THE USE OF THE FOURTEENTH AMENDMENT BY SALMON P. CHASE IN THE TRIAL OF JEFFERSON DAVIS

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The Fourteenth Amendment to the United States Constitution has been, since its inception in post Civil War America, the subject of controversy and debate.[1] At the most elementary level, it is described as the Amendment that defines citizenship and guarantees civil rights.[2] To legal scholars it is a "second American Constitution," the Amendment that altered the fundamental nature of Federalism.[3] The scholarship on the Amendment is voluminous. The resultant litigation is so massive that in 1955 a Justice of the Supreme Court commented that the Fourteenth Amendment is probably the "largest source of the Court's business."[4]

Although freed slaves were the ostensible beneficiaries of the Amendment, the first time the Amendment came before the Supreme Court, the parties seeking its benefits were not freedmen but butchers in the City of New Orleans.[5] The resulting decision in *The Slaughterhouse Cases* is one that is still debated and stands as a primary example of an unintended consequence of a constitutional amendment.[6] Although historians and legal scholars have considered a number of the unintended

1. *See* James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio and Pennsylvania*, 18 AKRON L. REV. 435, 435-36 (1985).

2. *Id.* at 435.

3. *Id.*

4. Felix Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 229 (1955).

5. *See* Slaughterhouse Cases, 83 U.S. 36, 57 (1873); *see also* RONALD M. LABBÉ & JONATHAN LURIE, THE SLAUGHTERHOUSE CASE: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT (2003) (providing a new and innovative interpretation of this much discussed case).

6. For a complete discussion of unintended consequences of various constitutional amendments, see David E. Kyvig, *Arranging for Amendment: Unintended Outcomes of Constitutional Design*, *in* UNINTENDED CONSEQUENCES OF CONSTITUTIONAL AMENDMENT 9 (David E. Kyvig ed., 2000).

consequences of the Fourteenth Amendment,[7] one result, unforeseen by its proponents, has been totally overlooked.

While Sections 1 and 2 of the Amendment have been the subject of much litigation, Section 3 has been generally ignored as a remnant of the Civil War.[8] On its face, Section 3 was enacted to disqualify from public office those who had taken an oath to support the Constitution and then joined the rebellion; a provision which was bitterly resented in the former Confederacy.[9] In the minds of the framers of the Fourteenth Amendment, it was in the best interest of the nation to place its administration, both state and national, in the hands of those who had never been in insurrection against it.[10] If former Confederates were sent back to public office they could arguably do by legal means that which they did not succeed in doing by virtue of the Civil War.

Section 3 can be interpreted as a criminal sanction for engaging in rebellion; that is, the inability to hold public office can arguably be seen as a penal sanction imposed by the government for the act of insurrection. It can also be seen as a disability imposed on those who had taken an oath and then violated the oath.[11] If found to be a punishment as opposed to a mere disqualification, similar to disqualifications such as age and foreign birth, Section 3 of the Fourteenth Amendment would bar any other criminal prosecution for rebellion by virtue of the double jeopardy clause of the United States Constitution.[12] In the legal proceedings that came to be known as *United*

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7. *See* Richard L. Aynes, *Unintended Consequences of the Fourteenth Amendment*, *in* UNINTENDED CONSEQUENCES, *supra* note 6, at 110-40.

8. Although this section of the Fourteenth Amendment is always thought of within the context of the Civil War, it could certainly be applicable to any parties in the future who engaged in rebellion, insurrection, or treason.

9. *See* JONATHAN TRUMAN DORRIS, PARDON AND AMNESTY UNDER LINCOLN AND JOHNSON – THE RESTORATION OF THE CONFEDERATES TO THEIR RIGHTS AND PRIVILEGES 1861-1898, at 370 (1953).

10. *Cf.* U.S. CONST. amend. XIV, § 3 ("No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.").

11. In the 19th century an oath had considerable meaning; "A man's word [was] his bond." YALE BOOK OF QUOTATIONS 622 (Fred R. Shapiro ed., 2006). For a complete discussion of the use of oaths during this period, see HAROLD MELVIN HYMAN, ERA OF OATH: NORTHERN LOYALTY TESTS DURING THE CIVIL WAR AND RECONSTRUCTION (1954).

12. U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .").

States v. Jefferson Davis, a legal determination was required to determine whether or not Section 3 imposed a simple disqualification or an actual punishment.[13] In 1868, a preliminary ruling in favor of the criminal sanction argument was utilized for the benefit of a most unlikely party – namely, Jefferson Davis.[14] Could those who pushed for the adoption of the Fourteenth Amendment, those who some historians consider the last vestiges of the abolitionist movement, have foreseen that a section of the Amendment enacted to guarantee the rights of freed blacks would be used to free the man who symbolized the slaveocracy that they so despised?[15] And moreover, could they have foreseen that the person who utilized this untended consequence would be Salmon P. Chase, one of the primary architects of anti-slavery litigation?

In the waning days of the Civil War, Salmon P. Chase, Chief Justice of the United States Supreme Court began planning an inspection tour of the South.[16] The exact reason for the trip has been a matter of conjecture, but it apparently stemmed from Chase's desire to learn as much as possible about conditions in that part of the country.[17] This knowledge was pertinent to Chase since his judicial circuit included rebel territory.[18] Of particular concern to the Chief Justice was the condition of the freedmen and the prospects of universal manhood suffrage, which Chase saw as a cornerstone of Reconstruction.[19] The death of President Abraham Lincoln did not alter his plans.[20] Before broaching the subject of his trip with President Andrew Johnson, Chase,

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13. *See* CHARLES FAIRMAN, 6 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-88, at 607-12 (1971).

14. *Id.*

15. *Cf.* DORRIS, *supra* note 9, at 280.

16. JOHN NIVEN, SALMON P. CHASE: A BIOGRAPHY 384 (1995). For a complete discussion of Chase's southern tour, see *id.* at 384-96; FREDERICK J. BLUE, SALMON P. CHASE: A LIFE IN POLITICS 250-53 (1987).

17. J.W. SCHUCKERS, THE LIFE AND PUBLIC SERVICES OF SALMON PORTLAND CHASE 519-20 (1878).

18. *Chief Justice Chase as an Advisor on Presidential Reconstruction*, 13 CIVIL WAR HIST. 242, 242 (James Sefton & John T. Hubbel eds., 1967). Chase replaced Roger B. Taney, a native of Maryland, as Chief Justice. *See* SCHUCKERS, *supra* note 17, at 266. As a result, Chase assumed his district which included Maryland, Virginia, North Carolina, and South Carolina. Michael Les Benedict, *Salmon P. Chase as Jurist and Politician: Comment on G. Edward White, Reconstructing Chase's Jurisprudence*, 21 N. KY. L. REV. 133, 142 (1993).

19. BLUE, *supra* note 16, at 250. On April 18, 1865, President Andrew Johnson consulted Chase regarding a speech setting forth his Reconstruction policy. *Id.* Chase had long advocated a plan that relied on local elections based on the votes of both black and white citizens who remained loyal to the Union. *Id.* Chase believed that his planned visit could provide further evidence to support a presidential proclamation that would secure equal and universal suffrage. *Id.*

20. *See* NIVEN, *supra* note 16, at 383.

a man noted for his organizational skills, learned that the revenue cutter *Wayanda* would shortly make a trip to New Orleans and was available to the Chief Justice and his entourage.[21] With the blessing of President Johnson, Chase left Washington on May 1, 1865.[22] During the course of the trip he wrote seven letters to Johnson describing conditions and making recommendations.[23]

On May 10, 1865, Jefferson Davis, President of the Confederate States, was arrested by Lieutenant-Colonel Benjamin Pritchard of the Fourth Michigan Cavalry in Irwinsville, Georgia.[24] Since the fall of Richmond in early April, Davis had been heading west to continue the Confederate fight.[25] His arrest was authorized under the military powers of the President and came in the form of an executive proclamation dated May 2, 1865 charging Davis as an accomplice in the murder of Abraham Lincoln and offering a reward of $100,000.[26] But for the proclamation arising from the assassination, there was no order to pursue

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21. *Id.* at 384. Chase's entourage included "his eighteen-year-old daughter Nettie and a small group of friends including Whitelaw Reid of the Cincinnati Gazette and William Mellen." BLUE, *supra* note 16, at 251.

22. BLUE, *supra* note 16, at 251.

23. *See* NIVEN, *supra* note 16, at 385-92; SCHUCKERS, *supra* note 17, at 520.

24. 7 JEFFERSON DAVIS: CONSTITUTIONALIST: HIS LETTERS, PAPERS AND SPEECHES 139 (Dunbar Rowland ed., 1923) [hereinafter JEFFERSON DAVIS: CONSTITUTIONALIST]. Many myths surround the capture of Davis, the primary one being that he was arrested in women's clothing. WILLIAM C. DAVIS, JEFFERSON DAVIS – THE MAN AND HIS HOUR 645 (1991). For accounts dispelling this myth, see WILLIAM J. COOPER, JEFFERSON DAVIS, AMERICAN 534 (2000); ROBERT MCELROY, JEFFERSON DAVIS: THE UNREAL AND THE REAL 510-11 (Smithmark Publishers 1995) (1937); Chester Bradley, *Was Jefferson Davis Disguised as a Woman When Captured?*, 36 J. MISS. HIST. 243, 251-68 (1974).

25. JEFFERSON DAVIS: CONSTITUTIONALIST, *supra* note 24, at 139.

> [The Union] will make every effort in their power to capture me, and it behooves us to face these dangers as men. We will go to Mississippi, and there rally on [Nathan Bedford] Forrest, if he is in the state of organization, and it is to be hoped that he is; if not, we will cross the Mississippi river and join Kirby Smith, and there we can carry on the war forever.

Id.; *see also* Case of Davis, Chase 1, 7 F. Cas. 63 (C.C.D. Va. 1867). Both the Federal Case and the Rowland accounts are prints from reports of the case prepared by Bradley T. Johnson, Esq. A partial report appears in 3 Am. Law. Rev. 368. *See Davis*, Chase 1, 7 F. Cas. at 63 n.1. Rowland also cites the same case as "From Decisions of Chief Justice Chase in the Circuit Court of the United States for the Fourth Judicial Circuit, 1867-1871. By Bradley T. Johnson of the Virginia bar, 1876." JEFFERSON DAVIS: CONSTITUTIONALIST, *supra* note 24, at 138.

26. HANS L. TREFOUSSE, ANDREW JOHNSON: A BIOGRAPHY 211 (1989) ("In a cabinet meeting on May 2, [Edwin] Stanton produced a memorandum signed by Judge Advocate General Joseph Holt, charging that Davis and various Confederates in Canada, such as Jacob Thompson, William C. Cleary, George N. Sanders, Clement C. Clay, Beverly Tucker, and others, had instigated [Lincoln's assassination].").

or capture the Confederate President.[27] General William T. Sherman wrote Chase on May 6, 1865 that "[t]o this hour the War Dept has sent me no orders to hunt for, arrest, or capture Jeff Davis . . . ."[28]

From Irwinsville, Davis was transported to Savannah, Georgia and then to Hilton Head, South Carolina, where he was placed aboard the steamer *William P. Clyde* for the ocean voyage to Fortress Monroe, Virginia, a United States military installation.[29] There the United States government would hold him pending the disposition of the immediate charge relating to the murder of Lincoln.[30] While the steamer *Clyde* was in Hilton Head Harbor it came alongside the ship carrying Chase and was "made fast" to his vessel.[31] In a letter the following day to the President, Chase reported, "Gen[eral] Gillmore asked me if I wished to see [Davis]; but I said 'No, I would not let any of our party see him. I would not make a show of a fallen enemy.'"[32]

On that day in May 1865, Chase and Davis were literally "ships passing in the night," the happenstance of fate that causes two persons to be at the same place at the same time.[33] The two men could not have been more divergent in thinking and philosophy. Salmon Portland Chase was the architect of anti slavery litigation in America, the so-called attorney general of the fugitive slave,[34] sole voice of the Radical Republicans in Lincoln's cabinet,[35] and now Chief Justice of the Supreme Court of the United States.[36] Jefferson Davis was the president of the Confederate States of America, champion of states' rights, the very icon of the institution of slavery in America, and now a defeated warrior.[37] It would be more than three and a half years before the two men would meet face to face in a courtroom in Richmond, Virginia.[38]

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27. *See* 5 THE SALMON P. CHASE PAPERS, CORRESPONDENCE 1865-1873, at 43 (John Niven et al. eds., 1998) (letter from W.T. Sherman to Chase, dated May 6, 1985).

