

THE TRIAL OF JEFFERSON DAVIS

An Interesting Constitutional Question.

At a time when the whole country is reminded of the fiftieth anniversary of the death of President Lincoln, it seems appropriate to call attention to the trial of Jefferson Davis, President of the Confederate States of America, who was suspected of being a party to Mr. Lincoln's assassination.

On the 14th of April, 1865, President Lincoln was assassinated. The oath, as his successor, was at once taken by Vice-President Andrew Johnson. Early in the month of May following his succession to the presidency, Mr. Johnson issued a proclamation in which he said:

"Whereas, it appears from evidence in the Bureau of Military Justice, that the atrocious murder of the late president, Abraham Lincoln, and the attempted assassination of the Honorable William H. Seward, secretary of state, were incited, concerted, and procured by and between Jefferson Davis, late of Richmond, Virginia," and other rebels and traitors against the government of the United States (naming them). "Now, therefore, to the end that justice may be done, I, Andrew Johnson, President of the United States, do offer and promise for the arrest of said persons, or either of them, within the limits of the United States, so that they can be brought to trial, the following rewards: one hundred thousand dollars for the arrest of Jefferson Davis," and suitable rewards were made for the arrest of all persons named in the proclamation.

Under the impression that Mr. Davis had conspired with others to assassinate President Lincoln, Mr. James Speed, then Attorney General of the United States, gave an official opinion, that all persons implicated in the murder of President Lincoln, "are subject to the jurisdiction of, and legally triable before, a military commission." In pursuance of this opinion, the Judge Advocate General was directed to prepare charges against the parties named in the President's proclamation as having committed the alleged offense, as it was the purpose of the government to try Mr. Davis by a military commission on the "charge of having procured the assassination of the President."

Mr. Davis was captured on the 10th of May, 1865, and was transferred to and imprisoned in Fortress Monroe and prepara-

tions were at once begun on the part of the government for his trial. But during his imprisonment in Fortress Monroe, it was determined by the government to try him for treason against the United States, although the President, as previously stated, had ordered that he should be tried before a military commission in pursuance of the opinion of the Attorney General. That opinion, however, seems to have been changed, for the Attorney General gave a later opinion that "although originally captured by the military authorities, Jefferson Davis and other parties alluded to, are, after a cessation of hostilities, subject to trial only by civil courts." The subject of the trial came up for consideration before President Johnson and his cabinet and special attention was given to the place where the trial should be held, as the courts of Pennsylvania, Maryland, Virginia and the District of Columbia had jurisdiction. An indictment was found against Mr. Davis in the District of Columbia, but no action was taken on it by the government. Owing to the disturbed political conditions of the country and to the question whether the *judicial* status of the federal court at Richmond was sufficiently determined to justify its taking jurisdiction in the case for the purpose of trying Mr. Davis, there was considerable delay in the proceedings. On this subject, the Attorney General in his opinion said:

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

By this time, it had become conclusively established that the charge made in the proclamation by President Johnson that Mr. Davis had been connected with the assassination of President Lincoln and the attempted assassination of Secretary Seward, was without foundation and wholly groundless. The only official action which was based on the report was President Johnson's proclamation issued almost immediately after the death of President Lincoln and at a time when the public mind and conscience were intensely aroused and imposed upon by false and malicious reports of almost every character. But as soon as the facts concerning the assassination were learned, it was also learned that

Mr. Davis was wholly innocent of any connection, public or private, with that shocking and cruel tragedy.

On the 8th day of May, 1866, being two days less than one year after his capture, Mr. Davis was indicted by the grand jury of the United States Court for the District of Virginia. As this indictment is short and its language peculiar and some of its averments most singular, its insertion in this article will be of interest. It reads as follows:

"The United States of America, District of Virginia, to-wit: In the Circuit Court of the United States of America in and for the District of Virginia, at Norfolk:

May Term, 1866.

The grand jurors of the United States of America, in and for the District of Virginia, upon their oaths and affirmations respectively, do present that Jefferson Davis, late of the city of Richmond, in the county of Henrico, in the district of Virginia, aforesaid, yeoman, being an inhabitant of, and residing within, the United States of America, and owing allegiance and fidelity to the said United States of America, not having the fear of God before his eyes, nor weighing the duty of his said allegiance, but being moved and seduced by the instigation of the devil, and wickedly devising, intending the peace and tranquillity of the said United States of America to disturb, and the government of the said United States of America to subvert, and to stir, move, and incite insurrection, rebellion and war against the said United States of America on the fifteenth day of June, in the year of our Lord one thousand eight hundred and sixty-four, in the city of Richmond, in the county of Henrico, in the district of Virginia aforesaid, and within the jurisdiction of the Circuit Court of the United States for the fourth circuit in and for the district of Virginia aforesaid, with force and arms, unlawfully, falsely, maliciously, and traitorously did compass, imagine, and intend to raise, levy, and carry on war, insurrection, and rebellion against the said United States of America, and in order to fulfill and bring to effect the said traitorous compassings, imaginations, and intentions of him, the said Jefferson Davis, afterward, to wit, on the said fifteenth day of June, in the year of our Lord one thousand eight hundred and sixty-four, in the said city of Richmond, in the county of Henrico, and district of Virginia aforesaid, and within the jurisdiction of the Circuit Court of the United States for the fourth circuit in and for the said district of Virginia, with a great multitude of persons whose names to the jurors aforesaid are at present unknown, to the number of five hundred persons and upward, armed and arrayed in a warlike manner, that is to say, with cannon, muskets, pistols, swords, dirks, and other warlike weapons, as well offensive as defensive, being then and there unlawfully, maliciously, and traitorously assembled and gathered together, did falsely and traitorously assemble and join themselves together against the said United States of America, and then and there, with force and arms, did falsely and traitorously, and in a warlike and hostile manner, array and dispose themselves against the said United

