

**LAW IN WAR, WAR AS LAW: BRIGADIER GENERAL
JOSEPH HOLT AND THE JUDGE ADVOCATE GENERAL'S
DEPARTMENT IN THE CIVIL WAR AND EARLY
RECONSTRUCTION, 1861–1865¹**

**LINCOLN'S FORGOTTEN ALLY: JUDGE ADVOCATE
GENERAL JOSEPH HOLT OF KENTUCKY²**

REVIEWED BY FRED L. BORCH III*

While very different in approach and scope, these two books about Major General Joseph Holt, who served as the Judge Advocate General (JAG) from 1862 to 1875, are important additions to American military legal history.

Joshua E. Kastenberg, an Air Force judge advocate now serving as a military judge, has written a unique study of Holt and his role in the development of military law during the Civil War era. *Law in War, War as Law* examines how then-Brigadier General (BG) Joseph Holt,³ and the

* Mr. Borch is the Regimental Historian and Archivist for the U.S. Army Judge Advocate General's Corps. He graduated from Davidson College (A.B., 1976), from the University of North Carolina (J.D., 1979), and from the University of Brussels, Belgium (LL.M, *magna cum laude*, International and Comparative Law, 1980). Mr. Borch also has advanced degrees in military law (LL.M, The Judge Advocate General's School, 1988), National Security Studies (M.A., *highest distinction*, Naval War College, 2001), and history (M.A., University of Virginia, 2007).

Mr. Borch was recently awarded a Fulbright for the Netherlands for 2012–2013 and will be a Visiting Professor at the University of Leiden.

Fred Borch is the author of a number of books and articles on legal and non-legal topics, including *Judge Advocates in Combat: Army Lawyers in Military Operations from Vietnam to Haiti (2001)*, and *Judge Advocates in Vietnam: Army Lawyers in Southeast Asia (2004)*. His latest book, *For Military Merit: Recipients of the Purple Heart* was published by Naval Institute Press in 2010.

¹ JOSHUA E. KASTENBERG, *LAW IN WAR, WAR AS LAW: BRIGADIER GENERAL JOSEPH HOLT AND THE JUDGE ADVOCATE GENERAL'S DEPARTMENT IN THE CIVIL WAR AND EARLY RECONSTRUCTION, 1861–1865* (2011).

² ELIZABETH D. LEONARD, *LINCOLN'S FORGOTTEN ALLY: JUDGE ADVOCATE GENERAL JOSEPH HOLT OF KENTUCKY* (2011).

³ When Congress created the position of Judge Advocate General (JAG) on July 17, 1862, it provided that the JAG would have the "rank, pay and emoluments of a colonel of cavalry." Consequently, Joseph Holt began his career as the JAG as a colonel but, when Congress authorized the JAG to be a brigadier general (BG) on June 20, 1864, he became BG Holt. After the death of Lincoln, Secretary of War Edwin Stanton promoted Holt to the rank of brevet major general as a reward for Holt's superb wartime. This explains

military lawyers serving under him, used the law to enhance President Abraham Lincoln's political goal of preserving the Union and ultimately, to destroy slavery. Consequently, while Kastenberg devotes some energy to examining the Articles of War, and the use of courts-martial to preserve good order and discipline in the Army, the principal theme of *Law in War, War as Law* is that BG Holt and his judge advocates – in the newly formed Bureau of Military Justice – expanded military law to “crush all enemies of the [Lincoln] administration and its goals, including internal enemies.”⁴