28. *Id.*

29. JEFFERSON DAVIS: CONSTITUTIONALIST, *supra* note 24, at 139.

30. Roy F. Nichols, United States vs. Jefferson Davis, 31 AM. HISTORICAL REV. 266, 268 (1926).

31. SCHUCKERS, *supra* note 17, at 524.

32. THE SALMON P. CHASE PAPERS, *supra* note 27, at 49. *See also* SCHUCKERS, *supra* note 17, at 524 (letter from Chase to President Johnson, dated May 17, 1865).

33. SCHUCKERS, *supra* note 17, at 524.

34. Les Benedict, *supra* note 18, at 135.

35. *See* Charles Wilson, *The Original Chase Organization Meeting and the Next Presidential Election*, 23 MISS. VALLEY HIST. REV. 61, 62 (1936).

36. NIVEN, *supra* note 16.

37. *See generally* MCELROY, *supra* note 24.

38. *See* Nichols, *supra* note 30, at 283.

Long before the conclusion of the Civil War, Chief Justice Chase, like countless others, pondered the question of whether or not Jefferson Davis and other rebel leaders should be placed on trial for treason.[39] General Ulysses S. Grant set the tone for leniency at Appomattox when he said, "The rebels are now our fellow countrymen!"[40] Robert E. Lee was not imprisoned and his officers and men "were allowed to go free under parole by Grant's easy and generous terms of surrender, in which, as one knows by a careful study of the sources, Lincoln had a prior hand."[41] Although some Confederate leaders fled the country in what has been called the "flight into oblivion" and some few were imprisoned for brief periods of time, all went free without standing trial.[42] The one great exception was the case of Jefferson Davis.[43]

Early on, Chase "foresaw constitutional and legal problems of a formidable nature that would hamper if not foreclose a trial" for Davis.[44] Aside from the legal and constitutional implications, Chase undoubtedly considered the impact of his participation in any litigation in light of his own political ambitions, which were always uppermost in his mind.[45] The White House always loomed on the horizon for Chase and he never rejected the possibility of leaving the bench for higher office.[46] Chase was a viable candidate for the presidency in 1860 and had allowed a

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39. NIVEN, *supra* note 16, at 396.

40. HENRY LUTHER STODDARD, HORACE GREELEY: PRINTER, EDITOR, CRUSADER 229 (1946).

> The terms [of the surrender at Appomattox] were generous: officers and men could go home 'not to be disturbed by U.S. authority so long as they observed their paroles and the laws in force where they may reside.' This clause had great significance. Serving as a model for the subsequent surrender of other Confederate armies, it guaranteed southern soldiers immunity from prosecution for treason.

JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 849 (1988).

41. DORRIS, *supra* note 9, at xx. Clement Claiborne Clay, Jr., long time friend of Davis, former US Senator, member of the Confederate Senate from 1861-1863, and diplomatic agent for the Confederate States was arrested with Davis. *See* RUTH KETRING NUEREMBERGER, THE CLAYS OF ALABAMA 268 (1958). He traveled with Davis on the *Clyde* and was imprisoned at Fortress Monroe where he stayed for one year. *Id.* Like Davis he was charged in the Lincoln Conspiracy but was not tried for treason. *Id.* at 265. For a discussion of Davis's attempt to escape Union troops at the conclusion of the War, see A.J. HANNA, FLIGHT INTO OBLIVION (La. State Univ. Press 1999) (1938).

42. DORRIS, *supra* note 9, at xx. Henry Wirz, the Swedish born commander of Andersonville Prison was the only person executed as a result of the Civil War. He was tried by a military commission, condemned, and executed on November 10, 1865. COOPER, *supra* note 24, at 541.

43. DORRIS, *supra* note 9, at xx. For a discussion of the demands for punishment and amnesty for Davis, see *id.* at 281-94.

44. NIVEN, *supra* note 16, at 395.

45. *Id.* at 409.

46. Les Benedict, *supra* note 18, at 140.

committee to be formed to promote a bid to unseat Lincoln in 1864, even though he was serving as a member of Lincoln's cabinet.[47] Critics allege that even the Southern tour was designed to seek support for the 1868 Republican nomination.[48] When, early in 1868, Chase recognized the futility of his attempts at gaining the Republican nomination because of the growing strength of Grant, he strongly considered and sought the Democratic nomination for the presidency.[49]

Had Lincoln lived, it is likely that Davis would not have been pursued nor would he have likely faced prosecution.[50] Although there were public debates throughout the war regarding the possibility of charging Davis with treason,[51] from the early stages of the conflict Lincoln's attitude was that of sympathetic understanding toward the South in general and individual Southerners.[52] In his last cabinet meeting, Lincoln voiced a desire to act kindly toward the enemy, and hoped that Davis would escape the country "unbeknown" to him.[53]

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47. *Id*. *See also* Wilson, *supra* note 35, at 62-63.

48. BLUE, *supra* note 16, at 283. "[Charles] Sumner assures me Chase has gone into [the South] to promote negro suffrage. I have no doubt that Chase has that and other schemes for Presidential preferment in hand in this voyage." GIDEON WELLES, THE DIARY OF GIDEON WELLES 304 (1911) (citing entry by Welles of May 10, 1865).

49. BLUE, *supra* note 16, at 297; ALBERT BUSHNELL HART, SALMON PORTLAND CHASE 413 (1899); NIVEN, *supra* note 16, at 426. For a complete discussion of Chase's presidential ambitions, see BLUE, *supra* note 16, at 283-307 (Chapter 10, "Chief Justice as Presidential Candidate").

50. Nichols, *supra* note 30, at 266. *See also* THE SALMON P. CHASE PAPERS, *supra* note 27, at 38; GEORGE FORT MILTON, THE AGE OF HATE: ANDREW JOHNSON AND THE RADICALS 152 (1930).

51. In her memoirs, Varina Davis, the wife of Jefferson Davis reports a correspondence in which Davis wrote:

> During the interval between the announcement . . . of the secession of Mississippi and the receipt of the official notification which enabled me to withdraw from the Senate, rumors were in circulation of a purpose, on the part of the United States Government, to arrest members of Congress preparing to leave Washington on account of the secession of the States which they represented.

VARINA DAVIS, 2 JEFFERSON DAVIS: EX-PRESIDENT OF THE CONFEDERATE STATES OF AMERICA: A MEMOIR 2-3 (1890). Varina's footnote states "Mr. Davis remained a week in Washington, hoping that he might be the person arrested." *Id.* at 3. Had this course of conduct occurred, the issue of secession could have ultimately made its way to the United States Supreme Court.

52. *See* MILTON, *supra* note 50, at 152.

53. *Id.*; THE SALMON P. CHASE PAPERS, *supra* note 27, at 38. George Fort Milton provides Lincoln's complete anecdote. MILTON, *supra* note 50, at 152. When asked by General Sherman late in the war what should happen to Davis, Lincoln related the following anecdote:

> One day a man who had taken a total abstinence pledge visited a friend, and was invited to take a drink. He declined because of his pledge, but he did accept the offer of lemonade. The friend pointed to the brandy bottle and said the lemonade would be more palatable with a little brandy. The guest answered, "If you can do so unbeknown to me, I will not object."

Originally, Johnson did not share Lincoln's compassion.[54] From the earliest days of secession he voiced a desire to have at least the leaders of the rebellion punished.[55] When he assumed the presidency, he maintained his vindictive attitude toward the South, commenting to a New Hampshire delegation that "Treason is a crime and must be punished as a crime . . . It must not be excused as an unsuccessful rebellion. . . ."[56] Johnson, however, gradually became more sympathetic and within months of becoming President adopted Lincoln's fundamental policy toward former Confederates.[57]

But the question was whether or not his newfound leniency would extend to Jefferson Davis, the former President of the Confederate States of America. Since their days together in the House of Representatives in the early 1840s, friction existed between Andrew Johnson and Jefferson Davis.[58] Several Davis biographers attribute the animosity to a remark made by Davis on the floor of the House in 1846 in which he seemingly demeaned and held in ridicule the position of tailors.[59] Since Johnson was a tailor early in his life, he was personally offended by what he thought was a disparaging remark about the working class.[60] "[A]ll his life Johnson would be ultrasensitive about his humble origins and resentful of the planter aristocrats," symbolized by Davis.[61] In 1879 a friend reminded Davis of his "haughty and sarcastic style of younger days,"[62] a trait that certainly would not have endeared Davis to Johnson. Whether this personal dislike rose to a level of vindictiveness that would cause Johnson to treat Davis differently from other Confederates is open to debate. Historians continue to speculate as to

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Id. "From this story, Sherman inferred that Lincoln wanted Davis to escape 'unbeknown' to him." *Id.*

54. SCHUCKERS, *supra* note 17, at 533.

55. *Id.*; DORRIS, *supra* note 9, at 95.

56. J.G. RANDALL, THE CIVIL WAR AND RECONSTRUCTION 707 (1937) (first omission in original).

57. ERIC L. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION 3 (1960). "Despite some indications in the beginning [of his administration] that Johnson's attitude toward the South might be a harsh one, his policy turned out to be quite otherwise." *Id.*

58. *See* DAVIS, *supra* note 24, at 131; COOPER, *supra* note 24.

59. COOPER, *supra* note 24, at 119: DAVIS, *supra* note 24, at 131. Davis, on the floor of the House, was engaged in praising General Zachary Taylor for a recent victory in the Mexican War and the value of professional military training. MCELROY, *supra* note 24, at 69-70. Davis remarked that not just any blacksmith or tailor could have performed so bravely or skillfully. *Id*. Johnson, a former tailor, took this remark as an affront. *Id.*

60. MCELROY, *supra* note 24, at 70.

61. DAVIS, *supra* note 24, at 131.

62. DORRIS, *supra* note 9, at 280.

> whether Andrew Johnson truly changed during the spring and summer of 1865, moving from his angry denunciation of Southern aristocrats into an alliance with them against the antislavery people of the North, or whether his Reconstruction policies were simply a continuation of his old-style Jacksonian unionism. Johnson did not perceive himself as changing, though to the outside world he seemed to veer 180 degrees.[63]

The prospect of the victorious North bringing criminal charges against Davis or other rebel leaders went to the very heart of the constitutional question raised by the departure of the Southern states; that is, could states secede from the Union, and if they did secede, was secession treason? The Constitution is silent on the question of secession. Therefore, only the Supreme Court could give a definitive and final answer – an answer that has never been delivered by the Court. Supporters of Davis argued that Davis and other leading secessionists applied the compact theory of the federal government, a theory advocated by Thomas Jefferson and James Madison and their successors who saw the American government as a confederation of states.[64] If the question of secession came before the high court, Chase as Chief Justice would be compelled to take a position on the issue, a prospect not necessarily advantageous to any future presidential candidate.

