

ESSENTIAL CIVIL WAR CURRICULUM

Post-War Treatment of High-Ranking Confederates

By Clint Johnson

Technically, the shooting stopped at the Battle of Palmito Ranch, near Brownsville, Texas, on May 13, 1865. Except for the occupying Union forces stationed around the South for nearly a decade during Reconstruction, most of the common soldiers on both sides put down their muskets and headed home.

The difficult and emotional job of putting the country back together lay ahead, made even more explosive with the assassination of President Lincoln less than a month before the last shots were fired. Even if Lincoln had lived, the clash between him and Congress over the future of the nation would have been colossal.

President Lincoln had spent years developing his plans for reunion, but the Radical Republicans in Congress and in his own cabinet had their own ideas.

As early as December 1863 Lincoln had proposed allowing Southern states to begin reconstituting their state governments when 10 percent of the 1860 voters had sworn loyalty oaths to the United States. The Radicals feared that so little proof of loyalty would allow the aristocrats to retain their power and their slaves.

Lincoln tried taking a high, if vague road to reconciliation, at least when talking to the general public. When he gave his second inaugural address on March 4, 1865, a time when all remaining Confederate armies were clearly inferior to overwhelming Union forces, the President seemed to imply that he was ready to welcome the rebelling states back with open arms. The most famous lines in that address make no distinction between the men who fought for the Union or the Confederacy.

“With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation's wounds, to care for him who shall have borne the battle and for his widow and his orphan, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations,” Lincoln said.¹

¹ Lincoln's Second Inaugural Address, March 4, 1865

In a March 27, 1865 meeting Lincoln hinted to both Generals Ulysses S. Grant and William T. Sherman, and to his own cabinet at his last meeting with them on April 14, that he wanted the top Confederate leaders to escape the country. In two separate meetings separated by just over two weeks, Lincoln, when asked what should be done with the Confederate leaders should they be captured, told a story of how a man would not object to someone slipping some liquor into his lemonade if it was unbeknownst to him.

The President's meaning was clear to both generals who both wrote about the story in their post-war memoirs. If the Confederate leaders were to escape the country, Lincoln had no plans to pursue them. Based on his understanding of Lincoln's intent, Sherman even discussed with his staff the idea of tracking down the Confederate cabinet and offering them ships to leave the country.

It was a simple idea put forth by a country lawyer who had no stomach for post-war punishment.. If there were no Confederates under arrest for whatever crimes might be lodged against them, there would be no trial. In Lincoln's mind, instead of lawyers arguing about the legality of secession and the deaths of some 800,000 Americans, the nation would concentrate on rebuilding.

The simple plan died when the President died. In the rush to avenge his murder, his dream of "malice toward none" was forgotten and replaced with vengeance in finding the conspirators responsible for his assassination. While John Wilkes Booth was obviously the killer, suspicion also fell on Confederate President Jefferson Davis as the man who may have ordered the killing.

A dual manhunt was launched. One focused on finding Booth and his immediate conspirators in northern Virginia. A second was somewhat more leisurely put together to track the Confederate Cabinet from southern Virginia into North Carolina, then South Carolina and then into Georgia.

Confederate President Jefferson Davis and Postmaster General John Henninger Reagan were captured on May 10, 1865, in southeastern Georgia by Federal cavalry.. Naval Secretary Stephen Mallory was taken the same day, May 10, from his home in LaGrange, Georgia. Vice President Alexander Hamilton Stephens was also taken from his home in Crawfordville, Ga., the next day on May 11. Treasury Secretary George Alfred Trenholm, who had left the Davis party before May 10, simply went home to one of his South Carolina plantations where he was arrested on June 13. Attorney General George Davis, the first Cabinet member to leave in Charlotte in mid-April, made his way into Florida. Finally tiring of his misadventures, Davis identified himself to Federal officials in Key West in June rather than chance the 90-mile sail to Cuba

Only Secretary of State Judah Philip Benjamin and Secretary of War John Cabell Breckinridge of the Confederate cabinet successfully eluded searching Federal authorities.

