

The Bridge-Burners

David P. Currie

CITIZENS classified as enemy combatants interned as prisoners of war for the duration of hostilities. Unlawful combatants tried summarily by military tribunals. Where are we? The United States during the second President Bush's war on terrorism? No. The Confederate States of America in 1861.

Within a few weeks after the inauguration of President Lincoln eleven Southern states (thirteen as the Confederates counted them¹) had purportedly left the Union and formed "a government of [their] own" – a looking-glass

variant of the United States without the North and without Northern ideas.² Enthusiasm for the new Confederacy in the South was great but by no means unanimous. Two Southern Justices remained on the U.S. Supreme Court. Andrew Johnson staunchly held on to his seat in the Senate. John Bouligny of Louisiana loudly refused to abandon his place in the House.³ More to the point, the entire mountainous area from the Pennsylvania border to northern Alabama, according to one historian, "formed a huge area of discontent" and Union sentiment.⁴

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- ¹ There were rival state governments both in Missouri and in Kentucky; each state was represented in both the U.S. and the Confederate Congress. That is why there were not eleven but thirteen stars in the Confederate flag. See *Stats Prov Govt*, 3d Sess 184, § 2 (Aug 20, 1861) (admitting Missouri to the CSA on condition it ratify the permanent Constitution); *Stats Prov Govt*, 5th Sess 221 (Nov 28, 1861) (making Missouri's admission final); *id* at 222 (Dec 10, 1861) (admitting Kentucky); James M. McPherson, *Battle Cry of Freedom: The Civil War Era* 291-97 (Oxford, 1988); Emory M. Thomas, *The Confederate Nation, 1861-1865* 94-95 (Harper & Row, 1979); E. Merton Coulter, *The Confederate States of America, 1861-1865* 55 (LSU, 1950).
- ² "Now that secession is a fact," an unidentified Delegate to the constitutional convention was reported as saying, "all we have got to do is to go on and form a government of our own." William C. Davis, "A Government of Our Own": *The Making of the Confederacy* 24 (Free Press, 1994).
- ³ See David P. Currie, *The Constitution in Congress: Descent into the Maelstrom*, ch 8 (Chicago, forthcoming 2004).
- ⁴ Burton J. Hendrick, *Statesmen of the Lost Cause* 331 (Little, Brown, 1939).

Not all of the disaffected residents of Appalachia were content to sulk in peace. Some of them, thinking it their patriotic duty to fight for the Union, took up arms against the Confederacy. A few of them went into bridge-burning. And therein lies the present tale.⁵

On November 11, 1861 Colonel W.B. Wood of the Confederate Army wrote to Inspector General Samuel Cooper to report the burning of five railroad bridges in eastern Tennessee. Six of the perpetrators had been captured, said Wood; what should he do with them? He did not hesitate to suggest the direction of his own thinking: "The slow course of civil law in punishing such incendiaries it seems to me will not have the salutary effect which is desirable."⁶

The initial response was a general one, and it was not in accord with Colonel Wood's suggestion. It came directly from Secretary of War Judah Benjamin, and it reflected a more conventional policy. Those prisoners who had actually borne arms against the Government should be sent off to Nashville to be tried for treason, presumably before a civil court; all others should be discharged on taking an oath of allegiance to the Confederacy.⁷

The next day Wood wrote directly to Benjamin. Having at the very least encouraged the rebellion, he argued, his prisoners deserved indeed to be sent to the gallows for treason. But it would be "a mere farce," he continued, to turn them over to the civil courts for trial; no jury in those parts would ever convict them. Let me keep them in custody, he pleaded, if not as traitors then as prisoners of war. For it would be sheer folly to release them: "They



Judah P. Benjamin, Attorney General (1861), Secretary of War (1861-1862), and Secretary of State (1862-1865), Confederate States of America. Library of Congress.

will take the oath of allegiance with no intention to observe it," and they would soon be back at their old tricks.⁸

Apparently Secretary Benjamin found Wood's eloquence irresistible, for he abruptly changed his tune. On November 25 he sent the Colonel revised instructions:

First. All such [prisoners] as can be identified as having been engaged in bridge-burning are to be tried summarily by drum-head court martial and if found guilty executed on the spot by hanging. It would be well to leave their bodies hanging in the vicinity of the burned bridges.