Chase could hardly forget that the Court's 1857 decision in *Dred Scott*[65] laid the groundwork for the legal issues that fueled the Civil War and caused irreparable damage to the reputation and standing of the

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63. GARRET EPPS, DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA 27 (2006).

64. The compact theory of the Union is a theory relating to the development of the Constitution, claiming that the formation of the nation was through a compact by all the states individually, and that the national government is consequently a creation of the states. *See* Alpheus Thomas Mason, *The Nature of Our Federal Union Reconsidered*, 65 POL. SCI. Q. 502 (1950). A leading exponent of this theory was John C. Calhoun, a person that Jefferson Davis closely identified with politically and philosophically. *See id.* Proponents of the theory relied heavily on the Kentucky and Virginia Resolutions written secretly by Thomas Jefferson and James Madison in 1798. *See id.* For a complete discussion of the South's position relative to the compact theory, see ALBERT TAYLOR BLEDSOE, IS DAVIS A TRAITOR; OR WAS SECESSION A CONSTITUTIONAL RIGHT PRIOR TO THE WAR OF 1861? (1907). For Jefferson Davis's view of the compact theory, see JEFFERSON DAVIS, 1 THE RISE AND FALL OF THE CONFEDERATE GOVERNMENT 171- 78 (1990). For a more recent interpretation of the same argument, see JAMES RONALD KENNEDY AND WALTER DONALD KENNEDY, WAS JEFFERSON DAVIS RIGHT? (1998).

65. Dred Scott v. Sandford, 60 U.S. 393 (1857). For an interesting discussion of the *Dred Scott* case, see Les VanderVelde & Sandhya Subramamian, *Mrs. Dred Scott*, 106 YALE L.J. 1033 (1997). The authors argue that had the case of Harriet Scott, Dred's wife, been pursued the result could have been different. *Id.* at 1035. They assert that she had a much better claim for freedom. *Id.*

court and particularly Chief Justice Roger Taney.[66] The Supreme Court was so widely distrusted by the moderate Republicans in the 40th Congress of 1867-1868 that it could easily have been the object of destruction rather than Andrew Johnson.[67] Even with the four Lincoln appointments to the court, not even Chase could predict the outcome of a case which forced a ruling on the issue of secession.[68] A decision that states could secede would mean that the 625,000 persons who lost their lives in the recent conflict died in vain.[69] A trial of Jefferson Davis for treason would bring all of these issues to the fore, a fact that fueled Davis's desire to have a trial.[70]

Six weeks after the surrender of Lee, Davis remained at Fortress Monroe, Virginia, a prisoner of the military.[71] Northern newspapers bragged that "Davis can never escape" and compared his imprisonment to that of Napoleon at Elba and St. Helena.[72] In the early weeks of his detention, Charles O'Conor, a prominent New York lawyer, attempted to contact Davis to offer his legal services.[73] O'Conor, a "Democrat of pronounced states'-rights and Southern sympathies,"[74] was "the acknowledged head of his profession in the United States."[75] The

66. *See* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 417-48 (1978) (providing a chapter-long discussion of the attacks on Taney and the Supreme Court as a result of the decision).

67. David F. Hughes, *Salmon P. Chase: Chief Justice*, 18 VAND. L. REV. 569, 581 (1965).

68. *Id.* at 582.

69. *See* WILLIAM BLAIR, WHY DIDN'T THE NORTH HANG SOME REBELS? THE POSTWAR DEBATE OVER PUNISHMENT FOR TREASON 5 (2004).

70. DONALD E. COLLINS, THE DEATH AND RESURRECTION OF JEFFERSON DAVIS 19 (2005). "Although [Davis] heartily desired a trial that he hoped to use as a platform to vindicate the rightness of the path he had chosen in 1861 – states' rights, the right of secession, and the Confederacy – it never came." *Id.* Davis essentially went to his grave arguing that his position on States' Rights was correct. He devotes most of his two volume memoirs to this argument. DAVIS, *supra* note 64.

71. *See* HART, *supra* note 49, at 352.

72. MCELROY, *supra* note 24, at 526. There is a great deal of information written about Davis's imprisonment. Originally he was held with a 24 hour guard and lights were kept on at all times. Charles M. Blackford, *The Trials and Trial of Jefferson Davis*, 29 S. HIST. SOC. PAPERS 45, 52 (1901). For a while he was held in leg irons. *Id.* But gradually, his confinement was eased. *See* MCELROY, *supra* note 24, at ch. XXVII-XXVIII. For the statement written by Richard Henry Dana, who was sent by Secretary of War Edwin Stanton to report on the condition of the prisoner, and other reports regarding his treatment, see Blackford, *supra* note 72, at 50-54. Davis's physician also wrote a description of his imprisonment that ultimately proved very controversial. *See* JOHN J. CRAVEN, THE PRISON LIFE OF JEFFERSON DAVIS (1866.) "*Prison Life* did portray Davis as a heroic victim of evil men." COOPER, *supra* note 24, at 555.

73. MCELROY, *supra* note 24, at 539.

74. Nichols, *supra* note 30, at 270.

75. REPORT OF THE TWELFTH ANNUAL MEETING OF THE VIRGINIA STATE BAR ASSOCIATION 241 (EUGENE C. MASSIE ed., 1900). O'Conor volunteered his services at the request of a number of

Governor of Mississippi offered to pay a fee of $20,000 but O'Conor declined the fee declaring "he desired to serve America by furthering prompt justice and would accept no financial remuneration whatever.'"[76] The Johnson administration, however, refused Davis the right to confer with counsel, even by letter.[77] On June 15, 1865, O'Conor complained to Secretary of War Edwin Stanton regarding his inability to confer with his prospective client.[78] In response Attorney General James Speed responded that the permission to have a personal interview with the accused was refused on the ground that "Davis was 'not in civil custody.'"[79]

While Davis's confinement was the talk of newspapers North and South during the months of May and June 1865, the nation's attention in terms of legal proceedings was focused on the trials of the Lincoln conspirators.[80] With assassin John Wilkes Booth already dead, the Johnson administration proceeded to try the conspirators before a military commission, a procedure about which Chase voiced misgivings.[81] Chase consistently stated that military commissions should not function as courts.[82] The assassination took place in the District of Columbia where civilian courts were open and functioning and should be utilized.[83] A year later, Chase, along with a majority of

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lawyers of similar views because practically all Southern lawyers were at that time barred from practicing in the federal courts because of the Ironclad Oath requirement. *See also* DORRIS, *supra* note 9, at 295. "On January 24, 1865, Congress required the oath of attorneys applying for the privilege of practicing in the United States courts." *Id*. at 6. However, this requirement was ultimately thrown out by the U.S. Supreme Court in *Cummings vs. Missouri*, 71 U.S. 277 (1867) and *Ex Parte Garland*, 71 U.S. 333 (1867).

76. HUDSON STRODE, JEFFERSON DAVIS – TRAGIC HERO – THE LAST TWENTY-FIVE YEARS 1864-1889 (Harcourt, Brace and World, Inc. 1955) 242. Some abusive citizens sent Confederate notes for the Davis defense fund. WILLIAM C. DAVIS, JEFFERSON DAVIS – THE MAN AND HIS HOUR – A BIOGRAPHY 645 (1991).

77. COOPER, *supra* note 24, at 539-40; MCELROY, *supra* note 24, at 539-40.

78. MCELROY, *supra* note 24, at 539.

79. *Id*.; *see also* EDWARD STEERS, BLOOD ON THE MOON: THE ASSASSINATION OF ABRAHAM LINCOLN 192-204 (2001) (recounting the events that led up to Booth's death on April 26, 1865). Soon after Davis was captured O'Conor decided to offer his considerable legal talents to Davis. His first attempt was on May 31, 1861 when he sent a letter to Secretary of War Edwin Stanton but Stanton replied that O'Conor must contact the Attorney General. COOPER, *supra* note 24, at 539. "Despite several attempts [to contact his prospective client] O'Conor never received a written agreement from Davis, nor was he permitted to visit Fortress Monroe. In the end O'Conor simply asserted that he represented Davis, a role that everyone on both sides accepted." COOPER, *supra* note 24, at 539-40.

80. *See* NIVEN, *supra* note 16, at 394.

81. *Id.*

82. *Id.*

83. *Id.*

the Supreme Court would rule that when the civilian courts were open and functioning, civilians should not be tried by military commission.[84] In the case of the Lincoln conspirators, the military court rendered speedy justice finding all parties guilty.[85] But there was no evidence that Davis was involved in the conspiracy.[86] At the conclusion of the proceedings the proclamation accusing Davis was not withdrawn; he was not brought to trial on the murder charges nor was he set free.[87] The Johnson administration intended to leave Davis in military custody with the intention of proceeding on the basis of treason.[88] His continued presence in military custody and a desire to have him tried before a military tribunal was at the urging of Secretary of State William Seward and Secretary of War Edwin Stanton.[89] Attorney James Speed and others in the administration had serious reservations on both the charge of treason and venue.[90] These men thought Davis should be brought before a civil court if he were to be tried.[91]

Treason, the only crime defined by the United States Constitution, is enumerated in Article III, Section 3:

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84. Ex Parte Milligan, 71 U.S. 2, 123 (1866). For a discussion of Chase's view on the proper venue for the Jefferson Davis Trial, see NIVEN, *supra* note 16, at 395-96; BLUE, *supra* note 16, at 263-66.

85. TREFOUSSE, *supra* note 26, at 211. "Booth was killed on April 26, but his associates, David Herold, George Atzerodt, Lewis Paine, and their alleged collaborators, Mrs. Mary Surratt, Samuel Arnold, Michael O'Laughlin, Edward Spangler, and Dr. Samuel Mudd, were all apprehended." *Id.* The trial, which started in early May, "ended in the conviction of the conspirators, with Herold, Atzerodt, Paine, and Mrs. Surratt receiving the death sentence, and the others, lesser terms." *Id.* Those receiving the death penalty were executed on July 7, 1865. STEERS, *supra* note 79, at 223-30; *see also id.* at 170 (providing a photograph of the execution). There are numerous accounts of the trial of the Lincoln conspirators. *See*, *e.g.*, *id.*; TREFOUSSE, *supra* note 26. For one of the most recent accounts that focuses on the role of Judge Advocate General Joseph Holt, see ELIZABETH D. LEONARD, LINCOLN'S AVENGERS: JUSTICE, REVENGE, AND REUNION AFTER THE CIVIL WAR (2004).

86. *See* Nichols, *supra* note 30, at 266. "Sufficient reliable evidence to substantiate the murder charge was never found . . . ." *Id.* at 266 & n.3 (providing a review of the evidence presented against Davis). "In the spring of 1866, testimony before a House committee proved conclusively the spuriousness of evidence connecting Davis to Lincoln's murder." COOPER, *supra* note 24, at 559. Like the Kennedy assassination, conspiracy theorists have speculated for years that Jefferson Davis and/or other high ranking Confederate officials were a part of a conspiracy that lead to the death of Abraham Lincoln. *See* WILLIAM HANCHETT, THE LINCOLN MURDER CONSPIRACIES (1983); WILLIAM A. TIDWELL et al., COME RETRIBUTION: THE CONFEDERATE SECRET SERVICE AND THE ASSASSINATION OF LINCOLN (1988). However, in this author's opinion, no credible evidence has ever been produced to establish a link. *See* LEONARD, *supra* note 85, at 82-87.

