The Squeamish Coroner:
War Crimes Trials of Early Reconstruction

Charlie Zaharoff
Matriculation No. 4978274

First Advisor: Jessica Gienow-Hecht
Second Advisor: Thomas Rommel

Freie Universität Berlin
JFK Institute for North American Studies
History Department
MA North American Studies

Berlin
Aug. 20, 2019

TABLE OF CONTENTS

INTRODUCTION

After the American Civil War, three ex-officers of the Confederate army stood trial for "violations of the laws and customs of war"—for murdering or murderously neglecting Union prisoners of war. Captain Henry Wirz, a prison commandant, was convicted and hung in November 1865. The other two were acquitted in January and June of 1866: Brigadier (one-star) General Hugh Mercer and a second prison commandant, Major John Gee.

These are likely the first war crimes trials in modern history.[1] For each, there exists a more or less verbatim transcript of the proceedings. Very few scholars have studied these documents, and always in isolation. Weighing all I find against the existing explanations for how and why federal prosecutors brought these charges to court, I attempt the first ever analysis of all three transcripts together.

These were political trials. No accepted legal machinery was then in place that would have, as a matter of routine, without the prompting or approval of political authorities, arraigned and passed judgment on commissioned officers of an enemy army. There was no clear precedent for it. To the contrary, the convention was to grant such officers immunity. What was it that motivated the prosecutors to defy this convention? What legal hurdles and counter-motives obstructed their work, such that only three officers of middling authority ultimately came to court?

Originally, in the first months after the close of open warfare in April 1865, federal prosecutors planned to bring dozens of former Confederate officials to court. My focus here is on war crimes—one route of legal action against these officials. War crimes prosecutions were built on the premise that the Confederates, while authorized to fight, had overstepped the limits of humane warfare set by international law. As these limits were codified and enforced by U.S. military authorities, the prosecutions were destined for military tribunals. Treason prosecutions, the other main route of legal action, treated the conflict within a domestic framework. In these, which were destined for civilian courts, prosecutors

---

[1] Gerry J. Simpson, *Law, war and crime: war crimes trials and the reinvention of international law* (Cambridge: Polity, 2007), 178.

sought to prove that Southerners had had no right to wage war at all—that in seceding, they had committed a high crime against their own country.

Treason concerned the Confederate cause, war crimes their character in battle. Together, they held out the opportunity for a post-mortem of the rebellion, a chance to publicly revisit the war and—if federal prosecutors were successful—to assign blame for its devastation to the former leaders of the Confederacy.

The federal government was tasked with reabsorbing a pseudo-state of roughly 9 million people, more than a third of them ex-slaves.[2] The ability to reunite a broken country and dismantle the slave system, as Union leaders promised, rested upon the support of Northern voters and the submission of ex-Confederates. Assigning blame and producing moral narratives of the war were seen as crucial to this support. While courts were potentially valuable here, the decision to entrust them with producing narratives came with a set of risks for federal prosecutors. When courts assigned blame and meted out punishments, they did so credibly. But to the extent they were credible, they had to remain autonomous. There was no simple way of assuring that the facts dug up in court and the verdicts given would discredit the former Confederacy, as the prosecutors intended.

Scalpel in hand, the Confederate body laid before them, federal prosecutors got squeamish. Treason charges never came to court, largely out of prosecutors' fear of acquittal.[3] War crimes prosecutors faced similar inhibitions. At first, in the Wirz trial, they overcame them. But the acquittals of Mercer and Gee in 1866 proved that bringing charges could backfire, functioning to exonerate Confederate leaders in the public eye. On top of that, internal opposition to their work was mounting, from legal and military authorities as well as from President Johnson. While the Mercer and Gee trials were underway, war crimes prosecutors were attempting to arraign

---

[2] According to the 1860 census. For estimates of Confederate war losses, see J. David Hacker, "A census-based count of the civil war dead," *Civil War History* 57 (2011).
[3] Cynthia Nicoletti has brought this to light in regard to the failed prosecution of Jefferson Davis, the prospective test case for treason. An acquittal would have been equivalent to a ruling that secession had been legal. Cynthia Nicoletti, *Secession on trial: the treason prosecution of Jefferson Davis*, Studies in legal history, (New York, NY: Cambridge University Press, 2017), 6-8.

Major (two-star) General George Pickett, who would have been the most prominent ex-Confederate to face war crimes charges. However, in light of weakening confidence among supporters and growing assertiveness among opponents, Pickett was never formally charged, signaling a premature close to war crimes prosecutions in mid-1866.

In the first section of this paper, before dealing with each trial in detail, I turn to existing explanations for how these legal events came to pass. These explanations center on the trial of Wirz, the prison camp commandant who was convicted and hung in November 1865. My goal here is to engage with the scholarship on *Wirz* and to re-contextualize this trial alongside *Mercer*, *Gee*, and the failed prosecution of Pickett, all of which belong to the same category of post-war legal action.[4]

Within the body of work on *Wirz* over the past century, I identify two major lineages within professional scholarship. They constitute lineages in that they cite each other heavily and work within a similar set of assumptions and methods. Jurists and historians who have evaluated *Wirz* as a legal precedent I call the "legalist" lineage. These scholars have tended to ignore the politics behind the trial and affirm the original narrative promoted by Wirz's prosecutors. The other lineage, which I call "revisionist," has attacked this narrative.[5] They attempt to show that the

---

[4] On my definition of this category, which excludes the prosecution of the Lincoln assassins, of guerrillas, and of petty offenders, see the Appendix.

[5] Works of this lineage include: William Best Hesseltine, *Civil war prisons; a study in war psychology* (Columbus, Ohio: The Ohio State University Press, 1930); James C Bonner, "War Crimes Trials, 1865-1867," *International Social Science Review* 22, no. 2 (1947); Darrett B Rutman, "The War Crimes and Trial of Henry Wirz," *Civil War History* 6, no. 2 (1960); Hesseltine, *Civil war prisons*. Lewis L Laska and James M Smith, "'Hell and the Devil': Andersonville and the Trial of Captain Henry Wirz, CSA, 1865," *Mil. L. Rev.* 68 (1975); Glen W LaForce, "The Trial of Major Henry Wirz—A National Disgrace," *Army Law.* (1988); William Marvel, *Andersonville: The last depot* (Univ of North Carolina Press, 1994); Edward F Roberts, *Andersonville Journey* (White Mane Publishing Company, 1998); Robert Scott Davis, *Ghosts and Shadows of Andersonville: Essays on the Secret Social Histories of America's Deadliest Prison* (Mercer University Press, 2006); Ruedi Studer, *Der Prozess gegen Captain Henry Wirz und seine Hintergründe 1865* (Traugott Bautz, 2006); William Marvel, *Lincoln's Autocrat: The Life of Edwin Stanton* (UNC Press Books, 2015). A recent book on Wirz

trial was a legal farce—a perversion of law by politics. While the legalist and revisionist depictions of *Wirz* appear to be diametrical opposites, they are similar in that they have both avoided close engagement with the trial transcript. They also hinge upon a similar binary of law and politics: law is assumed to be an ideal space that only functions in the absence of political influence.

My own explanatory model, which I lay out in the following section, revolves around a concept of the political trial that treats legal and political systems as co-constitutive rather than mutually exclusive. Whereas revisionist historians of *Wirz* (whose narrative has come to dominate historical discourse) invoke "political" as a kind of slander, my analysis confronts the fact that these trials *as well as their prevention* were political by default—that the underlying legal questions at play were also political questions.

I structure my explanation of the trials in terms of their interwoven legal and political contexts. On the legal side, I attempt to explain how prosecutors overcame the post-war convention of criminal immunity for enemy officials. Essential to their success was the fact that, over the course of the Civil War, the legal institutions of the federal army had grown to unheard-of proportions. Recently, a number of Civil War legal historians have unwrapped this institutional development and located the issue of war crimes within it.

On the political side, I introduce the concept of the "didactic trial," or a trial intended to influence public opinion and memory. On the one hand, prosecutors intended *Wirz* to wreck the moral standing of the former Confederate leadership. On the other, these prosecutions were part of the effort to publicly advertise the military legal institutions mentioned above as tools to enforce Reconstruction. The jurisdictional question of whether war crimes tribunals could be constituted in the first place involved more than interpreting the Constitution or the law of nations. It

---

that would belong here was shelved by U. of Tennessee Press after it was alleged that the author plagiarized Marvel's *The Last Depot*. R Fred Ruhlman, *Captain Henry Wirz and Andersonville Prison: A Reappraisal* (University of Tennessee Press, 2006); "Plagiarism Accusation Shelves Civil War Book Just Out From U. of Tennessee Press," *The Chronicle of Higher Education* (2006). https://www.chronicle.com/article/Plagiarism-Accusation-Shelves/37845.

was directly caught up in debates over the respective power of state-level civil authorities and federal military authorities, the former trying to resist and the latter trying to implement sweeping reforms to Southern society. These political overtones help to explain why opposition to war crimes trials from was so vigorous, and I finish the section with a sketch of where this opposition came from.

After offering these correctives, I dive into *Wirz*. The defendant was the commandant at Andersonville, which had more fatalities than any other Civil War prison camp. In addition to alleging a number of individual murders, prosecutors set out to prove that the overall death rate resulted from a homicidal conspiracy between Wirz and higher-ranking officials. I begin the section with a discussion of jurisdiction. The defense tried to derail the proceedings by invoking the Constitution and the Sherman-Johnston surrender agreement. A fragile set of circumstances—for one, the war was *officially* still in progress—allowed the prosecutors to weather these challenges and transgress the convention of immunity.

The second subsection is devoted to the intended didactic function of the proceedings. I show that the best explanation for Wirz's verdict lies in the strength of the prosecutor's case as opposed to any legal foul play. This is important because the trial was intended to showcase due process and, by extension, the military commission as a legal forum. All the same, the investigation of a conspiracy beyond Wirz's personal culpability introduced biases into the proceedings that undermined the court's claim to fairness. This investigation, enabled by the special procedural rules of the military commission, was central to the prosecutors' didactic intentions. I finish the section with an explanation for why prosecutors selected the POW crisis, a set of primarily white-on-white crimes, as their point of didactic emphasis.

After *Wirz*, I discuss the border case of Gen. George Pickett, whose investigation took place in the background of *Mercer* and *Gee*. Pickett was suspected of brutally executing over twenty Union POWs. In the end, he was never arraigned.

Among the leaders behind these prosecutions, there are two in particular to keep in mind: Judge Advocate General Joseph Holt, who oversaw the U.S. military court system, and Secretary of War Edwin Stanton, to whom Holt reported. The ultimate failure to bring charges against Pickett resulted from the hesitation of Holt

and Stanton in the face of a potential acquittal as well as mounting jurisdictional challenges. Their hesitation underlines the fact that these men understood war crimes trials as legitimate legal processes that could not be puppeteered from backstage. This does not mean their actions were apolitical; it means that they were constrained by the legal instruments they employed. Ultimately, the high bar that prosecutors set for themselves aided those who sought to prevent such trials altogether. In Pickett's case, the crucial opposition came from Gen. Ulysses Grant, a figure who railroaded several other key prosecutions.

After Pickett, I move on to the two acquittals, that of Hugh Mercer, a brigadier general accused of unlawfully ordering seven executions, and John Gee, the commandant of the prisoner of war camp at Salisbury—a case similar in its outlines to *Wirz*. The full transcripts for these trials were rediscovered and reprinted quite recently,[6] which is one reason they've eluded scholarship for so long. The acquittals highlight the risks that the prosecutors brought upon themselves by taking these charges to court. A look at the transcript of *Mercer* reveals that the defense did not stop at demolishing the prosecution's case in terms of evidence; they effectively used to the trial to promote counter-narratives of the POW crisis and polemics against Union leaders.

Gee began in February 1866, the month after *Mercer* ended. The aspect of this trial that I most want to emphasize—beyond the fact that Gee's defense team, like Mercer's, wrecked the prosecution—is how the trial embodies a political retreat from war crimes prosecutions that had begun some months before. In the midst of the trial, President Johnson intervened to cripple the jurisdiction of military courts, which led to a brief interruption of Gee's trial and an unusual showdown of civilian and military legal authorities. The debate over the constitutionality of military courts had become a proxy for the struggle between federal and local visions of Reconstruction—between militarily enforced reforms and the restoration of an

---

[6] Annette Gee Ford, *The captive: Major John H. Gee, commandant of the Confederate Prison at Salisbury, North Carolina, 1864-1865: a biographical sketch with complete court-martial transcript* (2000); Norman Vincent Turner, "Confederate Military Executions at Savannah, Georgia during the Civil War, which led to the trial of Brigadier General Hugh W. Mercer," Unpub, *Historical Effingham Society* (2007).

antebellum status quo—and the showdown in *Gee* was a microcosm of that struggle. Though the trial eventually continued without further interference, the active opposition of the president and legal authorities—not to mention a second defeat for prosecutors—signaled that the project of war crimes prosecution was at an end.

I conclude with some thoughts on the legacy of these early war crimes trials and the attempts of recent historians to associate themselves either with the prosecutors or with their opponents. For pro-prosecution historians, this attempt seems to derive from an ethical commitment to defending Reconstruction; for anti-prosecution historians, from a stated commitment to defending civil liberties. In contrast, my own analysis indicates that there is no straightforward way to translate these ethical commitments into a retrospective stance on the trials in question.

LITERATURE AND METHODOLOGY

I. Historiography of *Wirz*

In this section I summarize and critique the existing scholarship on *Wirz*. The literature is nearly silent on *Mercer* and *Gee*, thus the work on *Wirz* holds out the principle narratives to contend with. I identify two narrative and methodological tendencies (or "lineages") in this body of work, which I have labeled "legalist" and "revisionist"—the former promoting and the latter condemning Wirz's prosecution.

I.I. The Legalist Lineage

Lawrence Rockwood wrote in 2007 that regardless of criticisms of the Wirz trial, "*the doctrinal significance of such cases for the American military profession is not diminished.* Seven out of eight of the military panel that convicted and sentenced Wirz to be hanged were general officers. The secretary of war and the president as commander-in-chief upheld both the conviction and the sentence."[7] This line of

[7] Italics in original. Lawrence Rockwood, *Walking away from Nuremberg : just war and the doctrine of command responsibility* (Amherst: University of Massachusetts Press, 2007), 44.

thinking underpins what I call the "legalist" lineage of *Wirz* historiography.[8] That the trial occurred and that it resulted in state-sanctioned violence covers the criteria for precedential validity—all that remains is an explication of the court's rationale.[9] Handling *Wirz* as a precedent in this way works to validate the narrative that Wirz was a confirmed war criminal and that his trial was both necessary and legitimate.

Perhaps the most important works of this lineage emerged from the post-World War I era, when *Wirz*'s relevance as a legal precedent reached its peak.[10] In search of a legal basis for bringing charges against German leaders, the United States delegation to the 1919 Commission on Responsibilities cited *Wirz* as the jurisdictional precedent for doing so.[11] They argued that German offenders must be tried in domestic military tribunals constituted by the specific country that had fallen victim to the offense, much as the federal government had tried Wirz, an officer of the enemy forces, after the Civil War.[12]

Another way that legalist scholars have preserved *Wirz* as a precedent is by editing and publishing reprints of the trial transcript, cutting out large portions in order to reduce the original 800-page transcript to a manageable length. The reprint that is most cited by scholars of the past century appears in *American State Trials,*

---

[8] Such analyses derive from a view of law as a self-contained web of internally consistent rules and practices, sealed off from politics and historical particularity. Here I draw on Shklar's critique of Oppenheim and Kelson: Judith N. Shklar, *Legalism* (Cambridge, Mass.: Harvard Univ. Press, 1964), 130-1.

[9] A recent critic of *Wirz* writes, "The Wirz case is another one of those linear precedents often quoted when officials need a formalistic rationale that will help them legitimate the use of executive military commissions." Marouf Arif Hasian, *In the name of necessity: military tribunals and the loss of American civil liberties* (Tuscaloosa: Univ. of Alabama Press, 2012), 118.

[10] For examples of references to *Wirz* from this era: James F. Willis, *Prologue to Nuremberg: the politics and diplomacy of punishing war criminals of the First World War* (Westport, Conn.: Greenwood Press, 1982), 46.

[11] In their "Memorandum of Reservations," the U.S. delegates wrote that they "had especially in mind the case of Henry Wirz," who "was tried by a military commission, sitting in the city of Washington, for crimes contrary to the laws and customs of war, convicted thereof, sentenced to be executed, and actually executed on the 11th November, 1865." Robert Lansing and James Brown Scott, "Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities," *Am. J. Int'l L.* 14 (1920): 142.

[12] *Ibid*, 140-143.

Vol. 8.[13] What the *American State Trials* abridgment retains are the charges, summaries of the defense and prosecution arguments, relevant testimonies, and the findings. What is removed are most of the exchanges between the judges, the prosecutor, and the defense counsel, and these portions in particular crystalize the aspects of the trial that distinguish it from ordinary legal proceedings. Crucial elements such as attacks on the national loyalty of defense witnesses or allegations by the defense of witness intimidation disappear, as do the interpersonal dynamics of the courtroom in general. This functions to cleanse the transcript, rendering it serviceable as a precedent to be interpreted in a highly specific way, for example, to determine the appropriate venue to try enemy officers. There is no explanation for how a precedent suddenly emerged where there was none before.

I.II. The Revisionist Lineage

The significance of *Wirz* as a precedent, and thus as a topic for war crimes jurisprudence, was gradually displaced in the 20th century by trials of greater magnitude.[14] At the same time, having persisted in pockets of the U.S. publishing market, the diametrical opposite of the legalist lineage caught a second wind. I call it "revisionist," as it takes aim at the doctrinal histories of *Wirz*, portraying *Wirz* instead as an arbitrary expression of political power.[15] Because this lineage has dominated the narrative of *Wirz* for generations, it requires the most attention.

The revisionist lineage as a whole can be traced back to the points made on behalf of Wirz by his counsel and echoed in the Democrat-leaning press during the trial. All the specific arguments about jurisdiction and legal bias serve the following

---

[13] John D. Lawson, *American state trials; a collection of the important and interesting criminal trials which have taken place in the United States from the beginning of our government to the present day, Vol. 8* (St. Louis: Thomas Law Books, 1917), xxiii. A popular textbook on war crimes law from the 1970s contains a further abridgment of the *American State Trials* abridgment. Leon Friedman, *The law of war: a documentary history, Vol. 2* (New York: Random House, 1972), 775.

[14] In particular the Nuremberg and Tokyo trials, where prosecutors still referenced *Wirz* as a precedent. Joshua E. Kastenberg, *Law in war, war as law: Brigadier General Joseph Holt and the Judge Advocate General's department in the Civil War and early Reconstruction, 1861-1865* (Durham, N.C.: Carolina Academic Press, 2011), 260.

[15] For a list of revisionist works: see *supra* note 5.

explanation for the trial's occurrence: Republican politicians designed it as a way to appease the Northern public's demands for vengeance. This overarching scapegoat narrative, which is consistently re-articulated by the entire revisionist lineage, was already laid out in Wirz's closing statement at his trial.[16] After 1865 it has passed through roughly 75 years of non-academic and highly partisan historiography,[17] then through roughly 80 years of academic revision to the present moment.

