

Did Robert E. Lee Commit Treason?

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We, the undersigned prisoners of War, belonging to the Army of Northern Virginia, having been this day surrendered by General Robert E. Lee, C.S.A., Commanding said Army, to Lieut. Genl. U.S. Grant, Commanding Armies of the United States, do hereby give our solemn parole of honor that we will not hereafter serve in the armies of the Confederate States, or in any military capacity whatever, against the United States of America, or render aid to the enemies of the latter, until properly exchanged, in such manner as shall be mutually approved by the respective authorities.

Done at Appomattox Court House, VA, this 9th day of April, 1865.¹

THERE ARE SIX SIGNATORIES OF this Appomattox parole, beginning at the top of the list with Robert E. Lee himself, and including his longtime staff officers Walter Taylor, Charles Venable, and Charles Marshall; and it was formally counter-signed by Federal Assistant Provost-Marshal George H. Sharpe with the comment: “The above-named officers will not be disturbed by United States authorities as long as they observe their parole and the

laws in force where they may reside.”²

That promise of non-disturbance was at the core of what Lee wanted at Appomattox Court House. However much he and the rest of the Confederacy might have insisted that their break for independence was the constitutionally-justifiable action of sovereign states, Abraham Lincoln and his administration had never regarded the Confederacy legally as anything except an

¹ “Parole of Honor – Gen. Lee,” in RG 94, File E501R&P 520058, National Archives and Records Administration, Washington, DC.

² Adam Badeau, *Grant in Peace: From Appomattox to Mount McGregor: A Personal Memoir* (Hartford, CT: S.S. Scranton, 1887), 19; Peter G. Tsouras, *Major General George H. Sharpe and the Creation of American Military Intelligence in the Civil War* (Philadelphia: Casemate, 2018), 495-99

insurrection. Nobody needed to tell Robert E. Lee that such an understanding covered him and all of his dwindling band of scarecrow Confederates with the odium of treason. He would be surrendering, not the army of an independent nation, but of an illegal assembly which had raised its hand against the authority of its own flag and government, and for that, no other term was fitting except traitor. Traitors found with weapons in their hands could be shot out-of-hand, for when (said Kentucky senator George Bibb in 1833), they “appear in arms against the military of the Federal government, they are to be treated as enemies and shot down.”³ And for those tried and found guilty, “by the common law, the punishment of high treason was accompanied by all the refinements in cruelty which were oftentimes literally and studiously executed.”⁴

Given Ulysses Grant’s reputation for demanding surrender without the offer of any mitigating conditions, Lee had every reason to worry that a surrender demand from Grant would be the prelude to a bloody purge which would make the Jacobins look spineless. Lee had plainly dreaded the possibility that Grant “would demand unconditional surrender; and sooner than that,” he warned, “I am resolved to die. Indeed we must all determine to die at our posts.”⁵ Great was the relief on all Confederate hands when Grant’s terms turned out to be surprisingly mild: “the officers and men surrendered to be

paroled and disqualified from taking up arms again until properly exchanged, and all arms, ammunition and supplies to be delivered up as captured property.” This was not because Grant was suffering from a burst of irrational generosity. Although Lee could not have known this, Grant’s headlong pursuit of the Army of Northern Virginia from Petersburg had run out to the end of its supply tether, and if Grant could not convince Lee to surrender then, Lee might have easily taken the advice of his nephew, Fitzhugh Lee, and resumed the Confederate flight to Lynchburg and thus forced Grant to break off pursuit. “I was in a position of extreme difficulty,” Grant admitted, “I was marching away from my supplies, while Lee was falling back on his supplies. If Lee had continued his flight another day I should have had to abandon the pursuit, fall back to Danville, build the railroad, and feed my army. So far as supplies were concerned, I was almost at my last gasp when the surrender took place.”⁶

Grant also had to bear in mind Lincoln’s anxiety about the political impact of a prolonged war. Although Lincoln had once referred in passing to Lee (along with John C. Breckenridge, Joseph E. Johnston, and Simon B. Buckner) as “well known to be traitors then as now,” he was, in 1865, more interested in seeing traitors flee into exile than end up in courts where they could, like John Brown, make martyrs of themselves.⁷ Besides, “if Lee had escaped and joined Johnston in North Carolina, or reached the mountains,” Grant admitted, “it would have imposed upon us continued armament and expense” and Lincoln had specifically warned him that “the country would break down financially under the terrible strain

3 “The Collection Bill” (January 30, 1833), in *Register of Debates in Congress* (Washington: Games & Seaton), 9:268. Up until 1814, British law still provided for traitors to be drawn and quartered, after hanging. See “High Treason,” in *Sir William Blackstone, Commentaries on the Laws of England*, ed. Archer Ryland (London: S. Sweet, 1836), 4:92.

4 “Treason Against the United States,” *New York Times* (January 25, 1861).

5 Frank R. Cauble, *The Surrender Proceedings: April 9, 1865, Appomattox Court House* (Lynchburg, VA: 1987), 9-10; James Longstreet, *From Manassas to Appomattox: Memoirs of the Civil War in America* (Philadelphia: J.B. Lippincott, 1896), 627.

6 John Russell Young, *Around the World with General Grant* (New York: American News Co.), 2: 460.

7 Lincoln, “To Erastus Corning and Others” (June 12, 1863), in *Collected Works of Abraham Lincoln*, ed. R.P. Basler (New Brunswick, NJ: Rutgers University Press, 1953), 6:265

on its resources.” They might not have been the ideal terms, but they were, in Grant’s estimate, “the best and only terms.”⁸ There would be no death-march to prisoner-of-war camps, no Roman triumphs, and above all, no treason trials—at least for Lee’s men.

