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The Confederate Admiralty Court at Key West

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ABSTRACT

In 1861, the Confederate States of America authorized the establishment of a "Court of Admiralty and Maritime Jurisdiction" at Key West. Although a judge was appointed, the court never sat because the island remained in Union hands throughout the Civil War. After first describing the court's creation and staffing, this article highlights the various procedural and practical problems the court would have faced if it had been able to operate.

KEYWORDS

Appeals, Confederate States of America, Federal Courts, Forts, Jurisdiction, Key West, McQueen McIntosh, Prize Law, U.S. Civil War, William Marvin

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I. Introduction

On February 8, 1861, the delegates constituting the Provisional Congress of the Confederate States of America ("CSA") promulgated a "Provisional Constitution."[1] This temporary document remained in effect until February 22, 1862, when the CSA's Permanent Congress replaced it with a "Permanent Constitution."[2]

Article III, section 1(1) of the CSA's Provisional Constitution provided: "The judicial power of the Confederacy shall be vested in one Supreme Court, and in such inferior courts as are herein directed, or as the Congress may from time to time ordain and establish."[3] Article III, section 1(2) of the CSA's Provisional Constitution further specified:

> Each State shall constitute a District, in which there shall be a court called a District Court, which, until otherwise provided by the Congress, shall have the jurisdiction vested by the laws of the United States, as far as applicable, in both the District and Circuit Courts of the United States, for that State; the Judge whereof shall be appointed by the President, by and with the advice and consent of the Congress, and shall, until otherwise provided by the Congress, exercise the power and authority vested by the laws of the United States in the Judges of the District and Circuit Courts of the United States, for that State, and shall appoint the times and places at which the courts shall be held. Appeals may be taken directly from the District Courts to the Supreme Court, under similar regulations to those which are provided in cases of appeal to the Supreme Court of the United States, or under such regulations as may be provided by the Congress. The commissions of all the judges shall expire with this Provisional Government.[4]

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1 *See The Constitution of the Southern Confederacy*, N.Y. Herald, Feb. 10, 1861, at 1. For the text of the CSA's Provisional Constitution, see [Confederate States of America] Department of Justice, The Statutes at Large of the Provisional Government of the Confederate States of America 1-8 (James M. Mathews ed., 1864) [hereinafter Provisional Congress Statutes]. The CSA's Provisional Constitution also is available, in an easier-to-read format, at https://avalon.law.yale.edu/19th_century/csa_csapro.asp.

2 *See [No Headline in Original]*, Morn. Post (London), Feb. 22, 1862, at 4 (explaining that February 22 was chosen to officially begin the CSA because it was George Washington's birthday, "the most revered of American anniversaries, and the only one which continues to be honoured by both fragments of the dissevered Union.").

For the text of the CSA's Permanent Constitution, see Provisional Congress Statutes, *supra* note 1, at 11-23. The CSA's Permanent Constitution also is available, again in an easier-to-read format, at https://avalon.law.yale.edu/19th_century/csa_csa.asp. With certain exceptions (such as their treatment of slavery and states' rights), the CSA's two constitutions were nearly identical to the U.S. constitution. *See* Lochlainn Seabrook, The Constitution of the Confederate States of America Explained: A Clause-by-Clause Study of the South's Magna Carta (2016). *See also* Marshall L. DeRosa, The Confederate Constitution of 1861: An Inquiry into American Constitutionalism (1991).

3 Provisional Congress Statutes, *supra* note 1, at 6.

4 *Id*.

During its time as a U.S. state, Florida had been divided into two federal districts courts, designated, respectively, as the Northern District ("USDC-NDF") and the Southern District ("USDC-SDF").[5] While the USDC-NDF, headquartered in Tallahassee, handled the bulk of Florida's federal court cases, the USDC-SDF, sitting in Key West, heard the numerous disputes generated by the region's wrecking (*i.e.*, marine salvage) industry.[6]

Recognizing that Florida needed a second Confederate district court, but hamstrung by Article III, section 1(2) of the CSA's Provisional Constitution, the CSA's Provisional Congress decided to utilize Article III, section 1(1) of the CSA's Provisional Constitution, which allowed it to create an infinite number of "inferior" courts. Thus, on March 11, 1861, the CSA's Provisional Congress voted to establish a Court of Admiralty and Maritime Jurisdiction ("CAMJ") at Key West.[7]

Five days later, the CSA's Provisional Congress enacted a Confederate Judiciary Act ("CJA") to implement Article III of the CSA's Provisional Constitution.[8] Section 2 of the Act repeated:

> [E]ach of the Confederate States shall constitute one district, in which there shall be a court called a District Court, to consist of one judge, who shall reside in the state for which he is appointed, and shall receive a salary equal to that paid to a judge of the court of the highest jurisdiction in the state where he resides, payable quarterly.[9]

The subsequent admission of two large states to the CSA—Texas on March 2, 1861[10] and Virginia on May 7, 1861[11]—made it obvious that treating each state as a single judicial district was impractical. As a result, on May 21, 1861, the following amendment to Article III, section 1(2) of the CSA's Provisional Constitution was adopted:

> *Be it ordained by the Congress of the Confederate States of America*, That the second paragraph of the first section of the third Article of the Constitution of the Confederate States of America, be so amended in the first line of said paragraph, as to read, "Each State shall, until otherwise

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5 *See* Kermit L. Hall & Eric W. Rise, From Local Courts to National Tribunals: The Federal District Courts of Florida, 1821-1990, at 21-24 (1991).

6 *Id*. For descriptions of Key West's wrecking industry, see, e.g., John Viele, The Wreckers (2011); W. Randy Miller, *The Case of the Brig Halcyon: A Study in Old Key West Admiralty Law*, 27 J. Mar. L. & Com. 311 (1996); Dorothy Dodd, *The Wrecking Business on the Florida Reef 1822-1860*, 22 Fla. Hist. Q. 171 (1944); *Key West and Salvage in 1850*, 8 Fla. Hist. Q. 47 (1929); Jerry Wilkinson, *History of Wrecking*, *at* http://www.keyshistory.org/wrecking.html.

7 *See* Provisional Congress Statutes, *supra* note 1, at 60-61 ("An Act to Establish a Court of Admiralty and Maritime Jurisdiction at Key West, in the State of Florida").

8 *See id*. at 75-87 ("An Act to Establish the Judicial Courts of the Confederate States of America").

9 *Id*. at 75.

10 *See id*. at 44 ("An Act to Admit Texas as a Member of the Confederate States of America").

11 *See id*. at 104 ("An Act to Admit the Commonwealth of Virginia as a Member of the Confederate States of America").

> enacted by law, constitute a district;" and in the sixth line, after the word "judge," add "or judges."[12]

On the same day that this amendment passed, legislation was enacted splitting in two the Confederate judicial districts of Texas[13] and Virginia.[14]

Discussions of the CSA's judicial system typically focus on the CSA's Supreme Court (which never was formed);[15] the CSA's district courts (which met irregularly);[16] or the outsized role played by the state courts (which ended up with most of the CSA's judicial business).[17] In contrast, the CAMJ has been all

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[12] *Id*. at 9 ("An Ordinance of the Convention of the Congress of the Confederate States").

[13] *See id*. at 127 ("An Act to Divide the State of Texas into Two Judicial Districts, and to Provide for the Appointment of Judges and Officers in the Same").

[14] *See id.* at 149 ("An Act to Establish the Judicial Courts of the Confederate States of America, in the State of Virginia").

[15] *See*, *e.g.*, Charles E. George, *The Supreme Court of the Confederate States of America*, 6 Va. L. Reg. (n.s.) 592 (1920); Bradley T. Johnson, *Why the Confederate States Did Not Have a Supreme Court*, 27 S. Hist. Soc. Papers 307 (1899); Robert W. Ferrell, "The Supreme Court of the Confederate States of America" (unpublished honors thesis, University of Richmond, 1934), *available at* https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1310&context=honors-theses. *See also* David P. Currie, *Through the Looking-Glass: The Confederate Constitution in Congress, 1861-1865*, 90 Va. L. Rev. 1257, 1366-76 (2004) ("XI. The Missing Supreme Court").

In the absence of a Supreme Court, numerous questions that would have been put to it instead were directed to the CSA's attorneys general, who did their best to formulate answers. *See* The Opinions of the Confederate Attorneys General, 1861-1865 (Rembert W. Patrick ed., 1950). As has been explained elsewhere:

> Though the Confederate constitution made provisions for the existence of a supreme judicial court, with powers like those of the Supreme Court of the United States, the provisional congress refused to enact the legislation necessary to actually establish the national court. Therefore, the attorneys general of the Confederacy were often called on to act in place of a national tribunal and to render opinions interpreting the laws enacted by the Confederate congress. Accordingly their opinions were varied, covering both commonplace issues and constitutional questions.
> From 1861 to 1865, the Confederacy was served by four full time attorneys general—Judah Philip Benjamin, Thomas Bragg, Thomas Hill Watts, and George Davis—and by Wade Keyes, who functioned at various times as assistant, acting, and *ad interim* (temporary) attorney general. As a group, they authored 218 opinions for Confederate president Jefferson Davis and members of his cabinet; most of the opinions were requested by the Departments of War, Treasury, and the Navy, and most were related to the fighting of, or financing of, the U.S. Civil War.