Benjamin had been traveling with the Davis party before striking out on his own on May 3 when the party reached the Savannah River. Proclaiming: “I am going to the furthest place from the United States if it takes me to the middle of China!”, the always-happy, always-chubby, always-recognizable Benjamin drove away in a carriage. For the next several weeks he adopted the personality of a Frenchman who spoke no English, a planter, and then a simple farmer. He boarded a small boat near Bradenton, Florida, and then portrayed its cook when the vessel was boarded by Union sailors from a blockading vessel. By July 10, he was in Bimini. He finally reached England in mid-September where he launched a new career as a barrister.²

Breckinridge also left Davis on the Savannah River. Like Benjamin, he headed for Florida. With the help of Confederate guerrillas, he secured a boat on the St. Johns River. The boat was steered by John Taylor Wood, a successful Confederate sea captain who once commanded the commerce raider CSS *Tallahassee*. After surviving storms and Union patrols, the Breckinridge party made it to Cuba by June 10. From there he made his way to England, then to Canada. He finally returned to the United States in 1869 when he was positive he would not be arrested.

The Union scrambled to find places to send the political figures. Most would be taken to Federal forts in New York, Boston and outside Savannah, Ga. where they would stay varying lengths of time ranging into the fall of 1865.

The two most prominent, Davis and Stephens, found themselves on the same ship heading down the Savannah River to their unknown fates. The two had never liked each other. Stephens had even publicly said Davis was crazy to think that the Confederacy could still win the war early in 1865. They spoke briefly and respectfully on the ship once, but after that kept their distance from each other for the rest of the journey.

The capture of the Confederate cabinet might have been anticlimactic except for the April 14, 1865, assassination of President Abraham Lincoln. Almost immediately suspicion fell on Davis and his cabinet

Davis, of course, was the main suspect in the Lincoln assassination. In Federal prosecutor John Armor Bingham’s closing arguments in the trial against the known Lincoln conspirators on June 29, 1865, Bingham said: “It only remains to be seen whether Davis, the procurer of arson and of the indiscriminate murder of the innocent and unoffending, necessarily there from, was capable of also endeavoring to procure, and in fact did procure the murder, by direct assassination of the President of the United States and others charged with the duty of maintaining the Government of

² William C. Davis, *An Honorable Defeat: The Last Days of the Confederate Government* (New York: The Free Press, 2001), 244-5.

the United States, and of suppressing the rebellion in which this arch traitor and conspirator was engaged.”³

Bingham mentioned Davis seventy-four times in his closing arguments against the men and woman who were being tried for Lincoln’s assassination. He figured he would have Davis before him shortly and he was laying the groundwork for that trial.

Despite Bingham’s charges, the military court doubted the testimony of the witnesses who claimed to know Davis’s involvement. For example, dates did not match up when witnesses said conspirators were in Canada planning the Lincoln assassination.

To their credit, the Union military officers who presided over the trial and execution of the Lincoln conspirators did not add Davis to the trial.

The immediate capture and imprisonment of Confederate generals, the men most directly responsible for killing hundreds of thousands of Union soldiers, did not generate much interest among Union politicians. Only a handful such as Lieutenant General Joseph Wheeler, were arrested and imprisoned. Wheeler was released by the end of June 1865. Even men who had warrants out for their arrest like famed guerilla leader Colonel John Singleton Mosby were forgiven and were allowed to return to civilian life.

One exception to blaming Confederate military leaders was Colonel Henry Wirz. The commandant of Camp Sumter, the prison camp for Union soldiers at Andersonville, Georgia, was arrested on May 7, 1865 at the camp. He was taken to Washington and charged with intentionally mistreating the Union prisoners under his charge in 1864. The military tribunal found him guilty and hanged him on November 10, 1865. Though Wirz had never met or communicated with Jefferson Davis, Wirz’s lawyer said Witz was offered clemency by a Johnson Cabinet member if he implicated Davis in crimes against the prisoners. He refused.⁴

Robert E. Lee, in Grant’s hands at Appomattox, was given a parole by Grant and allowed to make his way to Richmond to reunite with his wife.