Or that, at least, was how it seemed until the night of April 14th, when Lincoln was assassinated in his box at Ford’s Theatre. Denunciations of Jefferson Davis and Robert E. Lee as traitors, and fit subjects for treason proceedings, then ascended like shell-bursts. “What has General Robert Lee done to deserve mercy or forbearance from the people and the authorities of the North?” the *Boston Daily Advertiser* shrilly demanded. “If any man in the United States—that is, any rebel or traitor—should suffer the severest punishment, Robert E. Lee should be the man.”⁹ Chief among those baying for blood was John Curtiss Underwood, who had been appointed a federal district judge for the Eastern District of Virginia in March, 1863, and who would become Robert E. Lee’s particular *bête noire*. Underwood was New York-born (in 1808) and New York-educated (at Hamilton College). But he had married a Virginian—in fact, Maria Underwood was a first cousin of “Stonewall” Jackson—and set up a law practice in Clarke county, sandwiched between the eastern wall of the Shenandoah Valley and Loudoun county.¹⁰

8 Young, *Around the World with General Grant*, 2: 301, 456, 627.

9 “General Lee,” *Boston Daily Advertiser* (June 15, 1865). Butler to Johnson (April 25, 1865), in *The Papers of Andrew Johnson: 1864-1865*, ed. LeRoy P. Graf (Knoxville: University of Tennessee Press, 1986), 7:636; Charles Bracelen Flood, *Lee: The Last Years* (Boston: Houghton Mifflin, 1981), 58.

10 Edward Bates to John C. Underwood (March 28, 1863), John C. Underwood Papers, 1856-1898 (MMC-2220), Library of Congress; Patricia Hickin, “John C. Underwood and the Antislavery Movement in Virginia, 1847-60,” *Virginia Magazine of History and Biography* 73 (April

His move to Virginia had abated none of his Northern suspicions of slavery; to the contrary, he joined the Liberty Party in 1840, the Free Soil Party in 1848, and sat in the first Republican national convention in 1856 that nominated John C. Fremont, where he declared that slavery “has blighted what was naturally one of the fairest and loveliest portions of our country.”¹¹

None of this made Underwood particularly popular in Virginia, and within a few months, Underwood was “exiled from the State for my opinions in favor of human equality.”¹² With Lincoln’s election, Underwood was briefly mentioned as a possible cabinet appointment, was offered a consular appointment in Peru in 1861 (which he declined), and tried to interest Lincoln in a commission to raise a regiment of Unionist Virginia volunteers. He was rewarded with a patronage appointment in 1862 as Fifth Auditor in the Treasury Department, and finally appointed as the federal District judge for the Eastern District of Virginia, which Congress then reorganized as the Federal District of Virginia in June, 1864.¹³

Underwood’s court briefly met in Alexandria (where Underwood took up residence) until Union control over Norfolk

1965), 159, 161-2, 164; Robert Icenhauer-Ramirez, *Treason on Trial: The United States v. Jefferson Davis* (Baton Rouge: Louisiana State University Press, 2019), 107-114.

11 Underwood to Henry Carey (November 6, 1860), Edward Cary Gardner Collection, Historical Society of Pennsylvania; Underwood to William Henry Seward (March 24, 1856 and February 2, 1858), in John C. Underwood Correspondence, Rare Books & Special Collections, Rush Rees Library, University of Rochester.

12 “Proscription in Virginia. Letter from John C. Underwood,” *New York Times* (January 6, 1857).

13 Underwood’s initial appointment was a recess appointment; he was confirmed by Congress in 1864. In 1863, there were 54 district courts and ten circuit courts, with Virginia included as part of the 4th Circuit. See Erwin C. Surrency, “A History of Federal Courts,” *Missouri Law Review* 28 (Spring 1963), 215-216, and Peter Charles Hoffer, Williamjames Hull Hoffer, N.E.H. Hull, *The Federal Courts: An Essential History* (New York: Oxford University Press, 2016), 159.

allowed the return of the district court there in 1864. From that perch, he looked forward to a day of retribution against his tormentors. “With the extinction of slavery,” Underwood promised, “will come the confiscation, sale, and subdivision of the old rebel plantations into farms, owned and cultivated by soldiers and other loyal men... who have stood by the country in its hour of peril.” But there would also be “a signal display of retributive justice which shall make hell and tyrants howl and tremble.”¹⁴ As he explained to Lincoln’s newly inaugurated successor, Andrew Johnson, in April, 1865:

*We know that we cannot go home in safety while traitors, whose hands are still dripping with the warm blood of our martyred brothers, remain defiant and unpunished. It is folly to give sugar plums to tigers and hyenas. It is more than folly to talk of clemency and mercy to these worse than Catalines, for clemency and mercy to them is cruelty and murder to the innocent and unborn. ...If the guilty leaders of this rebellion shall be properly punished our children’s children will not be compelled to look upon another like it for generations.*¹⁵

Applying this to Robert E. Lee, however, might be more difficult than it seemed, since there was now the matter of the Appomattox paroles to consider. But on April 26, 1865, Johnson’s Attorney General, James Speed, gave the paroles a very different twist than Lee and his soldiers might have at first thought. “We must consider in what capacity General Grant was speaking,” Speed wrote in reply to a query from Secretary of War Edwin Stanton. “It must be presumed that he had

¹⁴ Speech of John C. Underwood at Alexandria, July 4, 1863 (Washington: McGill & Witherow, 1863), 6, 10.