Confederate Attorneys General, *at* https://law.jrank.org/pages/5538/Confederate-Attorneys-General.html.

[16] *See*, *e.g.*, Ritchie Williams, *Flotsam and Jetsam: Admiralty Cases in Confederate Georgia*, 28 J. Mar. L. & Com. 617 (1997); T. R. Havins, *Administration of the Sequestration Act in the Confederate District Court for the Western District of Texas, 1862-1865*, 43 Sw. Hist. Q. 295 (1940); Warren Grice, *The Confederate States Court for Georgia*, 9 Ga. Hist. Q. 131 (1925).

[17] *See*, *e.g.*, Warren Moise, Rebellion in the Temple of Justice: The Federal and

but overlooked.[18] In his otherwise excellent 88-page article describing the CSA's judicial system, for example, Professor G. Edward White dismisses it in a single sentence: "The [CSA's] additional constitutional court was the Court of Admiralty and Maritime Jurisdiction, located at Key West in Florida."[19]

The seminal work on the CSA's judicial system is William M. Robinson, Jr.'s 1941 treatise *Justice in Grey: A History of the Judicial System of the Confederate States of America*.[20] Although Robinson devotes several pages to the CAMJ,[21] the instant article provides the first full portrait of the court.

II. The CAMJ

A. Creation

As explained above, soon after its formation the CSA's Provisional Congress voted to establish an admiralty court at Key West.[22] As Robinson points out, the

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State Courts in South Carolina During the War Between the States (2005); Winthrop Rutherfurd, *Drawing Lines of Sovereignty: State Habeas Doctrine and the Substance of States' Rights in Confederate Conscription Cases*, 51 U. Rich. L. Rev. 93 (2017); Robert W. Lee, *Florida Legal History: The Courts and Law During the Civil War, Reconstruction and Restoration Eras*, 15 St. Thomas L. Rev. 485 (2003); Jennifer Van Zant, *Confederate Conscription and the North Carolina Supreme Court*, 72 N.C. Hist. Rev. 54 (1995); J.G. de Roulhac Hamilton, *The State Courts and the Confederate Constitution*, 4 J. S. Hist. 425 (1938); Sidney D. Brummer, *The Judicial Interpretation of the Confederate Constitution*, 8 Law. & Banker & S. Bench & B. Rev. 387 (1915); Sam D. Elliott, *Tennessee's Confederate Courts*, 48 Tenn. B.J. 28 (Jan. 2012).

18 The ignoring of the CAMJ began at an early date:

> The Hon. Charles Sumner [R-MA], in his [April 13, 1869] speech in the [U.S.] Senate [denouncing the proposed Johnson-Clarendon Treaty, which sought to settle various war-related claims between the United States and the United Kingdom] averred . . . that . . . the Confederate States . . . were "without prize courts, or other tribunals for the administration of justice on the ocean." By the Act of March 11th, 1861, [however,] the Confederate Congress established "a Court of Admiralty and [M]aritime [J]urisdiction at Key West, in the State of Florida," and adopted for its guidance the "laws of the United States," until otherwise provided.

J. Thomas Scharf, History of the Confederate States Navy from Its Organization to the Surrender of Its Last Vessel 432 (1887) (footnotes omitted).

19 G. Edward White, *Recovering the Legal History of the Confederacy*, 68 Wash. & Lee L. Rev. 467, 510 n.277 (2011).

20 *See* William M. Robinson, Jr., Justice in Grey: A History of the Judicial System of the Confederate States of America (1941). As readers quickly discover, Robinson does not hide his enthusiasm for the CSA. *See*, *e.g.*, Charles Fairman, *Book Review*, 55 Harv. L. Rev. 172, 173 (1941) ("Of the author's own point of view it may be said, in paraphrase, that he is attached to the principles of the Constitution of the Confederate States, and well disposed to their good order and happiness.").

21 *See* Robinson, *supra* note 20, at 299-308 ("XIII. Special Courts of Admiralty and the Imbroglio at Key West").

22 *See supra* note 7 and accompanying text.

CAMJ was a "plain evasion," but "a happy solution," to the CSA's Provisional Constitution's limit of one district court per state.[23]

In contrast to earlier U.S. initiatives,[24] wrecking was *not* the reason the CSA was eager to have a court at Key West. With war just a month away,[25] the CSA was making plans to have "privateers" seize Union ships and sail them to Southern ports, where judges would be needed to "condemn" them as "prize."[26] Because of its location, Key West was expected to be the CSA's chief prize station:

> A letter of marque and reprisal is a government license authorizing a person, known as a privateer, to attack and capture enemy vessels and take them before prize courts to be condemned and sold[, with the privateer receiving a healthy cut and the government keeping the rest of the proceeds]. Cruising for prizes with a letter of marque was considered an honorable profession, in contrast to [the] universally reviled capital crime of unlicensed piracy. . . .
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> The Confederate Act of March 11, 1861, established "a Court of Admiralty and maritime jurisdiction at Key West, in the State of Florida[to hear prize cases.]" . . . . [Confederate district courts] in New Orleans, Louisiana; Mobile, Alabama; Savannah, Georgia; and additional Southern port cities [also stood ready to hear prize cases].
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> The [Confederate] Act of May 6, 1861, [which] authorized [the] issuance of letters of marque, [was the final necessary step. With its passage,] a fleet of Confederate privateers [was unleashed] to prey upon the commerce of the United States across the globe. . . .
>
> [During the early months of the war,] only two Confederate privateers [were] captured or destroyed and only two of their prizes [were] retaken

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23 *See* Robinson, *supra* note 20, at 299, 300.

24 In 1828, during Florida's territorial period, the U.S. Congress created a superior court, known as the "Southern Judicial District," in Key West to hear the area's many wrecking cases. *See* Hall & Rise, *supra* note 5, at 10-12. In 1847, Congress divided the recently formed U.S. District Court for the District of Florida into the USDC-NDF and USDC-SDF for the same reason. *Id*. at 21-24.

25 The Civil War began on April 12, 1861, when Confederate troops attacked Fort Sumter in Charleston, South Carolina. *See, e.g.,* Wesley Moody, The Battle of Fort Sumter: The First Shots of the American Civil War (2016).

26 The term "prize" refers to "a ship or property captured at sea under the laws of war." James Kraska, "Prize Law," at 1 (July 1, 2011), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1876724. By 1861, it was understood "universally" that to become prize, an item had to be "condemned" as such "by a court of competent jurisdiction . . . in the country of the enemy. . . ." Francis H. Upton, The Law of Nations Affecting Commerce During War: With a Review of the Jurisdiction, Practice and Proceedings of Prize Courts 162-63 (1st ed. 1861).

Although U.S. district courts continue to have prize jurisdiction, see 28 U.S.C. § 1333(2), changes in naval warfare have made prize law obsolete. Indeed, a prize case has not been heard in this country since United States v. The Europa, 80 F. Supp. 12 (S.D.N.Y. 1948). Some commentators, however, have balked at the notion that prize law has lost its relevancy. *See*, *e.g.*, David J. Bederman, *The Feigned Demise of Prize*, 9 Emory Int'l L. Rev. 31 (1995).

> by [Union] vessels. . . . Southern privateers, on the other hand, had within the same time captured approximately sixty federal vessels.
> Nonetheless, the initial enthusiasm for privateering was not sustained because [Southern] crews found it difficult to impossible to deliver their prizes to Confederate courts because of the Union blockade. As a result, the anticipated profits were never realized [and] most [privateers] turned to blockade running as a more profitable venture.[27]

The CAMJ bill was introduced on March 8, 1861, by Mississippi Deputy Alexander M. Clayton.[28] Its driving force, however, was Florida Deputy J. Patton Anderson:

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[27] Patricia A. Kaufmann, *Confederate Prize Court Mail*, 134 Am. Philatelist 38, 38-39 (2020). *See also* Robinson, *supra* note 20, at 211-12. For the CSA's prize statute, see Provisional Congress Statutes, *supra* note 1, at 100-04 ("An Act Recognizing the Existence of War Between the United States and the Confederate States; and Concerning Letters of Marque, Prizes and Prize Goods").

A great deal has been written about the Union's blockade of the South's ports, which the Union was able to enforce because its navy was three times the size of the CSA's navy. *See*, *e.g.*, James M. McPherson, War on the Waters: The Union and Confederate Navies, 1861-1865 (2012); Nick Wynne & Joe Crankshaw, Florida Civil War Blockades: Battling for the Coast (2011); Craig L. Symonds, The Civil War at Sea (2009). *See also* John Paul Jones, *Into the Wind: Rhett Butler and the Law of War at Sea*, 31 J. Mar. L. & Com. 633 (2000). Two recent commentators, however, insist the Union's blockade was not as successful as historians have claimed. *See* Michael Bonner & Peter McCord, The Union Blockade in the American Civil War: A Reassessment (2021).

[28] *See* 1 Journal of the Congress of the Confederate States of America, 1861-1865, at 115 (1904) [hereinafter CSA Journal]. *See also The Southern Confederacy Congress*, Sun (Balt.), Mar. 9, 1861, at 1.