87. Nichols, *supra* note 30, at 266-67.

88. *Id.* at 267.

89. *Id.*; COOPER, *supra* note 24, at 541.

90. COOPER, *supra* note 24, at 541.

91. *Id.*

> Treason against the United States, shall consist only in levying War against them, or, in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court. . . . Congress shall have Power to declare the Punishment of Treason . . . .[92]

In 1790 Congress passed a statute providing for the death penalty upon a conviction for treason and this law was in effect at the time of the Civil War.[93] But the acts of disloyal Northerners or adherents to the Confederacy did not seem to fit within the definition of "levying war" or "giving aid to the enemy" that was envisioned by the original statute.[94] If insurrection and levying war was accepted as treason, hundreds of thousands of men, most of them youths, were guilty of the offense that carried a mandatory sentence of death by hanging.[95] To the Congress, the old law was unworkable for the emergency.[96]

On July 31, 1861, Congress passed a law which provided that anyone found guilty of conspiracy to overthrow the United States Government or to interfere with the operation of its law "shall be guilty of a high crime."[97] The punishment was set at a fine not less than five hundred dollars and not more than five thousand dollars; or by imprisonment for not more than six years.[98] This legislation provided the courts with alternatives to execution in case of conviction for conduct that some would argue to be treason and others would assert

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92. U.S. CONST. art. III, § 3.

93. Act for the Punishment of Certain Crimes Against the United States, ch. 9, §14, 1 Stat. 112 (1790).

94. *See* DORRIS, *supra* note 9, at 4.

95. *See id.*

96. "Thus it appears that the authorities at Washington took the practical position very early that the rebellion was something more than, or different from, an act whose perpetrators were guilty of treason and should suffer the penalty of death." *Id.* at 5. In the bond hearing for Jefferson Davis, the District Court Judge, John C. Underwood, observed the following regarding the change in the statute:

> It is a little remarkable that in the midst of a gigantic civil war, the congress of the United States changed the punishment of an offense from death, to fine and imprisonment [Act July 17, 1862]; but under the circumstances it was very honorable to the government of the United States, and exhibited clemency and moderation.

Case of Davis, Chase 1, 7 F. Cas. 63, 78 (C.C.D. Va. 1867).

97. DORRIS, *supra* note 9, at 4.

98. *Id.* The 1790 law requiring the death penalty upon conviction "remained unmodified until the Civil War, when the general prevalence and variety of offenses against the government, occasioned by the organization of the Confederacy, called for special punitive measures to meet emergencies. Not every offense could be regarded as treason, as that term was commonly understood, and consequently the penalty of death was too severe to apply to every condition." *Id.*

was insurrection and/or rebellion.[99] The purpose of this measure was to deal with offenses involving defiance of the government, offenses which needed punishment, but for which the treason law would have been unsuitable.[100] Under an 1862 law – commonly known as the "Second Confiscation Law" – upon conviction for treason, courts were given an alternative to a mandatory sentence of execution and could, within their discretion, impose a sentence of up to five years in jail and a fine not less than $10,000.[101] The purpose of the law was to bring the statutory provisions concerning treason into harmony with the existing emergency and to soften the penalty for the offense.[102] This statute also granted freedom to those enslaved by persons convicted under the act.[103]

Shortly after Davis's arrest, an indictment for treason under the 1862 law was brought against him in the District of Columbia court, but no action was ever taken on these charges.[104] A trial in Washington would have relied on a theory of constructive treason since Davis was not actually present in the nation's capital during the war.[105] Supporters of this position argued that the commander-in-chief of the rebel army was constructively present with all the insurgents who waged war in the Northern States and the District of Columbia.[106] But "the government abandoned the doctrine of constructive presence as unconstitutional and advised that the proper place for a trial was in [Richmond,] Virginia," the capital of the Confederacy.[107]

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99. *Id.*

100. *Id.*

101. An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels, and for Other Purposes, 12 Stat. 589 (1862).

102. *See* DORRIS, *supra* note 9, at 4.

103. *See supra* note 101.

104. David K. Watson, *The Trial of Jefferson Davis: An Interesting Constitutional Question*, 24 YALE L.J. 669, 670 (1914).

105. SCHUCKERS, *supra* note 17, at 534.

106. *Id.* Constructive treason is imputed to a person by law from his conduct or course of actions, though his deeds taken severally do not amount to actual treason. Cramer v. United States, 325 U.S. 1, 28-30 (1945). Constructive treason is an offense under English law but was rejected by the framers of the U.S. Constitution who established a restrictive definition of the offense. *Id.* Under American jurisprudence treason requires an overt act of actually levying war of giving aid or comfort to the enemy. *Id.* A mere plotting, gathering of arms, or assemblage of men is not treason. *Id.* Chief Justice Marshall dealt with the issue in 1807 in *Ex Parte Bollman* where he held that treason was defined in the Constitution and could not be extended to doubtful cases. 8 U.S. 75. In essence, Marshall said the constitutional provision must be strictly construed. *Id. See* James Willard Hurst, *Treason in the United States*, 58 HARV. L. REV. 266 (1944) (providing the history of treason in the United States); *Cramer*, 325 U.S. at 1 (providing an excellent summation of the history of treason in the United States).

107. SCHUCKERS, *supra* note 17, at 534.

The prospects of a trial in Richmond gave rise to concerns as to whether it was possible to secure a fair and impartial jury in the former capitol of the Confederacy.[108] The *Philadelphia Inquirer* was typical of many Northern newspapers that commented that a trial "in the hotbed of treason by a jury of sympathizing traitors would be a transparent farce."[109] Questions about the potential pro defense jurors in the South failed to consider the ability of the prosecution to obtain a fair and impartial jury in a Northern city which would have a jury equally as biased for the prosecution.[110] Under 21st century standards, counsel for both sides would speculate as to whether a fair and impartial jury could be obtained in any venue.

A not guilty verdict would embarrass the government. A finding that Davis was not guilty of treason would imply that the Civil War was fought in vain.[111] A guilty verdict of course would be attacked by Southern loyalists and if rendered by a jury with black members would be condemned as a mockery, particularly in the South, and make the imprisoned Davis more of a martyr than he already was. These political realities, aside from the fact that Davis wanted to be vindicated in the courts, were the basis of Davis's persistent demands to be placed on trial.[112] "Davis wanted his day in court so that he could broadcast to the country the legitimacy and virtue of his cause. As [he] saw it, any fair trial had to result in his vindication."[113]

A trial in Richmond did, however, provide one benefit to the Johnson administration, and that was the fact that Chief Justice Salmon P. Chase was the Justice of the Supreme Court assigned to Virginia.[114] Under the system existing at that time, each Justice of the United States Supreme Court, in addition to their duties on the high Court, sat in a circuit court as a trial judge along with the local district judge.[115] The presence of Chase as the trial judge, even in spite of his known

108. Nichols, *supra* note 30, at 267.

109. CHARLES WARREN, 3 THE SUPREME COURT IN UNITED STATES HISTORY 207 (1922) (citing *Philadelphia Inquirer*, May 12, 1866). The decision to try Davis in Richmond raised the question of whether or not "a jury [could] be procured in Virginia or any state of the late Confederacy which would find Davis guilty[.]" Nichols, *supra* note 30, at 267.

110. *See id.*

111. *See* COOPER, *supra* note 24, at 554, 559.

112. COOPER, *supra* note 24, at 563.

113. *Id.*

114. Les Benedict, *supra* note 18, at 142.

115. For a discussion and history of the Federal Court System in the 19th century, see Richard H. Fallon et al., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (5th ed. 2003); EDWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS (2002).

reservations about the case, would surely add credibility to any findings on the guilt or innocence of Davis. But the unknown factor was the presence of Judge John C. Underwood, federal district judge for the Eastern District of Virginia, which included Richmond.[116] Attorney General James Speed did not think that Underwood was a suitable judge before whom to try Davis because of his temperamental partisanship.[117]

In August 1865 President Johnson notified Chase that he wished to meet with them regarding initiation of legal proceedings against the leaders of the Confederacy.[118] Chase immediately came to Washington and met with the President.[119] However, Chase was deeply concerned about the propriety of the President talking to him about the case.[120] "Chase heard [the President] out and then proceeded to deliver a short lecture on the impropriety of the executive discussing such an important matter of state as a treason trial with the chief of the judicial branch."[121] Aside from the ethical questions of a judge discussing the merits of a case with one side of the litigation, Chase was plagued with the problem that he had no heart in the prosecution.[122] He had never been a supporter of the Republican desire to render harsh treatment to Confederate leaders and hoped that the administration and Northerners would see the

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116. For background information on Underwood, see FAIRMAN, *supra* note 13, at 601-07. *See also* Crandall A. Shifflett, John C. Underwood – A Carpetbagger Reconsidered, 1860-1873 (1971) (unpublished dissertation, Univ. of Va.).

117. Nichols, *supra* note 30, at 268.

> When Lincoln in order to maintain the fiction of a loyal Virginia government recognized the Pierpoint regime, he appointed Underwood district judge. The latter was not well fitted for such office, because of his temperamental partisan ship and his hatred of Virginians. Speed knew this and realized that a trial before him was likely to be disgraced by partisan irregularities.

Id. at 268 n.7 (citing *New York World*, Dec. 6, 1867). For a more complete discussion of the formation of the government of West Virginia, see *infra* note 195.

118. ROBERT B. WARDEN, AN ACCOUNT OF THE PRIVATE LIFE AND PUBLIC SERVICE OF SALMON PORTLAND CHASE 645 (Wilstach, Baldwin & Co. 1874).

119. *Id.* Johnson wrote Chase on August 11, 1865: "I would be pleased to have a conference with you in reference to the time, place and manner of trial of Jefferson Davis, at your earliest convenience." *Id.*

120. NIVEN, *supra* note 16, at 395.

121. *Id.*

> I called on Mr. Johnson immediately on my return [from the Southern tour]. It seemed to me that he was less cordial than before I went South. . . . He wished to talk to me about the time, place & manner of the trial of Davis; but this did not seem to me a proper subject of conference between the President & Chief Justice & so I respectfully told him, and he readily as I thought assented.

THE SALMON P. CHASE PAPERS, *supra* note 27, at 64 (letter from Chase to Charles Sumner dated August 20, 1865).

122. HART, *supra* note 49, at 353.

disadvantage of making a martyr of the President of the Confederacy through prosecution.[123]

Prior to a meeting with Johnson, Judge Underwood seemingly agreed with both Chase and Lincoln relative to avoiding any prosecution of Davis.[124] Underwood "had previously taken the position that the great conflict had outgrown the character of a rebellion, and had assumed the dimensions of a civil war, and that sound policy and humanity demanded that the technical treason of its beginning should be ignored. . . ."[125] But after a meeting with the President, Underwood reversed his position.[126] He reasoned that his previous position was based on "overwhelming excitement of the times . . . thinking, perhaps, that his education in the principles of the Society of Friends and his former hostility to capital punishment had misled him. . . ."[127] Immediately after the interview with the President, Underwood proceeded to Norfolk, Virginia and gave the district attorney a mere three hours to prepare an indictment against Davis.[128] The charges returned by the grand jury were made "in the precise language suggested by the President . . . with the limitation" that other influential Confederates were dropped from the indictment on the basis that it would be "improper to include . . . any but the most influential and guilty, . . ." namely, Jefferson Davis.[129] This indictment was under the Second Confiscation Act that provided only for imprisonment and fines and not the death penalty.[130]

While the government prepared its case, Davis remained in military custody at Fortress Monroe, which one sympathetic chronicler of the events typified as "isolated even from his family, and all requests of counsel for communication with him were ignored or refused."[131] Northerners who had lived through or learned of Andersonville and other such horrors of the war and former slaves would hardly share this

123. See FAIRMAN, *supra* note 13, at 177.

124. *See* JEFFERSON DAVIS: CONSTITUTIONALIST, *supra* note 24, at 141-42.

