how individual justices viewed their duty as members of the Confederacy.

I. BACKGROUND

A. The State Rights Argument

When Owsley published *State Rights in the Confederacy*, it was well received and often cited.[6] Owsley took five major issues (local defense, relation of the states to their troops in Confederate service, suspension of habeas corpus, conscription, and impressment of property) where state and Confederate officials clashed, and he explained how the state officials frustrated the Confederate purpose by insisting on state autonomy.[7] In explaining his thesis, Owsley made extensive use of *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies*.[8] These records generally contain personal correspondence,

6. William Garrett Piston, *Introduction* to ALBERT BURTON MOORE, CONSCRIPTION AND CONFLICT IN THE CONFEDERACY, at xv (Univ. of S.C. Press 1996) (1924).

7. *See generally* OWSLEY, *supra* note 1.

8. U.S. WAR DEP'T, THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES (1880), *available at* http://cdl.library.cornell.edu/moa/browse.monographs/waro.html.

speeches, orders, and reports. These records are very personal in nature because they relay what one man was writing to another man, and Owsley adopts this style. He focuses on how specific individuals tired to thwart the Confederate effort.[9] This focus on individuals (especially state governors like Brown of Georgia and Vance of North Carolina)[10] led Owsley to mainly examine the legislative and executive branches of the state governments. He points out how state representatives and governors felt about state rights while generally ignoring the judiciary. In fact, in his chapter on conscription, there is hardly a mention of how the state courts dealt with this issue.[11]

Owsley's chapter on conscription is much shorter than the other chapters in his book. He explains this on the first page of the chapter when he says, "The story of this controversy has been adequately treated by another writer, and only a sketch . . . will be given."[12] He goes on to say, "There is one aspect of the subject . . . that permits of further study: the effect of this contest [over conscription] upon the results of the war."[13] Owsley then goes on to explain how various officials did whatever was in their power to disrupt the Confederate conscription effort. He pays particular attention to governors who try to expand their exemption systems.[14] Owsley's sole focus is on the legislature and executive branches. From Owsley's proof, it does seem that these branches were more concerned with state rights than Confederate conscription, and this supports that thesis. However, he left out the branch of government that seems to contradict his thesis: the judiciary.

The book that Owsley referred to as treating conscription fully is Albert Moore's *Conscription and Conflict in the Confederacy*.[15] This is the definitive work on the Confederate conscription effort, and it was published in 1924, a year before Owsley's work. Unlike Owsley's book, Moore's has a full chapter dealing with the Southern courts' treatment of the conscription issue.[16] Moore also deals with the executive and legislative branches, but he does not ignore the fact that state supreme courts were supportive of Confederate conscription.[17] Moore's chapter is an is-

9. *See* OWSLEY, *supra* note 1, at 203–08.
10. *See id.* at 205–08, 214–16.
11. *Id.* at 203–18. There is only one case mentioned in the chapter. *See id.* at 215.
12. *Id.* at 203 (referring to Moore's work, cited *supra* note 6).
13. *Id.*
14. *See id.* at 205–08 (describing Governor Brown of Georgia).
15. MOORE, *supra* note 6. Albert Moore was the chair of the University of Alabama History Department for twenty-eight years. *Id.* at xii.
16. *See id.* at 162–90 (Chapter 8, "The Courts and Conscription").
17. *See id.* at 162. Moore explained:

> The conscription laws vested the Confederate authorities with a supreme leadership in the war, but this leadership . . . contradicted the theory of a league of sovereign States, and many persons, inspired by turgid oratory and by a deluge of denunciatory editorials from leading papers, challenged it. Thus the courts were called upon . . . to maintain the dignity

sue-by-issue look at how state supreme courts dealt with conscription. The major issue that his writing covers is the initial constitutionality of conscription. Contrary to a "state rights" agenda, Moore says, "Within a few months after the conscription act was passed it was reviewed and upheld by the high courts of practically all of the States."[18] There was resistance to this court action from some members of the executive and legislative branches,[19] but generally the decisions by the high courts were accepted. Moore tells of a newspaper article from the *Confederacy* that "asserted that the opinion of the court should terminate all argument."[20] Moore quotes the article as saying, "'When we know what the law is, let every man obey it and have no more agitation about it.' Let 'governor, officers, privates, and all cease all opposition.'"[21]

As the state courts supported the Confederate conscription effort, Moore also claims that the Confederate government became more confident in receiving support from that particular branch of state government. Moore says that "[t]he Government apparently held most of the State supreme courts in high regard."[22] He gives the example of then-Attorney General Davis writing to the Secretary of War, saying that he had confidence that the Virginia Supreme Court would handle a case before it "with a due regard to the constitutional rights of the Confederate States."[23] Moore felt that the support from the state high courts was so strong that, had a Confederate Supreme Court been established, the two courts together could have ensured uniform application of conscription laws, notwithstanding interference from the legislature, executive, or inferior courts.[24] He wrote:

> The Supreme Court and the State high courts would have been of the same mind concerning the constitutionality of the conscription laws, and with the support of the State courts in this important way the Supreme Court could have weathered the storm of opposi-

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> and prerogatives of the States against the encroachments of the Confederate Government through the conscription system. But when the great powers of the Confederate Government were unsheathed *by the courts*, the new government looked so much like the old one that it was painful to the ultra-States' rights men.

Id. (emphasis added).

18. *Id.* at 168 & n.14 (citing examples from Georgia, Alabama, Texas, Virginia, Florida, and Mississippi).

19. *Id.* at 170 (citing Governor Brown's letter to the legislature and Lincoln Stephen's speech).

20. *Id.* at 171.