For a profile of Clayton, see Leslie H. Southwick, *Alexander Clayton: (1801-1889) Judge*, Mississippi Encyclopedia, last updated Apr. 13, 2018, *at* https://mississippiencyclopedia.org/entries/alexander-clayton/. As Southwick explains:

> [Clayton was born] in Campbell County, Virginia, . . . studied under a lawyer in Lynchburg in 1822[,] and was admitted to the bar the following year. He practiced first in Louisa County, Virginia. . . .
>
> He had little professional success, so the family moved to Clarksville, Tennessee, in 1829. . . . On 11 December 1832 Pres. Andrew Jackson nominated Clayton to be one of the three federal judges in the Arkansas Territory. He served until 1834, when he contracted cholera. . . .
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> In 1837 Clayton moved to Mississippi, his home for the remainder of his life. . . .
>
> Clayton was elected to [Mississippi's] High Court of Errors and Appeals in 1842. His opinions were thorough and largely free from political passions. . . . In his 1851 reelection campaign, he was allied with Jefferson Davis's candidacy for governor. Both men were defeated. . . .
>
> On 9 May 1861 President Davis nominated Clayton to the Confederate District Court for Mississippi, and he was confirmed and served for the remainder of the Confederacy's existence. It was often impossible[, however, for Clayton] to hold court because of Union occupation.

Id.

> [A] native of Tennessee, [Anderson] studied law in Frankfort, Kentucky. After being admitted to the bar, he practiced in Hernando, Mississippi, until 1846[. Following service as a lieutenant colonel in the Mexican War, he spent] a term in the Mississippi legislature[.] [I]n 1853 [he was] appointed by President Pierce [to be the] United States marshal for [the] Washington Territory, which he was later elected to represent as its delegate to Congress. Declining an appointment as territorial governor in 1857, Anderson moved to Florida the same year and established a plantation, [called Casablanca], near Monticello.
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> As a member of the Florida [secession] convention [in Tallahassee in] January, 1861, Anderson voted for immediate secession and was then appointed [a] delegate to [the CSA conference taking place in] Montgomery. He attended sessions of the Provisional Congress for only about three weeks and took an active part only in seeing that the law establishing a court of admiralty and maritime jurisdiction at Key West was properly written. He resigned on April 8, 1861, to accept the colonelcy of the First Florida Infantry.[29]

During debate on the bill (March 9, 1861), a disagreement arose over the salary to be paid to the CAMJ's judge, with Anderson proposing $3,500 and Clayton suggesting $3,000.[30] By a vote of 4-2-1, Anderson prevailed.[31] Three other minor amendments were agreed to unanimously.[32]

As finally adopted, the CAMJ statute read as follows:

> *The Congress of the Confederate States of America do enact*, That a court of admiralty and maritime jurisdiction at Key West, in the State of Florida, shall be and is hereby created, which shall have cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures

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29 Ezra J. Warner & W. Buck Yearns, Biographical Register of the Confederate Congress 5 (1975). For a further profile of Anderson, see James W. Raab, J. Patton Anderson, Confederate General: A Biography (2004).

30 *See* CSA Journal, *supra* note 28, at 119. Depending on where they lived, U.S. district judges at this time were making between $1,200 and $6,000, with those in Florida earning $2,000. *See Judicial Salaries: U.S. District Court Judges by State, 1789-1891*, Federal Judicial Center, *at* https://www.fjc.gov/history/judges/judicial-salaries-u.s.-district-court-judges-state-1789-1891#.

31 *See* CSA Journal, *supra* note 28, at 119. Florida, Georgia, Louisiana, and South Carolina voted for the higher amount; Alabama and Mississippi voted for the lower amount; and Texas abstained because its delegation was divided. *Id*.

32 *See id*. at 119-20. These amendments, respectively, defined the CAMJ's territorial jurisdiction with greater precision; set the salary of the District Attorney at $200; and required all orders to be signed and sealed by the CAMJ's judge and clerk. The first of these amendments was proposed by South Carolina Deputy Thomas J. Withers. The other two were proposed by Clayton.

Withers now is best known for the sexually explicit love letter that he wrote in 1826 to James H. Hammond, a college friend who later served as South Carolina's governor. *See* Martin Bauml Duberman, *"Writhing Bedfellows": 1826—Two Young Men from Antebellum South Carolina's Ruling Elite Share "Extravagant Delight,"* 6 J. Homosexuality 85 (1981).

under the revenue laws or laws of navigation and trade of the Confederate States, when the seizures are made or cause of complaint arises on waters which are navigable from the sea by vessels of ten or more tons burden, as well as upon the high seas, saving to suiters in all cases the right of a common law remedy, where the remedy at common law is ample and complete. The said court shall exercise jurisdiction in all that part of the State of Florida which lies south of a line drawn due east and west from the northern point of Charlotte Harbor, including the islands, keys, reefs, shoals, harbors, bays and inlets south of said line [*i.e.*, the area to the south of Lake Okeechobee].

SEC. 2. The said court shall also have cognizance of all crimes and offences cognizable under the authority of the Confederate States arising upon the high seas and within the territorial limits aforesaid. And until otherwise provided by law of Congress, the laws of the United States in regard to crimes and offences, and to the mode of procedure, practice and trial in all criminal or penal cases, shall be in force and form the rule of practice and decision in the said court.

SEC. 3. There shall be appointed by the President, by and with the advice and consent of Congress, a judge of said court, for the term prescribed by the Constitution, who shall receive compensation at the rate of three thousand five hundred dollars per annum, payable quarterly. The judge shall reside at Key West in the State aforesaid, and shall hold two regular terms of said court in each year, at Key West, the one commencing on the first Monday of May, the other on the first Monday of November in each year; and shall hold extra sessions of the same from time to time, at such places in said district as occasion may require, to dispatch the business of said court. And the said court shall be at all times open for the purpose of hearing and determining all cases of admiralty and maritime jurisdiction.

SEC. 4. The said judge shall also appoint a marshal and a clerk for said court, who shall be in all respects subject to the provisions of the act entitled "An act to establish the judicial courts of the Confederate States of America," so far as the same relates to the bonds, oaths, qualifications, powers, duties, liabilities and official conduct of the clerks or marshals respectively, and to the remedy for any violation of duty, breach of bond or other official delinquency. And they shall also have the same fees for their respective services as in said act are prescribed.

SEC. 5. The clerk shall reside and keep the records of the court at the place of holding the same, and it shall also be his duty to attend the sittings of the said court wherever held, and keep a record of its acts and proceedings, as if held at the regular place of holding the same. The said marshal shall also attend the said court wherever holden, and shall have power to appoint as many deputies as he may deem necessary, for whose official acts he shall be bound as for his own.

> SEC. 6. Appeals may be allowed and writs of error sued out from said court to the supreme court of the Confederate States, in the same manner and upon the same terms as from a district court of the Confederate States.
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> SEC. 7. The said judge shall also appoint for said court a fit person, learned in the law, to act as attorney for the Confederate States in all matters touching their interest, and in all crimes and offences against their laws. He shall receive for his services a salary of two hundred dollars per annum, payable quarterly, and the further sum of five dollars a day for each day that he may attend said court when in actual session.
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> SEC. 8. *And be it further enacted*, That no vessel, or any master thereof, shall be regularly employed in the business of wrecking on the coast of Florida without the license of the judge of said court; and before licensing any vessel or master, the judge shall be satisfied that the vessel is seaworthy and properly and sufficiently equipped and fitted for the business of saving property shipwrecked and in distress, and that the master thereof is trustworthy and innocent of any fraud or misconduct in relation to any property shipwrecked or saved on said coast.
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> SEC. 9. That the said court shall conform to the practice of the district courts when exercising admiralty and maritime jurisdiction, and shall moreover have power to make rules to govern the practice therein, not inconsistent with the laws of the Confederate States.
>
> SEC. 10. All writs and process, either mesne or final, which shall issue from said court, shall bear teste of the judge of said court, and shall be under the seal and signed by the clerk thereof.
>
> SEC. 11. This act shall take effect and be in force from and after the passage thereof.[33]

The subsequent enactment of the CJA[34] caused sections 4 and 7 of the CAMJ's enabling statute to be slightly modified:

> *The Congress of the Confederate States of America do enact*, That so much of an act entitled "An act to establish a Court of Admiralty and Maritime Jurisdiction at Key West, in the State of Florida," as provides for the appointment of a district attorney and marshal of said court by the judge thereof, be and the same is hereby repealed, and it is hereby made the duty of the President of the Confederate States to appoint for said court a fit person, learned in the law, to act as attorney for the Confederate States in all crimes and offences against their laws, and in all other matters

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33 *See supra* note 7 and accompanying text. Section 1, defining the CAMJ's territorial jurisdiction as extending from Key West to Charlotte Harbor, and § 8, requiring the CAMJ judge to handle the licensing of wreckers, were holdovers from earlier U.S. acts. *See* Hall & Rise, *supra* note 5, at 10-11, 22-24.

34 *See supra* note 8 and accompanying text.

