

TRUMP, TREASON, AND THE CIVIL WAR: LEARNING LESSONS FROM THE FAILURE OF THE POST-CIVIL WAR PROSECUTIONS

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In the aftermath of the January 6 attack on the United States Capitol, one question looms large: should former President Donald Trump be prosecuted for his role in fomenting the insurrection? This Note answers that question affirmatively using the Civil War as a case study. Expanding on scholarly work showing that the Civil War and January 6 are analogous, this Note examines the mostly failed prosecutions of Confederates in the aftermath of the Civil War. Despite indicting numerous top Confederate officials for treason, prosecutors were ultimately thwarted by a series of amnesties proclaimed by President Andrew Johnson. This Note follows a series of indicted Confederates, comparing their cases with Trump's. It then examines the long-term consequences of failing to try the top Confederates and whether similar consequences might result if Trump is not tried for insurrection.

Ultimately, this Note uses the Civil War case study approach to analyze whether Trump should, or could, be tried for treason. Part I reviews the relevant background of the post-Civil War prosecutions and the January 6 attack; Part II then explores numerous lessons learned from the post-Civil War prosecutions before Part III applies those lessons to Trump. These lessons go beyond just Trump: they are instructive for any future nexus of politics and prosecution.

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* J.D. Candidate, University of Arizona James E. Rogers College of Law, 2024. Civil War history has always fascinated me and I am humbled to be able to write about it in the context of a pressing modern legal issue. I express deep gratitude to Professor Christopher Griffin, who supervised this Note and shepherded me through the complicated task of comparing our Nation's past and present, and to all the wonderful folks at *Arizona Law Review* who helped bring this Note to the finish line. I also wish to thank my cat, who sat on my mousepad during nearly every stage of the writing process.

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INTRODUCTION

Early in the morning of May 10, 1865, the Union Army captured the fleeing Jefferson Davis, former President of the Confederacy.¹ It was one of the final chapters in a war that had killed some 750,000 Americans.² The southern secession had led to four years of combat bloodier than any other war in American history, before or since.³ Davis was imprisoned at Fortress Monroe, Virginia, awaiting an uncertain fate.⁴ Among the many pressing issues the country faced at the end of the Civil War, the United States government had to decide how to handle the millions of Confederate soldiers, generals, and politicians. By most accounts, the leaders of the Confederacy had committed outright treason against the United States.⁵ They

1. See John Adam Fox & Benjamin D. Pritchard, *The Capture of Jefferson Davis*, in 3 CIVIL WAR TEXT 25–27 (1964), <https://stars.library.ucf.edu/cgi/viewcontent.cgi?article=1004&context=civilwar-text> [<https://perma.cc/8FKH-NPSJ>]. This amusing compilation, with commentary, of the personal papers of the Union officer who captured Davis provides some first-hand accounts of the considerations and worries at the end of the War.

2. Guy Gugliotta, *New Estimate Raises Civil War Death Toll*, N.Y. TIMES (Apr. 2, 2012), <https://www.nytimes.com/2012/04/03/science/civil-war-toll-up-by-20-percent-in-new-estimate.html> [<https://perma.cc/LR8T-66QF>].

3. *Civil War Casualties*, AM. BATTLEFIELD TR. (Sept. 15, 2023), <https://www.battlefields.org/learn/articles/civil-war-casualties> [<https://perma.cc/5D2A-CEEV>].

4. Ian Mitchell, *The Trial of Jefferson Davis and the Treason Controversy*, 39 N. KY. L. REV. 757, 767–68 (2012). Davis was lucky that cooler heads had prevailed, and he was merely to be imprisoned: in the wake of the Lincoln assassination only a month and a half prior, President Johnson had agreed that Davis was to be summarily executed when captured. Dwight J. Davis, *The Legal Travails of Jefferson Davis: A Review and Lessons Learned*, 23 J.S. LEGAL HIST. 27, 28 (2015). Dwight J. Davis sagely notes that “[i]n recent years, we have seen too many examples of tyrants being overthrown and then thrown to the vindictive mob for execution. Stable societies seldom arise from such an approach.” *Id.* at 78.

5. See, e.g., Mitchell, *supra* note 4, at 767–72.

had waged four years of bloody, brother-on-brother war. Many called for them to be hanged.⁶

The Civil War was one of the most disruptive events in American history.⁷ The upheaval of the prevailing democratic order nearly destroyed the still-fledgling American experiment. That the Country survived is a testament to many incredible figures and many horrible sacrifices. Now, as they contemplate the future of America, politicians and historians often turn to the past as a guide. The Civil War holds a special place in that endeavor because of its immense scale and deep importance.⁸

How does a nation heal from divisive, violent events? After the January 6, 2021 attack on the U.S. Capitol, America was divided over what the federal government should do with the protestors and politicians involved.⁹ Moreover, this question confounded the legal establishment. The “democratic breakdown” evidenced by the January 6 attack has only one other parallel in American history: the Civil War.¹⁰ Despite that breakdown, American democracy survived the Civil War and grew back more resilient. This Note argues that the American Civil War and its aftermath can teach us a lot about our current moment, one in which the Nation seems polarized to the point of fissure.

Though the attack on the Capitol on January 6 was not comparable to the Civil War in scale, it was a defining and disruptive event in American history. It shook the foundations of our democracy and exposed deep cracks in our institutions. How to deal with its aftermath is a looming question in politics and national discourse, especially given the conclusions of the House January 6 Committee;¹¹ as of 2024, the prosecution of its participants is ongoing. In this turbulent time, we can look to history for guidance. America arguably reached the apex of political dysfunction in the aftermath of the Civil War, and we can learn many lessons from the triumphs and failures of the Reconstruction Era.

6. While much ado is made about the neutrality of news in modern times, newspapers had little conception of journalistic neutrality at the time of the Civil War. Most Civil War-era newspaper reports are at best taken with a grain of salt and at worst are outright propaganda. But they do provide useful insight into the opinions of the day. *See, e.g., What Shall Be Done with Jeff. Davis?*, N.Y. TIMES, Apr. 12, 1865, at 4; *The Trial of Jeff. Davis*, N.Y. TIMES, May 5, 1865, at 4.

7. *See* Anthony J. Gaughan, *The Dynamics of Democratic Breakdown: A Case Study of the American Civil War*, 11 BRIT. J. AM. LEGAL STUD. 113, 115–16 (2022). Gaughan examines the leadup to January 6, but not the aftermath, in the context of the Civil War. He argues that the Civil War was a “democratic breakdown,” which is what makes it so useful as a case study and a direct comparison to January 6th.

8. *E.g., id.*

9. *See, e.g.,* Kayla Epstein, *January 6: The Day That Still Divides America, Three Years On*, BBC (Jan. 5, 2024), <https://www.bbc.com/news/world-us-canada-67889403> [<https://perma.cc/GT4E-HCD4>].

10. Gaughan, *supra* note 7, at 115–16.

11. Peter Baker, *Jan. 6 Panel Vividly Detailed the Attack. Accountability Is Another Matter*, N.Y. TIMES (Oct. 13, 2022), <https://www.nytimes.com/2022/10/13/us/politics/jan-6-panel-accountability.html> [<https://perma.cc/6D2G-GHTL>].

Just as the Civil War was “a secession movement by disgruntled election losers,” January 6 was a reaction by “disgruntled election losers.”¹² Drake University Professor Anthony Gaughan has argued that the Civil War and January 6 are directly comparable historical events.¹³ This Note takes the comparison a step further by juxtaposing the aftermath of both events. Most pressingly, it asks: what can be learned from the prosecutions in the aftermath of the Civil War to guide future prosecutions for activities on and before January 6, 2021? Working from the principle that “those who cannot remember the past are condemned to repeat it,”¹⁴ this Note argues that the prosecutions in the aftermath of the Civil War were abject failures and that the Country can learn from those failures when it comes to January 6.

As the Civil War drew to a close, President Abraham Lincoln had a vision of a healed America that would achieve twin aims: forestalling violence by forgiving the South and providing for the rights of freed slaves.¹⁵ Lincoln hoped to avoid prosecuting Confederates.¹⁶ He even joked that it would not be the end of the world if Jefferson Davis escaped capture.¹⁷ But Lincoln’s assassination ended the dreams of an amicable Reconstruction.¹⁸ Afterwards, the North sought blood for the evils that had been waged.¹⁹ Tragically, neither Lincoln’s dream of a peaceful Reconstruction nor the northern desire of a South held accountable were realized. The Nation received the worst of both: Reconstruction was a bitter process that stole the rights of freed slaves and hardened the North and South against each other, and only one Confederate²⁰ was ever held accountable.²¹

Several prominent trials were conducted or attempted in the years immediately following the Civil War. John Wilkes Booth’s co-conspirators, who assassinated Lincoln and had endeavored to assassinate his Cabinet, were put to death by a military trial.²² Henry Wirz, Commandant of Andersonville Prison, was put to death for war crimes he perpetrated as its warden.²³ But no other Confederates faced trial as a result of three general amnesties issued by President Andrew

12. Gaughan, *supra* note 7, at 115.

13. *Id.*

14. GEORGE SANTAYANA, REASON IN COMMON SENSE 172 (1905).

15. LOUIS P. MASUR, LINCOLN’S LAST SPEECH: WARTIME RECONSTRUCTION AND THE CRISIS OF REUNION xv, 186 (2015).

16. *Id.* at 173.

17. *Id.* Ever the storyteller, Lincoln analogizes a Davis escape to that of a temperance lecturer who will not ask for his lemonade to be spiked but relates that if it were spiked without his knowledge, it wouldn’t hurt him much. *Id.* at 172–73.

18. *Id.* at xv.

19. *See infra* Section II.B.

20. This is aside from the Lincoln assassins, but their connection to the Confederacy is ideological at best, and none had served in the Confederate government. *See generally* Martin S. Lederman, *The Law(?) of the Lincoln Assassination*, 118 COLUM. L. REV. 323 (2018).

21. *See infra* Section II.D.

22. Lederman, *supra* note 20, at 414.

23. *Id.* at 455–56. Wirz’s crimes were undoubtedly horrific: under his tenure some 12,000 Union prisoners died of maltreatment, torture, and outright murder. *Id.* at 455.

Johnson.²⁴ Two key figures were indicted but never tried: Confederate President Jefferson Davis and Confederate General Robert E. Lee.²⁵ The story of how both Davis and Lee escaped responsibility for the Civil War has valuable lessons for January 6.²⁶

Prosecutions related to January 6 can be divided into two distinct categories: the insurrectionists who breached the Capitol and the politicians who allegedly goaded their actions—chiefly Donald Trump. Prosecutors have successfully filed charges in the first category, with hundreds of plea deals obtained and a near-perfect conviction record at trial.²⁷ The second category has only generated oblique charges and a great deal of conversation about whether Trump could be charged with further offenses and, if so, under what laws.²⁸ The under-prosecution of the second category raises concerns that top officials will evade consequences, much like Jefferson Davis did. By comparison, the prosecution of the first category raises questions of proportional punishment and whether the Civil War strategy of offering amnesty to the average person would be more conducive to healing the nation.²⁹

We do not face a second civil war—yet.³⁰ But the January 6 attacks have seriously tested the mettle of our system: our legal and political systems have

24. *Infra* Section II.A.

25. JOHN REEVES, *THE LOST INDICTMENT OF ROBERT E. LEE: THE FORGOTTEN CASE AGAINST AN AMERICAN ICON* 2, 64 (2018).

26. *See infra* Sections II.C, E.

27. Kyle Cheney & Josh Gerstein, *Where Jan. 6 Prosecutions Stand, 18 Months After the Attack*, POLITICO (July 7, 2022, 4:30 AM), <https://www.politico.com/news/2022/07/07/jan-6-prosecutions-months-later-00044354> [<https://perma.cc/9ANH-XH3X>].

28. *E.g.*, Barbara McQuade & Chuck Rosenberg, *Should Donald Trump Face Federal Charges for Jan. 6? Two Prosecutors Debate*, TIME (June 21, 2022, 10:49 AM), <https://time.com/6189307/donald-trump-federal-charges-for-jan-6/> [<https://perma.cc/KN5E-RPKF>]; Christina Pazzanese, *Should Trump Be Charged in Capitol Attack?* HARV. GAZETTE (June 29, 2022), <https://news.harvard.edu/gazette/story/2022/06/should-trump-be-charged-in-capitol-attack/> [<https://perma.cc/M77C-GHSH>]. For a breakdown of his charges, see *infra* Section III.B; *see also* Charlie Savage, *The Four Trump Criminal Cases: Strengths and Weaknesses*, N.Y. TIMES (Aug. 28, 2023), <https://www.nytimes.com/article/trump-cases-counts-charges-strengths.html> [<https://perma.cc/9WR3-B6W4>].

29. *See infra* Section III.C, which argues that offering amnesty to the insurrectionists would be a poor choice.

30. While talk of a new civil war has been in the vogue, commentators have pointed out the absurdity of fighting a civil war in the modern age. Sarah Vowell, *What's with All the Fluff About a New Civil War, Anyway?* N.Y. TIMES (Aug. 28, 2022), <https://www.nytimes.com/2022/08/28/opinion/civil-war-america.html?> [<https://perma.cc/SK7V-QK5B>]. Regardless, Americans seem to think civil war is imminent: 50.1% of respondents in a July 2022 poll agreed to the proposition that “in the next several years, there will be civil war in the United States.” *Survey Finds Alarming Trend Toward Political Violence*, U. CAL. DAVIS HEALTH (July 20, 2022), <https://health.ucdavis.edu/news/headlines/survey-finds-alarming-trend-toward-political-violence/2022/07> [<https://perma.cc/YK2L-UFKN>]. As much as Rep. Marjorie Taylor Greene is not representative of mainstream Americans, her secessionist call for a “national

become more unstable in this new decade. As prosecutions of the January 6 insurrectionists (and potentially those in government who goaded or backed their actions) continue, lingering questions remain about how to identify and hold accountable conspirators responsible for a politically calamitous act. Using the Civil War as a backdrop, this Note examines what lessons can be drawn from the history of prosecuting politically divisive cases involving political unrest. It primarily sheds light on one of the most pressing and divisive questions: how should President Trump be prosecuted in connection with January 6? The story of the Confederate prosecutions is used as a case study to demonstrate how legal challenges combined with a fraught political landscape can complicate even seemingly airtight legal cases. To that end, this Note examines how the law did and did not hold Davis and Lee accountable, and questions whether not prosecuting them was the right course.

The popular press has repeatedly suggested that Trump might have committed treason on January 6.³¹ Part of the goal of this Note is to see whether those claims have any basis in the law. The cases of Davis and Lee, who were charged with treason, are useful comparisons.

This Note proceeds in four Parts. Part I examines the factual background and historiography of the end of the Civil War and of January 6. Part II examines the post-Civil War prosecutions of Robert E. Lee, Henry Wirz, and Jefferson Davis, while considering President Johnson's escalating amnesties. Part III examines Donald Trump and January 6 in light of the Civil War prosecutions and considers whether he could or should be tried. A brief Conclusion follows.

I. BACKGROUND ON THE CIVIL WAR'S END AND JANUARY 6, 2021

A. *The End of the Civil War*

The American Civil War began on April 12, 1861, and lasted through the spring of 1865.³² The course of the war has been examined in great detail by other authors,³³ but a short account of the end of the war explains events central to this Note's analysis.

Several large Confederate armies remained in the field in the spring of 1865, among them the Army of Northern Virginia, under General Robert E. Lee's command.³⁴ The Army of Northern Virginia had abandoned Richmond, the Confederate capital, on April 2, 1865, and Union General Ulysses S. Grant was in pursuit.³⁵ Lee's army was bleeding soldiers and morale. His own officers, in near

divorce" is a concerning inflection point in the civil war dialogue. Al Weaver, *Greene Stirs Up Political Storm with 'National Divorce' Comments*, THE HILL (Feb. 23, 2023, 6:00 AM), <https://thehill.com/homenews/house/3870038-greene-stirs-up-political-storm-with-national-divorce-comments/> [https://perma.cc/K3B4-FSHP].

31. E.g., Jeannie Suk Gersen, *Did Trump and His Supporters Commit Treason?*, NEW YORKER (Jan. 28, 2021), <https://www.newyorker.com/news/our-columnists/did-donald-trump-and-his-supporters-commit-treason> [https://perma.cc/Q7SQ-Z5W4].

32. JAMES MCPHERSON, BATTLE CRY OF FREEDOM 844–862 (1988). An exact end-date for the war is uncertain and highly contested.

