In Case Any Misunderstanding Shall Arise:
The Law of War in the Exchange of Prisoners in the American Civil War

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Who shall bear the brunt of this great crying evil?
Is it Jefferson Davis? Or his privy Counselor the devil?
Or shall the weight of it, in truth, be laid upon,
The policy of our Government at Washington?[1]

- Frederic August James
  Died September 15, 1864, Andersonville Prison.

Introduction

Frederic August James, a carpenter's mate from the U.S.S. Housatonic, was one of more than 13,000 prisoners of war to die at Andersonville prison.[2] In all, 30,218 of the 194,473 Union soldiers imprisoned by the Confederacy died—a mortality rate of 15.5 percent. The odds for survival were only slightly better for Confederate prisoners in Union prisoner-of-war camps, as just under 12.1 percent of them—25,976 out of 214,865—perished while in captivity.[3] And yet the prisoner exchange cartel signed by representatives of the two sides in July 1862 called for

[1] CHARLES W. SANDERS, WHILE IN THE HANDS OF THE ENEMY: MILITARY PRISONS OF THE CIVIL WAR 252 (2005), (quoting FREDERIC AUGUSTUS JAMES, FREDERIC AUGUSTUS JAMES'S CIVIL WAR DIARY: SUMTER TO ANDERSONVILLE 81–94 (Jefferson J. Hammer, ed., 1973).
[2] James I. Robertson, Jr., The Oxford Companion to American Military History, "Prisoner-of-War Camps, Civil War," 558–59 (New York, Oxford University Press, 1999), John W. Chambers II, ed.
[3] SANDERS, *supra* note 1, at 1.

"[a]ll prisoners of war to be discharged on parole in ten days after their capture."[4] Prisoner exchange cartels were agreements between military commanders, within the sphere of their commands, to return enemy prisoners of war to their respective sides. Such cartels, according to nineteenth-century American publicist[5] Henry Wheaton, were generally exceptions to rules within nations about who must ratify international treaties and could be authorized by the military authorities.[6] The failure to uphold the cartel led to the pitiful deaths of thousands of soldiers.

In the aftermath of the Civil War, both historians and the American people looked to cast blame for this unnecessary human suffering. The United States hanged Captain Henry Wirz, the commandant of the infamous Andersonville prisoner-of-war camp, in 1865 for his role in the deaths of Union prisoners.[7] In the decade immediately following the cessation of hostilities, Confederate sympathizers unsheathed their pens to counterattack in publications supporting the Lost Cause. The Richmond, Virginia-based Southern Historical Society (SHS) devoted the third issue of its eponymous publication, *The Southern Historical Society Papers*, in March 1876 to "the *Prisoner Question*."[8] SHS secretary Rev. J. William Jones claimed, "the real cause of the suffering on both sides was the stoppage of the exchange of prisoners, and for this the *Federal*

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[4] OR Ser. 2, Vol. II, 267.

[5] Publicist was the eighteenth- and nineteenth-century term for scholars of the law of nations. [ADD CITATION].

[6] Wheaton Ch. II § 3.

[7] JOHN F. WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 298–301 (2012).

[8] J. William Jones, *Mr. Blaine's arraignment*, 1 S. HIST. SOC'Y PAPERS 113, 113 (1876) (arguing against the view among Northerners that the Confederate government was responsible for "a systemic cruelty to prisoners" during the Civil War). The SHS was founded in 1869 by Former high-ranking officials and military commanders in the Confederacy, among them General P.G.T. Beauregard and to "effect the collection and preservation of such papers and records as might be valuable in preserving a true history of the causes, events, and results of the late war between the Confederate States of America and the United States." Minutes, April 15, 1869, Southern Historical Society Collection, Eleanor S. Brockenbrough Archives at the Museum of the Confederacy, Richmond, Va. The SHS moved to Richmond in 1873 under the leadership of former Confederate General Jubal Early and became a powerful weapon in the hands of the Cult of the Lost Cause. *See* DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY 78–80 (2001); *see generally* Richard D. Starnes, *Forever Faithful: The Southern Historical Society and Confederate Historical Memory* 2 SOUTHERN CULTURES 177–194 (1996).

authorities alone were responsible."[9] The *SHS Papers* published letters from such high-ranking Confederates as General Robert E. Lee and Vice President Alexander Hamilton Stevens in the March 1876 issue blaming General Grant as well as the United States government for ending the cartel as part of a policy to defeat the Confederacy through attrition.[10]

The history of the prisoner exchange continued to downplay any racial factors and to emphasize the North's manpower advantage when discussing the paucity of prisoner exchanges in the Civil War. Noted international law scholar Quincy Wright stated that the Confederacy reacted to the perceived "indignity" of facing African American soldiers by threatening to execute any of their white officers if captured, but went on to say that no such executions occurred due to the threat of reprisal. He added that on the whole both the United States and the Confederacy worked to treat prisoners as required by the laws of war, but that this was not enough to prevent the death of thousands of prisoners due to disease, exposure or malnutrition. Although Wright acknowledged that prisoner exchanges were not required, he argued that the ultimate decision rested with President Lincoln, who agreed to exchanges rarely because they were more beneficial to the Confederate armies.[11] Wright mentioned neither the Dix-Hill Cartel, nor any actual mistreatment of African American soldiers captured by the Confederate military. Instead, his scholarship tends to suggest that the militaries of both sides conducted themselves honorably under the law of war, even if their respective governments might have acted with less dignity.

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[9] J. William Jones, *The Question Stated*, 1 S. HIST. SOC'Y PAPERS 115, 116 (1876).
[10] Robert E. Lee, *The Testimony of Robert E. Lee*, 1 S. HIST. SOC'Y PAPERS 115, 122 (1876); Alexander H. Stevens, *Vice-President Alexander H. Stevens*, 1 S. HIST. SOC'Y PAPERS 115, 124 (1876).
[11] Quincy Wright, *The American Civil War: 1861–65, in* THE INTERNATIONAL LAW OF CIVIL WAR 30, 60–61 (Richard A. Falk, ed., 1971).

Military historians have traditionally outlined the mistreatment of prisoners by both militaries. In his comprehensive 2005 study of military prisons in the American Civil War, historian Charles W. Sanders, Jr. charged both the Union and Confederate militaries with being unprepared to deal with the large numbers of prisoners, and for withholding better treatment and supplies from prisoners in response to injustices, both real and imagined, committed by the enemy on prisoners they were holding.[12] While Sanders does acknowledge that U.S. Lieutenant General Ulysses S. Grant supported his decision not to take part in prisoner exchanges on the Confederate treatment of African American soldiers, he too emphasizes the importance of the United States' manpower advantage, arguing: "the general's refusal [to exchange prisoners] was actually based on simple, ghastly arithmetic."[13] Popular historian Bruce Catton reserves only a few pages of his three-volume history, *Bruce Catton's Civil War* to the plight of prisoners, and he does little more than describe the horrendous conditions of the infamous POW camps in Elmira, New York and Andersonville, Georgia.[14]

The trend amongst scholars, however, has been to place increasing emphasis on the Confederacy's refusal to exchange black prisoners as a key explanatory variable for the failure of the two sides to continue their prisoner exchanges. In *Battle Cry of Freedom*, historian James McPherson states that the desire to exchange prisoners was stronger in the Confederate government because of their manpower disadvantage, but he cites the Confederacy's threatened treatment of African American soldiers and their officers and its handling of paroled prisoners from the Vicksburg garrison as the main reasons for the halt in prisoner exchanges.[15]

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[12] CHARLES W. SANDERS, JR., WHILE IN THE HANDS OF THE ENEMY: MILITARY PRISONS OF THE CIVIL WAR 5–6 (2005).
[13] *Id*., at 4.
[14] Bruce Catton, "A Stillness at Appomattox," *in* BRUCE CATTON'S CIVIL WAR 621–23 (1984).
[15] JAMES MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 791–92 (1988).

This shift of blame for the problems with Civil War prisoner exchanges has received strong support from recent scholarship on the laws of war and the American Civil War. In *Lincoln's Code*, a study of the laws of war in American history, Yale Law professor John F. Witt singled out the Confederacy's refusal to treat African Americans as prisoners of war as the main issue blocking the exchange of prisoners from 1863 until the war's waning moments in 1865.[16] In his 2010 study of the role of law in the American Civil War, historian Stephen Neff gives only a cursory discussion of Confederate policy towards black soldiers before concluding: "[f]or the present, it is only necessary to note that behind this tragic episode [of thousands of soldiers dying in Civil War prisons] lay the stubborn Confederate refusal to accord prisoner-of-war status to captured black troops."[17] Both of these scholars place great weight on the analysis of the laws of war provided by Francis Lieber,[18] but the Prussian Lieber was influenced by the more pragmatic approach to the law of war espoused by Carl von Clausewitz, whose ideas had not otherwise gained traction in how Americans thought about the law of war.[19] While Lieber is incredibly instructive for understanding the transition that American interpretation of the law of war has taken, and for investigating the U.S. military's actions from 1863 onward,[20] it is less beneficial when attempting to determine how most Americans in positions of authority argued against the prewar understandings of the law of war.