Hesseltine's 1930 *Civil war prisons* marks the beginning of professional scholarship on the Wirz trial and on Civil War prisons generally.[18] Performing a systematic analysis of Northern and Southern prisons, Hesseltine argues—counter to the popular narrative produced, in part, by Wirz's prosecutors—that the catastrophic death rates in Southern camps, and in particular at Andersonville, where Wirz was stationed, were not the result of any Confederate plot to exterminate Union soldiers. He argues that the belief in such a Confederate plot was the consequence of "war psychosis," or the tendency "for the supporters of one cause to identify their entire personality with that cause, to identify their opponents with the opposing cause, and to hate the supporters of the enemy cause with a venom which counterbalances their devotion to their own."[19] This bent of mind, he argues, together with government propaganda and sensationalism in the Northern press, formed a vicious circle that Hesseltine carefully tracks straight up to the Wirz trial, the spectacle to consummate this "psychotic" drive for revenge.[20]

---

[16] The transcript reads, "I cannot believe that [the judges] stepped down from their high positions, at the bidding of power, or at the more reckless dictate of ignorant, widespread prejudice, to consign to a felon's doom a poor subaltern officer…." *Trial of Henry Wirz: letter from the Secretary of War ad Interim in answer to a resolution of the House of April 16, 1866*, U.S. 40th Cong., 2d sess. House Executive document, (Washington: Gov't print, 1868), 704.

[17] Most of these were "Lost Cause" histories, which sought to blame the Union for the humanitarian disaster of Civil War prison camps and to demonstrate the virtue of the Confederate cause. These depictions of *Wirz* responded in part to the flood of sensationalist autobiographies written by former Union POWs. See James M. Gillispie, *Andersonvilles of the North: the myths and realities of Northern treatment of Civil War Confederate prisoners* (Denton, Texas: UNT Press, 2008), 27-45.

[18] Gillispie, *Andersonvilles of the North*, 58-61.

[19] Hesseltine, *Civil war prisons*, 172.

[20] *Ibid*, 233-239.

Though his analysis does not delve deeply into the proceedings, the way Hesseltine frames *Wirz* has been decisive for later revisionists, who have built upon his work by stringing together evidence of foul play by the judges and prosecutor. In their work to create the impression of a rigged trial, one can discern among them a process of source-cleansing that is reminiscent of the legalist historiography, but in reverse. Instead of reducing *Wirz* to an apolitical legal precedent—charge, evidence, finding, punishment—they reduce the trial to a string of political interferences. What follows in the decades after Hesseltine is a ballooning network of self-reference, of one revisionist citing another and following the same core narrative. This process has resulted in a loss of sensitivity to the original context of the arguments that the revisionists reproduce. When one revisionist pulls an argument from a partisan source of the 19th century and it is cited in turn by other revisionists, the argument is stripped of the specific connotations it had for the partisans who originally employed it.[21]

Another result has been the extent to which revisionists neglect the trial transcript. With her 1995 dissertation, Gayla Koerting appears to be the first *and* most recent scholar to have analyzed the document in depth—that is, with a focus on the trial as its own event. Koerting's relationship to the revisionist lineage is illuminating. The meat of her research consists of going through the transcript and weighing the procedural decisions of the commission against authoritative 19th century manuals of military law. Though structural faults impaired the defense, she argues, the judges acted not only within existing procedural bounds but with a mind to respect the rights of the defendant.[22] In her literature review, however, she refers readers to the established experts, writing that the prevailing "scapegoat theory" is

---

[21] A prime example is the number of scholars who have cited Rutman, ignoring his extensive, uncritical use of unreliable sources such as R Randolph Stevenson, *The southern side; or, Andersonville prison* (Baltimore: Turnbull Brothers, 1876); Louis Schade, *Mr. Louis Schade's open letter* (Washington, D.C., 1867). On Stevenson, see Gillispie, *Andersonvilles of the North*, 35.

[22] The presiding judge, she writes, "granted the defense far more leeway than most military courts would have done, but even his patience was stretched beyond limits" by the defense's delay tactics. Gayla M. Koerting, "The trial of Henry Wirz and nineteenth century military law" (Ph.D. Kent State University, 1995), 126-33.

adequate to explain the trials' occurrence and that Wirz was the "victim" of a hostile press and petty political maneuvers.[23] She ostensibly does this to bracket off political concerns so as to delve into legalistic ones. The result is that, though her findings contradict the works she cites, Koerting never attempts to square the two.

The other historian to work extensively with the transcript is William Marvel, arguably the most prominent *Wirz* revisionist today. Unlike Koerting, his analysis of the trial in *The Last Depot* (1994) plays a somewhat peripheral role in relation to the basic argument of the book, which is directed towards the wartime reality of Andersonville prison. The same is true for Hesseltine's *Civil War Prisons*. What Hesseltine does, primarily, is review records pertaining to various POW camps. Marvel, who is interested in reconstructing day-to-day life at Andersonville, works with the *Wirz* transcript with the intention of comparing testimony with other primary sources. A short analysis of the trial is tacked on at the end of the book to strengthen Marvel's larger goal of "absolving" Wirz. [24] Similarly, in *Civil War Prisons*, the trial appears at the very end to illustrate the "psychosis" that led so many in the North to believe in a conspiracy to exterminate POWs. In effect, Hesseltine's theory is not so much an explanation of why the trial occurred as an explanation of how people could believe in patent falsehoods—how they could elevate them, even, to the status of official truth. Marvel does the same, attaching a greater quantum of malice to the prosecutors, the judges, and the POWs who testified against Wirz.

In my view, there is no reason to think that a fair legal process will inevitably arrive at the truth, nor is the aim of the present study to uncover the truth as far as Civil War prisons are concerned. My focus here is on the trial as an event, and the "appease the public hysteria"[25] framework simply does not go far to explain its occurrence. While Northern public sentiment—inflamed by Lincoln's assassination and the war generally—can be seen as a necessary factor for the trials' occurrence, it is not necessary *and sufficient*. The scenario is just as probable—and the ultimate success of amnesty policies in Reconstruction underlines this probability—that the

---

[23] Koerting, "Nineteenth century military law," 221-3.
[24] Frank L Byrne, "Andersonville: The Last Depot," *Civil War History* 41, no. 2 (1995).
[25] Marvel, *The Last Depot*, 247.

public could have been just as furious and yet *zero* war crimes trials took place, as was the case for every post-war settlement prior to this one. How to account for the lack of a precedent or historical script for these trials? Why, if politicians and military leaders had always agreed to certain terms of victory and defeat that excluded criminal culpability, would they suddenly do the reverse? And why, if the public wanted revenge, would they demand a long, formally constrained judicial process that gives the defendants a stage to espouse their views and that could result in acquittal? Indeed, what is not accounted for in the Wirz-centric literature is the acquittal rate for Confederate officers on trial: two out of three.

Koerting is one of the few scholars to speak on this matter, albeit briefly. Because she relies on the "scapegoat theory" to explain the trials' political context, she considers it "a peculiar twist of fate" that Gee, facing charges similar to Wirz, was acquitted the next year.[26] Grasping for explanations for Gee's acquittal, Koerting points to the fact that, unlike Wirz, Gee was not a foreigner and that the judges were not "handpicked" by Joseph Holt, who directed the prosecution.[27] Koerting does not consider the most straightforward explanation, one already implied by her main analysis: that the case against Wirz was far stronger, that the judges weighed the evidence and came to a sensible decision in each case—an argument that in no way rules out the presence of political motives behind the trials.

My point of departure for this thesis is that a trial can be infused with political motivations and remain sound in terms of legal practice—as my primary source analysis for *Wirz*, *Mercer*, and *Gee* indicates. In the next section, I combine this theoretical orientation with an outline of the trials' legal and political contexts, factoring in recent headway in the scholarship on early Reconstruction. This will help to answer those questions that the revisionist and legalist accounts leave unanswered: What conditions allowed prosecutors to transgress the convention of post-war amnesty? What goals did they have in mind in doing so? What contrary conditions and goals kept them from realizing their prosecutorial vision more fully?

---

[26] *Ibid*, 197-8.
[27] Koerting, "Nineteenth century military law," 197-8.

II. Historical and Analytical Correctives

Several recent works by legal historians, while dealing only briefly with the trials, suggest a framework for approaching them that does not mutually exclude political motivations and legal validity. In the following, I will sketch this framework in two parts. The first will provide background on the general development of war crimes law. This part will describe the reigning convention of post-war criminal immunity and point to the growth of federal military laws and legal institutions during the Civil War as a primary enabling factor for prosecutors to overcome this convention. The second part will look to the trials' immediate political context. I apply the concept of the "didactic trial" to clarify the political motivations of the prosecutors, who wanted to instill an anti-Confederate version of the war's events in the minds of Southern and Northern publics. Their prosecutions were also part of the attempt to extend military legal institutions beyond the war so as to enforce federal reforms in the South. This aspect in particular spurred political opposition from within the military and legal establishments as well as from President Johnson, who effectively worked to curb the ambitions of war crimes prosecutors.

II.I. Legal Context: Confronting the Convention of Immunity

One thing that the existing literature fails to articulate is the precise nature of the convention that these trials transgressed and how this convention manifested in the trials themselves. Legalist and revisionist histories do not make clear how great of a legal hurdle the convention posed to the prosecutors; how, for the most part, the convention triumphed over their efforts; and how this triumph was a product both of legal and political reasoning.

It was clear enough to Wirz's counsel that, as an ex-Confederate officer, Wirz was called before "a tribunal unauthorized by either statute, military law, martial law, or well-established usage" for charges that were not "punishable under the laws of war."[28] These were the counsel's own words at the beginning of the trial, and according to the legal thinking of the day, his was arguably a fair assessment. War

[28] *Trial of Henry Wirz*, 11.

crimes, or the application of individual criminal culpability to wartime acts, did not yet exist as we now understand them. Even at the start of the 20th century, violations of the laws of war were considered "delinquencies" rather than "crimes": it was the exclusive right of the violator's own government to punish them, while a victim's recourse was to diplomacy or retaliation.[29] Part of this resulted from the fact there was no recognized power *above* states to determine or enforce criminal responsibility, thus "states and the officials under whose command the violations were committed remained immune."[30] The status of wartime violations as a state-to-state (as opposed to criminal) affair was the reason *Wirz* became so important as a precedent at the end of WWI. While *Wirz* did not occur in an international court, it established that international codes of wartime conduct could be enforced against individual offenders through the courts of a plaintiff state. In this way, *Wirz* helped usher in "war crimes" as a legal category, serving as ammunition against the convention of blanket immunity for soldiers' acts.[31]

How was this convention situated in the early stages of Reconstruction? Answering this question requires an approach to the law-politics relationship unlike that of the legalist and revisionist historians of *Wirz*. There was infighting among judges and jurists that cannot simply be reduced to legal ideas. For them, certain political commitments were always implicit. On the other hand, in terms of political self-interest alone, it is not easy to explain why leaders advocated war crimes trials at all considering the risks they entailed: unwanted revelations, acquittals, or the possibility of causing instability.[32] It is not surprising that, in the broad arc of

---

[29] John Fabian Witt, *Lincoln's code: the laws of war in American history* (New York: Free Press, 2012), 128.
[30] Anne Holthoefer, "Constructing International Crime: Lawyers, States, and the Origin of International Criminal Prosecution in the Interwar Period," *Law & Social Inquiry* 42, no. 3 (2017): 720-21.
[31] The current failure of the International Criminal Court to gain support from countries such as the U.S., Russia, China, and India can be viewed in light of the same convention. Steven W. Becker, "The Objections of Larger Nations to the International Criminal Court," *Revue internationale de droit pénal* 81, no. 1 (2010).
[32] Gary Jonathan Bass, *Stay the hand of vengeance: the politics of war crimes tribunals* (Princeton, N.J.: Princeton University Press, 2000), 7-8.

history, "victorious armies would often punish their defeated enemies, but they would seldom do so in the context of a trial."[33]

Only in the last century have such trials become a familiar postwar event. According to Anne Holthoefer, the fact of its current familiarity is the result of a laborious conversion from international "delinquencies" into "crimes" that occurred between the two World Wars.[34] Here, I would like to reapply her argument to the war crimes trials of early Reconstruction—indeed, these seem to belong to the very same conversion at an earlier stage of development.[35] The emergence of war crimes as a legal category, Holthoefer explains, can be explained through the interaction of state leaders and international lawyers, the former seeking to expand their right to punish beyond domestic boundaries and the latter seeking to strengthen autonomous legal institutions. "States commit to law because it is in their interest to do so. When states turn to law, however, they also commit to the rules by which law operates. This reinforces lawyers' interest in upholding the law and preserving it as institutionally distinct from politics."[36] Holthoefer shows that the mere presence of political will cannot explain the successful staging of prosecutions at Nuremberg, and that the absence of political will cannot explain the eventual collapse of prosecutions after World War I. While political enablement was fully necessary in both cases, she argues, one must also consider the extent to which well-established legal instruments and institutions were in place "through which legitimate claims (and counterclaims) over the violation of international law could be made."[37]

To explain the occurrence of the war crimes trials of early Reconstruction, the issue of legal instruments is as necessary as that of political support. On this account, it is essential to contextualize these trials in terms of the Union military's unprecedented development of laws and legal institutions intended to regulate Civil

---

[33] Friedman, *The law of war: a documentary history, Vol. 2*, 775.
[34] Holthoefer, "Constructing International Crime."
[35] Recall that the significance of *Wirz* as a precedent after WW1 regarded the domestic application of international law, not international law or courts as such. See *supra* notes 11 and 12.
[36] Holthoefer, "Constructing International Crime," 716.
[37] *Ibid*, 726.

War combat. The instrument used to widen this scope was called the "military commission," a jurisdictional conversion of the court-martial to pass judgment on civilians, guerrillas, and—in a post-war scenario—commissioned enemy soldiers (or "belligerents").[38] Roughly a thousand people were tried during the war in military commissions.[39] These trials were facilitated by the War Department's internal justice department, the Bureau of Military Justice. The people who coordinated the three war crimes trials in question were precisely those who had built up the Bureau over the course of the war. The Bureau's record of fairness and bureaucratic efficiency during the war lent it institutional credence for the post-war transition.

Mark Neely wrote in 1991 that "no overall study of military commissions exists that might provide an institutional and a historical context" for more "sensational" trials like *Wirz*.[40] In the past dozen years, several legally trained historians have filled much of this gap. John Fabian Witt's *Lincoln's code* (2012) focuses on the "radical expansion in the scope of the laws of war" carried out through Gen. Order 100, or the "Lieber Code," a pathbreaking attempt by the Union to codify international norms.[41] Joshua Kastenberg's *Law in war, war as law* (2011) reconstructs the conception of the Bureau of Military Justice and its daily operations during and after the conflict as a parallel justice system to administer these laws.[42] A crucial work by Detlev Vagts (2007) shows how the Bureau transitioned to the post-war period. He provides case studies of Reconstruction-era military commissions, revealing the strained relationship between the civil and military court systems that functioned in parallel in the postbellum South.[43] While noting repressive aspects of the military court system, for instance its role in silencing critics of the Lincoln

---

[38] See Gideon M Hart, "Military Commissions and the Lieber Code: Toward a New Understanding of the Jurisdictional Foundations of Military Commissions," *Mil. L. Rev.* 203 (2010).
[39] Witt, *Lincoln's code*, 267-8.
[40] Mark E. Neely, *The fate of liberty: Abraham Lincoln and civil liberties* (New York: Oxford University Press, 1991), 161.
[41] For a summary of its provisions, see Witt, *Lincoln's code*, 232-40.
[42] Kastenberg, *Law in war*.
[43] Detlev F Vagts, "Military Commissions: The Forgotten Reconstruction Chapter," *Am. U. Int'l L. Rev.* 23 (2007). On commissions during the war itself, see Hart, "Military Commissions and the Lieber Code."

administration,[44] these scholars come to a similar conclusion: that those who set the system up (Judge Advocate General Joseph Holt in particular) were committed to implementing rigorous procedural standards in favor of the defendant.[45]

Of the legal historians just mentioned, Witt and Kastenberg have the most to say about the three war crimes tribunals in question. Each dedicates only a passage to *Wirz* and mentions *Mercer* and *Gee* in passing, but their conclusions are important because they follow from an informed perspective on the relevant institutional context of law from which these trials emerged. Witt writes that despite "procedural irregularities," "enough witnesses, including Confederate and Union veterans alone, testified to brutal acts by Wirz that his responsibility for atrocities at Andersonville was well established."[46] Kastenberg writes, "However unique the accused and subject matter of the trial was in comparison to the thousands of military trials, Wirz's trial was conducted in a similar manner to the majority of the other trials, once it was underway."[47] There are certain biases at play that Kastenberg and Witt overlook, perhaps because they work with an abridgment instead of the original *Wirz* transcript. All the same, their work reflects my general view that while political forces "created the space" for the trial, the verdict was determined primarily by the legal process—that is, the formal evaluation of evidence.

II.II. Political Context: The Pro-Reconstruction Didactic Trial

We have some background, now, on the convention of criminal immunity and the institutional build-up of military law that presented the means to break this

---

[44] See Neely, *The fate of liberty*, 51-74, 93-112.

[45] Holt insisted on the provision of defense counsels, traditionally unprovided for in courts-martial. He also implemented a strict system of review for all proceedings, leading to hundreds of convictions' annulment on procedural grounds. Kastenberg, *Law in war*, 9-10, 63; Hart, "Military Commissions and the Lieber Code," 58-65. These actions do not resonate with Marvel's claim, in line with the revisionist lineage, that Holt was the "War Department's grand inquisitor," who proved "amenable to [Secretary of War] Stanton's ultimate intentions for the [Bureau] as an agency for the enforcement of political doctrine and the dissemination of partisan propaganda." Marvel, *Lincoln's Autocrat: The Life of Edwin Stanton*, 623.

[46] Witt, *Lincoln's code*, 301.

[47] He describes prior research on *Wirz* as "slovenly." Kastenberg, *Law in war*, 257.

convention. But what did war crimes prosecutions mean for the immediate context of Reconstruction? What was the political interest in "creating the space" for the trials, and why did others fight to close this space?

The revisionists use the term "propaganda" to explain the trials' political utility. In this context, the term subtly pushes one to think that while the law seeks justice and truth, politics weaponizes justice and warps the truth. In its place, I use "didactic function," a term I have lifted from the recent theoretical literature on political trials. The essential drive of this literature is "to dispel the myth that political trials are incompatible with the rule of law."[48] What is important is not *if* trials are political, but *what* politics they serve. One of the first works to argue this was Judith Shklar's *Legalism* (1964).[49] Shklar found most political trials difficult to justify according to a normative evaluation of their immediate goals. However, she took the Nuremberg trials as an exception. Beyond working to eliminate political enemies (which summary executions could have accomplished),[50] Shklar viewed the trials as justified in terms of their revelation of historical facts—which influenced the constitutional framers of the *Bundesrepublik Deutschland*—as well as their role in re-establishing liberal norms in the vacuum left by the National Socialist state.[51]

These last aspects belong to what Lawrence Douglas terms the "didactic" function of war crimes trials: to create a historical record, to locate moral lessons to shape public memory, and to honor victims. More generally,

> Didactic trials are […] charged with the task of actively re-imposing norms into spaces in which rule-based legality has been either radically evacuated or perverted. As a consequence, one of the principal functions of the didactic

---

[48] Jens Meierhenrich and Devin O. Pendas, *Political trials in theory and history* (Cambridge, United Kingdom: Cambridge University Press, 2016), 49-51.
[49] More broadly, Shklar argued that "legalism," the belief that rule-based procedures should resolve all societal conflicts, is itself a political ideology. Shklar, *Legalism*, 1-3, 143-46.
[50] During World War II, Churchill, Roosevelt, and Stalin all entertained the idea of mass summary execution as a way to deal with German leaders. Leon Goldensohn and Robert Gellately, *The Nuremberg Interviews: An American Psychiatrist's Conversations with the Defendants and Witnesses* (Vintage Books, 2005), viii.
[51] Shklar, *Legalism*, 178.

