

THE OPINIONS  
OF THE CONFEDERATE  
ATTORNEYS GENERAL  
1861 – 1865

Edited by  
REMBERT W. PATRICK

With a Foreword by  
HAROLD L. SEBRING

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EDITED BY

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HAROLD L. SEBRING

*Justice, Supreme Court of Florida*

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## FOREWORD

It may come as a surprise to many readers that though the permanent Constitution of the Confederate States made specific provisions for the establishment of a Supreme Court invested with judicial powers comparable to those exercised by the Supreme Court of the United States, the Confederate Congress refused to enact the legislation necessary for its creation. Thus it was that while district and state courts functioned more or less sporadically, no supreme national tribunal ever came into existence during the short and ill-fated life of the new republic.

Through the want of a paramount judicial authority to interpret the laws enacted by the Congress, this difficult and delicate task devolved upon the attorneys general of the Confederacy; for, since the Article of the Constitution creating the Supreme Court was never implemented by appropriate legislation, the chief law officer of the central government became, of necessity, the only authority whose opinions with respect to the national law were entitled to nation-wide consideration.

As would be expected, these official opinions covered a wide variety of matters and ranged from commonplace discussions of such mundane subjects as the dutiability of lemons, oranges and walnuts, and the responsibility of the central government to its officers and employees for moneys expended in removing their household furniture from Montgomery to Richmond when the seat of government was moved to erudite dissertations on weighty constitutional questions involving the fundamental powers of the new nation attempting to erect a permanent government and at the same time maintain an army in the field capable of waging a successful war.

For the first time since the collapse of the Confederacy these opinions are being made available to the general reading public in Rembert W. Patrick's present publication, *The Opinions of the Confederate Attorneys General, 1861-1865*. Dr. Patrick, who is the author of *Jefferson Davis and His Cabinet* and *Florida Under Five Flags*, is to be commended for his painstaking labors in making this material accessible. This volume should find a ready place in the collection of every thoughtful reader of legal or Confederate history, whatever may be his station, for these opinions possess a rare and historical significance which makes them fruitful subjects for study by all persons possessing even a casual interest in the life and death problems and struggles of a doomed republic that "lived and died gloriously."

HAROLD L. SEBRING

*Justice, Supreme Court of Florida*

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Permission to use the manuscript and publish the "Opinions of the Confederate Attorneys General" was graciously granted by the New York Public Library. The helpfulness of Dr. Robert W. Hill, Keeper of Manuscripts of the New York Public Library, facilitated the work of copying the manuscript and proofreading the copy. The attention which Dr. Hill and his assistants gave the editor eased and made pleasant a tedious task.

The Graduate Council of the University of Florida provided for the necessary photostats of the manuscript. Without this aid and encouragement the time required to accomplish the editing would have been greatly lengthened, or, indeed, the work might not have been undertaken.

The careful reading of the galley proofs by Eleanor B. Patrick and the typing of Henry C. Michael contributed greatly to the completed volume.

REMBERT W. PATRICK

Gainesville, Florida  
January, 1950

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## CONTENTS

	Introduction	xi
I	Opinions of Judah P. Benjamin	1
II	Opinions of Wade Keyes	37
III	Opinions of Thomas Bragg	51
IV	Opinions of Thomas Hill Watts	71
V	Opinions of Wade Keyes	169
VI	Opinions of Thomas Hill Watts	179
VII	Opinions of Wade Keyes	317
VIII	Opinions of Thomas Hill Watts	329
IX	Opinions of Wade Keyes	345
X	Opinions of George Davis	365
XI	Opinions of Wade Keyes	497
XII	Opinions of George Davis	509
	Index	585

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## INTRODUCTION

During the month of March, 1865, the Confederate administration in Richmond kept one eye on the reports from General Robert E. Lee at Petersburg and supervised, with the other, the sorting and packing of governmental archives. There was little time for the ordinary functions of administration. In the Department of Justice, the attorney general wrote only five opinions after February 15, 1865, and these were brief expositions on urgent questions. The problem was not one of adding to the archives but rather one of devising ways by which existing opinions and documents could be protected and shipped to points beyond the reach of Northern armies. The surrender of Richmond was certain. The most optimistic Confederate officials admitted that, and even they could foresee only faint possibilities for continued resistance after the capture of Petersburg and Richmond; yet all officials acting on these possibilities had their most important records boxed and labeled for shipment.

