AMERICAN CHRONICLES

WHAT HAPPENED WHEN THE U.S. FAILED TO PROSECUTE AN INSURRECTIONIST EX-PRESIDENT

After the Civil War, Jefferson Davis, the President of the Confederacy, was to be tried for treason. Does the debacle hold lessons for the trials awaiting Donald Trump?

By Jill Lepore

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The American Presidency is draped in a cloak of impunity. If Davis had been tried and convicted, things might have been different. Illustration by Barry Blitt

Jefferson Davis, the half-blind ex-President of the Confederate States of America, leaned on a cane as he hobbled into a federal courthouse in Richmond, Virginia. Only days before, a Chicago *Tribune* reporter, who'd met Davis on the boat ride to Richmond, had written that "his step is light and elastic." But in court, facing trial for treason, Davis, fifty-eight, gave every appearance of being bent and broken. A reporter from Kentucky described him as "a gaunt and feeble-looking man," wearing a soft black hat and a sober black suit, as if he were a corpse. He'd spent two years in a military prison. He wanted to be released. A good many Americans wanted him dead. "We'll hang Jeff Davis from a sour-apple tree," they sang to the tune of "John Brown's Body."

Davis knew the courthouse well. Richmond had been the capital of the Confederacy and the courthouse its headquarters. The rebel President and his cabinet had used the courtroom as a war room, covering its walls with maps. He'd used the judge's chambers as his Presidential office. He'd last left that room on the night of April 2, 1865, while Richmond fell.

Two years later, when Davis doddered into that courtroom, many of the faces he saw were Black. Among the two hundred spectators, a quarter were Black freedmen. And then the grand jury filed in. Six of its eighteen members were Black, the first Black men to serve on a federal grand jury. Fields Cook, born a slave, was a Baptist minister. John Oliver, born free, had spent much of his life in Boston. George Lewis Seaton's mother, Lucinda, had been enslaved at Mount Vernon. Cornelius Liggan Harris, a Black shoemaker, later recalled how, when he took his seat with the grand jury and eyed the defendant, "he looked on me and smiled."

Not many minutes later, Davis walked out a free man, released on bail. And not too many months after that the federal government's case against him fell apart. There's no real consensus about why. The explanation that Davis's lawyer Charles O'Conor liked best had to do with Section 3 of the Fourteenth Amendment, known as the disqualification clause, which bars from federal office anyone who has ever taken an oath to uphold the Constitution of the United States and later "engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof." O'Conor argued that Section 3's ban on holding office was a form of punishment and that to try Davis for treason would therefore amount to double jeopardy. It's a different kind of jeopardy lately. In the aftermath of the insurrection at the Capitol on January 6, 2021, legal scholars, including leading conservatives, have argued that the clause disqualifies Donald Trump from running for President. Challenges calling for Trump's name to be blocked from ballots have been filed in twenty-eight states. Eleven cases have been dismissed by courts or voluntarily withdrawn. The Supreme Court might have the final say.

The American Presidency is draped in a red-white-and-blue cloak of impunity. Trump is the first President to have been impeached twice and the first ex-President to have been criminally indicted. If he's convicted and sentenced and —unlikeliest of all—goes to prison, he will be the first in those dishonors, too. He faces four criminal trials, for a total of ninety-one felony charges. Thirty-four of those charges concern the alleged Stormy Daniels coverup, forty address Trump's handling of classified documents containing national-defense information, and the remainder, divided between a federal case in Washington, D.C., and a state case in Georgia, relate to his efforts to overturn the 2020 Presidential election, including by inciting an armed insurrection to halt the certification of the Electoral College vote by a joint session of Congress. His very infamy is unprecedented.