21. *Id.* (quoting November 1862 editions of the *Confederacy*). Moore also reports a similar situation in Alabama when he quotes the Clarke County (AL) *Democrat* as saying, "The decision of the Supreme Court in [conscription's] behalf has reconciled the people to it." *Id.* at 171 n.19.

22. *Id.* at 189 n.67.

23. *Id.* (quoting Letter from Attorney General Davis to Secretary of War (Nov. 30, 1864)).

24. *See id.* at 189.

> tion and instituted harmony and uniformity of interpretation in the courts.[25]

So it seems that when a historian (like Moore) actually looked at what the judiciary was doing with regard to conscription, the influence of state rights was not a great factor in their decisions to support the greater Confederacy. This stands in contrast to Owsley, who virtually ignored the judiciary in claiming that an over-emphasis on state rights led to a weakening of the Confederacy.

B. The Legal Character of the Southern Courts

In this discussion of the Supreme Court of Alabama, it is useful to understand the legal character and organization of the Southern courts as a whole. How the courts understood their role and their place in the government can explain why they ruled the way they did. Also, an understanding of the legal character of the courts helps explain the legal character of the larger Confederate government. As Moore said, "[W]e Americans have formed the habit of allowing our courts to say what a law means, and to draw the line of demarcation between the authority of our National Government and that of our States in the twilight zone of political power."[26] Moore was explaining that the American people traditionally understand that when there is a legal question, it will be the courts that set the standard. Looking at the courts' opinions allows us to see clearly where state and federal governments stand in relation to one another.

The Confederate court system was a product of the federal court system; and just like the federal Constitution, the Confederate Constitution laid out the organizational framework for the judicial branch.[27] However, in one important aspect, the Confederate system did not measure up to its sister system in the United States: there was no national Supreme Court.[28] Professor Don Fehrenbacher, of Stanford University, said, "In the constitutional history of the Confederacy there is no stranger chapter than the one we might title: A Supreme Court That Never Was."[29]

The absence of a Confederate Supreme Court did not stem from the lack of a provision for one. When the provisional constitution was adopted in February 1861, this document provided for one district court located in each state and that the district judges could come together to form a Confederate Supreme Court.[30] The Confederate Congress then met again in

25. *Id.*
26. *Id.* at 162.
27. *Id.* at 164.
28. FEHRENBACHER, *supra* note 4, at 68–69.
29. *Id.* at 69 (internal quotation marks omitted).
30. *Id.*

March of the same year, and they passed an act that established the responsibilities and obligations of the Confederate Supreme Court and the state supreme courts.[31] Fehrenbacher said that "[s]urprisingly, the act vested the Supreme Court [of the Confederacy] with broader power to review state court decisions than had been conferred upon the Supreme Court of the United States by the Judiciary Act of 1789."[32] State supreme courts could interpret the Confederate Constitution, but their decisions would be subject to review by the Confederate Supreme Court.[33] This did not sit well with ardent state rights supporters in Congress, so in July 1861, the Confederate Congress voted to delay the formation of a high court until a permanent constitution was in place.[34] The debate about the formation of a national supreme court did not end there. The question was brought before the Confederate Congress again in 1863 and 1864 and each time it was left unanswered.[35] Each time the decision on formation of the high court was delayed and held over for a future session.[36] Moore claims that

> it was felt that there was no public exigency requiring the establishment of the Supreme Court, and it would . . . be inexpedient to force a schism in Congress . . . when a concert of action was imperative. It would be folly for Congress to wreck itself with debate concerning the correct relationship of the parts of a system which had not been established.[37]

All future efforts to establish a Confederate Supreme Court were fruitless,[38] and since the Confederate district courts were not the favored venue,[39] each state supreme court became the final word on constitutional issues in its respective state.[40]

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31. *Id.*
32. *Id.*
33. MOORE, *supra* note 15, at 164.
34. FEHRENBACHER, *supra* note 4, at 69.
35. *Id.* at 70.
36. *Id.*
37. MOORE, *supra* note 15, at 165 (footnote omitted).
38. FEHRENBACHER, *supra* note 4, at 70 ("Further efforts [to establish a Confederate Supreme Court] came to naught.").
39. MOORE, *supra* note 15, at 166–67. Moore gives four reasons why the state courts were preferred over the Confederate district courts:

> (1) The State courts were naturally more popular with those who had grievances against the Confederate Government; (2) the fact that the organization of the Confederate court system was never completed impaired the dignity of the district courts and neutralized the influence they might otherwise have had; (3) they had no appellate jurisdiction over the State courts; and (4) the Government usually prosecuted in the State courts, because it was thought that their opinions would be respected more than those of the Confederate courts.

Id.
40. *See id.* at 167.

This piecemeal approach to constitutional law had its drawbacks. Fehrenbacher claims that "[t]here being no single authoritative voice, judicial interpretation of the Constitution was scattered among the various state courts and Confederate district courts. This circumstance tended to increase the significance of constitutional discussion in Congress and constitutional pronouncements from the executive branch . . . ."[41] This increased significance may have come in the form of obstruction to conscription (from the executive and legislative branches), and this in turn could support Owsley's theory that state governments interfered with Confederate conscription. However, state supreme courts were still free to play their role in constitutional interpretation and possibly support Confederate conscription in spite of what the other two branches may have been doing.