> touching their interest. The President shall also appoint a marshal for said court; and said attorney and marshal shall receive such pay in every respect, and perform such services respectively as are provided for and required of attorneys and marshals by an act entitled "An act to establish the Judicial Courts of the Confederate States of America."[35]

In the heady days following the CAMJ's creation, Mississippi and Texas also pressed the CSA's Provisional Congress for admiralty courts (at, respectively, Vicksburg and Galveston). As Robinson explains, their efforts proved unsuccessful.[36]

B. Staffing

On March 16, 1861, Jefferson F. Davis, the CSA's Provisional President, nominated, and the CSA's Provisional Congress approved, McQueen McIntosh to be the CAMJ's judge.[37] Subsequently, a pair of recess appointments made Fernando J. Moreno the CAMJ's marshal and John L. Tatum the CSA's district attorney.[38] If

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35 Provisional Congress Statutes, *supra* note 1, at 66 ("An Act to Amend an Act Entitled 'An Act to Establish a Court of Admiralty and Maritime Jurisdiction at Key West, in the State of Florida'").

36 *See* Robinson, *supra* note 20, at 302-04.

37 *See* CSA Journal, *supra* note 28, at 153. In their rush to publish, many newspapers initially got McIntosh's name wrong and therefore reported that *two* judges had been appointed to the CAMJ. *See*, *e.g.*, *Sunday Night Despatches*, Louisville Daily J. (KY), Mar. 18, 1861, at 3 ("Messrs. McQueen and McIntosh have also been confirmed Judges of the Admiralty Court at Key West[.]"). News of McIntosh's appointment was greeted with derision by Northern commentators:

> McQueen McIntosh has been appointed Judge in Admiralty at Key West, by the bogus Government at Montgomery, but will not enter upon his duties until the United States are dispossessed of Key West, which will happen about the time that the English are persuaded to give up Gibraltar. President Lincoln has just appointed a collector for that port, and as it is under the guns of Fort [Zachary] Taylor, he will not be disturbed, at present, in executing the functions of that appointment.

Key West, Nat'l Repub. (DC), Mar. 27, 1861, at 2.

38 *See Letter from Montgomery*, Daily Picayune (New Orleans), Apr. 11, 1861, at 1. *See also* CSA Journal, *supra* note 28, at 185-86 (reporting that Moreno and Tatum's appointments were being forwarded to the Committee on the Judiciary for its consideration).

Moreno and Tatum were both Key West residents and, until recently, had held these same positions at the USDC-SDF. *See* Jefferson B. Browne, Key West: The Old and the New 211 (1912) (listing Moreno's dates of service as 1853-61 and Tatum's as 1858-61). *See also* Hall & Rise, *supra* note 5, at 31-32.

As Browne reports, see *supra* at 56, 175, Moreno (1823-1905), a native of Pensacola, was primarily a merchant, although throughout his life he held a variety of political positions and served one term (1852-53) as Key West's mayor. Upon his death, one newspaper eulogized him by writing:

> The early history of Key West is replete with reminiscences of Col. Moreno. He came here a mere youth and for over half a century was identified with every movement for the upbuilding of Key West. Mr. Moreno was at one

McIntosh appointed someone to be the CAMJ's clerk, as he was authorized to do under section 4 of the CAMJ statute,[39] there now is no record of it.[40]

In 1856, McIntosh had been named the second judge of the USDC-NDF.[41]

> time mayor of Key West; and for many years vice-consul for Great Britain, France, Germany and Spain, and as such represented all other powers. Under Buchanan's administration he served as United States marshal of this district. He was a polished gentleman and one whom it was a pleasure to meet, whether in a business or a social way.
>
> In respect to his memory the flags on the city building and in many prominent places were placed at half mast Monday. The deceased was 83 years old. . . .

Island City News and Notes, Daily Miami Metropolis (FL), Nov. 23, 1905, at 9. *See also Fernando Joaquin Moreno*, Find-A-Grave, *at* https://www.findagrave.com/memorial/45136643/fernando-joaquin-moreno.

Tatum (1837-75), on the other hand, is something of a mystery. He appears to have been a native of Monticello (in Jefferson County, not far from Tallahassee), and was the brother-in-law, and one-time law partner, of James T. Magbee, a powerful Tampa politician. *See* Kyle S. VanLandingham, *James T. Magbee: "Union Man, Undoubted Secessionist and High Priest in the Radical Synagogue*," 20 Sunland Trib. (Journal of the Tampa Historical Society) 7 (1994). Tatum likely secured his federal position with Magbee's help. As Browne reports, once in Key West Tatum became an active figure in the secessionist movement. *See* Browne, *supra*, at 91, 130. By the time the war ended, however, Tatum had moved to Tallahassee. *See*, *e.g.*, "Pardon Proclamation, issued by President Andrew Johnson, to John L. Tatum of Leon County, Florida, dated Oct. 24, 1865," *available at* https://www.ancestry.com/. The 1870 federal census, taken a few years before his death, lists Tatum as back in Monticello and working as a merchant. *See* Office of the Secretary of the Interior, The Ninth Census of the United States: 1870 (1872) (Page 16, Line 26 of Schedule 1.—Inhabitants in [the] Town of Monticello, in the County of Jefferson, State of Florida, enumerated Aug. 16, 1870). *See also John Lawrence Tatum*, Find-A-Grave, *at* https://www.findagrave.com/memorial/68332290/john-lawrence-tatum.

39 *See supra* text accompanying note 33.

40 The most obvious choice, however, would have been Joseph B. Browne (1814-88), who had just resigned as the clerk of the USDC-SDF. As his son Jefferson reports, see Browne, *supra* note 38, at 225-26, Joseph Browne was born in Windsor, Virginia; moved to Key West when he was 16; and ended up holding numerous local offices, including mayor (multiple times) and postmaster.

Like Moreno and Tatum, Browne was an ardent secessionist. After Jefferson Davis was granted bail in May 1867 (while waiting to be tried for treason), he visited Key West and stayed with Browne. *See Joseph Beverly Browne*, Find-A-Grave, *at* https://www.findagrave.com/memorial/32092494/joseph-beverly-browne. *See also* Nancy Klingener, *Power Magnet: Key West's Long History of Presidential Visits*, WLRN, Apr. 18, 2018, *at* https://www.wlrn.org/news/2018-04-18/power-magnet-key-wests-long-history-of-presidential-visits (discussing Davis's visit).

41 Up until his appointment, many observers felt the Democrats would nominate McIntosh for a seat in the U.S. House of Representatives. *See Jacksonville (Fla.) Correspondence*, Charleston Daily Courier (SC), Apr. 1, 1856, at 2. Curiously, there is no published biography of McIntosh (1822-68) and his Federal Judicial Center web page (https://www.fjc.gov/history/judges/mcintosh-mcqueen) [hereinafter McIntosh FJC Biography] is extremely sparse:

> Born 1822 near Darien, GA[.]
> Died June 18, 1868, in Pensacola, FL[.]

Judge McQueen McIntosh (1861)
Photograph courtesy of the State Archives of Florida / Florida Memory RC00517 / reproduction by Michael Hopkins of Michael Hopkins Photography

Although he had been practicing law in Florida for just six years, McIntosh had managed to make the right political connections to get this position:

Federal Judicial Service:
Judge, U.S. District Court for the Northern District of Florida[.]
Nominated by Franklin Pierce on February 27, 1856, to a seat vacated by Isaac H. Bronson. Confirmed by the Senate on March 11, 1856[.]
[R]eceived commission on March 11, 1856.
Service terminated on January 3, 1861, due to resignation.
Education: Read law[.]
Professional Career:
Planter, Florida[.]
Private practice, Jacksonville, Florida, 1850-1856[.]
Judge, Confederate District Court, District of Florida [sic], 1861-[1865.]

At the time of his appointment, newspapers described McIntosh as a former resident of Savannah, Georgia, but otherwise said nothing about his background. *See, e.g., [No Headline in Original]*, Sun (Balt.), Mar. 28, 1856, at 4. McIntosh's obituary similarly was cryptic, merely reporting that he died in Pensacola "after an illness of several months, in the forty-sixth year of his age." *Florida—Miscellaneous*, Daily Picayune (New Orleans), June 26, 1868, at 4. A later source indicates McIntosh married a woman named Georgia Fannin (b. 1825) in Savannah on December 21, 1848 and with her had four children: Georgia, Thomas, Henry, and Jessie. *See* Joseph Gaston Baillie Bulloch, A History and Genealogy of the Family of Baillie of Dunain 100 (1898).