> trial is entirely circular: it is to show that the trial itself can fairly discharge the task assigned to it.[52]

Douglas offers two crucial points for the present study. The first is that, beyond validating or invalidating a court's factual conclusions, it is possible to study the trial as a distinct historiographic process. Whether or not we agree with the narrative that Wirz and the Confederate leadership were barbarous, we can look at the act of creating narratives through what Meierhenrich and Pendas call the "constitutive rules" of the trial—its formal structure, its modes of configuring and contesting evidence.[53] The question of whether these rules are adequate, of whether trials can effectively create historical records, is open to debate. For one, trials deviate from academic history writing in that they must reach a single, authoritative judgment.[54] The political background to these trials adds a whole other dimension. The platform granted the defense to further their own didactic ends—in our case, publicizing pro-Confederate narratives of the war—can undermine the political support necessary to constitute the court in the first place. Aware of this, judges may follow a double standard in what testimony they restrict—as we will see in *Wirz*.

As Meierhenrich et al. point out, Douglas lays out only the liberal conception of the didactic trial, and the above problems belong to this conception. The "show trial" in the Stalinist sense, with fixed outcomes, is another form.[55] The mistake made by many revisionists in depicting *Wirz* as an outright show trial[56] is that, in

---

[52] Lawrence Douglas, "The Didactic Trial: Filtering History and Memory into the Courtroom," *European Review* 14, no. 4 (2006): 514.
[53] Meierhenrich and Pendas, *Political trials*, 42.
[54] Criminal courts also apply definitions of causality and liability that are arguably ill-suited to the interpretation of broad, ambiguous historical processes. See R.A. Wilson, *Writing History in International Criminal Trials* (Cambridge University Press, 2011), 79; Shklar, *Legalism*, 195-7.
[55] Meierhenrich and Pendas, *Political trials*, 54. Gary Bass argues that, historically, this form has only cropped up in illiberal states. In contrast, when prosecuting war crimes, liberal states have generally respected the ground rules of due process. Bass, *Stay the hand of vengeance*, 24-8.
[56] For the most radical expression of the "show trial" accusation among recent revisionists, see Davis, *Ghosts and Shadows*, 192. Some revisionist critiques are more tempered, for example, Laska and Smith, "'Hell and the Devil'."

overstating their critique, they fail to perceive that the fundamental problems posed by *Wirz* do not lie in the distinction between show trial and liberal didactic trial but rather in the contradictions *within* the liberal didactic trial.

One of these contradictions relates to the second key issue brought up by Douglas: the function of the didactic trial to "legitimate itself."[57] In our case, the prosecutors intended to legitimate military tribunals as a legal venue for Southern Reconstruction, an intention which begs the question of what was truly "liberal" under the circumstances. The suspension of *habeas corpus*, or the right of all citizens to appear before a civilian court with a jury, was the initial basis of a prolonged military occupation of the South. Southerners considered this state of exception to be a blatant violation of the American Constitution. On the other hand, from the perspective of the Bureau of Military Justice, the alternative of allowing civilian courts to function without federal intrusion would have meant the restoration of a pre-war status quo: legally-enforced white supremacy.

Here, I cannot attempt to resolve these contradictions. It will suffice to ask: what politics did the trials serve? What politics did the absence of further trials serve? On the pro-trial side, recent scholarship points to the agenda of the Bureau of Military Justice, which resonated with radical Republicans in Congress. For the Bureau, the postwar trials were a logical extension of the project to codify the laws of war and create enforcement mechanisms—a way of saying: we told you these were crimes, now we are treating them as such. In terms of the larger radical agenda, however, the function of the trials took on a second layer of meaning—a way of saying: the South cannot be restored to its previous leaders because of what history proves about their character. The trials were thus a medium to express the necessity of a forceful reorganization of the South as well as the legitimacy of military courts as an instrument to this end. Beyond the issue of war crimes, keeping the system of military courts in place was crucial for the army to fulfill its larger role

[57] Douglas, "The Didactic Trial," 515.

in the postbellum South: protecting blacks and white unionists from violence, supervising elections, and working out labor contract systems to displace slavery.[58]

Opposition to the war crimes trials came from several angles. The first emerged within the military establishment. It took the form of amnesty clauses in the surrender agreements offered by Union generals, who continued to defend these agreements long after they were made.[59] By the time *Wirz* demonstrated that these surrender pacts could not prevent the prosecution of war criminals, Secretary of War Stanton and Judge Advocate General Holt found that they had an enemy in President Johnson, too, who began granting successive waves of pardons and moving to reinstate provisional governments in the South. As part of his battle against Congressional Republicans, Johnson attacked the Bureau of Military Justice. While this attack hindered war crimes prosecutions, its deeper motivations lay in promoting a soft Reconstruction: Johnson envisioned a quick reconciliation and partial emancipation based upon the good faith of Southern elites.[60] In declaring the war over in April of 1866, in the middle of the Gee trial, Johnson tried to pull the rug out from under military jurisdiction in the South.[61] That summer, he replaced Attorney General James Speed, who had been sympathetic to prosecuting former Confederates, with Henry Stanbery, who pushed to restore the power of state-level courts even when it directly undermined Reconstruction.[62]

---

[58] During Reconstruction, over a thousand military commissions took place (most of them in 1865 and '66), around 500 of which related specifically to implementing federal political reforms. Vagts, "Military Commissions," 236, 59.
[59] Kastenberg, *Law in war*, 265-6.
[60] For an overview of Johnson's battle with the Republicans in Congress, see Elizabeth D. Leonard, *Lincoln's avengers: justice, revenge, and reunion after the Civil War*, 1st ed. (New York u.a.: Norton, 2004), 173-91; David W. Blight, *Race and reunion: the Civil War in American memory* (Cambridge, Mass. u.a.: Belknap Press of Harvard Univ. Press, 2001), 44-57.
[61] Witt, *Lincoln's code*, 307-8.
[62] For instance, Stanberry "prevented district Army commanders from removing southern judges who refused to implement federal civil rights statutes invoked by black plaintiffs." Norman W Spaulding, "The Discourse of Law in Time of War: Politics and Professionalism During the Civil War and Reconstruction," *Wm. & Mary L. Rev.* 46 (2004): 2077-9.

Beyond the president and certain generals, another source of effective opposition came from civilian legal authorities—as I show in depth in the section on *Gee*. In April 1866, the Supreme Court ruled in *Ex parte Milligan* that military tribunals were unconstitutional in the state of Indiana.[63] While this decision had no direct bearing on the South,[64] it was a hit to the credibility of military courts and had a dampening effect on future war crimes prosecutions. Norman Spaulding has argued that, after a brief period of acquiescence, the "legal caste" (judges, lawyers, jurists, and professional organizations) turned against martial law in the South.[65] To legal elites, the total restoration of civilian courts seemed necessary in order to uphold the Constitution. At the same time, Spaulding argues, this restoration was an effective way for them to reclaim the influence they had lost during the war, even if came at the cost of undermining federal policies designed to protect freedmen.[66]

The alignment of this constellation of anti-trial forces helps to explain why so few trials took place. As I proceed to handle *Wirz*, *Mercer*, and *Gee* individually—as well as the border case of Pickett—I will show how prosecutors indirectly fought against these various sources of opposition through jurisdictional debates. Likewise, I will show how prosecutors took on their formal adversaries, the defense counsels, in the main proceedings. At these two levels, I will attempt to reconnect the trials to their context, piecing together the meaning they held for early Reconstruction.

THE WIRZ TRIAL

In August of 1863, the agreement in place to facilitate prisoner of war exchanges between the Union and Confederacy broke down over a disagreement regarding black soldiers, whom the Confederates refused to recognize as legitimate

---

[63] Supreme Court Of The United States, *U.S. Reports: Ex parte Milligan, 71 U.S. 4 Wall. 2.* (Library of Congress, 1866), 121-2. https://www.loc.gov/item/usrep071002a/.
[64] It only implied that military courts were unconstitutional in states that did not secede. Justice Davis, who wrote the majority opinion, said in 1867 that there was "not a word said in the opinion about [R]econstruction and the power in conceded in insurrectionary States." Quoted in Spaulding, "The Discourse of Law," Note 8.
[65] *Ibid*, 2080.
[66] Spaulding, "The Discourse of Law," 2073-91.

combatants eligible for exchange.[67] This led to severe overcrowding in Southern POW camps, which led in turn to increasing death rates. This was exacerbated by the collapse of Confederate systems of transport and economic production. The most disastrous example was at Andersonville, Georgia, where roughly 13,000 out of 45,000 Union POWs died, the vast majority of them from scurvy, diarrhea, and dysentery.[68] In the last stages of the war, the assertion circulated in the North that the Confederates had implemented a "deliberate policy of starvation and cruelty," which was seconded by well-publicized reports of the U.S. Sanitary Commission and the Congressional Committee on the Conduct of the War.[69]

This assertion later translated into the first charge at the Wirz trial, which stated that the defendant, "commandant" of Andersonville prison, "fully clothed with authority, and in duty bound to treat, care, and provide for" those prisoners in his custody, conspired with higher officials "to injure the health and destroy the lives of soldiers… to the end that the armies of the United States might be weakened and impaired…."[70] Wirz was found guilty of this charge by the ten Union army officers (seven of them generals; three of them trained lawyers) who sat on the commission.[71] Of the second charge, consisting of 13 counts of murder, either personally committed or ordered, Wirz was found guilty of 10 counts (one of which was mitigated) and not guilty of 3 counts.[72] President Johnson, who sat atop the ladder of military court review, signed off on Wirz's death sentence. The trial began in August 1865 and ended that October. Roughly 140 witnesses testified, including prison guards, POWs, and Confederate and Union officials—recounting day-to-day

---

[67] On whether the breakdown of exchange resulted from this or the fact that non-exchange tended to benefit the Union military, see Witt, *Lincoln's code*, 256-61.
[68] Koerting, "Nineteenth century military law," 60-61.
[69] Bruce Tap, "'These devils are not fit to live on God's earth': War Crimes and the Committee on the Conduct of the War, 1864-1865," *Civil War History* 42, no. 2 (1996): 125-7; Hesseltine, *Civil war prisons*, 197.
[70] *Trial of Henry Wirz*, 3.
[71] The full commission: Maj. Gen. Lew Wallace, Brev. Maj. Gen. John Geary, Brev. Maj. General Lorenzo Thomas, Brev. Maj. Gen. Gershom Mott, Brig. Gen. Francis Fessenden, Brig. Gen. A. S. Bragg, Brev. Brig. Gen. John Ballier, Brev. Col. Thomas Allcock, Lieut. Col. J. H. Stibbs. Koerting, "Nineteenth century military law," 74-84.
[72] *Ibid*, 807.

life in the prison in depth and exploring the potential culpability of various Confederate authorities. It was a colossal media event, as was the execution.[73]

I begin my analysis on *Wirz* by breaking down the jurisdictional debate, which encoded political questions central to Reconstruction such as whether the war was truly over and whether the Confederacy had been a sovereign state. I then move on to the main proceedings. I argue that there is a credible chain of charges-evidence-verdict indicating that the trial was not rigged, regardless of whether, over the ensuing 150 years, many of the prosecution's claims have been debunked by historians. I back up this argument by responding to the allegations of legal foul play made by revisionist historians, gauging the extent to which political commitments warped the proceedings. I clarify what these commitments were by employing the concept of the didactic trial, and conclude by piecing together the message that prosecutors tried to convey by selectively harping on crimes against POWs.

I. Jurisdiction: Breaking the Convention of Immunity

My first goal in analyzing *Wirz* is to understand how the prosecutors overcame the post-war convention of immunity. In this subsection, I show how this convention was dealt with by way of jurisdictional debates. The convention manifested both through Gen. Sherman's surrender terms and through challenges to the court's constitutionality. I argue that constitutional challenges, though valid from a formalistic viewpoint, were an implicit appeal to immunity in that civilian courts were not equipped to hear these cases. A unique set of circumstances allowed federal prosecutors to temporarily overcome these challenges.

I.I. The Defense's Appeal to the Surrender Terms

Conventionally, in wartime, illegal acts by enemy soldiers were to be dealt with by their own authorities in the form of a court-martial.[74] After the end of hostilities, the

---

[73] James Gillespie argues that "Without a doubt...the most decisive act cementing images of Southern barbarity in Northern minds was the trial and execution of Henry Wirz." Gillispie, *Andersonvilles of the North*, 9. For a summary of press coverage during the trial, see Koerting, "Nineteenth century military law," 149-55.

"favored practice in the age of enlightened warfare was to grant amnesty."[75] The convention manifested in the trial itself when the defense counsel, before submitting a plea, argued that the trial was in direct contravention of the Sherman-Johnston surrender deal of 26 April, 1865. According to the deal, in agreeing to surrender, all Confederate soldiers were "permitted to return to their homes, not to be disturbed by the United States authorities so long as they observe their obligation and the laws in force where they may reside."[76] Because Wirz came into custody as result of this deal, the defense counsel claimed, the federal government had broken its promise—an argument later recycled in *Mercer* and *Gee*.[77]

The argument goes back to the surrender deal itself and a rupture between Sherman and factions of the Union leadership who intended to prosecute Confederates.[78] For Gen. Sherman—like many other commanders, including Grant—maintaining the convention of immunity was a point of military honor. In Sherman's case, it also sprung from a political calculation. According to Mark Bradley, Sherman "distrusted the motives of the radical Republican faction in Congress.... [He] believed that the best means of securing a lasting peace was to bypass Reconstruction altogether and let the southern whites determine their own fate."[79] Sherman's agreement to generous terms of surrender, offering amnesty to Confederates regardless of rank, was a first blow to the project of prosecuting war criminals.

The counter-argument of the prosecutor was accepted without comment by the commission. He pointed out that the federal government had quickly repudiated

---

[74] William Winthrop, *Military Law and Precedents*, 2nd ed. (Washington: Gov't Printing Office, 1920), 794. https://archive.org/details/cu31924020024570/; Kastenberg, *Law in war*, 74. Spies were a special exception to this rule: see Stephen C Neff, *Justice in blue and gray: a legal history of the Civil War* (Harvard University Press, 2010), 78-79.
[75] Witt, *Lincoln's code*, 286.
[76] *Trial of Henry Wirz*, 9.
[77] Ford, *The captive*, 16-18; Turner, "Confederate Military Executions," 19.
[78] Jonathan Truman Dorris, *Pardon and amnesty under Lincoln and Johnson; the restoration of the Confederates to their rights and privileges, 1861-1898* (Chapel Hill,: University of North Carolina Press, 1953), 95-99.
[79] Mark Bradley, *Bluecoats and Tar Heels: Soldiers and Civilians in Reconstruction North Carolina* (University Press of Kentucky, 2009), 18.

Sherman's surrender deal as soon as reports of its conditions reached Washington in late April.[80] All the same, Sherman brought the convention of immunity into official terms and thus gave the federal government the appearance of bad faith when it decided to arrest former Confederate soldiers. As we will see in the section on Pickett, this was central to Ulysses Grant's thinking when he worked to prevent further prosecutions over the ensuing year.

I.II. The Defense's Appeal to the Constitution

The defense counsel went on to challenge the tribunal's constitutionality, an issue directly tied to the question of whether or not the war was officially over. The Constitution guarantees that, in the absence of an actual "rebellion or invasion," legal defendants have the right to be tried in a civilian court "by an impartial jury of the state and district wherein the crime shall have been committed."[81] Wirz was being tried in a military court in Washington D.C.; the defense argued he could only be tried in a civilian court in Georgia.[82] While Congress had signed off on Lincoln's suspension of *habeas corpus* in the midst of the war, the argument that this suspension remained valid after hostilities had ended, with civilian courts again in operation, became increasingly difficult to justify. Norton P. Chipman, Wirz's lead prosecutor, acknowledged this: "As we recede from a state of actual war and approach a condition of profound peace, we doubtless travel away from the cornerstone upon which the military commission as a judicial tribunal rests."[83]

Part of the attractiveness of military courts for prosecutors was the way these courts could insulate themselves from meta-concerns. Jurisdiction was contested, but the judges handled it summarily. In *Gee*, during a similar dispute, the commission shot down the defense, arguing "this objection being technical is

---

[80] *Trial of Henry Wirz*, 14. See also Maj. Gen. Wilson's testimony, in which he states that Wirz was arrested under orders from Gen. Thomas (who happened to sit on the military commission) to disregard the Sherman/Johnston armistice: *ibid*, 269-276.
[81] See Art. 1, Sec. 9 and Amendments 5 and 6: "U.S. Constitution." https://www.law.cornell.edu/constitution.
[82] *Trial of Henry Wirz*, 10.
[83] See *Trial of Henry Wirz*, 723-30.

waived, as it is the intention of the Government to try this case upon its merits."[84] At the end of *Wirz*, Judge Advocate General Holt, who oversaw the prosecution, extolled the military commission as a legal forum precisely because it "was [unencumbered] by the technicalities and inevitable embarrassments attending the administration of justice before civil tribunals." Revisionists have pointed to this as a sign of Holt's ill intent.[85] It is true that, from the point of view of the Constitution, the jurisdictional question should have been handled by the Supreme Court. On the other hand, Holt understood that the *habeas corpus* arguments were intended to keep any war crimes proceedings whatsoever from occurring. In Holt's defense of the military commission, he also wrote that these tribunals were indispensable "in cases of which the local criminal courts could not legally take cognizance, or which, by reason of intrinsic defects of machinery, they were incompetent to do so."[86]

The point about cognizance (or subject-matter jurisdiction) must be weighed against claims that these tribunals were unconstitutional. Beyond the Bureau of Military Justice as an organization, the military commission as a venue for trial, and Gen. Orders 100 as a legal code, there was simply no existing infrastructure of criminal law to handle such cases. From a pragmatic standpoint, Holt's argument of "incompetence" is just as important. How could one expect a fair trial in Georgia, in the year 1865, with a Southern judge and jury? The same issue came up in debates over potential treason trials. While civilian courts in formerly Confederate states could unquestionably take legal cognizance of treason, the chance of jury nullification—i.e., of jurors voting to acquit on a purely ideological basis—was

---

[84] Ford, *The captive*, 22. A nearly identical statement was given by the commission in the guerrilla Champ Ferguson's trial when the counsel tried to shield Ferguson with Sherman's surrender terms. Frustrated, the counsel exclaimed, "Has [this court] no discretion lodged in its hands at all? Are you babies on the question of trial and giants on the question of condemnation?" Thurman Sensing, *Champ Ferguson: Confederate Guerilla* (Vanderbilt University Press, 1994), 64, 48.
[85] Rutman, "The War Crimes and Trial of Henry Wirz," 127.
[86] United States War Department, *The war of the rebellion. Official records of the Union and Confederate armies* (Washington: Gov't print, 1880-1901), 3.5, 490-4.

uncomfortably high.[87] These two factors indicate that Holt's argument about the necessity of trying war crimes under military jurisdiction had merit. Indeed, I have seen no reference anywhere to a post-Civil War attempt to bring war crimes charges before a civilian court. It seems rather that if such trials were to take place, they would have happened in a military commission or not at all—in this way, appeals to the Constitution sought obliquely to uphold the convention of immunity.

