

## **Did the President Commit Treason?**

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Larry Bernstein:

Welcome to What Happens Next. My name is Larry Bernstein. What Happens Next is a podcast which covers economics, politics, and history.

Today's topic is Did the President Commit Treason?

The title is a bit of a bait and switch because the president in question is Jefferson Davis the President of the Confederate States during the American Civil War.

Our speaker is Cynthia Nicoletti who is a legal historian and law professor at the University of Virginia School of Law. Cynthia is the author of the book *Secession on Trial: The Treason Prosecution of Jefferson Davis*.

I chose this topic for today's podcast because the facts of the case relate to the ongoing legal battles for Donald Trump.

For those of you in our audience who are a little rusty on their US civil war history. Abraham Lincoln won the 1860 presidential election and within a few weeks ten Southern states seceded from the Union. The Confederate States held democratic elections and chose Jefferson Davis as their president, and he was the Commander in Chief of the Confederacy during the Civil War.

Davis was captured at the end of the war, and he was indicted for treason under penalty of death.

I want to learn from Cynthia whether Davis committed treason? Could Davis get a fair trial? Should his trial be in a court or by a military tribunal? Alternatively, should the Union have skipped the prosecution and simply shot him?

Davis's case turns on Section 3 of the 14th Amendment, which is the exact same section that has been applied by Colorado and Maine to prevent Donald Trump for being on their presidential ballot.

Are the courts the proper place to adjudicate these questions or instead should they be determined on the battlefield, by our elected representatives, or by the voters?

Buckle up!

Cynthia can you please begin with your six-minute remarks.

Cynthia Nicoletti:

I wrote this book about Jefferson Davis's treason trial that never happened. In the aftermath of the Civil War, Jefferson Davis, the President of Confederacy, was arrested and the government planned to put him on trial for treason. And the aim of the trial was to cement the government's victory and demonstrate that the Union's theory of the war was legally correct. His case was supposed to be a test case on secession. It was supposed to be the first trial in a string of trials.

It is clear to me that Davis committed treason within the meaning of Article Three of the Constitution, which says that levying war against the United States is treason. What is unclear is the question of his allegiance. That is the real issue. Because treason is a crime of allegiance. If I were a Canadian and I attacked the United States, I could be guilty of any number of things but not treason. The question in his case is whether secession of his home state of Mississippi in early 1861, does that remove his United States citizenship and his duty of loyalty to the United States and make him a foreigner.

It seemed easy when the government arrests Davis in May of 1865 to convict him. This is right after the war ends. They think about the prospect of trying him for war crimes against the U.S. He might be involved in Lincoln's assassination or for war crimes at Andersonville Prison or this question of treason. It turns out to be not so easy to convict Davis.

The cabinet with President Andrew Johnson discussed his trial a lot, but they cannot figure out what to try him for.

Public anger against Davis, which is palpable at the end of the war, fades quickly. Davis's lawyer raises the prospect that there is the potential that this case could end up with the wrong outcome. They could get a judge or a jury that might acquit Davis or get a hung jury. It is bad for the government if they cannot manage to convict Jefferson Davis of treason.

The Attorney General of the United States thinks that they cannot cook the books with trying Davis. They think about the military tribunal, about trying him before jurors who have already said that they think he is guilty and things like that. And the Attorney General says, we cannot do that. He is very invested in seeing the rule of law return in the United States, and he is against trying Davis in a way that is going to ensure his conviction. What happens four years later is the government does drop the case against Davis.

Larry Bernstein:

President Lincoln was elected in November 1860, and within a month after his election, the Southern states seceded from the Union. South Carolina was the first and that was followed by the rest of the Confederate states within a couple of months.

The state legislatures voted overwhelmingly to secede from the Union. In January 1861 Mississippi voted to secede. And the next week, Jefferson Davis who at the time was a US Senator for Mississippi implored the Senate to let the South leave in peace without fighting a war.

All the representatives and senators in the US Congress from the seceded confederate states resigned except for Andrew Johnson.

