

/\* Font Definitions \*/ @font-face {font-family:"Cambria Math"; panose-1:2 4 5 3 5 4 6 3 2 4; mso-font-charset:0; mso-generic-font-family:roman; mso-font-pitch:variable; mso-font-signature:-536869121 1107305727 33554432 0 415 0;} /\* Style Definitions \*/ p.MsoNormal, li.MsoNormal, div.MsoNormal {mso-style-unhide:no; mso-style-qformat:yes; mso-style-parent:""; margin:0in; margin-bottom:.0001pt; mso-pagination:widow-orphan; font-size:12.0pt; font-family:"Times New Roman",serif; mso-fareast-font-family:"Times New Roman"; mso-fareast-theme-font:minor-fareast;} p {mso-style-noshow:yes; mso-style-priority:99; mso-margin-top-alt:auto; margin-right:0in; mso-margin-bottom-alt:auto; margin-left:0in; mso-pagination:widow-orphan; font-size:12.0pt; font-family:"Times New Roman",serif; mso-fareast-font-family:"Times New Roman"; mso-fareast-theme-font:minor-fareast;} p.msonormal0, li.msonormal0, div.msonormal0 {mso-style-name:msonormal; mso-style-unhide:no; mso-margin-top-alt:auto; margin-right:0in; mso-margin-bottom-alt:auto; margin-left:0in; mso-pagination:widow-orphan; font-size:12.0pt; font-family:"Times New Roman",serif; mso-fareast-font-family:"Times New Roman"; mso-fareast-theme-font:minor-fareast;} .MsoChpDefault {mso-style-type:export-only; mso-default-props:yes; font-size:10.0pt; mso-ansi-font-size:10.0pt; mso-bidi-font-size:10.0pt;} @page WordSection1 {size:8.5in 11.0in; margin:1.0in 1.0in 1.0in 1.0in; mso-header-margin:.5in; mso-footer-margin:.5in; mso-paper-source:0;} div.WordSection1 {page:WordSection1;} -->

## **Secession on Trial During The Prosecution of Jefferson Davis**

F. BLAIR WIMBUSH: Thank you all for joining us for our faculty luncheon that we host in connection with each of these meetings. We are honored today to have an interesting conversation with Cynthia Nicoletti, who's going to talk to us about a timely historical topic-- the book, *Secession on Trial*, the treason prosecution of Jefferson Davis. And Cynthia is an interesting person. I got to sit next to her and chat with her for a minute. She has the rare distinction of being a triple 'hoo. But it was interrupted by a trip to Harvard Law School. And somewhere along the way, Cynthia may have suggested that-- without offending anybody who else may have gone to Harvard-- that she made a mistake and should have been a quadruple 'hoo, which we'll all appreciate, of course.

Like our esteemed dean, I struggled to get two degrees. She has four, and I just find that to be an incredible academic achievement. In addition, Cynthia's won a couple of recent book prizes. And without further ado and without taking further time from her conversation, Cynthia.

[APPLAUSE]

CYNTHIA NICOLETTI: Thank you, and thank you for that lovely introduction, Blair.

So my topic today is about the legality of secession in the United States, which is the legal theory that precipitated the American Civil War. Secessionists argued that the Constitution contained a legal right for the states to depart from the federal union at will, and 11 states did that in the winter of 1860 to '61 because of President Lincoln's election.

So President Abraham Lincoln was elected on a platform that pledged to end slavery in the federal territories, and white Southerners saw this as a threat to the institution of slavery. They were worried that this would put slavery on the path to ultimate extinction. And so these 11 southern states left the Union in advance of Lincoln's inauguration.

Lincoln insisted that there was no such right to secede in the Constitution. If a right to break up the nation existed, it had to come from a source outside of the union's founding legal document, the Constitution. And Lincoln insisted that secession was a threat to democratic self-government. He said, you can't just take your ball and go home-- there I'm paraphrasing-- if you lose the presidential election and leave the Union at will.

I'm not going to talk today about the constitutional theory behind secession because of limited time, but if people are interested, I can talk about it more in the Q&A. What I'm interested in talking about is how people think about this question of secession's legitimacy in the aftermath of the Civil War.

So in 1860 and '61, when the southern states leave the Union, it's one thing to think about the legal arguments for and against secession. It's quite another to think about how these get treated in the aftermath of the war, where, in 1865, once the Union has won and 700,000 people have perished in the war as a result.

And so what I'm interested in talking about is recreating how the discussion about secession looked in the aftermath of the war. And so I think we tend to tell ourselves two stories about how it is that the question of secession's legitimacy is settled in the United States.

So the first story that we tell ourselves is that secession was rendered unconstitutional, clearly rendered unconstitutional, by the Civil War itself. So victory on the battlefield is what matters. The Civil War settles this question. It's beyond dispute once the Union has won the day at Appomattox.

The second story that we tell ourselves about secession's constitutionality is that it was resolved by the Supreme Court. So there's a Supreme Court decision in 1869, *Texas v. White*, which is a case about the repayment of government bonds. And in that case, the Chief Justice of the United States, Salmon P. Chase, renders a decision where he says that secession is unconstitutional. And he says, famously, that the United States is an indestructible union of indestructible states.