I.III. Enabling Factors for the Prosecution

Chipman overcame the constitutional challenge with two arguments that were also sustained without comment. The first was simply that the president had not declared the war over, thus the tribunal's jurisdiction came under the umbrella of executive war powers. The second concerned the nature of the charges themselves:

> This prisoner is charged with the perpetration of offences many of them unknown to common law or statute law, they were committed by a belligerent, in his own territory, in the exercise of a commission assigned him by the enemy, and in the execution of the orders of his superiors given in violation of the laws of war. […] We turn then to the code international.[88]

Attorney General James Speed had recently issued an opinion arguing that illegal acts of war could only be tried in military courts. Like Chipman, he argued that such acts belonged to a special category of law to be distinguished from regular criminal codes by the fact that, in an international conflict, commissioned soldiers received the "license of the government to deprive men… of their liberty and lives."[89] Only the laws of war, adjudicated in military courts, dictated the limits of this "license." Here, the laws of war took the form of Gen. Order 100, which accounted for potential defendants beyond Union ranks—in other words, a code of

---

[87] For the alternative of assuring "loyalty" among the jurors, the accusation of jury packing would have been inevitable. See Nicoletti, *Secession on trial*, 146-7.
[88] *Trial of Henry Wirz*, 762.
[89] James Speed, "Military Commissions," in *Official opinions of the Attorneys General of the United States, Vol. 11*, ed. H. Hubley Ashton (Washington D.C.: W. H. & O. H. Morrison, 1869). Speed points to Congress's right to "define and punish…offences against the Law of Nations" to substantiate the notion that international law is constitutionally enshrined. See "U.S. Constitution," Article I, Section VIII, Clause X.

discipline for enemy soldiers.[90] Francis Lieber, its principal author, had anticipated a post-war situation in which no Confederate authority existed to court-martial its own soldiers. Article 59 states that "A prisoner of war remains answerable for his crimes committed against the captor's army or people, committed before he was captured, and has not been punished by his own authorities."[91]

What enabled Gen. Order 100's break from the convention of post-war immunity was the way it handled the issue of Confederate statehood. On the one hand, the Union had recognized the war as an international conflict, implying that the commission of a Confederate "belligerent" derived from an independent state authority. But the Union prefaced its recognition of Confederate statehood as a mere gesture to facilitate humane wartime conduct.[92] According to Gen. Order 100, Art. 153, dealing with the Confederate States as a belligerent power "neither proves nor establishes an acknowledgment of the rebellious people, or of the government which they may have erected, as a public or sovereign power."[93]

The legal frame of international warfare was necessary to fix the charges. Wirz would be tried as a commissioned fighter in a nominally state-to-state conflict under the law of nations; on the other hand, the opposing state—or the "so-called Confederate States" in the language of the charges—was merely a legal fiction that outlined Wirz's responsibilities as a commissioned fighter. What kept this fiction in place was the fact that, officially, the war was still in progress. In Chipman's words: "The spirit of rebellion is still rampant…. The war is not over…. The whole policy of the government towards the southern States sustains this idea."[94] A war, but without a formal opponent. This was the notion underpinning not only war crimes

---

[90] Confederates did not see Gen. Orders 100 as binding, but they were at least aware of it and familiar with its terms. In terms of POW treatment, Gen. Orders 100 merely codified well-established customs. Paul Finkelman, "Francis Lieber and the Modern Law of War," *The University of Chicago Law Review* Vol. 80, No. 4 (2013): 2104-7, 25.
[91] "General Orders No. 100: The Lieber Code," *The Avalon Project* (1863). http://avalon.law.yale.edu/19th_century/lieber.asp#art154. Art. 59 was invoked explicitly in *Gee* by the judges in their jurisdictional ruling: Ford, *The captive*, 21.
[92] Nicoletti, *Secession on trial*, 254-60.
[93] "Gen. Orders No. 100."
[94] *Trial of Henry Wirz*, 729.

tribunals but radical Reconstruction generally—extending the state of war beyond the end of open hostilities to authorize martial enforcement of federal reforms.[95]

II. The Didactic Function of *Wirz*

My second goal in analyzing *Wirz* is to understand his prosecution in terms of its perceived political utility for Reconstruction. To do this, I apply the concept of the didactic trial. As Kastenberg points out, Wirz was chosen both because his alleged crimes were symbolically potent and because the case against him was strong: he could be tried fairly and still, with a high degree of confidence, be found guilty.[96] Similarly, I argue that the prosecution can be understood on two didactic levels. The first concerned the public demonstration of due process, i.e., how *Wirz* legitimated the military commission as a legal venue.[97] The other concerned the specific charges against Wirz and the revelations that were intended to wreck the "moral standing" of the Confederacy, to use Kastenberg's phrase.[98] In *Wirz*, the prosecution tried to show not only that the Confederates had abandoned the laws of war, but that their actions necessitated the forceful imposition of enlightened norms across the South—and that the form of imposition should be the military commission.

I start this section by evaluating the evidence brought forward against Wirz, concluding that the most feasible explanation for his guilty verdict was the strength of incriminating witness testimony. In line with the didactic goal of showcasing due process, I find that the prosecutor and judges made a credible effort to keep the proceedings above-board, openly addressing and reacting to allegations of bias and corruption made by the defense. Next, I consider the prosecutors' other didactic goal of discrediting the Confederate leadership. I evaluate their choice to broaden the investigation beyond Wirz's personal culpability, arguing that this aspect of the proceedings opened up the trial to forms of structural bias that—even if they did not

---

[95] On the "conquest theory" of Reconstruction: Nicoletti, *Secession on trial*, 9-10.
[96] Kastenberg, *Law in war*, 257-8.
[97] Koerting writes, "The Wirz trial became the means whereby Holt...could vindicate their use of military tribunals once and for all in northern circles." Koerting, "Nineteenth century military law," 50.
[98] Kastenberg, *Law in war*, 257-8.

determine Wirz's fate—weakened the trial's appearance of fairness. I conclude by explaining prosecutors' specific choice of the POW disaster as the emphasis of this inquiry against alternatives such as racial crimes.

II.I. The Basis of Wirz's Conviction

A central impediment to reconstructing *Wirz* is the absence of an opinion or any official statement of the reasoning behind the verdict. For charge 2 and its 13 specified counts of murder, each guilty and not guilty finding can traced back with some confidence to specific testimonies. It is far more difficult for the first charge, which alleges a "conspiracy" with other officials. If this were broken down into "specifications" like charge 2, with individual acts of cruelty and neglect, we might trace the logic of the finding more clearly, but no specifications are given.[99]

A guilty verdict for charge 1 is also ambiguous in that no co-conspirators were on trial. The commission clearly ruled that Wirz himself neglected prisoners in a systematic and criminal way; did it also "rule" on the existence of a broader conspiracy? The answer lies in the fact that by design, "in addition to sitting as a trial court, [the military commission] also served as a fact-finding investigation."[100] Only Wirz was on trial; potential co-conspirators were merely investigated in the same process. Listing other officials in the verdict was akin to suggesting future indictments based upon any incriminating revelations. In this case, the judges' suggestions were not heeded, as none of Wirz's superiors were ultimately indicted.

The split structure of trial court and fact-finding investigation opened the door to a number of potential biases, which I will attend to below. Here I am concerned with the verdict itself, which was binding insofar as it concerned Wirz personally. The issue that prosecutors faced in defining Wirz's personal charges was

---

[99] As it was read in court when Wirz gave his plea, the first charge laid out how Wirz installed a system of "cruel, unusual, and infamous punishment upon slight, trivial, and fictitious pretenses" and how he "wilfully and maliciously neglect[ed] to" promptly remove dead bodies or to provide shelter, clean water, and medical treatment, listing mortality estimates for each form of punishment and neglect. However, before the commission announced its guilty verdict at the end of the trial, the charge had been cut down to a single paragraph. *Trial of Henry Wirz*, 3-5, 807.
[100] Kastenberg, *Law in war*, 60-1.

that the underlying cause of the alleged crimes was systemic. Guilt could be not assessed as one would assess the commission of a murder or theft; it had to account for various individuals' agency within the Confederate system of POW detainment, including their responsibility to prevent or punish the misbehavior of inferiors. If we consider charge 1 an embryonic form of "command responsibility"[101]—as a way of assessing Wirz's actions within an organizational structure—there remains a clear correspondence between the verdict and evidence of criminal negligence within a Wirz-sized frame of authority.

Most of the success of the defense regarding charge 1 was to limit this frame of authority. Multiple doctors testified, for instance, that Wirz had little to do with the operation of the hospital, a key site of alleged mistreatment.[102] He was furthermore shown to have very little power over obtaining supplies, and the ranking officer at the fort adjacent to the prison testified that Wirz was in no way responsible for overcrowding.[103] The closing argument argued that Wirz should not be punished for the "rash, wicked, or imprudent expressions of" superiors who hinted at a conspiracy, nor for "the motives which dictated [his] orders."[104]

In the end, this defense was insufficient. Wirz's authority at Andersonville centered on prison discipline. On this issue, the prosecution delivered. Beyond confinement, punishing POWs (even for attempting to escape) was generally seen as a breach of the customs of warfare.[105] At Andersonville there was a "deadline," a marked perimeter beyond which prisoners were told they could not pass. As the

---

[101] The judge advocate defined command responsibility broadly: those "sufficiently high in authority to have prevented these atrocities, and to whom the knowledge of them was brought," were culpable, as were inferiors who followed illegal orders *Trial of Henry Wirz*, 751, 73. Unfortunately, there is no record of whether the commission accepted his definition. On the 20th century development of the concept of command responsibility, see Matthew Lippman, "The evolution and scope of command responsibility," *Leiden journal of international law* 13, no. 1 (2000).
[102] *Trial of Henry Wirz*, 27-37, 81-85.
[103] *Ibid*, 99-104, 221-2, 455-66.
[104] *Ibid*, starting at 704. For a summary of the defense: Witt, *Lincoln's code*, 299-300.
[105] See H. W. Halleck, *International law, or, Rules regulating the intercourse of states in peace and war* (San Francisco: H.H. Bancroft, 1861), 430; "Gen. Orders No. 100," Art. 56.

prosecutor stated, such a line was "not a crime in itself"; it was rather "the recklessness of the enforcement" of the line, which Wirz oversaw.[106] Nearly two-dozen witnesses, some presenting notes written during their internment, testified to guards shooting inmates arbitrarily, often for reaching over the line to get water or food.[107] In no case was Wirz shown to discipline these guards.[108] Furthermore, though Wirz was not in control of fixing the daily rations, he could withhold them as a form of discipline, something he did for trivial offenses and on a few occasions for the whole camp, which was suffering already from malnutrition.[109] Many testified to other undue punishments, some of them resembling torture.[110] Several witnesses also testified to Wirz ordering black POWs to be whipped for refusing to work.[111]

In addition to all this, a number of witnesses testified to non-lethal beatings by Wirz himself.[112] This strengthened the prosecution's portrait of Wirz as a man capable of the 13 individual murders specified in charge 2. Two were allegedly beaten to death and three shot to death by Wirz himself. On Wirz's orders, three were allegedly shot to death, one mauled to death by bloodhounds during escape,

---

[106] *Trial of Henry Wirz*, 766. That Wirz was in control of prison discipline, see testimony of Persons. *Ibid*, refer to index.

[107] See the testimonies of R. Kellogg, J. Brown, Spring, Huneycutt, O.S. Belcher, T. Hall, Clancy, N. Clark, Halley, E. Kellogg, Bussinger, Merton, L.S. Pond, Bradley, De la Baum, J. B. Walker; J. Everett Alden; Corrigan, C. Williams, P. Tracy, Crouse, J. Marshall, H. Lull, Orcott, A.G. Blair, S. Riker, T. Walsh, W. B. Francis, J. A. Cain, and W. Crandall. *Ibid*, refer to index.

[108] Because inmates bathed in the same river they drank from, reaching over the deadline was often necessary to get clean water. This made the issue particularly scandalous. During the proceedings, the presiding judge actually made a sketch of a man shot reaching for water. "The Art of Lew Wallace: Over the Deadline," *General Lew Wallace Study & Museum*. https://www.ben-hur.com/the-art-of-lew-wallace-over-the-deadline/. See also Finkelman, "Francis Lieber," 2126.

[109] See e.g. the testimony of W. D. Hammack, a prison guard. *Trial of Henry Wirz*, refer to index..

[110] On undue punishment, see the testimonies of Way, Goldsmith (a clerk for Wirz), and S. Smith (a Confederate captain). *Ibid*, refer to index.

[111] See the testimonies of Spring, Merton, Maddox, Dyer, and in particular of Jennings and J. Fisher, who were personally whipped. A white POW was also whipped for trying to escape in blackface. See the testimonies of Huneycutt, Bardo, and Maddox. *Ibid*, refer to index.

[112] See the testimonies of Mundey, Heath, Dr. Castlen, Clancy, Achuff, Adler, Bradley, O'Hare; R. Tate; W. B. Francis, and W. W. Scott. *Trial of Henry Wirz*, refer to index.

and three killed by cruel punishments.[113] These were murders according to the laws of war, not a domestic criminal code; as such, the prosecutor had to show not only that the victim was killed but that it was not a result of reasonable prison discipline.

On ten counts, the judge found that Wirz was responsible for the alleged murder. The revisionists, following the defense counsel, are right to stress that usually (though not always) only one eyewitness could testify to each murder,[114] that they could only vaguely recall its time and place, and that out of them all, only one could identify the victim's name.[115] Yet no revisionist has tried to account for the three not guilty findings—if they are mentioned at all.[116] Nor has any mentioned the mitigation of one of the more controversial charges, that Wirz ordered a man to be killed by dogs, something emphasized in the defense's closing argument.[117] It appears likely, furthermore, that the defense was instrumental in at least one of the not guilty findings: specification 13, for pistol-whipping a POW.[118] The defense had multiple expert witnesses testify that damage to both of Wirz's arms was serious enough to have prevented such a brutal beating.[119] In short, while the judges were

---

[113] *Ibid*, 6-8.

[114] In attempting to link counts of murder to specific testimonies, I concluded that spec. 1 refers to either De la Baum or Conway; 2 to Hogeln; 3 to Gray or Snee; 5 to N. Allen (not certain); 6 to Kennel; spec. 7 to eight different witnesses (see *ibid*, 792); spec. 8 to several witnesses (see Wirz's own version about "Chickamauga" in closing statement: *ibid*, 710); 9 to Adler or Achuff; 12 to J. D. Brown. *Ibid*, refer to index.

[115] Chipman responded to this criticism by arguing that, under such extreme hardship, the POWs could hardly be expected to recall all the details. *Ibid,* 786-7.

[116] Marvel writes that the "court found him guilty on all counts." Laska and Smith mention the not guilty findings without commentary, as does Hesseltine. Marvel, *The Last Depot*, 246; Laska and Smith, "'Hell and the Devil'," 127; Hesseltine, *Civil war prisons*, 244-5.

[117] The commission struck out the words "incite and urge" (leaving "cause") as well as "encouragement and instigation" (leaving "knowledge"). *Trial of Henry Wirz*, 807.

[118] Spec. 4 may have been based on the testimony of Davidson, which Chipman advised the judges to disregard (*ibid,* 743). While the defense's cross-exam of Davidson was quite effective (*ibid*, 140-7), it is unclear whether this prompted Chipman's advice. The other two not guilty charges are dated August 3 and 20. Wirz was revealed to have been away for a couple weeks on sick leave in August (see the testimonies of Col. Fannin and Moesner: *ibid*, refer to index), but it is again unclear whether this revelation affected the not guilty rulings.

[119] See testimonies of Dr. G. G. Roy, Dr. Ford, and Dr. Bates. *Ibid*, refer to index.

generous in accepting vague POW testimony for the prosecution, they remained receptive to counter-evidence presented by the defense, discrediting roughly a quarter of the murder allegations in their verdict.

II.II. Allegations of Foul Play

Here I will review the weightiest allegations of unfairness levied against the judges and prosecutor: that of coordinated perjury, tacit collaboration between the prosecutor (also called the "judge advocate") and the judges (the "commission"), and intimidation of defense witnesses. Revisionist historians of *Wirz*, building upon allegations made by the defense counsel, have pointed to these as the basis of the verdict—a conclusion that does not sit well with the trial transcript.

There is evidence that a number of prosecution witnesses, in particular former prisoners of war, were untruthful on the stand.[120] It is important to note that military commissions, structured around the rules pertaining to courts-martial, were designed for the practicalities of martial law and warfare. The loosening of procedural rules—for instance, the judges' ability to alter dates in the original charges to fit the testimony—and reliance on notions of military honor made the court particularly vulnerable to shaky eyewitness testimony.[121] There is little existing evidence, however, that perjury was committed at the behest of the prosecutor.[122] In fact, the issue of perjury was addressed explicitly in the

---

[120] *The Last Depot* systematically debunks the veracity of many of these testimonies. For a sample of Marvel's method, see Marvel, *The Last Depot*, endnote 50.

[121] William Winthrop, a contemporary authority on military law, writes on military commissions that "Where essential…these rules and principles [of law and evidence] will be liberally construed and applied." Winthrop, *Military Law and Precedents*, 841-2. See also Koerting, "Nineteenth century military law," 122, 69.

[122] William Marvel has assembled the most concrete evidence, which only amounts to several suspicious incidents. Marvel refers with scant citation to rewards of cash and pardons for suggesting "compliant witnesses" who lived near Andersonville. Marvel, *Lincoln's Autocrat: The Life of Edwin Stanton*, 965; Marvel, *The Last Depot*, 244. He mentions that Ambrose Spencer, a witness, was offered a job working for the prosecutor; and that another, Felix de la Baum, who perjured, was scooped from the custody of a provost marshal for desertion and was never remanded (*ibid*, 243-4). Kastenberg admits that revelations about de la Baum undermined the court's

proceedings. The defense counsel at one point tried to retroactively impeach a witness after it came out that he had admitted his dishonesty to another witness. The court reacted by offering a subpoena to call him back to the stand.[123]

More broadly, *Wirz* revisionists claim that the judges tacitly collaborated with the prosecutor to undermine the defense. Laska and Smith write of the "intimate 'old boy' relationship which existed between the prosecution and the members of the military commission."[124] Marvel points to "insurmountable bias" in the commission's rulings and holds that the presiding judge "convicted the defendant in his own mind at the start of the trial."[125] All these points serve a greater argumentative scheme that derives the judicial result from political directives. In this way, revisionist works obscure the paradox at the heart of bona fide war crimes trials: that politicians, in a peculiar form of pursuing power, actually divest their power over the fate of the prisoner by investing it in a legal body.