Despite this progression emphasizing the importance of African American soldiers to the prisoner exchange issue, there is evidence that most Civil War scholars lack more than a surface-level understanding of the prisoner-of-war exchanges. Particularly, this scholarship has dealt

[16] *See generally* WITT, *supra* note 7, at 258–62.
[17] STEPHEN C. NEFF, JUSTICE IN BLUE AND GRAY: A LEGAL HISTORY OF THE CIVIL WAR 72–73 (2010)
[18] *See, e.g., id.*, at 75; *see also* WITT, *supra* note 7, at 8–9 (stating that the book would use the code drafted by Lieber as a focal point in the story of America's struggle to reconcile justice and humanitarianism in the law of war).
[19] *See* WITT, *supra* note 7, at 184–86 (contrasting Clausewitz's view of war as "the continuation of politics by other means" with the more traditional Enlightenment concept of war as a distinct state with its own set of laws and principles).
[20] *See id.*, at 252.

with only the top-down explanations of the halts in the prisoner exchanges, which has led to slippage in the discussion of Confederate policy. Even the noted scholar of Civil War and Reconstruction history Eric Foner has struggled with the issue, claiming in his 2010 book *The Fiery Trial: Abraham Lincoln and American Slavery* that the Confederacy eventually agreed to exchange African American soldiers as prisoners in 1865.[21] Such misrepresentations underscore the need for further exploration of the exchanges, with a particular emphasis on the varying jurisdictions that interacted with one another to create a landscape of varied policies and divergent outcomes.

Part One of this paper will examine how the United States came to treat captured Confederates as prisoners of war. In order to do so, the United States would have to treat the Confederate States as a belligerent under the law of war, rather than just as a rebellion under the United States' domestic law. Part One will outline how Lincoln and Seward deftly navigated the no-man's land between international and domestic law to apply both frameworks to the Union's war against the Confederacy. It will then discuss how the United States, pressured by the international community and threatened by retaliation from the South, chose to treat Confederate privateers as prisoners of war, and the section will conclude by demonstrating that the lack of a consensus regarding the rules that should regulate exchanges in the first year of the Civil War created varying outcomes for prisoners of war and led both sides to the negotiating table in July 1862.

[21] Eric Foner, The Fiery Trial: Abraham Lincoln and American Slavery 255 (2010). *But see id.*, at 255 n. 15 (citing James McPherson's argument that the Confederate military never agreed to exchange African American captives as prisoners of war); JAMES M. MCPHERSON, TRIED BY WAR: ABRAHAM LINCOLN AS COMMANDER IN CHIEF 247–48 (2008). Foner also cites a February 26, 1865 newspaper article declaring the exchange of "Negro prisoners" by the *Chicago Tribune*, but articles discussing the exchange of prisoners in that paper no longer reference the exchange of African American prisoners after February 27. *Compare* "Negro Prisoners Exchanged," CHICAGO TRIBUNE (Feb. 26, 1865) and "Negro Prisoners Exchanged," CHICAGO TRIBUNE (Feb. 27, 1865), *with, e.g.,* "Proposed Exchange of Prisoners in the Department of the South," CHICAGO TRIBUNE (Mar. 11, 1865).

Part Two will open by discussing the terms of the Dix-Hill Cartel for the exchange of prisoners and will analyze it within the context of the custom regarding the treatment of prisoners in the nineteenth century. The section will finish with an example of the problems that arose under the cartel in the summer and fall of 1862, and how the Confederacy was able to protect several categories of prisoners by threatening the United States with retaliation. In particular, the section will highlight how the Confederacy relied upon the grant of a valid commission from a belligerent government as the defining characteristic that entitled combatants to treatment as prisoners of war rather than under criminal law.

Part Three will examine how the prisoner exchange broke down over Confederate treatment of African American prisoners of war, and will compare the legal arguments made by both the United States and the Confederacy to contemporary understandings of the law of war as represented by the most popular treatises available at the time. After a brief overview of the history of African American soldiers and their treatment when captured (or refused quarter) by Confederate forces, the paper will expose the legal uncertainty within contemporary treatises on the law of war that was presented by the use of former slaves as soldiers.

Specifically, the paper will discuss President Jefferson Davis' December 1862 order to turn captured African American soldiers and their white officers over to state authorities for trial under state laws against slave insurrection. This position will be juxtaposed with his earlier refusal to turn over Virginians captured in the Union army to state authorities for treason trials. It will also compare Confederate arguments for treating Confederate partisans as prisoners of war with later arguments made by the Confederacy against the fair treatment of black soldiers, and will put these arguments in the context of who fell within the protections afforded by contemporary understandings of the law of war. Finally, Part III will explore how Confederate

leaders failed to enforce a consistent policy regarding African American prisoners throughout its various military and municipal jurisdictions.

Prisoner and the Law of War

Although wars by their very nature begin over disagreements between two sides, Enlightenment law of war theory was predicated on acknowledging the legitimacy of both sides in order to limit the horrors of war. "It has become an established principle of international jurisprudence that a war in form shall, in its legal effects, be considered as just on both sides, and that whatever is permitted to one of the belligerents be permitted to the other," wrote United States general and publicist Henry Halleck[22] in his 1861 treatise *International Law; or, Rules Regulating the Intercourse of States in Peace and War*.[23] On both sides, Halleck argued that quarter, the practice of accepting the surrender of an enemy combatant, could only be refused to those who had individually forfeited it by "some crime against the conqueror, under the laws and usages of war,"[24] and that the present custom—though he stressed it was not an obligation—was to exchange prisoners. Halleck quoted the famous Enlightenment publicist Emer de Vattel's *The Law of Nations* for the contention that countries were free to refuse exchanging prisoners if doing so would be to their advantage, so long as doing so would not violate a cartel between that nation and its opponent.[25]

Halleck's treatise was not written in a vacuum. In the preface to *International Law*, the author noted that the treatise arose out of notes he made while attempting to answer questions of

[22] Halleck graduated from the United States Military Academy and served with distinction in the Mexican War. He was called "Old Brains" in the Army due to his reputation as a scholar of military strategy and international law. SHELBY D. FOOTE, THE CIVIL WAR: A NARRATIVE: FORT SUMTER TO PERRYVILLE 144–45 (1958).
[23] Henry Halleck, *International Law; or, Rules Regulating the Intercourse of States in Peace and War* (New York: D. Van Nostrand, 1861), 425.
[24] *Id.* at 429.
[25] *Id.* at 431–32 (*quoting* Emer de Vattel*, Droit des Gens*, liv. 3, ch. 8 § 158).

international law during the Mexican War.[26] While that war had originally followed the civilities of European warfare, with battlefield paroles and exchanges readily given, the rise of Mexican guerillas and large numbers of paroled Mexican soldiers violating the terms of their paroles by returning to the lines before they were officially exchanged led President James K. Polk to order the halt of prisoners exchanges in 1847.[27]

Halleck looked not only to his past, but also to his country's future. A note beneath Halleck's preface cautioned that "new and unexpected circumstances ha[d] arisen which prevent the author from giving that personal attention to correcting proof," but legal historian Cynthia Nicoletti states that Halleck also wrote portions of his treatise in anticipation of the Confederate States of America's quest for foreign recognition. Unlike some earlier Enlightenment authors, Halleck argued that no level of military might or success transformed a rebellious faction of a nation into an independent state, and added that the parent state was not required to abide by the law of war in suppressing the civil war.[28] If the law of war applied to the seceded states, then the United States would be limited in the actions it could take against enemy persons and property as compared to if the United States were merely exercising its police power against an internal rebellion. And if the law of war applied to the seceded states, then the United States would have to treat the soldiers and sailors armed by the seceded states as prisoners of war.