Lee himself was not implicated in the Lincoln assassination. He made no public comment on it, but in an interview printed by the *New York Herald* dated April 21, 1865; the reporter wrote that Lee: “considered this event in itself one of the most deplorable that could have occurred. As a crime it was unexampled and beyond execration. It was a crime that no good man could approve from any conceivable motive.”⁵

³ Summation of the Lincoln conspirators’ trial prosecutor John Bingham, reprinted in Clint Johnson, *Pursuit: The Chase, Capture, Persecution and Surprising Release of Jefferson Davis* (New York: Citadel Press, 2008), 225.

⁴ Jefferson Davis, *Andersonville and Other War-prisons* (New York: Belford Company, 1890).

⁵ Transcript of interview with Lee, *New York Herald*, April 21, 1865, reprinted in John Reaves, *The Lost Indictment of Robert E. Lee* (Lanham, MD: Rowman & Littlefield, 2018), Appendix A, 236.

On May 29, 1865, President Andrew Johnson issued a proclamation to give amnesty and pardon to most former Confederates with the exception of 14 classes of people. Those classes included all officers above the rank of colonel in the army and lieutenant in the navy, all former Congressmen and Senators, all former judges, and people with personal wealth above \$20,000. Anyone within those excepted classes would have to apply for amnesty.

At the same time Johnson was issuing his pardon, Federal District Judge John Curtiss Underwood was asking a grand jury to indict former Confederate leaders for treason. Despite the chance he could be put on trial, Lee formally asked for a pardon from President Johnson on June 13, 1865. Cagily, Lee also sent General Grant a letter asking if his Appomattox parole still applied, and if it would keep him from being tried. Grant replied on June 20, 1865, agreeing with Lee's view that paroled prisoners of war could not be tried for treason as long as they obeyed their paroles. Grant even wrote President Johnson urging him to grant Lee's amnesty despite what Judge Underwood was doing in the courts.

On February 17, 1866, Lee was called before a House committee to get his opinions on what The South thought about future wars with foreign countries, and about the right of secession. Over two hours of testimony Lee politely answered questions, most of which asked his opinion rather than answer any specific charges. When asked if he thought Southerners believed they had the right to secede, Lee replied: "I think they considered the act of the state as legitimate; that they were merely using the reserved right to which they had a right to do....the act of Virginia in withdrawing from the United States carried me along as a citizen of Virginia, and that her laws and her acts were binding on me."⁶

After his testimony, Lee went back to Lexington where he was serving as president of Washington College. Even the Northern newspapers made little mention of his testimony.

With the exception of Wirz's execution and the relatively mild grilling of Lee on Capitol Hill one year after the war ended, the rest of the high-level Confederates returned to their civilian lives.

Only one Confederate leader had to face the wrath of the United States government. That was the former Confederate president.

Davis and several other military and civilian prisoners arrived at Fortress Monroe on the Virginia peninsula on May 19, 1865. Most of those men, including Stephens, were transferred to another ship heading north. Davis, and Clement Claiborne Clay, a former U.S. Congressman who had worked with the Confederate Secret Service in Canada, were off-loaded at Fortress Monroe.

⁶ Douglas Southall Freeman, *R.E. Lee*, 4 vols. (New York, Charles Scribner & Sons, 1935), 4:249, quoting a transcript from the U.S. House Joint Committee investigating the condition of the former Confederate States.

Almost as soon as Davis stepped onto the grounds of Fortress Monroe, the Federal government began a short-lived campaign of coordinated humiliation and what might be considered torture by 21st century standards.

On May 27, 1865, seventeen days after his capture, several national newspapers printed stories that Davis had been captured in women's clothing. The origin of that story was that Davis was wearing his wife's raglan, a type of 19th century sleeveless raincoat, and his wife had thrown a shawl over his head as he tried to walk toward his tied horse on the dark, early morning of May 10, 1865. A Union cavalryman saw him and stopped him. Oral reports of Davis's capture were given to Union Major General James Harrison Wilson who passed them up the chain of command to Secretary of War Edwin McMasters Stanton.

Stanton saw an opportunity to discredit Davis. Stanton gave copies of Wilson's telegram about Davis's clothing to two newspapers which printed it word for word. Within days, Northern editorial cartoonists were drawing Davis in a dress and clutching a Bowie knife. Davis never owned a large Bowie knife, but Postmaster General Reagan was a former Texas Ranger and owned one. Since both men were captured on the same day, the owner of the Bowie knife was confused.