The insurrection at the Capitol cost seven lives. The Civil War cost seven

hundred thousand. And yet Jefferson Davis was never held responsible for any of those deaths. His failed conviction leaves no trail. Still, it had consequences. If Davis had been tried and convicted, the cloak of Presidential impunity would be flimsier. Leniency for Davis also bolstered the cause of white supremacy. First elected to the Senate, from Mississippi, in 1848, Davis believed in slavery, states' rights, and secession, three ideas in one. Every state had a right to secede, Davis insisted in his farewell address to the Senate, in 1861, and Mississippi had every reason to because "the theory that all men are created free and equal" had been "made the basis of an attack upon her social institutions," meaning slavery. Weeks later, Davis became the President of the Confederacy. His Vice-President, Alexander Stephens, said that the cornerstone of the new government "rests, upon the great truth that the negro is not equal to the white man." Trump could win his Lost Cause, too.

Davis fled Richmond seven days before Robert E. Lee surrendered to Ulysses S. Grant at Appomattox. "I'm bound to oppose the escape of Jeff. Davis," Abraham Lincoln reportedly told General William Tecumseh Sherman, "but if you could manage to have him slip out unbeknownst-like, I guess it wouldn't hurt me much." After Lincoln was shot and killed, on April 15th, his successor, Andrew Johnson, issued a proclamation charging that Lincoln's assassination had been "incited, concerted, and procured by" Davis and offering a reward of a hundred thousand dollars for his arrest.

Union troops captured Davis in Georgia on May 10th as he attempted to sneak out of a tent while wearing his wife's shawl. He was conveyed to a military prison in Virginia. Captain Henry Wirz, who had served as the commandant of an infamous Confederate prison in Andersonville, Georgia, where thirteen thousand Union soldiers died of starvation and exposure, was captured three days before Davis. Tried before a military commission, Wirz was found guilty and hanged.

From the start, the prosecution of the former rebel President was more complicated. “I never cease to regret that Jeff. Davis was not shot at the time of his capture,” the dauntless Massachusetts senator Charles Sumner said. Sumner wanted Davis tried, like Wirz, before a military commission. “I am anxiously looking forward to Jefferson Davis’s Trial,” the Columbia law professor Francis Lieber wrote to Sumner at the close of Wirz’s trial. But “suppose he is not found guilty; is he not, in that case, completely restored to his citizenship, and will he not sit by your side again in the Senate? And be the Democratic candidate for the next presidency? I do not joke.”

Lieber, who grew up in Prussia, had taught at South Carolina College for twenty years before moving to Columbia, in 1857. “Behold in me the symbol of civil war,” he once wrote. A son of his who fought for the Confederacy had been killed; another, who fought for the Union, had lost an arm. During the war, Lieber had prepared a set of rules of war that Lincoln issued as General Orders 100, better known as the Lieber Code. (It later formed the framework of the Geneva Convention.) Edwin Stanton, the Secretary of War, appointed Lieber to head the newly created Archive Office, charged with collecting Confederate records. Lieber fully expected to find evidence showing a “perfect connexion” between Davis and Lincoln’s assassination. That evidence was not forthcoming. Johnson vacillated, but by the end of 1865 he decided that he wanted Davis tried not for war crimes but for treason.

The Constitution defines treason as levying war against the United States or giving aid and comfort to its enemies. If Davis couldn't be convicted of treason, the Philadelphia *Inquirer* remarked, "we may as well . . . expunge at once the word from our dictionaries." Although Congress had modified the definition of treason in 1862, there remained ambiguity about what distinguished it from rebellion or insurrection. Lieber hoped that the prosecution would "stamp treason as treason," but he was worried. "The whole Rebellion is beyond the Constitution," he maintained. "The Constitution was not made for such a state of things." In 1864, he quietly circulated to Congress a list of proposed constitutional amendments, including one that would end slavery, or what became the Thirteenth Amendment. ("Let us have no 'slavery is dead,' " he wrote to Sumner. "It is not dead. Nothing is dead until it is killed.") He also proposed an amendment guaranteeing equal rights regardless of race, or what became the Fourteenth Amendment. And he proposed an amendment clarifying the relationship between treason and rebellion: "It shall be a high crime directly to incite to armed resistance to the authority of the United States, or to establish or to join Societies or Combinations, secret or public, the object of which is to offer armed resistance to the authority of the United States, or to prepare for the same by collecting arms, organizing men, or otherwise." Lieber's Insurrection Amendment was never ratified. If it had been, Americans would live in a very different country.