States of America, and then and there, that is to say, on the said fifteenth day of June, in the year of our Lord one thousand eight hundred and sixty-four, in the said city of Richmond, in the county of Henrico, and district of Virginia aforesaid, and within the jurisdiction of the said Circuit Court of the United States for the fourth circuit in and for the said district of Virginia, in pursuance of such their traitorous intentions and purposes aforesaid, he, the said Jefferson Davis, with the said persons so as aforesaid traitorously assembled, and armed and arrayed in the manner aforesaid, most wickedly, maliciously, and traitorously, did ordain, prepare, levy, and carry on war against the said United States of America, contrary to the duty, allegiance, and fidelity of the said Jefferson Davis, against the constitution, government, peace and dignity of the said United States of America, and against the form of the statute of the said United States of America, in such case made and provided.

This indictment, founded on testimony of James F. Milligan, George P. Scarbury, John Good, Jr., J. Hardy Hendren, and Patrick O'Brien, sworn in open court and sent for by the grand jury.

L. H. CHANDLER,

United States Attorney for the district of Virginia."

Although this indictment was returned against Mr. Davis by the civil authorities, he had been arrested and was held a prisoner in Fortress Monroe under *military authority*, and therefore, could not be tried by the civil courts. Application was made for his release on bail, but this was refused on the ground that as the prisoner was committed and held as a military prisoner, the civil authorities had no power to release him.

On the 6th of October, 1866, President Johnson addressed a letter to the Attorney General, then the Honorable Henry Stanbery, asking "what further steps, if any, should be taken by the Executive with a view to a speedy, public, and impartial trial of the accused (referring to Mr. Davis) according to the constitution and laws of the United States." On the 12th of October, the Attorney General replied at some length to this letter, in which he reviewed the important events in the case and concluded his opinion as follows:

"I would suggest that, to avoid any misunderstanding on the subject, an order be issued to the commandant of Fortress Monroe to surrender the prisoner to civil custody, whenever demanded by the United States marshal, upon process from the federal courts."

It was in pursuance of this opinion, that the custody of Mr. Davis was transferred from the military to the civil authorities. Some time after this opinion of the Attorney General, a petition in *habeas corpus* was filed in the United States Circuit Court of

Virginia, praying that an inquiry be made into the cause of the commitment and detention of the prisoner and that the person having the prisoner in charge should abide by such order as the court might make in the premises. As the result of this petition, a writ was issued to the custodian of Mr. Davis to produce him in court. On the 13th of May, 1867, Mr. Davis was produced in court by General H. S. Burton, Commandant of Fortress Monroe, and surrendered by him to the United States Marshal. Upon this being done, the presiding judge remarked: "General Burton is now honorably relieved of the custody of the prisoner, who passes into the custody of the Court, under the protection of American Republican law." The transfer of the prisoner gave the civil authorities complete control over him, after he had been confined as a military prisoner for more than two years. The civil authority over the case had hardly been established when the prisoner was admitted to bail on motion of his counsel, upon his executing a satisfactory bond in the sum of one hundred thousand dollars. The bond was signed by many wealthy and representative citizens, among whom was the distinguished Horace Greely, who was the first to attach his signature to the instrument. Upon the execution of the bond the marshal discharged Mr. Davis from custody. Principally for the reason that Chief Justice Chase, who was to preside at the trial, could not sooner attend, the trial was postponed until the March term of the court in 1868. At that term, however, a new indictment was found against Mr. Davis, by the grand jury sitting at Richmond. This indictment was of such great length that it covers twenty-one printed pages.

One of the witnesses, upon whose testimony the new indictment was found, was Robert E. Lee, late commander of the Confederate armies. The indictment charged in various ways that Mr. Davis was guilty of treason against the government of the United States. The case was again continued until the November term of the court in 1868, when one of the counsel for Mr. Davis made an affidavit in which he stated that,

"Jefferson Davis was in the year 1845, previous to the alleged commission of the offenses set forth and charged in said indictment, a member of the Congress of the United States, to wit, a member of the House of Representatives of the United States from the State of Mississippi in said Congress, and as such the said Jefferson Davis, on the eighth day of December, 1845, took an oath to support the Constitution of the United States."