33. See generally *id.*

34. REEVES, *supra* note 25, at 11.

35. *Id.*

mutiny, insisted on April 7 that Lee surrender.³⁶ Lee was entirely opposed to surrendering, since earlier correspondence with Grant had indicated that, under Lincoln's orders, Grant was unable to negotiate on anything but military matters (and thus might be unable to give Lee amnesty).³⁷ Lincoln wished to decide contentious political issues himself.³⁸ But history intervened.

Part of Lee's army attempted a desperate punch through Union lines in the pre-dawn hours of April 9.³⁹ The attempt failed, and it was obvious that Lee's army was defeated.⁴⁰ Grant and Lee met that afternoon at Appomattox Court House and drafted surprisingly lenient surrender terms.⁴¹ The Army, and its officers, would be paroled. They were free to go home so long as they did not again take up arms. Most crucially, both Lee and Grant took this agreement to mean that there would be no trials for treason, nor prison time, for members of the Confederate Army.⁴² Whether Grant's terms exceeded his mandate only to negotiate military matters would rear its head later.⁴³

For the purposes of this Note, the prosecutions are considered post-Civil War because by the time prosecutions were being considered, the outcome of the war had been sealed.⁴⁴ Perhaps more important is the question of when Reconstruction began, since the Civil War prosecutions are not just part of the end of the war, but part of Reconstruction. The date Reconstruction started is itself contested, but historian Eric Foner makes a compelling case that Reconstruction began on January 1, 1863, with the Emancipation Proclamation.⁴⁵ In that case, it is

36. *Id.* at 12–13.

37. *Id.* at 14–15. This was a considerable concern for Lee, who expected to face the hangman's noose.

38. *Id.*

39. *Id.* at 15.

40. *Id.*

41. *Id.* at 17–18. The meeting actually occurred in the farmhouse of Wilmer McLean; the village simply happened to be named Appomattox Court House. Richard L. Kiper, *A Place Called Appomattox*, 64 *HISTORIAN* 763, 763 (2002) (reviewing WILLIAM MARVEL, *A PLACE CALLED APPOMATTOX* (2000)). History is full of irony: the first major battle of the war had taken place on McLean's property, and the war effectively ended in his parlor. *Id.*

42. REEVES, *supra* note 25, at 18. Grant would later point out that Lee wouldn't have surrendered if he assumed he was going to be hung for treason. *Id.*

43. *Id.* at 19. Lincoln's own stance on the treatment of the rebels had varied a bit. His original proclamation to Grant had been from an order transmitted through Secretary of War Stanton in late February. *Id.* at 14–15. But a March 1865 meeting between Lincoln and Grant on the River Queen established that Lincoln wanted lenient treatment of the rebels. *Id.* at 18–19. Yet he still mandated that Grant not decide political questions while providing Grant leeway to give "honorable terms." *Id.* at 19. Lincoln's death forestalled more authoritative interpretation of the mandate.

44. The Civil War lacks a scholarly consensus on when it ended. A wide range of dates in the Spring of 1865 could be considered the end of the conflict. Legally, the War was not declared over until the next year: August 20, 1866. Proclamation No. 4, 14 Stat. 814 (Aug. 20, 1866).

45. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION* xxvii, 1 (1988). Foner sees the Emancipation Proclamation as imperfect and yet heralding a new

safe to say that the Civil War prosecutions represented one of the opening acts of Reconstruction as prosecutors and politicians wrangled with Reconstruction's greatest question: how to heal the shattered Country.

B. An Overview of January 6, 2021

The hotly contested 2020 presidential election was called for Joe Biden on November 8, 2020, spelling defeat for President Trump and his re-election bid.⁴⁶ Losing is never fun, but Trump seems to have taken the loss particularly hard—even though he saw it coming. His advisors indicated to him that he probably wouldn't win.⁴⁷ Even before Election Day, Trump began a steady propaganda campaign built on the idea that his victory was inevitable and that if he didn't win, it was because the election was rigged.⁴⁸

Donald Trump's win in the 2016 election shocked many people because most election polling had favored his rival, Hillary Clinton.⁴⁹ Aside from showing that pre-election polling is not infallible,⁵⁰ it became the grain of truth in the "Big Lie"⁵¹ that Trump began to weave around the 2020 election. Trump's surprise win in 2016 gave him the basis to claim that it was impossible for him to lose in 2020.

vision of America. *Id.* at xxvii. It envisioned that the bloodshed of the Civil War would do more than just reunite the shattered Country but rebuild it as something stronger and more just. *Id.*

46. Patrick Maks, *Calling the 2020 Presidential Race State by State*, ASSOCIATED PRESS (Nov. 8, 2020), <https://blog.ap.org/behind-the-news/calling-the-2020-presidential-race-state-by-state> [<https://perma.cc/YN6V-5KHD>].

47. Alan Feuer et al., *Jan 6: The Story So Far*, N.Y. TIMES (June 9, 2022), <https://www.nytimes.com/interactive/2022/us/politics/jan-6-timeline.html> [<https://perma.cc/5MB2-ZBWT>].

48. *Id.*

49. Cf. Courtney Kennedy et al., *Confronting 2016 and 2020 Polling Limitations*, PEW RSCH. CTR. (Apr. 8, 2021), <https://www.pewresearch.org/methods/2021/04/08/confronting-2016-and-2020-polling-limitations/> [<https://perma.cc/W3ZD-Y8KU>]. Just because polls favored Clinton did not mean she *would* win. Rather, it was more likely for her to win. Pollsters cannot possibly poll every American who will vote on election day; they can only take a cross-section of the electorate and statistically extrapolate that data.

50. The shock after the 2016 election shows that Americans could probably use better education in understanding statistics. Seventy-seven percent of graduating high schoolers have never taken any form of statistics. Neel Guha & Amy Shen, *Calculus Is Overrated: Why We Should Prioritize Statistics*, STAN. REV. (Feb. 19, 2017), <https://stanfordreview.org/calculus-is-overrated-why-we-should-prioritize-statistics-ec8b147389a3/> [<https://perma.cc/K5D5-K3AN>]. Contrary to the frequent joke that lawyers can't do math, the Author is proud to have been a math teacher for a time prior to law school. The Author reports with sadness that American math education is woefully inadequate. Her personal experience is backed up by international statistics showing the United States lags far behind other nations in math skills. Erin Richards, *Math Scores Stink in America. Other Countries Teach It Differently – And See Higher Achievement*, USA TODAY (Feb. 28, 2020, 5:00 AM), <https://www.usatoday.com/story/news/education/2020/02/28/math-scores-high-school-lessons-freakonomics-pisa-algebra-geometry/4835742002/> [<https://perma.cc/PKS9-7RX3>].

51. Melissa Block, *The Clear and Present Danger of Trump's Enduring 'Big Lie.'* NAT'L PUB. RADIO (Dec. 23, 2021, 5:00 AM), <https://www.npr.org/2021/12/23/1065277246/trump-big-lie-jan-6-election> [<https://perma.cc/KMD7-9RSR>].

Thus, if he lost in 2020, he could claim it was only because his opponents had rigged the election.

The COVID-19 pandemic provided an unlikely and unfortunate boon to what would become the “Stop the Steal” campaign: mail-in-ballots.⁵² As much of the Nation was confined indoors for public health reasons, states expanded mail-in voting to reduce the physical contact required for voting.⁵³ Trump and his supporters latched onto this change and argued that this form of voting allowed for a new and massive vector of election fraud.⁵⁴ There is no evidence that any such wave of voter fraud occurred, but it was believable enough among Trump’s supporters that his rhetoric took hold.⁵⁵ The voter fraud claim was spread by an increasingly bizarre cast of characters, including the CEO of a pillow company, the administrator of an internet troll message board, Trump’s lawyer Rudy Giuliani, and of course, Trump himself.⁵⁶

Trump was very interested in any stories of voter fraud, even if patently absurd. Trump suggested to his aides that the dead were voting, voters were voting twice, and Native Americans were being paid to vote.⁵⁷ At every turn, Trump’s aides and lawyers pointed out that his claims were generally baseless and reinforced that he had lost.⁵⁸ But Trump pushed on, and lawyers filed about 60 lawsuits on his behalf challenging the election results.⁵⁹

When it became apparent that civil suits were not going to work, Trump began to entertain bolder action. Former National Security Advisor Michael Flynn had a conversation with Trump on December 18 wherein Flynn effectively suggested that Trump declare martial law and seize ballots.⁶⁰ While Rudy Giuliani argued that military action would be improper (amid suggestions of invoking the

52. Feuer et al., *supra* note 47.

53. *See id.*

54. *Id.*

55. Judy Woodruff, *Exhaustive Fact Check Finds Little Evidence of Voter Fraud, But 2020’s ‘Big Lie’ Lives On*, PBS NEWS HOUR (Dec. 17, 2021, 6:30 PM), <https://www.pbs.org/newshour/show/exhaustive-fact-check-finds-little-evidence-of-voter-fraud-but-2020s-big-lie-lives-on> [<https://perma.cc/3BHM-DS4E>].

56. Feuer et al., *supra* note 47.

57. *Id.*

58. *Id.*

59. *Id.* Though beyond the scope of this Note, whether Trump’s lawyers violated ethical rules of filing bogus lawsuits could be the subject of further research. The Colorado State Bar already disciplined a Trump lawyer for violating the duty of candor after giving false statements around the 2020 election. Liz Dye, *Trump Lawyer Jenna Ellis Declares Flawless Victory After Stipulation of Misconduct in CO Bar Complaint*, ABOVE THE LAW (Mar. 9, 2023, 1:13 PM), <https://abovethelaw.com/2023/03/trump-lawyer-jenna-ellis-declares-flawless-victory-after-stipulation-of-misconduct-in-co-bar-complaint/> [<https://perma.cc/6TKM-UMY2>].

60. *Cf.* Feuer et al., *supra* note 47. *The New York Times* does not state this conclusion. It notes that Flynn says that he isn’t advocating for the imposition of martial law. *Id.* Yet he goes on to talk about it at length and how it has been used before. Flynn should not be taken at his word: he had been pardoned for making false statements only the month prior. *Id.* It seems more likely that Flynn says he isn’t advocating for martial law so that he has plausible deniability.

Insurrection Act⁶¹), he did investigate whether a civil order could be issued to seize voting machines.⁶²

On January 3, Trump tried to force out Acting Attorney General Jeffery Rosen in favor of Jeffery Clark.⁶³ The tale of two Jefferies had been brewing for some weeks, as Mr. Rosen had proven recalcitrant in the face of entreaties to overturn the election.⁶⁴ Rosen left a bitter and angry meeting on the night of the 3rd having barely retained his position.⁶⁵ During the meeting Trump said, “One thing we know is you, Rosen, aren’t going to do anything to overturn the election.”⁶⁶ Trump relented only after the participants spent hours explaining Clark’s incompetence.⁶⁷ Though it was hardly a victory for justice, keeping Rosen in the job was better than appointing Clark, who had been planning to send a letter to Georgia election officials falsely claiming the federal government could invalidate their election results.⁶⁸

By this point, Trump was running short on time and options to maintain power. But one promising possibility remained: the January 6 vote to certify the Electoral College. The event should have been effectively ceremonial.⁶⁹ The certification vote was defined by 3 U.S.C. § 15, which traces its origin to 1887.⁷⁰ It is the sort of dense, wordy, and highly particularized legislation that requires great effort to understand—seemingly designed solely to formalize the already obvious: who won the general election. Yet it does have a mechanism built in to deal with perfidious electors: “[T]he two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified.”⁷¹ It is this seemingly well-intentioned⁷²

61. 10 U.S.C. §§ 251–53. The Act provides sweepingly, and concerningly, broad military powers to the executive. Ailee Katz, *Insurrection by Any Other Name? Race, Protest, and Domestic Military Intervention*, 55 COLUM. J.L. & SOC. PROBS. 145, 189 (2021) (suggesting that the considerable power of the Insurrection Act should be reined in).

62. Feuer et al., *supra* note 47.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *See* 3 U.S.C. § 15.

70. Lisa Marshall Manheim, *Election Law and Election Subversion*, 132 YALE L.J. FORUM 312, 330 (2022).

71. 3 U.S.C. § 15 (1948), *amended* by Pub. L. 117-328, Div. P, § 109(a) (2022). The Statute goes on to define the particulars of the process; thus, the “mechanism” of § 15 is broader than just the key quoted text. Note that Congress entirely rewrote the first chapter of 3 U.S.C. in 2022 in response to January 6; analyzing the amended version goes beyond the bounds of this Note but is worthy of future research. This Note analyzes the 1948 version because it is the one that Trump relied upon.

72. Dealing with rogue electors is an important safeguard, but probably one that was more pressing in 1887 when instant communication was still limited to the telegraph. In the modern age and given how Trump sought to abuse the fallback mechanism, it is apparent that this mechanism needed reform to prevent manipulation.

fallback mechanism that Trump thought he could use to delay certification of the electoral vote in states he had lost.⁷³

Even this process was not foolproof. To succeed, Trump needed one of two outcomes: (1) each state invalidating the certifications of their electors with the signature of their respective governors; or (2) both the House and Senate agreeing that the electors were invalid.⁷⁴ Even if Vice President Mike Pence had whipped the Senate to vote against the validity of a state's slate of electors, achieving either option was still a considerable task.⁷⁵ But Trump was out of options, so he hung his hat on this last-ditch effort.

Trump then suggested inserting slates of loyalist electors who would go against the popular vote in their districts, but local officials resisted.⁷⁶ He then tried to have Pence delay the counting of the electoral vote, but Pence was not swayed.⁷⁷ On the morning of January 6, Trump called Pence and told him, "You can either go down in history as a patriot, or you can go down in history as a pussy."⁷⁸ Trump ostensibly meant for Pence to use the fallback mechanism in § 15 to send the electoral votes back to the states for reconsideration, thus giving Trump a chance at winning after all.⁷⁹ The stage was set for a legal and political confrontation.

But it turns out the stage had also been set for a more direct sort of confrontation: Trump had organized a speech and protest to be held as the votes were counted. This—Trump's most critical move concerning January 6—had been set in motion weeks earlier, when he tweeted on December 19, 2020 that there would be a last-ditch protest at the Capitol on January 6, 2021. His last words on point were "Be there, will be wild!"⁸⁰ On the morning of January 6, a large crowd gathered near the Capitol to hear Trump speak.⁸¹ Trump gave a lengthy, inflammatory speech. He railed against the media, Democrats, and even those in his own party. The speech was peppered with calls for aggression and strength.⁸²

73. See Feuer et al., *supra* note 47.

74. "But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted." 3 U.S.C. § 15.

75. The states' governors already had to have certified the votes. 3 U.S.C. § 6. This plan would have required having the governors (and by extension their states' election apparatus) flip-flop. Perhaps Trump hoped that the Governors could be convinced of widespread election fraud. But it seems like it would have been a considerable political effort. The other option would have been next to impossible: it meant convincing the Democratic majority in the House to agree that the electoral votes were bad, effectively re-electing Trump.

76. Feuer et al., *supra* note 47.

77. *Id.*

78. *Id.*

79. 3 U.S.C. § 15.

80. Feuer et al., *supra* note 47. Twitter is now called X, but a suitable verb has yet to replace tweeting.

81. *Id.*

82. See *infra* Subsection III.B.3 for an in-depth analysis of his speech; *Transcript of Trump's Speech at Rally Before US Capitol Riot*, ASSOCIATED PRESS (Jan. 13, 2021, 7:11

During Trump’s speech, a group of protestors broke off and approached the Capitol.⁸³ They held up signs and banners of protest, chanting slogans such as “Hang Mike Pence.”⁸⁴ Before his speech ended, the protestors became insurrectionists as they broke through the first layer of police barricades around the Capitol.⁸⁵ After his speech ended, the enlarged crowd of insurrectionists broke through the second layer of barriers and then smashed into the Capitol itself.⁸⁶ Both the Senate and the House were in the middle of debating the certification of the electoral vote when Vice President Pence was suddenly removed from the chambers for his safety.⁸⁷ The Senate was recessed moments later, but the House kept debating.⁸⁸ Trump then tweeted out a taunting attack on Pence.⁸⁹ Insurrectionists continued to flow into the Capitol.⁹⁰ The House went into recess but was called back into session before being dramatically recessed again as the doors to the chamber were barricaded and officers drew guns inside the chambers.⁹¹

The Representatives were evacuated as a protestor was shot and killed trying to break into the Speaker’s lobby.⁹² Sometime during the evacuation, House Minority Leader Kevin McCarthy called Trump and told him to “call off the riot,”⁹³ an explicit acknowledgment by the top House Republican that it was Trump who controlled these insurrectionists. Then insurrectionists broke into the Senate chamber itself.⁹⁴ The National Guard was activated soon after.⁹⁵ More than an hour after insurrectionists breached the Senate, Trump tweeted again.⁹⁶ He nominally called for his rioting supporters to go home, all the while praising them: “We love

PM) [hereinafter *Trump Transcript*], <https://apnews.com/article/election-2020-joe-biden-donald-trump-capitol-siege-media-e79eb5164613d6718e9f4502eb471f27> [<https://perma.cc/MA26-PFNR>].