Can Donald Trump get a fair trial? Is trying Trump the best thing for the nation? Is the possibility of acquittal worth the risk? Every trial on charges related to the insurrection gives him a stage for making the case that he won the 2020 election, any acquittal will be taken as a vindication, and his supporters will question the legitimacy of any conviction. But failure to try him is an affront not only to democracy but to decency.

In 1865, plenty of Americans wanted Davis tried without delay. A rope-maker

from Illinois wrote to Johnson, volunteering to make the rope to hang him. But U.S. Attorney General James Speed, belying his name, wanted to slow things down. Americans were still mourning Lincoln and all that they had lost in the war. Speed, cautious by nature, wanted temperatures to cool. Many feared that bringing Davis to trial risked handing a rather stunning victory to the defeated Confederacy, as the legal historian Cynthia Nicoletti argued in a brilliant and exhaustively researched 2017 book, "Secession on Trial: The Treason Prosecution of Jefferson Davis." To a charge of treason, Davis was expected to respond that he had forfeited his American citizenship when Mississippi seceded from the United States, and you cannot commit treason against another country. According to Nicoletti, the worry that an acquittal would have established the constitutionality of secession meant that interest in prosecuting Davis simply evaporated. There are other views. In a 2019 book, "Treason on Trial: The United States v. Jefferson Davis," Robert Icenhauer-Ramirez, a former criminal-defense attorney, wrote that the prosecution unravelled because the men involved in it had towering political ambitions and were unwilling to risk losing so prominent a case. Neither explanation covers all the facts.

One hurdle had to do with the venue. Johnson's advisers disagreed about whether a military commission could, in peacetime, conduct a trial for treason. For the sake of both fairness and political legitimacy, it seemed safest to conduct the trial in a civilian court. That would require holding the trial where Davis had allegedly committed the crime, which meant Richmond. But what jury in the former capital of the Confederacy would possibly convict Davis of treason?

Lieber proposed a constitutional amendment to deal with this problem, too. One draft read, "Trials for Treason or Sedition shall be in the State or district in which they shall have been committed unless the administration of justice in the respective State or district shall have been impeded by the state of things caused by the commission of the criminal acts which are to be tried." In other

words, you shouldn't have to try someone for treason in a state where you can't possibly convict him of treason. That proposal went nowhere. A doctrine called "constructive presence," which informed the 1807 prosecution of Aaron Burr, might have argued for holding the trial in a Northern state—the governor of Indiana, for instance, volunteered to try Davis in his state, where the Confederate Army had marauded. But Speed, exercising the greatest possible caution, resolved that the case would be tried in Richmond, partly because Salmon P. Chase, the Chief Justice of the United States, was on the U.S. circuit court in Richmond. (At the time, Supreme Court Justices rode circuit.) Chase, who had previously served Ohio as a U.S. senator and as its governor, was best known for his abolitionism (people called him "the attorney general for fugitive slaves") and for his ambition (he was, it was said, as "ambitious as Julius Caesar"). In 1864, even while he was Lincoln's Secretary of the Treasury, he had sought the Republican nomination for President, after which Lincoln accepted his resignation and nominated him to the Supreme Court. Speed hoped that Chase's presence on the bench at the Davis trial, alongside a district-court judge, would provide the proper degree of authority and solemnity. This didn't solve the jury problem.

Then there was the question of the lawyers. Speed assigned the case to the federal district attorney for the Eastern District of Virginia, Lucius H. Chandler, who had virtually no trial experience. Having moved to Virginia from Maine, and never having supported the Confederacy, Chandler was one of only two lawyers in Virginia who had not been disqualified from practicing in federal court in Richmond owing to disloyalty. Speed brought in the New York lawyer William Evarts to direct the prosecution. Evarts, nearly as ambitious as Chase, was happy to participate in what he called "the greatest criminal trial of the age." But he left the legwork to Chandler.