President Lincoln took the position that the Confederate States had not seceded from the Union because it was unconstitutional to do so. Lincoln said that in a democracy elections matter, and that the losers cannot just leave. Lincoln made the argument that most of the Southern whites wanted to remain loyal to the union and that the people who wanted to secede were a loud minority.

Lincoln's characterization of the popularity of the Union in the South was a fiction.

Lincoln announced that the Confederate states were still part of the Union. They never left. And then when the war began, the Union was at war just with these bad apples.

The critical issue in Jefferson Davis's Treason Trial revolved around this question, did the Confederate States secede or was the civil war a rebellion led by some bad apples.

Cynthia Nicoletti:

I feel like there's a couple of different fictions. One is the legal fiction. The whole idea of the Union's theory of the war is that secession is illegal. So, it never happened. And so, we get this insurrection by Southerners who are just individually waging war against the United States. This is an illegal conspiracy to commit a big act of violence. They did not secede; they are still there. This is just a rebellion. And the whole theory of their prosecution of the war is that it is illegal to leave this Union.

And they are using tools that are derived from international law to put down the rebellion. They impose a blockade, they engage in prisoner exchange, all these things that you only do in a war. You are not doing that with a band of rebels. They are using both the instruments of international law and domestic law. They are using both of those legal theories during the war.

There is only one important decision that the Supreme Court decides during the war, but it's a biggie, which is the Prize cases in 1863.

The Supreme Court sanctions that legal fiction that the states are both in the Union for purposes of US domestic law. They cannot secede; the constitution, does not allow secession from the US, and the instruments of international law that traditionally you can only use against a foreign country.

If it is international law, you have two nations. The Supreme Court says, “you can use the instruments of international law and domestic law,” and the Supreme Court sanctions that legal fiction.

The other is a political fiction that Lincoln does he believe that it is only an extremist band of rebels who managed to hijack every state legislature? And put big armies in the field who are willing to die for the Confederacy. There are certainly Southern Unionists. He does say that there is a deep groundswell of Unionism, and he maintains that. But, as you say, that seems hard to believe.

Larry Bernstein:

Let's talk about the Prize Cases that the Supreme Court decided in 1863. Here are the facts. New Orleans was a major port in the Confederacy, and Lincoln decided to blockade it, which is bizarre to blockade your own port. The Federal government could close the port which is its right as a sovereign.

A blockade is term of art used in international law. Some privateers from the North tried to go around the blockade and traded goods with the South. Some Northern privateers were arrested, and the US government took their cargo. The case ended up in the Supreme Court that concluded that the Federal government had the right to impound the merchandise and that the blockade was legal.

Cynthia Nicoletti:

Congress licenses cutting off trade with individual states in this act of July 1861. The attorney general says to Lincoln, you should not say that you are blockading the ports. You should just say that you are closing them as a matter of U.S. domestic law. The problem is that he uses the language of the blockade and that is really slippery.

They end up using the language and the tools of international law because they are worried that the British are going to come in on the side of the Confederacy. The British are on board with that because those are known rules and the UK cannot violate them. Whereas if the U.S. says, as a matter of its own American law, “we are going to close off the British or we're going to close off this port or that port,” that means that the UK is going to have to be bound by whatever America says the rules are, right? But there were rules about international law and about blockade, which the British knew that the U.S. cannot manipulate.

Larry Bernstein:

The trouble here in the Prize cases is that the US government wants it both ways. They want to benefit from domestic law when it suits them and from international law to push back against the British. And this is relevant in the Jefferson Davis treason case because the critical question is whether the Confederacy is a separate country.

Next topic is why were the Americans fighting the civil war. Nikki Haley was asked this question in New Hampshire a couple of days ago, and she denied that the war was fought over slavery.

Abraham Lincoln said the same thing at the war's outset. Lincoln said that the war was being fought to preserve the Union and not to eliminate slavery. He took that position for political reasons because he wanted the border states to stay in the Union. But this was another Lincoln fiction. And the Confederate states assumed rightly that Lincoln was planning on undermining slavery whenever he could.

