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A Nation Without a Supreme Court*

JOSE M. CABANILLAS

The Constitution of the Confederate States of America, unanimously adopted on March 11, 1861, by the assembled delegates of the original seceding states and on June 19, 1861, by the state of Virginia, was for all practical purposes a copy of the Constitution of the United States. Its judicial provisions begin in Article III with the familiar-sounding phrase "The judicial powers of the Confederate States shall be vested in one supreme court and. . . ." There is no reason to believe that this phraseology was a blind copy of the older document, and that it was not the intention of the framers of the Confederate Constitution to include the provisions for supreme judicial review in the chart that was to guide the newborn nation. Nearly sixty years had passed since John Marshall had brilliantly expounded the necessity for supreme judicial authority over the acts of the various legislative and executive bodies that comprised the nation and the years had only confirmed the wisdom of his decision. Surely the forty-four delegates who signed the Constitution of the Confederate States were aware of this necessity when they retained a provision for a supreme court within the confederation. Otherwise it would have been a simple matter to expunge such a requirement from the instrument that they were drafting.

In spite of the constitutional requirement for the establishment of a supreme court within the judicial structure of the Confederacy, in spite of the historical need for a court of supreme jurisdiction, the supreme

* Based on Patrick, Jefferson Davis and His Cabinet and Opinions of the Confederate Attorneys General.

court authorized by the Confederate Constitution never came into being. Perhaps the loss of national prestige suffered by the United States Supreme Court following its *Dred Scott* decision played a part in the failure of the Confederate Congress to establish such a court, although the *Dred Scott* decision should have enhanced the United States Court in the eyes of sympathizers with the Southern cause. Perhaps the seceding states, having found a strong federal government to their dislike were loath to establish a strong central agency that might encroach on their jealously guarded sovereign rights. An indication that such a state of mind existed is found in the Virginia ordinance adopting the Constitution of the Confederate States. A clause in this ordinance reserved to the people of Virginia the right to renounce at a later date the newly-adopted constitution if they so found it desirable. At any rate, and for whatever reasons, the supreme court provided for in the Confederate Constitution was never established and the power of supreme judicial review was never officially vested in any one particular body or official of the Confederacy.

In the first few months of its life the new nation was undoubtedly too concerned with the vital issues of its existence, primarily with the organization of a central government, to worry about the legality of judicial decisions or legislative acts. But eventually and inevitably there arose issues requiring the interpretation of statutes or questioning the constitutionality of state and confederate legislation. Without a court of supreme judicial review, empowered to decide those issues, the heads of the Confederate Government, from President Davis on down, turned to the highest official of the Department of Justice, the Attorney-General, for assistance.

The first instance of a decision on constitutional issues found among the recorded opinions of the Attorneys-General appears to be the one rendered by Thomas Hill Watts who, on December 12, 1862, in a letter to the

Secretary of War, regarding payments for services rendered by an individual under the Conscription and Exemption Act, wrote: "That he should be paid for his services, there can be no doubt." Since this issue had been brought before the Attorney-General on the grounds of the constitutionality of the above Act, he appears to have ruled on this point in one short sentence.

Attorney-General Watts in a letter again written to the Secretary of War, on May 22, 1863, had this to say regarding the duties of his office: "In giving opinions to the President and the Heads of the Executive Departments, the Attorney-General is acting in the capacity of a Judge and must be governed by the same rules which govern Judges." He then proceeded to hold that an act of Congress passed on April 29, 1863, for the purpose of including certain temporary employees within the provisions of previously-enacted legislation, was unconstitutional and void in so far as its retroactive features were concerned.

Wade Keyes, acting Attorney-General, in a letter to the Secretary of the Treasury, under date of August 13, 1863, dealing with the legality of certain regulations issued by the Secretary under an act of Congress, wrote: "My opinion is against the legality of the said Regulations and against the competency of the Secretary of the Treasury to issue them."