Halleck's treatise explicitly withheld the protections of the law of war from those participating in an internal rebellion against a sovereign state. "Mere rebellions, however, are considered exceptions . . . as every government who treats those who rebel against it to its own municipal laws," wrote Halleck, leaving little room for interpretation of his views on the

[26] *Id.*, at iii.
[27] WITT, *supra* note 7, at 118–20; Paul J. Springer, "American Prisoner of War Policy and Practice from the Revolutionary War to the War on Terror," Ph.D. Dissertation, Texas A&M (2006), 98–99.
[28] CYNTHIA NICOLETTI, SECESSION ON TRIAL: THE TREASON PROSECUTION OF JEFFERSON DAVIS 207–08 (2012).

treatment of rebellions under the law of war.[29] As historian Stephen Neff highlights, however, the application of the law of war to civil wars had not been a major concern of most law of nations or international law theorists.[30] One reason for this, as Nicoletti points out, was that many thought the law of nations "applied between nations, and only between nations."[31] Applying international law within an individual nation was therefore an affront to that state's sovereignty.[32]

Bowing to reality, however, several treatises recognized the need to apply the law of war to civil conflicts once these struggles grew large enough. The sixth edition of American legal theorist Henry Wheaton's *Elements of International Law* stated that civil wars were what the famous seventeenth-century Dutch jurist Hugo Grotius had called "*mixed* war[s]," and that "the general usage of nations regards such a [civil] war as entitling both the contending parties to all the rights of war against each other, and even as against neutral nations."[33] This may have been too broad a reading of Grotius. Nicoletti argued that Grotius "struggled to prevent the law of nations from attaching to revolutionary movements," although he "acknowledged" that it was sometimes necessary for the law of nations to attach during civil wars.[34]

Eighteenth-century publicists, though more accepting of civil war and rebellion in light of occurrences in Europe, did not encourage civil war. Specifically, publicists argued that Vattel stated that, if certain conditions were met, the law of nations could apply in a civil war, breaking "bonds of society and government, or at least [suspending] their force and effect."[35] It was to

[29] Halleck, *International Law*, 333.
[30] STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS 4, 165 (2005).
[31] NICOLETTI, *supra* note 28, at 205.
[32] *Id*.
[33] Henry Wheaton, *Elements of International Law*, ed. William B. Lawrence, 6th ed. (Boston: Little, Brown & Co., 1855), 365.
[34] NICOLETTI, *supra* note 28, at 206.
[35] *Id.* (*quoting* Vattel, *The Law of Nations* (1758: repr., Northampton, MA: Simeon Butler, 1820), § 292–93).

arguments such as this to which Halleck responded, centuries later, that no level of military power could qualify a rebellious faction for treatment under the law of nations.[36]

The Confederate States and International Law.

Abraham Lincoln and the United States faced a "profound dilemma" at the outset of the Civil War. Relying solely on domestic law to govern treatment of the Confederacy would severely limit Lincoln's options, but invoking international law could be seen as de facto recognition of secession.[37] Originally, Lincoln opted to treat those who took up arms against the United States as criminals under domestic law. In *Lincoln's Code*, Yale law professor John Fabian Witt argues that this had the significant effect of denying Confederates the protections of the law of war. But then Lincoln seemingly contradicted himself by calling for a blockade of Confederate ports on April 19.[38] Confronted with a difficult choice between either "A" or "B," Lincoln and his Secretary of War chose "C. All of the above." The two men had decided that the United States could choose when it applied domestic law and when it applied international law in the upcoming conflict, and in 1863 the Supreme Court would vindicate this seemingly inconsistent position in the *Prize Cases*.[39]

Ships captured attempting to run the blockade forced Lincoln and the United States to recognize a wider conception of which Confederates would need to be treated as prisoners of war. This Article I, Section 8, Clause 11 of the United States Constitution enumerated Congress' power to grant letters of marque. The preceding clause also expressly granted Congress the

[36] *See id.*
[37] *Id.*, at 208.
[38] WITT, *supra* note 7, at 142–43.
[39] *Id.* at 151.

power "[t]o define and punish Piracies and Felonies on the high Seas, and offenses against the Law of Nations."[40]

By attempting to exercise the right to punish piracy on the high seas, the United States was forced to acknowledge that the Confederate government had rights under international law. The Confederate Constitution contained exact replicas of the U.S Constitution's clauses regarding piracy and privateering, [41]and under that authority Jefferson Davis called for privateers on April 17, 1861.[42] The tenth clause of Article I of the United States Constitution soon came into direct conflict with the eleventh clause of Article I, Section 8 of the Confederate Constitution when Union blockade ships began capturing Confederate privateers in the summer of 1861. Grand juries in New York and Philadelphia indicted the crews of *the Savannah* and *the Jefferson Davis*, respectively, as pirates. In October, juries sententenced four members of *the Jefferson Davis*' crew to death. But the defendants from the *Savannah* fared better when the jury continually came back deadlocked, perhaps convinced by the defense's argument that if the Confederacy could be viewed as a carrying on a war, then it should be able to grant letters of marque. The executions were never carried out, and eventually the members of both crews were transferred to military prisons as prisoners of war.[43] Lincoln and the United States' refusal to acknowledge the Confederacy's right to grant letters of marque had faced pushback from U.S. citizens who were unwilling to return guilty verdicts against the crew of the *Savannah*.

The United States had faced international resistance to its proposed treatment of Confederate privateers. In 1856, delegates from the United States had joined the belligerents from the Crimean War in Paris to discuss the terms of the European peace. The Americans were

[40] U.S. CONST. art. I, § 8, cl. 10, 11.
[41] C.S.A. CONST. art. I, § 8, cl. 10, 11.
[42] Charles W. Sanders, *While in the Hands of the Enemy: Military Prisons of the Civil War* (Baton Rouge, LA: LSU Press, 2005), 33.
[43] WITT, *supra* note 7, at 161–62.

successful in codifying the principles of free ships, free goods, and the requirement that blockades must be effective in order to be legal under the law of nations—positions held by the United States since the 1790s. But then the British responded with an article abolishing privateering, which is when governments grant commissions to privately-owned vessels allowing them to be arm and attempt to capture enemy shipping.[44] It is often said that governments and militaries are always fighting the last war, and such was the case with the Pierce administration. Privateers had been vital to the American cause during the War of 1812, and the United States did not want to give up what it saw as a valuable tool against the superior navies of Europe. The Pierce Administration did not see that technological advancements had virtually eliminated the effectiveness of converting the merchant fleet into privateering vessels, and it certainly could not have predicted a time when the United States would be the superior naval force in a major war.[45]

In addition to internal pressures regarding the trial of Confederate privateers such as the deadlocked juries in the *Savannah* cases,[46] the United States also had to consider external pressures when deciding whether to execute Confederate privateers convicted of piracy. Davis and the Confederacy had threatened retaliation against Union prisoners for executions of Confederate privateers. And after they captured 1,300 United States soldiers during the Battle of Bull Run on July 21, 1861, that threat of retaliation became a serious consideration for the United States, according to Witt.[47]

Retaliation would prove a valuable tool for the Confederacy as it fought for equal treatment under the law of war. Although the Confederate States were attempting to break away from the

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[44] 1 KENT, COMMENTARIES ON AMERICAN LAW, at 106–107 (10th ed., 1860)
[45] *Id.* at 133–35.
[46] MARK A. WEITZ, THE CONFEDERACY ON TRIAL: THE PIRACY AND SEQUESTRATION CASES OF 1861 34 (2005) (arguing that the arguments brought up in court, and that the juries had to interpret, helped to define the Confederacy as a nation in foreign opinion).
[47] *Id.* at 159, 163.

Union, they took with them a tradition in the law of war that stemmed from the Founding Fathers. The eighteenth-century law of war that the first American leaders had supported held views on property—especially in slaves—and neutral shipping that aligned perfectly with Confederate interests.[48] Like the generation fighting the American Revolution, the Confederate States of America had the good fortune that its interests aligned with the general tenets of Enlightened Law of War theory. In particular, it limited the force that could be used by a stronger opponent against the new and fledgling nation.[49] By allowing for privateering, the law of war gave the Confederacy a cheap and efficient way to round out its nascent naval forces. By restricting the amount of force that an opposing army should wield, the law of war gave an advantage to the smaller foe. While this had worked to the advantage of the United States in its battles with Great Britain, it held the potential to hinder their prosecution of the war against the Confederacy.[50]

The plight of prisoners in 1861

On July 13, 1861, United States General George B. McClellan wrote to Assistant Adjutant-General E.D. Townsend requesting "immediate instructions . . . as to the disposition to be made of officers and men taken prisoners of war." He added that he was concerned with "the liability incurred [by Confederate soldiers] taking up arms against the United States," and suggested that the government craft a response that would have a positive effect on the "deluded mass of rebels."[51] Many of McClellan's counterparts on both sides of the conflict sent similar letters to their respective capitals requesting instructions on the disposition of prisoners of war.

Unbeknownst to McClellan, the House of Representatives adopted a resolution on July 8—the first date Congress was in session—directing the Secretary of War "to instruct the officers of

[48] *Id.* at 223–24.
[49] *Id.* at 47–48.
[50] *Id.*, at 47.
[51] OR Ser. 2, Vol. III, 9–10.

the Army of the United States taking prisoners and releasing them upon their oath of allegiance to the United States to report their name and residence to [the Secretary of War] that they may be recorded in his Department."[52] The Confederate Congress, in session during the spring of 1861, had first dealt with prisoners of war on May 21. The Act Relative to Prisoners of War provided that the Confederate War Department would take responsibility for prisoners taken "during the pending hostilities with the United States" by providing "for the safe custody and sustenance of prisoners of war," which "[should] be the same in quantity and quality as those furnished to enlisted men in the army of the Confederacy."[53] The acts of both legislative bodies were nice gestures, and they demonstrated the intention of the United and Confederate States to abide by the customs of eighteenth-century European nations in the humane treatment of prisoners of war.