¹⁵ Underwood, in Savage, *The Life and Public Services of Andrew Johnson: Including His State Papers, Speeches and Addresses* (New York: Derby and Miller, 1866), 267.

no authority from the President, except such as the commander-in-chief could give to a military officer.” Presidents, only, grant pardons; hence, Grant’s paroles could not have drawn a blanket of immunity over the rebel surrender. That was all the encouragement John Underwood needed. Virginia was a “lions den of reconstructed traitors.” So, if there was any question “whether the terms of parole agreed upon with Gen. Lee were any protection to those taking the parole, the answer is, that was a mere military arrangement and can have no influence upon civil rights or the status of the persons interested.” As the “highest judicial officer in the Eastern District of Virginia,” and the sole functioning federal District judge operating anywhere in Virginia, bringing the penalties of treason down on the head of Robert E. Lee would belong to Underwood’s jurisdiction, and Underwood was convinced that Lee had committed exactly what the Constitution described as treason in Article 3, section three: *Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.*¹⁶

The principal hitch in any such proceeding, however, would be the co-operation of Andrew Johnson. Underwood had carefully cultivated Johnson, spending mornings “about President Johnson’s rooms from 10 to 11 A.M.” in the weeks after Lincoln’s assassination, and Johnson had assured Underwood that he was “very decidedly...in favor of prosecution.” Meeting

¹⁶ Speed, “Surrender of the Rebel Army of Northern Virginia” (April 22, 1865), in *Official Opinions of the Attorneys General of the United States*, ed. J. Hubley Ashton (Washington: W.H. & O.H. Morrison, 1869), 206; “Judge Underwood and General Lee,” *Norfolk Post* (June 22, 1865); Underwood to William D. Kelley (January 24, 1866), Dreer Collection of American Lawyers, Historical Society of Pennsylvania; William A. Blair, *With Malice Toward Some: Treason and Loyalty in the Civil War Era* (Chapel Hill, NC: University of North Carolina Press, 2014), 236-7.

at the end of April with Johnson and Johnson's advisor Preston King, Underwood was assured that he could treat "the late civil war" as "a rebellion, and that those who were engaged in it were, not only enemies to the United States, but were also guilty of treason" and "ought to be indicted." But just as Underwood was delivering a charge to a specially-constituted grand jury, "summoned from different parts of the Commonwealth," in the Norfolk city hall, Johnson looked for a moment as though he might be inclined to withhold such co-operation. On May 29, 1865, one day before Underwood's grand jury assembled, Johnson issued an amnesty proclamation, backed-up by a lengthy opinion from Attorney-General Speed, granting "to all persons who have, directly or indirectly, participated in the existing rebellion...amnesty and pardon, with restoration of all rights of property, except as to slaves." Underwood postponed the grand jury's proceedings "to afford an opportunity to those arrested to peruse and study its import."¹⁷

Underwood need not have worried. Andrew Johnson was as much an embittered Southern Unionist as Underwood himself, and the May 29th amnesty "excepted from the benefits of this Proclamation...all who shall have been military or naval officers of

said pretended confederate government above the rank of colonel in the army or lieutenant in the navy," and especially "all military and naval officers in the rebel service, who were educated by the government in the Military Academy at West Point or the United States Naval Academy," all of which seemed tailored to fit Robert E. Lee. Johnson actually called on Underwood "to wait upon him at the executive mansion in Washington" for a "consultation" that made clear Johnson's desire for "the prompt initiation of legal proceedings against the leaders of the civil war." Johnson was eager to see a treason trial of Lee go forward.¹⁸

On Friday, June 2nd, Underwood resumed his proceedings with the grand jury in Norfolk, and after the weekend break, the grand jury returned an indictment of Lee, and of thirty-six other high-ranking Confederates who, presumably, were also not intended to be covered by the Johnson amnesty.¹⁹ The indictment was then forwarded to Attorney-General Speed, and Underwood announced his "intention to proceed vigorously" in prosecuting Lee, and "asks for the co-operation of the Attorney-General in making up the cases."²⁰

Lee had some whiff of what was afoot "soon after his return to Richmond," when "a gentleman was requested by the Federal commander in the city to communicate to General Lee the fact that he was about to be indicted in the United

17 Underwood testimony (May 25, 1867), in "Impeachment of the President," *Reports of Committees of the House of Representatives for the First Session of the Fortieth Congress, 1867* (Washington: Government Printing Office, 1868), 578; "Case of Jefferson Davis – Statement of the Case," in Bradley T. Johnson, *Reports of Cases decided by Chief Justice Chase in the Circuit Court of the United States for the Fourth Circuit* (New York: Diossy & Co., 1876), 6; John Reeves, *The Lost Indictment of Robert E. Lee: The Forgotten Case Against an American Icon* (Lanham, MD: Rowman & Littlefield, 2918), 56; Underwood to George C. Wedderburn (April 28, 1865), in *Papers of John C. Underwood, 1865-1870*, Huntington Library, San Marino, CA; "By the President of the United States of America: A Proclamation" (May 29, 1865), in *The Statutes at Large, Treaties, and Proclamations of the United States of America*, ed. G.P. Sanger (Boston: Little, Brown, 1866), 13:758-9; "Opinion of Attorney General Speed," *Washington Daily National Republican* (May 30, 1865).