Now, what did these state courts (operating in absence of a Confederate Supreme Court) look like? Were they merely puppets of their respective state legislatures and executives, or did they have a character of their own? Because they were Southern courts, did they have a broad view of state rights or did they retain vestiges of their federal heritage? Moore answers these questions swiftly when he says:

> The principle of state sovereignty apparently never established itself as firmly on the bench as it did in the councils of state and in the norms of political philosophy. Many of the Southern jurists . . . were thoroughly grounded in the arguments of Chief Justice Marshall on behalf of the paramountcy of the Federal Government within the area of its jurisdiction. Moreover, they were as completely indoctrinated with the principle of *stare decisis* as were judges anywhere; hence we need not be surprised to find even State judges bolstering up the Confederate Government . . . with the irrefragable opinions and arguments of Marshall.[42]

The Confederate system was, for the most part, a mirror of the federal system, and the Southern judges had been trained in the federal system under federal judges.[43] The judges did not change their views on federalism overnight when the Confederacy seceded. In fact, Southern judicial opinions "cite[d] as freely the decisions of the United States Supreme Court to support their arguments as if there had been no secession."[44] Moore summarizes by saying, "The simple fact is, the courts of the

41. FEHRENBACHER, *supra* note 4, at 71.
42. MOORE, *supra* note 15, at 163.
43. *Id.*
44. *Id.*

Southern States were taken out of the Union, but they were by no means divorced from the principles of its system of jurisprudence."[45]

The fact that the Confederate Congress never got around to establishing a national supreme court led to the state high courts being the final arbiters of the Confederate Constitution. In a confederacy, where one of the principles of secession was state rights, one would be tempted to think that the state supreme courts would favor state rights over the supremacy of the confederacy. This was not the case though. The Southern judiciary was a product of the system from which it originated: the federal system. Because of this, when the many issues spawned by Confederate conscription came before the state supreme courts, the courts fell back on the principles of Marshall and his view that the central government was supreme.

II. THE ISSUES BROUGHT ON BY CONFEDERATE CONSCRIPTION

A. The Initial Constitutionality of Confederate Conscription: Ex parte Hill

In early 1862, the Confederacy was facing a dire military situation. In Tennessee, Forts Henry and Donelson, both on the Cumberland River, had been taken by Union forces.[46] General McClellan had also made incursions into the East.[47] Confederate President Jefferson Davis knew that something needed to be done to strengthen the military so he pressured Congress to enact conscription.[48] The Confederate Congress, apparently

45. *Id.* Professor Timothy Huebner, of Rhodes College, puts it this way:

> When southern jurists left the Union, they did not relinquish their early training and the decades of subsequent experience that connected them to the nation's constitutional and legal heritage. Though obviously affected by the southern political order that had led to the establishment of the Confederacy, southern judges nevertheless revealed their attachment to a broader set of values associated with American legal culture, including the decisions of the U.S. Supreme Court and the ideas of northern commentators. Even secession could not sever this link.

TIMOTHY S. HUEBNER, THE SOUTHERN JUDICIAL TRADITION: STATE JUDGES AND SECTIONAL DISTINCTIVENESS, 1790–1890, at 167 (1999).

46. MOORE, *supra* note 15, at 12.

47. *Id.*

48. *Id.* at 13. Moore writes:

> President Davis urged conscription upon Congress for several reasons. First, he thought it was imperative as a means of retrieving the mistake of short term enlistments. Second, it was necessary to have uniformity and regularity in the military system; a well balanced and sympathetically coordinated military machine could not be created by the independent action of twelve governments . . . . Third, he thought the act was necessary to secure an equal distribution of the burdens of war. Without it the ardent and patriotic would pay more than their debt of military service.

Id. at 13–14 (footnotes omitted). Davis's view was bolstered by support from Confederate Attorney General Thomas Watts, who pointed out that only Congress could logically prepare the country for war. OPINIONS OF THE CONFEDERATE ATTORNEYS GENERAL, 1861–1865, at 231, 235–36 (Rembert W. Patrick ed., 1950). Professor David Currie writes that "[i]n all of this . . . the reader may detect more than occasional reminders of the arguments Chief Justice John Marshall had made in upholding the Bank of the United States in *McCulloch v. Maryland*." David P. Currie, *Through the Looking-Glass: The Confederate Constitution in Congress, 1861–1865*, 90 VA. L. REV. 1257, 1281–82 (2004).

convinced by Davis, passed their first military conscription act "by a vote of more than two to one" on April 16th, 1862.[49] This act made every physically capable white man between ages 18 and 35 subject to conscription by the Confederate States of America.[50] In a region so strongly dedicated to state rights, it was not long before "the extent of the war powers of the Confederate Government" was attacked.[51] Moore claims that "[t]he constitutionality of the act was vigorously attacked by some of the States' rights politicians and journalists . . . . Those who objected to being conscripted were encouraged by the opposition of influential men to test the validity of the law in the courts."[52] In Alabama, the challenge to the constitutionality of military conscription came before the Alabama Supreme Court during the January term of 1863 in the form of the case *Ex parte Hill*.[53]

The case of *Ex parte Hill* arose when three men who had been conscripted by the Confederate Army petitioned for writs of habeas corpus to the judge of probate for Montgomery County. Asa J. Willis, Edward P. Johnson, and Calvin Reynolds were being held in the custody of Confederate enrolling officer L. H. Hill after being called to military duty. The main issue of the case was whether the three men should be exempt from military service by reason of "bodily incapacity or imbecility" (which will be discussed later). Before the court could address this issue it had to rule on the constitutionality of the Confederate conscription law that called these men up in the first place. Justice George Washington Stone, in his opinion, dealt quickly with the constitutionality of conscription before turning his attention to the issue of who should decide whether these men were physically fit for military duty.[54] He emphatically claimed that "[t]he acts of congress, known as the 'conscript laws,' are constitutional."[55]

Justice Stone began his defense of the constitutionality of Confederate conscription by looking to an old defense of the state's power to conscript, which was often cited in federal precedent. He wrote:

> The Confederate government, being engaged in war, has the unquestioned right to call the male residents of the Confederacy into the service. "As war can not be carried on without soldiers, it is evident . . . that whoever has the right of making war, has also

49. MOORE, *supra* note 15, at 13.
50. *Id.*
51. *Id.* at 167.
52. *Id.* at 167–68.
53. 38 Ala. 429 (1863).
54. *Id.* at 444–47 (Stone, J.). Justice Stone's opinion is in three basic parts: (1) the constitutionality of conscription, (2) the issue of which court should have jurisdiction over exemption cases, and (3) a reconciliation of his position with state rights theory.
55. *Id.* at 445.