83. Lauren Leatherby & Anjali Singhvi, *Critical Moments in the Capitol Siege*, N.Y. TIMES (Feb. 13, 2022), <https://www.nytimes.com/interactive/2021/01/15/us/trump-capitol-riot-timeline.html> [<https://perma.cc/SC8H-9GAE>].

84. Feuer et al., *supra* note 47; Leatherby & Singhvi, *supra* note 83.

85. Leatherby & Singhvi, *supra* note 83.

86. *Id.*

87. *Id.*

88. *Id.*

89. “Mike Pence didn’t have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth!” *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. Still, the National Guard wouldn’t arrive for another two hours. *Id.*

96.

It was a landslide election. And everyone knows it. Especially the other side. But you have to go home. . . . There’s never been a time like this when such a thing happened when they could take it away from all of us. From me, from you, from our country. This was a fraudulent election. . . . Go home. We love you. You’re very special.

Id.

you. You're very special."⁹⁷ It took more than an hour after that before the Capitol was declared secure, at which point Trump tweeted yet again.⁹⁸ Far from criticizing his rioting supporters, he implicitly endorsed them: "Go home with love & in peace. Remember this day forever!"⁹⁹

By the end of the day, four insurrectionists had died. One police officer died of his wounds a few days later, and two more officers died by suicide within days of the attack.¹⁰⁰ A further 150 officers were injured.¹⁰¹ Insurrectionists committed roughly \$2,730,000 in property damage.¹⁰² The damage to American institutions and confidence in the democratic process was unquantifiable but considerable.

C. A Note on Historiography and the Value of Historical Comparisons

Before addressing the particulars of the post-Civil War prosecutions and comparing them to January 6, some historiographical limits must be established. Drawing historical comparisons is an enlightening exercise, but those who engage in the practice often feel pressure to overextend the metaphor. As scholar Constantine Fasolt explains in *The Limits of History*, just because something has happened before does not mean it will again.¹⁰³ Historian Eric Foner, writing on Reconstruction, puts it best: "For historians, hindsight can be a treacherous ally. Enabling us to trace the hidden patterns of past events, it beguiles us with the mirage of inevitability, the assumption that different outcomes lay beyond the limits of the possible."¹⁰⁴

97. *Id.*

98. "These are the things and events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots who have been badly & unfairly treated for so long. Go home with love & in peace. Remember this day forever!" *Id.*

99. *Id.*

100. Chris Cameron, *These Are the People Who Died in Connection with the Capitol Riot*, N.Y. TIMES, <https://www.nytimes.com/2022/01/05/us/politics/jan-6-capitol-deaths.html> [<https://perma.cc/TYF3-657Z>] (Oct. 13, 2022).

101. *Id.*

102. Zachary Snowdon Smith, *Capitol Riot Costs Go Up: Government Estimates \$2.73 Million in Property Damage*, FORBES (Apr. 8, 2022, 5:07 PM), <https://www.forbes.com/sites/zacharysmith/2022/04/08/capitol-riot-costs-go-up-government-estimates-273-million-in-property-damage/?sh=3e3bcb5019c5> [<https://perma.cc/GNC3-KVB2>].

103. CONSTANTINE FASOLT, *THE LIMITS OF HISTORY XXI* (2004). This Note is as much a study in history as it is a study in law. The Author's thinking on how to properly cover history is further informed by MARY FULBROOK, *HISTORICAL THEORY* (2002) (positing that all history is essentially theoretical and requires historians, whether knowingly or not, to take theoretical positions); EDWARD CARR, *WHAT IS HISTORY?* (1961) (outdated, but is concise, lucid, and was long the standard intro text to historical analysis); RICHARD J. EVANS, *IN DEFENCE OF HISTORY* (1997) (updating Carr's ideas for the modern age).

104. FONER, *supra* note 45, at 603. Following this quote, Foner goes on to acknowledge where he has speculated, yet stands by the idea that Reconstruction could have ended differently: the newly freed slave could have been secured civil rights and prosperity. *Id.* at 603–04. He then glumly concedes that whatever his hopes for a better outcome, Reconstruction was ultimately a failure. *Id.* at 604. He quotes W.E.B. DuBois: "[T]he slave

With this principle in mind, the connections between the Civil War and January 6 certainly must be understood to have limits. January 6 was undoubtedly a terrible event when it occurred and will likely impact future historians' work. That said, the impact of January 6 simply pales in scope and scale to the full-scale violence and horror of the Civil War. The Civil War ended the lives of hundreds of thousands of people; only a handful died on and after January 6. With the benefit of historical perspective, there is an inclination to see heroes and villains in the Civil War. But January 6 does not yet have the benefit of history. Any attempt to cast its participants as heroic or villainous is misguided. Its alleged perpetrators are innocent until proven guilty. Despite these dimensions of incomparability, the Civil War remains instructive in how (and how not) to handle political prosecutions in the aftermath of democratic breakdown.¹⁰⁵

This metaphor also should not be taken as a moral equivalency. Whatever reasons the January 6 insurrectionists or President Trump had for their actions, it is in no way as dark or evil as the reason the Confederates had for fighting the Civil War: slavery.¹⁰⁶ The point of this Note is not to lump Trump in with the Confederates, but rather analogize similarly challenging historical situations. Still, it should be remembered that factions of the insurrectionists, such as the Oath Keepers, conspired to overthrow the duly elected government of the United States.¹⁰⁷ The insurrectionists also were not entirely divorced from the Confederacy's ideology. In a cruel echo of the Civil War, insurrectionists carried

went free; stood a brief moment in the sun; then moved back again toward slavery." *Id.* at 602.

105. Gaughan, *supra* note 7, at 115.

106. Slavery was undoubtedly the cause of the war. MCPHERSON, *supra* note 32, at vii–viii. Whatever the professed reason for the South's cause, McPherson concludes that it was ultimately a cover for slavery. JAMES MCPHERSON, *THIS MIGHTY SCOURGE: PERSPECTIVES ON THE CIVIL WAR* 3, 7 (2007). McPherson summarizes that even if the war was about state's rights, it was about a state's right to slavery, which meant the war was still about slavery. *Id.* Lincoln's second inaugural address captures that slavery, even if in complex ways, was behind the War: "These slaves constituted a peculiar and powerful interest. All knew that this interest was somehow the cause of the war. To strengthen perpetuate and extend this interest was the object for which the insurgents would rend the Union even by war . . ." Abraham Lincoln, 16th President of U.S., Second Inaugural Address (Mar. 4, 1865), in ABRAHAM LINCOLN PAPERS AT LIBR. CONG., Apr. 1865.

107. Lindsay Whitehurst et al., *Oath Keepers' Rhodes Guilty of Jan. 6 Seditious Conspiracy*, ASSOCIATED PRESS NEWS (Nov. 29, 2022, 7:53 PM), <https://apnews.com/article/oath-keepers-founder-guilty-of-seditious-conspiracy-42affe1614425c6820f7cbe8fd18ba96> [<https://perma.cc/47WD-F4V3>]. Seditious conspiracy is defined in 18 U.S.C. § 2384. The Oath Keepers are a far-right self-proclaimed militia group. Ryan Lucas, *Who Are the Oath Keepers? Militia Group, Founder Scrutinized in Capitol Riot Probe*, NAT'L PUB. RADIO (Apr. 10, 2021, 7:01 AM), <https://www.npr.org/2021/04/10/985428402/who-are-the-oath-keepers-militia-group-founder-scrutinized-in-capitol-riot-probe> [<https://perma.cc/DY2L-BEDZ>]. They take their name from the oath to protect the Constitution from enemies, both foreign and domestic. *Id.* Rather than being a highly structured organization, it is a loosely cohesive group for likeminded militant "patriots." *Id.* The idea that the group are patriots is decidedly at odds with their anti-government mission. This seeming contradiction is explained away by their founder, Steward Rhodes, on the conspiracy theory grounds that the current government is run by communists. *Id.*

Confederate flags inside the Capitol.¹⁰⁸ Even more troubling, white supremacy was a key motivating factor of January 6.¹⁰⁹

The same sorts of questions asked in the aftermath of the Civil War are now being asked in the aftermath of January 6. How should the alleged perpetrators be handled? How do we best heal the nation? What will the long-term impacts be? If anything, the fact that these questions have been asked before, and that the Country survived the tumultuous period after the Civil War, should offer hope that the United States will again answer these questions and persevere.

With an understanding of the events at the end of the Civil War, along with a historiographic framework through which to examine them, it is time to examine the legal wrangling that began as the Confederacy surrendered en masse.

II. POST-CIVIL WAR PROSECUTIONS

A. General Amnesty

The question of what to do with the millions of paroled Confederate soldiers was answered soon after the War's end. President Andrew Johnson, taking the reins after Lincoln's assassination, issued a series of increasingly broad and lax amnesties toward Confederates.¹¹⁰ The winding path towards these amnesties reflected a significant change of heart on Andrew Johnson's part.

In early April, after the fall of Richmond, Andrew Johnson stated that "treason is the highest crime known in the catalogue of crimes," and "treason must be made odious and traitors must be punished."¹¹¹ Contemporaries noted that Johnson appeared much tougher on traitors than Lincoln.¹¹² After Lincoln's death, Johnson spent hours pacing, repeatedly muttering "they shall suffer for this."¹¹³ At his first cabinet meeting as President, Johnson noted that he was "not disposed to treat treason lightly" and vowed to treat leading rebels with "exemplary severity."¹¹⁴ In a speech in April, a crowd chanted with regards to Davis, "Hang him!" To which Johnson responded, "Yes! I say hang him twenty times!"¹¹⁵ Contemporary commentators felt that Johnson was the firm hand needed to punish the South and that Lincoln would have been too kindhearted to do what needed to be done.¹¹⁶ Northerners felt that, while the average Confederate soldier should be held

108. Rashawn Ray, *What the Capitol Insurgency Reveals About White Supremacy and Law Enforcement*, BROOKINGS INST. (Jan. 12, 2021), <https://www.brookings.edu/blog/how-we-rise/2021/01/12/what-the-capitol-insurgency-reveals-about-white-supremacy-and-law-enforcement/> [<https://perma.cc/N6ZP-RYS9>].

109. *Id.*

110. Greater commentary on the proclamations may be found in Samuel T. Morison, *Presidential Pardons and Immigration Law*, 6 STAN. J. CIV. RTS. & CIV. LIBERTIES 253, 309–311 (2010). Despite the title, there is a surprisingly in-depth coverage of the Civil War, since much of the legality of the pardon power was determined in the aftermath of the Civil War, as President Johnson sought to sabotage Reconstruction.

111. REEVES, *supra* note 25, at 30–31.

112. *Id.* at 31.

113. *Id.* at 30.

114. *Id.* at 36.

115. *Id.* at 61.

116. *See id.* at 37–44.

blameless, the leadership of the Confederacy should be targeted for accountability.¹¹⁷

Johnson's turn towards amnesty is even more interesting because Congress was adamantly against it. In the view of congressional Republicans, Article IV of the U.S. Constitution gave Congress the power to determine how the Confederacy should re-enter the Union because members of the Confederacy, no longer considered states after secession, were now akin to territories and thus subject to congressional mandate.¹¹⁸ As much as congressional Republicans would likely have been the better masters of Reconstruction, their interpretation was a stretch. The southern states had left the Union, but they never renounced their statehood—they only renounced *the Union*.¹¹⁹ But congressional Republicans had a stronger argument when it came to readmitting states. Since Congress controlled the admission of states, under this view, the reintegration of the South would be on Congress's terms.¹²⁰ Even if the Confederate states were not territories, congressional Republicans had a solid argument that the states were no longer part of the Union, and thus Congress could control how they would re-enter “into this Union.”¹²¹

Johnson's opposing view was that the states never actually seceded because they had no legal right to secede; thus, the power to deal with the Confederates lay with him because they were still citizens of the United States.¹²² Consequently, the solution for Johnson was to be purely executive, rather than legislative.¹²³ The Supreme Court implicitly agreed with Johnson's interpretation in *Texas v. White*.¹²⁴

117. *Id.* at 44.

118. ANNETTE GORDON-REED, ANDREW JOHNSON 108 (2011). “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory . . . belonging to the United States.” U.S. CONST. art. IV, § 3. Congressional Republicans were understandably eager for this interpretation; “all needful Rules and Regulations” is a considerable grant of power.

119. *E.g.*, Virginia Ordinance of Secession, Va. Convention of 1861, ENCYCLOPEDIA VA.: VA. HUMANS. (Apr. 17, 1861), <https://encyclopediavirginia.org/entries/virginia-ordinance-of-secession-april-17-1861/> [<https://perma.cc/Q6AM-V9VQ>]. Virginia's secession ordinance states its purpose as “[t]o repeal the ratification of the Constitution of the United States of America, by the State of Virginia, and to resume all the rights and powers granted under said Constitution.” *Id.* Thus, Virginia continued to exist as a state, whilst repudiating the Union.

120. “New States may be admitted by the Congress into this Union.” U.S. CONST. art. IV, § 3.

121. *Id.*

122. *Id.*; GORDON-REED, *supra* note 118, at 108.

123. *Id.* at 110.

124. 74 U.S. 700, 725 (1868) (wartime bonds issued by Confederate Texas are invalid), *overruled by* Morgan v. U.S., 113 U.S. 476 (1885). “When . . . Texas became one of the United States, she entered into an indissoluble relation.” *Id.* Modern commentators have written at length about the Constitutionality of secession. Even if secession were illegal, that did not stop the Confederacy from seceding and fighting a four-year civil war. *See generally* Daniel W. Hamilton, *Still Too Close to Call? Rethinking Stamp's “The Concept of a Perpetual Union,”* 45 AKRON L. REV. 395 (2012) (arguing that understanding secession as a

But the Supreme Court's declaration of the invalidity of secession was less a bold proclamation of law than a de jure codification of the *fait accompli* established on the battlefields of the Civil War.¹²⁵ Even if the states had a right to secede, the Civil War established that the right to secession could only be won by the sword.¹²⁶

Although Johnson's interpretation carried the day, congressional Republicans had the last laugh when they impeached Johnson (without a Senate conviction), sinking his career even as they failed to get rid of him.¹²⁷

Johnson issued the first "amnesty and pardon" proclamation on May 29, 1865, which contained exceptions for 14 classes of persons, including Confederate Army officers above the rank of Colonel and those who held civil office in the Confederacy.¹²⁸ Such excepted individuals would have to apply directly to the President to be pardoned.¹²⁹ The next proclamation followed more than two years later on September 7, 1867, and only exempted three categories from the general pardon: top Confederate officials, including the President, Vice President, and cabinet officials, as well as officers who had held rank higher than Brigadier-General, those who abused prisoners of war, and those involved in the assassination of Lincoln.¹³⁰ The pardon exceptions map very closely onto the prosecutions that were attempted for President Jefferson Davis and General Robert E. Lee as top officials, Henry Wirz for abuse at Andersonville Prison, and the Booth conspirators

constitutional question is insufficient: it was also a moral question, a referendum on slavery, and a reflection of a North–South power struggle); Daniel A. Farber, *The Fourteenth Amendment and the Unconstitutionality of Secession*, 45 AKRON L. REV. 479 (2012). Farber argues that the Civil War cemented the unconstitutionality of secession and that regardless of constitutionality, the War forever changed how Americans viewed themselves: now they were not just citizens of their states but of the Nation as a whole. *Id.* at 512.

125. Cynthia Nicoletti, *The American Civil War as a Trial by Battle*, 28 L. & HIST. REV. 71, 74 (2010).

126. The American view of secession through war is not shared globally; the constitutions of numerous nations allow for secession in one form or another. *See generally* Tom Ginsburg & Mila Versteeg, *From Catalonia to California: Secession in Constitutional Law*, 70 ALA. L. REV. 923 (2019).

127. GORDON-REED, *supra* note 118, at 110, 140. Johnson's impeachment emerged out of several years of Republican discontent with Johnson, including riots in the South, and a generally botched job of Reconstruction. The 40th Congress (seated 1867) was overwhelmingly Republican and sought to bring Johnson to heel. The inciting incident was Johnson's firing of Secretary of War Edwin Stanton, a holdover from the Lincoln cabinet and a dear personal friend of Lincoln. The firing of Stanton was mostly pretextual however, and the real issue was that Johnson was attempting to restore a racialized version of the South that Republicans were aghast with. *See* Wesley M. Oliver, *The Search for Precedent in the Andrew Johnson Impeachment*, 39 QUINNIPIAC L. REV. 107, 120 (2020).