Born in 1807, Holt was a prominent civilian lawyer and politician who served as Commissioner of Patents, Postmaster General and Secretary of War in the Buchanan administration.⁵ Although he had been a Democrat, and supported Stephen Douglas for president in 1860, Holt soon found that he had much in common with Republican Abraham Lincoln after the latter's election. As the Civil War unfolded after the outbreak of hostilities in April 1861, Lincoln realized that civilians actively assisting the rebels must be arrested and imprisoned if the Union were to be preserved, and the president “turned to Holt to promote his policy of military control over civilian political prisoners or civilians accused of non-military crimes.”⁶ Consequently, although Holt had no military background, his acumen as a lawyer and his loyalty to the Union were the chief reasons that Lincoln selected Holt to fill the newly created position of Army Judge Advocate General (JAG) in 1862. Then, as the Army's top lawyer, Holt “masterminded” an “extreme expansion of military law.”⁷ Under Holt, for the first time in history, U.S. civilians who were not previously subject to military jurisdiction were now tried by a military commission for various offenses harmful to the Union war effort, including making public speeches inciting Union soldiers to desert from their units, and aiding the Confederacy by providing intelligence or materiel.⁸

why *Law in War, War as Law* refers to Holt as a BG in examining his activities during the Civil War and early Reconstruction.

⁴ KASTENBERG, *supra* note 1, at 8.

⁵ *Id.* at 19, 21.

⁶ THE JUDGE ADVOCATE GENERAL'S CORPS, THE ARMY LAWYER 52 (1975).

⁷ KASTENBERG, *supra* note 1, at 8.

⁸ *Id.* at 103–15; Gideon M. Hart, *Military Commissions and the Lieber Code: Toward a New Understanding of the Jurisdictional Foundation of Military Commissions*, 203 MIL. L. REV. 1, 10–21 (2010).

When Holt began serving as the Judge Advocate General on September 3, 1862, he inherited a military legal system that had been designed for an Army of 10,000 soldiers and had limited jurisdiction even over uniformed personnel.⁹ As Kastenberg shows, by the end of the Civil War, Holt and his judge advocates had transformed military law into a system that not only had unlimited jurisdiction over military personnel, but also could prosecute civilian enemies of the Union.¹⁰ During this period, Holt also started the Army on the path to developing a corps of lawyers to assist the Judge Advocate General, with the Bureau of Military Justice being the forerunner of today's Judge Advocate General's Corps. Holt also broke new ground in military law by overseeing the development and enforcement of the law of armed conflict in the Union army.

Law at War, War as Law is organized chronologically and thematically and, although the book is not a biography of Joseph Holt, he is the focal point of each chapter because of his preeminent role in the development of military law between 1862 and 1866. After an introductory biographical chapter about Holt,¹¹ the book covers a variety of topics, including the development of courts-martial and military commissions;¹² Holt's role in three prominent military trials, one of

⁹ Until Congress revised the Articles of War in 1863, courts-martial did not have jurisdiction over common law crimes like rape, robbery, burglary, murder, and manslaughter unless they were prejudicial to "good order and military discipline." Consequently, when the Civil War Draft Law of March 3, 1863 amended the Articles of War to give courts-martial jurisdiction over these offenses "in time of war, insurrection, or rebellion," this was a significant expansion in military jurisdiction. THE ARMY LAWYER, *supra* note 6, at 62.

¹⁰ Army commanders gained express authority to prosecute civilians when the War Department promulgated General Orders No. 100 (the "Lieber Code") on 24 April 1863. Prior to this time, no military tribunal had *in personam* jurisdiction over civilians but, after civilians sympathetic to the Confederate war effort began acting as spies and couriers, and also carried out guerilla activities against Union forces, Major General Henry Halleck, then serving as the Army's General-in-Chief, decided that such civilians must be subject to trial by a military commission if their activities were to be suppressed and the Lincoln administration victorious in preserving the Union. With General Orders No. 100 in force, commanders in the field—aided by Holt and his judge advocates—began convening military commissions to try civilian enemies of the Union. By the end of the Civil War, hundreds of civilians had been prosecuted for violations of the Law of War—and more than a few for making public pronouncements that undermined the Union effort. War Dep't, Gen. Orders No. 100 (1863) (Articles 13, 26, 149–157); Hart, *supra* note 8, at 3–4.

¹¹ KASTENBERG, *supra* note 1, at 13–41.