Cynthia Nicoletti:

I do not think that this is a fiction. I would draw a line between political ambitions or political choices and legal constraints. Lincoln is anti-slavery. He is not a racial egalitarian by any means, but he thinks that slavery is wrong. He understands that the American constitutional system allows the federal government and the President in particular, very few powers to eradicate slavery. He says to the southern states, "I can't interfere. I don't like slavery, but I don't have any power to end slavery in the United States."

The only power that the federal government has over slavery is in the territories, places that the federal government can control. He seeks to reassure Southerners on that basis. And he says in his first inaugural address, "I don't have the power to interfere with slavery where it exists. And that is not my purpose. I'm only talking about tinkering with it on the margins." The Southerners are paranoid about this. And the Dred Scott decision had just come down a few years earlier where the Supreme Court had said, "Congress and the President cannot interfere with slavery in the territories. They don't have the power to outlaw it." Lincoln disagrees with the Dred Scott decision and pretty much indicates that he's not going to follow that.

Larry Bernstein:

The next topic is Lincoln's Emancipation Proclamation. When I first read it in junior high school, I expected it to read something like the lyrics from a song by the Police: Free, Free, Set Them Free. But instead, the Emancipation Proclamation reads like a legal document.

Cynthia Nicoletti:  
It's a big disappointment.

Larry Bernstein:  
It is horrible.

Cynthia Nicoletti:  
Totally.

Larry Bernstein:  
Growing up Lincoln was my hero. Then you read the Emancipation Proclamation and it is like a bond indenture. It is legalese to the max and you are left wondering, what is he talking about? And what he says in the Emancipation Proclamation is that he is not freeing all the slaves. Lincoln is only freeing slaves where there is Union military control. And I want to bring this back to Lincoln's fiction that the states never seceded. For those Union supporting American citizens living in the Southern states among these bad apples. How is it possible that American citizens have given up their rights to hold slaves? What are you talking about, Mr. President? I'm a citizen with rights under the Constitution. No, the slaves remain my property. Mr. Lincoln you cannot have it both ways.

Cynthia Nicoletti:  
Lincoln would first say, I totally can have it both ways because the Supreme Court said I can in the Prize cases. So yeah, the Emancipation Proclamation is a big disappointment. You are expecting the Declaration of Independence 2.0, right? You are expecting lots of grand sweeping statements about freedom being a natural right. And there is none of that. It is a legal document. And I would say here is another place where secession does come into play, because the basis for the Emancipation Proclamation is international law.

He does not touch slavery in the border states. He touches it in the Confederacy.

Let's say I am a loyal unionist in the Confederacy, and here this is going back to your point, what about Lincoln's fiction, that there's a whole ton of white Unionists who are just being held down by the secessionists? Well, if that is true, their slaves are also being freed by the Emancipation Proclamation. It does not make any distinction between whether you are loyal to the Union or not. Just if you live in Confederate territory, all the slaves are free. And Lincoln can do that, the legal basis for that has got to be the law of war.

Larry Bernstein:  
Lincoln is assassinated in April 1865 just as the Civil War is about to end. John Wilkes Booth and his co-conspirators kill Lincoln, and they also attempt to murder Secretary of State Seward

and Vice President Johnson that same night. The country is stunned and confused. Nobody knows what is going on. How could this second-rate actor kill the President of the United States. It is totally mystifying. Jefferson Davis must have been behind the conspiracy to kill Lincoln, and then a month later Davis is captured.

Cynthia Nicoletti:

It is not good for Davis that Lincoln gets assassinated. I mean, it is a conspiracy. But there are several people who are involved in this, and the Lincoln conspirators are rounded up, and they get immediately tried and executed in military tribunals: they are civilians. All of them get hanged immediately.