When Jefferson Davis and his cabinet fled from Richmond on the night of April 2, the essential Confederate records were on their way south. For a time these records received attention, but after the surrender of Lee at Appomattox, they were neglected, for Confederate officials and their subordinates thought only of saving themselves from capture. Letters, orders, copy books, maps, and documents were purposely burned or inadvertently destroyed; some were captured by advancing Federal forces, and a few were secured and secreted by interested Southerners.

In April, one such Southerner, Major Felix Gregory de Fontaine, was at Chester, South Carolina, where he saw some records of the Department of Justice in the process of

being destroyed. Hastily he ransacked the material, thumbing through records too voluminous for him to retain, and selected a volume of the opinions of the Confederate attorneys general. De Fontaine retained his find when he returned to his home in Columbia, and a few years later included it in his personal papers when he moved to New York City.

The appellation "Northern man with Southern principles" could have been justly given to Felix Gregory de Fontaine. Although born in Boston, Massachusetts, his journalistic career in Washington and his wife, the former Georgia Vigneron Moore of Charleston, South Carolina, turned him toward the Southern point of view. In 1861 he published a strongly pro-Southern book, *A History of American Abolitionism Together with a History of the Southern Confederacy*. Throughout the Civil War he was a military correspondent with the rank of major, and at the same time published the *Daily South Carolinian* at Columbia. His newspaper articles, written under the pen-name "Personne", were often reprinted, and his book *Marginalia* (1864) warmed the hearts of those who loved the South and hated the North.

During the occupation of Columbia by General William T. Sherman, de Fontaine's printing press and equipment were burned, and shortly after the beginning of the Reconstruction period he moved to New York City. There De Fontaine worked for almost thirty years, first as managing editor of the *New York Telegram*, and later in various capacities with the *New York Herald*. As an avocation he classified himself as author and publisher of 114 Fifth Avenue, New York. He compiled a 660-page *Cyclopedia of the Best Thoughts of Charles Dickens* (later republished as the *Fireside Dickens*), wrote *Birds of a Feather Flock Together*, and finally devised a method of speed-writing which he published as *De Fontaine's Short Long Hand*.

During these years as editor, author, and publisher, De Fontaine had not forgotten the volume which he had se-

cured in 1865 at Chester, South Carolina. A typewritten copy was made from the manuscript and an index compiled with page citations based on the pagination of the manuscript copy. In 1896, De Fontaine published a sixteen-page prospectus of a volume to be entitled "Missing Records of the Confederate Cabinet, from April 1, 1861, to March 24, 1865" and sub-titled the "Legal History of the Southern Confederacy from the Adoption of Its Constitution to the Close of the Civil War."

"Words of preface are scarcely necessary in a work of this character," De Fontaine stated in his introduction, for, he continued:

A glance at its contents will indicate, even to a superficial observer, that it is a unique and remarkable historic curio. But it is something more. The thoughtful reader, no matter what may be his sphere, will on every page be impressed by the fact that in the strong individuality of the Southern Attorney-Generals he is brought face to face with men of splendid intellect, who, in their calm presentment of the legal and logical ideas that dominated the Southern Confederacy, are making him acquainted, as he never was before, with events and conditions that are nowhere else described in the annals of the Civil War. He will find himself reading history that stands apart, officially and more dispassionately written than any other that has been published since the surrender at Appomattox. As a matter of fact these "Missing Records of the Confederate Cabinet" supply a missing link in a chain that, but for their existence, would forever have remained incomplete.

In the absence of a Supreme Court, the Southern Attorney-Generals sat in judgment upon the gravest governmental questions. While the Constitution of the Southern Confederacy was nearly an exact transcript of that of the United States, and the very first Act of the first Confederate Congress, on February 9, 1861, "continued in force all the laws of the United States that were in force and in use in the Confederate States on the 1st day of November, 1860," the legal problems thereafter presented to the President, members of the

Cabinet, and heads of departments, and their subsequent solution, served to illustrate the difficulties of many a novel situation by which the new government was confronted. Hence, the official opinions of its legal advisers to-day possess a historic value that makes them interesting alike to students of history, to political economists, and especially to survivors of that eventful period who wore the "blue or the gray."