Some Union soldiers who saw Davis captured were incensed at the stories and did what they could to refute them. Private James H. Parker wrote in an article: "I defy any person to find a single officer or soldier who was present at the capture of Jefferson Davis who will say, upon honor, that he was disguised in woman's clothes."⁷

In 1912, General Wilson, the source of the story, admitted in writing: "no officer ever asserted that the Confederate chief was caught in crinoline or petticoats as worn in those days."⁸

Stanton had more in store for Davis than just humiliation.

Davis was ushered into a freshly white-washed cell that had been converted from an artillery casemate. A desk, chair and cot were placed inside, and heavy wooden doors covered the entrance. A bucket of water and a bucket for waste were in the corner. More than a dozen armed guards were assigned to literally watch Davis at all times. Clay was put into a cell beside Davis.

Written orders from Stanton ordered two guards to walk beside Davis's cot day and night. The light was never to be extinguished. Every 15 minutes an officer was supposed to open the door, walk into the cell and look at Davis -as if make sure a body double had not replaced him in the intervening 15 minutes when his presence was last checked. Manacles were supposed to be placed on Davis's hands and feet, but his jailer defied Stanton's orders and did not chain his hands.

⁷ James H. Parker, "The Capture of Jefferson Davis," in *Southern Historical Papers* 4, (August 1877): 91.

⁸ James H. Wilson, *Under the Old Flag*, 2 vols. (New York: Appleton & Company, 1912), 2:332.

Davis's jailer was Major General Nelson Appleton Miles. Just 26, the four-times wounded officer had won the Medal of Honor at Chancellorsville for holding his line during repeated assaults. Miles was ambitious. He had been a crockery salesman before the war. Teaching himself military tactics, he had advanced up the ranks and never tried to leave service despite his wounds.

Then the war ended and all those generals had nothing to do. Because he was not a West Point graduate, Miles was offered the command at Fortress Monroe or release from service, the usual fate of most non-professional generals. Reluctantly, Miles took the job, but spent the next two years worrying that taking care of Davis would damage his political future.

That worry became real when Miles, acting on orders from Secretary of War Stanton, shackled Davis's legs together, even though he was already inside a secure cell. He decided against shackling Davis's hands.

When the post doctor made his first visit to Davis, he was shocked.

"Mr. Davis presented a very miserable and affecting aspect, his eyes restless and fevered, his head shifting from side to side for a cool spot on the pillow. His pulse was full and at ninety, tongue thickly coated, his extremities cold and his head troubled with a long-established neuralgic disorder. He was so emaciated that his skin chafed easily against the slats of the iron cot," Craven wrote.⁹

When word leaked to two Philadelphia newspapers that Davis was shackled inside a cell, prominent Northerners reacted that it appeared the Federal government was torturing Davis.

Thurlow Weed, a political boss of New York City, wrote that "If true, it is a great error and a great calamity. I hope that this dreadful cloud may not obscure the glory of other achievements."¹⁰

Other newspapers were not sympathetic to what was happening to Davis.

The New York Times on July 27, 1865 wrote: "The very few here who are permitted to know the facts about JEFF. DAVIS' health, his prison habits, diet, privileges, and so on, are much amused at the manufactured fol-de-rol that appears periodically in the New-York and Philadelphia papers. One would imagine, did he credit the statements of these sensationalists, that JEFF, is in the hands of brutish tyrants rather than of Christian gentlemen: that he is being worn away between the upper and nether stones of official restriction and prison torture, instead of enjoying to his full

⁹ Hudson Strode, *Jefferson Davis, Tragic Hero* (New York: Harcourt Brace, 1964), 236, quoting Dr. John Craven.

¹⁰ *Ibid*, 239, quoting Thurlow Weed.

capacity every comfort which the necessary caution and watchfulness of his guardians will permit.”¹¹

Within five days, Stanton ordered the shackles removed.

While purely speculative, what Stanton may have been trying to do with his early, harsh treatment of Davis was drive him insane. As noted earlier in this article, Lincoln suggested to his cabinet members early in April 1865 that the entire Confederate cabinet be allowed to escape the United States. In Lincoln’s view, if there were no Confederate leaders within the Union’s borders, there would be no need for a trial dealing with the legality of secession.