¹² *Id.* at 43–75.

which involved the infamous Clement Vallandigham;¹³ the work done by judge advocates in the Union forces in the field;¹⁴ and the involvement of Holt and his lawyers in the Lincoln assassination trial.¹⁵ *Law at War, War as Law* also contains a unique section on the role played by BG Holt and the Bureau of Military Justice in the presidential election of 1864.¹⁶

Kastenberg is especially adept at explaining the importance of Joseph Holt in the development of military law when he details Holt's participation in the *Vallandigham* case. The accused in the case was a prominent anti-war Democrat politician who had served two terms in the House of Representatives and was a Confederate sympathizer. On May 1, 1863, Vallandigham made a public speech in Ohio that railed against the "wicked, cruel and unnecessary war" being waged by "King Lincoln" and insisted that the war was being "fought for the freedom of the blacks and the enslavement of the whites."¹⁷ This incendiary language violated a general order published by Major General Ambrose E. Burnside, then serving as commanding general of the Department of Ohio, who had made it a crime to declare "sympathies for the enemy."¹⁸ Since Vallandigham's speech had violated Burnside's order, Vallandigham was arrested and tried by a military commission for making statements with the express intent to aid the Confederacy. The commission convicted him and sentenced him to be imprisoned "for the duration of the war."¹⁹

When Vallandigham's case reached the U.S. Supreme on a writ of certiorari, Holt *personally* appeared before the U.S. Supreme Court on behalf of the government and achieved a great constitutional victory.²⁰ When the Court unanimously ruled in February 1864 that it could not review Vallandigham's conviction because the commission that had tried him was not a court for purposes of jurisdiction, this decision "empowered" Holt and his judge advocates "with almost the final word as to whether a military arrest or trial of a civilian was justified."²¹ There

¹³ *Id.* at 77–115.

¹⁴ *Id.* at 193–28.

¹⁵ *Id.* at 357–90.

¹⁶ *Id.* at 315–54.

¹⁷ *Id.* at 104.

¹⁸ *Id.* at 105.

¹⁹ *Id.* at 108. Vallandigham was not confined for long; Lincoln released him and had him sent across Union lines into the Confederacy.

²⁰ *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864).

²¹ KASTENBERG, *supra* note 1, at 113.

was no longer any impediment to using military law to combat civilian dissidents who sought to undermine the Union war effort or otherwise support the Confederacy. By the time the Supreme Court reversed course in *Ex parte Milligan* in 1866, the Civil War was over and the Union had been preserved.

While Kastenbergh correctly focuses primarily on the expansion of military jurisdiction orchestrated by Holt during the Civil War, he does not overlook the birth of the American Army's interest in the law of armed conflict.²² In particular, when the War Department published *The Instructions for the Government of the Armies of the United States in the Field* as General Orders No. 100 in 1863, this unique codification of the customary laws of war became the foundation for the conduct of U.S. troops in military operations. Known as the "Lieber Code"—named after its author, Columbia law professor Francis Lieber—it would later have a direct impact on the Hague Conventions of 1899 and 1907, and the Geneva Conventions of 1929.²³ Kastenbergh also shows how Holt was involved in this important development in the law of armed conflict. Holt was not content, however, to simply codify the laws of war. Rather, as Kastenbergh illustrates when discussing the military commission that tried Andersonville camp commandant Captain Henry Wirz, one of the reasons that Judge Advocate General Holt insisted that Wirz must be prosecuted was to "ensure that the law of war would permanently become a part of the nation's military law."²⁴

While *Law in War, War as Law* is a masterpiece of scholarly research, the book is a difficult read—not due to any deficiency in the author's writing style, but rather because the author's research resulted in abundant detail. Consequently, *Law in War, War as Law* is for the expert

²² *Id.* at 229–74.

²³ THE ARMY LAWYER, *supra* note 6, at 62.