They will be appreciated by members of the legal profession because of their keen and logical analysis of well-known laws under unusual applications. Publicists will find new and nicely drawn distinctions between National and State rights. Officers of the Army and Navy may learn useful lessons from the manner in which forces were assembled and subsisted; while men of every grade and calibre who would keep abreast of the times will be sharply interested in the discussion of subjects relating to domestic and international affairs.

In order to satisfy any curiosity that may be aroused concerning the truthfulness of these records, it is proper to add that they have not been out of the possession of the writer [de Fontaine] since April, 1865, when, being in Chester, S. C., it was his privilege to rescue them from destruction. In the urgency incident to the expectation of an attack upon the town by the Union forces, they, with other valuable memoranda belonging to the Confederate Government, were about to be burned when a timely hand conveyed them to a place of safety. They have been preserved until now even more securely than during the war, and they are at last made public in the belief that they will be neither misunderstood nor misjudged.

A few years ago the venerable Judge James M. Matthews, of Richmond, Va., who, during the war had been the chief law clerk of the Department of Justice, on being shown these documents, at once recognized them as the original and only records of the office of which for four years he had been the faithful custodian. At the same time he pointed out many papers that had been engrossed both by himself and by Jules St. Martin, one of the officials of the department and the brother-in-law of Hon. Judah P. Benjamin. Thus is estab-

lished the authenticity of these heretofore "Missing Records of the Confederate Cabinet."

Immediately following this introduction, De Fontaine's prospectus continued with a detailed ten-page index which began with "Abe Tipton" and ended with "Wynne, R. H., doorkeeper House of Representatives." A "Memoranda" on the final page of the prospectus offered prospective subscribers the proposed volume for \$4.00, "postage or expressage to any part of the world prepaid," and also stated:

In announcing the publication of "The Missing Records of the Confederate Cabinet," described in the foregoing Introduction and Index, it is pertinent to add by way of explanation that they comprise more than two hundred Official Opinions and constitute a volume of more than five hundred pages, each of which possesses peculiar historic color and interest even to the general reader.

The chief value of the book, however, and that which makes it an important addition to every public and private library, to the libraries of all governors, attorney-generals, judges, district attorneys, legislators and public officials, consists in the fact that it completes *a hitherto unfinished story of the war*. It is also a souvenir of the struggle that every old soldier should be proud to hand down to his children as something for which, on one side or the other, he put his life at stake.

We have had many books about the war—histories of campaigns, narratives of battles and discussions of principles involved, most of which have led to differences of opinion, but in this volume the reader is brought in close touch with the mainsprings of action—the wise counselors to whom the leaders of the Southern Confederacy submitted every question of legal doubt.

What response De Fontaine received to his project is unknown. He died on December 11, 1896, before he could begin the actual printing of the proposed volume.

Shortly after his death, W. Hampton de Fontaine offered to sell his father's treasured manuscript to the New York Public Library for \$30,000.00. But the son, who was deal-

ing with shrewd traders whose financial resources were limited, eventually accepted \$500.00—which was a fair price. From the date of acquisition, November 11, 1897, the manuscript remained practically undisturbed in the New York Public Library, until it was rebound in August, 1934, catalogued correctly as “Confederate States of America, Department of Justice; Opinions, 1861–1865”, and made accessible in the Manuscript Division of the Library.

This sturdily bound, well-preserved volume contains 358 over-sized pages of the opinions. Although the manuscript was the work of a number of copyists, the handwriting is always clear and readable. The opinions in the manuscript are not the originals which were composed by the various attorneys general, but are copies of the originals, as recorded by clerks in the Confederate Department of Justice.

The manuscript copy of the “Opinions of the Confederate Attorneys General” evidently included copies of every opinion of the attorneys general from April 1, 1861, through March 24, 1865. No additional opinions for this period were printed in *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies*, the *Official Records of the Union and Confederate Navies in the War of the Rebellion*, or any of the other published sources of Civil War history. One final opinion of George Davis, the last Confederate attorney general, was not included in the manuscript; but this opinion was not given Jefferson Davis until April 22, 1865, and was eventually printed in Dunbar Rowland’s *Jefferson Davis, Constitutionalist, His Letters, Papers, and Speeches*. A search of the Confederate material in the National Archives, and of the collections of regional, state, and university libraries, disclosed no other opinions in manuscript. That the 217 opinions of the manuscript in the New York Public Library and the additional opinion of George Davis were all of the official opinions of the attorneys general is an inescapable conclusion.