Davis’s capture, on the orders of Stanton after Lincoln’s assassination assured there would be a trial. The only way to avoid a trial was if the person to be tried—Davis—was unfit.

Stanton was well aware of how insanity could be a factor in trials. Stanton had virtually invented the idea of temporary insanity while defending U.S. Representative Daniel Edgar Sickles after he shot and killed Phillip Barton Key in 1859. Sickles, a known philanderer himself, had caught Key in an affair with Sickles’ wife. Stanton successfully convinced the jury that Sickles was temporarily insane with jealousy when he shot Key down across the street from The White House.

What Stanton had not counted on in 1865 was that Davis was a most hard-willed man. He had survived being shot in the Mexican War, malaria, herpes that left him blind in one eye, and a host of other problems that would have broken most men. Davis was a stubborn man dedicated to proving that he was right and everyone else was wrong when he forcefully took an opinion.

Even his future wife Varina recognized that trait about Davis on the first day they met. She wrote her mother: “He has a way of taking for granted that everyone agrees with him, with offends me.” In describing him further Varina wrote: “Would you believe it, he is refined and cultivated, yet he is a Democrat!”¹² Varina was a politically astute supporter of the Whig party.

Being kept awake in a prison cell was not something that would break Davis’s mind. Stanton stopped the guards walking beside Davis’s cot and removed the all-night lantern on July 22, 1865. Finally, on October 2, 1865, Davis was moved from the cold, damp casemate cell to a second-floor barracks room with barred windows.

All during the summer of 1865, the Johnson administration, Congress, the newspapers, and the general public pondered what to do with Davis. Some wanted a military trial as had been held with the Lincoln assassination conspirators. Others pushed for a civilian trial. Some wanted to

¹¹ *New York Times*, July 27, 1865, at <https://www.nytimes.com/1865/07/28/archives/washington-news-the-health-of-mr-jefferson-davis-at-fortress-monroe.html>, accessed September 21, 2020.

¹² Varina Howell Davis letter to her mother, in James T. McIntosh, Lynda Lasswell Crist, et al., eds., *The Papers of Jefferson Davis*, 14 vols. (Baton Rouge: Louisiana State University Press, 2003), 11:52-53.

hang Davis without a trial as an object lesson to anyone who would defy the power of the federal government in the future. Some, realizing that a trial could be unpredictable, wanted him released.

Figuring out what Davis had done wrong, if anything, was at the heart of any case against him. The legality of secession had been discussed, but not litigated, for decades. New England states had considered leaving the Union on three occasions early in the 19th century but had never acted on the idea. The South had only considered it once before in the 1830s.

What concerned the Johnson administration was whether they could prove that Davis had done anything that even warranted being in a Federal prison.

Treasury Secretary Hugh McCulloch wrote in his post-war memoirs that Attorney General James Speed had put together a legal team in the spring of 1865 to discuss what to do with Davis. According to McCulloch: “some of the ablest lawyers in the country came to the conclusion that Mr. Davis could not be convicted of treason by any competent and independent tribunal, and that therefore he ought not to be tried.”¹³

Congress was not privy to what Johnson’s Cabinet was studying, but the idea that Davis had committed treason was open to interpretation by many politicians and legal scholars. On May 29, 1865, Senator Edwin Dennison Morgan of New York wrote to President Johnson insisting that the nation had to find some crime that would convict Davis.

“The country is impressed with punishing Davis legally and promptly. There are grave doubts that can be accomplished by a trial for treason.”¹⁴

Others did not want to take the time to study if Davis had actually committed treason. They were convinced he had and they wanted him dead.

“So that the people may understand that the government recognizes such a crime, and if convicted, as he cannot fail to be, that he shall be punished, so that the people understand that is the fate of Traitors.”¹⁵

Charles O’Conor, the former chief prosecutor for the District of New York, put together a legal team of Northern lawyers who were convinced Davis had done nothing illegal. None had any personal ties to Davis. All worked without compensation. They were convinced that Davis, a civilian, should not be in a military prison if in a prison at all. They were unsure if he had committed any crime since secession had not been litigated. However, O’Conor had made himself

¹³ Hugh McCulloch, *Men and Measures of Half A Century* (New York: Charles Scribner’s Sons, 1888),408-9.