So you may notice the discrepancy between the two stories I've just told you about how it is that the secession question gets settled. So one is a story that is completely outside the normal operation of the legal system in the United States, and the second one is totally within the norms of the legal system in the United States. So it is within the legal system. The Supreme Court is what determines the outcome of the secession question.

But what I want to suggest is that neither of those stories really captures how the discussion looked in the aftermath of the American Civil War. It wasn't immediately apparent, after the Civil War ended in 1865, that Union victory on the battlefield would be seen as definitive, would be taken as the last settlement of the secession question, and it also was not at all certain that the Supreme Court would weigh in on secession or, indeed, that any court would really know what to do about this issue.

So rather than *Texas v. White*, there was a case that was percolating in the United States courts which people thought would be the case that would settle the secession question rather than the *Texas v. White* case, which I mentioned is about government bonds. This case had a little bit of a higher profile. It was, indeed, the case of *US v. Jefferson Davis*.

Jefferson Davis was the former president of the Confederacy, and the United States government contemplates putting him on trial for treason in the aftermath of the Civil War. So Davis escapes from the Confederate capital of Richmond in April 1865. And after Lincoln is assassinated the same month, President Andrew Johnson puts a price on Davis's head, in the Union Army catches up with Davis, who's fleeing in Georgia in May of 1865. Thereafter, the government transports him to Fort Monroe, Virginia, where he was imprisoned for the next two years.

He was finally released on bail in May 1867, and then was under indictment for the following two years, when the government finally drops the case against him. And his case was seen as the first case. So the government thinks, if we can put Davis on trial for treason and secure a conviction against him, there will be other cases to follow. His is supposed to be only the first. There are a number of people who would go on trial after Davis if the government manages to secure a conviction against him.

So initially, the government thinks about, what are they going to try Davis for? I mentioned that they think about trying him for treason, but there are a couple of other possibilities on the table. There are allegations that he's involved with Lincoln's assassination. There also is the possibility of trying him for the terrible conditions at Andersonville Prison. And so there's this question of whether they're going to try Davis for violations of the law of war or whether they're going to try Davis for the crime of treason.

And here, the government takes a fork in the road. They think initially about trying him for violations of the law of war, but the evidence is thin that Davis participated in the Lincoln assassination or was directing what happened at Andersonville Prison. And so some of the witnesses unravel, and so what the government is left with is the decision to try Davis for treason against the United States.

And I should mention that it seems really easy, at first glance, to try Jefferson Davis for treason against the United States. Making out a *prima facie* case against him for treason seems like probably the easiest thing in the world in May of 1865. So the US Constitution defines the crime of treason. Treason is defined as levying war against the United

States. Prior precedent had suggested that there had to be an overt act of violence in order to prove that somebody levied war against the United States.

But this is really pretty much a no-brainer when we're thinking about Jefferson Davis. His entire job was to levy war against the United States. That's pretty much the job description. Where things get tricky is when it came to Davis's defense. So it was widely anticipated that Davis would raise secession as his affirmative defense to the crime of treason.

So treason is a crime of loyalty, and it can only be committed by US citizens. So it was anticipated that he would argue that his home state of Mississippi seceded in January of 1861, and when Mississippi seceded from the Union, it broke the bonds of union and therefore destroyed Davis's United States citizenship. So if he's no longer a US citizen, he can't commit treason against the United States.

And Davis's prosecutors start thinking about this question, and they start worrying about what might happen if this defense on the grounds of secession is successful. And they're thinking about a couple of different possibilities. One is an adverse jury verdict, and then secondly, and maybe more surprisingly, is they worry about a ruling by the judges on this question, where maybe the judges might instruct the jury that secession was legal and therefore constituted a defense to treason.

And at the same time, the government is caught in a bind. So they certainly want to-- it seems like a good thing to pursue this case. There's a sense that if the government can't secure a conviction against Jefferson Davis, that might suggest a couple of unpleasant possibilities. One is that, is the United States a real nation if we can't get treason convictions against the leaders of the Confederate government? What does that suggest about national integrity?

And secondly, I think that Americans are also worried about this possibility of leaving the decision of the battlefield to be the only definitive statement on secession's legality. They think, we want to get a conviction in the court of law that suggests the same thing that the battlefield suggested in 1865.

So there's real pressure on the government to try to get a conviction against Davis, but on the other hand, they're also quite worried about what would happen-- maybe it's even worse if they put Davis on trial for treason and he's exonerated. And so this is something that the government is struggling with. What are they going to do about Davis?

So they consider first what forum they want to try Davis in. They think about possibly trying him in a military tribunal. There the jury would be composed of union generals. They seem almost certain to convict.

But there's this question of a military tribunal versus a civil trial, and maybe they also think about where they might hold a trial. So the Constitution says that you have to be tried in the place where your crime was committed, and indeed, Davis committed his crime with his pen at his desk in the Confederate capital of Richmond. But there are also suggestions that maybe they can try Davis anywhere the Confederate army marched, so maybe in Pennsylvania. There are also raids in other northern states, and so possibly they could try Davis outside of Richmond.