> naturally that of raising troops. . . . Every citizen is bound to serve and defend the State as far as he is capable."[56]

Then Stone cited the grants of power to Congress contained in the Confederate Constitution "'to declare war,' 'to raise and support armies,' 'to provide and maintain a navy,' and 'to make rules for the government and regulation of the land and naval forces.'"[57] He then used statutory construction to conclude that "no one can, with any plausibility, contend, that these several powers can only be exercised through State instrumentality."[58] It seems that Justice Stone felt that it was obvious that a government with such broad constitutional responsibilities would have the power to use conscription to carry out these responsibilities. Finally, like many judges who dealt with the issue of the constitutionality of the conscription laws, Justice Stone also saw the military realities of the war effort and thus he couched his opinion in these terms. He wrote:

> The magnitude of the war that is being waged against us, renders it necessary that the government put forth its greatest strength for the protection of our liberty and our property. This, I am satisfied, could not be accomplished by any means short of compulsory enrollment; and hence I hold, that the conscription acts are constitutional.[59]

It seems that the reality of war may have taken precedence over the theory of state sovereignty.

Justice Stone was not alone in his view of the broad power of the Confederate government to conscript. In his opinion for the court, Chief Justice Abraham Joseph Walker also supported the constitutionality of conscription. He wrote:

> The government of the Confederate States was organized by the States, and its laws have been passed and its officers selected, directly or indirectly, by the States and the people; and it should have the generous confidence and the manly support of the country, in the present struggle for independence and liberty.[60]

56. *Id.* at 444 (quoting EMERICH DE VATTEL, THE LAW OF NATIONS, OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 294 (Joseph Chitty ed., T. & J.W. Johnson & Co. 1852) (1758).
57. *Id.* at 445 (quoting CONST. OF THE CONFEDERATE STATES OF AM. art. I, § 8, cl. 11–14).
58. *Id.*
59. *Id.* at 446–47.
60. *Id.* at 442 (Walker, C.J.).

He went on to say that "[t]he employment of appropriate officers to execute the conscript law, is thus clearly authorized."[61] The words of these two justices do not show men overly concerned with state rights. They sound like the words of men who were products of the federal system from whence they came and words of men who understood what it would take to win a war against a militarily superior foe. If the Alabama Supreme Court was interested in obstructing the Confederate conscription effort in order to retain state sovereignty, this was their chance. The court could have declared conscription unconstitutional and then Alabama would have controlled how its men were called to military service. Not only did the court refuse to strike down the conscription laws, but the court also took this chance to affirm that "the laws of the Confederate States . . . shall be the supreme law of the land."[62] Because of rulings like this one, "the states' rights-minded Confederacy accepted compulsory military service before the United States did."[63]

B. State Militias vs. The Confederate Army: Ex parte Bolling *&* Ex parte McCants

Once the Alabama Supreme Court had determined that Confederate conscription was constitutional, a conflict between the Confederate Army and the state militia arose.[64] Questions arose when one man could be subject to both Confederate national service and Alabama state service. Moore says, "The fact that both the Confederate and State governments had authority under their respective constitutions to draft a militiaman into service gave rise to a question of precedency."[65] Also, what would happen when a man was exempted by one service but called up by the other? Did exemption from the Confederate Army mean that one would not serve in the military at all, or could he still find himself in the Alabama militia? The Alabama high court addressed the preceding questions (about precedency and conflicting exemption status) in the cases of *Ex parte Bolling*[66] and *Ex parte McCants*.[67]

Captain J. S. Bolling was an officer in the Alabama militia, and "acting under authority of the governor, organized a company of reserves for State defense."[68] Henry Watts was one of Captain Bolling's volunteers. Watts was only sixteen years old when he volunteered for state militia

61. *Id.* at 432.
62. *Id.* at 435.
63. Currie, *supra* note 48, at 1295.
64. *See* MOORE, *supra* note 15, at 171.
65. *Id.*
66. 39 Ala. 609 (1865).
67. 39 Ala. 107 (1863).
68. *Ex parte Bolling*, 39 Ala. at 609 (in syllabus).

service in August 1864, but he was allowed to enlist with the permission of his legal guardian. Since he was not yet seventeen, he was not liable for service in the Army of the Confederate States, but he soon turned seventeen (in October 1864), making him eligible for conscription by the Confederacy. In January 1865, Lieutenant George Verdery, acting as a Confederate county enrolling officer, conscripted Watts into Confederate service. Captain Bolling then petitioned the Alabama Supreme court for a writ of habeas corpus requiring Verdery to release Watts and to return him to the Alabama state militia. This petition was denied.[69]

The court, in a short opinion, did "not think there [was] any thing in the argument . . . that the State of Alabama had first availed itself of the services of the petitioner, in its militia service."[70] The court noted that since the boy was not yet seventeen, the Confederacy had no claim to him and that Alabama could use him as it saw fit.[71] However, when the boy did turn seventeen, the Confederate claim "attached to him as a conscript."[72] The court then went on to lay down a bright-line rule:

> [W]hen the lawful call of each government, Confederate and State, to perform military service, falls on the same person, the claim and call of the Confederate States must prevail over the claim and call of the State government, on the ground that the constitution of the Confederate States, and the laws made in pursuance thereof, are the *supreme law of the land*.[73]

The court did not subscribe to a state rights theory in this instance. The court could have ruled that since the State of Alabama was sovereign, and since their claim to the boy's service was "first in time," Watts should remain in the Alabama militia. Instead it chose to acknowledge the supremacy of the Confederate government.