128. Proclamation No. 37, 13 Stat. 758 (May 29, 1865). The proclamation avoids ascribing legitimacy to the Confederacy by describing the civil officials as "pretended" and the "pretended confederate government," notably not capitalizing the Confederacy whilst still capitalizing United States later in the proclamation. For more on Johnson's idea that the Country was to pretend the War never happened, see GORDON-REED, *supra* note 118, at 10.

129. Proclamation No. 37, 13 Stat. 758 (May 29, 1865).

130. Proclamation No. 3, 15 Stat. 699 (Sept. 7, 1867).

(even though the Booth conspirators and Wirz had been tried and executed, respectively, in 1865).¹³¹

The September 7 proclamation makes the proclamation of July 4, 1868, all the more interesting.¹³² Seeking “to remove all appearances or presumptions of a retaliatory or vindictive policy on the part of the Government,” Johnson pardoned all Confederates except those under “presentment or indictment” for treason.¹³³ That left just Jefferson Davis and Robert E. Lee, who were then under charge for treason.¹³⁴ The story of the proclamations ends on yet another auspicious date: Christmas Day, 1868. Johnson’s final pardon did not exempt anyone and absolved all involved in the treasonous rebellion.¹³⁵ As a result, even Jefferson Davis reclaimed his liberty, which was a considerable reversal for President Johnson, who had originally been lauded as tough on rebels for placing a \$100,000 bounty on Davis’s head.¹³⁶ Johnson’s action was all the more surprising given that he held a personal grudge against Davis from their days in Congress together.¹³⁷ If forgiving Davis was both politically and personally anathema to Johnson, why did it happen? Johnson’s change of mind was likely motivated by his twin desires to win re-election and enforce white supremacy.¹³⁸ How far might a modern president go against their own or their party’s stated ideals to be re-elected or reinforce their own ideology?

B. Prosecution Takes Shape

The first efforts at prosecuting Confederates began less than a month before Johnson’s first amnesty proclamation. On May 2, 1865, Secretary of War Edwin Stanton ordered the Army’s top lawyer, Brigadier General Joseph Holt, to provide a list of possible conspirators in the Lincoln assassination.¹³⁹ This investigation indicated that Jefferson Davis might have been behind the plot, and a \$100,000 bounty was promised for his capture, along with lesser bounties for other conspirators.¹⁴⁰ The capture of numerous top Confederates followed. Davis was captured on May 10.¹⁴¹ Confederate Vice President Alexander Stephens was arrested at his home the following day and imprisoned for the next five months.¹⁴²

131. Donald F. Paine, *Witness for the Prosecution*, TENN. BAR J., Aug. 2000, at 31. The Booth conspirators are beyond the scope of this Note since they were not themselves Confederates, even if they were sympathizers. For an instructive examination of the Booth conspirators’ trial, see generally Lederman, *supra* note 20.

132. This date seems to have been chosen for its patriotic resonance.

133. Proclamation No. 6, 15 Stat. 702 (July 4, 1868).

134. Mitchell, *supra* note 4, at 758.

135. Proclamation No. 15, 15 Stat. 711 (Dec. 25, 1868).

136. GORDON-REED, *supra* note 118, at 95.

137. REEVES, *supra* note 25, at 34.

138. FONER, *supra* note 45, at 191.

139. REEVES, *supra* note 25, at 45.

140. *Id.*

141. See JOHN ADAM FOX & BENJAMIN D. PRITCHARD, *THE CAPTURE OF JEFFERSON DAVIS* 25–27 (1964). Contrary to popular imagining, Davis did not try to flee in a woman’s dress. But he did wear a waterproof coat that looked quite like a woman’s dress, and northern cartoonists needed no further urging to draw him thusly. REEVES, *supra* note 25, at 46.

142. *Id.*; see ALEXANDER STEPHENS, *RECOLLECTIONS OF ALEXANDER H. STEPHENS; HIS DIARY KEPT WHEN A PRISONER AT FORT WARREN, BOSTON HARBOUR* (1865).

Many other Confederates evaded capture, including Confederate Secretary of War John C. Breckinridge (who had run in the 1860 presidential election).¹⁴³

But one crucial Confederate remained free: Robert E. Lee. The northern press chafed at this notion; they wanted him hanged. The sentiment was most colorfully expressed by the *Ohio Farmer*: “Robert E. Lee is now so poor that he has not the wherewith to clothe himself. If this be true, let the government relieve him at once—give him ten feet of rope, and six feet of soil. If every *traitor* earned this reward, Lee surely is the one.”¹⁴⁴ The desire to do something about Lee was echoed in the (perhaps hyperbolic) fears of a congressman who noted in 1865 that, if the political system could not be reformed, it seemed that Lee might well be elected president in the 1868 election.¹⁴⁵ *The New York Times*, in addition to calling for Lee to be hanged, also argued that the surrender terms Grant offered to Lee were purely military calculations and did not stop Lee from being charged with treason separately.¹⁴⁶

Treason is the only crime explicitly defined in the Constitution: “Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.”¹⁴⁷ Congress was empowered to decide the punishment, and it had chosen death.¹⁴⁸ Whether the Confederates would have been convicted of treason, and whether those convictions would have been upheld, remain open questions. A case considering the issue was certified for review by the Supreme Court but became moot after the Christmas Day amnesty and was never addressed again.¹⁴⁹

The U.S. Supreme Court looms just as large in modern times as it did in the post-Civil War prosecutions. Even the prosecutors of 1865 understood that the Supreme Court would be making momentous decisions.¹⁵⁰ Crucially, the Court might have decided whether the war was waged between nations or rather, was an internal rebellion; the former might absolve the Confederates while the latter would leave them vulnerable to treason charges.¹⁵¹ But such a decision would have probably arrived only after charges had been filed or even after a conviction was secured.

143. REEVES, *supra* note 25, at 47.

144. *Id.* (emphasis in source).

145. FONER, *supra* note 45, at 252.

146. *What Shall be Done with Jeff. Davis?*, N.Y. TIMES, Apr. 12, 1865, at 4; *The Paroled Rebel Soldiers and the General Amnesty*, N.Y. TIMES, July 4, 1865, at 4; REEVES, *supra* note 25, at 49.

147. U.S. CONST. art. III, § 3.

148. For the Punishment of certain Crimes against the United States, 1 Cong. Ch. 9, April 30, 1790, 1 Stat. 112, Ch. 9 § 1. The antiquated language of the 1700s is apparent: “[S]uch person or persons shall be adjudged guilty of treason against the United States, and shall suffer death.” *Id.* The discretion for the modern punishment has been considerably widened: it ranges from death to a mere minimum of five years in prison. 18 U.S.C. § 2381.

149. Mitchell, *supra* note 4, at 758. The underlying issue was whether Confederates owed a duty of allegiance to the United States or whether, in joining the Confederacy, had thrown off that duty. *Id.*

150. *Cf.* REEVES, *supra* note 25, at 56.

151. *Id.*

Looming over a January 6 prosecution is an equally momentous question: could President Trump actually be prosecuted, given that he was already impeached and acquitted for the events of that day? The Office of Legal Counsel (“OLC”) offered an opinion in 2000, in the aftermath of the Clinton impeachment, that asserted that a president could be tried criminally despite an impeachment acquittal.¹⁵² But the OLC’s commentary on a matter is not legally binding.¹⁵³ If anything, the OLC memo on presidential double jeopardy merely identifies an issue on which Trump’s lawyers could seize. Given that impeachment is a political, not a criminal, prosecutorial tool, it is hard to see how double jeopardy would apply. But on such a crucial issue, it seems almost inevitable that the Supreme Court would have to weigh in. It is a fool’s errand to guess the Court’s decision in a theoretical showdown over presidential double jeopardy. For that matter, it may not be that double jeopardy will reach the Supreme Court. The more important lesson is that no matter what, a case involving Trump would very likely reach the Supreme Court on at least some constitutional questions; indeed, as of the date of publication, the Supreme Court has already taken up at least one issue surrounding Trump’s legal troubles.¹⁵⁴

Unfortunately, the post-Civil War prosecutions do not provide a good answer for how to deal with the Supreme Court in the shadow of such uncertainty. They merely identify this opacity as a looming problem. Because of Johnson’s amnesties, none of the Civil War cases ever made it to trial, let alone appeal.¹⁵⁵ Thus, the outcome of any modern case at the Supreme Court is speculative at best.

The Civil War cases show what *not* to do as a judge or with judges. Leading up to the potential prosecutions, the government was heavily influenced by and in frequent communication with Judge John C. Underwood, a federal district judge in Virginia.¹⁵⁶ Underwood suggested who might be tried, for which crimes, and how.¹⁵⁷ Furthermore, Underwood—as a Southerner loyal to the Union—had personally led a delegation to Andrew Johnson to call for the prosecution of disloyal

152. See Whether a Former President May Be Indicted & Tried for the Same Offenses for Which He Was Impeached by the House & Acquitted by the Senate, 24 Op. Att’y Gen. 110, 34 (2000).

153. See generally Arthur H. Garrison, *The Bush Administration and the Office of Legal Counsel (OLC) Torture Memos: A Content Analysis of the Response of the Academic Legal Community*, 11 CARDOZO PUB. L. POL’Y & ETHICS J. 1 (2012).

154. See *Trump v. United States*, No. 23-939, 2024 WL 833184 (D. Colo. Feb. 28, 2024) (granting Writ of Certiorari). Note how history repeats itself: two cases surrounding the Nixon fiasco reached the Supreme Court. See generally *United States v. Nixon*, 418 U.S. 683 (1974); *Nixon v. Adm’r. of Gen. Servs.*, 433 U.S. 425 (1977).

155. This is not to say that a modern case must first reach conviction, as the Supreme Court has expressed a certain willingness to hear emergency injunctions and stay cases. However, the power of the stay (and by extension the emergency appeal) had not been confirmed at the time of the Civil War cases; the Court would not weigh in until *The Slaughterhouse Cases* in 1869, and it took many more decades for the jurisprudence to evolve. Jill Wieber Lens, *Stays of Injunctive Relief Pending Appeal: Why the Merits Should Not Matter*, 43 FLA. ST. U. L. REV. 1319, 1329 (2016).

156. REEVES, *supra* note 25, at 52–56.

157. *Id.*

Southerners.¹⁵⁸ While Underwood was indeed helpful to the government, he had a considerable conflict of interest: he would be the judge who presided over Davis's trial (alongside Supreme Court Justice Salmon P. Chase) and would oversee indictments of 39 top Confederates, including Lee.¹⁵⁹

Furthermore, Underwood's neutrality was undermined by being an obvious political appointee: he was a vocal Republican, having been one of the Party's earliest leaders.¹⁶⁰ He had spoken at the 1856 Republican Convention with great notoriety and campaigned across the country for Lincoln in 1860.¹⁶¹ Lincoln rewarded Underwood with an appointment as a federal judge in eastern Virginia—to the great horror of Southerners, who had no shortage of hatred for Underwood.¹⁶² His ethics were also questionable: he had thrown out a suit brought by an estate that was wrongfully confiscated and eventually sold to his own wife.¹⁶³ Underwood may have had the power of the federal government at his back, but he lacked the support of the southern public he was making judgments for. Underwood's *ex ante* and *ex parte* communications deeply undermined the legitimacy of his court. But he was the judge nonetheless, and his court would soon set in motion the indictments of the top Confederates, Robert E. Lee chief among them.

C. Robert E. Lee

Robert E. Lee's service as a Confederate general was not a foregone conclusion. He had served 34 years as a United States Army officer, including service in the Mexican–American War.¹⁶⁴ But when the Civil War came, Lee turned in his Army commission and signed up with the Confederate forces.¹⁶⁵ Lee spent the next four years as a top Confederate general, leading armies in numerous campaigns before surrendering at Appomattox.¹⁶⁶ It seemed obvious to northern observers in 1865 that Lee had committed treason in forsaking his military oath to the United States and fighting for the Confederacy.¹⁶⁷ But actually convicting Lee would be a different matter.

Before Lee could be prosecuted, the legal question left unsettled by the surrender terms at Appomattox had to be solved: did the parole that Grant had given

158. *Id.*

159. *Id.* at 52.

160. *Id.* at 52–55.

161. *Id.*

162. *Id.* Reeves includes an editorial which describes Underwood with 25 very unique insults: “[He is an] absurd, blasphemous, cowardly, devilish, empirical, fanatical, ghoulish, horrible, ignorant, jacobinal, knavish, lily-livered, maudlin, nondescript, odious, poisonous, querulous, rascally, sycophantic, traitorous, unrighteous, venal, witless, extravagant, yankeeish zero.” *Id.* at 54.

163. The Supreme Court properly reversed this case. *McVeigh v. United States*, 78 U.S. 259, 267–68 (1871); Davis, *supra* note 4, at 54–55.

164. REEVES, *supra* note 25, at 16, 20.

165. MCPHERSON, *supra* note 32, at 280–82. At the outbreak of the War, Lee was an American Army colonel; Secretary of War Winfield Scott “considered Lee the best officer in the army.” *Id.* at 281. Lee was offered a command in the Union Army but turned it down in favor of loyalty to his home state of Virginia. *Id.*

166. *Id.* at 848–50.

167. *See supra* Section II.B.

at Appomattox prevent Lee from being tried in a civilian court? General Benjamin Butler, the Army's top lawyer, opined that it did not, and thus a prosecution could go ahead.¹⁶⁸ But wrangling over the question of parole delayed Lee's prosecution into the summer.¹⁶⁹ At any rate, the non-resolution of the parole question did not stop prosecutors from seeking an indictment.

Robert E. Lee was indicted for treason by a grand jury in Norfolk, Virginia in June 1865.¹⁷⁰ All told, the grand jury indicted 37 top Confederates.¹⁷¹ But the parole question reared its head again: Attorney General Speed placed the prosecutions on hold indefinitely.¹⁷² The exact reason why is disputed, but the likeliest story is that General Grant objected, arguing that Lee was still protected by the parole granted at Appomattox.¹⁷³

The next period of Lee's legal escapade was confounded by questions of whether Lee had qualified for a pardon under Johnson's first amnesty.¹⁷⁴ The answer seemed to be no.¹⁷⁵ Rather intriguingly, Lee sat before a House committee investigating the War on February 17, 1866.¹⁷⁶ Combined with testimony from Judge Underwood before the same panel in January 1866, Lee's testimony revealed a lurking problem: uncertainty that a Virginia jury would actually convict Lee.¹⁷⁷ Both Underwood and Lee expressed their skepticism that a jury composed of Virginians would ever convict Lee, the Virginia native and hero of the Confederacy.¹⁷⁸

168. REEVES, *supra* note 25, at 60–61. General Butler had been relieved of command of the Army of the James by Grant, but the Army had kept him around for his legal expertise. *Id.* at 60.

169. Though a few months delay is fast by today's standards, the delay was a snail's pace for the nineteenth century, which saw extremely fast trials; for example, the Booth conspirators were tried and executed within just 12 weeks of Lincoln's assassination. Lederman, *supra* note 20, at 414, 418. Of course, speedy does not inherently mean just—at least one of the Booth conspirators was put to death against the wishes of even the military commission that passed the sentence. *Id.* at 414.

170. REEVES, *supra* note 25, at 1.

171. *Id.* at 63. Thirty-seven Confederates were indicted on a single day alone, but two more would be indicted at later dates, including Jefferson Davis the following year, to add up to the 39 total indictments that Judge Underwood oversaw. *Cf. id.* at 52. *See also infra* Section II.E.

172. REEVES, *supra* note 25, at 81.

173. *Id.* at 81–85. Stories often grow long in the telling, and the role of Grant seems to have been greatly exaggerated through the years. *Id.* But it does seem that Grant said at least something to Johnson, and Johnson in turn ordered Attorney General Speed to put the trials on hold for the time being. *Id.* at 82.

174. *Id.* at 87–95.

175. *Id.*

176. *Id.* at 124–29.

177. *Id.* at 125. The absurdity of both a judge and a defendant before that judge appearing before the same House committee to discuss ongoing litigation cannot be overstated.

178. *Id.* at 124. It seems that Lee did not have to be tried in Virginia; after all, his armies had fought in both Pennsylvania and Maryland, where northern juries would be amenable to conviction. *Id.* at 155. But Attorney General Speed insisted on Virginia. *Id.*

This reality check mirrors one of the chief difficulties that might arise in trying Trump: putting together a jury that could in fact convict him. Underwood's perhaps tongue-in-cheek suggestion of packing the jury was obviously an improper solution.¹⁷⁹ But his comment reflects a thorny reality: even with the most seasoned counsel at voir dire, how could a prosecutor parse the underlying political commitments, for or against Trump, that might taint a juror's decision? Packing a jury based on politics is clearly not the answer. But it seems hard to imagine that politics could be ignored in such an ideologically charged trial. Even beyond loyalty or hatred of Trump, it may be that some citizens feel it inappropriate to convict a president at all.