In the correspondence of the attorneys general, there are

letters which in substance are opinions. Such, for instance, is the reply of George Davis on September 16, 1864, to a question of Zebulon B. Vance, Governor of North Carolina, in which the Attorney General wrote: “. . . under the law and uniform practice of this Department I am forbidden to give such an opinion [as the one requested] except upon the requirement of the President or the Secretary of War.” (*War of the Rebellion Records*, Ser. IV, Vol. III, 655–657.) George Davis, however, explained the general policies of the Confederate government to Governor Vance, and concluded: “I express no opinion myself, being as I have said, precluded from so doing by the rules of my office.” This letter, and others of a similar nature, were not and should not be classified as official opinions of the attorneys general.

The 218 official opinions were the work of four Confederate attorneys general and Wade Keyes, who was at various times Assistant, Acting, and *Ad Interim* Attorney General. Thirteen of the opinions were penned by Judah Philip Benjamin, seven by Thomas Bragg, twenty-four by Wade Keyes, ninety-nine by Thomas Hill Watts, and seventy-five by George Davis. The attorneys general gave thirty-seven opinions to Jefferson Davis, President of the Confederate States of America, 1861–1865; thirty-three to Christopher Gustavus Memminger, Secretary of the Treasury, 1861–1864; thirty-four to James Alexander Seddon, Secretary of War, 1862–1865; twenty-nine to Stephen Russell Mallory, Secretary of Navy, 1861–1865; twenty-seven to George Wythe Randolph, Secretary of War, 1862; twenty-six to George Alfred Trenholm, Secretary of the Treasury, 1864–1865; seven to John Henninger Reagan, Postmaster General, 1861–1865; seven to Leroy Pope Walker, Secretary of War, 1861; four to Judah Philip Benjamin, Secretary of War, 1861–1862, and Secretary of State, 1862–1865; three to John Cabell Breckinridge, Secretary of War, 1865; three to William M. Browne, Assistant Secretary of State; two to George Nelson, Superintendent of Public Printing; two to

Henry St. George Offutt, Assistant Postmaster General; one to Lewis Cruger, Comptroller; and one to Thomas S. Bock, Speaker of the Confederate House of Representatives. Two opinions were general statements and were not given to a specified official of the government.

Neither Robert Toombs nor Robert Mercer Talliaferro Hunter, his successor as Secretary of State, requested opinions from the attorneys general; all other members of the Confederate Cabinet, with the exception of the attorneys general themselves, did seek information and counsel from the heads of the Department of Justice. Almost three fourths of the 218 opinions were written for the War, Treasury, and Navy Departments, the officers of which made respectively seventy-four, sixty, and twenty-nine calls for interpretations of laws and modes of procedure; only seventeen requests for opinions originated in the other departments, and of these, nine came from officers in the Post Office Department, four from the State Department, and four from the Department of Justice.

In subject matter the opinions varied from minute problems of administration to the fundamental concepts of government. Since war was paramount in the Confederacy, questions from the Secretaries of the War and Navy Departments were most frequently presented to the attorneys general. Definitions of militia, volunteer, provisional, and regular troops; the organizational procedures in companies, battalions, and regiments; and the duties and rights of governors and the President in military affairs came within the purview of the attorneys general. The election, appointment, and promotion of officers; the pay, rations, and clothing of soldiers; and the ever-present problems of enlistments, bounties, and furloughs were fruitful subjects of inquiry. After the enactment of the Confederate conscription and exemption laws, the decisions of the attorneys general not only guided the administration in the enforcement of these acts, but also determined individual liabilities and exemptions. Conscription brought additional problems on the



hiring of substitutes, evasions of the draft, obligations and rights of alien residents, desertions, and pardons. After the Confederacy drafted most of its manpower, and competition for men became acute between industry and the services, the attorneys general were confronted with questions of policy on the detailing of military personnel for necessary civil pursuits and war production.

