

Secession on Trial: The Treason Prosecution of Jefferson Davis

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Review

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What is treason? In common parlance, it is the betrayal of a trust. In English common law, it was compassing the death of the king or his family, or a conspiracy against him. When Parliament beheaded Charles I, it changed the definition to waging war against the nation. Many of the framers of the federal Constitution had served in the Continental Congress or the Continental Army in the late war against Great Britain. They had committed treason against the crown, but no one was executed for treason by British authorities. Instead, a precedent was set to treat soldiers and political leaders of the United States as subjects in rebellion, but not traitors. The federal Constitution followed this, rather than the older English, precedent, defining treason as levying war against the United States or giving aid and comfort to its enemies, presumably in wartime. When western Pennsylvania farmers burned the home of a tax collector and threatened his life, they were tried and convicted of treason, but pardoned. Their defense was that their violent acts were not directed against the nation, but against the person of the tax collector. The Constitution also required that a defendant be present when the treasonous act was committed. It was this provision that allowed Aaron Burr to escape conviction for acts done in his absence. States had treason provisions in their laws as well, and the most infamous of these cases was the Virginia prosecution of John Brown and his comrades for their raid on the Harpers Ferry armory. The case should have gone into the federal courts, as Harpers Ferry was federal land, but the federal district judge did not object to Virginia prosecuting Brown.

Were the officers of the Confederate armed forces and the political leaders of the Confederacy traitors? They did levy war against the United States, but if the Confederacy was an independent nation, as it claimed, then the war was a belligerency between sovereign powers and not a civil war or insurrection by citizens of the United States against their government. In fact and in law prior cases offered little clear precedent. During the war, in the so-called Prize Cases involving the seizure of ships violating the blockade of the Confederacy, lawyers for the federal government argued that the distinction between belligerency, governed by internal law of war, and civil insurrection, a crime in federal law, did not matter. The need to save the Union trumped everything else. Lawyers for the confiscated ships and cargos argued that the federal government could not have it both ways, and that even under federal law, the Blockade, proclaimed by

President Abraham Lincoln in April, was not constitutionally sound until Congress agreed in July.

What then to do with the former Confederates when victory over the Confederacy was assured and the government of the Confederacy had in fact ceased to exist? None of the officers who led Confederate troops were prosecuted for treason. They were at first barred from participation in state and federal government, and later pardoned. If they had not committed a crime, neither the prohibition nor the blanket pardon made any sense. But again, as in the blockade, practical considerations overruled legal consistency. If the Union was to include former southern states, or if they had never left the Union, peace between the sections required that former Confederate officers and political leaders be rehabilitated as citizens.

The tension between strict legalism and practical politics was perfectly illustrated in the treatment of Confederate President Jefferson Davis. Cynthia Nicoletti holds both the J.D. and the Ph. D. and the present work demonstrates her facility in both law and political history. She rightly treats the prosecution of Davis as a story rather than a legal treatise, bringing alive the people and the problems on both sides of the case. Davis's trial was supposed to be the test case of the legality of secession, but he was never actually tried. Held in a Richmond prison, his jury would have been sympathetic to his plight, and thus a danger, even when picked by federal marshals. Could he have been acquitted, a backdoor vindication of the right of secession? Would that have thrown the fruits of victory away? If convicted, would others like Robert E. Lee and Alexander H. Stephens follow? Certainly, Chief Justice Salmon Chase worried about this outcome, as did Davis's prosecutors, and ironically, Davis's defense counsel. So, the prosecutors delayed with the active connivance of the defense counsel.

With no trial whose ins and outs to follow, Nicoletti turns her attention to the counsel in the cause, Charles O'Connor for Davis, and William Evarts for the prosecution. Watching closely were President Andrew Johnson and the members of his cabinet, themselves divided over whether to try Davis for treason or for war crimes, and whether to use a military tribunal or a civil jury trial. Varina Davis, Jefferson's wife, was active in his defense, reaching out to his former Senate colleagues, members of newly readmitted Mississippi's state bar, and even old northern friends. Here are their stories, reminding us of the remarkable civility of this civil war, in part because of the central role that lawyers on both sides played during and after the hostilities.

In subsequent chapters, Nicoletti's cast of characters widens out from those immediately involved in the case to those who had a stake in Davis' fate. There is Clement Clay, who after pardon never recanted his view that secession was legal, and so did Jubal Early and Stephens. James Longstreet thought the opposite—surrender of the army meant surrender of the claim to legitimacy. Robert E. Lee agreed (testifying before the grand jury against Davis). Future President James Garfield worried that former Confederates never accepted the verdict of the battlefield. The battle of history would have to be won. Republican members of Congress weighed in as well, seeking to punish former rebels with legislation. For a time, the very idea of the rule of law seemed in peril. Attorney general James Speed saved the day, advising Congress that a rush to judgment imperiled future prospects for a peaceable Reconstruction. Gradually,

public sentiment followed the same course, from demands for Davis' immediate execution to greater caution (a change in public opinion that O'Connor in part orchestrated).

The grand jury hearings provide the next scenes, allowing Nicoletti to parse out the difference between district (trial) and circuit (trial) courts. The former, over which a single district court judge presided, could not handle federal felonies. The latter required the presence of district court judge John C. Underwood and Chief Justice Chase, riding circuit. Underwood pressed for a pro-Union grand jury and trial jury, but Chase, perhaps because he still had the presidency in mind, simply refused to attend. More than Underwood, Chase knew that the real issue lay in the federal courts of the newly reincorporated states. If these could not meet because of local opposition, Reconstruction itself might fail. Behind his concerns lay the uncertain status of the former members of the Confederacy. Where they conquered? Had they ever left? Could they?

There's so much more here—radical reconstruction; the impeachment of President Johnson, the re-occupation of the recalcitrant South. But enough—let Nicoletti tell the rest of the story. One cannot leave this review, however, without saying how remarkably thorough was her research; how well she argues her points; and how clearly and compellingly she writes. Bravissima.

*Peter Charles Hoffer teaches American history at the University of Georgia. His *Uncivil Warriors: The Lawyers' Civil War* will appear in late Spring from Oxford University Press, followed by his co-authored *The Clamor of Lawyers: The American Revolution and Crisis of the Legal Profession* from Cornell.*