125. *Id. See also* Case of Davis, Chase 1, 7 F. Cas. 63, 78 (C.C.D. Va. 1867).

126. JEFFERSON DAVIS: CONSTITUTIONALIST, *supra* note 24, at 141-42.

127. *Id.* at 142.

128. Nichols, *supra* note 30, at 269 n.12.

129. *Davis,* Chase 1, 7 Fed. Cas. at 63-65, 81-88. Though the grand jury indicted Davis for treason, the court refused to proceed against any who had surrendered to commanding generals on parole and had faithfully kept the terms of such parole. JEFFERSON DAVIS: CONSTITUTIONALIST, *supra* note 24, at 142.

130. *Horace Henry Hagan, United States vs. Jefferson Davis*, 25 SEWANEE REV. Q. 220, 222 (1917) (referring to the 1862 Act as the "Treason Act of 1862").

131. Nichols, *supra* note 30, at 268.

view.[132] In the North, Davis was regarded as the arch traitor and demands for his head where widespread, far in excess of any other rebel leader.[133] Secretary of War Edwin Stanton and Judge Advocate General Joseph Holt were the two government officials who were most adamant in their determination to punish Davis.[134]

On September 21, 1865, five months into Davis's incarceration, the Senate called upon the President for information on the subject of a trial for the prisoner.[135] But Johnson did not reply.[136] On October 2, 1865, Johnson addressed a second formal letter to Chase relative to the prospective prosecution.[137] Contrary to their earlier discussions, this time he did not mention Davis specifically, but indicated that it may become necessary for the government to prosecute some high crimes and misdemeanors committed against the United States within the district of Virginia, and inquired whether the "district is so far organized and in condition to exercise its functions that yourself, or either of the associate justices of the Supreme Court, will hold a term of the Circuit Court there during the autumn or early winter, for the trial of causes."[138] This letter was the first formal indication that the government wished to proceed with a trial in civil court as opposed to a military court, even though the prisoner remained in military custody.

Chase respectively replied that he was not prepared to hold court.[139] By way of explanation he pointed out that there was insufficient time between the opening of the Supreme Court term for the fall term of 1865, when all judges were required to be in attendance, and the date proscribed for the opening of the district court, November 27, "for the transaction of any very important business."[140] He further explained that a civil court could not function while martial law existed.[141] Although Chase had a well-known distaste for military government,[142] the basis of his refusal to hold court while military rule persisted was the provision

132. LEONARD, *supra* note 85, at 137-64. Andersonville was a Civil War prison located in Georgia. *See id.*

133. See KENNEDY, *supra* note 64, at 9.

134. LEONARD, *supra* note 85, at 148.

135. JEFFERSON DAVIS: CONSTITUTIONALIST, *supra* note 24, at 142.

136. *Id.* at 142-44.

137. *Id.* at 144.

138. *Id.*

139. *Id.* (letter from Chase to Johnson dated October 12, 1865).

140. *Id.*

141. *Id.*

142. *See* NIVEN, *supra* note 16, at 394.

in the United States Constitution regarding separation of powers; each branch of government is separate and cannot overlap in its functions.[143]

Indicative of the desire in the North to pursue charges against Davis, on December 21, 1865, the Senate made another request of the President to be "informed upon what charges, or for what reasons, Jefferson Davis is still held in confinement, and why he has not been put upon his trial."[144] Attorney General James Speed replied that during the crisis of the war, Davis, like any other insurgent, was taken into custody as a prisoner of war.[145] "Though active hostilities have ceased, a state of war still exists over the territory in rebellion. Until peace shall come in fact and in law, they can rightfully be held as prisoners of war."[146]

On April 2, 1866, President Johnson issued a proclamation of peace declaring "that the insurrection which had existed in the States of Georgia, South Carolina, North Carolina, Virginia, Tennessee, Alabama, Louisiana, Arkansas, Mississippi, and Florida was at an end."[147] Such a proclamation would have initially appeared to have ended military control, restored civilian government, and complied with the requirements set forth by Chase for the opening of the district court.[148] But Chase was not satisfied that military rule had ended.[149] He wrote a friend on May 15 that the proclamation "might be fairly construed as abrogating martial law, and restoring the writ of habeas corpus; but subsequent orders from the War Department have put a different construction upon it."[150]

On May 8, 1866, the circuit court of the United States of Virginia met at Norfolk with Judge Underwood presiding and a grand jury was impaneled and sworn for the purpose of bringing charges against Davis.[151] This grand jury returned yet a third indictment against Davis stating the date of the offense as June 15, 1864.[152] The earlier indictment that was returned the previous summer was "lost from the

143. THE SALMON P. CHASE PAPERS, *supra* note 27, at 70 (letter from Chase to Johnson, dated October 12, 1865).

144. Reply to the Attorney General to the Resolution of the State Relative to the Prosecution of Jefferson Davis for Treason, XI Op. Att'y Gen. 411 (1869).

145. *Id.*

146. *Id.*

147. SCHUCKERS, *supra* note 17, at 536.

148. *Id.*

149. *Id.* at 536-37.

150. *Id.*

151. Watson, *supra* note 104, at 671.

152. JEFFERSON DAVIS: CONSTITUTIONALIST, *supra* note 24, at 150-51.

records of the court."[153] This new indictment was again under the 1862 law, which provided only for a fine and imprisonment if convicted and set forth traitorous intents and purposes on the part of Davis alleging that "with force and arms, unlawfully, falsely, maliciously, and traitorously did . . . levy, and carry on war, insurrection, and rebellion against the said United States of America. . . ."[154] The grand jury, presided over by Judge Underwood, allegedly included black and white illiterates.[155] This fact alone was sufficient to enrage white Southerners, sympathetic to the cause of Davis and in their minds raise further questions about the propriety of Underwood acting as the trial judge.[156]

In response to this indictment, Davis's team of lawyers appeared in Court in Richmond on June 5, 1866 on behalf of their client.[157] They inquired when the case would be tried and asserted that their client's right to a speedy trial was being denied.[158] By now Davis had been in custody for 13 months.[159] Once again, counsel for Davis indicated their willingness and readiness to go to trial.[160]

But the district attorney, Lucius H. Chandler was not present even when the case was continued to the following day in anticipation of his arrival.[161] The prosecution was represented by an assistant U.S. Attorney, Major J. S. Hennessey who said that "in the absence of the district attorney, Mr. Chandler, the question could not be answered at once."[162] The following day Hennessey stated that the government did in fact wish to proceed with the prosecution but they were not prepared to go forward on that date.[163] His reasons were as follows: first, Davis was still in military custody; second, the attorney general was engaged in other business and not available; and finally, Davis was not physically

153. *Id.* at 142.

154. Watson, *supra* note 104, at 671.

155. KENNEDY, *supra* note 64, at 104; STRODE, *supra* note 76, at 279. Strode is decidedly pro Davis and pro Southern. He makes the only reference to the composition of this grand jury that I can locate, which is the reason I used the adjective "allegedly." Strode cites a letter from Mrs. Robert E. Lee, dated May 6, 1866 to a friend in which she states, "Have you read Underwood's charge to the grand jury, 5 of whom are negroes?" *Id.*

156. *See*, *e.g.*, STRODE, *supra* note 76, at 279, 307-08.

157. Blackford, *supra* note 72, at 61-62. On this occasion Davis was represented by Messrs. James T. Brady, William B. Reed, James Lyons, and Robert Ould. *Id.*; JEFFERSON DAVIS: CONSTITUTIONALIST, *supra* note 24, at 152.

158. Blackford, *supra* note 72, at 61-62.

159. *See* JEFFERSON DAVIS: CONSTITUTIONALIST, *supra* note 24, at 152.

160. *See* Blackford, *supra* note 72, at 61-62.

161. MCELROY, *supra* note 24, at 564

162. *Id.*

163. *Id.*

strong enough to withstand a lengthy trial.[164] Underwood, after making a statement regarding the defendant's improved living conditions, granted the request of the assistant district attorney for a delay and continued the case until the first Tuesday in October, when he believed that the Chief Justice and the attorney general would be available.[165]

Two days later, other counsel for Davis, Charles O'Conor, and Thomas G. Pratt, ex-governor of Maryland, accompanied Attorney General Speed to Chase's residence in Washington to ascertain if he would consider bond for the accused.[166] Chase reiterated that he would not act until the writ of habeas corpus was restored and military law had ceased in the South.[167] A request to Judge Underwood for bond met with a similar response for essentially the same reasons, but Underwood also stressed that he could not allow for the posting of bond because Davis was in military custody and had never been in the custody of the district Court.[168]

By September of 1866 Chase was able to raise another legal roadblock to Davis's trial.[169] Through a clerical error, the Judiciary Act of July 23, 1866 failed to set new circuit boundaries for the district courts.[170] Chase questioned whether the old allotments gave jurisdiction and concluded: "It is very doubtful, therefore, whether the Chief-Justice can hold any court in Virginia till after some further legislation by Congress, making or authorizing allotment to the new circuits."[171]

While Salmon Chase and John Underwood were both members of the Republican Party, their respective positions on Davis were symbolic of the split in the Republican Party relative to the treatment of former Confederates. Chase, considered a radical while in Lincoln's cabinet, now wanted to avoid the trial, extend mercy, and put the issue of the Civil War in the past.[172] The War was over. The secession movement had been defeated. So why rule on the question of whether or not

164. *Id.* at 564-65.

165. Case of Davis, Chase 1, 7 F. Cas. 63, 70 (C.C.D. Va. 1867).

166. *Id.* at 71.

167. HART, *supra* note 49, at 352; *Davis*, Chase 1, 7 Fed. Cas. at 71.

168. *Davis*, Chase 1, 7 Fed. Cas. at 72.

169. *See* THE SALMON P. CHASE PAPERS, *supra* note 27, at 183 (letter from Chase to Thomas W. Conway, printed in *New York Tribune*, Sept. 19, 1870).

170. *See id.*

171. SCHUCKERS, *supra* note 17, at 542 (Letter from Chase to Schuckers, dated September 24, 1866).

172. *See* HART, *supra* note 49, at 299 (showing Chase wrangling with the President Lincoln over military matters); *id.* at 353 (saying that Chase "had no heart in the prosecution" of Jefferson Davis); DORRIS, *supra* note 9, at 358.

secession is treason? Underwood, formerly a moderate, now wanted to proceed with a trial and extract some form of punishment.[173] Seen in light of today's standards, his partisan activities on behalf of the Republican Party would raise serious questions as to his ability to be fair and impartial in the *Davis* case. However, as will be demonstrated, the harsh treatment received by Underwood at the hands of historians with Southern leanings may be reflective of their impression of him as a Republican partisan and most likely colored their interpretation of his actions.[174] But Underwood also engaged in a number of questionable decisions that did little to endear him to the judicial district that he served.[175]

Born in New York in 1809, Underwood attended college in New York and then went to Virginia to serve as a tutor for two years.[176] He returned to New York to become a lawyer and later briefly returned to marry a former student, Maria Gloria Jackson of Clarksburg, (West) Virginia.[177] Underwood was considered a Tammany Hall politician and practiced Free-Soil Politics.[178] While living in Virginia before the war, Underwood made himself unpopular by attempting to preach abolitionist doctrines.[179] In 1856 Underwood offered his assistance to William H. Seward for a possible presidential bid.[180] He and Seward would become lifelong friends.[181] With one or two other Republicans in the State of Virginia, Underwood attended the 1856 Republican Convention where he made antislavery remarks that further inflamed his fellow Virginians and caused him to be exiled from the state.[182]

Unable to return to his adopted state, Underwood remained in New York where newspapers "hailed him as the 'exile from Virginia', and a 'martyr to free speech'"[183] and the "hero of Virginia Republicanism."[184]

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173. *Cf.* JEFFERSON DAVIS: CONSTITUTIONALIST, *supra* note 24, at 141-42 (stating Underwood's former position that "the technical treason of its beginning should be ignored," and indicating that this changed after an interview with the President. He then sat on the bench during the grand jury indictment of Jefferson Davis).