It is true that, particularly in the second half of the trial, the judge advocate and the commission expressed a shared annoyance at the defense counsel, who increasingly relied on delay tactics.[126] This reflected an ultimately overwhelming tendency for the judges to overrule the objections of the defense and to sustain those of the prosecutor,[127] with an arguable double standard on allowing hearsay.[128]

---

appearance of legitimacy, but counters that the state's case was "strong enough that [de la Baum's] testimony was unnecessary." Kastenberg, *Law in war*, 259.

[123] See portions on Alcoke in *Trial of Henry Wirz*, 557-85.

[124] Laska and Smith, "'Hell and the Devil'," 106-7.

[125] Marvel points to a private letter by the judge—quoted by many revisionists—in which he contemptuously describes Wirz's physical appearance. Gail Stephens has shown that Marvel's conclusions are based on a misreading of the letter. Marvel, *The Last Depot*, 245; Gail Stephens, *Shadow of Shiloh: Major General Lew Wallace in the Civil War* (Indiana Historical Society, 2010), 226-7.

[126] Judge Advocate Chipman called the defense counsel "puerile" and one of the judges called his behavior "unendurable." *Trial of Henry Wirz*, 608, 90.

[127] By my count, rulings favored the prosecutor 57 to 12. The imbalance partially reflects the fact that the counsel, unfamiliar with the rules of military courts, repeatedly raised objections although the court had formally ruled against him in similar instances. Hasian, *In the name of necessity*, 127-8.

[128] During defense examinations, when the judge advocate objected to hearsay, the court would ask under what circumstances the witness had heard the information (e.g. at *Trial of Henry Wirz*, 592.) or sometimes sustain it outright (e.g. at *ibid*, 459);

Still, one should note that in the first weeks of the trial (the first 20 objections), the judges ruled about equally in favor of both sides,[129] and there were numerous occasions throughout the trial of clear discordance between the judge advocate and the commission.[130] One should also recognize that the defense exerted real power in the courtroom. As discussed above, in terms of charge 1, there were several major allegations that the defense quite conclusively debunked, and the activity of the defense was likely pivotal in the three not-guilty findings and the mitigation of the dog-related specification. At several points, the commission also took note when the counsel effectively weakened testimony through cross-examination.[131]

There is still the allegation of witness intimidation to contend with—that the defense was kept from examining key witnesses. Many revisionists point to a private under Wirz's command named James Duncan who was arrested mid-trial for alleged violations committed at Andersonville.[132] Incredibly, no one has noted that, in direct contravention of the judge advocate's argument, the judges offered to call Duncan to the stand for the defense.[133] All the same, it could be claimed that the arrest had a dampening effect on other witnesses on the fence about whether to make an appearance. This was argued by the defense counsel, who stated generally that defense witnesses came "under peculiar circumstances" where they felt obliged to make a good impression on the government. The judge advocate, taking these words to insinuate witness tampering, called for a full investigation to clear the

---

generally, the commission would flatly overrule similar objections by counsel during the prosecutors' examinations (e.g. at *ibid*, 652).

[129] See, for example, the effective cross-examination of Col. Gibbs by the defense, which the judge advocate unsuccessfully objected to. *Trial of Henry Wirz*, 20-27.

[130] See instances of discord at *ibid*, 150, 411-413, 423-25, 580, and 691.

[131] The defense's cross-examination of Alcoke, the sole witness of a murder, led to a question by a judge about a factual contradiction. During the defense's cross-examination of an officer POW, the court acknowledged contradictions within his testimony about a man dying in the stocks. *Trial of Henry Wirz*, 216, 60-69.

[132] E.g., Rutman, "The War Crimes and Trial of Henry Wirz," 125-6.

[133] The presiding judge stated, "In respect to Duncan, I do not see any objection to his appearing as a witness for the prisoner." The defense never followed up on the offer. *Trial of Henry Wirz*, 615-18.

prosecution of any misconduct, indicating a desire to keep the proceedings above-board. The counsel refused to give any names of witnesses who had complained.[134]

The counsel's complaint about witness intimidation similarly applies to Judge Advocate Chipman's harsh, openly partisan cross-examinations of defense witnesses in which he questioned their loyalty to the Union—for the most part tolerated by the judges.[135] It also applies to the requirement in the procedural rules (drafted specifically for the Lincoln assassins' trial and *Wirz*) requiring the defense counsel to take a special loyalty oath.[136] While these actions do not constitute outright misconduct on the part of the judges or prosecutor, they do indicate the depth of influence that the charged political environment surrounding the trial had on its actual proceedings. In the following subsection, I will probe the extent to which this influence damaged the trial's appearance of even-handedness.

II.III. Bias in the Conspiracy Investigation

The military commission's functional split between trial court (for Wirz alone) and fact-finding investigation (implicating higher Confederate officials) inflated the political relevance of the proceedings and helped it become a media sensation. The functional split was largely a product of how charge 1 (conspiracy) was framed, and though it was permitted by the procedural rules for such commissions, it opened the door to certain biases that weigh heavily on any evaluation of the trial's legitimacy.

As discussed above, the conspiracy charge was poorly defined. While this appears to have been a problem of conceptual clarity as opposed to a tacit strategy for assuring conviction, one would be right to criticize the prosecutor and judges for failing to erect a proper barrier between the investigation of the defendant individually and the court's broader probe. We do not know if the judges ultimately

---

[134] *Ibid*, 265, 701.
[135] See the cross-examinations of Guscetti and Harris, both of whom had apparently published articles in a Democrat-leaning newspaper: *Ibid*, 520-528, 549.
[136] *Trial of Henry Wirz*, 6-7. On Stanton's role in implementing this rule: Walter Stahr, *Stanton: Lincoln's war secretary* (Simon and Schuster, 2017), 439.

followed Judge Advocate Chipman's definition of conspiracy,[137] which seemed to imply that incriminating evidence revealed in the trial about higher officials could add to Wirz's guilt by mere association. While nothing akin to an explicit conspiracy to murder POWs was uncovered, evidence did surface that top officials looked the other way when internal complaints made their way up the chain of command.[138] If the judges did accept Chipman's definition, one could argue that it constituted a violation of Wirz's due process rights.[139] On the other hand, it is unlikely that this element of "guilt by association" had much of an impact on the guilty finding. There was an abundance of evidence against Wirz pertaining to his own level of authority.

There is a related factor of bias to consider here. As indicated by the measures taken to assure that the defense counsel and witnesses were loyal to the Union,[140] the prosecutors were highly anxious about the potential for pro-Confederate operatives to testify. A unique procedural rule of military commissions opened up the potential for this anxiety to translate into legal bias: Judge advocates had the authority to issue subpoenas for prosecution and defense witnesses, something unthinkable for prosecutors in civilian proceedings.[141] Revisionists have

---

[137] According to his definition, Chipman stated that whatever was done by one conspirator was "the declaration or act of all the other parties to the conspiracy." Yet he also argued mid-trial that the defense did not have the right to counter testimony without direct bearing on Wirz. Counsel responded a few days later by asking Chipman to formally declare that what concerned other co-conspirators would not incriminate Wirz. Chipman refused. The judges gave no ruling or clarification of the counsel's role in this regard. *Trial of Henry Wirz*, 750, 411-3, 40-1.

[138] For testimony in *Wirz* that Confederate officials knew about the situation at Andersonville and failed to act, possibly shielding Gen. Winder, who oversaw the prison system, from internal complaints, see: *ibid*, 219-20, 224-7, 230, 239-250, 309-11, 416-422.

[139] On "guilt by association," see Steven R Morrison, "Relational Criminal Liability," *Fla. St. UL Rev.* 44 (2016): 7-9.

[140] See *supra* notes 135 and 136.

[141] Another prosecution-friendly peculiarity of military commissions was that, in the absence of counsel, judge advocates were required to fill in and argue both sides. Vagts, "Military Commissions," 263-4. Revisionists have pointed to this as another form of bias against Wirz. Over the course of the trial, the counsel did withdraw at several points, but this never led to a situation where Judge Advocate Chipman meaningfully took over the defense. Chipman deliberately tried to distance himself from any responsibility to the defendant. See *Trial of Henry Wirz*, 594.

argued that Chipman abused this power by refusing to subpoena key defense witnesses. They do not mention, however, that the issue was brought up openly in the proceedings. Upon the complaint of the defense counsel, Chipman summarized to the commission the few exceptions he made to the subpoenas requested by the defense then submitted these exceptions to review by the commission.[142]

Those he refused to subpoena included Gen. Robert E. Lee and several other high-ranking Confederate officials. Robert Ould, the Confederate commissioner of prisoner exchange, initially received a subpoena that Chipman subsequently revoked. Wirz's counsel responded that these witnesses were no longer necessary for the defense,[143] and Kastenberg has noted that "Ould's testimony would not [have undermined] the government's case against Wirz at any rate."[144] Ould would have provided evidence of the South's inability to feed its own troops[145] and blamed the breakdown of prisoner exchanges on the Union government.[146] Similar points would have been underscored by Lee and the others whom Chipman refused to subpoena. Like Ould, they had no information to offer about Wirz himself—only evidence suggesting that a conspiracy to kill POWs was not a part of Confederate policy.[147]

---

[142] *Trial of Henry Wirz*, 615-8.
[143] *Ibid*, 730.
[144] Kastenberg, *Law in war*, 259.
[145] Evidence of the collapse of the Southern economy and infrastructure was already underscored by other witnesses, as Chipman pointed out: *Trial of Henry Wirz*, 728-30.. See the testimony of Lieut. Col. Ruffin: *ibid*, refer to index.
[146] For a first-hand account of Ould's attempted testimony, including his own retelling of the prisoner exchange breakdown, which virtually omits the issue of race, see Robert Ould, "Judge Ould's Vindication of the Confederate Government," *Southern Historical Society Papers* 1 (1878). https://en.wikisource.org/wiki/Southern_Historical_Society_Papers/Volume_01/March/Judge_Ould%27s_Vindication_of_the_Confederate_Government.
[147] The judges gave no opinion as to whether witnesses such as Ould rightfully kept out of court. However, at another point in the trial, they did sustain an objection by Chipman when he argued that exploring the causes of the prisoner breakdown was irrelevant to Wirz's personal guilt. *Trial of Henry Wirz*, 691. Counsel had recently led one witness to testify that the POWs at Andersonville blamed the breakdown of prison exchanges on their own government and hoped for McClellan to be elected in fall 1864. *Ibid*, 640-3. See a related exchange at *Ibid*, 696.

One cannot detach Chipman's decision to revoke Ould's subpoena from the political circumstances of the trial: allowing him to testify would have meant handing a high-profile ex-Confederate the chance to voice anti-Union polemics in the national press. This quandary was perhaps inescapable—but only because the prosecution had broadened the scope of inquiry so far beyond Wirz's personal culpability in an effort to expand and manipulate the trial's publicity. Norton P. Chipman later wrote that he and Joseph Holt saw the trial as "the means of bringing to light and giving the history and the whole truth as to this prison, and not simply to submit evidence to convict Wirz."[148] Holt himself praised the historical function of the trial, stating shortly after *Wirz* that "No other species of tribunal" could offer the "freedom of view and inquiry" to prevent "one of the most important chapters in the annals of the rebellion" from being "lost to history."[149]

It is true that, in terms of its procedural structure, the military commission was better suited to exploring the deeper causes of what happened at Andersonville than a regular jury trial.[150] But the active and visible suppression of counter-narratives—steering the investigation away from Union leaders' role in the POW crisis—lent an unsavory element to Holt's praise of the commission, one that likely undermined the prosecution's didactic goal of showcasing legal fairness.

II.IV. The POW Crisis as Didactic Focus

All three trials discussed in this thesis, as well as the near-trial of Gen. Pickett, concerned the treatment of Union POWs, and a memo by Holt shortly after the Wirz trial pointed to eighteen more specifically POW-related crimes that he intended to prosecute.[151] The simplest explanation for this emphasis is the level of public outrage at the time about the death rates in the camps, a point stressed by revisionist historians. In this section, I will build on this explanation by showing how the narrative pushed by the prosecution, in exploiting outrage over the POW

---

[148] Norton Parker Chipman, *The Tragedy of Andersonville* (Digital Scanning Inc, 2004), 27-30.
[149] Department, *Official records*, 3.5, 490-4.
[150] See *supra* note 100.
[151] Department, *Official records*, 2.7, 782-3.

disaster, tried to keep the message palatable by emphasizing white-on-white crimes and playing down the disaster's connection to racial issues.

The immediate context of these war crimes trials was the battle over Reconstruction. Those leading the prosecutions were pushing for the military enforcement of freedmen's rights in the face of Southern and Northern Democratic opposition. In a recent lecture, Michael Vorenberg has argued that, in line with this intention, the "crime of slavery" was on trial in *Wirz*—at least indirectly.[152] He is the first to argue this, and it is worth exploring the extent to which slavery was in fact emphasized in the proceedings.

The prosecutors brought up the issue of whipping black POWs and forcing them to work. They put black witnesses on the stand, which, theoretically, if the trial had occurred in a civilian court in the South, would not have been possible without forceful intervention.[153] Still, I hesitate to emphasize the racial side of *Wirz* to the extent that Vorenberg does. One of his major arguments is that the prosecution seized on the issue of unleashing catch dogs on POW escapees so as to invoke the image of runaway slaves.[154] But in this case, as in general, the outrage was only indirectly about black victimhood. In selecting the narrative focus of the POW camps, the point that prosecutors sought to drive home was that Confederates had stooped to crimes against other whites—in this case, that they would treat fellow whites as badly as they would treat slaves. As an official reproduction of excerpts from the transcript later summarized, Andersonville represented the "...fruits of a system of human slavery which trained its devotees to acts of cruelty."[155]

---

[152] Michael Vorenberg, "Judgment at Washington: Lew Wallace, Henry Wirz, and the Elusive Quest to End the Civil War" (paper presented at the conference, A Just and Lasting Peace: Ending the Civil War, Washington D.C., 2014).

[153] Vagts points out that in early Reconstruction, the presence of black jurors in civilian courts depended on whether Republican or Democratic regimes prevailed. Furthermore, testimony by black people was as a rule inadmissible in the South; it was only legally—not to say practically—guaranteed with the passing of the Civil Rights Act of 1866. Vagts, "Military Commissions," 264.

[154] Vorenberg, "Judgement at Washington."

[155] *Report on the treatment of prisoners of war by the rebel authorities during the War of the Rebellion*, (Washington: Govt. Printing Office, 1869), 5-8. William Lloyd Garrison, in his commentary on the Wirz trial, similarly wrote that "Confederate

In defending Wirz's use of dogs to track down POWs, the counsel pointed to a ruling by Justice Lumpkin of the Georgian Supreme Court in favor of such practices for returning escaped slaves and convicts. The prosecutor responded first that POWs were neither slaves nor convicts, and second that local law was irrelevant in a case governed by international law.[156] "Whatever the peculiar forms or rights of this or that government," he later stated, "its subjects acquire no control or power other than is sanctioned by the great tribunal of nations…."[157] In this way, the prosecutor associated himself with the "the rules of enlightened civilization," as he called them, contrasting "civilization" to the Confederate South as a kind of backwards province. Lumpkin's ruling, he argued, "is another evidence of the extent to which a naturally strong mind may be warped and turned from a strict view of justice when compelled to square it with a system of slavery."[158]

This is one of the few instances in the trial where Chipman actually invoked the word "slavery" or the issue of race. In his closing statement, Chipman argued that the crimes in question were "the work of treason, the legitimate result of that sum of all villanies, and which, by many, very many, proofs during the past four years, has shown itself capable of this last one developed."[159] Chipman identified treason, the betrayal of national loyalty, as the root historical cause of crimes of Andersonville, not slavery. That he worked to prevent an exploration of the prisoner exchange breakdown—officially, a measure by the Union to protect black soldiers—underlines this point. We can ultimately attribute this to the fact that the decision to stop exchanges for the sake of black soldiers was an "extraordinarily unpopular policy" among voting whites in the North, the prosecution's foremost intended

---

leaders had transferred their usual inhumane treatment of slaves to the captured enemy…." Koerting, "Nineteenth century military law," 194.

[156] *Trial of Henry Wirz*, 492, 771-2.

[157] *Ibid*, 762.

[158] *Ibid,* 771-2.

[159] *Ibid*, 749.

audience.[160] Witt contends that "in 1865 and 1866, prosecuting high Confederate officials for crimes against black Union soldiers" was "politically implausible."[161]

Among the many risks that didactic trials such as *Wirz* entailed for the prosecuting party, here the federal government, there was the risk that, even if the trial went according to plan, the prosecutors could miscalculate by choosing a narrative that did not resonate with the public—or that was misinterpreted altogether.[162] Prosecutors may have feared that the white voting public in the North would be indifferent or even resent an emphasis on white-on-black crime. They may have feared such trials would incite race riots in the South such as those which broke out in New Orleans and Memphis the following year.[163]

These are all hypotheses to be left to further research. My point is that, even when the chance of conviction was high, bringing alleged war criminals to court entailed a set of considerable risks for the prosecuting party. These risks served to limit the scope of crimes considered politically expedient and to inspire doubt among the prosecutors' supporters. This lowered the bar for opponents to prevent their work altogether, as demonstrated by the case of Gen. Pickett. If we ask why so few war crimes trials took place, the near-trial of Pickett holds out answers.

THE NEAR-TRIAL OF PICKETT

As the Wirz trial came to a close in October 1865, a board of inquiry led by U.S. army officers opened an investigation into the execution of nearly two dozen Union soldiers on the orders of Confederate Major Gen. George Pickett.[164] The object of the

---

[160] Witt, *Lincoln's code*, 256. Since the 1864 elections, Republicans had played down the racial aspect of POW exchanges. According to Neely, they "didn't want to raise an issue of putting white prisoners at risk for the sake of black ones." Mark E Neely, *The Civil War and the limits of destruction* (Harvard University Press, 2007), 188.
[161] Witt, *Lincoln's code*, 320.
[162] In the case of treason prosecutions, for instance, Charles Sumner doubted their didactic efficacy: the punishment of a few elites, he thought, might lead the public to think that Reconstruction was unnecessary. Nicoletti, *Secession on trial*, 198.
[163] Witt, *Lincoln's code*, 314.
[164] The following analysis is based on two documents assembled by the Adjutant General's Office in response to House resolutions demanding updates on Pickett's prosecution: "Executive Doc. 98: Letter from the Secretary of War, in answer to

board was to decide whether Pickett should be indicted for war crimes. The executed men in question had been court-martialed in February and March of the previous year by the Confederate army in North Carolina and sentenced to hang as turncoats, that is, soldiers who deserted to join Union ranks. Sources claimed to the contrary that many of these men were never officially enlisted in the Confederate army; that they were POWs tried and punished illegally; that some were hung naked in public; and that some of their widows were persecuted and robbed. The board finished its investigation in November and came to the following conclusion:

> The object... perpetrated on the part of the leaders, was to terrify the loyal people of North Carolina, to make them subservient to their foul scheme of rebellion, and to bring contempt upon the government…. It is the opinion of the board that… there should be a military commission immediately appointed for the trial of [Pickett and two inferiors].[165]

The finding of the board of inquiry in November 1865 offers a clue as to the didactic intention of *Pickett*, that is, beyond the circular function of all such prosecutions to legitimate the military commission as a legal venue. To Holt, war crimes tribunals were part of a strategy to sever the Southern public's allegiance to former Confederate elites, who at that time showed no contrition and were actively making their way back into positions of power.[166] Consider the implications of spreading the idea that Confederate authorities "terrif[ied] the loyal people of North Carolina, to make them subservient" to the rebellion. We again have a focus on white POWs falling victim to the Confederate leadership, but in contrast to *Wirz*, in which crimes against Northern POWs were in focus, prosecuting Pickett would have

---

resolution of the House of Representatives, of April 16, transmitting the report of Judge Advocate Gen. Holt, relative to the murder of certain Union soldiers belonging to 1st and 2nd N. Carolina loyal infantry.," 1st session of the 39th Congress (1866), https://archive.org/details/executivedocumenunit/page/n333; "Executive Doc. 11: Message from the President of the United States, in Answer to a resolution of the House of the 23rd of June last, relative to rebel General Pickett," 2nd session of the 39th Congress (1867), https://archive.org/details/executivedocumen7359unit.