²⁴ KASTENBERGH, *supra* note 1, at 257. In 1864, reports reached the North that Union prisoners of war were suffering cruel treatment and dying from a lack of food and water at the Andersonville prison camp. Thousands died while imprisoned; the Andersonville National Cemetery holds 12,912 graves but actual deaths were greater. Since this maltreatment of prisoners was a violation of customary international law—and the Lieber Code—Holt insisted that Wirz must be tried for war crimes. Wirz was charged with conspiracy to "impair and injure the health and to destroy the lives . . . of large numbers of federal prisoners at Andersonville" and with "murder, in violation of the law and customs of war." He was found guilty by a military commission and hanged on 10 November 1865. Holt, in his report on the Wirz trial to President Andrew Johnson, insisted that there was "at no time a darker field of crime than that of Andersonville." THE ARMY LAWYER, *supra* note 6, at 66.

who wants to drink deeply at the well of military legal history; this is not a book for those who want an easy-to-read introduction to Joseph Holt and his impact on the development of military law.

Elizabeth D. Leonard, a professor of history at Colby College, has written the first full-length biography of Holt, and her book, *Lincoln's Forgotten Ally*, is important for this reason alone. In a thoroughly researched narrative, Leonard shows that Lincoln selected Joseph Holt to be his Judge Advocate General for two reasons: first, Holt was “brilliant, rational, stunningly articulate, [and] a painstakingly careful attorney;”²⁵ second, “he was a fearlessly determined supporter of the Union and the Lincoln administration, including Lincoln’s policies on civil liberties, slave emancipation, and the need for a hard-war approach to crush the Confederate rebellion.”²⁶

Professor Leonard succeeds in capturing a wealth of personal detail about Holt that makes him three-dimensional. In particular, Leonard should be commended for her exploration of the difficult relationships that Holt had with members of his family. His brother, Robert, who had moved from Kentucky to Mississippi, was a die-hard slaveholder who believed fervently that his adopted state and the Confederacy must be free to secede, and *Lincoln's Forgotten Ally* shows how Holt’s unswerving loyalty to Lincoln and to the Union caused a permanent rupture between the brothers.²⁷ This sort of family discord was a frequent result of the Civil War, and it is instructive to see that relationships in the Holt family were as strained as those in many other American families. Leonard also should be commended for including a discussion of Joseph Holt’s domestic life, including his romantic and intimate relationships with women, in this biography.²⁸ These sort of personal aspects are often overlooked, if not ignored, by biographers, so Leonard’s exploration of them ensures that a well-rounded portrait of Holt emerges in her book.

As *Lincoln's Forgotten Ally* shows, Holt had many things in common with Lincoln. Both were from Kentucky, both were lawyers, and both ultimately became so committed to the Union that they jettisoned any sympathies they might have once had with slave-owning Southerners and embraced completely the idea that only emancipation

²⁵ LEONARD, *supra* note 2, at 171.

²⁶ *Id.*

²⁷ *Id.* at 141–42; 197–98.

²⁸ *Id.* at 193–94.

could defeat the Confederacy and preserve the Union.²⁹ Additionally, after Lincoln's death, Joseph Holt remained very much in the same camp as the radical Republicans who favored hard reconstruction of a recalcitrant South, as opposed to the soft policies favored by President Johnson and others.³⁰ Since Holt continued to serve as Judge Advocate General until 1875, his views on how the federal government should reconstitute the Southern States—and the role of the Army and military law in Reconstruction—continued to be important.

Professor Leonard devotes an entire chapter to the Lincoln assassination and BG Holt's role in prosecuting the seven men and one woman who conspired to murder Lincoln, Vice President Andrew Johnson, Secretary of State William H. Seward and perhaps also General Ulysses S. Grant on April 14, 1865.³¹ One of the strengths of her prose is the way that she explains how Holt and those prosecutors assisting him in the trial were convinced that John Wilkes Booth and his co-conspirators were a small part of a larger Confederate plot to throw the Union into chaos by decapitating its leaders. As Leonard shows, Holt believed wholeheartedly that President Jefferson Davis and other Confederate leaders were part of the plot to kill Lincoln, Johnson and Seward, and as a result he devoted considerable time and energy at the trial to introducing evidence of this larger conspiracy.³² But, as Leonard shows, Holt's steadfast belief in the involvement of Davis and other high-ranking Confederates led him to make a number of errors of judgment that later harmed his reputation as Judge Advocate General.³³

While *Lincoln's Forgotten Ally* is a good book, it could be better. Leonard provides little linkage between Holt's tenure as the Judge Advocate General and the dramatic evolution of military law that occurred during the years that he served as Lincoln's top military lawyer. Prior to Holt's service, the senior Army judge advocate did not have supervisory authority over judge advocates in the field, much less the

²⁹ *Id.* at 171.

