AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 6: The Civil War and Reconstruction—Criminal Justice/Infamous Crimes and Criminals

The Debate over the Prosecution of Jefferson Davis

Jefferson Davis (1808–89) was the president of the Confederacy. Shortly after General Robert E. Lee surrendered at Appomattox, Davis was captured by the Union Army and imprisoned in Fort Monroe, Virginia. The Johnson administration and most Republicans in Congress were determined to try Davis for treason. Organizing that trial proved complicated. Davis could be convicted of treason only if secession was unlawful. Many southerners and some northern Democrats hoped a treason trial would vindicate the South's position that secession was not a crime. "If the right to withdraw existed," the chief judge of the Pennsylvania Supreme Court wrote, "it must have included the right of defense." The lawyers for the federal government feared a trial judge or, on appeal, the Supreme Court might accept this argument.

Procedural problems proved even more difficult. Internal debates broke out within the Johnson Administration and within Congress over proper constitutional procedures for the Davis trial. Attorney General Joshua Speed (1814–82) insisted that Davis could be constitutionally tried only by a civil jury and only in Richmond, Virginia, the seat of the Confederacy. Other members of President Andrew Johnson's cabinet and Congress insisted that Davis could be tried by a military commission or by a civil jury any place in the United States. Chief Justice Chase confused issues further by insisting that a civil trial take place in Virginia only after military commanders were no longer authorized to impose martial law. Otherwise, Chase feared, the military might reverse any decision a civil court made in the Davis trial. Chase also raised questions about whether punishing Davis for treason violated Section 3 of the Fourteenth Amendment, which prohibited federal officials who joined the Confederacy from holding public officials. In private correspondence, Chase maintained that the Constitution may have intended deprivation of the right to hold office to be the exclusive punishment for Confederate officials.

From 1865 to 1869, President Johnson, Congress, and Chief Justice Chase debated the proper forum and means for trying Jefferson Davis. The Johnson Administration eventually initiated a civil prosecution in Richmond. That prosecution was abandoned in 1869 when President Johnson before leaving office issued a blanket amnesty for all Confederate officials still subject to prosecution.[1]

We have excerpted Attorney General Speed's defense of a civil trial in Virginia and a speech Senator Jacob Howard gave urging that Davis be tried in the North. Speed emphasized the need to obey the letter of the Constitution while Howard emphasized the need to punish traitors. Article 3 of the Constitution requires that federal crimes be tried in the State where the crime occurred. The Sixth Amendment has a similar requirement. Was General Speed correct when he claimed that Virginia, the seat of the Confederate government, was the only place where Davis could be tried? Was Senator Howard right when he claimed that treason convictions are impossible to secure under these conditions? If so, does this mean the Constitution should receive some other interpretation or that the Constitution is defective?

Joshua Speed, "Opinion on the Case of Jefferson Davis"[2]

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[1] For more information about the Davis trial, see Cynthia Nicoletti, "Did Secession Really Die at Appomattox?: The Strange Case of U.S. v. Jefferson Davis," *University of Toledo Review* 41 (2010): 587.
[2] Case of Jefferson Davis, 11 Op. Att'y Gen. 411 (1866).

I have ever thought that trials for high treason cannot be had before a military court. The civil courts have alone jurisdiction of that crime. The question then arises, where and when must the trials be held?

In that clause of the Constitution mentioned in the resolution of the Senate, it is plainly written that they must be held in the State and district 'wherein the crime shall have been committed.' I know that many persons of learning and ability entertain the opinion, that the commander-in-chief of the rebel armies should be regarded as constructively present with all the insurgents who prosecuted hostilities and made raids upon the northern and southern borders of the loyal States. This doctrine of constructive presence, carried out to its logical consequences, would make all who had been connected with the rebel armies liable to trial in any State and district into which any portion of those armies had made the slightest incursion. Not being persuaded of the correctness of that opinion, but regarding the doctrine mentioned as of doubtful constitutionality, I have thought it not proper to advise you to cause criminal proceedings to be instituted against Jefferson Davis, or any other insurgent, in States or districts in which they were not actually present during the prosecution of hostilities.

. . .

It follows from what I have said, that I am of the opinion that Jefferson Davis, and others of the insurgents, ought to be tried in some one of the States or districts in which they in person respectively committed the crime with which they may be charged. Though active hostilities and flagrant war have not for some time existed between the United States and the insurgents, the peaceful relations between the Government and the people in the States and districts in rebellion have not yet been fully restored. None of the justices of the Supreme Court have held circuit courts in those States and districts since actual hostilities ceased.

When the courts are open, and the laws can be peacefully administered and enforced in those States whose people rebelled against the Government—when thus peace shall have come in fact and in law—the persons now held in military custody as prisoners of war, and who may not have been tried and convicted for offences against the laws of war, should be transferred into the custody of the civil authorities of the proper districts, to be tried for such high crimes and misdemeanors as may be alleged against them.

. . .

I should regard it as a direful calamity, if many whom the sword has spared the law should spare also; but I would deem it a more direful calamity still, if the Executive, in performing his constitutional duty of bringing those persons before the bar of justice to answer for their crimes, should violate the plain meaning of the Constitution, or infringe, in the least particular, the living spirit of that instrument.

Senator Jacob Howard (Republican, Michigan), "Speech"[3]

. . .

. . . [I]t is due to our dignity as a nation, it is due to the justice of the nation, it is due to the obligation which we owe to the Constitution and to the nation, that there should be an arraignment and punishment according to the forms of law at least of the ringleaders of this rebellion. . . .

. . .

. . . Did [the framers of the Constitution] intend to cover with immunity from the responsibility of treason the man who should command and commit it, but who should happen to be personally and corporeally at the time in another State or district whose people were so universally disloyal that a jury could not be found among the sufficiently loyal and virtuous either to convict or indict the offender? Or the American citizen who, as a rebel and a traitor, should hurl bolts of war against his country from a foreign soil? . . .

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The term "constructive presence," therefore, as employed by the learned Attorney General, if intending anything not implied by the accepted definition of legal presence, means exactly the contrary.

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[3] *Congressional Globe*, 39th Cong., 1st Sess. (1866), 566–69.

Legal presence, I cannot doubt, comprehends, in the case of a commander, all military orders and acts of procuring, or, in other words, causing acts of war to be committed by his soldiers or subordinates, wherever given and done, and render him triable in any judicial district in his department where those orders are executed or those acts result in levying war; for this presence results directly from the military authority he holds and exercises. . . . The doctrine of legal presence was devised for the purpose of testing and making out the guilt of the traitor, not to screen him. . . . It was devised as a plain, practical rule of common sense by which courts were to hold the man guilty who was really so; not to enable the powerful, the cunning, and the wary to "entangle justice in the net of law," and escape her falling ax by the dexterous maneuver of darting from one place to another."

I cannot resist the conclusion that Davis may be legally tried in any judicial district where hostilities have taken place. . . .

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. . . I regard it as wholly out of the question to try and convict Davis or any other rebel leader of the crime of treason in any rebel State, for the plain reason that no impartial jury can be found there. . . .