It is important for Davis's lawyer to stretch out the timeline because there's so much anger after Lincoln's assassination that it is easy to convict anybody. Davis's lawyer, his main goal is to make sure that Davis does not get caught up in the conspiracy to assassinate Lincoln or for war crimes at Andersonville Prison.

There is a woman who is a mother of somebody who was tortured at Andersonville Prison, and she sends Johnson a picture of her kid, and she says, anytime he thinks about letting Jefferson Davis go, he should pull out that picture of her kid and stare at it. This idea of connecting Davis to Andersonville or the Lincoln assassination seems like the easiest path to convict him.

Francis Lieber one of his jobs in 1865 is to go through all the Confederate records and try to find evidence that would connect Davis to the Lincoln assassins. And he does not find evidence of it.

Larry Bernstein:

Winston Churchill was asked at the end of the Second World War what they should do with the former Nazis. And he said, shoot them. And the Americans said that we should have a trial at Nuremberg with US Supreme Court Justice Robert Jackson as chief prosecutor.

Some questions are best answered on the battlefield and not in the courthouse. What do you think about trials for the leaders of the vanquished?

Cynthia Nicoletti:

That's such a good question. If you want it to have a meaningful impact, you should shoot them. Gosh, I feel like I am going straight to hell for saying that.

Larry Bernstein:

Supposedly Abraham Lincoln just before he was assassinated suggested that he would be pleased if Davis somehow fled the country. But Lincoln's successor Andrew Johnson did not agree, and after Davis was captured, Johnson instructed his Attorney General Speed to indict him.

Cynthia Nicoletti

Davis's lawyer says if you are going to conduct a trial that means something. It should be something other than a show trial like that of Lincoln's conspirators.

And once they commit to putting him on trial, the US Attorney General says, well, if you are going to put him on trial, you're going to have to do it in a fair way.

We had a war that killed 700,000 people. He is worried about violence. He wants the rule of law to return. That is one his main goals. And that is one of the things that makes it quite tough to try Davis, is this real concern in making sure that Davis's case is not trumped up.

Larry Bernstein:

Years ago, I had a book club with Judge Richard Posner. I asked him about the Civil War case about Milligan.

Here are the facts. An Indiana Congressman and other local confederate sympathizers conspired to free Confederate soldiers held at a fort. Amongst the conspirators was a union spy, and Milligan was arrested.

Milligan was convicted at a military tribunal with the penalty of death. Milligan's lawyer approached President Lincoln in the Spring of 1865 to see if he would pardon him. Lincoln told Milligan's lawyer to relax as the civil war was about to end and that the matter would likely be dropped. The war ended, Lincoln was assassinated, and his successor Andrew Johnson decided to proceed with Milligan's execution. But Milligan appealed to the Supreme Court that decided that Milligan needed to be tried in a Federal Court and not with a military tribunal because the courts were open in his home state of Indiana.

I asked Judge Richard Posner what he thought about this famous civil war case, and he told me that if the war was ongoing then shoot Milligan. If not, let him go.

Cynthia Nicoletti:

I love that story. Now, of course, Milligan happens once the war is over. And I think that is not a coincidence that the court is able to say those things about the return of the rule of law and how war does not interrupt the Constitution in the United States. They can say that once the war is over. And Milligan's brief is recycled from a brief that they wrote in favor of Davis and other Confederates. And Milligan gets cited today as the United States believes in the rule of law even during wartime.



It is easy to say that once the war is over. This goes to my point about if you are going to convict Davis, how are you going to do it? There's that moment with the Lincoln conspirators and the assassination, and they try those conspirators before a military tribunal right away, and they get convictions and they hang them right away.

Larry Bernstein:

During World War 2, a few German American citizens trained by the Nazis were dropped off by a U-Boat on Long Island to cause trouble, and they were promptly arrested. There was a military tribunal, and they were shot. Courts were open on Long Island. It goes back to the idea that when there is a war on then the government will do what it wants.

Cynthia Nicoletti:

These decisions are not a coincidence.