Lee's prosecution was revived on April 2, 1866, when President Johnson declared the War over in all states but Texas.¹⁸⁰ Thus, Grant's military parole no longer applied to Lee (if it had ever applied to civilian court proceedings, which is dubious).¹⁸¹ But Lee remained in limbo because the government sought to first try Jefferson Davis, which would set an example.¹⁸² As explored in Section II.F, this choice backfired. In contrast, January 6 prosecutors seem to have made a smart calculation: they didn't wait to try Trump before going about trying the insurrectionists. But in going after Davis first, Civil War prosecutors lost out on easier cases like Lee's, which might have provided precedent and worked out legal issues in a lower-stakes environment.

Davis's trial (and thus Lee's) was again delayed when Congress redistricted the circuit courts in 1867, which in turn saw the replacement of Attorney General Speed and several of the prosecution's trial team.¹⁸³ Trial was reset for March 1868 and then again for June because Chief Justice Chase was presiding over President Johnson's impeachment.¹⁸⁴ To add to the comedy of errors, trial was reset again to November, after the presidential election, because the prosecutor who would be leading the Davis trial had also been the lead prosecutor at the impeachment.¹⁸⁵ Davis was nearly tried.¹⁸⁶ But the lame-duck Andrew Johnson, having failed to secure re-election, now acted with the Christmas Day amnesty, rendering the entire process moot.¹⁸⁷ Lee's indictment would be formally dropped in February 1869.¹⁸⁸

Though Lee was never tried, applying the facts of Lee's conduct to the elements of treason is instructive. The Treason Clause provides two different elements, either of which is sufficient for conviction. The government could have argued either that (1) Lee had levied war against the United States; or (2) that he had "adhered" to the enemies of the United States, thereby "giving them Aid and

179. *Id.*

180. *Id.* at 151.

181. *Id.*

182. *Id.* at 151–52.

183. *Id.* at 158, 163.

184. *Id.* at 164.

185. *Id.* at 165.

186. *See infra* Section II.F.

187. *See supra* Section II.A.

188. REEVES, *supra* note 25, at 185.

Comfort.”¹⁸⁹ The first element is easily met—Lee was a top general for the Confederate states, which he led in four years of warfare against the Union. The second element is also met: Lee “adhered to” the enemies by straightforwardly joining them.¹⁹⁰ His service as a general was certainly an aid and comfort to the enemy. Even though he himself was not firing the cannons, he was the director of military action on the battlefield. But despite this seemingly easy conviction, the prosecutors’ mistakes delayed the process so much that a conviction could never be secured.

The final chapter in Lee’s story is alarming because it shows that Congress is susceptible to historical revisionism. In April 1975, the 94th Congress posthumously issued Lee a full pardon, which included restoring full rights of citizenship.¹⁹¹ The matter of Lee’s citizenship aroused much enthusiasm around the Bicentennial.¹⁹² But the hoopla was overblown. Lee was a citizen; the rights he had died without were only those set forth under the Fourteenth Amendment: but for a vote by two-thirds of Congress, he couldn’t hold public office.¹⁹³

That didn’t stop the 94th Congress from seizing on his case and restoring his rights through the supposed technicality that he had applied for a pardon (assumedly under Johnson’s first amnesty¹⁹⁴) by submitting a loyalty oath that had purportedly been lost by bureaucratic error.¹⁹⁵ In fact, it seems that his loyalty oath was not lost, but rather purposefully denied by the Johnson Administration.¹⁹⁶ Ultimately, the 94th Congress’s Joint Resolution 23 (“JR 23”) is erroneous: it assumes that Lee had fewer rights than he really did.¹⁹⁷ JR 23 ignores the Christmas Day amnesty, which would have restored to Lee the “other rights of citizenship” that

189. U.S. CONST. art. III, § 3.

190. “Adhere” does not require one to join the Nation’s enemies, though Lee makes the analysis simple. *Cf.* Captain Jabez W. Loane, IV, *Treason and Aiding the Enemy*, 30 MIL. L. REV. 43, 58–62 (1965). Captain Loane explores the meaning of adhere but somewhat unsatisfyingly does not come to a clear conclusion on its meaning, likely because treason is an infrequent offense, especially in modern times. *See id.* The meaning has not been much clarified since, though some authors have briefly touched on the issue; it seems ripe for further scholarly work. *E.g.*, Paul T. Crane, *Did the Court Kill the Treason Charge?: Reassessing Cramer v. United States and Its Significance*, 36 FLA. ST. U.L. REV. 635 (2009).

191. The act to forgive Lee was almost universally well received at its passage in 1975; it was seen as a unifying action after the divisions of the Vietnam War. REEVES, *supra* note 25, at 2–6. For thoughts on what it meant to forgive Lee, see generally Ron Spears, *Lincoln and Robert E. Lee: Justice and Reconciliation for Whom?*, 110 ILL. B.J. 44 (2022).

192. REEVES, *supra* note 25, at 2–6.

193. U.S. CONST. amend. XIV, § 3. Lee’s other rights had been restored by the Christmas Day amnesty, which provided for “restoration of all rights, privileges, and immunities under the Constitution and the laws which have been made in pursuance thereof.” Proclamation No. 15, 15 Stat. 711 (Dec. 25, 1868).

194. This amnesty required those excepted from a pardon to apply to the President. Proclamation No. 37, 13 Stat. 758 (May 29, 1865).

195. S.J. Res. 23, 94th Cong., 89 Stat. 380 (1975).

196. The Act was based on a supposedly rediscovered loyalty oath of Lee’s, but Reeves shows that the oath was never lost and argues that Andrew Johnson must have known of it and still chose to not restore Lee’s citizenship. Reeves views the Act as a discordant episode of historical forgetfulness. REEVES, *supra* note 25, at 2–6.

197. *See* S.J. Res. 23, 94th Cong., 89 Stat. 380 (1975).

JR 23 claims he did not have.¹⁹⁸ JR 23 also restored Lee’s rights on the false premise that his lost submission to the 1865 amnesty would have restored his right to hold public office.¹⁹⁹ It would not have. Only a two-thirds vote of Congress would have restored that particular right.²⁰⁰ It seems that Johnson did not pardon Lee at first because he wanted Lee tried. Johnson eventually changed his mind—for insidious reasons.²⁰¹ But Congress seems to have ignored all of this. Even the legislative history materials describe Lee as “one of the greatest Americans of all time.”²⁰² A stunning reversal for a man who faced the hangman’s noose 110 years prior. Lee’s exculpation by the 94th Congress is not only counterfactual; it is a sign that the political process can be hijacked by historical revisionists.

As Trump and his supporters push for a counterfactual narrative that he won the 2020 election, it is worrying that the 117th Congress only narrowly avoided being hijacked by revisionists. It seems possible that a future Congress, more removed from the events of 2020–2021, might succumb to the pressures of historical revisionism and exculpate Trump. Whether Trump would be exculpated is of heightened importance because he might find himself in the same boat as Lee: stripped of the right to hold public office.²⁰³ If he were convicted of treason, he would certainly lose the right to hold office again.²⁰⁴ A sedition conviction would

198. *Id.*; cf. Proclamation No. 15, 15 Stat. 711 (Dec. 25, 1868).

199. Cf. S.J. Res. 23, 94th Cong., 89 Stat. 380 (1975).

200. U.S. CONST. amend. XIV, § 3. In fairness to Congress, its outcome was still technically correct. More than two-thirds of Congress passed S.J. Res. 23, so it had the right to restore his citizenship. It passed the House by a vote of 407–10 and the Senate by a similar margin. But that does not remedy the erroneous logic on display in S.J. Res. 23.

201. See *infra* Section II.F.

202. Restoring Posthumously Full Rights of Citizenship to Gen. R. E. Lee, S. REP. NO. 94-44 (1975).

203. U.S. CONST. amend. XIV, § 3. “No person shall . . . hold any office, civil or military, under the United States . . . who, having previously taken an oath . . . as an officer of the United States . . . 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.” *Id.* State courts, most notably in Colorado, have seized on this issue: Colorado’s Supreme Court declared Trump ineligible for the ballot in January 2024. *Anderson v. Griswold*, 2023 CO 63, ¶ 5 (Colo. 2023), *cert. granted, sub nom.* *Trump v. Anderson*, 144 S. Ct. 539 (2024). The Supreme Court’s resulting decision is not unexpected: faced with a classic issue of federalism, the Court chose federal power over state power and held that the states lack the power to disqualify national candidates. *Trump v. Anderson*, 144 S. Ct. 662, 671 (2024). Indeed, it is easy to imagine how states disqualifying national candidates in a patchwork could cause chaos. *Id.* What is unexpected about the decision is its breadth: the Court opined that such a removal could only result from Congressional legislation enacted for the purpose of removing the right to hold office. *Id.* at 667. The Court’s requirement for enabling legislation flies in the face of the idea of disqualification as a broad remedy intended to rebuild the country in peace after insurrection.

204. The likeliest way Trump would be convicted of treason would be “in adhering to their Enemies, giving them Aid and Comfort.” U.S. CONST. art. III, § 3; see also *infra* Section III.B. This aligns nearly exactly to the text of the Fourteenth Amendment: “or given aid or comfort to the enemies thereof.” U.S. CONST. amend. XIV, § 3. The enabling legislation requirement for disqualification is met in the modern treason statute, which provides for the disqualification from office. 18 U.S.C. § 2381.

also strip him of the right to hold office, but it is less clear whether other convictions relating to January 6 could also disqualify him.²⁰⁵

Ultimately, Lee's case is a disappointing failure: a combination of prosecutorial delay and political malfeasance which ensured he never faced justice. But there is one notable Confederate who did face justice.

D. Henry Wirz

Henry Wirz, Commandant of the Andersonville Prison, was the only Confederate put to death for treason.²⁰⁶ His story is a stark contrast to Lee's.

The treatment of prisoners of war ("POWs") in the Civil War was not originally a material issue.²⁰⁷ A robust prisoner exchange scheme ensured that soldiers were equally swapped, and those who could not be immediately exchanged were paroled. But the parole system broke down in May 1863 when the Confederate Congress declared that captured Black soldiers would either be enslaved or executed.²⁰⁸ The North responded by holding southern prisoners as hostages to persuade the South not to follow through on its threat. The South, in turn, responded by ignoring the parole system: it returned 35,000 paroled soldiers to the front lines, and prisoner exchanges ceased.²⁰⁹ Consequently, POW camps swelled in size.²¹⁰

The South also massacred Black Union soldiers who had been captured by the hundreds after several battles ceased, often in a particularly cruel fashion that presaged the lynchings of the Jim Crow era to come.²¹¹ Those Black POWs who

205. Key here is the phrase "shall have engaged in insurrection or rebellion against the same." U.S. CONST. amend. XIV, § 3. This might apply if, say, Trump were convicted of seditious conspiracy (18 U.S.C. § 2384), which has been used against other January 6 participants. The Supreme Court in *Trump v. Anderson* explicitly called out sedition under 18 U.S.C. § 2383 (the section immediately before seditious conspiracy) as an extant law properly passed by Congress which prescribes disqualification from office as punishment. 144 S. Ct. at 670. Yet, seditious conspiracy does not mention disqualification from office as a punishment, which leaves open the question of whether it is sufficient enabling legislation. 18 U.S.C. § 2384. Colorado tried to remove Trump from the ballot box even absent a conviction. Nicholas Riccardi, *Colorado Supreme Court Will Hear Appeal of Ruling that Trump Can Stay on Ballot Despite Insurrection*, ASSOCIATED PRESS (Nov. 21, 2023, 5:23 PM) <https://apnews.com/article/trump-insurrection-14th-amendment-appeal-colorado-7436a07c9d0259bba9a13136c541cf2c> [<https://perma.cc/ZEK7-J46T>].

206. FONER, *supra* note 45, at 190. This should not be interpreted as support for the death penalty, but rather a reflection that Civil War era punishment was much quicker to jump to the noose. See also Michael Brazao, *The Death Penalty in America: Riding the Trojan Horse of the Civil War*, 4 MOD. AM. 26 (2008) (noting that the death penalty remains unusually prevalent in the South, a legacy of the racial animus of the Civil War).

207. MCPHERSON, *supra* note 32, at 791.

208. *Id.* at 791–92.

209. Lewis L. Laska & James M. Smith, 'Hell and the Devil': *Andersonville and the Trial of Captain Henry Wirz*, C.S.A., 1865, 68 MIL. L. REV. 77, 79 (1975).

210. MCPHERSON, *supra* note 32, at 792.

211. A firsthand account from a Union soldier described how Confederates treated Black POWs: they were variously taken into the woods to be hung, summarily executed by bullet on a riverbank, beaten to death with the butt of a rifle, and dragged through the streets with a rope around their neck. *Id.* at 793.

weren't killed tended to be treated poorly.²¹² The Lincoln Administration put considerable thought into its response to the massacres and mistreatment, even going so far as to order absolute retaliation: for every Union soldier executed, one Confederate soldier would be executed.²¹³ In reality, this was not implemented, as Lincoln sadly noted to Frederick Douglass that a cycle of retaliation would have no end, and thus the only way to achieve justice for the fallen would be to win the war and prosecute those responsible.²¹⁴ Lincoln's mid-war prosecution posture is an interesting contrast to Lincoln's later desire for forgiveness, but it helps explain Johnson's initial desire for post-war prosecution and makes the final non-prosecution of anyone besides Wirz all the more curious.

Commandant Henry Wirz was in charge of the Andersonville Prison, the cruelest of the Confederate POW camps.²¹⁵ Originally designed to hold 10,000 people, it was filled to the brim with 45,000 Union POWs, 13,000 of whom died in its inhumane conditions.²¹⁶ Each man was allotted a mere 34 square feet (compared to 180 square feet per man in even the most cramped Union prison).²¹⁷ The open-air prison provided no shelter in the sweltering southern heat.²¹⁸ There was not enough food and not even a plan for clean water or removing sewage.²¹⁹ The attitude of Southerners towards the prison fueled northern anger: one southern editorial lauded that "300 sick and wounded Yankees died at Andersonville. We thank Heaven for such blessings."²²⁰

Wirz, for all the horrific acts he committed, was hardly given just treatment. On May 7, 1865, after the Union Army had liberated Andersonville, a Union officer approached Wirz and informed him that General J. H. Wilson requested his presence.²²¹ This was only a sliver of the truth: Wilson had ordered his arrest.²²² But Wirz, thinking he had safe passage, went to Wilson freely.²²³ Wilson arrested Wirz, who was already notorious in the northern press.²²⁴ He was to be tried before a military tribunal, and the Judge Advocate General Corps ("JAG") assumed the prosecution.²²⁵ Interestingly, JAG at first sought to show that there had been a general conspiracy among top Confederates, and Wirz was one of a number of

212. *Id.* at 795–96.

213. General Orders No. 252: Order of Retaliation (July 30, 1863), in ABRAHAM LINCOLN PAPERS AT LIBR. CONG., Aug. 1863; MCPHERSON, *supra* note 32, at 796.

214. MCPHERSON, *supra* note 32, at 794–95.

215. *Id.* at 796. Laska & Smith, *supra* note 209, at 78. Smith & Laska describe Andersonville as a synonym for misery and compare it to "Ypres and Guernica and Auschwitz." *Id.*

216. MCPHERSON, *supra* note 32, at 796.

217. *Id.*

218. *Id.*

219. Laska & Smith, *supra* note 209, at 82. Clean water was eventually provided, not by Wirz, but by the prisoners themselves who dug a well. *Id.*

220. MCPHERSON, *supra* note 32, at 797–98.

221. Laska & Smith, *supra* note 209, at 87–88.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 89.

officers investigated.²²⁶ But only Wirz was charged.²²⁷ Despite Wirz's undeniable culpability, he appears to have been singled out for prosecution, mostly because of northern press coverage of Andersonville and the fact that he was a foreigner (having been born in Switzerland).²²⁸

Wirz never received the benefit of Johnson's escalating amnesties because he was hanged on November 10, 1865.²²⁹ Wirz has the dubious distinction of being the only Confederate tried for war crimes, despite the wide range of other horrors perpetrated during the War.²³⁰ Lincoln's wish that those who massacred Black POWs be held accountable was never realized,²³¹ in part because of Lincoln's death and also because of Andrew Johnson's sabotaging of Reconstruction. The failure to bring justice to these men, and all others who suffered from war crimes in the Civil War, is a stain on the Nation's history.