174. *See* Patricia Hickin, *John C. Underwood and the Antislavery Movement in Virginia 1847-1860*, 73 VA. MAG. HIST. & BIOGRAPHY 156 (1965).

175. *See supra* note 86 and accompanying text; *infra* notes 202-208 and accompanying text.

176. Hickin, *supra* note 174, at 156.

177. *Id.* at 156-57.

178. Nichols, *supra* note 30, at 268 n. 7; FAIRMAN, *supra* note 13, at 601.

179. Nichols, *supra* note 30, at 268 n. 7.

180. Hickin, *supra* note 174, at 165.

181. *See id.*

182. *Id*. at 158-59.

183. *Id.* at 159.

As a result he enjoyed sudden fame in the North where he became a frequent and popular speaker on behalf of John Charles Fremont, the Republican nominee in 1856.[185] Speaking to large audiences, he often appeared on the same platform as such major figures as Horace Greeley, and sometimes as the main speaker for the evening.[186]

"Shuttling between New York and Virginia in the late 1850s, [Underwood] had helped to organize the Virginia Republican party and had worked to provide northern funds for the establishment of Republican newspapers in western Virginia."[187] He was among a small group of Virginia Republicans who attempted to host the 1860 Republican National Convention in Wheeling, Virginia.[188] Plans were proceeding in a very hopeful manner until John Brown staged his famous raid in 1859, causing the site to be shifted to Chicago to avoid southern hostilities.[189] Underwood attended the 1860 Republican Convention, once again as a supporter of Seward.[190] When the bandwagon shifted to Lincoln, Underwood threw his support to the nominee, giving Lincoln his full support.[191] This support and his active participation in Republican politics paid off.[192] It was even suggested that he might receive a cabinet post. Instead he was nominated to the office of United States Counsel in Peru.[193] Unwilling to accept the post and perhaps through the influence of Chase, Underwood was confirmed as Fifth Auditor to the United States Treasury on August 1, 1861.[194]

As a leader of the Virginia Republican Party, Underwood played a major role in the formation of the "Restored government" of Virginia

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184. Patricia Hickin, John Curtis Underwood and the Antislavery Crusade 1809-1860 (1961) (unpublished dissertation, Univ. of Va.) [hereinafter Hickin, Dissertation] 136.

185. Hickin, *supra* note 174, at 159.

186. *See* Hickin, Dissertation, *supra* note 184, at 63-64.

187. RICHARD LOWE, REPUBLICANS AND RECONSTRUCTION IN VIRGINIA 1856-70, at 34 (1991).

188. *Id.* at 9.

189. *Id.*

190. Hickin, *supra* note 174, at 165.

191. *Id.* at 166.

192. HANS LOUIS TREFOUSSE, HISTORICAL DICTIONARY OF RECONSTRUCTION 235 (1991).

193. *Id.*

194. Shifflett, *supra* note 116, at 15-16. *See also* Journal of the Executive Proceedings of the Senate of the United States of America, Volume XI 481 (Government Printing Office 1887). Letter dates July 26, 1861:

To the Senate of the United States:

I nominate John C. Underwood, of Virginia, to be Fifth Auditor of the Treasury . . . .

ABRAHAM LINCOLN

(italics in original). For further background on Underwood, see Hickin, *supra* note 174, at 161-65; LOWE, *supra* note 187.

formed by the Union loyalist after secession which led to the creation of the State of West Virginia.[195] In 1864 Underwood was rewarded for his service to the Republican Party by an appointment as District Court Judge in Richmond, Virginia.[196] "First among many Federal judges that the South would learn to hate," Chase biographer, Frederick Blue calls Underwood an "undisguised partisan Republican."[197] Another Chase biographer and Civil War historian, John Niven is equally as harsh when he comments that "Chase came in conflict with the corrupt and vengeful district court judge, John Underwood."[198]

Underwood's status as a Northerner, an abolitionist and a Republican was sufficient to cause an immediate dislike among the residents of Virginia.[199] His disparaging remarks about the City of Richmond to a grand jury on May 7, 1867 did further damage to his reputation[200] and his legal maneuvering gave his critics ample ammunition.[201] In a case involving the confiscation of the home of Dr. William McVeigh, a popular doctor of Richmond who was the owner of a large and well-placed residence in the City of Alexandria,[202]

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195. *See* Hickin, *supra* note 174; LOWE, *supra* note 187, at 12-14. The scope of this paper prohibits a lengthy discussion of the "Restored" government of Virginia, however, the concept was based on the Lockean right of revolution and the Supreme Court's 1848 decision in *Luther v. Borden*, 48 U.S. 1 (1849). LOWE, *supra* note 187, at 13. Since state officials supposedly led Virginia out of the Union, Francis H. Pierpoint, the leader of the movement, reasoned that a convention of Union loyalist meeting in Wheeling, as representatives of the people, should:

> declare that seceding state officers had abused their powers and that the loyal people were exercising their right to reconstitute the state government. Then the convention should turn out all disloyal public officials, appoint new ones, invite the Union army in to preserve order and secure the northwest, and ask for recognition of the Restored state government by Congress.

Id. at 13. This process gave rise to the creation of the State of West Virginia which thoroughly depleted the number of Republicans in Virginia. *Id.* at 14. Pierpoint continued to serve as governor of the "Restored" government of Virginia during the remainder of the War and Reconstruction. *Id.* at 13-14.

196. *See* FAIRMAN, *supra* note 13, at 601.

197. BLUE, *supra* note 16, at 264.

198. NIVEN, *supra* note 16, at 434.

199. *See* Hickin, *supra* note 174.

200. In May of 1867, Underwood described the City of Richmond to a grand jury as a city "where licentiousness has ruled until probably a majority of births were illegitimate or without the forms of law; where the fashionable and popular pulpit had been so prostituted that its full-fed ministering gay Lotharios generally recommend worship of what they most respected – pleasure, property and power . . . ." FAIRMAN, *supra* note 13, at 602 (citing *Richmond Dispatch*, May 7, 1867).

201. *See id.* at 823-28.

202. Fairman provides a summary of the various pieces of the litigation but they must be read with caution due to Fairman's disdain for Underwood. It is, however, a valuable source for the citations for the various cases that arose out of the confiscation of the McVeigh property. *Id.*;

Underwood's action do come into question. Under the 1862 Confiscation Act, Underwood, on the motion of the district attorney, struck the answer of the defendant McVeigh as "irregular and improperly admitted."[203] He reasoned that McVeigh, as a Confederate, had no standing to file an answer or assert any claims and recorded that McVeigh was in default.[204] The property was condemned and the federal marshal carried out the sale to the highest bidder and sold the real estate.[205] "The transcript does not name the purchaser: but it soon appears that a title in fee was vested in Mrs. Maria J. Underwood, wife of the Judge."[206] In November of 1864 Chase (acting as a circuit court judge with appellate jurisdiction over Underwood) affirmed Underwood's decree, allowing the case to proceed to the Supreme Court.[207] A unanimous Supreme Court reversed the ruling, reasoning that allowing the order to stand "would be a blot upon our jurisprudence and civilization."[208]

The other matter that raised questions in the minds of former Confederates about the propriety of Underwood's rulings involved criminal cases and the use of the writ of habeas corpus, a legal remedy that was at the heart of Chase's anti slavery litigation.[209] But it also involved the newly adopted Fourteenth Amendment and specifically Section 3.[210] Between the time of the adoption of the Amendment in July 1868 and the final hearing of the *Davis* case in December of the same year, Underwood heard three cases invoking the writ.[211] The facts were essentially the same. Each of the defendants, all of whom happened to be black, were found guilty of various capital offenses in Virginia state courts and sentenced to be hanged.[212] Once the Fourteenth Amendment was ratified, the defendants alleged that their convictions

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McVeigh v. United States, 78 U.S. 259 (1871). This case must have been one of the first cases that Underwood heard. Fairman says that he was appointed in 1864, so he must have been appointed during the first 3 months of the year in order to be on the bench in April. FAIRMAN, *supra* note 13, at 601, 823-24.

203. FAIRMAN, *supra* note 13, at 823.

204. *McVeigh*, 78 U.S. at 267.

205. FAIRMAN, *supra* note 13, at 823.

206. *Id.* at 824.

207. *See McVeigh*, 78 U.S. at 266.

208. *Id.* at 267.

209. Chase was an early proponent of the use of the writ of habeas corpus in anti-slavery litigation. For a few examples, see NIVEN, *supra* note 16, at 51, 62.

210. FAIRMAN, *supra* note 13, at 602-05.

211. *Id.*

212. *Id*. at 602-04.

were invalid as a result of Section 3 of the Amendment.[213] It was their position that the judges who conducted their trials were former Confederates who fell within the disqualified class set forth in the Amendment, making their actions a nullity and the resultant convictions void.[214] Underwood, acting alone and without the knowledge of Chase, ruled that "Section Three of the Amendment operated of its own force, at once, to remove every disqualified person from office; accordingly the trial had been invalid and the petitioner could not be held."[215] Underwood granted the defendants' request for writs of habeas corpus and released the defendants.[216]

Upon learning of this ruling, Chase addressed a letter to Underwood on November 19, 1868, just prior to the final hearing on the *Davis* case, a hearing in which Chase would make a ruling involving the same section of the Fourteenth Amendment.[217] Chase admonished Underwood to cease such rulings until the two could confer on the subject.[218] Apparently Underwood took no heed. On January 14, 1869, Chase addressed another letter to Underwood questioning his conduct.[219] Newspapers and the organized bar attacked the finding of the judge.[220] Based on Underwood's premise, every case tried by a state court judge, or for that matter any decision made by a public official who had been a part of the rebellion in any way, was deemed to be a nullity as a result of the disqualification section of Section 3 of the Fourteenth Amendment, something the opponents of Underwood propounded was clearly outside

213. *See id.* at 603.

214. *See id.* at 602.

215. *Id.* at 603.

216. *Id.* at 603-04. The race of the defendants in this case must be considered as a key element. Herein, blacks had been convicted by state courts and their convictions were overturned by federal courts, presided over by a Northerner. This was the very kind of federal control that the South had recently fought a war over.

217. *Id.* at 603.

218. *Id.*; *see* THE SALMON P. CHASE PAPERS, *supra* note 27, at 285-86 (letter from Chase to Underwood dated November 19, 1868).