Larry Bernstein:

In April 1865, the Civil War was about to end. President Lincoln spoke with General Grant about what terms would be an acceptable surrender.

A week later, the Confederate General Robert E. Lee and General Grant met at a farmhouse in Appomattox Virginia, and Grant offered him very liberal terms of surrender. The Confederate soldiers if they gave up their military weapons and promised not to fight again, then they would not be prosecuted for waging war; they could keep their horses and their side arms. They were offered parole, go home and be good citizens.

How do these liberal terms for surrender for the Confederate soldiers relate to the treason charge against Jefferson Davis?

Cynthia Nicoletti:

There is this issue with parole. Well, how far does that extend? When the Union is talking about trying Confederates for treason, they are thinking about trying the civil officers. Davis is the first one. They also arrest all of Davis's cabinet. And what about the military officers? What about Robert E. Lee, who is better known today than Jefferson Davis.

Grant steps in with President Johnson and says, I think that my parole saying that all of them could leave the battlefield, including Robert E. Lee himself, that extends beyond just leaving the battlefield. That means we cannot try them for treason that effectively we have given immunity for levying war against all the Army officers or anybody in the army.

Larry Bernstein:

Next topic is venue shopping for Jefferson Davis's trial.

Venue is super important because you want to be tried in a place where you can find a sympathetic jury. Davis wanted a jury in the former confederacy. The US attorney general wants to win, but he wants Davis to get a fair trial. Convicting Davis in a sham military tribunal like the Lincoln assassin conspirators or in a place like Washington DC would look ridiculous and might turn Davis into a martyr.

The Judiciary Act of 1790 required that the trial must be in a place where the crime is committed. For Davis's treason trial, it must be in a venue where he committed treason. Davis had not been to the Northern states during the Civil War, and he spent almost all his time in the Confederate capital of Richmond Virginia and that is where the trial was planned to be held.

Cynthia Nicoletti:

This is both a bug and a feature of the U.S. Constitution. It's not just the Judiciary Act of 1790 that talks about this. It is the Constitution itself. Article Three of the Constitution and the Sixth Amendment say that you must be tried in the place where your crime was committed. The Confederate armies went many places beyond Virginia. They went to Pennsylvania to Gettysburg, but Davis was not everywhere. The armies were.

He commits his crime at his desk in Richmond. And in accordance with the Constitution, he is going to be tried where he committed his crime. Richmond has a Confederate population. The government tries many ways to get around this problem. One of the prosecutors says, Virginia during the war used to contain West Virginia. So how about we try them in West Virginia? Still the same state potentially. And West Virginia was pretty unionist. And so, the government also thinks about, well, if the Confederate army was in Pennsylvania, and that is where the actual act of violence that you need for a trial.

Larry Bernstein:

Why is the government trying to move the case to a venue where Davis cannot get a fair trial? If they moved the case to DC, for example, there is no way that Davis would be able to find anyone on the jury to acquit. Why do you view the venue selection as a bug?

Cynthia Nicoletti:

So that is the feature. What do you want a jury trial to do? We want a jury trial so that your local community, your peers are the ones who are deciding on your fate. That is why I like jury trials. I'm a lawyer. I'm an American. I believe in that. The problem is if you have a locally contained act of treason that is geographically located in a particular place, then you go to that place to get a conviction. Now you got a problem that this local community is particularly predisposed to find Davis not guilty. This is the bug, right? This local community in Richmond is going to be particularly prejudiced in Davis's favor. And so, what the government eventually does is they require that jurors take the ironclad oath, meaning not only that they swear that they were not

only presently loyal to the United States, but always have been. It is supposed to be that only unionists can serve on this jury but not all jurors are always truthful.

Larry Bernstein:

You just said something interesting in your own self-identification. You said that you are a lawyer and an American, but you did not say that you were a citizen of Virginia. In 1865 when Davis was indicted, self-identity by state was much more important than being American. That goes to the core of Jefferson Davis's defense. If you asked Jefferson Davis, how do you self-identify? He would have said that previously he was a US Secretary of State and had represented the State of Mississippi in the US Senate. But Davis would have said that he was a citizen of the State of Mississippi and his state legislature of Mississippi had seceded from the Union in January 1861.

