

WARTIME TRIALS are rarely typical of a nation's legal system, but they often tell us something interesting about the capacity of its institutions to deal with the exigencies of the time. The three great trials of the Civil War frame the crisis. The first — the piracy trial of privateers operating on behalf of the Confederacy — marked the beginning of the war. The second — the trial of the commanders of a notorious Confederate prisoner-of-war camp — represents the brutality of the war itself. And the third — the trial of Lincoln's assassins — signaled the end of the Civil War and the birth of Reconstruction.

Naval operations were an important element of the war from the outset, when Lincoln announced a blockade of the South just days after the attack on Fort Sumter.¹ To compensate for its own naval deficiency Davis began issuing, on behalf of the Confederacy, letters of marque and reprisal, which authorized private ships to hunt down and attack Union shipping vessels.² Such letters were recognized by international law and are explicitly authorized by the Constitution — if issued by the United States or another sovereign nation. Refusing to recognize the Confederacy as a legitimate government, Lincoln responded by issuing a proclamation declaring the crews and officers of Confederate warships and privateers to be pirates — that is, they would not be treated as prisoners of war.³

The tense exchange of words came to a head in June 1861, when the privateer *Savannah*, captained by Thomas Baker and armed with an eighteen-pound swivel gun, captured a brig laden with sugar and sent it into a South Carolina port.⁴ The next day, a U.S. Navy brig, the USS *Perry*, captured the *Savannah* outside Charleston Harbor after a brief exchange of fire.⁵ A Union prize crew boarded the *Savannah* and arrested its crew, the first priva-

teers to be captured by the North.⁶ They were taken to New York City and incarcerated in the infamous Tombs Prison.⁷

In October 1861, thirteen members of the *Savannah* went on trial, over which Justice Samuel Nelson of the Supreme Court presided.⁸ True to his threat, Lincoln had ordered the defendants charged with and tried for piracy on the high seas, which meant that they faced likely death sentences if convicted.⁹ An infuriated Davis insisted that the *Savannah* crew had operated lawfully as a Confederate warship. He countered Lincoln's order by directing that thirteen of the highest-ranking Union prisoners, chosen by lot, be executed if the *Savannah* defendants were executed.¹⁰ Indeed, in a letter issued shortly after seizure of the *Savannah*, Davis had warned Lincoln that the Confederate government would "deal out to the prisoners held by it the same treatment and the same fate as shall be experienced by those captured on the *Savannah*."¹¹

The trial of the *Savannah* crew lasted one week and then went to the jury, which was hopelessly deadlocked.¹² The court declared a hung jury; the defendants were never tried again and were later exchanged for Union prisoners. Judges and juries were generally reluctant to convict captured Confederate privateer crews, but following the capture of the *Savannah*, the crew of the *Jeff Davis*, "the most notorious of the privateers," was convicted and sentenced to death in Philadelphia.¹³ With Lincoln and Davis still in a staredown over treatment of captured crews — the hung jury in the *Savannah* trial left the question unresolved — Davis ordered lots drawn among Union prisoners, and those selected (including a grandson of Paul Revere) were held for execution if the death sentences of the *Jeff Davis* crew were carried out.¹⁴ Lincoln ultimately backed down, announcing in early 1862 that privateer crews would be treated as prisoners of war.¹⁵

The prisoner-of-war issue became prominent as the conflict wore on. By war's end, according to official reports, the Confederacy captured 211,000 Union soldiers and took 195,000 prison-

ers, while the Union captured 247,000 Confederate soldiers and took 215,000 prisoners.¹⁶ Prisoner-of-war camps were certainly an undesirable venue in either North or South, but the shortage of resources and decimated supply system in the South contributed to the harsh conditions endured by prisoners there.¹⁷ Particularly notorious was Andersonville Prison in southwestern Georgia, where "mosquito-infested tents, myriad maggots, a contaminated water supply, unbaked rations, inadequate hospital facilities, and lack of sanitation led to high death rates."¹⁸ When Union prisoners attempted to escape by tunneling, prison officials sent bloodhounds to hunt them down.¹⁹ In the first six months of 1864, there were 130,000 prisoners at Andersonville; in one month, nearly 3,000 prisoners had reportedly died — a rate of 100 per day. In total, approximately thirteen thousand prisoners are believed to have died there.²⁰