¹⁴ Edwin Morgan, letter to President Johnson, May 29, 1865 in Paul H. Bergeron, *Papers of Andrew Johnson*, 16 vols., (Knoxville: University of Tennessee Press, Knoxville), 8:134-5.

¹⁵ Amasa Walker, letter to Andrew Johnson, July 18, 1865, in Bergeron, *Papers of Andrew Johnson*, 8:433-4.

notorious as a member of the circle of New Yorkers who were openly sympathetic to the Confederacy during the war, so he was hardly a neutral judge of this issue.

O’Conor was convinced that Davis had not committed treason, the most frequently mentioned charge, since he had simply led the states once they had left the Union. He had not tried to take over the existing U.S. government. Nor had he conspired with a foreign government to overthrow the U.S. government. As Davis famously, succinctly said about The South’s leaving the Union: “We seek no conquest. All we ask is to be let alone.”¹⁶

In the spring of 1866, the Federal government was still unsure what to do with Davis, even though it had released Clement Clay in April 1866. Judge Underwood still wanted to try Davis for the Lincoln assassination though the key witnesses against Davis had all been proven to be liars. Still other prosecutors suggested he be tried for crimes against United States Colored Troops. Underwood liked that idea and offered to pack the jury with freed slaves. That idea eventually died as Davis never took the field on any battlefield where United States Colored Troops fought and were rumored to have been executed.

Complicating matters in the court was the insistence of Chief Justice Salmon Portland Chase that he would not try any case involving Davis as long as the military remained in control of Virginia’s government. The Radical Republican plan to keep the Confederate states under military rule had backfired on any plan to swiftly rid the nation of Davis through a civilian judicial process.

Varina Davis finally saw her husband in person on May 3, 1866, almost a year after he had been captured, and 10 months after he had been sent to Fortress Monroe. She wrote: “His cheek bones stood out like those of a skeleton. Merely crossing the room made his breath come in short gasps, and his voice was scarcely audible.”¹⁷

On May 8, 1866, a year after the Johnson cabinet had received a report from its own team of lawyers that Davis had done nothing justiciable, a U.S. prosecutor in Norfolk formally charged Davis with treason. The prosecutor based his indictment on a July 1862 law making it illegal for anyone to make war against the United States.

The four-page indictment included the phrase that Davis had: “most wickedly, maliciously, and traitorously did ordain, prepare, levy and carry on war against the United States.” “Wickedly” appears three times in the indictment.¹⁸

¹⁶ Jefferson Davis, speech to Confederate Congress, April 29, 1861 at https://avalon.law.yale.edu/19th_century/csa_m042961.asp, accessed September 21, 2020.

¹⁷ McIntosh, *Papers of Jefferson Davis*, 2:759.

¹⁸ Indictment filed in the Circle Court of the United States at Norfolk, at <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2443&context=ylij>, accessed September 20, 2020.

Oddly, and without explanation, the prosecutor cited the single date of June 15, 1864, as the date Davis carried out his rebellion against the United States. That was three years after the war had started. And, curiously, the only thing that happened on that particular date was that the Union Army had advanced into trenches around Petersburg and then pulled back when they found them empty. Had they advanced instead of retreating, Petersburg might have been captured in June 1864 and the war might have ended that summer, rather than dragging into the spring of 1865. Davis had nothing to do with the Union army squandering an opportunity to end the war early.

The nation's newspaper editors were beginning to fear bringing Davis to trial.

Harpers Weekly worried "there is a chance and the probability of this humiliation", i.e. Davis being found innocent in a trial based on secession. The newspaper helpfully suggested that evidence be found that Davis had harmed prisoners of war or had assassinated Lincoln so he could be executed for real crimes rather than figuring out if secession was constitutional.¹⁹

To the surprise of the Federal government, Davis's attorneys asked that the treason trial begin immediately. The Federal prosecutors, never thinking that Davis wanted a speedy trial, suggested that it might be more comfortable for Davis if they wanted until October so Davis could be "enjoying the cool breezes of the sea at Fortress Monroe, instead of the heated and fetid atmosphere of a crowded courtroom."²⁰

The same government that had shackled Davis and kept him awake was now concerned that he might like a cool court room rather than a hot one.