5 My complete study of constitutional issues in the Confederacy will appear in the *Virginia Law Review* in 2004 and will then form part of the fifth volume in the series *The Constitution in Congress*.

6 *Official Records of the Union and Confederate Armies*, series 2, vol 1, p 840 (Government Printing Office, 1894) [hereafter cited as OR].

7 Benjamin to Col. Danville Leadbetter, Nov 19, 1861, id at 845. Leadbetter had been appointed to command the troops assigned to protect the railroads between Bristol and Chattanooga. Id at 841 (Nov 11, 1861).

8 Wood to Benjamin, Nov 20, 1861, id at 845-46.

Second. All such as have not been so engaged are to be treated as prisoners of war ... In no case is one of the men known to have been up in arms against the Government to be released on any pledge or oath of allegiance. ... They are all to be held as prisoners of war and held in jail till the end of the war.⁹

On the same day J.C. Ramsey, the Confederate District Attorney for Tennessee, also wrote to Benjamin in search of instructions. The military authorities, he reported, had decided to court-martial the bridge-burners and other men charged with treason. "What," asked Ramsey, "shall I do?"¹⁰ The Secretary's reply was immediate and succinct:

I am very glad to hear of the action of the military authorities and hope to hear they have hung every bridge-burner at the end of the burned bridge.¹¹

On November 29 Brigadier-General William Carroll, the Confederate commander at Knoxville, reported a cloud on the horizon: Judge West H. Humphreys of the Confederate District Court "had issued writs of habeas corpus in the cases of several prisoners who are without doubt guilty of burning the railroad bridges" Not to worry, Carroll assured Secretary Benjamin: "Your instructions are fully understood and I shall not allow any interference in their execution."¹²

Colonel R.F. Looney, appointed to preside over a court-martial at Knoxville, was writing to the Secretary of War at the same time as General Carroll, and in the same vein. "The question of the jurisdiction of courts-martial" over civilian offenders had been raised in the

habeas corpus proceedings, but a court-martial would be "much more effective in ferreting out the offenders."¹³ What should he do? Once again Benjamin's response was terse and to the point:

Courts of justice have no power to take prisoners of war out of the hands of the military An answer to a writ of habeas corpus that the prisoner was captured in arms against the Government and is held as a prisoner of war is a good and complete answer to the writ.

Benjamin closed with a reprise of the orders he had given to Colonel Wood a few days earlier:

Send this dispatch to General Carroll and let him send at once all the prisoners to Tuscaloosa as prisoners of war except those found guilty of bridge-burning and murdering the guards placed at the bridges. Let not one of these treacherous murderers escape.¹⁴

That same day, from Colonel Danville Leadbetter in Greeneville, came news that Benjamin's orders were being carried out: "Two insurgents have to-day been tried for bridge-burning, found guilty and hanged."¹⁵ General Carroll, in Knoxville, was more circumspect:

The court-martial has sentenced A.C. Haun, bridge-burner, to be hung. Sentence approved. Ordered to be executed at 12 o'clock tomorrow. Requires the approval of the President. Please telegraph.¹⁶

Benjamin expressed impatience:

Execute the sentence of your court-martial on the bridge-burners. The law does not require any approval by the President, but he entirely

⁹ Benjamin to Wood, Nov 25, 1861, id at 848.

¹⁰ Ramsey to Benjamin, Nov 25, 1861, id.

¹¹ Benjamin to Ramsey, Nov 25, 1861, id at 849.

¹² Carroll to Benjamin, Nov 29, 1861, id at 850.

¹³ Looney to Benjamin, Nov 29, 1861, id.

¹⁴ Benjamin to Looney, Nov 30, 1861, id at 851.

¹⁵ Leadbetter to Benjamin, Nov 30, 1861, id.