In *Ex parte McCants*, the court addressed the question of determining the status of a man who had been exempted from Confederate service but was now being called to serve in the state militia.[74] This is the reverse of the previous question. Here the Confederate government was not trying to obtain a man's service, but rather it has exempted him and now the state was trying to conscript him. Again, the Alabama Supreme Court had the opportunity to support conscription (by allowing conscription into the state militia after Confederate exemption) or it could obstruct conscription (by

69. *Id.* at 610.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* (emphasis added).
74. *Ex parte* McCants, 39 Ala. 107, 108 (1863). Under the first conscription act many men were exempted based on their providing substitutes for their service. *See* MOORE, *supra* note 15, at 27.

making the Confederate exemption status apply to state militia). The court chose to support conscription.

Allen G. McCants was liable for service in the Confederate Army, but in January 1863, he was able to procure his discharge by supplying a substitute to serve in his stead. In June 1863, President Davis ordered the governor of Alabama to supply "seven thousand troops from the State militia, to be mustered into the service of the Confederate States . . . for the term of six months."[75] To fulfill this request the governor held a draft, and McCants was one of the men drafted. McCants petitioned the supreme court for his release based on the fact that he had already supplied a substitute for his military service. The court denied his petition and said he was liable for state service.[76]

Chief Justice Walker delivered the opinion of the court, and he began by pointing out that the Confederate power to "raise and support armies" was distinct and separate from the power to "call[] forth the militia."[77] He reasoned that "[t]he government may exercise those different powers for different purposes, and may impose upon citizens . . . duties altogether variant in their character and objects."[78] He then laid down the rule that "[a] discharge from the operation of one governmental power can not be a discharge from another, differing in the extent of the obligations imposed."[79]

The remainder of Justice Walker's opinion focused on the impracticability of having one class of citizens (who could afford substitutes) sit at home while another class of citizens bore the burden of both Confederate service and state service.[80] He even claimed that a man could have a "sense of patriotism with the act of leaving the army, by the reflection that he could still serve the country as a militia-man."[81] It seems that Justice Walker was not inclined to let an able-bodied man out of military service just because he could afford to hire a substitute.

This ruling could be viewed as a state rights approach to the issue since the court sided with the state's authority to conscript its citizens (supporting Owsley's theory of the predominance of state rights). It is true that the court did not think that just because the Confederate government had ruled on a man's status, that this precluded the State of Alabama from making its own determination as to his fitness for militia duty. However, it is important to note that this was *not* an obstruction of conscription. The ruling in *Ex parte McCants* actually put more men into uniform by not

75. *Ex parte McCants*, 39 Ala. at 107 (in syllabus).
76. *Id.* at 110.
77. *Id.* at 108.
78. *Id.*
79. *Id.* at 109.
80. *See id.* at 109–11.
81. *Id.* at 109.

allowing them to claim one exemption for two different service obligations. We have seen that when the two governments made simultaneous claims to one individual, the Confederate claim would be honored.[82] But now we see that when the Confederate government forfeited its claim to a man, the Alabama high court would allow that same man to be conscripted by the state.[83] This appears to be the case of a court supporting the war effort however it could. The Alabama Supreme Court seems to have been more concerned with military exigencies than with an abstract theory about state rights.

C. Who Determines a Man's Exemption Status?: Ex parte Hill

As stated previously, after ruling on the constitutionality of conscription in *Ex parte Hill*, the Alabama Supreme Court turned its attention to the main issue of the case.[84] One will note that the Confederate conscription acts had given the War Department the authority to adjudicate certain types of exemptions.[85] Moore explains the background of this case:

> The conscription acts conferred much discretionary authority upon the War Department, in the exercise of which it formulated general policies and gave general instructions to the enrolling officers. Thus the Department and its subordinate officers were invested with quasi-judicial powers; that is, the enrolling officer had to judge the merits of each individual's case . . . and the Department was often called upon to hear cases which were appealed from the enrolling officers. Quite generally those who were not satisfied with the rulings of the officers sought relief of the courts . . . .[86]

The court now had to determine whether it had the authority to interpret the exemption provisions of the conscription laws or if that duty should be left to the War Department.