Under the law of war, however, neither of these actions bound either belligerent to what was generally considered the most humane treatment of prisoners of war: paroling and exchanging them so that they could return to their own lines. These bills laid the foundations for how prisoners of war would be treated when in the custody of the opposing government, but they did nothing to ensure that prisoners would be exchanged. For the first year of the war, exchanges would be handled largely by officers in the field, both allowing greater room for flexibility and leading to uneven results in exchanges based upon the idiosyncrasies of the negotiating commanders.

The eighteenth-century philosopher Emer de Vattel had argued that only a cartel between belligerents could bind the parties to specific policies on the treatment of prisoners of war, though custom dictated a certain level of humane treatment.[54] Writing a century later and an

[52] Or Ser. 2, Vol II, 17 (July 8, 1861).
[53] http://docsouth.unc.edu/imls/csaacts/actpow.html.
[54] Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*,

ocean away, the United States' two most prominent publicists, Henry Wheaton and James Kent, both endorsed Vattel's assessment.[55]

Absent such a cartel, both sides had room to maneuver when making special exchanges of prisoners. Such was the case for McClellan in 1861. Winfield Scott, the Union general-in-chief, replied that both officers and the enlisted should be paroled upon taking an oath not to fight until they had been properly exchanged. Excepted from these liberal paroles, however, were "officers . . . who have recently been officers of the U.S. Army or Navy and who you may have reason to believe left either with the intent of bearing arms against the United States." Those prisoners, Scott instructed, should be sent to Fort McHenry.[56] Scott was, as Witt stated, well suited to deal with difficulties arising under the law of war. He had been trained as a lawyer, had been a prisoner himself during the War of 1812, and he was "one of the most well read officers in the early U.S. Army."[57] Scott's reply to McClellan represented both the European customs that Scott had studied, as well as the United States' view that captured Confederates could still be treated as criminals.

Without a cartel binding both sides, either side was well within their rights to refuse exchanges when doing so was in their favor. Brigadier General Joseph J. Reynolds initially agreed to General Robert E. Lee's proposal to exchange Union prisoners captured at the First Battle of Bull Run for the paroled Confederate prisoners who surrendered with John Pegram, the

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edited and with an Introduction by Béla Kapossy and Richard Whitmore (Indianapolis: Liberty Fund, 2008) Vol. III § 153.

[55] HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 417 (William B. Lawrence, ed., 6th ed. 1855); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 79 (William H. Forman & Richard A. McCurdy, eds., 10th ed. 1860).

[56] *Id.* at 9–10.

[57] WITT, *supra* note 7, at 122.

first former U.S. commissioned officer to be captured while in the military service of the Confederate States of America, earlier that summer.[58]

But just two days later, Reynolds had to inform Lee that General William Rosecrans, who was in charge of the department, had forbidden Reynolds from accepting Lee's terms. By trading Manassas prisoners for those captured within the vicinity Lee and Reynolds were now fighting in, Rosecrans stated that the Confederate forces would have "advantages of the local knowledge [the parolees] have acquired," while the Union forces would "[receive] none in return." Secondly, Rosecrans reasoned the proposed exchange would have effectively sent Lee's command reinforcements, while the exchange would have done nothing to swell the ranks of the opposing U.S. units because the Manassas prisoners would likely be transported elsewhere. The fragility of agreements between individual commanders in the field, such as the one between Lee and Reynolds, demonstrated how the chain of command made agreements in the first year of the war even more difficult.

Without a cartel binding each side to exchange prisoners, both sides could seek advantages when negotiating potential exchanges. Although individual military commanders were constrained by their respective chains of command, they had increased leeway in which to negotiate prisoner exchanges. More importantly, they had every right to refuse a proffered prisoner exchange, allowing the number of enemy prisoners in captivity to grow beyond what either side was prepared to handle at the outset of hostilities.

The Dix-Hill Cartel

[58] OR Ser. 2, Vol. III, 25 (Aug. 7, 1861); *see* Scott Laidig, "Brigadier General John Pegram, Lee's Paradoxical Cavailier," OSU.COM EHISTORY (Spring 1998).

On July 22, 1862, United States General John Dix and his Confederate General D.H. Hill signed an agreement between the United States and Confederate armies to govern the exchange of prisoners between the two armies. By agreeing to an exchange with the Confederate army, the United States avoided recognizing the Confederate government as a legitimate state. The Dix-Hill Cartel established an official scale of equivalents governing the number of prisoners to be exchanged for prisoners of varying ranks held by both sides—citizens could only be exchanged for citizens—and encouraged the swift return of prisoners to their own lines. Importantly, surpluses of prisoners were to be paroled, "unable to serve in the armed forces until the officer or soldier they were exchanged for reached their respective lines."[59] Three supplemental articles ironed out some of the logistics, such as the location for exchanges, and added that "in case any misunderstanding shall arise [while conducting prisoner exchanges] in regard to any clause or stipulation in the foregoing articles it is mutually agreed that such misunderstand shall not interrupt the release of prisoners on parole . . . but shall be made the subject of friendly explanations."[60]

Terms of the Cartel

The nine articles of the Dix-Hill Cartel, though they cover little more than a page of the *Official Records*, were built upon centuries of precedent from the law of war. Eighteenth-century Swiss philosopher Emer de Vattel argued in his treatise *Le Droit des Gens* (*The Law of Nations*) that the practice between enlightened European nations had evolved into the usage of exchanges of prisoners. But in *Elements of International Law*, American publicist Henry Wheaton argued that such exchanges were dependent upon agreements between belligerents, and were not

[59] OR,Ser. 2, Vol. IV, 266–67 (July 22, 1862).
[60] *Id.* at 268.

required by the law of war.[61] Both authors stressed the importance of usage in establishing norms for conduct, however, and the Dix-Hill Cartel was a prime example of reliance on precedent. The cartel signed in 1862 relied heavily on a cartel between the United States and the United Kingdom from the War of 1812. Union Major General John Wool, attempting to negotiate an exchange cartel in February 1862, sent a copy of the 1812 agreement, called the Mason-Barclay Cartel, to Confederate representative General Howell Cobb.[62] The 1862 cartel borrowed heavily from its 1812 predecessor, even down to the exact exchange rates used for officers of different ranks.[63]

By its own words, the Dix-Hill Cartel was meant to bind the militaries of the United States and the Confederate States to a regular exchange of prisoners. The first article to demonstrate the binding nature of the agreement was Article 6, which started with a declaration that the Cartel would be in effect "during the continuance of the war" regardless of which side had the surplus of prisoners. It then laid out five "great principles" which would dictate future exchanges:

> (1) an "equitable exchange . . . according to the scale of equivalents;"
> (2) privateers, as well as men from different services, could be exchanged for each other in accordance with the scale of equivalents;
> (3) *all* prisoners should be exchanged or paroled to their own lines within ten days, or as soon as practicable;
> (4) paroles are not considered absolved until the equivalent has reached their own lines; and
> (5) paroles forbade "the performance of field, garrison, police, or guard, or constabulary duty."[64]

This article specified that logistical concerns, like those that derailed the exchange negotiations between generals Reynolds and Lee a year earlier, . First, it attempted to eliminate surplus as an

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[61] Wheaton, *Elements of International Law*, 417 (*citing* Vattel)
[62] OR Ser. 2, Vol. III, 303–09 (submitted to Gen. Cobb Feb. 23, 1862).
[63] *Compare* OR Ser. 2, Vol. IV, 266 with OR Ser. 2, Vol. III, 303. Although the British government did not officially acknowledge the Mason-Barclay Cartel, both sides used the agreement as guidelines in prisoner treatment and exchange throughout the war. *See* Witt at 68.
[64] *Id.*

excuse for refusing an exchange by mandating that both sides release all prisoners, and let the paroles be dealt with over time. Article 6 also attempted to eliminate strategic delays like the one at the heart of Rosecrans' denial of Reynolds' deal with Lee. In that instance, Rosecrans had refused to accede to the exchange, despite its practicability, because doing so would have put Reynolds' command at an immediate, relative numerical disadvantage.

Article 9—one of three supplemental articles appended to the original agreement—demonstrated that the agreement was meant to be flexible in order to promote the continued exchange of prisoners:

> And in case any misunderstanding shall arise in regard to any clause or stipulation in the foregoing articles it is mutually agreed that such misunderstanding shall not interrupt the release of prisoners on parole, as herein provided, but shall be made the subject of friendly explanations in order that the object of this agreement may neither be defeated nor postponed.[65]

In the first year of the war, prisoner exchanges had been held up by several matters of legal interpretation, such as the status of belligerents, whether privateers were criminals or prisoners of war, or the enforceability of oaths of allegiance. Article 9 should have allowed for these legal gymnastics to continue without the consequences being felt by soldiers stuck in prison camps. In theory, this final catchall should have effectively eliminated the need for military prisons during the Civil War, and with it, eliminated the suffering that took place there. This article, and the eight preceding it, however, would fail to live up to the lofty ideals that gave birth to Dix-Hill Exchange Cartel.