Second only to military problems were those of finance. A majority of all financial queries arose in the Treasury Department, but no department escaped the dire distress caused by inflation. Repeated inquiries came to the Department of Justice for interpretation of congressional acts which provided increased salaries for employees of the executive departments of the government. Inflation also motivated refunding acts which called for interpretations of the intent of Congress, while taxation, under the guise of impressments and forced sales at fixed prices, involved the right of eminent domain. Laws which provided for the more generally known types of taxes on sales, incomes, imports, exports, land, and produce were subject to interpretation by the attorneys general.

Similar to his Secretaries of the Treasury, Jefferson Davis relied heavily on the advice of the attorneys general. In the always possible and often actual conflict between the Confederacy and the states, the President turned to his chief legal advisors for direction and support. At times he sought only the proper course of action, but once that action was determined, he used the attorneys' opinions to bolster his contentions against the counterclaims of governors who jealously guarded their own and their states' power. Not all of Jefferson Davis' problems were of such weight; many related to individual pardons, appointments, and minor administrative rules. Occasionally Davis called on the attorneys general to decide jurisdictional disputes of the cabinet members.

In addition to the problems arising in the military, financial, and executive offices, numerous specific needs for the

clarification of postal laws, contracts, individual and governmental liability for property, impressment of slaves, and foreign affairs required attention. Had the attorneys general accepted appeals from and penned opinions for individuals, their duties would have been extended beyond the limits of time and endurance. With few exceptions, the attorneys general refused to deliver opinions unless in answer to an official request by the President or the departmental heads. The Confederate Constitution and the precedents established by the United States attorneys general supported the contention that opinions should be given only to executives of the government on current problems of the departments.

The failure of the Confederate Congress to establish a supreme court posed a baffling question to the attorneys general. In the absence of a court, there was no agency to resolve conflicts between Confederate and state law. Although doubting their authority, the first attorneys general delivered opinions which declared state laws unconstitutional and advised the Confederate administration to disregard those laws. In rendering opinions on the constitutionality of congressional acts, the attorneys general were on even more doubtful ground, for not even a clear precedent and well-established practice of the Supreme Court of the United States could be relied on to support their acts. In time, the Confederate attorneys general concluded that their powers did not encompass judicial review. Consequently, Wade Keyes and George Davis advised the administration to seek repeal of unconstitutional state laws by appeal to governors and state legislatures. Both Keyes and Davis specifically declared they had no right to declare the acts of Congress unconstitutional, and informed department heads of their duty to enforce every law until that time when a supreme court should be established. In the opinion of George Davis, the last Confederate attorney general, his duty was to advise against the signing of any bill which vitiated the Constitution, but once the President had approved, the at-

torney general was powerless to declare the law unconstitutional.

Although the detailed and closely reasoned opinions of the Confederate attorneys general will not have the general appeal envisioned by Felix Gregory de Fontaine, students of the Confederacy cannot ignore them. The problems of the Confederacy are reflected in the questions considered by the attorneys general; their answers give additional information on the administration of Jefferson Davis. The Southern interpretation of the compact theory of the United States government is repeatedly explained by the Confederacy's leading lawyers, and the basic principles of the Confederate government are expounded with clarity. An accounting of the legal process of secession and the legal basis of a new compact by sovereign states which created the Confederate government—a government bound by laws and precedents of the United States—are officially explained by the attorneys general. Since the Confederacy was an experiment in revolution and because there was no supreme court, these records are more historically pertinent to Confederate history than the opinions of the United States attorneys general are to United States history.

The value of the opinions, however, is not limited to students of the Confederacy. While expositions on state sovereignty in the United States are essentially of historic interest, the rights of a state remain a current issue in American political life. Arguments of the attorneys general of the Confederacy for state sovereignty and state rights later became the ideas of proponents of the rights of a state within a permanent union, and conversely the opinions may be used by those who favor a stronger central government. Moreover, the legal reasoning, the evident continuity of English and American law in the Confederacy, and the decisions of the attorneys general may aid and challenge the legal student. Problems in and the use of international law, as well as the conclusions drawn, are of more than academic interest in an internationally minded world.