The Confederate states had held a valid constitutional convention, written their own constitution, held democratic elections, and that he, Jefferson Davis, had won the presidency. He would argue that he identified as the President of a separate country. There was no treason because he did not hold any allegiance to the United States. In fact, he defended his new confederate country against an invasion by a foreign power.

Jefferson Davis did not seek a pardon from US President Andrew Johnson because he was the president of a different country. Where is the treasonous crime?

Cynthia Nicoletti:

I'm a Yankee. I'm a transplanted Northerner, but I will say I came to UVA initially as a student because I was interested in the Civil War. To the larger point about secession and Americanness, the war ingrained the idea of the cohesion of the nation.

If you think about the two big legal ideas that come out of the Civil War, one is that slavery is abolished, and the second is that the nation is a nation. Davis is hell bent on, "I'm not going to apply for a pardon. I have my integrity and I believe in secession, and I want to be a spokesman for the cause of secession." His lawyer is much more realistic and says, you have a wife and four small children, maybe you don't want to be hanged. I will say that if his argument is, "I believed that secession was legal and I still do," that is not a defense. You can believe that secession is legal, but the crime of treason does not require that you think it is treason.

Larry Bernstein:

I know Davis's lawyer would be wary of putting Jefferson Davis on the stand because they suspected that Davis would behave like Samuel Jackson in that Matthew McConaughey movie.

Cynthia Nicoletti:  
Time to Kill.

Larry Bernstein:  
Yeah, A Time to Kill. Samuel Jackson is on the stand, and the prosecutor asks him, "Did you kill that man?"

"Yes, and they deserved to die. I hope they burn in Hell!"

And in a Jefferson Davis trial for treason, a Richmond jury would expect Davis to take the stand to explain that he had no allegiance to the United States as the President of the Confederacy. The jurors lived in Richmond during the Civil War. Everybody they knew believed that they lived in a separate country. I cannot imagine that the state could persuade 12 men to convict.

Cynthia Nicoletti:  
Unless the oath really works, you get only Unionists on the jury.

Larry Bernstein:  
You cannot have it both ways. You cannot have a jury of only Unionists and then tell the world that this was a fair trial. You would lose public opinion in the South and turn him into a martyr.

Cynthia Nicoletti:  
That is really interesting. One thing that has been running throughout this conversation is that you pointed to a lot of fictions, a lot of dualities of thinking. And this is such an indictment of my profession. In law it's just allowed. There is a difference between legality and morality. And there should not be, and there is.

The government is hypocritical or two-faced. And I think the answer is yes, but they get boxed into corners that maybe they do not anticipate. Looking back at this now, this is such a mess. Why don't you just shoot him?

Larry Bernstein:  
The genius of the American system is that there are certain questions that are legal in nature and others are political. And these questions get properly sorted. The real trouble arises when the legal profession decides to interfere in the political realm. We are facing that hurdle right now with Trump.

For Jefferson Davis's treason trial, there would be two judges. There was the local Federal Judge Underwood and Chief Justice of the US Supreme Court Salmon Chase who was riding the circuit who would also sit on the bench.

Justice Chase was a political animal and planned to run for President, and Chase saw no benefit for him convicting Davis.

Cynthia Nicoletti:

The distinction between individual goals and the whole government's goal is all over this case. The prosecutors, they try to figure out ways to tell the public if this case goes sideways, we did not want to have anything to do with it.