Davis, still in military prison, arranged for his wife, Varina, to retain Charles O'Conor, the celebrated New York trial lawyer and pro-slavery Confederate

sympathizer. “I have not left a stone unturned under which there crept a living thing,” O’Conor liked to say. He was among the most famous lawyers in the country; he was also despised by Black Americans. An editorial in a Black newspaper based in San Francisco declared that he was “as great a traitor as Jeff Davis.” O’Conor’s strategy for his new client was to delay a trial for as long as possible, while the national mood cooled. Luckily for O’Conor, slow-rolling is what Speed wanted, too.

Lieber was not wrong to worry that Davis could run for President. In January, 1866, Alexander Stephens, the former Vice-President of the Confederacy, was elected to the Senate. Two former Confederate senators and four former Confederate congressmen had also been sent to the Thirty-ninth Congress, which had convened the previous month for its second session. The clerk refused to call their names at roll, and they were never sworn in. But their presence made clear the need for measures keeping “from positions of public trust of, at least, a portion of those whose crimes have proved them to be enemies to the Union, and unworthy of public confidence,” as a congressional committee wrote.

A fifteen-man Joint Committee on Reconstruction began considering proposals to disqualify former Confederates from federal office and, at the same time, to guarantee the equal citizenship of freedmen. In January, 1866, the committee held hearings to inquire into the delay in prosecuting Davis, and called the Virginia judge in charge of the case, John C. Underwood. A New York-born abolitionist and Radical Republican appointed to the U.S. District Court by Lincoln in 1864, Underwood had issued a series of rulings protecting equal rights, declaring, in one case, that “all distinction of color must be abolished.” He’d also suggested that he intended to sell Davis’s Mississippi plantation to ex-slaves for a half-dollar an acre. White Virginians despised him; the feeling appears to have been mutual. The committee asked Underwood whether any jury in Virginia was likely to convict Davis of treason. “Not unless it is what is

called a packed jury," Underwood answered. The committee then summoned Robert E. Lee, who offered a similar assessment:

Question. Suppose the jury should be clearly and plainly instructed by the court that such an act of war upon the United States, on the part of Mr. Davis, or any other leading man, constituted in itself the crime of treason under the Constitution of the United States; would the jury be likely to heed that instruction, and if the facts were plainly in proof before them, convict the offender?

Answer. I do not know, sir, what they would do on that question.

Question. They do not generally suppose that it was treason against the United States, do they?

Answer. I do not think that they so consider it.

What about a Black jury? Black men were banned from jury service, with dreadful consequences. In 1865 and 1866, in five hundred trials of whites accused of killing Blacks in Texas, all-white juries found all five hundred defendants not guilty. "Are our lives, honor, and liberties to be left in the hands of men who are laboring under the most stubborn and narrow prejudice?" the editor of one Black newspaper asked. In March, Congress passed the Civil Rights Act, which enshrined the right to testify in criminal trials. Johnson, in a statement that the attorney Henry Stanbery helped craft, vetoed the bill, warning that it might lead to Congress declaring "who, without regard to color or race, shall have the right to sit as a juror." Congress overrode the veto, and kept on with the work of extending rights to Black men and denying them to former Confederates. In April, the Radical Republican Thaddeus Stevens added to the proposed Fourteenth Amendment a new section that would disqualify from Congress any former federal officeholders or servicemen who had taken "part in the late insurrection." There followed much discussion of who, exactly, was to be disqualified, with one version of the amendment stating, "The President and Vice-President of the late Confederate States of America

so-called . . . are declared to be forever ineligible to any office under the United States." This, however, was not the version that Congress sent to the states for ratification, in June, which, in any case, the states of the former Confederacy refused to ratify. Congress, one North Carolinian said, wanted Southerners to "drink our own piss and eat our own dung."

Lieber grew resigned to a foul outcome. "The trial of Jeff. Davis will be a terrible thing," he thought. "Volumes—a library—of the most infernal treason will be brought to light," but "Davis will not be found guilty, and we shall stand there completely beaten." Frederick Douglass blamed Johnson, predicting, as a newspaper reported, that "Davis would never be punished, simply because Mr. Johnson had determined to have him tried in the one way that he could not be tried, and had determined not to have him tried in the only way he could be tried." And, even if he were tried, any verdict would be appealed to the Supreme Court, which, in the aftermath of the Dred Scott decision, could hardly be said to have enjoyed unqualified confidence. *Harper's Weekly* asked, "Does anybody mean seriously to assert that the right of this Government to exist is a question for a court to decide?" Will Americans trust the Supreme Court to decide a question of such moment in 2024?