The number and variety of books and cases cited by the attorneys general in rendering their decisions was impressive. State reports and state laws of the American commonwealths; the laws, digests, and reports of the United States; and the opinions of the United States attorneys general were frequently consulted. An almost complete library of English legal lore—digests, reports, and commentaries—was at the command of the Confederate attorneys general. Early and then current volumes on American and English military law were shelved in the attorney general's office beside the standard works on international law. By frequent use of these references, the attorneys general found precedent in American, and particularly in English, jurisprudence to support their considered opinions.

In copying the manuscript of the "Opinions" for publication, the editor made a few alterations in form and chronology, but every effort was directed toward an exact reproduction of the text. Although the manuscript had no chapter divisions, for this volume it was divided into twelve chapters, each of which contained the opinions of one attorney general. Since Wade Keyes often assumed direction of the Department of Justice, his opinions form brief chapters which appear between the resignation of one attorney general and the appointment of another; whenever Keyes acted as the attorney general during the vacation period of an incumbent, his opinions break what would otherwise be excessively long chapters. In two instances, however, when Keyes gave only one opinion (pp. 58–59, 114–115) during a brief absence of the attorney general, no chapter division was made for his single opinion.

Chronological changes were limited to corrections of errors in entry. Occasionally a clerk in the Department of Justice failed to copy an opinion at its proper place, and consequently an opinion of an earlier date would follow one of later date. These chronological corrections were indicated in explanatory footnotes.

Because many copyists entered the opinions in the per-

manent record which was the "Opinion Book" of the attorney general's office, inconsistencies in spelling, punctuation, and capitalization frequently occurred in the manuscript. A word may be written as "defense" at one time and "defence" at another. Notwithstanding these obvious inconsistencies, the manuscript was reproduced in its original text. The final typewritten copy of the manuscript was compared, word for word, with the original manuscript in the New York Public Library. In spite of all efforts to secure an exact text, variations may exist, but these should be few and inconsequential.

Certain compromises were necessary in footnoting to prevent the inclusion of too many notes. Since the attorneys general used hundreds of references in the text of their opinions and gave the sources of their information, no explanatory footnotes were added. The abbreviations in the text together with the reference works and books cited may be checked in a legal reference handbook such as Henry J. Brant's *How To Find The Law* (West Publishing Company, St. Paul, 1940). References to such well-known authorities as Hugo Grotius, William Blackstone, Robert Joseph Phillimore, and Emmerich de Vattel required no explanation. Some rather obscure authors were cited, such as: John Paul Jones O'Brien, *A Treatise on American Military Laws* (Philadelphia, 1846); William C. DeHart, *Observations on Military Laws . . . of the Army and Navy of the United States* (New York, 1859); E. Samuel, *An Historical Account of the British Law, and the Law Military as Declared by Ancient and Modern Statutes* (London, 1816); and Henry W. Halleck, *International Law* (New York, 1861).

Whenever necessary, men and events of the text were identified in footnotes. Because of the nature of the manuscript, more emphasis was given to brief biographical sketches of the Confederate attorneys general than to other, and often more historically important, characters. Except in cases of specific citation in the text to a preceding opinion,

no cross reference was made to a subject content similar to that under consideration by the attorney general. The cross referencing of all opinions on a given subject, especially on such often-considered topics as increased salaries and extra compensation, would have resulted in excessively long footnotes. Listings in the index will supply references to problems which were often considered by the attorneys general.

Nearly all of the "Opinions" in this volume are published for the first time. The opinions of April 1 and November 25, 1861, May 5, 1864, March 15 and 24, 1865, are in the New York Public Library, *Bulletin*, (Volumes I and II, 1897-1898); those of April 2, 1861, January 24, October 17, October 18, and November 26, 1862, April 22 and April 26, 1864, are in the *Official Records of the Union and Confederate Armies* (Ser. IV, Vol. I, 204-205; Vol. II, 15, 124-125, 126-128, 212; Vol. III, 313-135, 318-322); those of January 24, 1861, and December 27, 1862, are in the *Official Records of the Union and Confederate Navies* (Ser. II, Vol. I, 375; Vol. II, 321-322); and that of April 22, 1865, is in Dunbar Rowland, *Jefferson Davis, Constitutionalist* (Vol. VI, 577-579). With the exception of these fifteen opinions, no other published records of the "Opinions of the Confederate Attorneys General" have been discovered.