Judge Underwood, unsure how to head off an immediate trial, suggested that Davis apply for a pardon from President Johnson. The same judge who had been threatening to try Davis for the assassination of Lincoln was now suggesting he apply for a pardon.

While the Johnson administration and the judicial branch were trying to figure a way out of the mess the capture of Davis had created, Congress was making the situation worse. On June 10, 1866, Representative George Sewel Boutwell of Massachusetts introduced a resolution saying Davis and Clay were guilty of treason and complicity in the Lincoln assassination. Boutwell was trying to get Congress to agree that Davis was guilty of capital crimes even though no court had tried him for any crimes. The charge of Davis assassinating Lincoln had been dismissed by a court a year earlier. Radical leader Thaddeus Stevens was so incensed at the surprise declaration that he offered to defend Clement Clay if a trial ever took place.

¹⁹ *Harpers Weekly*, May 26, 1866,

²⁰ Dunbar Rowland, ed., *Jefferson Davis, Constitutionalist: His Letters, Papers and Speeches*, 10 vols. (Jackson: Printed for the Mississippi Department of Archives, 1923), 7:155, statement of James Brady to Judge John Underwood.

At the beginning of 1867 Davis was still in legal limbo.

Trying to make something happen, one of Davis's attorneys asked Chief Justice Chase to issue a writ of habeas corpus to transfer Davis from military control to the Federal District Court in Richmond. Chase suggested the attorneys ask Underwood for the writ. To their surprise, Underwood agreed. On May 13, 1867, three days past the second anniversary of his capture, Davis was released on \$100,000 bail. Some of the money came from wealthy Northern abolitionists, including Gerrit Smith, who had bankrolled John Brown's 1859 raid on Harpers Ferry.

After he was released, O'Connor wrote that he "was pursued by a joyful crowd."

"Poor Davis there, wasted and careworn, was almost killed with caresses," O'Connor wrote.²¹

The case had not been dismissed. Davis had only been let out on bail to come back to court at some future date.

Congress was shocked that Davis was let out on bail. It called prosecutor Lucius H. Chandler and Attorney General Henry Stansbury to testify before the House Judiciary Committee. Chandler kept repeating that he had no direction from the Johnson administration about how to prosecute Davis.

Stansbury shocked the committee with this statement: "I never have been myself able to see how, if called upon to justify Davis's imprisonment, it could be done. The government has always in that matter stood in a false position."²²

The court date was set for November 25, 1867, with Chief Justice Salmon Portland Chase finally agreeing to participate with Judge Underwood in a two-judge panel that would oversee a grand jury made up of black jurors.

The newspapers scrambled to make sure that court date never happened. They feared that Davis might win a trial. The *New York Times* editorialized: "The forthcoming trial is likely to do us damage and discredit. If Davis is convicted, he will not be punished. If he is acquitted, as he may be, the consequences, especially in the Southern states will be still more injurious. We believe the whole proceeding should be dismissed."²³

When the court date came, Chief Justice Chase was not in court. A new date was set for March 1868. That date too came and passed with the prosecution delaying the trial once again until December 1868.

²¹ McIntosh, *Papers of Jefferson Davis*, 12:204.

²² Robert Icenhauer-Ramirez, *Treason on Trial* (Baton Rouge: Louisiana State University Press, 2019), 236.

²³ *New York Times*, Oct. 28, 1867.

On July 4, 1868, Johnson issued a blanket amnesty for all former Confederates except those under indictment for treason. The treason indictment against Davis had never been withdrawn so he was still under threat.

In November 1868 Chief Justice Chase did something perhaps unethical and perhaps illegal. He met privately with Davis's attorneys without anyone present representing the Federal government. During the meeting Chase suggested at the upcoming trial, at which he would preside, Davis's attorneys should argue he had been punished enough by not being allowed to hold future offices under the 14th Amendment. That Amendment prevented former Confederates from holding offices in the U.S. government.