Both the Union and Confederacy used the reports of conditions at these prison camps as propaganda during the war.²¹ Sentiments of outrage and vengeance lingered for some time. Henry Wirz, commander of Andersonville, was later convicted of war crimes and hanged — the only Confederate to be tried and executed after the war.²² Historians disagree as to whether Wirz's conviction and execution were warranted or rather "a miscarriage of justice resulting from the North's need for a scapegoat."²³

The imprisonment of soldiers at Andersonville and other wartime prisons persisted, at least to some degree, because of the breakdown of the prisoner exchange program between the Union and Confederacy. The Confederacy rejected the program in response to the Emancipation Proclamation and to the Union army's enlistment of black soldiers — Davis called these measures "the most execrable recorded in the history of guilty men."²⁴ The Confederacy ordered, and its Congress approved, the permanent detention of captured black soldiers and all Union officers captured in the Confederacy; they would be turned over to state governments for likely execution.²⁵ Lincoln

halted all exchanges of Confederate officers and in July 1863 issued an executive order declaring that the Union would treat Confederate prisoners correspondingly — either execution or hard labor — to Confederate treatment of Union prisoners.²⁶ Nevertheless, the Confederacy executed black soldiers. The most brutal such episode occurred in April 1864 at Fort Pillow, Tennessee, where Nathan Bedford Forrest — who later became “Grand Wizard” of the infant Ku Klux Klan — led the massacre of nearly three hundred black soldiers, as many as thirty after they had surrendered.²⁷ Evidence from Fort Pillow shows the burying alive of the wounded and the deliberate burning of hospital tents.²⁸ Finally, during the winter of 1864–65, the Union and Confederacy exchanged thousands of sick and wounded prisoners, both black and white.²⁹

The first years of the Civil War were difficult for Lincoln; he struggled to maintain cohesion and morale within the Union as each month brought more bloodshed and less hope that an end to the conflict was imminent. The Democrats scored great victories in the 1862 congressional elections and were anticipating success in the 1864 elections.³⁰ Lincoln’s prospects for reelection were uncertain when he faced the Democratic challenger, General George McClellan, with whom Lincoln had clashed repeatedly when McClellan commanded the Army of the Potomac. By the time the 1864 election took place, momentum had swung to the Union side and the Democrats were running a poorly organized campaign around a weak, unrealistic peace platform. Lincoln defeated McClellan soundly, winning 55 percent of the popular vote and the electoral votes of every state but three (221–12).³¹ The country had spoken on war and emancipation: Lincoln’s victory crushed any Confederate hopes for a negotiated peace and ensured that the Union would continue to fight until it achieved military victory.³²

As Lincoln looked toward the end of the war, he insisted on reunion and limited black suffrage, as well as a generous recon-

struction with no persecution of the South after the war.³³ In his second inaugural address, Lincoln famously articulated these sentiments: “With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation’s wounds, to care for him who shall have borne the battle and for his widow and his orphan, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations.”³⁴ The Union had overwhelmed the Confederacy in material superiority — manpower, weapons, and resources — by mid-1865. The Confederacy was tired and beaten; the glory of fighting for its way of life had ended in defeat and desolation.³⁵

More than 620,000 Union and Confederate soldiers died during the Civil War, a ratio of 182 of every 10,000 Americans.³⁶ On April 9, 1865, Lee surrendered to Grant at Appomattox Court House, Virginia. Less than a week later, Lincoln was assassinated by John Wilkes Booth while watching a play at Ford’s Theatre in Washington. The Union troops tracked down Booth nearly two weeks later and shot him to death. Booth had apparently plotted for months to kidnap Lincoln and to hold him hostage in exchange for concessions to the Confederacy, but the end of the war ruined Booth’s plan.³⁷ Booth then decided to murder Lincoln. He recruited accomplices to kill Secretary of State William Seward (who was stabbed but survived) and Vice President Andrew Johnson (whose supposed attacker lost his nerve to carry out the assignment).³⁸

A military court convicted eight accomplices of conspiracy in the assassination, sentencing four to death by hanging and the rest to imprisonment at hard labor.³⁹ Two of the accomplices, actor-historian James McPherson, were likely convicted unfairly. Mary Surratt, keeper of a boardinghouse where Booth planned the kidnapping, was part of his original kidnapping plot but probably unaware of the revised plans for assassination; Dr. Samuel Mudd, who treated Booth’s broken leg, was at most an

accessory after the fact."⁴⁰ Surratt was hanged; Mudd was convicted and sentenced to life in prison, but was eventually pardoned by President Johnson in 1869, along with the other imprisoned conspirators (one conspirator had already died in prison, two years after his conviction).⁴¹ The nation at once clamored angrily to avenge Lincoln's death and mourned deeply its former president, whom it now likened to the martyred Jesus.⁴²

The most deadly war in American history was over, but its legacy was to continue well beyond the termination of military hostilities.