> In 1855, Judge [Isaac H.] Bronson [the Northern District's first judge] died at his home in Palatka. The vacancy created by his death intensified sectional and political rivalries within the state. Residents of western Florida had resented Bronson's partiality to holding court in St. Augustine, only thirty miles from Palatka, and his comparatively infrequent trips to Tallahassee and the Panhandle. At the same time, interested parties on the east coast wanted to maintain their close connection with the federal court. Debate over the appointment also was split between those who advocated a zealous states' rights supporter on the court and those who favored a more moderate nominee to the federal bench.
>
> Stephen R. Mallor, [the] moderate [U.S.] senator from Key West who shared the concerns of commercial interests in the state's northern Gulf Coast ports, endorsed George S. Hawkins, a former U.S. attorney, Florida Supreme Court justice, state legislator, and circuit court judge from Apalachicola. Hawkins hailed from the Panhandle, had federal experience through his service as district attorney, and his judicial qualifications would have eased the transition from Bronson's tenure. However, Florida's senior senator, David Yulee, sponsored McQueen McIntosh, a . . . radical states' rights Democrat who had moved to Jacksonville from Georgia in 1850 and had close connections to the railroad industry in the eastern and central regions of the state. On February 27, 1856, President Franklin Pierce, at the urging of his attorney general, Caleb Cushing, appointed McIntosh to the vacancy.[42]

Little is known about McIntosh's time on the federal bench, for almost none of his opinions have survived.[43] An 1859 newspaper article, however, provides some insight into his docket:

> The U.S. Court for the Northern District of Florida was also in session at Apalachicola, the Hon. McQueen McIntosh, presiding. The *[Montgomery Weekly] Advertiser*, of the 11th, says:
>
> There will be several important cases for consideration of the court, as presented in the case of the supposed slaver E.A. Rawlins, for an infringement of the statutes of the United States in such cases made and provided. Also, for an alleged murder said to have been committed on the high seas upon a person designated as the "Spanish Captain" of said bark, by the first, second and third mates, and a person called Delameyer as principal, and the alleged American captain, Hayden, as an

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42 Hall & Rise, *supra* note 5, at 24 (footnotes omitted).

43 In their book, Hall and Rise summarize Bronson's opinion in *Ferreira v. United States* (1851), which involved a claim for damages arising from General George Matthews's 1812 attempt to foment a rebellion against Spain while Florida was a Spanish colony. *See* Hall & Rise, *supra* note 5, at 25-26. As they explain, a copy of the opinion is available in the P.K. Yonge Library of Florida History at the University of Florida. *Id*. at 208 n.12.

> accessory before the fact, if the Grand Jury should succeed in bringing in indictments against them.[44]

Three days after Abraham Lincoln won the 1860 presidential election, McIntosh announced that he planned to resign his seat in protest.[45] By the time he made good on his threat (January 3, 1861),[46] McIntosh had been elected to serve as a delegate to Florida's secession convention, more formally known as the Convention of the People of Florida ("CPF").[47] At the CPF, McIntosh took a leading role:

> Former federal judge McQueen McIntosh introduced a series of resolutions that came to define the purpose of the Convention itself. First, the resolution made clear that the Florida delegation believed secession to be a constitutional right of the states to enact as they saw fit. Because of the supposed constitutionality of secession, the elected representatives at the Convention were therefore tasked with the responsibility of this severance. In what would be the most important wording of the resolution, the delegation found "just and proper cause" for Florida to secede from the Union. The passage of the McIntosh resolutions was the final push toward immediate secession. . . . By January 10, the final Ordinance of Secession had passed the Convention by a vote of 62 to 7. [When Convention President John C. McGehee] announced [that] the Ordinance [had] passed, marked in the Convention Journal of Proceedings at 12:22 p.m., Florida became the third state to declare secession from the Union.[48]

In addition to agreeing to secede and adopting a new state constitution, the CPF's delegates enacted various ordinances. Ordinance No. 17, dated January 19,

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44 *Later [News] from the Florida Ports*, Daily Picayune (New Orleans), May 19, 1859, at 1. *See also Arrest of Florida Outlaws*, Glasgow Weekly Times (MO), Nov. 8, 1860, at 2 ("[F]orty or fifty of the outlaws in the late Calhoun county disturbances [have] been arrested by the authorities and confined in the jails of Apalachicola and Marianna. . . . Hon. McQueen McIntosh, of the U.S. District Court, and Hon. J.J. Finley, of the the State Judiciary, [have been] untiring in their endeavors to restore tranquility."); *Florida Judges and the Slave Trade*, Daily Picayune (New Orleans), June 16, 1859, at 1 (reporting on accusations that McIntosh was "acting in collusion with the slave traders on [Florida's east] coast").

45 *See By Telegraph to Brooklyn Daily Eagle: Georgia and Florida*, Brooklyn Daily Eagle (NY), Nov. 9, 1860, at 3 ("The *[Montgomery Daily] Mail* publishes a despatch from Apalachicola [dated Nov. 6, 1860] stating that McQueen McIntosh, Federal Judge for Florida, will not hold office under Lincoln.").

46 *See* McIntosh FJC Biography, *supra* note 41. *See also Important [News] from the South*, N.Y. Herald, Jan. 10, 1861, at 8.

47 For a detailed look at the CPF, see Ralph A. Wooster, *The Florida Secession Convention*, 36 Fla. Hist. Q. 373 (1958). As Wooster explains, McIntosh owned 63 slaves. *Id*. at 383. Only eight delegates (out of a total of 69) owned more slaves. *Id*. at 383-85.

48 Michael Paul McConville, "The Politics of Slavery and Secession in Antebellum Florida, 1845-1861," at 88-89 (footnote omitted) (unpublished M.A. thesis, University of Central Florida, Summer 2012), *available at* https://stars.library.ucf.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=3221&context=etd.

1861, abolished the USDC-SDF and transferred its authority to a new court known as the "Court of Admiralty for the Southern District of Florida."[49]

In full, Ordinance No. 17 read as follows:

> *Be it ordained by the People of the State of Florida in Convention assembled*, That there shall be established a Court at Key West in this State, which Court shall have and exercise Admiralty jurisdiction only; that the laws of the late United States applicable to, and heretofore governing the District Court of the United States for the Southern District of Florida, be and the same are hereby adopted for the control and government of said Court; that said Court shall be known as the Court of Admiralty for the Southern District of Florida, and that the limits of its jurisdiction shall be the same as were prescribed by an Act of the late Federal Congress, Approved February 28, 1847.
>
> 2. *Be it further ordained*, That there shall be one Judge of said Court, with a salary of twenty-five hundred dollars per annum, who shall be appointed by the Governor of this State, by and with the advice and consent of the Senate thereof, who shall have power to appoint a Clerk of said Court, which said clerk, before entering upon the duties of his office, shall enter into a bond in the sum of two thousand dollars to be approved by the said Judge, conditioned for the faithful performance of his duties.
>
> 3. *Be it further ordained*, That a Marshal of said Court shall be appointed in like manner as the Judge thereof, who, with the Clerk of said Court, shall receive the same fees and emoluments as were prescribed by an act of the late Federal Congress, approved February 26th, 1853. The said Marshal shall enter into a bond in the sum of twenty thousand dollars, conditioned for the faithful performance of his duties, and the payment of all monies coming into his hands under the order of the Court, which bond shall be approved by the Judge thereof.
>
> 4. *Be it further ordained*, That the said Judge shall reside at Key West, that the Court shall be always open for the transaction of admiralty business, and that appeals may be taken from the decrees thereof to the Supreme Court of this State, in like manner as appeals from the Circuit Courts of this State are now prosecuted.
>
> 5. *Be it further ordained*, That whenever the Provisional or permanent Government of a Southern Confederacy shall establish a Court of Admiralty and foreign jurisdiction for the Southern District of Florida, this ordinance shall cease to be of any force and effect.[50]

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49 *See* Robinson, *supra* note 20, at 21. The incongruity of a state convention abolishing a federal court apparently gave none of the delegates pause.

50 Journal of the Proceedings of the Convention of the People of Florida, Begun and Held at the Capitol in the City of Tallahassee, on Thursday, January 3, A.D. 1861, at 105-06 (1861).

As the legislative record reveals, Ordinance No. 17 was proposed by McIntosh.[51] As originally written, it required a 1% fee to be imposed on wrecking awards, but this provision was dropped after an objection was raised by William Pinckney, one of Monroe County's three delegates.[52]

A heated discussion then took place over section 5. Samuel B. Stephens, one of Gadsden County's three delegates, proposed that its wording be changed to:

> *Be it ordained*, That the General Assembly of the State of Florida are hereby authorized to establish a Court of Admiralty for the Southern District of the State of Florida, to continue until otherwise provided for by the permanent government of the Southern Confederacy.[53]

When Stephens's proposal passed by a vote of 25 to 22,[54] John Beard, one of Leon County's five delegates, immediately moved for reconsideration.[55] In response, Stephens made a motion to table Beard's motion, which failed 42-4.[56] Lewis A. Folsom, one of Hamilton County's two delegates, then made a motion to adopt the ordinance's original wording, which passed 42-5.[57]

A short time later, Governor Madison S. Perry tapped Stephen R. Mallory to head the new court:

> Hon. E. [sic] Marvin, late U.S. Judge at Key West, has made his threats that he would not recognize the Admiralty Jurisdiction of the Republic of Florida, and that every citizen of our State who, after its secession, refused to recognize the laws of the United States, should be treated as a traitor. The Governor has accordingly very properly and promptly removed him, and appointed S.R. Mallory Admiralty Judge in his stead.[58]

Mallory, however, declined the appointment,[59] which caused Perry to turn to McIntosh:

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51 *See* Constitution or Form of Government for the People of Florida, as Revised and Amended at a Convention of the People Begun and Holden at the City of Tallahassee on the Third Day of January, A.D. 1861, Together with the Ordinances Adopted by Said Convention 82-84 (1861) [hereinafter Form of Government].