219. THE SALMON P. CHASE PAPERS, *supra* note 27, at 292 (letter from Chase to Underwood dated January 14, 1869). Chase expresses his regrets to Underwood regarding the procedural manner in which Underwood handled cases. *Id.* He questions the propriety of the use of the Fourteenth Amendment to void prior court rulings and allow for release of prisoners on writs of habeas corpus. *Id.* He goes on to point out that issues were arising regarding the validity of civil judgments based on Underwood's interpretation of the amendment. *Id.* On May 3, 1869 when Chase sat as the Circuit Judge in Richmond, he reversed the prior decisions made by Underwood. FAIRMAN, *supra* note 13, at 606.

220. FAIRMAN, *supra* note 13, at 603, 605-06.

the intent of the framers of the Amendment.[221] Here were black defendants that the white population of Virginia saw as convicted by a duly elected Virginia state court judge, whose convictions were set aside by a Northern Republican federal judge by virtue of his interpretation of the Fourteenth Amendment.[222] This intervention by the federal courts in state court matters was at the core of the arguments that caused the Civil War.

But yet, the disparaging remarks about Underwood and views of his decisions must be considered in light of the sources from which they were drawn. The report of the *Davis* case which appears in the Federal Reports[223] was, according to the footnote "Reported by Bradley T. Johnson, Esq., and here reprinted by permission." Dunbar Rowland reprints the identical report in his Volume VIII of his work on the *Davis* trial.[224] Rowland points out that Bradley was a member of the Virginia Bar and dates the report in 1876.[225] It is unclear as to whether or not Bradley relied on a verbatim transcript of the proceedings to create his report. But as a member of the Virginia Bar, it must be assumed that he was a Southerner who would be more than likely to write with a Southern bias. 1876 was the year of the disputed election of Hayes and Tilden that resulted in the restoration of Southern control in the South.[226] Is it possible that, after the election, the Republicans lost control of the official Federal Reports and suddenly a Southerner gives a "fair and impartial" report of the *Davis* proceedings and/or the decisions of Judge Underwood?

Even Supreme Court historian Charles Fairman, who devotes a good many pages to Underwood, comes in to question when you consider his sources.[227] One of his footnotes refers to the seemingly pro Southern Nichols article, which has been cited herein, and Bradley T. Johnson's report of the case.[228] Albert Bushnell Hart, who wrote his

221. The question of the effect of Section 3 of the 14th Amendment on office holders who had taken an oath to support the Constitution and then engaged in the rebellion is discussed in *U.S. v. Powell*, 27 F. Cas. 605, 606 (C.C. N.C. 1871). *See also* Griffin's Case, 11 F. Cas. 7 (C.C. Va.. 1869); State v. Watkins, 1869 La. LEXIS 367, at **1-2 (La. 1869).

222. *See Griffin*, 11 F. Cas. at 7.

223. Case of Davis, 7 F. Cas. 63 (C.C.D. Va. 1867).

224. JEFFERSON DAVIS: CONSTITUTIONALIST, *supra* note 24 at 138.

225. *Id.*

226. *See* ALEXANDER FLICK, SAMUEL JONES TILDEN: A STUDY IN POLITICAL SAGACITY 403 (1939). There are many accounts of the contested Election of 1876, however, one comprehensive source is KEITH IAN POLAKOFF, THE POLITICS OF INERTIA: THE ELECTION OF 1876 AND THE END OF RECONSTRUCTION (1973).

227. *See generally* FAIRMAN, *supra* note 13.

228. *See generally* Nichols, *supra* note 30; FAIRMAN, *supra* note 13, at 608 n. 171.

original biography of Chase in 1899 is not critical of Underwood, nor is Schuckers whose work on Chase was released in 1874.[229] So any view of Underwood's actions in the *Davis* proceedings must be assessed in light of the available sources.

In March 1867, Congress passed the corrective legislation that solved the problem Chase presented regarding the allotment of justices to the judicial circuits.[230] With its passage, a major obstacle to the trial of Davis was overcome and counsel for Davis decided to force the issue of Davis's confinement by bringing their client to court on a writ of habeas corpus and compelling the government to either try him or allow him to post bond.[231]

But the government's case against Davis was in shambles.[232] Attorney General Speed resigned from the Johnson administration in the summer of 1866.[233] He was replaced by Henry Stanbery who refused to become personally involved in the prosecution.[234] Stanbery had made no preparation of the case against Davis and had no plans of doing so.[235] By taking the position that the Attorney General was only required to represent the government in cases before the Supreme Court, he avoided involvement in the *Davis* case and placed sole responsibility of its trial on special counsel William Evarts.[236] To strengthen the prosecution, Evarts secured the services of H.H. Wells, an expert criminal lawyer, and Richard Henry Dana.[237] But Evarts, like Stanbery had little interest in the prosecution.[238] Speaking to Dana, he said "It may be that the trial will take place at the end of November, more likely in May next, as likely as either, not at all."[239]

In a conference with Davis's lawyers in May of 1867, the government's lawyers "intimated to O'Conor that there would be no trial that term and that bail would be accepted."[240] Probably recognizing the weakness of their case and the lack of public interest in continuing the prosecution, the prosecutors indicated a willingness to grant Davis his

229. *See generally* HART, *supra* note 49; SCHUCKERS, *supra* note 17.
230. BLUE, *supra* note 16, at 264.
231. Nichols, *supra* note 30, at 271.
232. *See id.* at 269-72.
233. *Id.* at 269.
234. *Id.*
235. *Id.* at 272.
236. *Id.*
237. *Id.* at 275.
238. *Id.*
239. *Id.*
240. *Id.* at 273.

freedom, at least temporarily.[241] The fact that Evarts found that he alone was responsible for the prosecution and that he had only two weeks to prepare for a bond hearing may have contributed to this decision.[242] One also speculates as to whether or not the government lawyers hoped that Davis would leave the country. His wife and children were residing in Canada.[243] Other former Confederates were living in England.[244] Allowing Davis's release on bond, with the hope that he would place himself outside the jurisdiction of American courts, would provide an easy solution to all concerned. This speculation becomes more plausible when the amount of the bond is considered.[245]

Later that month, Davis was brought to court. The military transferred his custody to the court marshals and bond was posted in the amount of $100,000, one tenth of the original amount offered the same Northerners, led by Horace Greeley, who had lobbied so long to obtain the release of Davis.[246] On May 13, 1867, after 720 days in custody, Jefferson Davis was released to the cheers of sympathetic Southerners.[247] The case was set for trial in the fall session.[248]

But the case did not go forward in the fall.[249] Just prior to the opening of the regular Richmond district court session in November of 1867, Chase notified Underwood by letter that the press of business in Washington prevented him from attending court.[250] Fortunately for the prosecution, who was still attempting to prepare a case, the matter was postponed until the following March to suit the convenience of the Chief Justice.[251] Unbeknownst to the defense, in early 1868 Evarts and newly appointed special counsel, Richard Henry Dana concluded that "before a

241. *See id.* at 273-74.

242. CHESTER L. BARROWS, WILLIAM M. EVARTS: LAWYER, DIPLOMAT, STATESMAN 172 (1941).

243. COOPER, *supra* note 24, at 545.

244. GAINES M. FOSTER, GHOSTS OF THE CONFEDERACY 15 (1988).

245. *See* Nichols, *supra* note 30, at 273-74.

246. Nichols, *supra* note 30, at 274. Judge Underwood "agreed to accept a bond of $100,000, guaranteed by twenty men to the amount of $5,000 each, provided it was not furnished exclusively by Southerners . . . . He insisted that at least five Northern men of known anti slavery opinions should go on the bond." STODDARD, *supra* note 40, at 235. In addition to Greeley, they included Cornelius Vanderbilt and Gerrit Smith. *Id.* For an account of the actual transfer and the proceedings relative to the bond hearing, see MCELROY, *supra* note 24, at 581-88.

247. MCELROY, *supra* note 24, at 582, 586.

248. BLUE, *supra* note 16, at 265.

249. *Id.* at 266.

250. FAIRMAN, *supra* note 13, at 608-09.

251. BLUE, *supra* note 16, at 265.

trial could be brought on a new indictment must be found and that no trial should take place except before Chase."[252]

In March, 1868 events in Washington further hampered the prosecution of Jefferson Davis.[253] The impeachment trial of President Andrew Johnson was held between March and May, 1868 and this trial required the attendance of the Chief Justice.[254] In addition, Stanbery resigned from the position of Attorney General to represent Johnson in the impeachment trial.[255] When he was reappointed by the President, Congress refused to confirm the reappointment and William Evarts became attorney general.[256] But Evarts had also been an integral part of the defense team in the Johnson impeachment trial, so in the spring of 1868 he was hardly ready to proceed with the prosecution of Davis, even with the assistance of Wells and Dana.[257]

Dana was convinced that the prosecution of Jefferson Davis should be abandoned.[258] In a letter to Evarts dated January 25, 1868, he "urge[d] that the prosecution be abandoned . . . . Why should the U[nited] States voluntarily assume the risk of a failure, by putting the question of the treason of Jefferson Davis to a petit jury of the rebel vicinage?"[259] In addition to legal problems that Dana had already pointed out with the indictments, time was running out on the indictments.[260] They had to be tried within three years after the offense.[261] This meant that the government only had until April of 1868 to bring the case to trial.[262] As a result, a Richmond grand jury brought a new indictment against Davis on March 26, 1868.[263]

This new indictment accused Davis of treason in the form of levying war against the United States for a period beginning May 2,

252. Nichols, *supra* note 30, at 276.

253. *Id.* at 279.

254. *Id.* If Johnson had been impeached, O'Conor had advised Davis to flee the country. *Id.* Johnson's successor would have been Ben Wade, the implacable radical out to punish all Confederates. *Id.*

255. GENE SMITH, HIGH CRIMES AND MISDEMEANORS: THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON 242-43 (1977).

256. *See* Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL'Y 667, 757 (2003).

257. Nichols, *supra* note 30, at 280. For an in depth discussion of the inner workings of the trial, see SMITH, *supra* note 255, at 236-63.

258. Richard Henry Dana, *The Reasons for Not Prosecuting Jefferson Davis*, PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY 64, at 201-209 (1930-1932).

259. *Id.* at 203.

260. Nichols, *supra* note 30, at 277.

261. *Id.*

262. *Id.*

263. *Id.* at 278.

1861 to May 10, 1865 and was brought under the 1790 law that called for execution upon a finding of guilt.[264] The less stringent laws dealing with treason and rebellion which had been enacted during the war used in the earlier indictments were ignored. By indicting Davis under the 1790 law that required execution, the prosecution may have been intentionally setting them up for defeat. Perhaps they brought an indictment on a charge that they knew they could not win. Dana was doing his best to see that Davis never came to trial at all.[265]

On June 3, 1868, Chase arrived in Richmond prepared to commence the trial but, probably to his relief, no one else was.[266] Not even the district attorney was in attendance. ". . . [A] Mississippi lawyer read the agreement between Evarts and O'Conor postponing the case and there was nothing for the court to do but to concur."[267] Since this date was just a month before the Democratic Convention, in preparation of which Chase's daughter, Kate Chase Sprague, and friends were actively seeking to garner the nomination, it is probable that Chase would have rather been elsewhere.[268] But neither would he have wanted to be forced into a ruling on the *Davis* case that would alienate Southern Democrats.[269] In a letter dated June 3, 1868 from Richmond to Judge Milton Sutliff, Chase remarked that if he were President, he would "proclaim a general amnesty to every body of all political offences committed during the late rebellion. . . . I can see no good to come, at this late day, from trials for treason."[270]

While the prosecutors were manipulating the indictment, in July the Democrats nominated Horatio Seymour for President, handing Chase another defeat in his bid for the White House.[271] The Republicans nominated Grant whose prospects for victory were strong.[272] Chase had alienated himself from the Republicans as a result of the impeachment; differing views on Reconstruction and of late his attempt to gain the Democratic nomination.[273] If Chase wanted to have any influence on

264. *Case of Davis*, Chase 1, 7 F. Cas. 63, 88 (C.C.D. Va. 1867).