18 Grant to Henry W. Halleck (May 6, 1865), in O.R., series two, 8:535-6; "Case No. 3621a. Case of Davis," in *The Federal Cases: Comprising Cases Argued and Determined in the Circuit and District Courts of the United States* (St. Paul, MN: West Publishing Co., 1894), 7:64-65.

19 "Names of Those Indicted for Treason at Norfolk," *New York Times* (June 19, 1865); for the text of the indictment, see Reeves, *The Lost Indictment of Robert E. Lee*, 65-66.

20 "Indictment of Gen. Lee and Others," *Alexandria Gazette* (June 19, 1865).

States courts for treason.”²¹ But Lee may also have had suspicions from the first that Grant’s generosity would be challenged, since he had determined to keep as low a political profile as he could and “procure some humble home for my family until I can devise some means of providing it with subsistence.” With that in view, Lee rode off to the Pamunkey river estate of his cousin, Col. Thomas Carter, looking for real estate possibilities.²²

“In my opinion the officers and men paroled at Appomattox C.H...cannot be tried for treason so long as they observe the terms of their parole.” For Grant, this was as much a personal as a legal issue. “Good faith as well as true policy dictates that we should observe the conditions of that convention.” But neither Stanton nor Johnson were moved, and so Grant confronted Johnson directly in a Cabinet meeting. “Mr. Johnson spoke of Lee and wanted to know why any

Lee had every reason to worry that a surrender demand from Grant would be the prelude to a bloody purge which would make the Jacobins look spineless.

News of the indictment reached the fifty-eight-year-old Lee when he returned to his family’s borrowed quarters in Richmond. He squared-off at once to fight back, and appealed to Grant “through Mr. Reverdy Johnson.” On June 13th, he wrote to Grant, demanding to know on what grounds he could “be indicted for treason by the grand jury at Norfolk,” since “the officers and men of the Army of Northern Virginia were, by the terms of their surrender, protected by the United States government from molestation so long as they conformed to its condition.”²³

Grant, who had just returned from a tumultuous appearance at a “mass meeting” at Cooper Institute, immediately forwarded Lee’s letter to Secretary of War Stanton with his own endorsement, confirming that

military commander had a right to protect an arch-traitor from the laws.” Grant, who “was angry at this,” heatedly explained to Johnson that he, as president, “might do as he pleased about civil rights, confiscation of property and so on...but a general commanding troops has certain responsibilities and duties and power, which are supreme.” That included a parole carrying immunity from prosecution. Besides, if he had not given such a parole, “Lee would never have surrendered, and we should have lost many lives in destroying him.” And then the stinger: “I should have resigned the command of the army rather than have carried out any order directing me to arrest Lee or any of his commanders who obeyed the laws.”²⁴

Grant wrote back to Lee on June 20th, assuring him that he had put Lee’s case before Stanton and Johnson with his recommendation to “quash all indictments

21 John Esten Cooke, *A Life of Gen. Robert E. Lee* (New York: Appleton, 1883), 489.

22 Lee to William Cabell (May 24, 1865), in R.E. Lee Collection, Leyburn Library, Washington & Lee University.

23 “Indictments for Treason,” *Alexandria Gazette* (June 10, 1865); Douglas Southall Freeman, *R.E. Lee: A Biography* (New York: Charles Scribner’s Sons, 1935), 4:198-201; Lee to Grant (June 13, 1865), in *Personal Reminiscences of General Robert E. Lee*, 179-180.

24 “Our President. A Meeting Last Night at Cooper Institute,” *New York Herald* (June 8, 1865); Lee to Grant (June 20, 1865) and “Interview” (July 6, 1878), in *The Papers of Ulysses S. Grant*, ed. John Y. Simon (Carbondale, IL: Southern Illinois University Press, 1988), 15:210-211 and 28:421; John Russell Young, *Around the World with General Grant* (New York: American News Co.), 2:460-61.

found against paroled prisoners of war, and to desist from the further prosecution of them.” He added, hopefully, that “this opinion... is substantially the same as that entertained by the Government.”²⁵ Still, Grant remembered that the only member of the cabinet who agreed with him was William Henry Seward. Lee, who was never an instinctive optimist, was not an optimist now. He told Walter Taylor that he had “made up my mind to let the authorities take their course. I have no wish to avoid any trial the government may order.” To his brother, Charles Carter Lee, he wrote resignedly “all about the indictments” on June 21st:

*The papers are arguing the Subject pro & Con, & I presume the Gov't will decide in favour of the stronger party. I am here to answer any accusations against me & Cannot flee. I have rec'd offers of professional Services from several Gentn: Reverdy Johnson, Tazewell Taylor, Mr [William H.] Macfarland, &c, in the event of being tried, & shall take advantage of them if necessary.*²⁶

And yet, whether General Lee and Judge Underwood realized it, there were serious constitutional, legal and practical obstacles in the path of a conviction—or even a trial—for treason of the Confederacy’s most famous soldier.

25 Grant to Lee (June 20, 1865), in O.R., series one, 46 (pt 3):1287. Grant would continue to insist that “the paroles given to the surrendered armies lately in rebellion against the Government should be held inviolate, unless in cases where all rules of civilized warfare have been violated.” See Grant to Johnson (December 21, 1865), in O.R., series two, 8:815

26 Lee to Taylor (June 17, 1865) in Taylor, *General Lee: His Campaigns in Virginia, 1861-1865 with Personal Reminiscences* (Norfolk, VA: Nusbaum Books, 1906), 298; Lee to Charles Carter Lee (July 21, 1865), in Papers of the Lee Family, Box 4, M2012.003, Jessie Ball duPont Library, Stratford Hall.