The Trial of Captain Henry Wirz

Date: 1865
Location: District of Columbia
Defendant: Confederate captain Henry Wirz
Charges: Murder, battery, torture
Verdict: Guilty
Sentence: Hanging

Throughout the ages, there have been those who have attempted to rewrite history, especially the history of human atrocities. Some Turks are seeking to erase from the pages of history the attempted genocide of the Armenian people. Holocaust deniers — calling themselves “revisionists” — are now trying to rewrite the most awful episode in modern history. Not surprisingly, there have been repeated efforts to “revise” the history of the American Civil War, especially its most barbaric aspects.

The American Civil War was one of the most brutal internecine struggles in history. It was fought on battlefields, in cities, and, most disturbingly, in prisoner-of-war camps. The savagery of the war is difficult to understand by the usual racial, linguistic, nationalistic, or religious explanations. When different races, religions, or nations engage in combat, each side generally dehumanizes the other. They are killing not merely their enemies, but rather “savages,” “heathens,” or “inferiors.”

Not so in the Civil War. The combatants were, if not brothers, certainly cousins. They shared a common religion, national id-

entity, language, and race (except for the black soldiers of the Union). They also shared a common destiny and future. Yet they killed with the ferocity of eternal enemies.

Perhaps the most inexplicable manifestation of this fraternal hatred was the treatment of prisoners of war, particularly by the Confederacy, and most especially in the “rebel prison” at Andersonville, Georgia, where nearly thirteen thousand prisoners died.⁵² Though the prison was originally designed to hold ten thousand prisoners, the Andersonville population swelled to more than thirty-two thousand by August 1864 as a result of the Confederacy’s dwindling resources and the breakdown of the normal prisoner exchange system.⁵² Reading the record of mistreatment, brutality, and outright murder of the Union prisoners at Andersonville — many of whom were only teenagers — shocks the conscience of any civilized person.

The keeper of the prison was a Swiss émigré named Captain Henry Wirz. Under Wirz’s stewardship of the prison camp, which lasted only thirteen months, more Union soldiers died than were killed in action in the combined battles of Gettysburg, Antietam, Second Bull Run, Charlottesville, and the Wilderness. According to witnesses, Wirz boasted that he “could kill more Yankees there than they were killing at the front.”⁵³ But Wirz’s victims were unarmed and imprisoned. Most died of malnutrition, disease, exposure, and other preventable causes aggravated by the overcrowded conditions. Some prisoners were hanged, others shot, and still others beaten to death.

Wirz, like other camp commanders later in history, sought to defend himself on the ground that he was simply “obeying the orders of his superiors.” And indeed, the Union prosecutors lent some credence to this argument by originally naming as unindicted co-conspirators Jefferson Davis and other leaders of the Confederacy. Subsequently, new charges were prepared that designated these leaders as co-conspirators. But after hearing the

evidence, the court-martial restored the names of Jefferson Davis and several of the other leaders.

The evidence of Wirz's barbarity and gratuitous cruelty was overwhelming. Dozens of witnesses — Union prisoners, Confederate soldiers, doctors, local farmers, ministers and priests — testified as to the general condition of the camp. One Union soldier from New York described his experience in the prison stockade:

When I was first put into the stockade I tried to find a place to lie down, but it was a pretty hard matter; I went to two or three places, but it was of no use. One man said that I could not lie down there. Pretty soon I had to fight for a place to lie down on. There was no room there, and they said we had no business there. Of course I got a place after a while. The men were perfect skeletons where I lay. They were in the worst kind of a state, half-naked, filthy, lousy, too sick to get up; I lay on the ground many a night when I couldn't sleep; sometimes on account of men around me groaning in agony. When I would wake up in the morning I would see men dead all around me, perfect skeletons. One man died and lay there so long that he could not be taken out, and they had to bury him where he died.⁵⁴