The negotiations leading up to the Dix-Hill Cartel were also a preview of how the law of war would affect Civil War prisoner exchanges because both sides still attempted to negotiate more aggressively when they held more prisoners than their opponent. "[I]f a nation finds a considerable advantage in leaving her soldiers prisoners with the enemy during the war rather

[65] *Id.* at 268.

than exchanging them, she may certainly, unless bound by cartel, act in that respect as is most conducive to her interest."[66] Although the Confederacy had held a credit in the balance of prisoners throughout the first year of the war, the capture of Fort Donelson in February 1862 swung the advantage back to the United States and, according to military historian Paul J. Springer, led the United States to walk away from the negotiating table. McClellan's inept Peninsula Campaign, however, gave the Army of Northern Virginia an opportunity to even the score, and the United States re-opened discussions in the summer of 1862. Without a cartel to constrain the United States, they were free to pursue, or avoid, a cartel for the exchange of prisoners depending upon their strategic interests.

Threat of Retaliation

As historian Charles Sanders noted in his 2005 book, *While in the Hands of the Enemy*, the exchange of prisoners under the cartel was "fraught with difficulties from the start." Only a day after the cartel had been signed, General John Pope issued General Orders No. 11, which authorized his officers to expel Confederate citizens from within Union lines, and added that any who returned could be executed as spies. President Davis immediately protested, arguing, among other things, that General Orders No. 11 violated the Cartel. In a letter to the general commanding the U.S. army, dated August 2, 1862, Lee decried Pope's orders, as well as Secretary of War Edwin Stanton's July 23 order "to take the property of [citizens of the Confederate States] . . . without compensation," and Brigadier General Adolph von Steinwehr's holding "innocent and peaceful inhabitants . . . as hostages." Lee, parroting his president, contended that such actions constituted sufficient grounds for the Confederacy to renounce the infant Cartel, and stated that General Pope and any of his commissioned officers who followed

[66] Vattel, *supra* note 53.

Pope's orders would not be treated as prisoners of war by the Confederacy. Instead, Lee warned that the Confederacy would treat them like "robbers and murderers."[67] Lee's letter alluded to General Orders No. 54, which had been released by the Adjutant and Inspector General's Office the day before Lee sent his letter. In addition to treating Pope and his commissioned officers as criminals, General Orders No. 54 called for Steinwehr and his officers to receive a similar treatment if captured, and stated that if any hostages were executed, an equal number of commissioned officers, held prisoner by the Confederacy, would be hung in retaliation.[68]

In identical letters to Lorenzo Thomas and William Ludlow—two Union officers overseeing the exchange of prisoners in Virginia—on September 24, 1862, the Confederate Agent of Exchange Robert Ould[69] wrote that "[i]t always has been and is now the earnest desire of the Confederate authorities that the war shall be conducted in every respect in accordance with the usages of civilized warfare."[70] The laws of war provided the Confederacy with a tool to enforce the usages of civilized warfare against their opponent; retaliation. The practice, according to Kent, had long been endorsed by the United States.[71] Now the United States was learning firsthand just how powerful a tool it could be. "[S]ince it has been announced by the competent military authorities of the United States that the orders to which exception has been taken are not in force, the officers who have been detained are freely released on parole until exchanged," Ould declared.[72]

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[67] *SHS Papers*, 299–300.
[68] *Id.* at 301–02.
[69] Ould was a lawyer serving as an assistant secretary of the Confederate War Department. 1 CONFEDERATE MILITARY HISTORY 630–31 (Clement A. Evans, ed. 1899).
[70] Letter from R. Ould to L. Thomas (Sep. 24, 1862), *in* 2 THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES 4 (1899), 552; Letter from R. Ould to W. Ludlow (Sep. 24, 1862), *in* 2 OFFICIAL RECORDS 4 at 553.
[71] 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 104–05 (William H. Forman & Richard A. McCurdy, eds., 10th ed. 1860).
[72] Letter from R. Ould to L. Thomas (Sep. 24, 1862), *in* 2 OFFICIAL RECORDS 4 at 552; Letter from R. Ould to W. Ludlow (Sep. 24, 1862), *in* 2 OFFICIAL RECORDS 4 at 553.

The Confederacy used these early negotiations to argue for an expanded definition of who qualified for protection under the law of war that included any soldier holding a valid commission from their government. Ould also became increasingly distressed by the Union's refusal to treat Confederate "partisan rangers" as prisoners of war eligible for exchange.[73] On October 5, 1862, Ould presented Ludlow with a list of grievances under the cartel. Chief among these grievances was the treatment of partisan soldiers and home guard. In arguing for their recognition as prisoners of war eligible for exchange under the cartel, Ould struck upon a central tenant of eighteenth-century law of war theory when he argued that officers and men in a home guard unit are entitled in all respects to the privileges of officers and men in the regular army because "they are so recognized by the acts of the Confederate Congress."[74] Ould was stressing the central role that the governing body of a belligerent power plays in sanctioning their own people's violence against the enemy. He made similar arguments in condemning the detainment of Confederate partisan rangers:

> Partisan rangers are not persons making war without authority, but are in all respects like the rest of rhe Army except they are not brigaded and act generally on detached service. They are not irregulars who go and come at pleasure, but are organized troops whose muster-rolls are returned and whose officers are commissioned as in other branches of the service. They are subject to the Articles of War and Army Regulations and are held responsible for violation of the usages of war in like manner with regular troops.[75]

Ould argued that the crucial issue in determining whether or not a soldier was protected by the law of war hinged on holding a valid commission. This was, according to law professor John Fabian Witt, the "key distinguishing feature." Commissions were licenses to commit violence, and they put soldiers outside the sphere of criminal punishment. Without a commission, the same

[73] Sanders, *While in the Hands of the Enemy* at 132–33.
[74] Letter from R. Ould to W. Ludlow (Oct. 5, 1862), *in* 2 OFFICIAL RECORDS 4 at 600.
[75] *Id.* at 601.

violence was a crime. Witt contended that the answer to violations of the law of war was not in criminal punishment, but in retaliation.[76]

Perhaps with the threat of retaliation in mind, Ludlow forwarded the letter to Thomas, his superior officer, and Thomas decided to accept many of Ould's arguments. Specifically, Thomas recommended to Secretary of War Stanton that the Missouri guards and the partisan rangers be treated as prisoners of war and exchanged. Although Stanton forbade Thomas from telling Ould directly, the Confederate agent of exchange was made aware of the changes in U.S. policy by others means.[77]

Although the threat of retaliation had brought the U.S. exchange agents to agree to their demands, the Confederate military acted to retaliate with hostages before the United States could respond. General Lee sent a letter to Secretary of War George W. Randolph that prisoners captured by the partisan ranger Col. John Imboden had been sent to Richmond to be held as hostages for Col. Imboden's men. Randolph forwarded Lee's missive to Ould, with instructions to inform the Union agent of exchange "prisoners taken by the partisan corps will not be exchanged until the enemy consent to exchange the partisans."[78] A circular released by Ludlow on that same day underscored how Ould's arguments had played a role in changing Union policy. It read: "The body of Confederate troops known by the designation of Partisan Rangers *and whose officers are commissioned by the Confederate government* and who are regularly in the service of the Confederate States are to be exchanged when captured."[79]

The Confederate retaliation worked. On November 20, the Union officially dropped its position regarding partisan forces. Ludlow informed Ould that "orders have been issued and are

[76] Witt, *Lincoln's Code* at 128–29.
[77] Sanders, *While in the Hands of the Enemy* at 133.
[78] Letter from G. Randolph to R. Ould (Oct. 14, 1862), *in* 2 OFFICIAL RECORDS 4 at 913, 918.
[79] William H. Ludlow, Circular (Nov. 20, 1862), *in* 2 OFFICIAL RECORDS 4 at 739 (emphasis added).

now being executed to send all the prisoners at the West belonging to irregular organizations for Vicksburg for delivery to your agent there."[80]

The Confederacy also retaliated in order to limit the categories of people who could be brought within the realm of the law of war. In a December 2 letter from Ludlow to Ould, Ludlow told his Confederate counterpart that he had recently learned of the capture of thirty to forty Pennsylvania citizens in a raid by General J.E.B. Stuart. In his mind this was so clear a violation of the law of war, and "so clearly in contravention of the positions [Ould] has laid down that [Ludlow] need only mention the fact to [Ould] to insure" that the Pennsylvanians be swiftly returned.[81]

If Ludlow believed that the matter was just one of miscommunication, however, then he had fallen into Ould's trap. "[The Pennsylvanians] were captured and are now held in retaliation for captures of non-combatant citizens of the Confederate States," he replied. Then he named his price: the release of non-combatant citizens by the North and a commitment to "abandon the policy of making such captures in the future.[82]" By embracing retaliation, the Confederacy risked a potential downward spiral. The possibility of escalating violence, according to Witt, caused Enlightenment law-of-war theorists such as Vattel to caution against the practice. Yet The United States had endorsed retaliation since the American Revolution.[83]

Through adroit use of the law of war, however, Ould looked to have his cake and eat it too. "In retaining these Pennsylvanians," he said, "the Confederate Government does not abandon its position so often reiterated that the capture of non-combatants is illegal and contrary to the usages of civilized warfare." Instead, Ould claimed that the capture of the Pennsylvanians was

[80] Letter from W. Ludlow to R. Ould (Nov. 20, 1862), *in* 2 OFFICIAL RECORDS 4 at 738.
[81] Letter from W. Ludlow to R. Ould (Dec. 2, 1862), *in* 2 OFFICIAL RECORDS 5 at 20.
[82] Letter from R. Ould to W. Ludlow (Dec. 11, 1862), *in* 2 OFFICIAL RECORDS 4 at 71–72.
[83] Witt, *Lincoln's Code* at 41, 48.

merely an attempt to stop all future arrests of non-combatants. In fact, he argued that the Confederacy had no choice, stating that the failure of the United States to respond to Confederate protests forced the Confedracy's hand.[84] Events already in motion, however, would limit the effectiveness of this Confederate threat.