This narrow issue arose in the context of the three aforementioned petitioners who were trying to claim an exemption from Confederate service based on physical disability.[87] The conscription acts provided this exemption for "bodily or mental incapacity or imbecility"[88] but the acts stated

82. *See Ex parte* Bolling, 39 Ala. 609, 610 (1865).
83. *See Ex parte McCants*, 39 Ala. at 110.
84. *Ex parte* Hill, 38 Ala. 429, 447 (1863). At this point, Justice Stone's opinion turns to the main issue of the case.
85. MOORE, *supra* note 15, at 172.
86. *Id.*
87. *Ex parte Hill*, 38 Ala. at 444; *see also supra* text accompanying note 54.
88. *Id.* at 448.

that this determination was to be made by "one or more surgeons, to be employed by the government, [and] assigned to that duty by the president."[89] The acts further provided that this decision, "as to the physical and mental capacity of any such person for military duty in the field, shall be final."[90] The petitioners were never examined by military doctors, so they had never been held unfit for service.[91] Rather, they were seeking to have the Alabama Supreme Court make this "fitness" decision "by evidence on the trial of the *habeas corpus*."[92] So the question was whether the court could make this determination when the conscription acts had expressly provided for an official of the executive branch (military surgeons) to do so. The court declined to assume this authority.[93]

In his opinion, Justice Stone stated that state courts had jurisdiction to rule on matters of exemption, but only when the exemption statute in question did not already provide for another official to make the determination.[94] He explained that a majority of the court felt that state jurisdiction over some exemption matters was appropriate;[95] but when an exemption was "granted on conditions, the adjudication of which is *expressly reserved to certain officers named or provided for* . . . State courts have no authority to supervise the action of such officers . . . ."[96] Under the facts of this specific case, he wrote that "the acts of congress give to the surgeon, and to the board of examination, the exclusive right to pass on the question of mental or bodily incapacity; and that takes from State courts all right to inquire into the question."[97] He continued, "[For the state to] entertain jurisdiction is such cases, would lead to the most embarrassing and disastrous collisions between the authorities of the two governments."[98] Justice Stone even admitted that rulings such as this (supporting a compound system of government) might cause some state rights to be to be encroached upon, but "[t]his grows . . . out of the fact, that . . . the constitution of the Confederate States, and the acts of congress passed pursuant thereto, are the supreme law of the land."[99] Basically, Justice Stone felt that whenever Congress wanted to provide the arbiter of a cer-

89. *Id.*
90. *Id.* at 449.
91. *Id.* at 444.
92. *Id.*
93. *Id.* at 452 (Stone, J.) ("Jurisdiction is the right to inquire into the alleged fact of such physical disability. The probate judge has no authority to inquire into, or try that question.").
94. *See id.* at 453–54. Justice Stone's opinion is treated first in this Note because his view would eventually become the majority opinion, while Chief Justice Walker took his view in this case and extended it in a subsequent case. The other justices on the court remained with Justice Stone's *Ex Parte Hill* opinion.
95. *Id.* at 453.
96. *Id.* at 454 (emphasis added).
97. *Id.* at 450.
98. *Id.* at 454.
99. *Id.*

tain category of exemption, they could do so by bestowing that authority within the statute itself.

Chief Justice Walker agreed in principle with Justice Stone in this case but eventually he would go even further with his views on Confederate power.[100] In his opinion for the court Walker wrote "that a State court or officer has no right of control over the conduct of the officers of the general government, in the exercise of an authority bestowed by its law."[101] He was concerned with the practical effect of having two governments clash over an issue with no clear definition of whose decision should trump.[102] If states were allowed to contradict Confederate authority, he predicted that

> [a] law for the raising of . . . armies, might receive the acquiescence and prompt obedience of a majority of the States; while a minority, by aid of their courts, utterly thwarted its execution within their limits. Thus a burden designed to be common, would become partial. And a clash of authority between the States and the Confederate government would lead to disastrous results.[103]

Justice Walker concluded by saying, "I cannot reconcile with sound principle . . . the proposition, that an officer of the Confederacy, when engaged in the execution of an act of congress . . . can be subject to the control of the judicial tribunals of the States."[104] It seems that there were few circumstances where Justice Walker would allow the judiciary of the state to look over the shoulder of officers of the Confederacy.

In this case one sees two justices who were willing to give broad latitude to the Confederate government to determine a man's exemption status. Justice Stone merely required that the conscription law in question actually designate a Confederate authority to be the exemption arbiter, and then he would allow Confederate executive officers to control the

100. *See Ex parte* Hill, 38 Ala. 458 (1863). Chief Justice Walker made his views expressly clear in this case by saying that the state courts had no authority to review a Confederate exemption decision even if the law did not expressly inhibit such review:

> I maintain, that so much of that jurisdiction as is exercised in the application of judicial correctives to the irregularities and errors of the executive officers of that government, charged with the enforcement of the conscript law, is necessarily exclusive; and that such officers, when acting within the limits of their authority, can not be interfered with by a State court, although they may commit errors . . . . The proposition which I maintain, leads, therefore, directly to the assertion, that the erroneous action of such officer, within the limits of his authority, or the incorrectness with which he discharges his duty, although injuriously affecting the liberty of the citizen, may be corrected by a *Confederate, but not by a State court*, through the instrumentality of the writ of *habeas corpus*.

Id. at 477–78 (Walker, J.) (emphasis added).

101. *Ex parte Hill*, 38 Ala. at 437.

102. *See id.* at 440–41.

103. *Id.* at 441.

104. *Id.* at 440.

process.[105] It is arguable that this was a state rights position because authority over some cases remained in the state. However, this authority was subject to the Confederate government refusing to first exercise its own authority—so the state's authority was conditional.[106] Justice Walker seemed to agree with Stone's position, but then he went even further in a future case when he stated that state courts should not supervise *any* Confederate officer in the performance of his duties—this would be up to the Confederate courts.[107] One justice (Stone) would only take the authority to determine exemption cases when the Confederacy had not already taken the authority for itself. The other justice (Walker) eventually moved to the position that it did not matter if the Confederacy had failed to take the exemption authority. He felt that the Confederacy always had the authority to control its executive officers, regardless of how explicit the law was on the issue. These positions are not the strongest state rights positions, and they definitely are not an obstruction of the war effort. The Alabama Supreme Court could have said that, since the liberty of its citizens was at stake, it would always be the final arbiter of their status. Instead, it ceded this authority to the central government.