¹⁶ Carroll to Benjamin, Dec 10, 1861, id at 853.

approves my order to hang every bridge-burner you can catch and convict.¹⁷

The next day Carroll wrote again to inform the Secretary that his wishes had been attended to; the execution had taken place. He took the occasion, however, to raise once more the question of “interference” by “the civil authorities”:

Several attempts have been made to take offenders out of my hands by judicial process to be tried by the civil tribunals ... In order to avoid these embarrassments I felt myself justified in placing the city under martial law until such time as all the prisoners charged with military offenses now in my custody can be tried by a military tribunal.¹⁸

Two days later Carroll reported that the other half of Benjamin's order was being executed as well: “Out of the number thus arrested I have sent and will send about 100 as prisoners of war to Tuscaloosa.”¹⁹

Writing from Knoxville a month later, Colonel Leadbetter voiced second thoughts about the propriety of Carroll's order. Having been served with a writ of habeas corpus in the case of an alleged accessory to bridge-burning, Leadbetter had replied that the petitioner was being held as a prisoner of war, in pursuance of instructions. But the judge was not satisfied; he insisted on determining for himself whether the petitioner was lawfully held.

In the condition of the country immediately subsequent to the bridge-burning, [Leadbetter wrote,] I should have paid no respect to a writ of habeas corpus. The military law of self-preservation prevailed at that time. But the circumstances are now less urgent and I infer that the Government does not wish to suspend the writ. Martial law might be

proclaimed locally and the lawyers here think that the writ would thus be suspended. I do not see how so long as Congress has not suspended the writ.

In most cases, Leadbetter continued, “[t]he judges ... would decide that a man taken literally in arms against the Government is a prisoner of war.” But there would surely be cases, he added, in which a guilty party would be “turned over to the civil courts to be bailed out and tried by his peers.”

If the military have any function or mission to perform in this disturbed country their efforts in that behalf will be frustrated by the interference of the civil courts for the military will be brought into contempt.

The letter closed with yet another plea for instructions from the Secretary of War.²⁰

Apparently the Secretary said nothing to encourage the Colonel to defy the court's writ, for the next relevant entry in the Official Records is a plaintive note from Leadbetter lamenting continued interference by civilian judges:

Outwardly the country remains sufficiently quiet but it is filled with Union men who continue to talk sedition and who are evidently waiting only for a safe opportunity to act out their rebellious sentiments. If such men are arrested by the military the Confederate and State courts take them by writ of habeas corpus and they are released under bond to keep the peace; all of which is satisfactory in a theoretical point of view but practically fatal to the influence of military authority and to the peace of the country. It seems not unlikely that every prisoner now in our hands might or will be thus released by the Confederate court even after being condemned by court-martial to be held as prisoners of war.²¹

17 Benjamin to Carroll, Dec 10, 1861, id at 854.

18 Carroll to Benjamin, Dec 11, 1861, id at 854. See Carroll's accompanying proclamation of the same date, id at 855, noting the necessity of “suspend[ing] for a time the functions of the civil tribunals.”

19 Carroll to Benjamin, Dec 13, 1861, id at 856.

20 Leadbetter to Benjamin, Jan 11, 1862, id at 870.

21 Leadbetter to Inspector General Cooper, Jan 21, 1862, id at 877.

The Bridge-Burners



Bridges were essential, and vulnerable, links in the supply networks of both the Union and the Confederacy.

Above: The engine "Firefly" on a trestle of the Orange and Alexandria Railroad. Library of Congress.

Below: The wreckage of the Richmond & Petersburg Railroad Bridge over the James River. Library of Congress.