In certain circumstances, the U.S. military refused to respond to intimidation. By December 1862, Ould and the Confederacy had still not received what they felt was a satisfactory answer regarding the execution of private citizen William Mumford in New Orleans for taking down the Union flag.[85] The Confederacy never received what they would have considered a satisfactory answer, but upcoming issues for the cartel would make Mumford's death pale in comparison.

In the first few months after the prisoner exchange cartel was signed in 1862, prisoner exchanges worked to efficiently return prisoners of war to their respective armies. Through retaliation, the Confederacy was also able to take control over which categories of non-traditional prisoners would be included in exchanges. Confederate retaliation also helped to enforce the lines separating private citizens from the law of war so as to protect the Southern citizens who had come within the jurisdiction of the United States military.

The Cartel Breaks Down

When the Emancipation Proclamation went into effect on January 1, 1863, it fundamentally changed the nature of the Civil War. A conflict that had at its base been about saving the Union became a crusade to break the bonds of millions of Southern slaves. The Emancipation Proclamation also paved the way for African Americans to enlist in the U.S. army en masse. Lincoln justified the Proclamation as a measure of "military necessity," and stated "such persons

[84] Letter from R. Ould to W. Ludlow (Dec. 11, 1862), *in* 2 OFFICIAL RECORDS 4 at 72.
[85] Sanders, *While in the Hands of the Enemy* at 145.

of suitable condition, will be received into the armed service of the United States."[86] After almost two years of bitter fighting, the United States was officially fighting to free the slaves. The Confederacy, on the contrary, had been fighting for slaves since Fort Sumter. The difference was that they were fighting to keep slaves. The possibility of facing blacks on the battlefield had grave consequences for both the Confederacy and the prisoner exchange.

From slaves to soldiers

On Christmas Eve of 1862, Davis issued a preemptive response to Lincoln's Proclamation. In General Orders No. 111, Davis declared "[t]hat all negro slaves captured in arms be at once delivered over to the executive authorities of the respective States to which they belong to be dealt with according to the laws of said States." A similar fate was ordered for commissioned officers "found serving in company with armed slaves in insurrection against the authorities of the different States of this Confederacy."[87] The Confederate Congress later entrenched this policy with a joint resolution that was approved by Davis on May 1, 1863.[88] Around the same time, Ould and Ludlow began to argue about the Confederacy's "[d]iscrimination among our captured officers and men."[89] Davis, according to Sanders, was using the threat of retaliation that had been so successful in enforcing Southern rights under the law of war during the first two years of the Civil War. This time, however, Sanders stated that retaliation would not be as effective because (1) the Union had begun to hold a surplus of prisoners compared to the Confederacy; and (2) Union problems with its parolees made the government less willing to follow through on negotiations that would leave the United States holding the responsibility for thousands of soldiers who would not be allowed to fight or serve in any meaningful capacity.

[86] Abraham Lincoln, "Final Emancipation Proclamation, *in* LINCOLN: SPEECHES, LETTERS, MISCELLANEOUS WRITINGS, PRESIDENTIAL MESSAGES AND PROCLAMATIONS 424–25 (1989).
[87] OR Ser. 2, Vol. V, 795–97; WITT, *Lincoln's Code*, 244.
[88] OR Ser. 2, Vol. V, 940–41.
[89] WITT, *Lincoln's Code*, 245–47, quoting Ludlow, internal punctuation omitted.

The Confederate Congress approved of Davis' sentiment in General Orders No. 111, but altered it slightly in an attempt to bring it in line with Davis' previous positions on the treatment of prisoners of war. Rather than turning Union officers over to state authorities for commanding black soldiers and "inciting servile insurrection," the Confederate Congress transferred the authority to deal with such officers with the military. "If captured," the Joint Resolution said that commissioned officers or other white leaders of African American troops "[would] be put to death or otherwise punished at the discretion of the court." Although the resolution is not explicit on which court, the Resolution is clear on the fact that such cases would remain within the jurisdiction of the national Confederate government.[90]

The Confederacy soon had an opportunity to show that its government was not bluffing. After the assault on Fort Wagner by the 54th Massachusetts on July 18, 1863, the Confederate forces denied the customary flag of truce that would have allowed the Union forces to retrieve their wounded and dead from the killing field in front of the fortification.[91] Far from denying black soldiers the rights to a decent burial or comfort from their wounds, African American soldiers often received no quarter, and in cases such as the infamous Fort Pillow massacre, hundreds of African American soldiers were murdered in cold blood. Although Professor John Fabian Witt noted in *Lincoln's Code* that the Confederate government never officially condoned the practice of summarily executing black soldiers, the government does not appear to have made any effort to stop it. Indeed, Witt argued that Ould even acknowledged that the executions, if kept quiet, could actually ease the tension building up around the exchange. In a report to Secretary of War James Seddon on May 2, 1864, Ould wrote that greatest threat to the continuance of the exchange cartel with the Union was "the inadmissible claim . . . that

[90] "Joint resolutions adopted by the Confederate Congress on the subject of retaliation April 30–May 1, 1863, *in* OR Ser. 2, Vol. V, 940.
[91] "Assault on Fort Wagner," *The Liberator*, July 31, 1863.

recaptured slaves shall be treated as prisoners of war," but noted that such a difficulty would only arise if the Union found a "well-authenticated case of the retention of a negro prisoner." Ould finished by stating that no such case had yet been found by them, and noted that he had "no especial desire to find any such case."[92] Reading between the lines, Witt interpreted Ould's comments as a *de facto* acceptance, and even encouragement, of the practice of summarily executing black soldiers captured by the Confederacy.

In line with the law of war, Lincoln threatened retaliation against Confederate prisoners of war in order to expand the definition of prisoner of war used by the Confederacy to include African Americans serving in the U.S. military. In his July 30, 1863 "Order of Retaliation,"Lincoln decreed "The government . . . will give the same protection to all its soldiers." For each U.S. soldier killed "in violation of the laws of war," Lincoln promised that a Confederate soldier would meet the same end. And "for every one enslaved by the enemy," Lincoln promised a rebel soldier would be "placed at hard labor" until his U.S. counterpart was released.[93] Having sent African American soldiers into harm's way, Lincoln accepted the mantle of protecting them from violations of the laws of war through retaliation—the one tool that Vattel said was left to parties who had agreed to an exchange cartel.[94]

Exchanges ceased

U.S. agent of exchange William Ludlow and Confederate agent of Exchange Robert Ould had worked well together during the first six months of the cartel. Together they had helped

[92] Ould to Seddon, OR Ser. 2, Vol. VII, 105.
[93] Lincoln, "Order of Retaliation, July 30, 1863, 484–85. The U.S. government did not always extend this equal treatment in its own dealings with African American soldiers. An article in *The Liberator* published the day after Lincoln's Order of Retaliation declared that "colored" soldiers were not allowed to serve as substitutes for white draftees. And on March 21, 1865, General Grant wrote to Stanton attempting to rectify a situation where the paymasters were paying white soldiers while withholding compensation from their black comrades. Grant, Letter to Edwin Stanton, March 21, 1865, 1082.
[94] Vattel, *supra* note 54, Vol. III § 153.

exchange thousands of prisoners. But their relationship would quickly sour.[95] Davis' proclamation had stated that all Union officers currently held captive by the Confederacy would remain in the South, and Ludlow spent much of the spring of 1863 working to secure their release, without much success.[96]

In response to Ludlow's questions about the release of these officers, Ould responded that, in conforming with Davis' proclamation, he would only be exchanging officers for officers of corresponding rank. Ould stated that, although he would continue to release non-commissioned officers and privates on parole, the courtesy would not be extended to regular officers. This drastic step, according to Ould, was "forced upon the Confederate Government not only by the refusal of the authorities of the United States to respond" to Confederate questions about Mumford's execution, but also "their persistence in retaining Confederate officers who were entitled to parole and exchange."[97]

The standoff between the positions taken by the Confederate and U.S. agents of exchange hurt both the the cartel, and the prisoners of war the cartel was supposed to protect. Conditions for Union officers held in the South worsened to the point that Stanton relented, allowing Ludlow to orchestrate a special, man-for-man exchange with Ould in late March. Although Ludlow told Ould that only special exchanges would be possible until Davis revoked his December proclamation, Ould agreed to these exchanges in early April 1863. [98] These special exchanges would be only temporary, however, and the issues that led to them would pale in comparison to the next set of problems facing the prisoner exchange cartel.