There's a duality of purpose with a lot of the individual actors who are concerned about their own careers, maybe more than the government's case. Shockingly, these are people with an ego. And Chase is one of these people. He is perpetually running for president. And in 1868 when Davis's case is up, he is running for president. And this time he wants to run on the Democratic ticket, and he does not want to be in the position of having convicted Jefferson Davis. And what he tries to do is to run away from this case. After the 14th Amendment is ratified in the summer of 1868, he knows Davis's lawyers, and he gets together with one of them, and he reads the 14th amendment aloud in Section 3 of the 14th Amendment says that you are disqualified from office if you have participated in the rebellion.

And he says, I read Section 3 as saying that that is the only conviction you can have for treason that removes the idea of independently trying somebody for treason who is subject to Section 3 of the 14th amendment. And this is, dare I say, a surprising reading of Section 3, that it would also cut off the possibility of treason prosecutions to Davis's lawyer. But Davis's lawyers take that suggestion and they run with it, and they present that argument to Chief Justice Chase who finally manages to make it to trial. And then he accepts that argument. That is not what you're supposed to do as a judge is tell the lawyers what to argue.

Larry Bernstein:

For the benefit of the audience, I want to step back and explain what we are talking about. Here is Section 3 of the 14th amendment.

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

This is the same section that was used to remove Trump from the presidential primary ballot in Colorado and Maine. This Section 3 of the 14th amendment has been so rarely applied. And here it is central to both Trump and Jefferson Davis cases.

Salmon Chase was the sitting Chief Justice of the US Supreme Court when the 14th Amendment was passed. And Chase interprets Section 3 to limit the US government for an act of rebellion to only disqualification of certain government positions. No more death penalty for treason.

The civil war ends, and the former Confederate States elect new representatives to the US Congress, and no surprise they are all former confederates. They include the biggest players like the Confederacy's Vice President Stephens. What happens?

Cynthia Nicoletti:

Article 3 does allow Congress to remove the disabilities. They just refuse to seat them, and they can do that. Thad Stevens comes up with this when the Confederate starts showing up as being elected from these states, he just says, each House can decide the qualifications of its members, and they just refuse to seat them. But then after a while, they do start taking some of these former confederates in Congress. Congress just gives up after the end of military reconstruction in 1870, and they seat these people.

Larry Bernstein:

This is a fascinating aspect of the political process.

You have both short and long-term goals. You want to win the next election, but you want a functioning democracy that includes reintegrating the South into the country. The Democrats recognized that white Southerners will be their political allies for a long time. The Democrats want and need these congressmen in the House and Senate. And the Republicans are boxed because they want a functioning national democracy even if it means including their political opponents.

Cynthia Nicoletti:

This goes to your overall point about democracy. Secession has run through the whole conversation, which is after the war, the Republican party in Congress have two choices. One is that they have got to reconstruct a Union where they reintegrate the Confederates in some way, or they've got to keep them under military rule, maybe indefinitely, who knows? But if you believe in democracy, you have to find a way to rebuild a bridge with these people. They are going to be in the country now. You can either just put them under the boot of Republicans for a generation, a hundred years, forever, or you got to figure out a way to live with them. And the choice they made was to reintegrate them quickly.

Larry Bernstein:

Compare Trump versus Jefferson Davis as it relates to Section 3 of the 14th Amendment. This is a provision that was drafted with the purpose of preventing Confederates from getting into Congress and other offices which failed its original purpose. And today that same provision is being used against Trump to prevent his reelection.

Cynthia Nicoletti:

Well I think that there are a lot of technical questions about whether Section 3 of the 14th Amendment applies.

Larry Bernstein:

How would you compare the application of Section 3 of the 14th Amendment to Jefferson Davis and Donald Trump?

Cynthia Nicoletti:

To prove that Davis committed treason is easy. The secession part makes that hard because it's not clear whether or not it removes his duty of loyalty. To have treason, you need levying war against the United States. He is the commander in chief of the Army and there are massive acts of violence. I mean we have the war. This is harder with Trump in terms of saying whether there's an act of violence. There is the riot at the Capitol, and that certainly counts as violence, but what exactly is Trump's role in causing that?