By late February the crisis had eased sufficiently that Secretary Benjamin could afford to express concern that “in the confusion and disorder of the times some innocent men [might] have been confounded with the guilty” and in the case of individuals who claimed innocence to seek evidence of good character. At the same time, however, he was careful to defend his previous course of action. It was true, he wrote, that the citizen who had taken arms against his own Government was a traitor subject to prosecution in the civilian courts. But he was also a prisoner of war, subject under the laws of war to be kept in custody until the cessation of hostilities as a matter of self-defense; it was “an act of clemency” not to have him condemned for treason.²²

That was enough to justify one prong of Benjamin’s November 25 order; the law of nations was just what Benjamin implied it was.²³ It was General Kirby Smith, in a later response to a Union officer who had apparently complained about the treatment of a man named David Fry who had been arrested by Confederate authorities, who undertook to justify the other prong:

[L]et me assure you that nowhere within the limits of this department will any violation of the rules of civilized warfare meet with my sanction. David Fry was captured within our lines in citizen’s dress and was sent to Knoxville charged as a citizen of East Tennessee with bridge-burning. ... His presence within our lines in citizen’s dress and engaged in the felonious occupation of bridge-burning makes him amenable either as a citizen of East Tennessee to the criminal courts of the land or as a spy to the military court of the service.²⁴

In other words, as the leading commentator on Confederate courts later put it, the bridge-burners “were accused not of treason but of a violation of the common law of war.”²⁵ That was enough to bring them within what the U.S. Supreme Court, in *Ex parte Quirin*, would later say was a traditional exception to the requirements of tenured judge and jury trial;²⁶ there is no doubt that, at least if Congress had so provided, they could be tried by military tribunals in the United States today.²⁷

It was only a few days after General Smith’s letter, however, that Assistant Adjutant-General H.L. Clay informed our friend

22 Benjamin to the Members of the Tennessee Delegation in the Congress, Feb 24, 1862, id at 879, 880.

23 See Vattel, *The Law of Nations*, bk iii, § 148.

24 Smith to Brig. Gen. S.P. Carter [US Army], Apr 19, 1862, OR, series 2, vol 1, pp 882-83.

25 See William M. Robinson, Jr., *Justice in Grey: A History of the Judicial System of the Confederate States of America* 275 (Harvard, 1941). See also Vattel, bk iii, §§ 149, 179 (cited in note 23) (distinguishing spies, for example, from ordinary prisoners of war, who were not to be put to death). One of the earliest treatise writers in the United States had recognized this distinction as early as 1829. William Rawle, *A View of the Constitution of the United States of America* 220-21 (Philip H. Nicklin, 2d ed 1829) (invoking a “settled principle of the laws of war”).

26 317 US 1 (1942). The United States would also employ military tribunals to try civilians for war crimes in connection with the Civil War, and both the Attorney General and the only civilian court to consider the constitutionality of this practice would uphold it. See 13 Stat 356, § 1 (Jul 2, 1864), recognizing the jurisdiction of military commissions over “violations of the laws and customs of war”; 11 Op [US] AG 297, 309-17 (1865) (Attorney General James Speed); *Ex parte Mudd*, 17 F Cas 954 (No 9,899) (SD Fla 1868) (involving alleged accessories to the assassination of President Lincoln); William Winthrop, *Military Law and Precedents* *1219-24 (Arno, 1979) (rev 2d ed, first published in 1920).

27 The only crime for which the Confederate Congress subjected civilians to military trials was passing or importing counterfeit notes in the service of the enemy, which Clement C. Clay in the Senate argued was a war crime. Pub Laws, 1st Cong, 2d Sess 80 (Oct 13, 1862); 47 Southern Historical Society Publications at 42 [hereafter cited as SHSP]. When Congress in the waning days of the war

Leadbetter (now Brigadier-General in Chattanooga) that

[a] citizen cannot be tried by a military court for an offense committed in a district before the declaration of martial law. The offender will be held for trial by some court in Georgia having jurisdiction of the case.

"This decision of the Attorney General," Clay concluded, "does not apply in cases where soldiers who are not citizens are upon trial."²⁸ Thus, whatever the Constitution might permit, the Confederate Government had concluded at the highest level that civilians were not to be tried before military courts even for war crimes, except where martial law prevailed.