[165] "Exec. Doc. 98," 14-17.

[166] Leonard, *Lincoln's Avengers*, 177-96. On the related issue of oaths of allegiance, Pres. Johnson's preferred strategy for ensuring Southern compliance with federal demands, see Dorris, *Pardon and amnesty*, 315-19.

shown that many Southerners were also victimized, a message directed to sections of the North Carolinian public whose allegiance to the Confederacy may have been tepid in the first place.[167] In summer 1866, the officer who led the board of inquiry the previous fall wrote to Holt asking why Pickett had not yet been arraigned, arguing that "The poor white of the south will [lose] confidence in the federal power if they are thus forsaken and their murdered friends unavenged."[168]

In the end, the case never came to court. Three major factors overcame the impetus to prosecute; all three foretold the ultimate success of anti-trial forces. The first was the hesitation to prosecute by Judge Advocate General Holt himself, a direct consequence of his commitment to putting on a procedurally sound trial. The second was Secretary of War Stanton's uneasiness in the face of jurisdictional challenges. And the third was opposition from within the military establishment.

I. Holt and Stanton's Cautiousness

Holt's consistent belief was that war crimes trials needed to be fair in order to serve their political function. Fair trials admitted a level of risk, particularly that of acquittal, and the decision to prosecute became politically useless (or dangerous) if the risk rose above a certain threshold. Thus, after the report of the board of inquiry in November, Holt scrutinized their research and found weaknesses and misinterpretations in their case for indictment. He advised Stanton in December that the board's report contained "no grounds upon which personal charges could be established and sustained against the guilty parties."[169]

Later it was Stanton who refused to call for a military commission, even after more substantial evidence against Pickett was uncovered. Holt recommended twice

---

[167] It was a border state, late to secede and with a slimmer majority than in the Deep South. At the time of its secession, Lincoln pushed the narrative of a conspiracy by slave-holding elites against popular will. On whether this was accurate, see James M. McPherson, *Battle cry of freedom: the Civil War era*, The Oxford history of the United States, (New York u.a.: Oxford Univ. Press, 1988), 276-308.

[168] "Ex. Doc. 11," 5.

[169] "Exec. Doc. 98," 48-9.

that Pickett be arraigned,[170] but Stanton and Holt, while remaining politically aligned, had begun to deviate by January 1866 on the issue of prosecutions. For instance, Holt was of the firm opinion that ex-Confederate President Jefferson Davis should be brought before a military commission according to the legal framework of war crimes.[171] Stanton, on the other hand, believed along with Attorney General Speed that Davis should only be tried in a civilian court, citing concerns about jurisdictional challenges.[172] This belief was further cemented by the *Milligan* decision and Johnson's declaration to formally end the war in spring 1866. Although Stanton continued to support the military commission as a legal enforcer of Reconstruction in the South,[173] he apparently lost faith in war crimes tribunals' ability to legitimate this legal forum.[174]

II. Intervention by Grant on Pickett's Behalf

The cautiousness shown first by Holt and later by Stanton kept the prosecution in limbo. Its fate was decided by the intervention of Ulysses Grant. The basis of this intervention leads us back to the convention of post-war amnesty that the pro-trial faction was trying to undo. Grant, like Sherman, had promoted the convention by offering generous terms of surrender at Appomattox, and the terms remained "a transcending point of honor" for Grant, "regardless of what information had come out subsequently about the conduct of the Southern officers covered by them."[175] Grant also had a personal relationship with Pickett going back to the Mexican-

---

[170] *Ibid*, 53-4; "Ex. Doc. 11," 3.
[171] Department, *Official records*, 2.8, 847-55.
[172] Nicoletti, *Secession on trial*, 142-3.
[173] Vagts, "Military Commissions," 269; Stahr, *Stanton: Lincoln's war secretary*, 470.
[174] Stanton wrote an official memo in July 1866 that he "has not felt authorized to pursue the course recommended by the Judge Advocate General [regarding Pickett] until the Supreme Court should be formally promulgated. The magnitude of the offence alleged against Pickett is such that there should be no reason to contest the jurisdiction of the tribunal." "Ex. Doc. 11," 3.
[175] Gerard A Patterson, *Justice Or Atrocity: General George E. Pickett and the Kinston, NC Hangings* (Gettysburg, PA: Thomas, 1998), 128-9.

American War.[176] In March 1866, Grant forwarded Pickett's request for clemency to the president, in which Pickett had written that his "action was sanctioned by the then confederate government."[177] In other words, his commission as an officer shielded him from criminal prosecution. Grant appended his own note confirming this line of thinking: "During the rebellion belligerent rights were acknowledged... and it is clear to me that the parole given by the armies laying down their arms protects them against punishments for acts lawful for any other belligerent."[178] While Grant could not unilaterally block the prosecution, historians agree that this intervention was crucial in keeping Pickett out of court.[179]

Kastenberg has shown that Grant, in his early promotion of a quick North-South reconciliation,[180] collided on at least four different occasions with Holt over the war crimes prosecutions of former Confederate officers.[181] His boldest action came in the summer of 1865 after a grand jury indicted over thirty top Confederate officials for treason.[182] Grant threatened to resign if these men were arrested, and Johnson apparently bowed to his threat.[183] Grant's position makes clear that the active prevention of prosecutions came from within the military establishment as well as from other quarters of government. It underlines the reasons why, in cases

---

[176] A few years later, Grant offered Pickett public office in Virginia. Donald E. Collins, "War Crime or Justice? General George Pickett and the Mass Execution of Deserters in Civil War Kinston, North Carolina," *NCUV Project* (1999). http://homepages.rootsweb.com/~ncuv/kinston2.htm.

[177] "Ex. Doc. 11," 8.

[178] Grant went on to add that while some of Pickett's decisions were reproachable, "I do not see how good, either to the friends of the deceased or by fixing an example for the future, can be secured by his trial now." *Ibid*, 8-9.

[179] Patterson, *Justice Or Atrocity*, 128; Kastenberg, *Law in war*, 264; Collins, "War Crime or Justice?."

[180] Brooks Simpson argues that Grant later turned away from his "somewhat naive optimism about the regeneracy of Southern loyalty." Reconstruction. Brooks D Simpson, *Let Us Have Peace: Ulysses S. Grant and the Politics of War and Reconstruction, 1861-1868* (UNC Press Books, 2014), 116, 29-30.

[181] Kastenberg, *Law in war*, 265-6.

[182] "Indictment of R. E. Lee is Found," *New York Times* (New York), Jan. 8, 1937, 21, https://nyti.ms/2XHR84r.

[183] Simpson, *Let Us Have Peace*, 104-9; William A Blair, *With Malice toward Some: Treason and Loyalty in the Civil War Era* (UNC Press Books, 2014), 241.

like Pickett's, the threshold for successfully bringing a case to court was so high. It required firm political support, and this was something that wavered over time, as indicated by Stanton's increasing reluctance to endorse war crimes tribunals.

THE MERCER AND GEE TRIALS

While Pickett's prosecution floundered, two trials of former Confederate officers took place in the South. Each led to an outright victory for the defense, indicating that federal prosecutors had not rigged the commissions and that, as a consequence, the didactic function they envisioned had the potential to backfire. The associated political risk, in addition to a swell of jurisdictional challenges during *Gee*, indicated that further prosecutions would flounder in the manner of Pickett's.

I. The Mercer Trial

At the turn of 1866, Brig. Gen. George Mercer was charged with murder for allegedly ordering the execution of seven Union POWs after a summary court-martial in Savannah, GA.[184] As in the case of Pickett, the question of whether these were in fact Union POWs was up for debate. According to the charge, they had been "induced to enlist in the army of…the so-called Confederate States to avoid starvation" in the camps;[185] from Mercer's standpoint, they were turncoats who had voluntarily joined Confederate ranks. Thus, when they were caught trying to escape to Union lines as Sherman's army approached in December 1864, Mercer claimed he had the right to punish them as deserters, whereas the prosecutor claimed they had not legitimately joined the Confederate army and were thus shielded from punishment as POWs.

I.I. The Basis of Mercer's Acquittal

Considering the carefulness with which Joseph Holt had approached Pickett's case, the arraignment of Mercer is somewhat of a mystery. After the proceedings began in

---

[184] The following is based on Norman Turner's compilation of the *Mercer* transcript. Turner's work can be obtained from the Historical Effingham Society. For a brief summary of the Dec. 1864 incident: Turner, "Confederate Military Executions," 13-4.
[185] *Ibid*, 18.

mid-December, the lead prosecutor (John H. Watrous) had to ask for an indefinite delay to cull more witnesses in the press.[186] He apparently had nothing more to go on than hearsay testimony from Union Gen. W. P. Carlin, whose men had reported on the incident in Savannah the previous year and who apparently tried to get the charges against Mercer dropped before the trial began.[187]

Once the proceedings resumed in January, the prosecutor was able to present eyewitnesses, but none of them could identify Mercer as being present at the court-martial in question.[188] The defense, on the other hand, offered a solid alibi. His son, an officer under his command, stated that the two were elsewhere on the night of the court-martial and only heard about it the next morning.[189] After a few more examinations, the defense counsel stated that he had "intended to introduce a number of other witnesses, but…such was the paucity of the evidence elicited against the accused, that he deemed it unnecessary to detain the Court for that purpose." The judge advocate agreed to close without final arguments. After "very brief deliberation," the commission ruled that Mercer was not guilty.[190]

I.II. The Didactic Function Backfires

For Holt, who directed the prosecution, and for the pro-trial faction more generally, *Mercer* turned out to be worse than a mere acquittal. The trial received national news coverage and the full transcript was published piecemeal in the *Savannah Republican*, a newspaper that had been installed upon the military capture of Savannah and was funded mainly by the Union War Department—but whose editors nonetheless sympathized with the defendant.[191] The framing of the charges

---

[186] *Ibid*, 16-17, 24-25.
[187] *Ibid*, 21, 24.
[188] One even stated, "[Mercer] had nothing to do with the execution, to my knowledge." See examinations of McQuade, Schenck, and Evans, respectively, at *ibid*, 25-9, 30-1, and 32-3.
[189] *Ibid*, 35.
[190] *Ibid*, 36.
[191] Richard H. Abbott, "The Republican Party Press in Reconstruction Georgia, 1867-1874," *The Journal of Southern History* 61, no. 4 (1995): 726. The editors of the *Savannah Republican* wrote that "many of our citizens, who can not politically

clearly indicates that the prosecution intended to tie Mercer into the broader narrative of POW abuse. The victims had been recruited from some of the worst camps in the South; they were faced with the choice of switching sides or remaining there to starve; in the end, they were cruelly punished for trying to their own ranks. So went the intended narrative. The defense successfully flipped it on its head.

Some papers in the South wrote editorials ridiculing the prosecution,[192] but ultimately it sufficed to publish excerpts of court testimony. One defense witness was stationed at Florence, S. Carolina, one of the camps where the turncoats were recruited. He testified that those who agreed to switch sides "said they were fooled into service [in the Union army]. That they were often drugged and found themselves enlisted on recovering."[193] One prosecution witness, on cross-examination, was asked about his time as a POW: "Were you not much disappointed and dissatisfied when you learned that your Government would not make an exchange?" The witness responded, "Yes sir: it was circulated among us that [Union leaders] would not exchange sound men for skeletons."[194] Furthermore, Mercer's son testified that, on the night of the court-martial, the battalion of turncoats was "alarmed, fearing that they would be summarily dealt with by General Sherman if they should be captured in arms."[195] So went the counter-narrative: the escape was not an act of loyalty, but one of fear of Union reprisals; the original enlistment of the Union POWs in the rebel army was not an act of desperation, but one of free will.

Mercer was a general, the highest-ranking Confederate officer to come before a court after the war. It is uncertain to what extent this legal event influenced Northern leaders—existing research on *Mercer* is particularly scarce—but the success of the defense in publicizing anti-Union polemics could only have deepened the squeamishness among those who continued to back war crimes trials. Added to

---

affiliate with the General, believe him to be innocent and are sanguine that a fair and impartial trial, such as the General will surely have, will surely prove the falsity of the charges." Turner, "Confederate Military Executions," 22.

[192] *Ibid*, 36-7.

[193] *Ibid*, 33-4.

[194] *Ibid*, 28-9.

[195] He even claimed that Gen. Mercer had made extra provisions for the men's protection from Sherman's forces. *Ibid*, 35-6.

this was the fact that jurisdiction, which was not heavily debated in *Mercer*, again came into doubt during *Gee*, which began the following month. Jurisdictional uncertainty, compounded by the growing assertiveness of anti-trial forces and the repeated failure of prosecutors to deliver a Reconstruction-friendly narrative, was perhaps decisive in preventing further defendants from facing war crimes charges.

II. The Gee Trial

In terms of the spectacle and the horror of the crimes alleged, *Gee* came closer to the scale of *Wirz*. The commission was in session for nearly four months, from February to June 1866, in Raleigh, N.C.[196] The most in-depth media coverage appeared in the South, where editorials and reprints of court testimony ran frequently. Northern papers also printed features and periodic updates; the *New York Herald*, a leading Republican newspaper, kept a correspondent in Raleigh.[197] The defendant, former Confederate major and prison commandant John Gee, was accused of criminally neglecting the prisoners at Salisbury, where the POW death rate was roughly 25%. Gee also faced seven counts of murder, each for ordering inferiors to fire on POWs.

After hearing 46 witnesses for the prosecution and 69 for the defense, the counsel called for an end to the proceedings. "We cannot present to this commission a stronger argument of the innocence of the accused than the record of the evidence before you," he stated. He then requested to proceed to the verdict without closing arguments. Like in *Mercer*, the lead prosecutor (Francis E. Wolcott) consented.[198] The commission announced that it found the defendant *not guilty* on all counts.[199]

In the following, I will argue—as I did for *Wirz* and *Mercer*—that beyond any political circumstance or hidden motivation, the most plausible explanation for the

---

[196] The following is based on a republication of the trial transcript compiled and edited by Annette Ford. It runs roughly 600 pages. Ford, *The captive*.
[197] *Ibid*, 589. For an example of Northern coverage, see "The Horrors of Salisbury Prison," *New York Times* (New York), Mar. 2, 1866 1866, https://nyti.ms/2JwJFzO.
[198] Ford, *The captive*, 568.
[199] The commission stated that they "attach[ed] no responsibility [to Gee]… other than for weakness in retaining position when unable to carry out the dictates of humanity, and [believed] that higher authorities of the Rebel Government were fully responsible for all the alleged violations of the Laws and Customs of War." *Ibid*, 569.

verdict is the respective strength of the cases made by prosecution and defense. Due process itself, through the magnifying glass of publicity, was the means by which political ends were sought. With a mind to identifying these ends, there are two points I want to emphasize about *Gee*. The first relates to the formulation of charges, which made no reference to a conspiracy. The effort to implicate the Confederate leadership more generally, and thus the broader investigative element of *Wirz*, was abandoned in *Gee*. The second relates to jurisdiction. *Gee* bore a particularly clear connection to Reconstruction debates over the right of military courts to try citizens in the South, where local courts were not trusted with handling certain types of proceedings. Here, the circular function of war crimes trials—a court legitimizing its own right to exist—and the political stakes of this self-legitimation come into focus.

II.I. The Basis of Gee's Acquittal

As in Wirz, the first charge against Gee concerned his responsibility at a systemic level, relative to his standing as camp commandant. Major Gee, the charge read, "fully clothed in authority and in duty bound to treat, and care and provide for said prisoners… did willfully and maliciously, and in violation of the laws and usage of civilized warfare, utterly fail and neglect to provide,… or attempt to have provided" sufficient rations, clothing, fuel, shelter, water, or hospital attendance. As a result, "twelve hundred per month, whose names are unknown, died from disease, starvation and exposure."[200]

The term "clothed in authority"—meaning that the defendant was a commissioned Confederate officer, thus subject to international norms—also appeared in the charge against Wirz, as did similar counts of neglect. Yet the charge was not framed in terms of a conspiracy with higher officials, in part because of the War Department's ultimate failure to dig up sufficient evidence on this account.[201]

---

[200] *Ibid*, 11-12.

[201] The War Department had created an archive of Confederate documents to this end, a project that ultimately struggled to prove anything more than Confederate officials' unresponsiveness to internal complaints. Witt, *Lincoln's code*, 318; Carl L. Lokke, "The Captured Confederate Records under Francis Lieber," *The American Archivist* 9, no. 4 (1946).

As a result, the ill-defined functional split in *Wirz* between trial court and fact-finding commission was eliminated, leaving only an examination of prison conditions and how they related to Gee's personal actions. In other words, the absence of a conspiracy in the charges allowed the judges to establish a clear perimeter around admissible evidence. A major effect of this perimeter was that it prevented the defense from using the court to promote anti-Union narratives. For instance, the commission sustained the judge advocate's decision to block subpoenas of Robert Ould, the Confederate exchange commissioner, and Robert E. Lee, the same men whom Wirz's counsel had attempted to subpoena.[202] The difference with *Wirz* was that Gee's prosecutor, like his counsel, was also held back from delving into questions that were not explicitly laid out in the charges.[203]

If Gee's responsibility as commandant was to ensure a tolerable standard of living for prisoners, he clearly failed. Salisbury had the highest mortality rate of all POW camps in the Civil War.[204] The sanitary conditions and the quality of food were abysmal, and the prisoners lived in literal holes in the ground through the winter.[205] However, the defense demonstrated that these issues were out of Gee's control. What really separated their work from Wirz's defense team, which also showed that Confederate systems of transport, supplies, and bureaucracy were dysfunctional,[206] was the amount of evidence they brought proving the intensity of Gee's objections to prison conditions. A number of credible witnesses testified that Gee complained to superiors formally and informally, with great insistence and on many occasions, suggesting more humane alternatives of confinement.[207] Furthermore, unlike at

---

[202] *Ibid*, 521. In another instance, when the defense counsel prompted a witness to fault Union Secretary of War Stanton for the breakdown of prisoner exchanges, the commission sustained an objection by the judge advocate. *Ibid*, 187.
[203] See the successful objection by counsel at *ibid*, 24.
[204] McPherson, *Battle cry of freedom*, 797-802.
[205] See descriptions of prison conditions in the testimonies of Ireland, Barnes, and Davis, starting respectively at Ford, *The captive*, 78, 150, 87. The total lack of shelter was revealed to be the consequence of a special order given by Gen. Winder. See testimony of Brig. Gen. Johnson, starting at *ibid*, 513.
[206] See the string of testimonies at *ibid*, 346-422.
[207] See testimonies of Lyerly, M.C. Davis, Dr. Howerton, Baxter, Fuqua, James Best, and Stockton, starting respective at *ibid*, 31, 44, 57, 209, 239, 488, and 495.