1. *The Constitution’s definition of treason is a very narrow one*, and is based on English treason laws dating back to the 1350s which limited treason to seven grounds, including attacks on the king’s person or household, levying war against the king, or giving the king’s enemies aid and comfort. Restoration-era judges, eager to put nooses around the necks of as many of the Puritan revolutionaries of the 1640s as possible, gradually opened-up the definition of treason to include notions of “constructive treason,” in which something as simple as the mere airing of an opinion at variance with the king could be deemed treason.²⁷

But the Constitution sharply reined-in applications of “constructive treason.” It defined treason in just two specific ways—*levying war*, which suggested involvement in internal insurrections, and giving *aid and comfort*, which more nearly described assistance lent to an external war being waged by a sovereign belligerent. If anything, the Constitutional provision (and its statutory companion, the Crimes Act of 1790) made it nearly impossible to obtain convictions for treason, something that was dramatically exposed in the celebrated trial of Aaron Burr. By the time of the Civil War, only five convictions for treason had ever emerged from the federal courts, and all of those had occurred in the administrations of Washington and John Adams—both of whom then pardoned the convicted.²⁸

The Civil War triggered renewed invocations of the law of treason. A Conspiracies Act, on July 31, 1861, and the Crimes Act of August 6, 1861 defined any conspiracy “to levy war against the United

27 Bradley Chapin, *The American Law of Treason: Revolutionary and Early National Origins* (Seattle: University of Washington Press, 1964), 3-4, 55-57, 84.

28 James Willard Hurst, *The Law of Treason in the United States: Collected Essays* (Westport, CT: Greenwood Pubs., 1971), 145, 150, 187; Charles Warren, “What Is Giving Aid and Comfort to the Enemy?” *Yale Law Journal* 27 (January 1918), 333; Blair, *Malice Toward Some*, 15, 31-32, 52.

States” as a “high crime” and labeled Confederate recruitment “a high misdemeanor,” while the Second Confiscation Act applied the penalties of treason specifically to “any person” who should “set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States.”²⁹

But Senator Garrett Davis of Kentucky was quick to argue that treason, strictly speaking, was a crime involving “adherence to a foreign enemy with which the United States are at war...and that adherence to a domestic enemy was not an adherence to an enemy within the meaning of the Constitution.” It only confused matters more that the Confederacy had been accorded belligerent rights “in exchanges of prisoners and other acts,” and that concession could imply that Confederate officers had been the servants, not of treason, but of a separate, sovereign nation.³⁰

2. *Lee would have to be tried in the jurisdiction where the treason occurred.*

The Constitution prefaces the section on treason with a requirement that “the Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed,” and the Sixth Amendment adds that such a trial would have to take place in the “district wherein the crime shall have been committed.” That meant, at the least, that a trial of Lee would probably take place in Virginia. And while it had not been difficult to create a co-operative

29 “An Act to define and punish certain Conspiracies” (July 31, 1861) and “An Act to punish certain Crimes Against the United States” (August 6, 1861), in *Statutes at Large, Treaties and Proclamations of the United States of America*, ed. George P. Sanger (Boston: Little, Brown, 1863) 12:284, 317.

30 William Blair, “Friend or Foe: Treason and the Second Confiscation Act,” in *Wars Within a War: Controversy and Conflict Over the American Civil War*, eds. Joan Waugh & Gary W. Gallagher, (Chapel Hill: University of North Carolina Press, 2009), 48.

grand jury in Norfolk, the wording of the Sixth Amendment seemed to require that such a trial take place in Richmond. It would be a much more monumental task to find a civilian petit jury in Virginia which would vote to convict Robert E. Lee.

Judge Underwood certainly understood that this would be one of his most formidable obstacles. When he was quizzed six months later whether he found “it practicable to get a jury of loyal men in your court,” he glumly replied, “Not unless it is what might be called a packed jury.” Without such packing, Underwood was unsure whether a jury would vote to convict Lee of treason. “It would be perfectly idle to think of such a thing. ...Ten or eleven out of the twelve on any jury, I think, would say that Lee was almost equal to Washington, and was the noblest man in the State.”³¹

3. *The Chief Justice of the Supreme Court, Salmon P. Chase, would not co-operate.*

Abraham Lincoln had installed Salmon Chase as Chief Justice after the death of Roger Taney in October, 1864, partly to kick the ambitious Chase upstairs and remove him as a rival for the presidency, and partly to ensure that the administration’s emancipation policies during the war would get a friendly hearing from a devout anti-slavery man like Chase if challenges erupted after the war ended. Chase, however, had agendas of his own; if he could not usurp Lincoln as President, he could certainly magnify his office as Chief Justice. Ever since Roger Taney’s unavailing effort to bind Lincoln’s war policies in *ex parte Merryman*, the Supreme Court and the federal judiciary as a whole had played a muted role in the conduct of the war. But as soon as the shooting was stopped, Chase and the High

31 Examination of Judge John C. Underwood (January 31, 1866), in *Report of the Joint Committee on Reconstruction*, 7; J.M. Humphries to Underwood (May 15, 1866), *Underwood Papers*, Library of Congress.

Court once again moved to re-assert themselves over against the executive and legislative branches of the government.