There are some First Amendment arguments that he did not incite it directly. But one thing that really strikes me about these two trials that it was hard to convict Davis because the act of treason was so big. It is a war, and it's the whole region that's involved in it. Then it becomes hard to convict him in any Southern court, and potentially with the act at the Capitol, maybe it's too small. Some people want to say that Donald Trump's involvement was not enough, or that the act of treason was not enough. Maybe Jefferson Davis is too big to jail. Maybe Trump has the opposite problem.

Larry Bernstein:

Abraham Lincoln was denied being on the presidential ballot in ten of the Southern states in the election of 1860. Lincoln was not going to win any of the slave states in that election, but it shows that the desire to remove your political opponent from the ballot has precedent. Today in the blue states of Colorado and Maine, they are trying to get Trump off their presidential ballot. History repeats itself.

Cynthia Nicoletti:

I read Section 3 as probably disqualifying Trump but that is a legal matter. My sense is that the Supreme Court is not going to throw him off the ballot. Ultimately, they do not want to do that

because they think that that saps the political process or the right to vote. Even if the legal remedy says we are going to preclude the democratic process from operating here. I mean that is what the 14th Amendment does. It says whether you got the votes or not, you cannot have this office. But I think politics is going to be allowed to operate to make that decision politically even if the law here probably says that they should not have the room to do that. In the United States, we leave a lot of things up to the political process. And this goes to these questions that you are raising about secession.

If the local populace has the democratic expression that they want something like the secession crisis, that ultimately, they are denying local populations the opportunity to leave if they want. American democracy is sometimes in conflict with legal rules like the 14th Amendment that says, this should be precluded.

Larry Bernstein:

President Andrew Johnson ultimately pardons the officers of the Confederacy and as a result, there is no treason trial for Jefferson Davis. The former president of the confederacy Jefferson Davis walks, and he dies in his own bed.

I end each episode with a note of optimism. What are you optimistic about as it relates to the decision not to try Jefferson Davis?

Cynthia Nicoletti:

I am optimistic that the case ultimately was papered over because it was too dangerous. The outcome of the case could have been potentially quite catastrophic. I do not know that Chase did the right thing in disassembling and trying to avoid it, but I do think we could have gotten the wrong outcome. And then there was the potential of having another civil war.

They thought that there could have been violence again. If Davis had been convicted and hanged that might have happened, had he become a martyr for the lost cause. The idea of the rule of law coming back into the United States and that we do have a decision that was not dangerous on the books is a good thing. Avoidance was the right outcome in his case.

Larry Bernstein:

Thanks, Cynthia, for joining us today.

If you missed our previous podcast the topic was did Oswald act alone in assassinating JFK. Our speaker was Gerald Posner who is the author of the book entitled Case Closed: Lee Harvey Oswald and the JFK Assassination. Gerald worked for years researching this book and has investigated the major conspiracy theories related to the murder of JFK. This year is the 60th anniversary of his assassination.



The podcast is split into two. In Part 1, we discussed Lee Harvey Oswald's psychological make-up, his time in the Marines, his decision to move to the Soviet Union and his work to support Fidel Castro. We reviewed all of Oswald's movements on the day that JFK got shot from the moment he woke up and grabbed his rifle from the garage to his arrest after murdering the Dallas police officer JD Tibbit.

In Part 2 we discussed the events at Parkland Hospital, JFK's bizarre and unprofessional autopsy, Oswald's murder by Jack Ruby on live TV, Oswald's KGB file, and the Mob's role in the conspiracy.

I would now like to make a plug for next week's podcast with Patrick Ruffini who is the author of the book *Party of the People: Inside the Multiracial Populist Coalition Remaking the GOP*. I want to learn from Patrick how the Republicans will persuade Black and Hispanic voters to join their White Working-Class brethren.

You can find our previous episodes and transcripts on our website [whathappensnextin6minutes.com](http://whathappensnextin6minutes.com). Please subscribe to our weekly emails and follow us on Apple Podcasts or Spotify.

Thank you for joining us today, good-bye.