Donald Trump has made much of the fact that three of the prosecutors who are heading prosecutions against him are Black: Fani Willis, the district attorney of Fulton County, Georgia; Letitia James, the attorney general of New York; and Alvin Bragg, the district attorney of Manhattan. Trump has labelled the three prosecutors "racist," calls Bragg an "animal" and James "Peekaboo," and insists that the charges against him are both politically and racially motivated. Sometimes it feels as if the century and a half separating the trial of Jefferson Davis from the trials of Donald Trump were as nothing.

In March, 1867, again overriding Johnson's veto, Congress passed the Military

Reconstruction Act, which called for the occupation of the former Confederacy by the U.S. Army and stipulated that no state could reënter the Union without first ratifying the Fourteenth Amendment. Congress also endorsed jury service for Black men. In Texas, when the military governor announced that Black men would be allowed on juries, some judges refused to hold court. In Virginia, Underwood impanelled Black jurors for Davis's trial. Many Northerners approved. "The trial of Jefferson Davis, for leading the Rebellion in behalf of Slavery, should be before a jury made up in part of freedmen, if only for the historic justice, not to say the dramatic beauty and harmony, of such a denouement," the New York *Tribune* wrote. But Southern newspapers expressed disgust at the "African quota of the Grand Jury," describing the men, swearing an oath on the Bible, as having "smacked their lips over the sacred volume when permitted to get at it." And an editorial that ran in both the North and the South asked, "If Davis is to stand before a nigger jury, what becomes of the notion that a man is to be tried by a jury of his peers?"

When a new trial date came—June 5, 1866—Davis wasn't there; he was in military prison. Lucius Chandler stayed home sick. Chief Justice Chase spent the day in his library in Washington, where he wrote a letter to his daughter. Outside his window, he could hear a newsboy crying, " 'Dai-l-y Chron-i-cle!, full account of ' something I don't understand what and 'trial of Jeff Davis!' " O'Conor, knowing that Chase wouldn't be there, didn't bother to show up, either. Chase maintained that he could not possibly attend a civilian court in Virginia, because the state was still under military rule. Chase planned to run for President in 1868, and he wanted no part in the trial of Jefferson Davis. He had his eye on the election.

Underwood rescheduled the trial for October. But the Chief Justice had no intention of showing up in October, either. Meanwhile, any momentum there ever was to prosecute Davis withered as congressional Republicans pursued Reconstruction, a plan that involved treating the former Confederacy as a

conquered nation. If a trial were held and Davis argued that he could not have committed treason because, after Mississippi seceded, he was no longer a U.S. citizen, the government would have to argue that he had always been a U.S. citizen. But if he had been a U.S. citizen during the war, then the Confederacy had not been a foreign belligerent, and the U.S. could not justify its occupation of the region as a "conquered province." Under these circumstances, Radical Republicans became some of Davis's most ardent defenders. Gerrit Smith, a fiery abolitionist, helped post bail, and that fiercest of congressional radicals, Thaddeus Stevens, secretly offered to represent Davis.

Over the summer, Speed resigned: he supported the Fourteenth Amendment; Johnson opposed it. In Speed's place, Johnson appointed Stanbery, who'd written the President's veto of the Civil Rights Act. When Chandler travelled to Washington to confer with Evarts and Stanbery, the new Attorney General explained that he not only wouldn't lead the prosecution but also wouldn't attend the trial. The three men decided not to object to O'Conor's request that Davis be released on bail. And so it was that on May 13, 1867, Jefferson Davis walked into the federal courthouse in Richmond, eyed the grand jury, and smiled. (Grand jurors operate in secrecy and would not normally appear at such a hearing, but Underwood had seemingly insisted on the presence of the mixed-race jury, to serve, as he said, as "ocular evidence that the age of caste and class cruelty is departed, and a new era of justice and equality, breaking

through the clouds of persecution and prejudice, is now dawning.") When the prosecution said that it was not prepared for trial, Underwood agreed to release Davis on bail. "The business is finished," O'Conor wrote to his wife. "Mr. Davis will never be called up to appear for trial."