As comparisons go, Wirz's case does not have many direct modern-day parallels. While the crimes of January 6 could have had intense political ramifications (potentially spelling the end of American democracy and ushering in an era of chaos), Wirz's outright mass murder was viscerally horrific in a way that the events of January 6 were not and could not have been. Instead, Wirz serves best as a contrast to the Confederate wrongdoers who were never tried. Wirz's crimes were so blindingly obvious that it was easy to try and execute him. His responsibility for the deaths of those in his custody was self-evident. But it is a poor legacy of the Civil War that only the most blindingly obvious war-crime prosecution was successful.

Wirz's case conversely raises one of the most bedeviling questions of the Civil War prosecutions: how should prosecutors try cases that might conceivably result in acquittal? This is not to say that prosecutors routinely bring cases they can't win; prosecutors are held to an ethical duty not to file charges they do not reasonably think can result in a fair conviction.²³² Rather, when prosecutors try someone, especially a political figure, they must grasp that an acquittal might be worse than not trying the person in the first place. An acquittal not only exonerates the defendant, but it can also permit their ideology to flourish.²³³

The true lesson of Wirz's case is that he was the exception that proved the rule: the government was so afraid to lose cases in the aftermath of the war that it

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 128–29.

230. MCPHERSON, *supra* note 32, at 796–97. Wirz was tried before a military tribunal, as the Confederacy was still being treated as a belligerent. Laska & Smith examine the controversy behind this decision at some length. Laska & Smith, *supra* note 209, at 91–97.

231. Since Wirz was the only Confederate tried for war crimes, and all Confederates were pardoned by 1868, those who committed the massacres were never tried. Cf. MCPHERSON, *supra* note 32, at 797; *see supra* Section II.A.

232. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *Appendix J: Criminal Justice Standards for the Prosecution Function: Standard 3-4.3*, in LEGAL ETHICS – THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY (July 2021 Update).

233. This idea is explored further with Lee and Davis; *see infra* Section II.F.

did not prosecute as many Confederate officials as it could have. At any rate, in the prosecutor's caution, the political process—vis à vis Johnson's amnesties—made further prosecution moot. So, if Wirz's prosecution was speedy and successful, why did the very next trial, that of Jefferson Davis, never happen?

E. Jefferson Davis

The case of Jefferson Davis is at once instructive and perplexing. Davis's rise to the Presidency of the Confederacy began, ironically, in the very same United States Army that he would spend four years fighting against.²³⁴ He served in the Army in his youth before serving as one of Virginia's senators from 1847 to 1853, then serving a stint as Secretary of War.²³⁵ He was again a Virginia senator from 1856 until he resigned in January of 1861.²³⁶ At that point, he found himself promptly elected as the President of the nascent Confederacy for his combination of political, military, and administrative experience.²³⁷ Davis's election deserves extra consideration here because it was hardly democratic. He was chosen by a slate of electors, but there had been no popular vote to empower those electors.²³⁸ He served until his capture in 1865.²³⁹

Davis's imprisonment at Fortress Monroe became a potent arrow in the defense's quiver.²⁴⁰ Conditions were abysmal, which generated considerable public sympathy for Davis; in fact, the conditions of his imprisonment may have contributed to his subsequent lionization in the "Lost Cause" mythos.²⁴¹ Even if Davis's trial ended inconclusively, his imprisonment helped him win in the court of public opinion.

Scholar Cynthia Nicoletti notes that a loss in the Davis case would have undercut the moral victory secured by General Lee's surrender at Appomattox.²⁴²

234. Davis, *supra* note 4, at 33–35. Dwight J. Davis provides a far more excellent overview of Jefferson Davis's life and trial than this Note could, so the Author defers to his excellent research and lessons learned.

235. *Id.* at 30, 33–35.

236. *Id.* at 33–35.

237. *Id.* at 35.

238. *Id.* Davis was confirmed in a popular vote election later that year. *Id.* But given that his initial election was unopposed, his re-election was a *fait accompli*; it is difficult to imagine the Confederacy switching its leader in the first year of the War. Further, the popular vote election should not be considered as the will of the people at large; a mere 48,522 votes were cast, of which Davis won 97% (reflecting widespread disenfranchisement, including of Black people and women). *CSA President Popular Vote, OUR CAMPAIGNS*, <https://www.ourcampaigns.com/RaceDetail.html?RaceID=162560> [https://perma.cc/SKS7-2DS7] (last visited Mar. 23, 2024). Compare that to the 1860 federal election, in which 90,122 votes had been cast in Alabama alone, let alone the entire South. *1860 Presidential Election Results, UNIV. CAL. SANTA BARBARA PRESIDENCY PROJECT*, <https://www.presidency.ucsb.edu/statistics/elections/1860> [https://perma.cc/YP9U-KS9Y].

239. See Fox & Pritchard, *supra* note 1.

240. Davis, *supra* note 4, at 44–50.

241. *Id.*

242. Cynthia Nicoletti, *Did Secession Really Die at Appomattox?: The Strange Case of U.S. v. Jefferson Davis*, 41 U. TOLEDO L. REV. 587, 592 (2010).

Extreme caution was taken in selecting a venue.²⁴³ In May 1866, Davis was indicted for treason in the same court that Lee had been indicted in.²⁴⁴ Secretary of War Stanton wished for Davis to be tried in a military court.²⁴⁵ But in *Ex parte Milligan*, the U.S. Supreme Court reasoned that the civil courts were the proper venue for trying ex-Confederates.²⁴⁶ An able team of nationally renowned lawyers was assembled to defend Davis.²⁴⁷ The judges—of which there were to be two due to a law requiring that the Supreme Court Justice responsible for the venue’s federal district also be present—included none other than the problematic John C. Underwood.²⁴⁸ The other was the Chief Justice of the United States, Salmon P. Chase.²⁴⁹

Davis’s trial was considerably delayed by a true comedy of errors,²⁵⁰ during which time he was finally granted bail.²⁵¹ Thus it was on December 3, 1868 that the trial opened.²⁵² But first, the court had to consider a motion to dismiss.²⁵³ The judges ended up split on the motion: Chase for dismissal, Underwood against.²⁵⁴ Such a split could only be appealed directly to the Supreme Court, so the trial was delayed

243. *Id.* While Attorney General Speed may have been cautious, it doesn’t mean he made the right decision. As noted in Section II.C, Virginia—the former capital of the Confederacy—was an inopportune place to try former Confederates.

244. REEVES, *supra* note 25, at 64.

245. Mitchell, *supra* note 4, at 768.

246. 71 U.S. 2, 131 (1866) (the opinion begins at page 108: the preceding 106 are a transcript of the voluminous arguments). *Milligan* concerned an Indiana resident of 20 years who had been arrested by Indiana’s militia during the War, tried by a military tribunal, and sentenced to death. *Id.* Mr. Milligan had never been a soldier, and Indiana was never the site of any Civil War battles. *Id.* The Court reasoned that only a prisoner of war could be tried before a military tribunal, and Milligan was hardly a prisoner of war; he was a civilian and should have been tried in a civilian court. *Id.* at 131.

247. Davis, *supra* note 4, at 50–54.

248. *Id.* at 54–56.

249. *Id.* Chase is an interesting fellow with an odd life story. *See generally* DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* (2005) (his biography is best told in Kearns’ book, which follows not only Chase, but the other Republican hopefuls in the 1860 presidential election who were appointed to Lincoln’s cabinet). Chase had served in the Lincoln cabinet and beat out several other Lincoln cabinet members to earn the appointment to the Court in 1864 upon the death of Chief Justice Roger B. Taney. *Id.* at 676–81. Chase was undoubtedly an improvement over Taney, who had been responsible for the Court’s appalling decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

250. *See supra* Section II.C for a full accounting.

251. REEVES, *supra* note 25, at 163. Davis, *supra* note 4, at 62–67. It was an ominous sign that when he finally walked free, a crowd of some 5,000 men assembled to cheer his freedom. *Id.* at 67.

252. Davis, *supra* note 4, at 74.

253. *Id.* The defense argument rested on a nuance in the Fourteenth Amendment that prevented former Confederates from holding office. *Id.*; *see supra* Section II.C. They argued that this provision had repealed the Treason Clause, and since it was passed after the crime had been committed, was thus an ex post facto law. Davis, *supra* note 4, at 74.

254. Davis, *supra* note 4, at 74

once more.²⁵⁵ But President Johnson intervened with the Christmas Day amnesty just a few weeks later, and Davis went free.²⁵⁶

That Davis never stood trial would have been unbelievable to many northerners in 1865. Even before his capture, *The New York Times* carried a piece that did not stop at assuming Davis would go to trial for his crimes; it also offered advice to the eventual prosecutor on how to do their job: “It is always becoming in a prosecuting officer to abstain, in making his opening statement, from invectives, embellishment and appeals to the passions.”²⁵⁷

A century later, the 95th Congress offered a full pardon to Davis.²⁵⁸ Davis’s pardon lacks any formal explanation in its text, so it is not conducive to the same sort of analysis as Lee’s pardon by the preceding Congress. But the same concerns apply. Davis was not just some low-level Confederate—he was *the* top official. If anyone had committed treason, it was the former Senator Davis. Far from being the final healing capstone of the bygone Reconstruction era, the twentieth century pardons of Lee and Davis were only the latest in a long line of failures to properly grapple with the legacy of the Civil War.

F. The Legacy of Civil War Amnesty

While the post-Civil War prosecutions were the opening acts of Reconstruction,²⁵⁹ they were deeply unsuccessful; the rest of Reconstruction fared little better. Despite the considerable promise of Reconstruction, the experiment was ultimately a failure that left the South underdeveloped, segregated, and straining beneath the yoke of Jim Crow. Did the attendant failure to formally stamp out Confederate ideology, i.e., not prosecuting its chief agonists, contribute to the South’s woes?

The Reconstruction Era, despite its accomplishments in reuniting the Country, fell far short of its promises.²⁶⁰ The reasons are many, not least of which was the presidency of Andrew Johnson, who harbored immense racial animus and was not cut out for the task of binding the Country back together.²⁶¹ For better or worse, Johnson oversaw the start of Reconstruction, which shaped the future of America.²⁶² Johnson’s Reconstruction failures are countless. He pulled Black troops out of the South, enabling repression of Black citizens by militias.²⁶³ Johnson voided

255. *Id.*

256. *See supra* Section II.A.

257. *The Trial of Jeff. Davis, supra* note 6, at 4.

258. S.J. Res.16, 95th Cong., 92 Stat 1304 (1978).

259. *See supra* Section I.A.

260. FONER, *supra* note 45, at xxvii.

261. GORDON-REED, *supra* note 118, at 12. Gordon-Reed reprints a quote from Johnson that emblemizes his true sympathies as a white Southerner: “[T]he people of the South, poor, quiet, unoffending, harmless, would not be trodden under foot to protect [n-words].” *Id.*

262. *See id.* at 14–15.

263. *Id.* at 114. This is not to say that Johnson was entirely incapable; the Johnson Administration did have some positive achievements, though they were mainly the work of Secretary of State Seward. Seward prevented war with France in 1866 after French troops

agreements that had set aside land so that freed slaves could be given their “forty acres and a mule,” preventing the Nation’s best chance at reparations and sabotaging the Freedmen’s Bureau Act.²⁶⁴ Johnson stood idly by as his southern home-rule policy ignited a period of intense lynching activity.²⁶⁵ Johnson’s extension of amnesty to even Jefferson Davis and Robert E. Lee is a central part of the Reconstruction legacy. But were those decisions correct?

The words of scholar Dwight J. Davis best capture the long-term consequences of not trying Jefferson Davis:

The failure to have an open hearing on the evils of rebellion and a shaming of the leaders who chose this disastrous course left a vacuum that was soon filled by the glorification of the rebellion in the myth of the “Lost Cause.” Central to the myth was the near deification of leaders like Jefferson Davis and many others Would fair but measured punishment for the leaders of the rebellion have caused the South to more closely examine the roots of the rebellion? Under this hypothesis, the South might well have more deeply assimilated into the Union and have avoided the more than one hundred years of resistance to racial equality.²⁶⁶

The post-war lives of other Confederates only reinforce the harm that the failure of prosecution caused. Alexander H. Stephens, Vice President of the Confederacy, was imprisoned briefly at the end of the War but never indicted.²⁶⁷ His “punishment” was that he would be elected to Congress in 1873 and later serve as Governor of Georgia.²⁶⁸ General Jubal Early, who had fled abroad to avoid prosecution, returned after Johnson’s Christmas Day amnesty.²⁶⁹ Early would go on to become a progenitor and avid advocate of the “Lost Cause” ideology that supposed that the South’s fight had been noble, yet doomed from the start.²⁷⁰

intervened in Mexican affairs and purchased Alaska (which admittedly received mixed reception at the time). *Id.* at 105–06.

264. *Id.* at 115–16; see also Henry Louis Gates Jr., *The Truth Behind ‘40 Acres and a Mule,’* PBS, <https://www.pbs.org/wnet/african-americans-many-rivers-to-cross/history/the-truth-behind-40-acres-and-a-mule/> [<https://perma.cc/VY96-YC8N>] (last visited Apr. 13, 2024). The “forty acres and a mule” idea emerged from General Sherman’s General Field Order No. 15, which set aside land in South Carolina and Florida, with 40 acres allotted per freed family. *Id.* Sherman did not specify a mule in his original order, but later provided that the army would lend a mule to needy settlers. *Id.* Johnson voided Sherman’s Order No. 15 set asides, as well as set asides ordered by General Oliver Howard. GORDON-REED, *supra* note 118, at 115–16.

265. GORDON-REED, *supra* note 118, at 117–20.

266. Davis, *supra* note 4, at 78–79. He goes on to add that “[o]ne is hard-pressed to identify any other comparable apocalypse of a society dealt defeat in war where in the aftermath, the leaders of the disaster become secular saints to devoted followers.” *Id.*

267. FONER, *supra* note 45, at 190.

268. *Id.*

269. Kathryn Shively Meier, *Jubal A. Early: Model Civil War Sufferer*, 4 J. NINETEENTH-CENTURY AMERICANISTS 206, 207–09 (2016). Early’s adventures took him to Mexico (where he hoped to run a guerilla campaign against the Union), Cuba (which he found “uninteresting”), and Canada before his return in 1869. *Id.* at 207.

270. *Id.* at 209.

This is not to say that the amnesties were entirely meritless. By choosing to forgive the common man with his September 7 amnesty, Johnson made a particular statement that the ringleaders would be held responsible for the wartime action.²⁷¹ Further, Johnson's first Proclamation represented a blueprint for political change. Among the categories of people it excluded were those who owned more than \$20,000 of taxable property, indicating that Johnson was putting the wealthy, landowning class squarely in his sights.²⁷² It was a much sterner statement on southern political reformation than Lincoln had put forth.²⁷³ The September 7 amnesty was a grand statement on the nature of the American future: it laid the groundwork for Reconstruction and set down the first olive branch for healing the Nation. It suggested that the future of the South would be controlled by the average man, not the wealthy planter class that had long dominated the South.²⁷⁴ Whether this was political posturing on Johnson's part or a genuine desire to shake up southern politics is debatable, but that doesn't change that it was a carefully crafted piece of law.²⁷⁵

The fact that the September 7 amnesty was crafted with complex tactical and political considerations makes the end result all the more tragic. None of the grand political changes that the September 7 amnesty portended ever occurred. When just the common man had been forgiven, there was an opportunity to examine the rebellion's leaders and the root causes of the Civil War. But with all men forgiven, those concerns faded into the rearview, just as Johnson intended.²⁷⁶

The Civil War broke America's legs. But Johnson's amnesties ensured that the bones were never set to heal properly. Crooked and unworkable, those limbs stumbled into the twentieth century and more racial unrest, as any victim of the Jim Crow South could attest. To truly heal the Nation, the bones would need to be rebroken. The pain proved too great to bear for a century, until the Country was finally forced to reconfront the issue during the Civil Rights Movement.²⁷⁷ Nevertheless, the Civil Rights Movement was not the final word on Reconstruction. The racial and political divisions exemplified by the Civil War still echo in the twenty-first century.²⁷⁸

271. Cf. Proclamation No. 37, 13 Stat. 758 (May 29, 1865). Johnson does not outright claim this position; his stated reason for offering amnesty is to promote a return to loyal behavior and to snuff out the last vestiges of insurrection. But the categorical exceptions allow one to read past the political statements and see the underlying purpose of the amnesty.

272. FONER, *supra* note 45, at 183–84.

273. *Id.*

274. *Id.*

275. *Id.* Johnson's motivations here were probably class focused. Based on an 1864 speech of his, Johnson's goal here was land reform/redistribution that would benefit the common farmer. *Id.* But Johnson's stated goals and his actual goals frequently failed to line up; other commentators suggested that his real goal with the \$20,000 clause was to twist the arm of the planter class so that they were forced to accept his version of Reconstruction. *Id.*

276. GORDON-REED, *supra* note 118, at 10.

277. Peggy Cooper Davis et al., *The Persistence of the Confederate Narrative*, 84 TENN. L. REV. 301, 340 (2017).

278. *Id.* at 356.