Martial law itself, especially when imposed by commanders in the field without a shadow of statutory authority as in General Carroll's case, came under increasing attack in the Confederate Congress. The Senate Judiciary Committee, reporting a bill to renew the President's power to suspend the writ of habeas corpus in September 1862, specified that it

meant neither to interfere with the right of civilian defendants to a grand jury and public trial nor to empower any officer to declare martial law.²⁹ Tennessee Representative George Washington Jones said not even Congress could authorize martial law,³⁰ and Representative Russell offered a bill to prohibit it anywhere in the Confederacy.³¹ Nothing came of these legislative initiatives, but President Davis was moved to explain in October that, although he had suspended *civil* jurisdiction as well as habeas corpus in some cases, he had done nothing to interfere with the ordinary criminal courts: They remained open to reinforce military efforts to preserve order.³²

In August 1862 Secretary Benjamin curtly informed Confederate commanders everywhere that they had no authority to suspend habeas corpus, and a month later he unceremoniously set aside all declarations of martial law made without express presidential authorization – one of which, he noted the same day in a note to the General who had issued it, the President himself had termed "an unwarrantable assumption of authority."³³

made it a crime to assert false claims against the Government, to conspire to overthrow the Confederacy, or to give military information to the enemy, it provided for courts-martial only of members of the armed forces; civilian defendants were to be tried in the ordinary civil courts, as Acting Attorney General Wade Keyes in November 1863 ruled they must be for treason. Pub Laws, 2d Cong, 2d Sess 8 (Dec 19, 1864); id at 11 (Dec 29, 1864); id at 130 (Mar 13, 1865); Op Confed AG at 352, 354, invoking the provisions of CS Const, Art I, § 9 respecting grand and petit juries.

²⁸ Clay to Leadbetter, Apr 28, 1862, OR, series 2, vol 1, p 886.

²⁹ 46 SHSP at 187.

³⁰ 47 SHSP at 82. See also 45 SHSP at 226 (Sen. Oldham); Georgia Sen. Benjamin Hill to Vice-President Stephens, Mar 14, 1864, in Ulrich B. Phillips, ed, *The Correspondence of Robert Toombs, Alexander H. Stephens, and Howell Cobb*, Am Hist Soc Ann Rep 1911, vol 2, pp 634, 636 (1913); Stephens to James M. Calhoun, Sep 8, 1862, in Henry Cleveland, Alexander H. Stephens, in *Public and Private* 747-48 (National Pub Co, 1866): "[I]n this country there is no such thing as Martial Law, and cannot be until the Constitution is set aside . . ."

³¹ 47 SHSP at 112.

³² 1 CS Messages at 259-60 (Oct 8, 1862). See also Vice-President Stephens's Speech to the Georgia Legislature, Mar 16, 1864, in Cleveland, Stephens at 774 (cited in note 30): "Martial law has [since] been abandoned."

³³ OR, series 4, vol 2, p 39; series 1, vol 9, pp 735-36. See also Jefferson Davis to Mississippi Governor J.J. Pettus, Aug 4 (?), 1862, OR, series 1, vol 13, p 874, asking that General Holmes be informed that he was reported to have "usurped powers" by (inter alia) declaring martial law and directed to "correct these abuses as rapidly as is consistent with the defence of the country."

Perhaps this tale sounds vaguely familiar. In late 2001, after the abominations of September 11, President George W. Bush authorized the establishment of military tribunals to try unlawful combatants accused of war crimes,³⁴ and a few days before these lines were written the Fourth Circuit Court of Appeals upheld the Army's right to detain as a prisoner of war a citizen who had borne arms against his country.³⁵ Not only was all of this entirely proper as a matter of the current constitutional law of the United States; it all found a precedent in

Secretary Benjamin's 1861 orders to Confederate commanders in East Tennessee.

I don't say that whatever was good enough for the Confederate States of America is good enough for us. I do say that the tale of the bridge-burners shows that neither the detention of enemy combatants nor the military trial of war criminals is a modern heresy invented by the second Bush Administration. It is also one more bit of evidence (as if we needed it) that there is nothing new under the sun. *GP*

34 66 FR 57833 (Nov 13, 2001). Unlike Benjamin's order, Bush's applied only to aliens, but there was nothing in the theory that justified it to require this limitation.

35 *Hamdi v Rumsfeld*, 296 F3d 278, 283 (2002).