265. *See* SAMUEL SHAPIRO, RICHARD HENRY DANA, JR. 1815-1882, at 137 (1961).

266. Nichols, *supra* note 30, at 279; *Davis*, Chase 1, 7 F. Cas. at 88.

267. Nichols, *supra* note 30, at 280.

268. NIVEN, *supra* note 16, at 429. For a complete discussion of the involvement of Chase's daughter Kate Chase Sprague and her management of her father's presidential bid at the Democratic Convention of 1868, see *id.* at 429-32.

269. *Id.*

270. THE SALMON P. CHASE PAPERS, *supra* note 27, at 227.

271. NIVEN, *supra* note 16, at 432.

272. *See* BLUE, *supra* note 16, at 284-85.

273. BLUE, *supra* note 16, at 283-85.

Reconstruction, he must do it from the Supreme Court.[274] His former influence with the Executive Branch was now gone.[275] His prospects of ever reaching the office he so desired must have seemed remote.

Chase, who had stood on ethical principles early in the proceedings against Davis when he refused to talk to Johnson about the proceedings and made a wasted trip to Richmond, now engaged in his own manipulations.[276] Just after the adoption of the Fourteenth Amendment in July 1868, an associate of Charles O'Conor, counsel for Davis, had a conversation with Chase.[277] Chase made it clear that he took the position that the disability imposed by Section 3 of the Fourteenth Amendment constituted a punishment within the meaning of the law.[278] If Davis were subjected to a punishment as a result of the Fourteenth Amendment, no further punishment could be imposed by virtue of the double jeopardy clause of the United States Constitution.[279] According to Chase, the defense could anticipate a favorable ruling on a motion to quash the indictment, thereby disposing of the case on a procedural technicality.[280] The merits of the case would not be reached. Section 3 of the Fourteenth Amendment would save Chase from making a decision on the question of whether or not secession is treason.[281]

To add to the irony of Chase's interpretation of the Amendment and revelation of his pre-judgment of the case, Chase biographer John Niven asserts that during the period between the adoption of the Amendment by Congress and its ratification by the states, Chase had attempted to have the disqualification clause of the Fourteenth Amendment dropped on the basis that it was too harsh on former Confederate officials.[282] This deletion, which would seemingly make the Amendment more palatable to the South, required a quid pro quo.[283] Namely, Chase would require acceptance of impartial suffrage with property and literary requirements.[284] This suggestion was not acceptable to the South and the suggested deletion was not pursued.[285]

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274. *Id.* at 297.
275. *Id.*
276. MCELROY, *supra* note 24, at 604; *see also supra* notes 118-122 and accompanying text.
277. MCELROY, *supra* note 24, at 604.
278. *Id.* at 608-09.
279. *Id.*
280. *See id.* at 604.
281. *See id.* at 589-611 (Chapter 39 "Why Jefferson Davis Was Never Tried").
282. NIVEN, *supra* note 16, at 409 (citing letter from Chase to Schuckers of May 15, 1866).
283. *See id*.
284. *See id.*
285. *See id.*

On December 3, 1868, the matter was finally ready to proceed to trial.[286] Ironically, the United States District Court now used the building that two years before housed the Treasury and Confederate executive offices.[287] Whether the two judges, Chase and Underwood, were at odds as some authors suggest is difficult to ascertain, particularly in light of the harsh treatment that Underwood has received at the hands of Southern historians.[288] The first order of business was a ruling on the motion to quash the indictment, the motion that Chase had suggested to defense counsel some months earlier.[289] It is possible, as was often the practice in circuit courts of the time, that the judges agreed to disagree for purposes of sending the case to the Supreme Court, which is what Chase biographer Hart suggests.[290] Is it possible that Chase anticipated an amnesty from the outgoing president?

The facts were not in issue. Davis provided an affidavit that he had taken an oath to support the Constitution of the United States in 1845 when he was elected to Congress.[291] The Court took judicial notice of the fact that Davis had engaged in insurrection by virtue of his service as an official of the Confederate States of America, placing him clearly within the class of those disqualified by the Amendment.[292] The sole question before the court was whether or not the disqualification was a punishment within the meaning of the law.[293] If the disqualification was found to be a punishment, then any further punishment inflicted against Davis would be a violation of the double jeopardy clause of the Constitution and he must go free.[294]

The courtroom was filled with people.[295] All counsels were present and prepared to go forward.[296] At the commencement of the case, the district attorney read a statement that the press of business in Washington kept William Evarts, the attorney general from attending.[297] During the course of the arguments, available accounts assert that Chase

286. Watson, *supra* note 104, at 674; Case of Davis, Chase 1, 7 F. Cas. 63, 89 (C.C.D. Va. 1867).
287. DAVIS, *supra* note 24, at 656
288. *See* MCELROY, *supra* note 24, at 604.
289. *Davis*, Chase 1, 7 F. Cas. at 88-89.
290. HART, *supra* note 49, at 353.
291. *Davis*, Chase 1, 7 Fed. Cas. at 89-90.
292. *See id. at* 63, 94.
293. *Id.*
294. Id.
295. COOPER, *supra* note 24, at 565.
296. *Id.* at 566.
297. *See* Nichols, *supra* note 30, at 280.

seemed to have forgotten Underwood was at his side.[298] According to Davis biographer McElroy, "Underwood was so detested among Mr. Davis' counsel that O'Conor ignored his very existence, and addressed himself exclusively to the Chief Justice. . . ."[299] But McElroy gives no authority for his statement. The arguments continued for two days, with Chase denying several request for recesses during the course of the arguments.[300]

The legal proceedings that commenced in a burst of retribution for the horrors of the war and the assassination of Lincoln had now dragged on too long. Former Confederates now served in the Congress.[301] A new president was elected. Chase likely understood that his chances of going to the White House were now behind him.[302] It was time to close the judicial chapter on the Civil War. "To Chase, Johnson, and an increasing number of Northerners, punishing Jefferson Davis no longer seemed as important as it had in 1865."[303]

After completion of two days of oral arguments, Chief Justice Chase opened court for the purpose of rendering a decision on the motion to quash.[304] He announced to no one's surprise that the Court could not agree.[305] Chase voted to quash the indictment.[306] Underwood voted to deny the motion.[307] Since the two judges could not agree, the matter was certified to the United States Supreme Court.[308]

On December 25, 1868, President Johnson, with the impeachment behind him and the end of his term close at hand, issued a proclamation of general amnesty, which granted a full pardon for the offense of treason to all participants in the rebellion, which included Davis.[309]

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298. MCELROY, *supra* note 24, at 604.

299. *Id.*

300. Case of Davis, Chase 1, 7 F. Cas. 63, 91 (C.C.D. Va. 1867).

301. *See* DORRIS, *supra* note 9, at 379-80.

302. *See* BLUE, *supra* note 16, at 297, 300.

303. *Id.* at 266. In an interesting article entitled *Why Didn't The North Hang Some Rebels?: The Postwar Debate Over Punishment for Treason*, Pennsylvania State University History Professor William Blair argues that the North didn't hang some of the Rebels because trying Rebels as traitors in civil court proved far more dangerous than letting the criminal go unpunished. BLAIR, *supra* note 69, at 33.

304. *Davis*, Chase 1, 7 Fed. Cas. at 102.

305. Nichols, *supra* note 30, at 283.

306. *Id.* at 283 n.47.

307. *Id.*

308. *Id.* "Following the disagreement of the circuit court on this motion and its certification of division to the Supreme Court, Evarts proposed to enter a *nolle prosequi* in the circuit court if the defendant's counsel would agree to drop the motion to quash. This was agreed to." BRAINERD DYER, THE PUBLIC CAREER OF WILLIAM M. EVARTS 108 (1933).

309. DORRIS, *supra* note 9, at 357-58; FAIRMAN, *supra* note 13, at 788.

"The outraged Senate demanded that he explain by what authority he acted, and he responded with a recital of the history of presidential amnesties from Washington to Lincoln."[310] The amnesty proclamation declared "unconditionally and without reservation . . . a full pardon and amnesty for the offence of treason against the United States, or of adhering to their enemies during the late civil war, with restoration of all rights, privileges, and immunities under the Constitution and the laws."[311]

This effectively disposed of the criminal prosecution. On February 26, 1869, the Attorney General wrote to Davis's legal counsel that instructions had been given to enter a *nolle prosequi* as to all indictments "for treason alleged to have been committed during the late war and that his office had 'no information of any such prosecution' pending anywhere against Jefferson Davis."[312] An unknown clerk made an entry in the journals of the United States Supreme Court in February, 1869 dismissing the request to certify the question of the motion to quash.[313]

Jefferson Davis was a free man. He lived until 1889 always wearing grey suits in honor of his beloved Confederacy. He never sought a pardon and persisted to his death that he would have preferred a trial which he felt would have vindicated him. In 1881 he published his memoirs in the form of his two volume work, *The Rise and Fall of the Confederate Government*.[314] Many Southerners, to Davis's chagrin, paid little attention to the book and in the North it was dismissed as the "ravings of an unrepentant traitor."[315] In 1978 at the instigation of then-Mississippi Senator Trent Lott, Congress passed a bill restoring the full rights of Citizenship to Jefferson Davis.[316] The bill was signed on Oct 17, 1978 by President Jimmy Carter.[317]

Chase continued as Chief Justice of the Supreme Court until his death in 1873. In the years following the *Davis* ruling, Chase steered the

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310. TREFOUSSE, *supra* note 26, at 346.

311. Proclamation No. 15, 15 Stat. 711 (Dec. 25, 1868) (published online at John T. Woolley & Gerhard Peters, The American Presidency Project, *available at* http://www.presidency.ucsb.edu/ws/print.php?pid=72360 (last visited Mar. 26, 2009).

312. Nichols, *supra* note 30, at 284. "In February, Evarts took the necessary steps to put an end to all proceedings both in the circuit court and the Supreme Court, and thus after nearly four years the government's case against Jefferson Davis was terminated." DYER, *supra* note 308, at 108. See also RANDALL, *supra* note 56, at 116.

313. Hagan, *supra* note 130, at 224.

314. *See* DAVIS, *supra* note 64.

315. *See id.* at vi (foreword by James M. McPherson).

316. S.J. RES 16, 95th Cong. (1978) (enacted).

317. *Id.*

Supreme Court on a prudent and realistic course. He was well aware that the Republican-dominated Congress would take any opportunity to threaten the independence of the Court. Chase was a major figure in Civil War America. First and foremost he was the architect of anti slavery litigation. He is recalled as the governor of Ohio, Secretary of the Treasury, presidential contender, and Chief Justice of the United States. But it should not be forgotten that through a novel and ingenious use of Section 3 of the Fourteenth Amendment, Chase saved the Supreme Court from having to make the ultimate legal decision regarding the American Civil War. He also denied Jefferson Davis the trial that he always wanted; a trial that Davis felt would vindicate him and his cause. Chase, through the use of Section 3 of the Fourteenth Amendment, saved the nation the pain of making a decision on whether or not secession is treason. It is unlikely that any of the Framers of the Amendment would have anticipated this result. But such is the nature of constitutional law.