Chase had essentially written Davis's defense for the trial before him.

The trial opened on December 3, 1868 with Davis's attorneys arguing that the 14th Amendment acted as punishment for Davis. The prosecutor was surprised and complained to Chase about the defense, but Chase said he had already learned of the defense.

After O'Connor made a long and skillful argument about the 14th Amendment, which was weakly countered by the unprepared prosecution, Chase ruled in Davis's favor. Underwood, the other judge, ruled against, saying the 14th Amendment was not a punishment, but merely a guide as to who should hold future offices. The 1-1 tie meant the case would be kicked up to the Supreme Court – the court where Chase was Chief Justice.

The three-times deferred trial, always requested by the prosecuting federal government, was now going to the U.S. Supreme Court.

Attorney General William Maxwell Evarts, who O'Connor hinted in letters may have also been communicating with the Davis legal team on his own, began to worry about presenting the government's case to the Supreme Court. He had already seen Chase vote in Davis's favor in the lower court, and he knew Chase was a persuasive justice who might easily sway the other justices to side with Davis rather than the government.

Sometime in December 1868, Evarts approached the Davis defense team and offered to drop all charges against Davis if they agreed to stop any attempt to have the case tried. In effect, the U.S. government asked the defendant to drop the case rather than the other way around. O'Connor, without consulting Davis, who was in London England trying to start an insurance company, agreed on behalf of his client.

On Christmas Day 1868, perhaps knowing what Chase had offered, President Johnson issued his final blanket amnesty proclamation for all Confederates. It finally included Davis. Every Confederate general and politician was finally considered an American again.

While thousands of letters to and from Jefferson Davis exist, researchers have never found the correspondence from Davis to O’Conor. O’Conor never married so he left no heirs to his letters other than a sister, who was a Catholic nun. No one knows if O’Conor kept the Davis letters, destroyed them, or passed them along to his sister, and she destroyed them or put them into a long forgotten archive.

The missing Davis to O’Conor correspondence is important because Davis’s reaction to his final release from trial is unknown. Davis’s lawyer, O’Conor, made the deal for him without consulting him. Instead of having his day in court, Davis spent the rest of his life defending himself and the Confederacy by writing letters and books in which he defended secession.

O’Conor was confident he could have successfully defended Davis in Federal court and at the Supreme Court. His strategy would have been that the United States had waged war on The South just as it would any foreign nation. By calling on all states to enlist volunteers to fight the war and by exchanging prisoners, the United States had recognized the Confederacy as a nation—despite Lincoln’s insistence that they were just rebellious states.

Trying to find a way to settle the issue of secession’s legality once and for all time, the Supreme Court ruled in *Texas vs White* in 1869. *Texas vs White* was a complicated case involving United States bonds purchased in 1850 that Texas had sold during the war to raise money. The Supreme Court ruled that since Texas had never legally left the Union, it had no right to sell the bonds. Chase, with the majority, had finally found a case he could use to sweep the issue of secession off the table of history without giving it a human face as he would have had the tall, gaunt, defiant Jefferson Davis appear before the Supreme Court.

In the decades after the war, some Confederates rejoined the U.S. Army. Several former Confederate generals donned blue again and commanded former Yankees and rebels – now just plain American soldiers in Cuba during the Spanish-American War in 1898. While the war was short, Southerners had flocked to the enlistment tables, anxious to prove to their government that their loyalties once again lay with the United States.

Did *Texas vs. White* settle the issue of secession once and for all? Technically it did, but it did nothing to change the decades-long, pre-war discussion as to what the states intended when they ratified the Constitution.

What would post-war United States have looked like had Lincoln lived? Would he have won over the Radicals to endorse his vision of letting the seceding states back into the Union without punishment? Would a mild Reconstruction have prevented the rise of the Ku Klux Klan? Would the freedmen have been accepted on equal terms with whites?

What if the Confederate leaders had been allowed or even invited to have a role in rebuilding the nation without slavery instead of being initially banned from public service? What

if the issue of secession's legality had been allowed to lie dormant as a result of the war's end instead of debated for another two years while its civilian leader lay in a federal prison?

All that is speculative history that will never be answered.