D. The Repeal of "Substitute" Exemption Law: Ex parte Tate

The practice of substitution was allowed under the first conscription act, passed on April 16, 1862.[108] The substitution policy "provided that persons not liable for service might be received as substitutes for those who were, under regulations issued by the Secretary of War."[109] It was not long before it was clear that substitution could not last. First, it was an unpopular practice because those wealthy people who could afford to pay a substitute did so "whether their talents could be used to advantage behind the battle lines or not."[110] Second, the Confederate government realized that military necessity required every able-bodied man to serve in uniform,

105. *Id.* at 453–54.

106. It is also useful to note that even when the Alabama Supreme Court chose to exercise its jurisdiction to determine a man's exemption status, the court usually ruled in favor of the Confederacy. *See, e.g.*, *Ex parte* Bolling, 39 Ala. 611 (1865) (holding that a man was subject to recall by the Confederate medical board of examination for further review even after he had once been found physically unable to serve); The State *ex rel*. Graham, 39 Ala. 437 (1864) (holding that a Confederate soldier on furlough from the Confederate Army was not liable for state militia service); *Id.* at 459 (1864) (holding that a foreigner domiciled in the Confederacy is liable for conscription); *Ex parte* Stringer, 38 Ala. 457 (1863) (holding that even though having conscientious scruples against taking up arms would be an excuse for not serving in the state militia under Alabama's Constitution, it was no excuse for not serving in the Confederate Army under the Confederate Constitution); *Ex parte* Hill, 38 Ala. 458 (1863) (holding that a man who has put in a substitute is exempt from military service only until his substitute, by a change in conscript age, became liable for conscription himself).

107. *See supra* note 100 and accompanying text.

108. *See* MOORE, *supra* note 15, at 27.

109. *Id.*

110. *Id.*

regardless of whether they could be useful on the home front or not.[111] Between late 1863 and early 1864, the Confederate Congress passed two acts. The first abolished substitution and the second made the principals (who had previously provided substitutes) now liable for service in the Confederate Army.[112] On January 9th, the principals were ordered to report for duty "either as volunteers or conscripts."[113] The abolition of substitution, of course, led to principals seeking refuge in the court system.[114] Moore claims that "[a]fter the question of the constitutionality of the conscription law was determined by the courts, there were no other cases that opened up such serious constitutional discussions and interpretations as those pertaining to the abolition of substitution."[115] In Alabama, the case that called into question the abolition of substitution was *Ex parte Tate*.[116]

George W. Tate was conscripted to Confederate service in 1862, but on June 9th, he was able to obtain a substitute to serve in his stead. The Confederate Army accepted Tate's substitute and discharged him from service. After the substitution policy was abolished, Tate was arrested by a Confederate enrolling officer who claimed that he was "liable to conscription for the military service of the Confederate States."[117] Tate sued on a writ of habeas corpus, but the suit was denied by the chancellor at Selma, so he sought relief from the supreme court. Tate claimed that his participation in the substitution policy was actually a contract with the government and thus, the abolition of substitution should be "inoperative and void, because [the acts] impair the obligation of contracts."[118] The court, per Justice John Phelan, held that exemptions from military service were revocable and thus the abolition of substitution was constitutional.[119] Men in the position of George Tate were going to have to serve, notwithstanding their having employed substitutes.

Justice Phelan began his opinion by pointing out that the Confederate government had the "power of war and peace," and this power was "first in importance."[120] He went on to state that when this power is invoked, "'[e]very man capable of carrying arms, should take them up at the first order of him who has the power of making war.'"[121] Having established

111. *See id.* at 39–44.
112. *Id.* at 44–45.
113. *Id.* at 45.
114. *Id.* at 179.
115. *Id.* at 177.
116. 39 Ala. 254 (1864).
117. *Id.* at 254 (in syllabus).
118. *Id.* at 255 (in syllabus).
119. *Id.* at 273–74.
120. *Id.* at 256.
121. *Id.* at 257 (quoting EMERICH DE VATTEL, THE LAW OF NATIONS, OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 293–94 (Joseph Chitty ed., T. & J.W. Johnson & Co. 1852) (1758).

that it is the highest duty of government to defend its citizens, and that these citizens must rally to the call of their government, Phelan then addressed the specific question: "Is it within the power of the congress of the Confederate States to grant *permanent* and *irreparable exemptions* from military service, upon *any terms*, *or any consideration whatsoever*?"[122] Phelan seems to have felt that the real issue was whether Congress had the power to reverse its previous decision to let some men use substitutes, or whether this decision was final (granting men continuous exemption status).

Justice Phelan claimed that there were "certain high functions of government—which the legislature has no right to give or grant away. They can neither be surrendered nor sold."[123] He went on to say that "there are unquestionably certain high attributes of sovereignty, which do not allow of any such limitations. Among these may be mentioned the right of *eminent domain*."[124] Phelan then went on to compare eminent domain to the power of war and peace. He said:

> It would exhibit a strange adjustment of the principles and powers of government, if it can be laid down as law, that all the money in the world could not suffice to purchase, even through the solemn formalities of a *legislative contract*, the exemption of a piece of land from being taken by the state for a road, or a bridge, or the site for a fort, if the public good required it; and yet that an able-bodied citizen could be allowed by law to buy, for a few dollars, an absolute exemption from the military service of his country, although that country might at the time be engaged in a death-struggle to maintain his liberties and its own existence.[125]

Like the power of eminent domain, "the high and solemn trust confided to the legislature, in the possession and exercise of the war power, it cannot surrender or sell."[126] So for Phelan, the war power was too important for even Congress—by possibly allowing substitution to continue indefinitely—to limit it in a way that would not allow for future necessary modification.