A new trial date was set, for November 25th. No one expected the prosecution to be ready. Two years after Davis's arrest, Chandler had still not conducted any investigation, or prepared a superseding indictment. Underwood told Speed that he believed Chandler was a Confederate sympathizer who was making money by selling pardons. But it may well be that the prospect of Black men on the jury led the government to abandon the prosecution, fearful that Black men issuing a verdict that condemned a white man to death would inflame the country beyond any possibility of repair. O'Conor at one point assured Varina Davis, "Chandler professes the kindest disposition and says he will try to get a White jury. But this is impossible. Underwood is a devoted courtier at the feet of Sambo and there is no appeal from his decisions." The trial jury, O'Conor warned, "will be composed of 8 or 9 negroes and 3 or 4 of the meanest whites who can be found in Richmond." He wrote to Varina, "I find it impossible to believe that we are destined to play parts in a farce so contemptible as a trial before Underwood and a set of recently emancipated Negroes, but it is equally impossible to assert with confidence that the thing will not happen."

The thing did not happen. On the day the trial was to begin, a crowd assembled in Richmond to wait for the train from Washington. "The colored population seemed to take a deep interest in the proceedings, and were on hand en masse," a correspondent for the New York *Times* reported. The train pulled up. "Has Mr. Chase come?" people cried. He had not. At the courthouse, Underwood announced that the court was adjourned. It's one of the sorriest moments of the whole sorry story. A newspaper reported that there had been a crowd outside the courthouse, "consisting chiefly of blacks," but upon hearing the announcement the crowd "quietly dispersed." No justice, only peace. And

peace is not enough.

Then as now, what one half of the country thought best for the country the other half thought worst. In February, 1868, the House impeached Johnson, having investigated him for, among other things, intentionally derailing the Davis prosecution. Lieber favored impeachment, not least for the precedent that it would establish. "As to history, it will be a wonderful thing to have the ruler over a large country removed for the first time without revolution," he wrote. The same hesitancy that derailed the Davis prosecution derailed the Johnson impeachment: so grave a thing, to try a king. In any event, the Johnson impeachment trial grossly interfered with the Davis treason trial. At the Senate impeachment trial, Chase presided, as Chief Justice, and Evarts led Johnson's defense, joined by Stanbery (who had resigned his position as Attorney General), which led to yet more postponements.

There was one last gasp. With Chandler's term as district attorney expiring in June, Evarts recruited the Boston lawyer Richard Henry Dana to join the prosecution. Dana worked hard to prepare for trial. In a Richmond hotel, he and Evarts readied a new, fourteen-count indictment, based on the testimony of multiple witnesses, including Robert E. Lee, who had testified against Davis before a new grand jury. (Evarts wrote a parody of Chandler's earlier, cursory indictment: "I have arrived at the fact that J.D. used to wear a Confederate uniform on great occasions, and have a witness who can prove it, in the person of a colored waiter who came to me last evening.") But Dana reluctantly concluded that the trial should not proceed. What seemed more urgent was to disqualify Davis from ever again holding public office; sending him back to prison, or, God knows, hanging him, could have been almost as bad for the country as acquitting him. Dana drafted a letter of resignation on both lawyers' behalf, and sent it to Evarts, who pocketed it, unsure what to do.

By the time Chase and Underwood finally held court together in Richmond, in December, 1868, the Fourteenth Amendment had been ratified, and Chase had discreetly suggested to the defense a new line of reasoning: that Davis could no longer be prosecuted for treason because, having been disqualified for office upon the amendment's ratification ("It needs no legislation on the part of Congress to give it effect," the defense said), he had already been punished. O'Conor gleefully offered up this argument, suggested to him by the Chief Justice himself. Dana, who knew the argument to be nonsense, countered that the Constitution is not a criminal code and that being disqualified from office is not a penalty. Chase agreed with O'Conor; Underwood agreed with Dana. The case would have gone to the Supreme Court. But, on Christmas Day, Johnson pardoned "every person who directly or indirectly participated in the late insurrection or rebellion," and, not long after that, the prosecution entered a nolle prosequi. The end.