52 *Id*. at 83.

53 *Id*. at 83-84.

54 *Id*. at 84.

55 *Id*.

56 *Id*.

57 *Id*.

58 "Secession Items," Buffalo Morn. Express, Feb. 11, 1861, at 2 (reporting on a story in the *East Floridian*, a newspaper in Fernandina, whose headline had been "One Traitor Removed").

59 Mallory was a reluctant Confederate, which probably explains why he turned down Perry's appointment. Nevertheless, when called upon to become the CSA's Secretary of the Navy, Mallory accepted and remained in this office for the duration of the war. For a profile of Mallory, see Rodman L. Underwood, Stephen Russell Mallory: A Biography of the Confederate Navy Secretary and United States Senator (2005).

> We [the *Apalachicola News*] have the pleasure of announcing to the public the appointment of this gentleman [McQueen McIntosh], by His Excellency, Gov. Perry, as Judge of the Court of Admiralty for the Southern District of Florida. This appointment is considered as a very judicious one, and meets the hearty approval of all those of our citizens who appreciate the ability of Judge McIntosh. Hon. [Stephen] R. Mallory, late United States Senator from this State, was first appointed to this position, by Gov. Perry, but for causes as yet unknown to us, he declined the appointment.
>
> We understand that Judge McIntosh will proceed as early as possible to Key West, to assume the duties of his office, and we are satisfied that he carries with him the esteem of a grateful and approving constituency. We congratulate the citizens of Key West on this appointment, and commend our friend Judge McIntosh, to their warmest hospitalities.[60]

By its own terms, Ordinance No. 17 expired upon the creation of the CAMJ.[61] Nevertheless, on April 24, 1861, the CPF passed Ordinance No. 32, which repealed numerous prior ordinances, including Ordinance No. 17.[62]

C. Attempt to Open

In May 1861, McIntosh traveled to Key West to take up his duties as judge of the CAMJ. The trip proved disastrous, however, and McIntosh barely escaped with his life:

> When Florida left the Union, the Federal government had a gunboat and two companies of artillery at the Key West Naval Base, sufficient to enforce beyond question United States authority on the island. But the soldiers could not control sentiment, and the people were soon divided into pro-Secessionists and pro-Unionists.
>
> The only United States civil officials at Key West who did not resign their offices after Florida seceded were District Judge William Marvin [of the USDC-SDF] and Charles Howe, Collector of Customs. Neither the state nor the Confederate government recognized the authority of Judge Marvin or Collector Howe.
>
> Early in May, 1861, McQueen McIntosh, a secession leader, was sent to Key West as the new state appointee to the bench occupied by Marvin. McIntosh demanded that Marvin relinquish the office and surrender all records and papers pertaining to the post of district judge. Judge Marvin refused, [and only] his [subsequent] personal intervention with the Union officers kept McIntosh from being arrested. Instead, McIntosh was allowed to leave the island.

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60 *Hon. McQueen McIntosh*, Charleston Daily Courier (SC), Feb. 21, 1861, at 1.
61 *See supra* text accompanying note 50 (under § 5).
62 *See* Form of Government, *supra* note 51, at 45-46.

> The last hope of the Confederacy to assert peaceably its authority at Key West was now gone, and because the island was never invaded by the Confederacy it remained Union territory throughout the war.[63]

As has been explained elsewhere, the meeting between McIntosh and Marvin occurred on Monday, May 12, 1861.[64] In all likelihood, it took place in the "Stone Building," which in 1859 had become Key West's third federal courthouse.[65]

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[63] John E. Johns, Florida During the Civil War 155 (1963) (paragraphing inserted for improved readability). *See also* Hall & Rise, *supra* note 5, at 32 ("When McIntosh arrived in early May he discovered, to his horror, that Union forces had completely occupied Key West. . . . This considerable display of force convinced McIntosh to return to safer harbors."). McIntosh needed Marvin's help to leave the city (and avoid being arrested while doing so) because "there was an order in force prohibiting non-residents from going or coming without the authority of the commanding officer, unless they would take [an] oath of allegiance [to the United States]." Browne, *supra* note 38, at 93.

[64] In his book, Browne reproduces a letter that U.S. Brevet Major William H. French sent to U.S. Brevet Captain George L. Hartsuff on the day McIntosh left Key West (Friday, May 16, 1861). *See id*. at 218-19. According to French, McIntosh arrived in Key West on Sunday, May 11, 1861, and planned to hold the first session of the CAMJ on Tuesday, May 13, 1861. McIntosh used the intervening day (Monday, May 12, 1861) to have his meeting with Marvin. McIntosh then spent the next four days cooling his heels, waiting for permission to leave the city.

An anonymous letter in the *New York Herald*, dated Wednesday, May 14, 1861, disagrees slightly with this timeline, reporting that McIntosh arrived in Key West on Monday, May 12, 1861:

> The schooner Dolphin, Filer [in command], arrived on the 12th, from Cedar Key [north of Tampa], having as [a] passenger Judge McQueen McIntosh, lately appointed Judge of the Admiralty Court of Key West by the Southern Confederacy, and John L. Tatum, District Attorney of the same court. We understand that Judge McIntosh *will not attempt to organize his court at Key West, but will speedily leave the city*, which is now in the complete possession of the United States authorities.

Our Key West Correspondence, N.Y. Herald, May 21, 1861, at 8 (italics in original).

[65] The Stone Building, at present-day 226 Whitehead Street, served as the court's home from 1859 to 1885:

> Shortly after the admission of Florida to the Union, the United States court was moved from the county court house to a . . . building belonging to Wall & Pinckney, fronting on Wall street[.] This building was destroyed by fire in 1859, and the court moved to the "Stone building" situated on the corner of Caroline and Whitehead streets. . . . In 1885 [the court] moved to a building then belonging to Mr. John W. Sawyer, on the corner of Front and Fitzpatrick streets. . . .
>
> [The Stone Building] is one of the oldest buildings in Key West, and for many years had the unique distinction of being the only one not built entirely of wood. It was known as "The Stone Building," [because it was] built [out] of cement from a cargo of that material wrecked at Key West. It is a quaint three-story structure with a high pitched roof, having a narrow balcony supported by consoles of solid cement, extending the entire side on Whitehead street. On the gable end was once a similar balcony, but it has been taken down, and only the consoles remain. Above the side balcony

The press quickly spread word of McIntosh's misadventure, with the *National Republican* reporting:

> McQueen McIntosh, of the Confederate States, and appointed to the position of judge of this district, arrived [in Key West] a few days [ago], and, finding the island in the quiet possession of the United States, has concluded it best to leave to-day [May 16, 1861]. Himself and the [CSA's] district attorney, J.L. Tatum, sail for Tampa this evening.
>
> Judge Marvin, of the United States court, having organized his court, is ready to transact any business that may be brought before it.[66]

A short time later, the *Montgomery Weekly Advertiser* wrote:

> Hon. McQueen McIntosh, Judge of the Admiralty Court at Key West, reached [Tallahassee] on Thursday [May 23, 1861], direct from [Key West]. We learn from him that the Federalists there carry things with a high hand. The [pro-secession newspaper] *Key of the Gulf* had been suppressed, and its editor, Mr. Ward, forced to leave. The mail steamer *Suwannee*, Captain Forbes [in command], had been seized, and pressed into Lincoln's service. The yacht *Wanderer*, which had gone into Key West for the purpose of procuring a new register, was also taken possession of and refused permission to leave. No secret was made of the intention to retaliate for the capture of the *Atwater*, and preparations appeared to be making for a foray along the coast.
>
> Judge McIntosh left Key West in a sailing vessel, which although leaving with full permission, was brought to by a shot from the [U.S.S.] *Crusader*, boarded by an officer and searched, and then allowed to pursue her voyage without further molestation.[67]

In its coverage, the *New York Times* displayed unabashed glee in McIntosh's plight:

> Poor Judge Mackintosh [sic], "Confederate States Admiralty Judge for the Southern District of Florida," arrived here a fortnight ago. He probably had not heard [news] from [Key West] since [U.S.] Capt. [Montgomery C. Meigs's] arrival [in the city in November 1860]. On learning the actual state of affairs, he [claimed] he had come for his health; but as he didn't find it healthy, he soon went away again, and took his District-Attorney with him. He was narrowly watched, and if he had attempted to discharge

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> is a large plaster mask of the builder, Mr. John G. Ziriax, who kept the foremost bakery of his day. Before it acquired the cognomen of the "Stone Building" it was known as the "Ziriax Building."

Id. at 68, 75.

66 *Key West Loyal*, Nat'l Repub. (DC), May 27, 1861, at 2.

67 *Late [News] from Key West*, Montgomery Weekly Advertiser (AL), June 5, 1861, at 4.