Andersonville, there was no evidence of a cruel system of punishment. Witnesses testified that Gee never punished POWs for escaping and that his first reaction upon their return was always to get them rations.[208] A guard testified that Gee threatened him with punishment for mistreating POWs, and many other testimonies described acts that substantiated Gee's concern for the prisoners' welfare.[209]

Furthermore, the defense successfully cast *all* the murder allegations into doubt. Three counts received the most attention.[210] The first was the shooting of a Union officer on the edge of camp while he went to urinate, which nearly all witnesses agreed was unwarranted.[211] No one claimed, however, that Gee was on site. One POW who worked at camp headquarters testified that Gee attempted to reward the responsible guard, but his credibility was seriously undermined in cross-examination.[212] Multiple witnesses—including Union and Confederate officers—testified that Gee showed remorse after learning of the incident, and one Confederate official testified that, due to the ambiguity of the deadline where the lieutenant was shot, Gee had no legal basis to punish the guard.[213]

A second count alleged that Gee ordered POWs to be shot after a chimney collapsed in one of the camp's main buildings and prisoners gathered chaotically near the entrance. The primary prosecution witness, a Northern reporter interned at Salisbury, testified in cross-examination that Gee's order to forcefully disperse the crowd was probably for the purpose of saving those under the ruins.[214]

---

[208] See testimonies of Fuqua, David Martin, Duke, and Stockton, starting respectively at *ibid*, 239, 443-4, 481, 495.
[209] See testimony of David Martin: *ibid*, starting at 445. See also testimony that Gee interfered to stop abuse by a recruiter; that Gee requested to build a bakery and started work without official approval; that he badgered the quartermaster as many as 3 daily to get more straw for POWs: starting respectively at *ibid*, 134, 332, 545.
[210] The other murders either had no clear link to Gee, or the witnesses arrived after the fact, with little knowledge of the circumstances. See, e.g., testimony on the murder of Moses Smith, a black POW, by prosecution witnesses W. E. Davis and J. Browne, starting respectively at *ibid*, 187, 173.
[211] For a summary, see the testimony of another POW officer at *ibid*, 74-5.
[212] *Ibid*, 97-105.
[213] See testimonies of Gault and Fuqua, starting respectively at *ibid*, 156, 239.
[214] See testimony of W. E. Davis, starting at *ibid*, 187.

The third and most serious allegation concerned a small "disturbance"—to quote the charges—in camp that "could have [been] quelled and terminated...by the use of moderate force," but in response to which Gee ordered "the entire prison guard to fire upon the mass of prisoners in the enclosure...indiscriminately," causing ten POWs to be killed and numerous others to be seriously wounded.[215] While it was confirmed that ten POWs died and that 53 were wounded, testimonies revealed that "disturbance" was an understatement: 30 to 40 POWs successfully disarmed around 20 guards and threatened to set a camp-wide breakout in motion.[216] Gee himself was the one who ordered the ceasefire,[217] and was successful in doing so even though citizens from Salisbury had arrived amid the chaos with "a very decided disposition to keep up the firing on the prisoners."[218]

II.II. The Didactic Function of Gee

Leaving the issue of jurisdiction aside, all indicators point to the fact that Gee's due process rights were respected by the commission. As I argue for *Wirz* and *Mercer*, the judges' verdict in *Gee* is most plausibly explained by their weighing of evidence in the courtroom—at the very least a process clear from any corruption, but arguably also reflecting a sincere, intelligent effort to evaluate the facts. To make this argument does not imply that the decision to bring charges was impartial. The prosecutor and those who selectively ordered the prosecution doubtlessly thought they could get the accused convicted and thereby damage the reputation of the former Confederate leadership. In *Gee,* this expectation was reasonable given the severity of conditions at Salisbury and of the accusations made against the defendant. Gee's defense team simply outclassed the prosecutor, furnishing evidence that Holt and others were not aware of when they ordered the trial.

One should also keep in mind that there was a political purpose beyond conviction or acquittal that the prosecution served for the Bureau of Military Justice.

---

[215] *Ibid*, 11-12.
[216] See in particular testimonies beginning at *ibid*, 171, 187, and 239.
[217] See testimonies starting at *ibid*, 290, 443.
[218] Quote from *ibid*, 239; see confirming testimonies starting at *ibid*, 312, 448.

This was to lend credence to the claim that, contrary to the accusation of arbitrary rule and unconstitutional legal practices, military commissions were fair and necessary to handle certain cases in the South (here, war crimes) for which the civil courts were ill-equipped. Consider that a Floridian paper—one that helped fundraise for Gee's defense and that promoted anti-Union narratives during the trial—published the following commentary after a few weeks of proceedings:

> The idea is that… [Gee was really] convicted before trial and that the trial is but a mere form. This prevalent notion is erroneous and absurd. Several of the points presented by [counsel] have been sustained and the Judge Advocate overruled, showing that the Commission at least, whatever may be thought of the witnesses, are not influenced by prejudice.

It is unclear how much *Gee* functioned to change Southern minds about the legitimacy of military courts, but this was certainly part of the trial's intended function. War crimes tribunals were not only designed to shape the memory of the war and perceptions of Confederate character; they were also part of a legal-institutional battle between military and civil courts, the former enforcing federal law where the latter sought to preserve the legal customs of the state. More than at any point in *Wirz* and *Mercer*, this element of the political relevance of war crimes for Reconstruction came into exceptional focus in *Gee*.

II.III. Jurisdiction: The Resurgence of Immunity

At the opening of the trial, Gee's counsel challenged the court's jurisdiction in a manner similar to Mercer and Wirz's counsels before him: the defendant, he argued, was guarded from arrest by his parole, which followed from the Sherman-Johnston surrender.[219] In response, the judge advocate pointed to *Wirz* as "a direct parallel" and thus a "precedent" for military commissions' legal cognizance of such cases.[220]

---

[219] *Ibid*, 14-16.

[220] The counsel stated, citing Vattel's *Law of Nations*, that a commander has the power to agree to an enemy's terms of surrender "and his sovereign cannot annul them." The judge advocate rebutted with another citation of Vattel that surrender terms could only protect acts "in strict conformity with the laws and customs of war." *Ibid*, 14-16.

The commission agreed with him. They gave a formal opinion that echoed Art. 59 of Gen. Orders 100: "a prisoner of war is not protected from the punishment of crimes committed in violation of the laws and customs of war… for which he has not already been punished by his own authorities."[221] Guénaël Mettraux has called this "a principled stance against the possibility of providing immunity to those who committed war crimes through pardons and paroles."[222]

The legal infrastructure of *Wirz* and *Mercer* remained intact in late February 1866, rooted in the extension of executive war powers. By the time *Gee* got underway, however, this source of authorization had grown precarious. The president himself was rapidly and continually granting pardons to former Confederates and intervening in legal actions against alleged war criminals.[223] More importantly, a few days before *Gee* began, Johnson vetoed a renewal of the Freedmen's Bureau Bill, which sought to keep military jurisdiction valid across the former Confederacy to assist federal agencies in locally implementing Reconstruction reforms.[224] *Mercer* and *Gee* came under the same jurisdictional umbrella. Continuing his attack on military jurisdiction, President Johnson declared on April 2nd that the Confederate insurrection was at a formal end, adding specifically that "…military occupation, martial law, military tribunals, and the suppression of the writ of *habeas corpus* are in times of peace dangerous to public liberty…."[225] This was Johnson's bow out of Reconstruction. Congress would go on to successfully respond by making themselves the source of legal authorization for

---

[221] *Ibid*, 21.
[222] Guénaël Mettraux, "A Little-known Case from the American Civil War: The War Crimes Trial of Major General John H. Gee," *Journal of International Criminal Justice* 8, no. 4 (2010).
[223] Witt, *Lincoln's code*, 307-8.
[224] Johnson emphasized in his response to the bill that allowing military courts to try citizens in the South was a violation of their rights according to the 5th and 6th Amendments. Andrew Johnson, "Veto Message on Freedmen and Refugee Relief Bureau Legislation," (1866). https://millercenter.org/the-presidency/presidential-speeches/february-19-1866-veto-message-freedmen-and-refugee-relief.
[225] Andrew Johnson, "Proclamation Declaring the Insurrection at an End," *The Harvard Classics: American Historical Documents* (1866). https://www.bartleby.com/43/42.html.

Reconstruction, passing the Civil Rights Act and Freedmen's Bureau Bill later that spring and providing support for the Bureau of Military Justice.[226] The specific issue of war crimes prosecutions, however, would not survive the transition from Presidential to Congressional Reconstruction.

The April 2nd proclamation nearly stopped the Gee trial in its tracks. About a week later, Daniel Fowle, a N. Carolina state superior court judge, issued a writ of *habeas corpus* for Gee, demanding that the military authorities turn him over to civilian authorities.[227] The Supreme Court had also announced its *Milligan* decision the day after Johnson's proclamation.[228] The Court held that military commissions could no longer try citizens in states that did not secede. While *Milligan* had no direct bearing on the South and while Johnson's proclamation did not effectively cease military rule, the two together apparently emboldened Judge Fowle to intervene in *Gee*. After the commanding officer in N. Carolina, General Ruger, refused to comply, the judge ordered his arrest. The general would not submit. Meanwhile, the commission proceeded, and Judge Fowle hoped for an intervention from President Johnson on his behalf.[229]

Two weeks after his intervention, Fowle backed down. The White House announced that since the trial began before April 2nd, it should continue until it reached a verdict. That said, as the *New York Times* reported, the president ordered them "not to pass sentence in the case, but to send the full record of the proceedings in the trial, when it shall be concluded, to Washington, to enable the Government to

---

[226] The Act of March 2, 1867, passed over Johnson's veto, secured the right of federal officers to constitute military commissions, "and all interference, under color of State authority with the exercise of military authority under this act, shall be null and void." Vagts, "Military Commissions," 245. See also *supra* note 60 and Hart, "Military Commissions and the Lieber Code," 67.

[227] For a summary of the incident, see Bradley, *Bluecoats and Tar Heels*, 109-10. As it surfaces in the trial transcript, and for related primary sources compiled by Ford, see Ford, *The captive*, 7-9, 171-2.

[228] Gee's counsel brought it up in court on April 11th, demanding for the second time that the trial be stopped. Having already received one go-ahead from Gen. Ruger, the commission overruled the motion without comment. Ford, *The captive*, 179.

[229] Bradley, *Bluecoats and Tar Heels*, 109-10.

act understandingly in the whole matter,"[230] which may indicate that the president would have shown leniency if Gee were found guilty.

Spaulding writes of *Milligan* that its "endorsement of civil liberty" was favorable to "southern sympathizers and opponents of Reconstruction…."[231] State-level legal authorities in the South understood the *Milligan* decision as well as the April 2nd proclamation as tokens of encouragement to reclaim the broad legal discretion granted to them in the Constitution. From the former Confederate perspective, the defense of "civil liberty" meant a return to an antebellum status quo (minimally accounting for the 13th Amendment). On the other hand, from a pro-Reconstruction perspective, the violation of this status quo—of *racially exclusive* civil liberty—was seen as necessary in order to install *universal* civil liberty. *Gee* was caught up in this confrontation. Gen. Ruger, who ordered *Gee* as well as the court of inquiry for Pickett the previous fall, saw the "restraining influence of prompt trial and punishment… by military commissions [as] the only adequate remedy for the existing evils" in the area.[232] Judge Fowle, in his attempt to regain civilian control of the state legal system, repeatedly locked horns with Ruger on this account.[233]

Gee, like *Wirz* and *Mercer*, was a trial designed to operate on two didactic wavelengths. Hoping for a conviction, the prosecutors tried to discredit the former Confederate leadership on a moral level. They also sought to exploit and, in the best case, strengthen the jurisdictional footing of military courts. Their jurisdiction rested upon the argument that although Southerners' citizenship was restored, their

---

[230] "The Gee Trial," *New York Times* (New York), Apr. 30, 1866 1866, https://nyti.ms/2Sk1SEw.
[231] Spaulding, "The Discourse of Law," 2006.
[232] Vagts, "Military Commissions," 241-2.
[233] In early 1866, military officials in N. Carolina attempted to stop the traditional punishment of whipping. In advocating for its abolition, one officer argued that although "the law makes no distinction on account of color,[…] in the practical application colored men are publicly whipped and white men discharged on the payment of a small fine." In this dispute, Ruger bowed to Fowle's defense of whipping on the grounds of its theoretical racial neutrality. In another such confrontation the next year, Fowle resigned in protest of the military's removal of a state law requiring jurors to hold property, a qualification that excluded most blacks and impoverished whites. Bradley, *Bluecoats and Tar Heels*, 114-15, 39, 62.

participation in the rebellion required them to submit to a special form of accountability in the form of direct federal rule. At the ground level, figures like Judge Fowle, who was formerly a Confederate general[234] and whose moral standing was thus implicitly under attack, battled against this form of accountability. Johnson helped them to this end by issuing a series of amnesty proclamations, culminating in 1868 with a universal pardon.[235] While military Reconstruction continued without presidential backing, the program of prosecuting war criminals specifically, which the president could unilaterally obstruct through pardons and the system of military court review, seemed to collapse halfway through the third and final trial of a former Confederate officer. Furthermore, the acquittal of this officer that summer, which some in the press interpreted as a "vindication of the South,"[236] must have left many supporters of war crimes prosecutions wondering why to continue with this unruly and unprecedented form of political justice.

CONCLUSION

Three former Confederate officers were tried for war crimes in 1865 and '66. The first (Capt. Wirz) was convicted and sentenced to death by hanging. The second two (Brig. Gen. Mercer and Maj. Gee) were acquitted. These appear to be the first trials in modern history where a government tried officers of an enemy army for violating international customs of war. Here I have offered an integrative analysis of all three trial transcripts. By way of the transcripts and scholarship on the legal and political battles of early Reconstruction, I have explored what it was the prosecuting party was after and the extent to which the unfolding of the trials met or broke from their intentions. Doing so offers a strong indication of what allowed these unprecedented trials to take place; at the same time, it suggests what made the federal government abort its broader prosecutorial program after only three trials.

---

[234] Jerry L. Cross, "Daniel Gould Fowle," (2006). https://www.ncpedia.org/biography/governors/fowle.
[235] Witt, *Lincoln's code*, 223-5.
[236] Ford, *The captive*, 592.

Historiography on the topic has revolved almost exclusively around *Wirz* and is dominated by what I call the revisionist lineage. The revisionists argue that *Wirz* was a legal farce intended to appease the Northern public's calls for revenge. Breaking from this narrative, and re-contextualizing the trial alongside *Mercer* and *Gee* as well as the near-trial of Pickett, I conclude that *Wirz* was in fact conducted with a genuine concern for due process. My analysis of the transcript did indicate factors of bias that undermined the trial's appearance of even-handedness, particularly in regard to its broader fact-finding investigation. All the same, I found that Wirz's guilty verdict was primarily a function of the evidence brought forward in court. This was also the case for the acquittals of Mercer and Gee.

That all three trials were generally fair to the defendants is essential to reconstructing their political intent. On the one hand, those who designed and ordered the prosecutions sought convictions, hoping to damage the reputation of the Confederate leadership and thus galvanize popular support in the North and acquiescence among southern whites for military Reconstruction. On the other hand, for this message to be successfully conveyed, the trials had to be seen as credible in the public eye. As a consequence, those who oversaw the prosecutions understood that introducing the risk of acquittal was necessary to bring war crimes charges to court, and their hesitance to arraign Pickett, despite a court of inquiry's recommendation in November 1865, highlights this fact.

The ability to bring charges in spite of a long-standing tradition of post-war immunity rested upon several enabling factors. The first was that, on a scale never seen before, the Union army had codified the laws of war and developed a bureaucracy and court-system to adjudicate them. As regular criminal courts were not equipped to hear these cases, the institutional build-up of the Bureau of Military Justice over the course of the war supplied the necessary legal infrastructure. The other enablements arose from the nature of the war itself, which was formalized in the fashion of an international conflict but remained nonetheless a *civil* war. This meant that, in the wake of the conflict, all enemy soldiers and officials fell into the permanent custody of the federal government. At the same time, because the war

was not officially declared over, military court jurisdiction could remain in place and ex-Confederate soldiers could be tried according to international law.

In order for this legal infrastructure to remain intact through the transition to peacetime, prosecutors relied on executive war powers. This proved an unsteady source of authorization, as the postwar agenda of President Johnson strayed quickly from that of the prosecutors in the War Department's justice bureau. When Johnson—aided by the civilian legal authorities at the state and Supreme Court levels—de-authorized military courts in the middle of the Gee trial, the Bureau of Military Justice was able to readjust to secure Congressional authorization for its general operations in the South. In the process, however, their ability to prosecute ex-Confederates for wartime violations diminished. Furthermore, figures within the federal military establishment were working to prevent further prosecutions. This is illustrated by Ulysses Grant's successful intervention on behalf of Pickett.

The Bureau prosecutors' consecutive defeats in *Mercer* and *Gee* also played a role in preventing further trials. Even to the extent they demonstrated that war crimes commissions were not rigged, they backfired on the other didactic goal of discrediting the Confederacy through convictions. Prosecutors had chosen to highlight the issue of POW camps specifically, likely because they considered white-on-white crimes the best topic to provoke outrage among Northern and Southern whites. In the end, the prosecutors' intended message was not clearly conveyed by the proceedings. The ex-Confederate officers came across as having served honorably, and their trials occasionally held out opportunities for the defense to blame Union leaders for the POW crisis. In this way, one of the essential justifications for charging ex-Confederates with war crimes was cast into doubt.

Looking back from the 21st century, is it possible to say that these trials *were* justified? At a recent academic conference, the historians Michael Vorenberg and Paul Finkelman—neither of whom has written extensively on these trials—tried to reclaim the prosecutors' standpoint on this question. As part of Reconstruction, they argued, Confederate leaders who misbehaved in the war needed to be punished and the procedural shortcomings of the Wirz trial were insignificant in light of this legal

and political necessity.[237] In Finkelman's words, "the tragedy of the postwar experience" was the failure to prosecute more Confederate leaders, especially those who committed crimes against blacks.[238]

Vorenberg and Finkelman provided an overdue reaction to the dominant revisionist narrative. They pointed out, for instance, that *Wirz* must be seen through the lens of 20th century history, in particular the Nuremberg trials. If the past century has discredited the convention of post-war immunity, why should we condemn some of the earliest legal actors for fighting against and partly overcoming it? Why should we reject military commissions out of pocket if this was the only feasible legal path to prosecute alleged war criminals at the time? Furthermore, if most historians today agree that military Reconstruction was necessary to defend rights for ex-slaves, how can we detach this necessity from the issue of post-war war crimes prosecutions? In this context, to emphasize that the state should never violate civil liberties (as the *Wirz* revisionists do) is to ignore that the quick reestablishment of civil liberties for former Confederates—that is, the return to a constitutional status quo and the removal of military jurisdiction in the South—signified the abandonment of emancipation as a political project.