And what really cements the discussion is the decision of the Attorney General, James Speed, who is worried, in the aftermath of the war, of, I would say, cooking the books against Davis. And he wants to get a conviction against Davis, but he also-- his paramount responsibility, as he sees it, is to return the United States to the rule of law. So he thinks of the Civil War as really a great rupture, in which, maybe, people in the United States will be torn away from the rule of law and, maybe, think that we can substitute violence for our reasoned discussions of legal questions.

And so he says, my job is to return the United States to the normal functioning of the legal system. And he says, OK, well, in accordance with that principle, Davis committed a civil crime, treason, so he has to be tried in a civil court, and also, he has to be tried in the place where he committed the crime, Richmond, Virginia. And as you might imagine, it's potentially difficult to get a conviction against Jefferson Davis in a place as deeply Confederate as Richmond was at the time. Federal jurors had to take the ironclad oath and swear that they had always been loyal to the Union, but you never know whether or not somebody could take that oath and still vote to exonerate Davis.

And so the government is struggling with this decision of what they're going to do in putting Davis on trial, and at the same time, Davis's defense attorneys go to work in terms of trying to stoke the government's worries about this case. So

Davis's main defense lawyer was a New Yorker named Charles O'Connor, and he was very savvy about what to do about this case. And he realizes that the government's worries about secession are there, and so what he does is he tries to magnify them.

So he wants to use the secession arguments instrumentally. He hopes to get the government to drop the case. He thinks that that's the best outcome for his client, because he fears for Davis's life if Davis was convicted. And so what he does is he feigns confidence in the idea that secession would be exonerated. So he suggests that-- not just the possibility that a jury might exonerate Davis, but also that the two federal judges who are supposed to preside over Davis's case, Chief Justice Salmon P. Chase And John Underwood, who was the district judge, might find in favor of secession themselves.

And what he does is he suggests that there are all kinds of connections, interesting connections, between secession and some of the Reconstruction politics of Republican politicians, including Chief Justice Chase, and suggests to them that there is a possibility that the judges might find that secession is constitutional. After all, Chief Justice Chase had previously been a longtime politician, and had, in that capacity, mounted lots of states' rights arguments in favor of antislavery principles. And so there's this suggestion that maybe Chase will have to find in favor of secession.

At the same time that Charles O'Connor and Davis's legal team raised these questions about whether or not the judges might find in favor of secession, they're also trying to change public opinion in Davis's favor, and so they get the momentum for Davis to build. And what emerges is a very weird set of allies in favor of Jefferson Davis.

And a notable one being Horace Greeley, who is the antislavery editor of the New York Tribune. And Greeley uses the New York Tribune to suggest that maybe we shouldn't try somebody like Jefferson Davis for treason. What should happen in the aftermath of the war is forgiveness. And he suggests that Davis really wasn't any different from George Washington. It just happens to be that the Confederacy lost the war.

And so Jefferson Davis's lawyers are very good at getting the government to delay the timetable of the trial, and then, at the same time, getting public opinion to build in Davis's favor so that it will become politically infeasible for the government to eventually try Jefferson Davis.

So they managed to draw out the timetable, and then, eventually, Chief Justice Salmon P. Chase tries to put an end to this. So I mentioned to you that Chase is presiding over the Davis trial in 1868. He is also running for president on the Democratic ticket. He'd previously run twice as a Republican. And he figures out that it looks bad for him if Davis is convicted. He wants to get southern support. It also looks bad for him if Davis is exonerated. And he says the best way to get out of this is to figure out a way out.

And so he tells Davis's legal team that the newly ratified 14th Amendment has an argument that they should pick up on. So section 3 of the 14th Amendment said that Confederates who had served before the war in high office were precluded from serving again in Congress. And Chase suggests to Davis's lawyers, well, that seems like you could make an argument that that's the only punishment for treason. You can't punish somebody also with a criminal conviction. And Davis's lawyers pick up on this argument, make that argument, and then Chase accepts it, unsurprisingly.

So what happens then is that Chase accepts it, the district judge John Underwood rejects this argument, and so it's set to go on appeal to the US Supreme Court. At that point, the US government decides, maybe we should drop the case, which they do in early 1869. So Chief Justice Chase supplied this argument, but he wasn't content to let the results of the war stand as the only definitive statement on secession, which brings me back to Texas v. White, which I mentioned at the outset of the talk.

So he is the author of the Texas v. White opinion, in which the Supreme Court disposes of the secession arguments in about one paragraph, which went basically unnoticed at the time. And Chase declares the union to be an indestructible union of indestructible states sets forth some basic reasoning about why secession is unconstitutional. And Chase puts this in the opinion, and, I think, hopes that, as time passes-- he puts this into the US reports, and by putting it into the US reports, as time passes, this would make it look as though the question of secession's constitutionality had been resolved by reason, and not just the trial by battle that Union victory represented.

And he was largely successful, I think, at doing that. Only pesky historians who come long after the fact who pick at the

scab unearth what happened and seek to understand what is underneath that paragraph.

[APPLAUSE]