It has been nearly three years since the Capitol attack. In November, a district-court judge in Colorado found that Trump did indeed engage in insurrection against the United States, but the judge refused to order the removal of Trump's name from the state's primary ballot. Will the Supreme Court find that the Fourteenth Amendment disqualifies Trump? Will any jury in New York, Florida, Georgia, or Washington, D.C., convict him of a crime? He could be acquitted. Or he could be convicted, win the Presidency, and pardon himself. Whatever the outcome, it will be contested by half the country, and there will be a cost, which won't be borne equally.

Amnesty is a kind of charity. It is not usually given with malice toward none. "More than six years having elapsed since the last hostile gun was fired between the armies then arrayed against each other," Ulysses S. Grant told Congress in 1871, "it may well be considered whether it is not now time that the disabilities imposed by the Fourteenth Amendment should be removed." Over the

objections of the first Black members of Congress, Congress voted for a general amnesty. In the Senate, Charles Sumner tried to attach civil-rights provisions to the bill, on the ground that both measures involved the removal of disabilities and the guarantee of rights. "Now that it is proposed that we should be generous to those who were engaged in the rebellion," Sumner said, "I insist upon justice to the colored race everywhere throughout this land." Or, as the Black congressman Joseph Rainey said of ex-Confederates, "We are willing to accord them their enfranchisement, and here today give our votes that they may be amnestied," but "there is another class of citizens in this country who have certain dear rights and immunities which they would like you, sirs, to remember and respect." The amnesty bill passed, without civil-rights guarantees. A civil-rights bill did pass in 1875; eight years later, the Supreme Court found it unconstitutional.

Salmon Chase ran for President in 1868 and 1872 and lost. Lieber died in 1872, Chase and Underwood in 1873, Sumner in 1874. In 1876, Lucius Chandler put stones in his pockets and drowned himself. Jefferson Davis died of a cold in 1889, at the age of eighty-one. He was buried in New Orleans; his remains were later moved to Richmond. In 2020, Black Lives Matter protesters pulled down an eight-foot-tall statue of him that had been made by Edward Valentine and erected on Richmond's Monument Avenue in 1907. The fifteen-hundred-pound statue—defaced, toppled, and streaked with paint—is currently on display in a room at Richmond's Valentine museum, whose founding president was the sculptor himself. In 2021, a group calling itself White Lies Matter stole a stone chair dedicated to Davis from a cemetery in Selma, and held it for ransom. *Harper's* reported this fall, "A New Orleans tattoo shop owner was cleared of charges in a ransom plot to turn the Jefferson Davis memorial chair into a toilet."

Aside from that single day in Richmond in May of 1867, Davis never appeared in a courtroom to defend himself against the charge of treason. But, for the

Presidential trial that never happened, twenty-four men had been assembled for a jury pool. Twelve of them were Black. So momentous was the occasion that the twenty-four men sat for a photograph: twelve white men and twelve Black men posed, cheek by jowl, hands on one another's shoulders, the picture of a promise. Joseph Cox was a blacksmith who, like his fellow-juror Lewis Lindsey, served as a delegate to Virginia's 1867 constitutional convention. At the event, where delegates elected Underwood to preside over the proceedings, Lindsey proposed a disqualification clause, which would bar former supporters of the Confederacy from holding office. John B. Miller, born free, worked as a barber; he was later elected to the Virginia House of Delegates. Albert Royal Brooks, born into slavery in 1817, had bought the freedom of his wife, Lucy Goode, their three youngest children, "and the future increase of the females"—his own unborn, nor yet conceived, children and grandchildren—for eight hundred dollars. Lucy Goode Brooks had a cameo made: a silhouette of her husband taken from that photograph of him as a juror called to determine whether Jefferson Davis had committed treason against the United States. She wore it as a brooch for the rest of her life. ♦

An earlier version of this article incorrectly described Letitia James's case against Donald Trump.

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