On the other hand, Vorenberg and Finkelman's arguments only engage with the legacies of *Wirz* and Nuremberg at a surface level. Nuremberg did not prove that, everywhere, in all post-war contexts, it is appropriate to put on war crimes tribunals.[239] As Shklar argues in *Legalism*, the sense and value of such trials is always context-dependent. For the Nuremberg trials specifically (in contrast to most political trials), Shklar argued that they were justified as a way to re-establish liberal norms of law in the vacuum left by National Socialism.[240] One could perhaps re-

---

[237] See their talks at "A Just and Lasting Peace: Ending the Civil War," a 2014 conference in Washington D.C. available at: https://www.c-span.org/video/?319092-6/discussion-military-trial-henry-wirz.
[238] Finkelman, "Francis Lieber," 2126.
[239] Some scholars have even argued that war crimes trials are generally ineffective for post-war political transitions. See, e.g., Jack Snyder and Leslie Vinjamuri, "Trials and errors: Principle and pragmatism in strategies of international justice," *International security* 28, no. 3 (2004).
[240] Shklar, *Legalism*, 147-8.

purpose this argument to fit Reconstruction, applying it to the specific vacuum left by legal slavery. One could argue, in line with Vorenberg and Finkelman, that massacres of surrendering black troops were the logical result of a Confederate system wherein black humanity was negated. On a didactic level, punishing these atrocities could have offered a potent moral defense for Reconstruction.

This is an argument worthy of deeper investigation. In the limited frame of serving justice, one can easily argue that those who committed such crimes deserved to be punished—or that, in a deeper sense, there was no longer a place for them in U.S. society. The didactic angle, however, remains speculative. One of the central historical facts to contend with is that despite the array of anti-black crimes committed and the ample evidence available to prosecutors, they seemed to consciously avoid race, choosing instead the route of crimes against whites.[241] This choice apparently came from a calculation about the white voting population, whose political support for Reconstruction was indispensible.[242] One must furthermore contend with the fact that, for those trials which *did* occur, the prosecutors were often ineffective in driving home the message they wished to convey.

The decision to prosecute was laden with risks and concessions, and in coming to a historical judgment, these must be piled up and weighed against all the plausible alternatives. The existing narratives—pro-prosecution, anti-prosecution—are attractive because they make it easy to associate with one side or another of the historical situation, whereas for the historical actors themselves, the situation was ambiguous and wrought by conflicting ethical commitments. If one aligns oneself with the prosecutors' strategy, one should do so grudgingly. If one opposes their efforts outright, this opposition must be justified in light of the unsettling consequences of universal amnesty in the postbellum South.

---

[241] That is, beyond the killing of two black soldiers dealt with in the Champ Ferguson trial; the charge of killing Moses Smith, a black POW, in the Gee trial (see *supra* note 210); and the issue of whipping in Wirz. On the charges against Ferguson, a guerrilla fighter, see Sensing, *Champ Ferguson*, 177.

[242] The prosecutors themselves were radical in terms of the racial politics of the day. For example, "Judge advocates [pushed] for…upending the traditional rules prohibiting blacks from testifying against whites, or...to challenge whites in lawsuits." Kastenberg, *Law in war*, 313.

APPENDIX

Note on Case Selection

My selection of cases to analyze is a function of trying to locate their position inside the larger historical arc of war crimes law and, more specifically, to understand how they transgressed a long-standing convention of criminal immunity for commissioned soldiers—in other words, how a precedent emerged where none was before. To this end, I have constructed "war crimes trials" as a category.

"Violations of the laws of war" in contemporary usage meant a broad range of infractions ranging from the commonplace to the infamous, most of which would not qualify as "war crimes" in the current sense of the term. Out of this broader pool of military commissions I left out lower-level offenders, including Confederate soldiers below officer rank,[243] and pushed to the background the Lincoln assassination and acts of war by guerrillas or non-commissioned fighters.

Wirz, Pickett, Mercer, and Gee were commissioned belligerents. Their commission, their license to kill,[244] made prosecuting them in civilian courts under regular criminal charges hard to imagine. In the assassins' trial, it is true that the political aims of the prosecutors—damaging the reputation of Confederate leaders—bore close similarities to *Wirz*. But as Witt points out, the assassins could have been tried according to domestic criminal law without any extraordinary legal jockeying.[245] For guerrillas such as Champ Ferguson, who was tried and convicted for mass murder at roughly the same time as Wirz, the Confederate government did not take credit for their actions. Their participation in the war was *prima facie* illegal, thus the convention of criminal immunity did not apply to them.[246]

---

[243] This includes the trial of James Duncan, a private stationed at Andersonville prison, as well as a host of others that resulted in a mix of convictions and acquittals. On Duncan, see Department, *Official records*, 2.8, 926-8.; for a sample of others, see United States Army, Military Trials: Middle Department, 1862-1868, Law, Library of Congress, 363, 462, 65, 543, 73, 683, 1157, n.p., https://lccn.loc.gov/59056960.
[244] On this "license," see *supra* note 89.
[245] Witt, *Lincoln's code*, 295.
[246] This point is complicated to some degree by the Partisan Ranger Act of 1862, which many considered an open endorsement of pro-Confederate guerrilla warfare. On the act, which was repealed in 1864, see Witt, *Lincoln's code*, 190.

BIBLIOGRAPHY

Abbott, Richard H. "The Republican Party Press in Reconstruction Georgia, 1867-1874." *The Journal of Southern History* 61, no. 4 (1995): 725-60.

Army, United States. Military Trials: Middle Department. Law. n.p. https://lccn.loc.gov/59056960.

"The Art of Lew Wallace: Over the Deadline." *General Lew Wallace Study & Museum*. (2011). Accessed 28 May, 2019. https://www.ben-hur.com/the-art-of-lew-wallace-over-the-deadline/.

Bass, Gary Jonathan. *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals.* Princeton, N.J.: Princeton University Press, 2000.

Becker, Steven W. "The Objections of Larger Nations to the International Criminal Court." *Revue internationale de droit pénal* 81, no. 1 (2010): 47-64.

Blair, William A. *With Malice toward Some: Treason and Loyalty in the Civil War Era.* UNC Press Books, 2014.

Blight, David W. *Race and Reunion: The Civil War in American Memory.* Cambridge, Mass. u.a.: Belknap Press of Harvard Univ. Press, 2001.

Bonner, James C. "War Crimes Trials, 1865-1867." *International Social Science Review* 22, no. 2 (1947): 128.

Bradley, Mark. *Bluecoats and Tar Heels: Soldiers and Civilians in Reconstruction North Carolina.* University Press of Kentucky, 2009.

Byrne, Frank L. "Andersonville: The Last Depot." *Civil War History* 41, no. 2 (1995): 169-71.

Chipman, Norton Parker. *The Tragedy of Andersonville.* Digital Scanning Inc, 2004.

Collins, Donald E. "War Crime or Justice? General George Pickett and the Mass Execution of Deserters in Civil War Kinston, North Carolina." *NCUV Project*. (1999). Accessed Jun. 10, 2019. http://homepages.rootsweb.com/~ncuv/kinston2.htm.

Cross, Jerry L. "Daniel Gould Fowle." (2006). Accessed July 15, 2019. https://www.ncpedia.org/biography/governors/fowle.

Davis, Robert Scott. *Ghosts and Shadows of Andersonville: Essays on the Secret Social Histories of America's Deadliest Prison.* Mercer University Press, 2006.

Department, United States War. *The War of the Rebellion. Official Records of the Union and Confederate Armies.* Washington: Gov't print, 1880-1901.

Dorris, Jonathan Truman. *Pardon and Amnesty under Lincoln and Johnson; the Restoration of the Confederates to Their Rights and Privileges, 1861-1898.* Chapel Hill,: University of North Carolina Press, 1953.

Douglas, Lawrence. "The Didactic Trial: Filtering History and Memory into the Courtroom." *European Review* 14, no. 4 (2006): 513-22.

"Executive Doc. 11: Message from the President of the United States, in Answer to a Resolution of the House of the 23rd of June Last, Relative to Rebel General Pickett." 2nd session of the 39th Congress (1867). https://archive.org/details/executivedocumen7359unit.

"Executive Doc. 98: Letter from the Secretary of War, in Answer to Resolution of the House of Representatives, of April 16, Transmitting the Report of Judge Advocate Gen. Holt, Relative to the Murder of Certain Union Soldiers

Belonging to 1st and 2nd N. Carolina Loyal Infantry.". 1st session of the 39th Congress (1866). https://archive.org/details/executivedocumenunit/page/n333.

Finkelman, Paul. "Francis Lieber and the Modern Law of War." *The University of Chicago Law Review* Vol. 80, No. 4 (2013).

Ford, Annette Gee. *The Captive: Major John H. Gee, Commandant of the Confederate Prison at Salisbury, North Carolina, 1864-1865: A Biographical Sketch with Complete Court-Martial Transcript.* 2000.

Friedman, Leon. *The Law of War: A Documentary History, Vol. 2.* New York: Random House, 1972.

"The Gee Trial." *New York Times* (New York), Apr. 30, 1866 1866. https://nyti.ms/2Sk1SEw.

"General Orders No. 100: The Lieber Code." *The Avalon Project*. (1863). Accessed 20 May, 2019. http://avalon.law.yale.edu/19th_century/lieber.asp#art154.

Gillispie, James M. *Andersonvilles of the North: The Myths and Realities of Northern Treatment of Civil War Confederate Prisoners.* Denton, Texas: UNT Press, 2008.

Goldensohn, Leon, and Robert Gellately. *The Nuremberg Interviews: An American Psychiatrist's Conversations with the Defendants and Witnesses.* Vintage Books, 2005.

Hacker, J. David. "A Census-Based Count of the Civil War Dead." *Civil War History* 57 (2011).

Halleck, H. W. *International Law, or, Rules Regulating the Intercourse of States in Peace and War.* San Francisco: H.H. Bancroft, 1861.

Hart, Gideon M. "Military Commissions and the Lieber Code: Toward a New Understanding of the Jurisdictional Foundations of Military Commissions." *Mil. L. Rev.* 203 (2010): 1.

Hasian, Marouf Arif. *In the Name of Necessity: Military Tribunals and the Loss of American Civil Liberties.* Tuscaloosa: Univ. of Alabama Press, 2012.

Hesseltine, William Best. *Civil War Prisons; a Study in War Psychology.* Columbus, Ohio: The Ohio State University Press, 1930.

Holthoefer, Anne. "Constructing International Crime: Lawyers, States, and the Origin of International Criminal Prosecution in the Interwar Period." *Law & Social Inquiry* 42, no. 3 (2017): 711-43.

"The Horrors of Salisbury Prison." *New York Times* (New York), Mar. 2, 1866 1866. https://nyti.ms/2JwJFzO.

"Indictment of R. E. Lee Is Found." *New York Times* (New York), Jan. 8, 1937 1937. https://nyti.ms/2XHR84r.

Johnson, Andrew. "Proclamation Declaring the Insurrection at an End." *The Harvard Classics: American Historical Documents*. (1866). Accessed Jun. 13, 2019. https://www.bartleby.com/43/42.html.

———. "Veto Message on Freedmen and Refugee Relief Bureau Legislation." (1866). Accessed June 21, 2019. https://millercenter.org/the-presidency/presidential-speeches/february-19-1866-veto-message-freedmen-and-refugee-relief.

Kastenberg, Joshua E. *Law in War, War as Law: Brigadier General Joseph Holt and the Judge Advocate General's Department in the Civil War and Early Reconstruction, 1861-1865.* Durham, N.C.: Carolina Academic Press, 2011.
Koerting, Gayla M. "The Trial of Henry Wirz and Nineteenth Century Military Law." Ph.D., Kent State University, 1995.
LaForce, Glen W. "The Trial of Major Henry Wirz—a National Disgrace." *Army Law.* (1988): 3.
Lansing, Robert, and James Brown Scott. "Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities." *Am. J. Int'l L.* 14 (1920).
Laska, Lewis L, and James M Smith. "'Hell and the Devil': Andersonville and the Trial of Captain Henry Wirz, Csa, 1865." *Mil. L. Rev.* 68 (1975): 77.
Lawson, John D. *American State Trials; a Collection of the Important and Interesting Criminal Trials Which Have Taken Place in the United States from the Beginning of Our Government to the Present Day, Vol. 8.* St. Louis: Thomas Law Books, 1917.
Leonard, Elizabeth D. *Lincoln's Avengers: Justice, Revenge, and Reunion after the Civil War.* 1st ed. New York u.a.: Norton, 2004.
Lippman, Matthew. "The Evolution and Scope of Command Responsibility." *Leiden journal of international law* 13, no. 1 (2000): 139-70.
Lokke, Carl L. "The Captured Confederate Records under Francis Lieber." *The American Archivist* 9, no. 4 (1946): 277-319.
Marvel, William. *Andersonville: The Last Depot.* Univ of North Carolina Press, 1994.
———. *Lincoln's Autocrat: The Life of Edwin Stanton*. UNC Press Books, 2015.
McPherson, James M. *Battle Cry of Freedom: The Civil War Era.* The Oxford History of the United States. New York u.a.: Oxford Univ. Press, 1988.
Meierhenrich, Jens, and Devin O. Pendas. *Political Trials in Theory and History.* Cambridge, United Kingdom: Cambridge University Press, 2016.
Mettraux, Guénaël. "A Little-Known Case from the American Civil War: The War Crimes Trial of Major General John H. Gee." *Journal of International Criminal Justice* 8, no. 4 (2010): 1059-68.
Morrison, Steven R. "Relational Criminal Liability." *Fla. St. UL Rev.* 44 (2016): 635.
Neely, Mark E. *The Civil War and the Limits of Destruction.* Harvard University Press, 2007.
Neely, Mark E. *The Fate of Liberty: Abraham Lincoln and Civil Liberties.* New York: Oxford University Press, 1991.
Neff, Stephen C. *Justice in Blue and Gray: A Legal History of the Civil War.* Harvard University Press, 2010.
Nicoletti, Cynthia. *Secession on Trial: The Treason Prosecution of Jefferson Davis.* Studies in Legal History. New York, NY: Cambridge University Press, 2017.
Ould, Robert. "Judge Ould's Vindication of the Confederate Government." *Southern Historical Society Papers* 1. (1878). Accessed 26 May, 2019. https://en.wikisource.org/wiki/Southern_Historical_Society_Papers/Volume_01/March/Judge_Ould%27s_Vindication_of_the_Confederate_Government.
Patterson, Gerard A. *Justice or Atrocity: General George E. Pickett and the Kinston, Nc Hangings.* Gettysburg, PA: Thomas, 1998.

"Plagiarism Accusation Shelves Civil War Book Just out from U. Of Tennessee Press." *The Chronicle of Higher Education*. (2006). Accessed Apr. 26, 2019. https://www.chronicle.com/article/Plagiarism-Accusation-Shelves/37845.

Report on the Treatment of Prisoners of War by the Rebel Authorities During the War of the Rebellion. Washington: Govt. Printing Office, 1869.

Roberts, Edward F. *Andersonville Journey.* White Mane Publishing Company, 1998.

Rockwood, Lawrence. *Walking Away from Nuremberg : Just War and the Doctrine of Command Responsibility.* Amherst: University of Massachusetts Press, 2007.

Ruhlman, R Fred. *Captain Henry Wirz and Andersonville Prison: A Reappraisal.* University of Tennessee Press, 2006.

Rutman, Darrett B. "The War Crimes and Trial of Henry Wirz." *Civil War History* 6, no. 2 (1960): 117-33.

Schade, Louis. *Mr. Louis Schade's Open Letter.* Washington, D.C., 1867.

Sensing, Thurman. *Champ Ferguson: Confederate Guerilla.* Vanderbilt University Press, 1994.

Shklar, Judith N. *Legalism.* Cambridge, Mass.: Harvard Univ. Press, 1964.

Simpson, Brooks D. *Let Us Have Peace: Ulysses S. Grant and the Politics of War and Reconstruction, 1861-1868.* UNC Press Books, 2014.

Simpson, Gerry J. *Law, War and Crime: War Crimes Trials and the Reinvention of International Law.* Cambridge: Polity, 2007.

Snyder, Jack, and Leslie Vinjamuri. "Trials and Errors: Principle and Pragmatism in Strategies of International Justice." *International security* 28, no. 3 (2004): 5-44.

Spaulding, Norman W. "The Discourse of Law in Time of War: Politics and Professionalism During the Civil War and Reconstruction." *Wm. & Mary L. Rev.* 46 (2004): 2001.

Speed, James. "Military Commissions." In *Official Opinions of the Attorneys General of the United States, Vol. 11*, edited by H. Hubley Ashton, 297-317. Washington D.C.: W. H. & O. H. Morrison, 1869.

Stahr, Walter. *Stanton: Lincoln's War Secretary.* Simon and Schuster, 2017.

States, Supreme Court Of The United. *U.S. Reports: Ex Parte Milligan, 71 U.S. 4 Wall. 2.* Library of Congress, 1866. https://www.loc.gov/item/usrep071002a/.

Stephens, Gail. *Shadow of Shiloh: Major General Lew Wallace in the Civil War.* Indiana Historical Society, 2010.

Stevenson, R Randolph. *The Southern Side; or, Andersonville Prison.* Baltimore: Turnbull Brothers, 1876.

Studer, Ruedi. *Der Prozess Gegen Captain Henry Wirz Und Seine Hintergründe 1865.* Traugott Bautz, 2006.

Tap, Bruce. "'These Devils Are Not Fit to Live on God's Earth': War Crimes and the Committee on the Conduct of the War, 1864-1865." *Civil War History* 42, no. 2 (1996): 116-32.

Trial of Henry Wirz: Letter from the Secretary of War Ad Interim in Answer to a Resolution of the House of April 16, 1866. U.S. 40th Cong., 2d Sess. House Executive Document. Washington: Gov't print, 1868.

Turner, Norman Vincent. "Confederate Military Executions at Savannah, Georgia During the Civil War, Which Led to the Trial of Brigadier General Hugh W. Mercer." Unpub. *Historical Effingham Society* (2007).

"U.S. Constitution." Accessed 20 May, 2019. https://www.law.cornell.edu/constitution.

Vagts, Detlev F. "Military Commissions: The Forgotten Reconstruction Chapter." *Am. U. Int'l L. Rev.* 23 (2007): 231.

Vorenberg, Michael. "Judgment at Washington: Lew Wallace, Henry Wirz, and the Elusive Quest to End the Civil War." Paper presented at the conference, A Just and Lasting Peace: Ending the Civil War, Washington D.C., 2014.

Willis, James F. *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War.* Westport, Conn.: Greenwood Press, 1982.

Wilson, R.A. *Writing History in International Criminal Trials.* Cambridge University Press, 2011.

Winthrop, William. *Military Law and Precedents.* 2nd ed. Washington: Gov't Printing Office, 1920. https://archive.org/details/cu31924020024570/.

Witt, John Fabian. *Lincoln's Code: The Laws of War in American History.* New York: Free Press, 2012.