> any of the functions of his office, he would have been committed for treason. . . .
>
> Judge Mackintosh, of whom I have spoken, denounced him [Marvin] as a traitor in the Florida Convention, and volunteered to pull the rope at his execution. Circumstances alter cases. Judge Mackintosh, when here the other day, was compelled to ask Judge Marvin to use his influence with the military authorities to induce them to permit him (Mackintosh) to go away.[68]

In his autobiography, Marvin does not mention his meeting with McIntosh. He does, however, summarize the period:

> Although I had always been a [D]emocrat in my politics, and resided at this time in the most Southern town the United States, and was a slave-owner to the extent[,] at least, of owning my own domestic servants, yet, I had never accepted the views of John C. Calhoun and other Southern leaders, touching the easy dissolubility of the federal union of the States. It seemed to me that the Union was intended by the framers of the Constitution to be perpetual, and, that the movement in favor of Secession that was being inaugurated, if persisted in, could end in nothing else but civil war and the ultimate subjugation of the seceding states; I, therefore, opposed the Secession Movement with all my might.
>
> I announced myself as a candidate on [the] Union side in the County of Monroe, for election as a delegate to the State Convention [*i.e.*, the CPF] which had been called to meet in Tallahassee in January, 1861. I was beaten at the election by a secessionist. The Convention passed an Ordinance declaring Florida to be out of the Union and an Independent Nation. The interval of the time between the date of that Ordinance and the time when the Civil War began, was a period in the history of my life of great mental anxiety and suffering.
>
> It was impossible during all this time for any person living in the South to form any opinion as to whether the Government at Washington would acquiesce in the secession movement or not. It was generally claimed by the leaders in the South that Secession was a peaceable measure and in accordance with the Constitution. The State authorities at Key West were secessionists; Unionists were liable to bad treatment from them. Many of my dearest friends, including the Clerk of my Court [Joseph B. Browne], the Marshal [Fernando J. Moreno], and the District Attorney [John L. Tatum] turned [into] secessionists. During this period of painful anxiety, I found great comfort in the society of my little family then consisting of my sister Mrs. Pinckney, my niece Dora, and my daughter Hattie. The Rev. Osgood E. Herrick, rector of St. Paul's Church, Robert Campbell, George Allen, Major Hunt, Captain John Brannan, U.S.A. and Captain

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[68] "ISAM," *Affairs at Key West*, N.Y. Times, June 17, 1861, at 3 (paragraphing slightly altered for improved readability).

> Craven of the Navy, contributed a good deal by their loyal sentiments and companionship in misery, to make my life endurable. It was, however, the saddest period of my life.
>
> The commencement of the war ended all this uncertainty. It was now certain that the Union was to be maintained, the Country was to be saved. I saw no other end than victory on the side of the Government of the United States. Soon after the war broke out, the President appointed a new Marshal for the Court, [James C.] Clapp, and a new District Attorney [Thomas J. Boynton], and I appointed a new Clerk [George D. Allen]. The Court was thus again organized and in good condition for work. The President, also, authorized [William H. French,] the officer in command of the troops at Key West[,] to declare martial law whenever he thought it best to do so. As soon as the existence of this order was made known, the leading secessionists left the Island and went to the mainland.
>
> The Unionists were now in the ascendency and quiet and good order prevailed. I soon had an immense amount of work to do in deciding Prize cases. [M]ost of the vessels captured for attempting to break the blockade of the Ports in the Gulf Mexico and at Charleston and Savannah were brought to Key West for adjudication, and I had plenty of work to do up to the time of my resignation in 1863. I resigned because my health had become much impaired by long residence in a hot climate, mental anxiety and overwork. I was, probably, the only Federal Judge South of the Potomac and the Ohio, (if we except Justice [James M.] Wayne of the Supreme Court [a Georgian appointed by President Andrew Jackson in 1835]) who continued to perform his official duties during the war.[69]

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[69] Kevin E. Kearney (ed.), *Autobiography of William Marvin*, 36 Fla. Hist. Q. 179, 213-14 (1958) (footnote omitted) (paragraphing inserted for improved readability). In 1865, at the request of President Andrew Johnson, Marvin (1808-1902), originally from Fairfield, New York, returned to Florida to run the state until new elections could be held. *Id*. at 215. *See also Provisional Governor of Florida*, N.Y. Times, July 15, 1865, at 1.

At least in the North, Marvin's handling of his wartime docket, which consisted primarily of prize cases, was much lauded, with one newspaper commenting:

> Hon. William Marvin is the judge of this court [the USDC-SDF], and [he] decides the cases [based on the] evidence deduced from the examination of witnesses brought before the Prize Commissioner, George D. Allen, Esq. . . . . The most difficult suits brought before the court are those where the claimants attempt to prove their neutrality. All such [ships] have so-called British provisional registers, and it requires careful discrimination in the decision of such cases, to bring violators of the blockade to justice, and still avoid leaving troublesome questions behind for diplomatists to settle. Judge Marvin is abundantly able to do this; and his decisions, therefore, have given very general satisfaction.

The List of Suits Now Before the United States District Court for Adjudication—Judge Marvin Presides at the Bench—Value of the Captures Nearly Half a Million [] Dollars, N.Y. Herald, Apr. 1, 1862, at 7. *See also* Hall & Rise, *supra* note 5, at 33-36 (offering similar praise).

D. Near Dissolution

McIntosh's disastrous trip led to calls to dissolve the CAMJ. As Robinson explains, only the CSA's pride saved the court:

> In the fall following Judge McIntosh's unsuccessful effort to hold court at Key West, one of the Florida deputies, Jackson Morton, moved [on November 29, 1861] to have the Committee on the Judiciary inquire into the expediency of rescinding the act creating the Court of Admiralty. On December 23, 1861, the Committee recommended that the act be repealed, and Congress repealed it at once. When the deputies had had an opportunity to think the matter over during Christmas week, they apparently concluded that the abolishment of the court might be construed as a concession in favor of Union sovereignty at Key West, for upon the reopening of Congress after New Year [January 2, 1862] the abrogation of the court was reconsidered and withdrawn by unanimous consent.[70]

Despite being unable to take his seat, for the rest of the war McIntosh remained a CSA judge and continued to collect his salary. As Robinson further explains:

> On account of the continuous occupation of Key West by the enemy, the court was never able to sit there. Judge McIntosh, however, continued to draw his pay from the [CSA's] Attorney General's Office until the end of the Confederate government, and on at least one occasion he sat on the bench by interchange.
>
> When Judge [George S.] Hawkins, of the [CSA's] District of Florida, was disqualified in a particular case, [McIntosh] held a special term of [the] court at Marianna in July 1863. Even in his old district (where he had presided for five years as United States judge), the nature of the Key West court was not fully understood. At the opening of the court [session] in Marianna, [McIntosh] was announced as the "Judge of the District Court for the District of Key West." [McIntosh] made no correction and even signed the minutes prepared for his signature as "C.S. Judge Southern Florida, sitting in Western Florida."
>
> Though no other examples of [McIntosh's] Confederate judicial records have been found, it is within the range of possibility that Judge McIntosh held court at other places in his district than Key West, under his statutory authority [under section 3 of the CAMJ statute] to hold extra sessions "at such places in said district as occasion may require."

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[70] Robinson, *supra* note 20, at 306-07 (citing CSA Journal, *supra* note 28, at 491 (proposed repeal), 603 (repeal), 635 (reinstatement)). Robinson gives the last *Journal* page cite as "605," but this clearly is a typographical error in his book. Morton's motivation for wanting the CAMJ abolished is unknown—as his biographer has noted, "Morton was somewhat unpredictable and appears to have been easily influenced by those around him." Brian R. Rucker, Jackson Morton: West Florida's Soldier, Senator, and Secessionist 37 (1990).

. . . .

> There must have been plenty of maritime business for [McIntosh] to settle, at, say, Hillsborough, a now extinct village which lay on the [east] coast about halfway between the present cities of Miami and Palm Beach. This village was only about fifty miles from the Bahamas, and small sloops and schooners were in the constant habit of sneaking cargoes of cotton across the Straits of Florida to British colonial markets. Then, too, there were *balandras* and *goletas* from Cuba which trafficked through the blockade. No traces of sittings [by McIntosh] in any of these out-of-the-way places have been found, but the personnel of the court was continued on the roster of the Confederate States judiciary despite the imbroglio at Key West, and it would have been ready to hear and determine maritime cases there had the war ended differently.[71]

III. Additional Problems

Because the CAMJ never sat, previous commentators generally have failed to consider the various administrative, procedural, and substantive problems that would have arisen had McIntosh's trip gone better. At best, these problems would have taken time and ingenuity to resolve. At worst, they would have sunk the entire enterprise.

A. Jurisdiction

As will be recalled, five days after establishing the CAMJ the CSA's Provisional Congress enacted the CJA.[72] Section 39 of the CJA provided:

> The said district courts shall have original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under the revenue laws or laws of navigation and trade of the Confederate States, when the seizures or cause of complaint arises on waters which are navigable from the sea by vessels of one hundred or more tons burden, within their respective districts as well as upon the high seas; saving to suitors in all cases the right of a common law remedy, where the remedy at common law is ample and complete.
>
> And said district courts, as courts of admiralty, shall be deemed always open for the purpose of filing libels, petitions, answers and other pleadings, for issuing and returning mesne and final process and commissions, and for making all interlocutory orders or rules which may be necessary.
>
> And the laws of the United States and the rules of court in reference to admiralty proceedings in force in the admiralty courts of the United States of America, on the twentieth day of December, one thousand eight

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71 Robinson, *supra* note 20, at 307-08 (footnotes omitted). As explained *infra* note 77, George S. Hawkins became Florida's second CSA district court judge in 1862.