The unresolved struggles of the Civil War are still with us. Neo-Confederate movements and white supremacy are growing threats emboldened by the “Lost Cause.”²⁷⁹ “Lost Cause” ideas have taken root in education.²⁸⁰ Statues honoring Confederates, including Davis and Lee, still stand; the reckoning with their monuments is only now playing out, more than 150 years after the end of the Civil War.²⁸¹ The Confederate flag remains a ubiquitous symbol in much of America.²⁸² Confederates like Lee became heroes to future Americans, including presidents.²⁸³ Presidents may have a great effect on the nation’s ideology, as exemplified by the precipitous rise of white supremacists and neo-Confederates during Trump’s presidency.²⁸⁴

What will be the legacy of January 6? Will its ideas remain a part of the American fabric? Will “Make America Great Again” flags still be waved in 150 years? Commentator Lydia Polgreen fears that the worst of January 6 might fade to collective amnesia, and what remains might be rebranded as part of the heroic story of the Nation.²⁸⁵ Her fear seems justified given the legacy of the Civil War: the treasonous Confederates, far from being an American anathema, came to be upheld as heroes. To prevent history from repeating itself, the United States must learn from the failure of the Civil War prosecutions and do better when it comes to January 6.

III. COMPARING POTENTIAL PROSECUTIONS FOLLOWING THE JANUARY 6 ATTACKS TO POST-CIVIL WAR PROSECUTIONS

January 6 prosecutions so far have succeeded, no doubt in part because no official has been tried—only average citizens who planned or participated in the

279. See generally Emily R. Larrabee, *Violence in the Name of the Confederacy: America’s Failure to Defeat the Lost Cause*, 14 DREXEL L. REV. 451 (2022).

280. Charlotte Mostertz, *Teach Your Children Well: Historical Memory of the Civil War and Reconstruction, Public Education, and Equal Protection*, 22 U. PA. J. CONST. L. 589, 617 (2020).

281. Larrabee, *supra* note 279, at 487. Larrabee suggests creating a streamlined process to remove Confederate monuments. *Id.*

282. *Id.* at 489–90. Larrabee also suggests a ban on Confederate imagery in public, in line with what was done with Nazi imagery in post-war Germany; though she admits it would face First Amendment issues. *Id.* at 490.

283. James C. Cobb, *How Did Robert E. Lee Become an American Icon?*, HUMANITIES (July/Aug. 2011), <https://www.neh.gov/humanities/2011/julyaugust/feature/how-did-robert-e-lee-become-american-icon> [<https://perma.cc/P8EL-TLP6>].

284. Ed Kilgore, *You Don’t Have to Be Southern to Be a Neo-Confederate*, INTELLIGENCER (Oct. 7, 2022), <https://nymag.com/intelligencer/2022/10/you-dont-have-to-be-southern-to-be-a-neo-confederate.html> [<https://perma.cc/L86T-LLAH>].

285. See Lydia Polgreen, *How Will History Remember Jan. 6?*, N.Y. TIMES (Dec. 19, 2022), <https://www.nytimes.com/2022/12/19/opinion/january-6-report-history.html> [<https://perma.cc/4JDZ-QZSR>].

insurrection.²⁸⁶ One major question remains: how should the U.S. Department of Justice prosecute Trump?²⁸⁷

A. *Parallels with the Civil War*

Major historical events often raise issues as they unfold but that do not resonate until long after their occurrence. Take *United States v. Steinmetz*, a 1992 case in which the government seized from auction the bell from the Confederate raiding ship *CSS Alabama*.²⁸⁸ In determining the bell's rightful owner, the court had to turn to Civil War-era writings and cases to determine whether Confederate ships had been pirate vessels.²⁸⁹ Most pressingly, the court used the writings of Jefferson Davis and Alexander Stephens to reason that the Confederates were not pirates, despite contemporary Union claims that they were.²⁹⁰ It is an odd irony that Stephens and Davis were not only part of the Confederacy, which would enable the *Steinmetz* issue to occur some 125 years later, but also central to resolving that case. Could Trump's writings be used someday as evidence in litigation that emerges from January 6? Regardless, whether Trump is convicted will to some extent decide whether his version of events is merely evidence in other legal proceedings or a mainstream animating ideology.²⁹¹

B. *Should, and Could, Trump Be Prosecuted for Treason?*

Ultimately, grand questions remain as to how Trump will be prosecuted for his actions on January 6.

286. Ian Prasad Philbrick, *Hundreds of Jan. 6 Cases*, N.Y. TIMES (Aug. 21, 2022), <https://www.nytimes.com/2022/08/21/briefing/jan-6-attack-riot-suspects.html> [<https://perma.cc/Y9VL-EHPD>].

287. Peter Baker & Katie Benner, *Jan. 6 Committee Appears to Lay Out Road Map for Prosecuting Trump*, N.Y. TIMES (Oct. 13, 2022), <https://www.nytimes.com/2022/06/11/us/politics/jan-6-prosecute-trump.html> [<https://perma.cc/9V38-5PX2>].

288. See Susan Poser & Elizabeth R. Varon, *United States v. Steinmetz: The Legal Legacy of the Civil War, Revisited*, 46 ALA. L. REV. 725 (1995); *United States v. Steinmetz*, 973 F.2d 212 (3d Cir. 1992).

289. *Steinmetz*, 973 F.2d at 218. The court noted that the stories behind the *Alabama's* bell "are more suited to an epic poem than a legal opinion." *Id.* at 214–15. A Union ship sunk the *Alabama* off the coast of France in 1864, its bell was recovered by a British diver, the bell was sold to a pub that was bombed during WWII, the bell was pulled unscathed from the rubble after the war ended, it was traded to an antiques dealer in exchange for \$12,000 in antique guns, the government refused to purchase it, and it sat on a shelf for 11 years before finally being seized at auction. *Id.* at 215–16.

290. *Id.* at 218–19.

291. Trump's version of events, as presented in a 12-page memo to the House January 6 Committee, mostly focuses on the idea that the 2020 election was fraudulently stolen and that it was the right of the January 6 insurrectionists to question the supposed election fraud. Claire Hansen, *As Jan. 6 Committee Discloses New Details, Trump Responds With Recycled Lines*, U.S. NEWS & WORLD REPS. (Oct. 14, 2022, 2:54 PM), <https://www.usnews.com/news/politics/articles/2022-10-14/as-jan-6-committee-discloses-new-details-trump-responds-with-recycled-lines> [<https://perma.cc/53Y6-AF65>]. Although the commentary borders on clickbait, notable quotes from Trump's memo can be read here: Chris Cillizza, *The 22 Wildest Lines from Donald Trump's 12(!)-page Statement on the January 6 Committee*, CNN (June 14, 2022, 7:22 PM), <https://www.cnn.com/2022/06/14/politics/donald-trump-statement-january-6-committee/index.html> [<https://perma.cc/9EWH-FEM3>].

1. Comparing Trump to Jefferson Davis

The most obvious Civil War figure for comparison to Trump is Jefferson Davis. Both were presidents accused of serious, codified crimes with political ramifications. Both were powerful men with unusual personalities in controversial times. But does the comparison work beyond that? Is Trump sufficiently akin to Jeff Davis?

Davis explicitly sought to challenge the legitimacy of the United States government, while Trump is alleged to have done so much less overtly. Davis never faced justice; Trump has yet to do so.

While Civil War-era writers may have called for the hanging of Confederates, the only known hanging called for on January 6 was that of Vice President Mike Pence. Trump is reported to have reacted positively to the rioter's chant of "Hang Mike Pence," musing that perhaps Pence should have received that punishment.²⁹²

The Civil War analogy has some key limits. Trump was the duly elected President of the United States, whereas Jefferson Davis was president of a breakaway coalition of rebel states. Davis was elected for the purpose of waging active armed rebellion; Trump was not.

One counterargument to trying Trump is that his direct acts were limited to political speech.²⁹³ Trump did not himself storm the Capitol with weapons in hand. But even if he did not enter the Capitol, Trump was still the leader of the attempted coup and would have been its chief beneficiary. He spent months agitating and organizing his followers and then gave his incendiary speech on January 6. Trump was, like Davis, a leader. That fact also explains why Davis was indicted for treason, and ordinary Confederates were not. Davis, as *the* leader of the Confederacy, was clearly understood to be in a different category. Why should Trump, as paramount leader, be treated the same as the ordinary folks who were acting at his urging?

2. Trump's Speech

Convicting Trump for his actions on January 6 is simplified by having a recorded transcript of his entire remarks on January 6. Such a speech would be admissible into evidence against him in a criminal trial.²⁹⁴ What does that speech show?

By saying "[w]e will not take it anymore and that's what this is all about We will stop the steal," Trump reinforced the idea that the pre-election

292. Maggie Haberman & Luke Broadwater, *Trump Said to Have Reacted Approvingly to Jan. 6 Chants About Hanging Pence*, N.Y. TIMES (May 25, 2022), <https://www.nytimes.com/2022/05/25/us/politics/trump-pence-jan-6.html> [<https://perma.cc/6BFN-8CGC>].

293. This raises First Amendment concerns, which may be important, but are beyond the scope of this Note.

294. FED. R. EVID. 801(d)(2). Keeping Trump's speech out of evidence entirely would likely require a novel legal theory. Though it is not impossible to see a court cutting out parts of Trump's speech on relevance or time-wasting grounds.

polling was wrong.²⁹⁵ Trump then intimated that Pence should overturn the election: “I hope Mike is going to do the right thing. I hope so. I hope so. Because if Mike Pence does the right thing, we win the election.”²⁹⁶ Trump then specifically addressed the election certification process: “Today we see a very important event though. Because right over there, right there, we see the event going to take place. And I’m going to be watching. Because history is going to be made.”²⁹⁷

Trump peppered his speech with calls for aggression and strength. After analogizing the Republican Party to a boxer, he said that “we’re going to have to fight much harder.”²⁹⁸ Later, he said, “The Republicans have to get tougher. You’re not going to have a Republican Party if you don’t get tougher.”²⁹⁹ Independently, these comments could be dismissed as political bluster. But when taken together, they are probative evidence that Trump was egging the protestors on to the Capitol.

A key line in Trump’s speech was his call to action for protestors: “Now, it is up to Congress to confront this egregious assault on our democracy. And after this, we’re going to walk down, and I’ll be there with you.”³⁰⁰ Following his views about Congress and Vice President Pence, Trump explicitly called for protestors to march on the Capitol itself. It seems that protestors listened too: about 15 minutes later, a large group of protestors broke off from the Ellipse and walked toward the Capitol.³⁰¹

Trump also announced an alarming interpretation of the Constitution: “The Constitution doesn’t allow me to send [votes] back to the States. Well, I say, yes it does, because the Constitution says you have to protect our country and you have to protect our Constitution.”³⁰² Perhaps he was referring to the oath of office he took, which reads in part “I . . . will to the best of my Ability, preserve, *protect* and defend the Constitution of the United States.”³⁰³ But it is a dangerous notion that the Constitution allowed him to bypass its clear provisions in furtherance of his own idiosyncratic ideas. It shows that Trump was willing to twist the means if it gave him the end he wanted: another term in office.

3. *Treason for Trump?*

Perhaps one of the strongest arguments for indicting Trump on treason charges using post-Civil War prosecutions as an analogue lies in the indictment of Lee. Lee’s indictment accused him of “being moved and seduced by the instigation of the devil, wickedly devising and intending . . . to stir, move and *incite insurrection*, rebellion and war against the said United States of America.”³⁰⁴

295. *Trump Transcript*, *supra* note 82.

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. Leatherby & Singhvi, *supra* note 83.

302. *Trump Transcript*, *supra* note 82.

303. U.S. CONST. art. II, § 1 (emphasis added).

304. REEVES, *supra* note 25, at 63 (emphasis added). While Lee’s prosecutors seem to have gone for both elements of the treason clause by discussing war, levying war is not necessary to convict someone of treason.

Though Donald Trump hardly levied war against the United States, it is easy to argue that his words leading up to and on January 6 were “inciting insurrection.” His second impeachment used that exact charge.³⁰⁵

Treason, in requiring the accused to be an enemy of the United States, must inherently happen in a “time of war or quasi war.”³⁰⁶ But such conflict may be informal, as with the 1857 Mormon War.³⁰⁷ Trump’s supporters on January 6 were arguably enemies of the United States. They sought to overthrow a rightfully elected government. They nearly succeeded, too, and staged an outright attack on the heart of American governance. Even if short-lived, this putsch was still run by legal enemies of the United States. There is sufficient evidence and legal support to show that Trump could be prosecuted for treason for his actions on January 6, in line with prosecutorial ethics.³⁰⁸

It is worth remembering that the modern punishment for treason ranges from five years imprisonment and a fine up to death; those convicted are also barred from holding public office.³⁰⁹

While this Note argues that Trump could be prosecuted in good faith for treason and in fact should be prosecuted for at least one charge related to January 6, securing a treason conviction is still a difficult proposal. Convincing a judge is one thing; convincing a jury is far more difficult. As a matter of strategy, it may be more appropriate to charge Trump with a lesser offense that would be less likely to draw constitutional challenges; seditious conspiracy³¹⁰ is the most obvious alternative.³¹¹

Indeed, it is this strategy that the January 6 prosecutors have taken, though their charges are lighter than expected.³¹² The charges³¹³ are conspiracy to defraud

305. H.R. Res. 24, 117th Cong. (2021); *see infra* Subsection III.B.4.

306. Captain Jabez W. Loane, IV, *Treason and Aiding the Enemy*, 30 MIL. L. REV. 43, 43 (1965).

307. *Id.* at 52.

308. ROTUNDA & DZIENKOWSKI, *supra* note 232.

309. 18 U.S.C. § 2381.

310. “If two or more persons . . . conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States . . . they shall each be fined under this title or imprisoned not more than twenty years, or both.” 18 U.S.C. § 2384.

311. Several insurrectionists on the ground have been convicted of this charge. Press Release, U.S. Dep’t Just., Four Oath Keepers Found Guilty of Seditious Conspiracy Related to U.S. Capitol Breach, <https://www.justice.gov/opa/pr/four-oath-keepers-found-guilty-seditious-conspiracy-related-us-capitol-breach> [https://perma.cc/HH9Y-L6XF] (Jan. 23, 2023).

312. This Note was authored beginning in the fall of 2022, when it seemed that Trump might never be charged for his involvement in January 6. The final draft was finished in spring 2023, after his indictment on hush-money charges, but before his other indictments. This Note has been amended prior to going to print to cover his subsequent indictments, which allows for unique insight into the accuracy of this Note’s predictions.

313. *See generally* Indictment at 42–45, *United States v. Trump*, No. 1:23-CR-00257-TSC (D.D.C. 2023), <https://int.nyt.com/data/documenttools/trump-jan-6-indictment-2020-election/1f1c76972b25c802/full.pdf> [https://perma.cc/L33W-RK59].

the United States,³¹⁴ conspiracy to obstruct an official proceeding,³¹⁵ obstruction of and attempt to obstruct an official proceeding,³¹⁶ and conspiracy against civil rights.³¹⁷ Clearly, prosecutors believe these are the charges that will succeed. But the point of this Note is that, just as a prosecutor can be under-cautious in prosecution, they can also be over-cautious. So why haven't the prosecutors chosen stronger charges? Why avoid seditious conspiracy, an offense many January 6 rioters have faced?

Multiple arguments could be made to prosecute Trump for seditious conspiracy. First, he conspired to “overthrow, put down, or to destroy” the federal government. He worked for months to sow doubt and install loyalists, all in preparation for reversing the results of the election.³¹⁸ When he didn't achieve this outcome, he pressured Vice President Pence to help him.³¹⁹ When that tactic failed, Trump gathered his supporters, and in a speech rich with calls for aggression and strength, told them to walk toward the Capitol, where he would eventually join the demonstration.³²⁰ Trump did not utter unequivocal words, such as “let's overthrow the government.” But Trump should not be able to hide behind innocuous readings of his statements. Developing a more accurate narrative will likely require testimony from experts in political speech and misinformation. This sort of strategy is the bread and butter of any prosecution, but as shown by the Civil War prosecutions, it is of utmost importance when the defendant acted with political intent.

Despite the lesser charges, the severity of Trump's actions should not be understated. Trump attempted a coup.³²¹ He urged his supporters to overthrow the duly elected government and install him in its place. Any equivocation that Trump didn't know what he was doing or that he didn't mean to foment insurrection is disingenuous. Trump was a sophisticated player, and he stood to benefit the most from the January 6 attack. Words have power, and Trump used them to manipulate

314. 18 U.S.C. § 371. The statute specifies a maximum five-year prison term.