Addressing Tate's contract claim, Phelan ruled that the Confederate powers, like eminent domain and war power, were inherent conditions in every legislative contract.[127] He wrote, "'Every contract is made in subordination to them, and must yield to their control, as conditions inherent

122. *Id.* at 259.
123. *Id.*
124. *Id.* at 264.
125. *Id.* at 272 (emphasis added) (internal citation omitted).
126. *Id.*
127. *See id.* at 267–69.

and paramount, wherever a necessity for their execution shall occur.'"[128] So even if exemptions were a form of legislative contract, they had to "be taken under the implied condition that, if the exigencies of the country require, they may be revoked and set aside; and that each successive congress must be the judge of what . . . the necessities of the country . . . require."[129] The risk would be on the man accepting an exemption that the Confederate government could revoke the exemption when necessity required.

Again, one sees the Alabama Supreme Court siding with the Confederate central government on a matter of constitutional law. The court did not protect its citizens in detriment to the war effort. Professor Alfred Brophy writes: "One should probably admire the decision for its forthright grappling with the central issue and certainly for the insight it provides into Alabama in relation to the other Confederate courts."[130] He explains that "Phelan rested on the bulwark of inalienable war power; the nuances of contract law and of statutory interpretation were not important to the decision. . . . Justice Phelan in no way wanted his decision on this political issue to be confused with technical issues of contract law."[131] As Professor Brophy explains, even though Tate wanted to make this a contract case, Justice Phelan would have none of it. This was a case about "higher and firmer"[132] principles. The Confederate war effort was primary and any state contract claim or state rights issue was secondary.

CONCLUSION

Professor Owsley claimed that the Confederacy "[d]ied of State Rights."[133] This is an enticing argument. Wouldn't it be ironic if the very thing that Southerners claimed led them to secede ended up being the downfall of their Confederate States? However, like most things in life (and history), the answer to a broad question (such as, "Why did the South lose the war?") never comes down to just one cause. In the multiple regression equation that explains defeat, the United States' overwhelming financial and human resources as well as its geographic, political, and technological advantages all played a role. In the Confederacy, there were immediate and increasing financial problems, which may have made a victory impossible. Divisions within the South and morale—certainly both of which were related to the declining fortunes of the war and to the sacri-

128. *Id.* at 266–67 (quoting W. River Bridge Co. v. Dix, 47 U.S. 507, 532 (1848)).
129. *Id.* at 273.
130. Alfred L. Brophy, *"Necessity Knows No Law": Vested Rights and the Styles of Reasoning in the Confederate Conscription Cases*, 69 MISS. L.J. 1123, 1165 (2000).
131. *Id.*
132. *Ex parte Tate*, 39 Ala. at 273.
133. OWSLEY, *supra* note 1, at 1.

fices the war made necessary—contributed to the loss. However, historians have increasingly thought it unfair, in their assessments of the Confederacy, to attribute the loss to state rights. The data presented here confirms, once again, that critical components of the state governments were willing to subordinate claims of individuals to the needs of the war.

It may be true that there were some parts of the Confederate states' governments that obstructed the overall goals of the central government. The legislatures and executives may not have cooperated fully with the Confederacy. However, when one looks closely at the judicial branch in the State of Alabama, on the issue of Confederate military conscription, it is hard to see the influence of state rights. As Professor Brophy writes: "The Confederate courts aggressively protected the right of the Congress to compel military service from its citizens."[134]

The Alabama Supreme Court faced many different issues in regard to Confederate conscription, and the court almost always found in favor of broad national power. Beginning with the constitutionality of conscription, the court held the act of conscription permissible based on the fundamental responsibility of the national government to defend its citizens and its authority to "'raise and support armies.'"[135] When conflicts arose between the state militia and the Confederate Army, the court found in favor of the Army.[136] Then when the Confederate Army had given up its claim on a man's service, the court had no problem sending that man into state militia service.[137] It seems that no matter what, male citizens who were eligible were going to serve in the military. When the court had a chance to take jurisdiction over *all* conscription cases, it did not do so. The court allowed Congress to declare for itself when the Confederate executive could decide a man's military service status.[138] Finally, in upholding the abolition of substitution, the high court said that Congress could not grant an unlimited exemption and that all exemptions came with the "implied condition" that the Confederacy could change one's exemption status based on the necessity of the current military situation.[139] In all of these issues the Alabama Supreme Court did not take as much power as it might have. Instead, understanding the seriousness of the military situation, the court fell back on the principles that it had evolved from: the principles of Justice Marshall

134. Brophy, *supra* note 130, at 1179.

135. *Ex parte* Hill, 38 Ala. 429, 445 (1863) (quoting CONST. OF THE CONFEDERATE STATES OF AM. art. I, § 8, subdiv. 12).

136. *See Ex parte* Bolling, 39 Ala. 609 (1865).

137. *See Ex parte* McCants, 39 Ala. 107 (1863).

138. *See Ex parte* Hill, 38 Ala. 429 (1863). There was also one justice (Chief Justice Walker) who, in a future case, would even go farther to say that a state could never review a Confederate executive exemption decision. *See supra* note 100 and accompanying text.

139. *See Ex parte* Tate, 39 Ala. 254 (1864).

and federalism. The court knew the principle that, rather than state rights, "'[s]elf-preservation is the supreme law.'"[140]

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140. *Id.* at 259 (quoting JOHN C. CALHOUN, A DISQUISITION ON GOVERNMENT AND DISCOURSE ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES 10 (Richard C. Cralle ed., 1851).

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