The preceding quotations appear to be more in the nature of formal opinions than of constitutional decisions but on December 18, 1863, Wade Keyes was more explicit when ruling on the constitutionality of a state act. In 1863 a citizen of Virginia had entered into a contract to supply the Confederate Government with whiskey for the use of a Confederate Army. On March 12, 1863, the Legislature of Virginia enacted a law making it an offense to manufacture any whiskey or other spirituous or malt liquors and at a later session, on October 31, 1863, expressly prohibited the fulfillment of any contract

for the making of ardent spirits which might have been entered into with the Confederate Government. When requested by the Secretary of War to pass on the legality of the acts of the Virginia Legislature, Keyes replied: “. . . a state has not the power to forbid the fulfillment of a contract which the Confederate Government has the authority to make: and . . . the Act of October 31st, expressly forbidding the fulfillment of such a contract, is a nullity.”

In early 1864 the Confederate Navy commenced the erection of a distillery in South Carolina for the purpose of distilling whiskey for the sole use of the Confederate Navy. When the Governor of South Carolina required that the work be discontinued on the grounds that the laws of that state prohibited the establishment of distilleries, the conflict was referred to George Davis, the last of the Confederate Attorneys General. In an opinion dated March 7, 1864, he referred to the Keyes' opinion of December 7, 1863, and added: “The States . . . have made the Constitution of the Confederate States their Supreme Law, before which all other laws must yield. That Constitution empowers Congress ‘to provide and maintain a Navy.’ Both powers are full and complete . . . They were intended to be beyond the control of the States; and they must be so, or else become a mere nullity.”

In an opinion rendered by Attorney-General Davis on October 25, 1864, to the Secretary of War, regarding the constitutionality of a section of the Conscription Act, he said: “That is a question which it is not competent for you to decide . . . the Head of an Executive Department cannot refuse to execute the clearly expressed will of Congress on the ground that it violates the Constitution. That is a Judicial question, and must be left to the Courts of Law.” On November 30, 1864, in a letter to the Secretary of War, again dealing with the troublesome Virginia anti-distilling statutes, Attorney-General

Davis advised the Secretary that the matter be laid before the Governor of Virginia with the request that he call it to the attention of the Legislature. And in a letter to the Secretary of the Treasury on January 11, 1865, Attorney-General Davis advised the Secretary that the Justice Department “. . . had accepted it as a general rule, to decline giving opinions as to the constitutionality of any Act of Congress, upon the ground that even if the opinion of the Attorney-General be against the constitutionality of any Act, it would still be the duty of the Executive Departments to enforce the laws, until otherwise instructed by the Judicial Tribunals.” In these words did the Attorney-General express the futility that he must have come to feel regarding the effect that the rulings of his office might have on the constitutionality of laws. By then the days of the Confederacy were numbered and the flight from Richmond on April 3, 1865, put an end to the activities of the Attorney-General.

The lack of a supreme court to pass on the few instances of conflict between state and Confederate laws and the Constitution was felt by all the Attorneys-General and every one of them at one time or another recommended that such a court, as provided by the Constitution, be established. But the lack of supreme court review never did really hamper the central government; state court decisions in conflict with the Constitution were either ignored by the Confederate Government or considered effective only within the jurisdiction of the courts rendering them. In the matter of the constitutionality of laws, the administration was guided by the opinions of the Attorney-General which were, as could be expected, mostly favorable to the administration. In this way, decisions favorable to the conduct of the war, the major issue in the struggle for existence, were assured.

The Confederacy was a short-lived experiment and, in so far as a test to determine the need for a supreme court is concerned, it was an experiment conducted in an

inadequate laboratory. That its life was unhindered by the absence of a supreme court was due more to the necessity for mutual assistance and support at a time when the nation's existence was at stake than to the ability of a group of states to coexist without a national court of last resort. That the nation could have continued to exist so unhindered in times of peace is a question still open to debate. And so the query, so often posed by so many people, as to the necessity for a supreme court in our system of democratic government must, in so far as the experience of the Confederacy is concerned, remain unanswered.