³⁰ *Id.*

³¹ *Id.* at 200–44.

³² *Id.* at 202–06; 212–13.

³³ *Id.* at 214–16. For example, one of Holt's errors in judgment was to use the perjured testimony from Sanford Conover, who testified at the military commission that Confederate agents in Canada “had discussed the assassination conspiracy and other dastardly plans” to harm Union leaders. This testimony was later revealed to be a fabrication, and some believed that Holt had known this testimony was false but nevertheless presented it as true so as to incriminate Jefferson Davis and other Confederate leaders. *Id.* at 215.

power to review their legal work. This changed when Congress created the office of “Judge Advocate General” and gave the JAG powers of both supervision and review.³⁴ This is why both Holt and Lincoln were so busy reviewing courts-martial, and why they developed such a close working relationship—because Holt now was *required* to exercise authority over Army legal operations in the field, to include reviewing serious courts-martial.³⁵

Similarly, *Lincoln’s Forgotten Ally* should have explained the real importance of the Bureau of Military Justice in the Army, and why it was such a unique departure from the past. For the first time in history, Congress gave the Judge Advocate General a professional staff of uniformed lawyers to assist him. The existence of this legal staff—and Holt’s role in hiring its members, organizing it, and deciding what it would do—was the genesis of the modern Corps of judge advocates that exist in all the U.S. Armed Forces today.³⁶

A final point: *Lincoln’s Forgotten Ally* would be a better book if it explained that Holt was important to Lincoln because of the way in which Holt used the law, and his powers as Judge Advocate General, to achieve the Union’s victory. For example, at the end of her discussion of the well-known military commission that tried Clement Vallandigham, Leonard concludes by writing that the Supreme Court “ruled against the defendant.”³⁷ But she misses the two most important points about *Ex parte Vallandigham* and Holt’s role in the case: that this was the only time in history that a JAG argued a case before the Supreme Court; and that he won not on the facts but on jurisdictional grounds. This latter point is critical because Holt’s victory in the Supreme Court meant that, in convincing the Court that it did not have the authority to review what occurred at a military commission, the Union was now able to convene these military tribunals—and prosecute civilian dissidents—without any judicial oversight.³⁸ When Leonard discusses the 1866 *Milligan* case, in which the Court reversed its holding in *Vallandigham*, she should have mentioned that Holt did not argue the case before the Court (although it was a 5-4 vote and arguably might have made a difference if he had) and her claim that that the *Milligan* decision “by implication revived

³⁴ THE ARMY LAWYER, *supra* note 6, at 49.

³⁵ *Id.* at 51.

³⁶ *Id.* at 50.

³⁷ *Id.* at 184.

³⁸ KASTENBERG, *supra* note 1, at 113.

questions about the jurisdiction of other military commissions”³⁹ is not accurate. One only needs to look at the hundreds of military commissions that Holt’s judge advocates convened in the occupied southern states after 1866.

As Pulitzer Prize winning historian James McPherson correctly observes, “Elizabeth Leonard has rescued Joseph Holt from undeserved historical obscurity,”⁴⁰ and for that rescue, judge advocates owe her a debt of gratitude. *Lincoln’s Forgotten Ally* is valuable because it is the only window we have into Holt as both the Judge Advocate General and a man with human flaws and personal challenges similar to the rest of us. Those with an interest in military legal history will want to read this good book.

³⁹ LEONARD, *supra* note 2, at 244.

⁴⁰ *Id.* back cover.