72 *See supra* note 8 and accompanying text.

> hundred and sixty, so far as the same may be applicable, and are not inconsistent with the constitution and laws of the Confederate States, are hereby continued in full force and effect in the courts of the Confederate States, until altered or repealed by law.[73]

In admiralty cases arising in South Florida, this language would have caused considerable mischief, for any dispute cognizable in the CAMJ also would have been cognizable in the CSA's District Court for the District of Florida (headquartered in Tallahassee). This open invitation to litigants to forum shop, and the proverbial "race to the courthouse" it would have engendered, would have been difficult to control. In 1824, the U.S. Supreme Court had adopted the "first-to-file" rule,[74] under which the first court seized of a case is expected to see it through to its conclusion.[75] Due to the CJA's December 20, 1860 cut-off date, the first-to-file rule applied to all CSA cases.[76]

It is possible, of course, that McIntosh and his counterparts on Florida's CSA district court would have come to some sort of understanding.[77] For example, the

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73 Provisional Congress Statutes, *supra* note 1, at 82 (paragraphing inserted for improved readability).

74 *See* McIver v. Smith, 22 U.S. (9 Wheat.) 532 (1824).

75 In modern times, of course, various procedural safeguards have been adopted to prevent the rule from being abused. *See*, *e.g.*, 28 U.S.C. § 1404(a) (permitting federal judges to order inter-district transfers "[f]or the convenience of parties and witnesses, [and] in the interest of justice").

76 Because it was not designed specifically for admiralty cases, there is a chance that the first-to-file rule would not have been deemed an "admiralty rule." As a practical matter, however, this merely would have caused a pivot to the CSA's general "reception statute." It adopted all U.S. laws (except those "inconsistent with the Constitution of the Confederate States") in effect on November 1, 1860. *See* An Act to Continue in Force Certain Laws of the United States of America, Provisional Congress Statutes, *supra* note 1, at 27.

77 During its existence, the CSA's District Court for the District of Florida had two judges. The first was Jesse J. Finley, who served from March 1861 to March 1862 (when he resigned to join the CSA's Army). The second was George S. Hawkins, who took Finley's place in April 1862 and remained on the bench for the duration of the war. For accounts of their service, see Henry Putney Beers, Guide to the Archives of the Government of the Confederate States of America 44-46 (1968). *See also* Robinson, *supra* note 20, at 153-54.

As Beers points out, see *supra* at 46, the surviving records of the CSA's District Court for the District of Florida were transferred in 1953 to the Federal Records Center in East Point, Georgia as "Record Group 21." Today, these materials are described as follows:

> 21.11.3 Records of the Confederate States District Court for the Northern [sic] District of Florida
> Textual Records (in Atlanta): Minute books and execution dockets of the Middle Division (Marianna), 1861-64. Case files, minute books, and dockets of the Middle Division (Tallahassee), 1861-65. Minute books of the Western Division (Pensacola), 1864. Minute books and a judgment docket of the Apalachicola Division, 1862-64.

Records of District Courts of the United States (Record Group 21), 1685-1993, National Archives of the United States, *at* https://www.archives.gov/research/guide-fed-records/groups/021.html#21.11.3.

latter judges might have agreed to decline to hear any cases that also were within the CAMJ's purview, perhaps on the ground of *forum non conveniens*.[78] Whether such an arrangement would have been legal is an open question.[79] Alternatively, either of the CSA's Congresses could have passed a law making the CAMJ a full district court, thereby eliminating the problem entirely.[80]

B. Governing Law

Although it adopted the admiralty laws of the United States as they stood on December 20, 1860,[81] section 39 of the CJA further provided that such laws would remain in force only for as long as they were not "altered or repealed by law."[82] It remains unclear whether the phrase "by law" refers to "statutory law" or also includes "common law." If the former, only the CSA's Provisional Congress (and, later, the CSA's Permanent Congress) would have been able to make changes in the CSA's admiralty laws. If the latter, however, the CSA's district judges also would have had this power.[83] McIntosh, of course, would have been bound by whichever one of these two views prevailed due to section 9 of the CAMJ's enabling statute.[84]

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78 By 1860, U.S. admiralty courts had adopted, and were applying, the basic principles of the *forum non conveniens* doctrine. *See*, *e.g.*, Mason v. Ship Blaireau, 6 U.S. (2 Cranch) 240 (1804); The Jerusalem, 13 F. Cas. 559 (C.C.D. Mass. 1814) (No. 7,293) (Story, Cir. J.); Bucker v. Klorkgeter, 4 F. Cas. 555 (S.D.N.Y. 1849) (No. 2,083); Cochran v. McLean, 5 F. Cas. 1142 (S.D.N.Y. 1839) (No. 2,927A); Willendson v. The Forsoket, 29 F. Cas. 1283 (D. Pa. 1801) (No. 17,682).

79 Rule 46 of the U.S. Supreme Court's 1844 Admiralty Rules arguably would have countenanced such an arrangement: "In all cases not provided for by the foregoing rules, the District and Circuit Courts are to regulate the practice of the said courts respectively, in such manner as they shall deem most expedient for the due administration of justice in suits in admiralty." The 1844 Admiralty Rules, formally known as the "Rules of Practice of the Courts of the United States in Causes of Admiralty and Maritime Jurisdiction on the Instance Side of the Court," can be found at 44 U.S. (3 How.) iii-xiv (1845).

Had it been able to sit, the CSA's Supreme Court presumably would have adopted its own version of the 1844 Admiralty Rules, as it was authorized to do by § 43 of the CJA. *See* Provisional Congress Statutes, *supra* note 1, at 83 ("The Supreme Court shall have power from time to time to make all such rules and regulations as it may deem needful for the orderly and correct dispatch of cases not inconsistent with the rules of law. . . .").

80 Robinson expresses surprise that this was not done. *See* Robinson, *supra* note 20, at 301-02.

81 For a detailed description of these laws, see, e.g., Alfred Conkling, The Admiralty Jurisdiction, Law and Practice of the Courts of the United States (2d. ed. 1857).

82 *See supra* text accompanying note 73.

83 Robinson takes the latter view. *See* Robinson, *supra* note 20, at 57 ("The inference is very strong that the [CSA's] Congress did not intend to weaken, materially at any rate, the maritime powers of the [CSA's] district courts.").

84 *See supra* text accompanying note 33 ("SEC. 9. [The CAMJ] shall conform to the practice of the district courts when exercising admiralty and maritime jurisdiction. . . .").

C. Publication of Decisions

One of the most serious problems faced by the CSA's district courts, and one that likewise would have plagued the CAMJ, was the lack of a reliable means for publicizing decisions:

> With paper in short supply, the confederate courts were forced to use the forms that had been printed for their predecessors, striking, whenever necessary, the word "United" and substituting in its place the word "Confederate."
>
> As matters turned out, this was only the beginning of their problems: Nobody paid a great deal of attention to the Confederate district courts which, by the [CSA's] failure to create a Supreme Court, were kept hanging in the air. They had no final jurisdiction under the Constitution and laws, and at best had only concurrent jurisdiction with the state courts over which they had no authority, appellate or otherwise. In most of the districts they scarcely functioned at all, and since their decisions were only scatteringly published in the newspapers, little was known of them at the time and far less today.[85]

D. Appeals

In addition to not having a Supreme Court,[86] the CSA lacked intermediate appellate courts. Thus, had McIntosh been able to hear cases at the CAMJ, dissatisfied litigants would have had nowhere to go to contest his decisions.[87]

IV. Conclusion

Although it never sat, the CAMJ deserves more attention than it has received. In addition to shedding light on how the CSA's leaders viewed a host of topics, it remains one of only two American courts ever created as an admiralty court.[88]

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85 Robert W. Lee, "Confederate Courts," *in Florida's Other Courts: Unconventional Justice in the Sunshine State* 77, 79 (Robert M. Jarvis ed. 2018) (footnote omitted) (quoting Hamilton, *supra* note 17, at 433).

86 *See supra* note 15 and accompanying text.

87 Under § 6 of the CAMJ's enabling statute, see *supra* text accompanying note 33, appeals in admiralty cases were supposed to go directly to the CSA's Supreme Court. *See also* Robinson, *supra* note 20, at 47-48. In contrast, in the U.S. system admiralty appeals went first to the circuit courts and then to the U.S. Supreme Court. *See* Erwin C. Surrency, History of the Federal Courts 212 (2d ed. 2002) (explaining that this procedure was changed in 1863 to allow "appeals [to] be taken directly to the Supreme Court if the value of the vessel exceeded two thousand dollars or where the District Court judge certified that the case involved a question of national importance.").

88 The other such court, of course, was Florida's interregnum admiralty court, discussed *supra* notes 49-62 and accompanying text. I am discounting the vice-admiralty courts that existed prior to the Revolutionary War because they were British courts and, despite their name, focused primarily on revenue collection. *See* Carl Ubbelohde, The Vice-Admiralty Courts and the American Revolution (1960).