Several witnesses recalled the particular brutality of Captain Wirz, who used packs of hounds to hunt down fugitive prisoners and directed the prison sentries to shoot any man who crossed a wooden railing around the camp (called the "dead-line"). One witness described the cold-blooded murder of a defenseless Union prisoner:

As I came near the gate I saw a cripple — a man with one leg, on crutches; he had lost one leg above the knee. He was asking the sentinel to call Captain Wirz. He called him, and in a few minutes he came up. I stopped to see what was going to be done. . . . This cripple asked him to take him out; he said his

leg was not healed, and that he had enemies in camp who clubbed him. Captain Wirz never answered him, but said to the sentinel, "Shoot that one-legged Yankee devil." I was there and heard the order, and saw the man turn on his crutches to go away. As he turned the sentinel fired, and the ball struck him on the head and passed out at the lower jaw. The man fell over, and expired in a few minutes. . . . The sentry was relieved. . . . Report says that he got a thirty days' furlough.⁵⁵

After a sixty-three-day trial, Wirz was found guilty and hanged.

But the controversy over his court-martial and hanging did not end with his burial in Washington, DC. Several years after Wirz's inglorious death, partisans of the Confederate cause — led by Jefferson Davis himself — tried to revise the history of Andersonville and its barbaric commander. Jefferson Davis published an influential article in which he blamed the "despondency" of the Union soldiers, rather than starvation and execution, for the extraordinary death rate at Andersonville.⁵⁶ Eventually, a monument was erected to the memory of Captain Wirz at Andersonville, declaring his innocence and the guilt of those who convicted him. Wirz was officially proclaimed "a martyr" of the Confederacy by the Georgia Division of the United Daughters of the Confederacy, who put the entire blame for the deaths at Andersonville on "causes wholly unavoidable," as well as on Union refusal to arrange prisoner exchanges.

This attempt to "revise, reverse [and] discredit the findings and judgment" of the court-martial and of history stimulated General H. F. Chipman to publish a counterattack in 1911. Chipman acknowledges that he published it "more [in] the spirit of the advocate than of the judge."⁵⁷ And indeed, he was an advocate — specifically, the judge advocate who prosecuted Wirz at the court-martial. But he assures the reader that he has presented the testimony and evidence on both sides without having "sup-

pressed any fact which would have tended to strengthen the defense of the accused. . . ."⁵⁸

A reading of Chipman's book supports the author's assurance, since considerable testimony is presented on Wirz's behalf. For example, Chipman reprinted much of the testimony given in the defense by the Reverend Peter Whelan, a priest from Savannah who attended to Catholic prisoners at Andersonville. The Reverend Whelan offered a favorable portrayal of Wirz and attributed many of the problems in the camp to "great moral depravity" among the prisoners:

Captain Wirz afforded me every facility to visit the prisoners and afford them any relief that was in my power. He never put any obstacles in my way, whether physical or spiritual. . . .

I administered to five of the prisoners who were hanged. There was one of them who was not a Catholic. They were arrested as raiders in the stockade, together with several more who were not condemned. There was a court-martial of the prisoners held on these men and six of them were condemned. They were put in the stocks. I visited them the evening before they were hanged and gave them all the consolations of religion that it was possible for me to do. The next morning Captain Wirz came down to carry them to the stockade to be delivered to the prisoners there. I asked him to delay their execution for another day. He said to me that it was out of his power. They were prisoners who were plundering or robbing and using violence on other prisoners. . . . Captain Wirz said something like, "Boys, I have taken these men out and now I return them to you, having taken good care of them. I now commit them to you. You can do with them as you see fit." Then turning around to the condemned men he said, "May the Lord have mercy on your souls."⁵⁹

Yet the totality of the evidence speaks for itself, and it speaks convincingly of Wirz's moral and legal guilt.

We must never forget, of course, that military history is generally written by the victors rather than the vanquished. This is even truer of postwar military trials. No Union camp commander was placed on trial for the killing of Confederate prisoners, nor was any Union general tried for the destruction of civilian cities.

The trial, conviction, and execution of Captain Wirz make up an important episode in the development of the laws of warfare. Ironically, it did not prevent other atrocities in subsequent wars.