In particular, Chase refused to participate in his auxiliary role as a Circuit judge so long as military tribunals were operating anywhere within a given District. “While military authority was supreme in the South,” Chase explained, “no Justice of the Supreme Court could properly hold a Court there.” As Chase explained to Horace Greeley, military tribunals regularly interfered with civil proceedings, and “instances are not wanting where their acts have been nullified by military orders.” Without Chase’s participation in a capital case, Judge Underwood would have to try Lee’s treason case by himself, and that would produce a verdict of something less than unchallenged authority. As it was, Chase did not have a particularly high opinion of Underwood’s competence as a judge. “The ‘Anxious’ man,” Chase remarked drily, “can have a trial before Judge Underwood” any time he wants. But “the Court will be a quasi-military court,” and Chase would have nothing to do with it.³²

4. *Lee’s own self-defense.* Two weeks after Judge Underwood’s grand jury indicted him, Lee shrugged off his pessimism and began asserting a more defiant tone. To his cousin, Martha “Markie” Williams, Lee declared that he was “aware of having done nothing wrong.” That sense of “nothing wrong” grew out of a theory of citizenship which, in turn, was based in a fundamental ambiguity in the federal Constitution. Nowhere in the Constitution, as it was written in 1787, is the concept of citizenship

actually defined. In the five places where the Constitution refers to citizenship, it speaks of citizens of the states, and citizens of the United States. But the Constitution made no effort to sort out the relationship between the two, leaving the strange sense that Americans possessed a kind of dual citizenship, in their “native State” (as Lee called it) and in the Union. This played directly into the larger pre-war argument that the Constitution had neatly divided sovereignty between the states and the federal Union. Beginning, then, with the premise that “all that the South has ever desired was that the Union, as established by our forefathers, should be preserved; and that the government, as originally organized, should be administered in purity and truth,” Lee had no trouble in arguing that Virginia and the other rebel states “were merely using the reserved right” of state sovereignty when they seceded.

In “my view,” Lee reasoned, that meant that “the action of the State, in withdrawing itself from the government of the United States,” required its citizens to act with it. “The act of Virginia, in withdrawing herself from the United States, carried me along as a citizen of Virginia” because “her laws and her acts were binding on me.” In the event, the Civil War had exploded that theory by sheer force. “The war,” he explained to his nephew, Edward Childe, “originated from a doubtful question of Construction of the Constitution, about which our forefathers differed at the time of framing it” and it had now been settled “by the arbitrament of arms.” But neither Lee nor any other individual Confederate could be called a traitor for having done so; “the State was responsible for the act, not the individual.”³³

32 “Judge Underwood’s Decision,” *New York Times* (April 16, 1866); Chase to Horace Greeley (June 1, 1866 and June 5, 1866), Chase to Underwood (November 19, 1868 and January 14, 1869), and Chase to Thomas Conway (September 19, 1870), in *The Salmon P. Chase Papers: Correspondence, 1865-1873*, ed. John Niven (Kent, OH: Kent State University Press), 5:100-101, 107-7, 183, 285-6, 292.

33 Lee to Williams (June 20, 1865), in “To Markie”: *The Letters of Robert E. Lee to Martha Custis Williams*, ed. Avery Craven (Cambridge, MA: Harvard University Press, 1933), 62-3; Lee to Chauncey Burr (January 5, 1866), *Personal Reminiscences of General Robert E. Lee*, 189; Examination

By that point, other factors had intervened to render Lee's treason indictment a nearly-dead letter. For one thing, Grant's threat to resign if the Appomattox paroles were set aside was nothing for Andrew Johnson to trifle with. Johnson seemed to Henry Winter Davis "anxious to conciliate rather than resolved to command" Grant, and on June 11, 1865, Judge Underwood was called to Washington for a full week's-worth of consultations with Attorney-General Speed which effectively sent the Lee indictment to the back-burner until the next term of the Circuit court in Norfolk in October. "When Judge Underwood of Virginia was here a few days ago," smirked the *Alexandria Gazette*, "he did not succeed in getting an order for the arrest of Gen. Lee, and that distinguished officer is to be left unmolested." Finally, in June, 1866, Speed instructed Underwood's district attorney to suspend any proceedings against Lee and the others. "I am instructed by the President to direct you not to have warrants of arrest taken out against them, or any of them, until further orders."³⁴

For another, Underwood and Johnson had a bigger fish to fry in the person of Jefferson Davis, who had been imprisoned in Fortress Monroe since May of 1865 and whom Underwood's grand jury indicted for treason on May 8, 1866. On June 23rd, the *Norfolk Post* announced that "all speculations concerning the trial of General Lee for treason in consequence of his indictment at Norfolk may as well be

abandoned at once," and a month later, the *Wheeling Daily Intelligencer* quietly announced that "it is understood here that...when the treason indictments against Gen. Lee and other noted rebels will be called up...the President will direct nolle pros. [*nolle prosequi*, or 'no longer prosecute'] to be entered, and dispose of each defendant, as he proposes to dispose of other leading rebels who have been active participants in the war, namely, by putting them on long probation, and then as a condition, precedent to pardon, imposing such penalties and restrictions as may be justified by the circumstances."³⁵

Just as in the Lee indictment, Davis's prosecution went aground repeatedly on Chief Justice Chase's refusal to participate until the grip of military rule in the defeated Confederacy had been released. Trial dates were set, but postponed again and again as both the Chief Justice and the president became embroiled in Andrew Johnson's impeachment trial. Johnson barely survived his impeachment, and in a gesture of contempt for the Radical Republicans who had nearly destroyed him, Johnson issued "a full pardon and amnesty for the offense of treason" to "all and to every person who directly or indirectly participated in the late insurrection or rebellion" on Christmas Day, 1868. The sword dangling over the heads of Davis, Lee and the others was now withdrawn, and February 11, 1869, the indictments of Lee and the others whom Underwood had named were dismissed.