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[95] Sanders, *While in the Hands of the Enemy* at 149.
[96] *Id.* at 150.
[97] Letter from R. Ould to W. Ludlow (Jan. 17, 1863), *in* 2 OFFICIAL RECORDS 5 at 187.
[98] SANDERS, WHILE IN THE HANDS OF THE ENEMY at 150–51.

Chief among these was the release of General Orders No. 100, Lieber's Code, in late April.[99] The main theme of Lieber's Code was military necessity. The Code was a perfect base of support for Lincoln, who increasingly was using military necessity to justify his expansive use of executive power. Torture, poison, and assassinations were outlawed by the code, but pretty much anything else was on the table if justified by the situation.[100] The Code was not written in a vacuum—its prohibition on assassination (or "outlawry") was likely written in light of Davis' proclamation that General Benjamin Butler was subject to summary execution if captured as retaliation for his execution of William Mumford.[101]

The Code's provisions providing for racial equality under the law of nations were particularly unappetizing to the Confederacy and helped to cement the stoppage of prisoner exchanges under the Dix-Hill cartel. Article 57 stated that the law of nations denies nations the right to declare an entire race exempt from protection as public enemies, while Article 58 made the sale of enemy soldiers into slavery "a case for the severest retaliation."[102] These assertions were not necessarily in line with earlier American treatises on the law of war. Both Kent and Wheaton excluded Native Americans from the protections of the law of war based on their race and religion.[103] Kent cited Christianity, however, as one of the principles that had led civilized nations to abandon the practice of enslaving prisoners of war.[104] Native Americans were not an analogous group to former slaves because Native Americans were thought of as parts of separate nations than either the United States or the Confederacy.

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[99] *Id.*, at 152–53.
[100] WITT, LINCOLN'S CODE at 234–37.
[101] *Id.* at 244.
[102] *Id.* at 243.
[103] *Id.* at 93.
[104] 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 14 (William H. Forman & Richard A. McCurdy, eds., 10th ed. 1860).

Fruitless negotiations

Exchanges discussions between the U.S. and Confederate agents of exchange broke down because the two sides could not agree on whether to black soldiers and their officers as prisoners of war.[105] The United States military's agent of exchange alluded Article 57 of General Orders No. 100 in its negotiations by stating that the exchange cartel should not discriminate based on race.[106] Recording the results of their meeting on August 25, 1863, U.S. Brigadier General Sullivan Meredith—who replaced Ludlow as the U.S. agent of exchange in Virginia in the July 1863—said that the Confederates would "'die in the last ditch' before giving up the right to send blacks back to slavery as property recaptured, but they were willing to make exceptions in the case of free blacks." Meredith's tone regarding the Confederacy's treatment of black soldiers and their officers demonstrated a lack of trust. He stated that the Confederacy's treatment of free and enslaved blacks on equal footing made "no comment necessary." Meredith added that he declined an officer-for-officer exchange that excluded those who commanded black soldiers.[107] Meredith's letter made clear that the Confederacy would not budge on the issue of black prisoners of war. Nor too could the North acquiesce, as black soldiers were becoming an increasingly important part of the Union war effort.[108]

Public opinion in the North, at least among Republicans, gave the U.S. government the support it needed to take a stance that could lead to additional suffering for U.S. prisoners of war. The *New York Times* indirectly concurred with Meredith's reasoning in March 1864 when responding to a (false) report in the *Richmond Dispatch* that the exchange had started up once again. Believing that "the difficulties with reference to the exchange of negro troops" had not

[105] SANDERS, WHILE IN THE HANDS OF THE ENEMY at 155.
[106] William Ludlow to Robert Ould (June 14, 1863), *in* 2 OFFICIAL RECORDS 6, at 17–18; *see also* WITT, *supra* note 7, at 245.
[107] Letter from S. Meredith to E. A. Hitchcock (Aug. 25, 1863), *in* 2 OFFICIAL RECORDS 6 at 226.
[108] SANDERS, WHILE IN THE HANDS OF THE ENEMY, at 218.

been settled, the article stated that it agreed with the position of the U.S. Government that withholding the surplus of Confederate prisoners was the least violent means of protesting the Confederacy's treatment of African American soldiers. "[O]ur honor," the *Times* stated, "is solemnly pledged, as that of any Government ever was, to secure for our black soldiers . . . the treatment of prisoners of war." To relent now, the article reasoned, would mean that retaliation would be the only method left for the Union to protest both the refusal of quarter and the sale of black soldiers into slavery.[109]

Because neither side would budge from its interpretations of the law of war, it was not until February 1865, Ould and Grant were able to communicate directly and re-open general exchanges. At that point, the Union could overlook Confederate treatment of black prisoners because the need for black soldiers was no longer pressing with the war in its waning stages.[110] It was not until the stakes were lowered that the two sides were able to overlook their differences and re-open the general exchanges.

Slavery and the Law of War

At the highest level, the Confederacy treated captured African American soldiers as criminals rather than prisoners of war. But Confederate treatment of African American soldiers defied generalization. African American soldiers came into contact with and under the jurisdiction of myriad representatives of the Confederacy when they surrendered—individual Confederate soldiers, the Confederate military, and both the national Confederate and state governments. These different entities treated African American prisoners differently at various times, and often this contact and jurisdiction overlapped, leading to an inconsistent response to the introduction of African American troops to the Civil War.

[109] *The Exchange of Prisoners Resumed What are the Terms?*, N.Y. TIMES, March 12, 1864.
[110] *Id.* at 273–74.

Although Jefferson Davis had attempted to put forth a uniform Confederate response with his General Orders 111, members of African American units from the U.S. Army were subjected to a wide array of treatments at the hands of Confederate captors. Some of the first African American prisoners taken were those of the 54th Massachusetts in their assault on Fort Wagner. These prisoners were originally given over to the South Carolina state government and were held as prisoners in Charleston, regardless of whether or not they had been a free man or a slave before enlisting. At the urging of Confederate Secretary of War Seddon, the governor of South Carolina transferred these captives over to Confederate military authorities at the end of 1864.[111] The soldiers who survived the ensuing forced marches and unsanitary military prison conditions were finally paroled in February 1865 just as they were about to be liberated by Sherman's Army.[112]

Other African American soldiers were not even that lucky. In his capacity as commanding general for the Trans-Mississippi, Lieutenant General E. Kirby Smith chastised one of his subordinates for allowing his men to take "negro prisoners." Smith went on to say that he hoped that the subordinate's officers understood "the propriety of giving no quarter to armed negroes and their officers." Smith advised the refusal of quarter so as to be "relieved from a disagreeable dilemma," but suggested that any "negro prisoners" captures should be turned over to State authorities to be tried for crimes against those states.[113]

General Smith was not unique in offering multiple courses of action in dealing with African American prisoners. Smith was the most explicit Confederate general in promoting the summary execution of African American soldiers attempting to give themselves up, but Nathan Bedford

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[111] M. L. Bonham to James Seddon (Dec. 8, 1864), *in* OR ser. 2, Vol. 7, 1206.
[112] Daniel States & Alfred Green, *in* Luis F. Emilio, History of the Fifty-Fourth Regiment of Massachusetts Volunteer Infantry, 1863–1865, at 422-23 (2d ed., 1894); *See also* BURKHARDT, CONFEDERATE RAGE, YANKEE WRATH, at 78–79.
[113] Kirby Smith to R. Taylor, June 13, 1863, *in* OR, Ser. II, Vol. 6, at 22–23.

Forrest was the most infamous. In addition to overseeing massacre the massacre Fort Pillow, Forrest also routinely referred to captured African Americans as property and thus concluded that they belonged to whoever captured them.[114]

The massacre of African American soldiers and their officers who had attempted to give themselves up was clearly against the law of war, but the law surrounding captured property in wartime—and of captured slaves—was much less clear. The European publicists had little to say about captured slaves, as the capture of slaves was a rare occurrence on the battlefields of Europe for which these laws were written down. Vattel and Grotius both permitted the capture of private property on land in wartime.[115] Witt argues that Kent and Wheaton, writing the two main American international law treatises of the eighteenth century, restricted the capture of private property on land precisely to protect slaves from being captured and born to freedom.[116]

The United States had traditionally argued that slaves were treated differently under the law of war. Historically the United States had argued that slaves should not be taken as spoils of war, and should be returned to their masters.[117] But the Emancipation Proclamation led some of its supporters to argue that the custom allowed Lincoln to free slaves captured from the enemy in the midst of war. In his 1862 pamphlet, *The Commander-in-Chief*, prominent corporate lawyer Grosvenor Lowrey argued that to free the slaves was in line with Lincoln's powers under the law of war.[118] Lowrey added that the act of free slaves through war had been approved by Presidents

[114] *See* Neff, *supra* note 17, at 72–74.
[115] See Witt, *supra* note 7, at 30.
[116] *Id.*, at 71.
[117] *See, e.g.,* Witt, *supra* note 7, at 72–77 (documenting the arguments made by U.S. officials against British actions in the War of 1812).
[118] GROSVENOR LOWREY, THE COMMANDER-IN-CHIEF: A DEFENCE UPON LEGAL GROUNDS OF THE PROCLAMATION OF EMANCIPATION AND AN ANSWER TO EX-JUDGE CURTIS' PAMPHLET, ENTITLED "EXECUTIVE POWER" 11 (1862).