When this affidavit was filed, counsel for Mr. Davis asked that the indictment against him be quashed. *This raised the interesting constitutional question.*

On the 3rd of December, 1868, the question was argued, and a brilliant array of counsel appeared for the defendant and also for the government. Mr. William M. Evarts, who had previously been of counsel for the government, seems not to have appeared in the case at this time. The question presented for the determination of the court by counsel for Mr. Davis was contained in the following written statement made by Mr. O'Connor:

"The indictments in these cases were framed on the alleged fact that the defendant had engaged in the insurrection and rebellion against the United States, known to the court and to the several departments of the government as having existed at the several times mentioned in the said indictment in the State of Virginia and elsewhere, and thereby given aid and comfort to the enemies of the United States engaged in said insurrection and rebellion.

And the defendant alleges that prior to such insurrection and rebellion, and in the year 1845 he, the said defendant, was a member of the congress of the United States, and as such member took, in said year, an oath to support the constitution of the United States in the usual manner, and as required by law in such case.

And the defendant alleges in bar of any proceedings upon said indictments, or either of them, the penalties and disabilities denounced against and inflicted on him for his said alleged offense by the third section of the fourteenth article of the constitution of the United States, forming an amendment to such constitution.

And he insists that any judicial proceeding to inflict any other or further pain, penalty, or punishment upon him for such alleged offense is not admissible by the constitution and the laws of the United States.

Wherefore he, the said defendant, moves the court now here to quash and set aside the said indictments, or to dismiss the same and the prosecution thereon, or to render such other relief in that nature as the aforesaid facts and circumstances shall require, and as may seem proper."

Such a question had never before been raised in the history of American jurisprudence and has never been raised since. It was exceedingly novel, interesting and important. The original constitution of the United States had defined treason—the only crime it did define. It provided that, "Treason against the United States, shall consist only in levying war against them, or in adher-

ing to their enemies, giving them aid and comfort." It had also provided, "That congress shall have power to declare the punishment of treason." The act of April 30th, 1790, was the first legislation of congress on the subject of treason and it provided that the punishment for that offense shall be "death by hanging." This continued to be the punishment until the act of 1862, by which congress provided, "That every person guilty of treason shall suffer death; or, at the discretion of the court, shall be imprisoned at hard labor for not less than five years and fined not less than ten thousand dollars, and that every person so convicted of treason, shall moreover, be incapable of holding any office under the United States." This act was passed in the very midst of the Civil War, while those who were guilty of treason against the government were aiming their cannon at the dome of our national capitol, and the roll of their drums could be heard from the halls of congress. Its passage was due to the recommendations of President Lincoln, who said he was so frequently asked to pardon those who had been convicted of treason, whom he thought should not suffer death, on account of their youth, that he suggested a modification of the punishment for such offense. It is hardly conceivable that unless some such influence was exerted, congress would have passed such an act at such a time. The provision of the act that "Every person so convicted of treason shall moreover be incapable of holding any office under the United States" was subsequently incorporated into the fourteenth amendment to the constitution.

It is not considered necessary in this article to review the arguments of counsel on the respective sides of the question made in behalf of Mr. Davis. They were, of course, very able. At the conclusion of the argument of Mr. O'Connor, who closed in behalf of Mr. Davis, the Chief Justice announced that the court would take the motion to quash the indictment under consideration. On December 5th, the Chief Justice made the announcement that the court had "failed to agree upon a decision in regard to the motion." Thereupon, counsel for Mr. Davis asked "that the fact of the disagreement be certified to the Supreme Court of the United States," which request was granted and the following entry was made upon the journal of that court:

"At that term of the court, begun and held at Richmond, in the said district, on the 23rd day of November, 1868, and continued until this day, a motion was made on behalf

of the defendant to quash or set aside the said indictment, and to dismiss the same and the prosecution thereof.

And upon that motion it appeared that the said Jefferson Davis, having previously to the offenses charged in the said indictment taken an oath as a member of congress to support the constitution of the United States, the question arose whether, by the operation and effect of the third clause of the fourteenth amendment to the constitution of the United States, the defendant is exempted from indictment or prosecution for treason in levying war and participating or engaging in the late rebellion. And upon that question the opinions of the judges were opposed. And thereupon the said point is upon the request of the said defendant, stated under the direction of the said judges, and certified under the seal of the said Circuit Court to the Supreme Court of the United States at its next session."

The supreme court never decided the question which was certified to it. The certificate of disagreement is somewhere among the records of that court, but no hearing was ever had upon it. The issuing of the President's proclamation of general amnesty had a quieting effect on the country and amidst the peaceful feeling which followed, the clamors of the warlike spirit subsided and at a later term of the United States Court in Richmond, Virginia, the indictments against Mr. Davis were laid away. Thus ended the case of the *United States v. Jefferson Davis*. It was dismissed from the docket of the Supreme Court at Washington on motion of the Attorney General of the United States on the 19th of February, 1869. But no formal order was made dismissing the case in the federal court at Richmond, Virginia. So far as that court was concerned, it simply died.

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