Nevertheless, Underwood's indictment remained only nearly-dead for three years, and Lee anxiously eyed any moment when

of Robert E. Lee (February 17, 1866), in *Report of the Joint Committee on Reconstruction*, 133; Lee to Edward Lee Childe (January 16, 1866), in *Lee Family Digital Archive* (<http://leefamilyarchive.org>), Stratford Hall.

³⁴ Brooks Simpson, *Let Us Have Peace: Ulysses S. Grant and the Politics of War and Reconstruction, 1861-1868* (Chapel Hill: University of North Carolina Press, 1991), 101; *Alexandria Gazette* (July 18, 1865); Speed to Lucius H. Chandler (June 20, 1866), in "Impeachment of the President," *Reports of Committees of the House of Representatives for the First Session of the Fortieth Congress*, 512.

³⁵ "Extra Session of the Virginia Legislature—Circular from the Attorney General," *Daily Cleveland Herald* (June 13, 1865); "The Indictments Against General Lee and Others," *Baltimore Sun* (June 19, 1865); "The Indictment Against Gen. Lee," *Boston Post* (June 19, 1865). See also *Alexandria Gazette* (June 12 and June 21, 1865) and *Norfolk Post* (June 23, 1865).

it seemed it might bark back into life. Lee was actually subpoenaed to appear at the opening of Davis's trial in November, 1867, but Chase declined to join Underwood on the bench in Richmond, and the trial was postponed. "I am considered such a reprobate," Lee half-joked, that "I hesitate to darken the doors of those whom I regard; lest I should bring upon them some disaster."³⁶

Ironically, the treason indictment only made Robert E. Lee more obdurate and more defiant. Publicly, he soothingly urged reconciliation and submission, and undertook the presidency of Washington College, in Lexington, Virginia, as a means of encouraging "all our young men is to adhere to their states & friends, & aid both in restoration of the country." Every Southerner, he wrote to former governor and now Lexington neighbor John A. Letcher, "should unite in honest efforts to obliterate the greivous effects of war, & to restore the blessings of peace...promote harmony & good feeling, qualify themselves to work; & the healing of all dissensions."³⁷

But the war had changed Lee from a mild Unionist Whig who barely ever mentioned politics and had "never taken part in the discussion of political questions" into a touchy protector of secession orthodoxy. Privately, Lee expressed mounting bitterness at the outcome of the war and the direction of Reconstruction. "All that the South has ever desired was that the Union, as established by our forefathers, should be preserved, and that the government as originally organized should be administered in purity and truth." In the "justice of that

cause" he was unashamedly confident. He complained in January, 1866, to Reverdy Johnson that the Radical Republicans were intent on "a policy which will continue the prostration of one-half the country, alienate the affections of its inhabitants from the government, and which must eventually result in injury to the country and the American people." The Union was turning into exactly what the secession fire-eaters and Northern Copperheads had prophesied it would become, "one vast Government, sure to become aggressive abroad & despotic at home; & I fear will follow that road, which history tell us, all such Republics have trod, Might is believed to be right, & the popular Clamor, the voice of God." The further Reconstruction drove matters along, the more Lee suspected that another civil war could easily take place. "The several states...must unite, not only for their protection, but for the destruction of this grand scheme of centralization of power in the hands of one branch of the government to the ruin of all others, and the annihilation of the Constitution, the liberty of the people and of the country." By the end of his life, he had almost lost faith entirely in democracy. "Although Republican forms of Govt...still have my preference over all others," he had now come to believe that a republic "requires a virtuous people...& the world has not yet I fear reached the proper standard of morality & integrity to live under the rule of religion & reason." He added, "Spain I think showed her wisdom in adopting a constitutional monarchy."³⁸

36 Lee to Mrs. Julie G. Chouteau (March 21, 1866), Papers of the Lee Family, Box 4, M2009.341, Jessie Ball duPont Library, Stratford Hall; Icenhauer-Ramirez, *Treason on Trial*, 255-56, 292.

37 Lee to Philip Slaughter (August 31, 1865) and Lee to John A. Letcher (August 28, 1865), in Lee Family Digital Archive (<http://leefamilyarchive.org>), Stratford Hall.

38 Lee to "dear Sir" (July 9, 1866), in Elizabeth Brown Pryor, *Reading the Man: A Portrait of Robert E. Lee through His Private Letters* (New York: Viking, 2007), 443; Lee to Edward Lee Childe (January 5 and January 22, 1867, and February 16, 1869), Papers of the Lee Family, Box 4, M.2009.345, Jessie Ball duPont Library, Stratford Hall; Lee to Chauncey Burr (January 5, 1866), in Robert Lee jnr., *Recollections and Letters of General Robert E. Lee* (New York: Doubleday, 1924), 225; Lee to Reverdy Johnson (January 27, 1866), Lee to Charles W. Law (September 27, 1866) and