Van Buren and Tyler during their administrations.[119] But the very fact that Lowrey's pamphlet was a response to the pamphlet of another prominent legal mind in the United States, Samuel Curtis, is indicative of the fact that the law on this issue was not settled.

Commissions and POW Status

Just days after the signing of the Dix-Hill Cartel, Virginia Governor John Letcher requested that Secretary of War George W. Randolph for permission to try Virginians captured in service to the Union army under state law charges of treason and inciting servile insurrection. Davis denied this request, and the prisoners were exchanged soon afterwards, but Davis left the door open when he stated that Pope's actions meant that he was not a "public enem[y] entitled if captured to be considered as prisoners of war."[120]

State and national government officials in the Confederacy held differing views about the locus of authority over certain categories of prisoners. On August 15, 1862, Letcher wrote to Randolph once again to request that the State of Virginia be allowed to try the captured Virginians under state law. Assuming that Randolph's lack of a reply to previous requests—and the subsequent exchange of some of the prisoners—constituted an implicit denial, Letcher abruptly changed course, asking instead for permission to try Union officers under Generals Pope and Jackson for violation of Virginia law under the recent General Orders. He quoted President Davis' letter to Lee, before asking: "If these men are to be considered as 'robbers and murderers' they are such under the laws of Virginia, and they have justly incurred the penalties which those laws annex to their crimes. Letcher ended his letter by requesting that free blacks

[119] Mark E. Neely, Jr., Lincoln and the Triumph of the Nation: Constitutional Conflict in the American Civil War 137 (2011).
[120] Sanders, *While in the Hands of the Enemy* at 129 (*quoting* Letter from J. Davis to R. Lee (July 31, 1862), *in* 2 OFFICIAL RECORDS 4 at 830–31.

captured by General Jackson be handed over to Virginia state authorities "to be dealt with as Virginia laws prescribe."[121]

Randolph passed the question back up to Davis, stating the need for "the Confederate States of America to define its position with reference to the prisoners of war claimed by State authorities as offenders against the municipal laws of the States." Under the laws and usages of war, this case appeared to be simple: soldiers carrying commissions from opposing governments were to be treated as prisoners of war.[122] Davis, however, sent the issue back to Randolph with instructions to gather more information from Letcher regarding the cases. When confronted with the issue in another request from Letcher just days later. Davis firmly established Confederate support for respecting the protections of prisoners of war. Confronted with a private citizen arrested for treason, Davis argued against trying the case because "it would not serve a good purpose to indict for treason those citizens who may have chosen to adhere to the enemy." Davis then added that "[i]f the prisoner had been a solider of the hostile army he would be entitled to treatment due to a prisoner of war, which might prevent his delivery to be tried for a civil offense." He affirmed, however, the Courts right to try cases for specific crimes when the defendant was neither fighting nor working for the enemy.[123]

Davis' response to Letcher's request seemingly closed a loophole that Davis had created to avoid applying the protections of the law of war to certain Union officers. One could argue that even the Union general Henry Halleck's treatise had given justification to Davis' argument, but Halleck had argued that quarter could only be refused against those who individually forfeited it by "some crime against the conqueror, under the laws and usages of war."[124] Refusing quarter

[121] Letter from J. Letcher To G. W. Randolph (Aug. 15, 1862), 850–51.
[122] *See* Witt, *Lincoln's Code* at 128.
[123] Letter from J. Davis to G. W. Randolph (Aug. 19, 1862), 855.
[124] HALLECK, INTERNATIONAL LAW at 429.

was a different action, however, as it involved the refusal to take an enemy prisoner, rather than capture and transfer to state authorities. And retaliation in this sense appeared to be against the individual who committed the crime, not against his subordinate officers.[125] Most importantly, however, Davis upheld the sanctity of holding a commission from an enemy belligerent.

Both the leading American and European treatises at the time of the Civil War place limits on which subjects of a country can commit violence against an enemy in wartime, but they place the determinative authority with the subjects' sovereigns. In peacetime, membership in the military of another nation itself generally did not exempt a foreign subject from the jurisdiction of a foreign power. The outbreak of war, however, was seen to give members of an enemy's military certain "immunities" from the opponent's jurisdiction.[126] In order to gain the protection of the laws of war in the exercise of violence against the enemy, the treatises required that subjects have the permission of their sovereign.[127] The "express" sanction of the subject's government was clearly understood to grant a license to commit violence against the enemy,[128] although publicists generally felt that there was an exception for wanton destruction that would allow for a military to try an enemy combatant for crimes outside the law of war. But these exceptions were vague, and a nation's recourse for any alleged injuries was generally limited to retaliation against their enemy generally.[129] Absent some special, nebulously defined circumstances, those subjects sanctioned by their own sovereigns to fight the enemy were due to be treated as prisoners of war

[125] *Cf.* 1 KENT, COMMENTARIES ON AMERICAN LAW at 104–05 (stating that while Grotius had argued retaliation could only be carried out against the individual transgressor, Kent himself stated that this rule had been relaxed).
[126] *See* WHEATON, ELEMENTS OF INTERNATIONAL LAW, at 148 ("Without doubt, a military force can never gain immunities of any other description than those which war gives").
[127] *Id.*, at 430; KENT, COMMENTARIES, at 105.
[128] *Compare* WHEATON, ELEMENTS OF INTERNATIONAL LAW, at 430 (allowing for both express and implicit sanction by the subject's sovereign), *with* KENT, COMMENTARIES, at 105 (requiring express permission from the sovereign in order to commit violence).
[129] *See* Witt, Lincoln's Code, at 128–29.

if captured by their enemy. In any event, they were to be dealt with by the enemy military, rather than the enemy's municipal governments.

Calling for the trial of U.S. Army officers leading African American soldiers for criminally fomenting servile insurrection, Confederate policy violated the nineteenth-century notions of the law of war. But what was the stated policy of the Confederate government, and what actions were actually taken by the various state and military jurisdictions from Virginia to the Mississippi, however, were different matters altogether. Due in part to the threat of reprisals from the United States, there were no instances of U.S. commissioned (and therefore white) officers being tried for inciting servile insurrection, either by the Confederate military or the governments of her various states.[130] To conclude that white officers of African American units were protected would require that individual Confederates gave quarter, which is simultaneously the restraint from the use of violence against the enemy and the act of accepting the enemy's surrender.

Confederate soldiers often did not give quarter to African American soldiers in the U.S. Army, and sometimes they did not give quarter to these black soldiers' white officers. While the most famous example was at Fort Pillow in 1864, where Confederate troops under the command of General Nathan Bedford Forrest massacred the black (and white) troops after they had attempted to surrender, there were numerous reports of Confederate soldiers refusing to give quarter to African American soldiers.[131] If these soldiers had the expressed permission of their sovereign to go to war, then they were in almost all circumstances due to be treated as prisoners of war if captured.

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[130] *See* Quincy Wright, *supra* note 11, at 60–61.

[131] "The Massacre at Fort Pillow," N.Y. TIMES (Apr. 16, 1864); *see also* GEORGE S. BURKHARDT, CONFEDERATE RAGE, YANKEE WRATH: NO QUARTER IN THE CIVIL WAR 105–117 (2007), NEFF, *supra* note 17, at 74.

Conclusion

What made the exchange of African American soldiers captured by the Confederacy so complicated, apart from the Confederate commitment to the institution of slavery, was that the arguments made by both sides had not come into conflict under the law of war before. The examples given in the American international law treatises, as well as by lawyers on both sides, did not contain examples of what to do when former slaves were recaptured while fighting for the enemy. Whether the protection offered to the former slaves as a soldier of the opposing side would trump the alleged property rights or municipal laws of their former masters had not been previously adjudicated.

But although this issue was not settled on a theoretical plane, the discombobulated nature of the Confederate response to African American soldiers as potential prisoners of war belied the difficulty of their position. By treating African American soldiers inconsistently, the Confederacy undermined its position. At various times African American captives were transferred from military jurisdiction to civil jurisdiction, and vice versa. They were treated sometimes as soldiers and sometimes as property. Occasionally they were treated with (relative) humanity and viewed as prisoners of war. Far more often, however, Confederate soldiers and officials attempted to deny the humanity of African American soldiers in order to keep alive the conceit that these men were in fact property.