The attrition of Lee's postwar confidence in democratic government adds a fresh layer of difficulty to answering the original question: did Robert E. Lee commit treason? For years after his death in 1870, unreconciled Northerners continued to denounce Lee as the arch-traitor of the rebellion. Frederick Douglass complained, after wading through newspaper obituaries for Lee, that "we can scarcely take up a newspaper...that is not filled with nauseating flatteries of the late Robert E. Lee" and his "bad cause." "I think it safe to say," declared Vermont's U.S. senator George F. Edmunds, that no one "has committed the crime of treason against more light, against better opportunities of knowing he was committing it" than Lee.³⁹

But in the end, everything dangled on Lee's own carefully-honed distinction: until the Civil War settled matters, there was a plausible vagueness in the Constitution about the loyalty owed by citizens of states and the Union, and so long as it could be argued that Lee was simply functioning within the latitude of that vagueness by following his Virginia citizenship, it would be extraordinarily difficult to persuade a civilian jury that he had knowingly committed treason. True: as Edmunds argued, "instead of being the child of Virginia and wedded to the institutions of his State, and sharing her destinies with a passionate enthusiasm, he was the child of the people; he was the ward of the nation."⁴⁰ True again: no one seemed, in simple terms, more to conform to the Constitutional definition of treason against the United

States—*levying war against them, or in adhering to their enemies, giving them aid and comfort*—than Robert E. Lee. But treason, in Anglo-American jurisprudence, knows no accessories. "Where war has been levied," all who aid in its prosecution by performing any part in furtherance of the common object, however minute, or however remote from the scene of the action. In other words, everyone who is involved in treason is a principal, and that would have compelled the federal courts to conduct treason trials in wholesale, not to say politically repugnant, numbers. Even Wendell Phillips acknowledged, "We cannot hang men in regiments" or "cover the continent with gibbets. We cannot sicken the nineteenth century with such a sight." The best that Phillips could hope for was to "banish Lee with the rest."⁴¹

In the end, one has to say, purely on the merits, that Lee did indeed commit treason, as defined by the Constitution. But the plausibility of his defense introduces hesitations and mitigations which no jury in 1865—even Underwood's "packed jury"—could brush by easily. That, combined with the reluctance of Ulysses Grant and Salmon Chase to countenance a treason trial for Lee, makes it extremely unlikely that a guilty verdict would ever have been reached. But the jury which might have tried him was never called into being, and without a trial by a jury of his peers, not even the most acute of historical observers is really free to pass judgment on the crime of Robert E. Lee. Yet the question remains far from academic. In the cosmopolitan atmosphere of global communications and cultural fluidity, the notion of treason has acquired an antique feel, not unlike medieval notions of honor or feudal loyalty. To the extent that global communications,

Lee to D.H. Maury (May 28, 1867), in *Personal Reminiscences of General Robert E. Lee*, 190, 199, 206; Lee to Annette Carter (March 28, 1868), in *Duty Most Sublime*, 145.

39 Douglass, in David W. Blight, *Frederick Douglass' Civil War: Keeping Faith in Jubilee* (Baton Rouge: Louisiana State University Press, 1989), 229; Edmunds, in "Mrs. R.E. Lee," *Congressional Globe*, 41st Congress, 3rd Session (December 13, 1870), 74.

40 Edmunds, in "Mrs. R.E. Lee," 74.

41 Phillips, "Abraham Lincoln" (April 23, 1865), in *Speeches, Lectures, and Letters* (Boston: Lee & Shepard, 1905), 450-1.

mass migration, and instant universal commerce render national boundaries more and more meaningless, can modern individuals be held to the standard of absolute loyalty to a single political entity? “Citizenship does not free a man from the burdens of moral reasoning,” writes legal philosopher A. John Simmons. “The citizen’s job” is not to absorb obligations to the nation-state and “to blithely discharge it in his haste to avoid the responsibility of weighing it against competing moral claims on his action. For surely a nation composed of such ‘dutiful citizens’ would be the cruellest sort of trap for the poor, the oppressed, and the alienated.” Moreover, the assertion of the existence of international standards of human rights runs in direct conflict with how states regard, and are allowed to regard, the disloyal behavior of their nationals. Nor is this merely an exercise of left-internationalism; for many libertarians, treason loses the taint of moral betrayal and becomes a mechanism by which an all-powerful State prevents “dangers to its *own* contentment.”⁴² As it is, the Constitutional definition itself is so narrow that convictions for what

might be considered treasonable offenses are prosecuted instead under the 1917 Espionage Act. But to deny that treason can occur, or that citizens can be held culpable for it, is to deny that communities can suffer betrayal to the point where their very existence is jeopardized.

Perhaps it is a token of an instinct, running back to the Constitutional Convention, to err on the side of absorbing society’s defaulters which underscores our willingness to leave an Aaron Burr or a Robert E. Lee unmolested. Walt Whitman thought that “this has been paralleled nowhere in the world – in any other country on the globe the whole batch of the Confederate leaders would have had their heads cut off.” It was a uniqueness of which Whitman was proud. In that way, Herman Melville wrote,

*The captain who fierce armies led
Becomes a quiet seminary’s head—
Poor as his privates, earns his bread.*⁴³

Mercy—or at least, a *nolle prosequi*—turned out to be the most appropriate punishment, after all. a

42 Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979), 200; Murray Rothbard, *The Anatomy of the State* (Auburn, AL: Ludwig von Mises Institute, 2009), 45-46.

43 Walt Whitman’s *Civil War*, ed. Walter Lowenfels (New York: Knopf, 1961), 251; Melville, “Lee in the Capitol,” in *Battle-pieces And Aspects Of The War: Civil War Poems*, ed. L.R. Rust (New York: Da Capo Press, 1995), 229, 237.