315. 18 U.S.C. § 1512(k).

316. § 1512(c)(2). The Statute specifies a maximum twenty-year prison term. Interestingly, the Statute more generally regards witness tampering, including the prohibition on murdering or otherwise using violence against witnesses. Trump has been charged under the Statute's catch all provision. The crucial wording of the Statute is “whoever *corruptly* . . . otherwise obstructs, influences, or impedes any official proceeding, or attempts to do.” *Id.* While it is almost facially obvious that Trump tried to obstruct, influence, or impede the January 6 certification, proving that he did so with corrupt intent will be the true hurdle.

317. 18 U.S.C. § 241. This charge is intriguing because it is being used to allege that Trump conspired to remove the voting rights of individuals, but the underlying statute says nothing of voting. Indeed, the bulk of the Statute covers the use of violence, murder, and sexual abuse to deprive individuals of their rights. This charge seems the ripest for challenge.

318. *See supra* Section I.B.

319. *See supra* Section I.B.

320. *Trump Transcript*, *supra* note 82.

321. While American sources have been hesitant to describe Trump's action as a coup, foreign sources have been far blunter in their assessment. *E.g.*, Chris McGreal, *A Very American Coup Attempt: Jan 6 Panel Lays Bare Trump's Bid for Power*, *GUARDIAN* (Dec. 19, 2022, 2:26 PM), <https://www.theguardian.com/us-news/2022/dec/19/trump-attempt-coup-jan-6-panel-executive-summary> [<https://perma.cc/AT6V-5339>].

and order his followers on his behalf—and they listened. The consequences would have been disastrous had the attackers succeeded: it would have likely spelled the end of American democracy. It would have shown that the presidency was no longer won by the vote but was rather the sort of “right” the Confederates sought to enforce: the right of the sword.³²² Trump must be held accountable.

4. *Previous Attempts at Holding Trump Accountable*

The House twice impeached Trump, and the Senate twice acquitted him of all charges. The first case was over a phone call with the Ukrainian President Volodymyr Zelensky in 2019, in which President Trump asked for Ukraine to investigate Joe Biden, his political rival.³²³ The second came a week after January 6 on a charge of inciting insurrection.³²⁴

That Trump was not indicted criminally during his presidency is not surprising. There remains an open question as to whether a sitting President can even be indicted.³²⁵ Given the chaos and loyalty-seeking in the Department of Justice under Trump, it is hard to see how he even would have been investigated while in office.³²⁶ That question may become relevant again if Trump wins a non-consecutive second term in 2024. He has vowed that he will not drop out of the 2024 presidential race, even if indicted.³²⁷

322. See *supra* Section II.A for a discussion of gaining rights by the sword.

323. Jean Galbraith, *President Trump Impeached and Acquitted of Charges Relating to His Conduct of Foreign Affairs*, 114 AM. J. INTL. L. 495, 495 (2020). History holds yet more ironies: Biden and Zelensky became strong partners in the wake of the Russian invasion of Ukraine. Peter Baker & Andrew E. Kramer, ‘It’s Complicated’: How Biden and Zelensky Forged a Wartime Partnership, N.Y. TIMES (Feb. 24, 2023), <https://www.nytimes.com/2023/02/24/us/politics/biden-zelensky-ukraine-russia.html> [https://perma.cc/GYV5-UCE6].

324. Nicholas Fandos, *Trump Impeached for Inciting Insurrection*, N.Y. TIMES (Jan. 11, 2021), <https://www.nytimes.com/2021/01/13/us/politics/trump-impeached.html> [https://perma.cc/G76P-KDY5].

325. Finkelstein & Painter answer this question affirmatively, or at least argue that a president *should* be indictable while in office. See generally Claire O. Finkelstein & Richard W. Painter, *Presidential Accountability and the Rule of Law: Can the President Claim Immunity if He Shoots Someone on Fifth Avenue?*, 24 U. PA. J. CONST. L. 93 (2022).

326. See *supra* Section I.B for more on the infighting in the Department of Justice around the time of January 6.

327. Rebecca Picciotto, *Trump Pledges to Stay in 2024 Presidential Race Even if he Is Criminally Charged*, CNBC (Mar. 4, 2023, 6:38 PM), <https://www.cnbc.com/2023/03/04/trump-pledges-to-stay-in-2024-presidential-race-even-if-he-is-criminally-charged.html> [https://perma.cc/VBK6-T5PB].

Trump's three other criminal indictments on non-January 6 issues, one for his hush-money payments,³²⁸ one for attempts to meddle in the Georgia election,³²⁹ and one for his mishandling of classified documents,³³⁰ add an interesting dynamic to his January 6 prosecution. While the examination of the other indictments is mostly beyond the scope of this Note, the lessons gleaned in the course of this Note may apply to those prosecutions as well.³³¹ Perhaps most importantly, the lesson to not delay prosecution applies.³³² It could be potentially disastrous to wait for other cases to wrap up before reaching trial on a January 6 issue. There are multiple cases to be made against Trump,³³³ and they have to be made simultaneously. This will of course require expert work by prosecutors. But the alternative, as the Civil War shows, is to face a loss—even for unexpected reasons.³³⁴ The longer prosecution drags on, the more likely it is for the case to weaken, for Trump to die,³³⁵ or for the political process to overrun prosecutors just as the Johnson amnesties did.

A pardon for insurrectionists, or Trump himself, is not yet on the table. But clemency has been discussed.³³⁶ Pardoning Trump or the insurrectionists might

328. Jonah Bromwich et al., *The Case Against Donald Trump: What Comes Next?*, N.Y. TIMES (Apr. 5, 2023), <https://www.nytimes.com/article/trump-indictment-criminal-charges.html> [<https://perma.cc/3S6S-NHKY>]. There seems little doubt that Trump did have his lawyer pay \$130,000 to actress Stormy Daniels, ostensibly to buy her silence around a politically damaging affair she claimed she'd had with Trump. *Id.* The payment itself appears legal, but the charges stem from alleged tampering with business records to obfuscate the purpose of the payments. *Cf. id.*

329. *Keeping Track of the Trump Investigations*, N.Y. TIMES (Oct. 20, 2022), <https://www.nytimes.com/interactive/2023/us/trump-investigations-charges-indictments.html> [<https://perma.cc/Y746-ZYGQ>].

330. *Id.*

331. When the Author began writing this Note in the fall of 2022, it seemed pie-in-the-sky that Trump might be indicted for anything. With now four indictments, that makes the lessons of this Note all the timelier. Trump's other indictments are fertile ground for future research. Just as this Note has referred back to Nixon and the Civil War, it seems likely that Trump's cases will provide precedent for decades if not centuries.

332. See *supra* Sections II.C, II.E for the price of delays in the Civil War prosecutions.

333. It remains possible that other charges could be filed in yet unknown cases. Further, and as this Note argues, Trump could and should face stronger charges for his involvement in January 6.

334. *Id.* Though this is speculation due to the lack of first-hand accounts, it is hard to imagine that the prosecutors saw Johnson's final amnesty coming. Perhaps if they had, they would have sped up the process. It is for this reason that prosecutors in the Trump cases should assume that the worst could be right around the corner and seek to prevent delay at all times.

335. Trump's age presents an extra challenge for prosecutors: he is no spring chicken, being 77 years old at the time of writing. Brian Duignan, *Donald Trump*, BRITANNICA (April 2, 2024), <https://www.britannica.com/biography/Donald-Trump> [<https://perma.cc/C94U-JGQ6>]. If Trump were to die before the conclusion of his case, justice could not be done, and it is not hard to believe that his memory might even be elevated because of a perception of the injustice of dying while under indictment.

336. *E.g.*, Stephen L. Carter, *Biden's Next Grand Bargain Could Retire Trump*, BLOOMBERG (Aug. 18, 2022), <https://www.bloomberg.com/opinion/articles/2022-08-18/president-joe-biden-should-pardon-donald-trump-on-one-condition> [<https://perma.cc/NU7Y-ABJK>].

seem like an enticing opportunity to a President angling for grand reconciliation in the mold of Andrew Johnson's escalating pardons. But the failure of the 39th Congress to assert its interpretation of the law led to Johnson's eventual and total pardon of all Confederates.³³⁷ This Note has argued that pardoning top officials for reconciliatory purposes was ultimately a mistake.³³⁸ In failing to prosecute Davis, Lee, and other top officials, the ideas of the Confederacy were never truly repudiated or eliminated. The racist ideas of the Confederacy lived on in Jim Crow regimes and persist to this day.³³⁹

The ideas around Trump are no less dangerous. Trump and the insurrectionists showed that they did not believe in a peaceful transition of power and that they instead believed it was their duty to hold onto the outgoing Administration's power. This idea is a troubling one. The United States is fortunate to have enjoyed a long history of peaceful transfers of power—until 2021. Much of the rest of the world has not been so lucky, and endless coups and civil wars have been fought because of the lack of institutions ensuring peaceful transitions.³⁴⁰

Leaving Trump's narrative of election fraud without legal rebuttal casts grave doubts on the strength of American institutions. It shows that a political actor can disrupt the political process through demagogic means with impunity. Politicians at other levels are now experimenting with wild election fraud claims in an attempt to turn losing elections in their favor.³⁴¹ The question is not whether the election fraud narrative will spawn more violence, but when.³⁴²

C. Healing the Nation?

While this Note argues that prosecuting Donald Trump is the right choice, a question remains: why not follow the Civil War example of prosecuting the leaders and forgiving the soldiers, so to speak? Why not grant amnesty to the insurrectionists of January 6, even if Trump is to be tried?

For one, this Note has argued that the prosecutorial decisions of the Civil War were generally wrong and thus make bad precedent in legal and policy terms; they should be better understood as a cautionary tale.³⁴³ Johnson's amnesties started out small but eventually encompassed all Confederates. Following Johnson's path,

337. See *supra* Section II.A.

338. See *supra* Section II.A.

339. See *supra* Section II.F.

340. See, e.g., Scott A. Tyson, *The Peaceful Transfer of Power and the Social Contract*, 85 J. POLS. 125, 125 (2023). For a thoughtful and well researched review on the transition of power in America going back about 50 years, see generally DAVID MARCHICK ET AL., *THE PEACEFUL TRANSFER OF POWER: AN ORAL HISTORY OF AMERICA'S PRESIDENTIAL TRANSITIONS* (2022).

341. Alexandra Berzon, *Kari Lake Will Present Election Fraud Claims in an Arizona County Court*, N.Y. TIMES (Dec. 21, 2022), <https://www.nytimes.com/2022/12/21/us/politics/kari-lake-arizona-case.html> [<https://perma.cc/6CYM-YG59>].

342. Cf. Odette Yousef & Miles Parks, *Concerns of Violence Grow as Election Day Nears*, NAT'L PUB. RADIO (Nov. 2, 2022, 5:00 AM), <https://www.npr.org/2022/11/02/1132822805/election-violence-concerns-voting-threats> [<https://perma.cc/T4GX-XDRA>] (citing increased threats of violence, and a growing number of armed civilian poll intimidators).

343. See *supra* Sections II.B–C, II.E.

a future president could pardon low-level insurrectionists first, later pardoning more prominent figures and perhaps even Trump. Second, a key distinction exists between the average Confederate soldier and the average January 6 rioter: the former was acting under the color of an army and the laws of war, whereas the latter was not. Many Civil War combatants were in fact prosecuted during the war for violating the laws of war, including nearly a thousand who took up arms but were not members of either the Confederate or Union armies.³⁴⁴ The January 6 insurrectionists did not even have apparent authority for the actions they took, certainly none granted pursuant to military operation, and are thus subject to standard, civilian prosecution.

On the other hand, why not pardon Trump? Presidents pardoning other presidents is not without precedent: President Ford pardoned President Nixon after the latter's ignominious resignation in the wake of the Watergate scandal.³⁴⁵ Often elided, however, is that Nixon walked away mostly scot-free,³⁴⁶ but those who perpetrated the criminal break-in on his behalf did not. The Watergate burglars received harsh prison sentences, as much as 40 years, though all but one of them served no more than 14 months after appeals.³⁴⁷ Former FBI agent and co-planner of the burglary Gordon Liddy was not so lucky: he was sentenced to 20 years in prison and served five, freed only after President Carter commuted his sentence.³⁴⁸ Why should Nixon, who directed the burglary and worked ceaselessly to mislead investigators and obstruct justice, have gone free when his underlings did not?

Equally, why should the January 6 insurrectionists serve long sentences while Trump gets off without a scratch? The trials are far from over, and already a 22-year sentence has been handed down for seditious conspiracy.³⁴⁹ Any

344. Lederman, *supra* note 20, at 365–66. Many civilians were tried for violations of the laws of war, but the prosecutions were often aimed at minor conduct or even conduct protected by the Constitution, such as free speech (under the guise of disloyalty). *Id.* at 366.

345. Jonathan T. Menitove, *The Problematic Presidential Pardon: A Proposal for Reforming Federal Clemency*, 3 HARV. L. & POL'Y REV. 447, 452–53 (2009).

346. While the pardon did prevent him from facing criminal liability, Nixon's resignation didn't leave him unscathed; his name remains synonymous with crook. The investigation into him was damning. Gaughan, *supra* note 7, at 345. Nixon has been permanently tarnished in the popular imagining, but no such reckoning has come for Trump, which makes the question of putting Trump's legacy on trial all the more relevant.

347. *Id.* at 283–84, 372. Gaughan sees the Watergate prosecutions as a failure of the rule of law. *Id.* He faults Judge Sirica, who oversaw the burglar's trials, for impinging on a laundry list of the defendants' constitutional rights. *Id.* at 846. Judge Sirica violated the neutrality of the judiciary, denied defendants their Fifth and Sixth Amendment rights, imposed draconian sentences, and effectively acted as a prosecutor in the case. *Id.* The end (discovering Nixon's malfeasance, along with his subsequent resignation) may have been just, but the means were deeply unconstitutional.

348. *Id.* at 383–84.

349. Sareen Habeshian, *Here Are the Harshest Punishments yet for Jan. 6 Rioters*, AXIOS (Sep. 5, 2023), <https://www.axios.com/2023/09/01/jan-6-longest-sentences-list> [<https://perma.cc/8VHB-J88F>]. The 22-year sentence was for Henry "Enrique" Tarrio, leader of the Proud Boys militia. *Id.* Stewart Rhodes, leader of the Oath Keepers, got 18 years for seditious conspiracy. *Id.* Even non-leaders have received long sentences. Militia Eduardo Medina & Remy Tumin, *Ex-N.Y.P.D. Officer Gets 10 Years for Jan. 6 Attack, Longest*

conversation about pardoning Trump cannot be extricated from pardoning the insurrectionists. Allowing Trump to go free generates myriad negative consequences, from the preservation of his ideology to the degradation of democracy. But to pardon Trump and not the insurrectionists would be an almost greater disgrace. It would show that American justice truly has two tiers: one for the powerful and one for their agents. Prosecution should be built on the idea that no one is above the law. Yet the criminal justice system has long struggled with differential outcomes and selective prosecution.³⁵⁰ To selectively choose to not prosecute Trump only reinforces historical imbalances that have favored the powerful.

The instinct to pardon people and promote healing is understandable. But the Civil War shows that healing first requires the underlying problem to be fixed.³⁵¹ The underlying problems are numerous and unfixed. The ideas of white supremacy, election interference, and political violence—among a host of others—have not been settled. If the lessons of the Civil War hold true, to pardon Trump or the insurrectionists without addressing these issues head-on might allow them to take greater hold among the American public.

CONCLUSION

This Note used a combination of legal and historical analysis to argue that Trump should be prosecuted for his actions surrounding January 6 and that prosecutors could and should bring harsher charges than Trump is currently facing. It also laid out, from the lessons of the Civil War, the pitfalls that prosecutors and politicians should avoid in politically charged prosecutions. Further, this Note took the lessons of the Civil War and laid out the long-term consequences of not prosecuting Trump.

Trump's idea that he was the rightful winner of the 2020 election continues to attract followers and believers. If he is not held to account for inciting the January 6 attack, that idea will continue to metastasize, just like the ideas of the Confederacy lived on in Jefferson Davis and General Lee. Will we have a future in which we create statues of the "honorable" Trump, just as we did with Davis and Lee? Will there, in the absence of adequate or successful criminal prosecution, be a second iteration of the Lost Cause in Trumpism? We have the tools to avoid that. There are so many lessons from the post-Civil War prosecutions that can be applied to this moment. But if we can't remember our ignominious past, we may just find ourselves in a bleak future.

Sentence to Date, N.Y. TIMES (Sept. 1, 2022), <https://www.nytimes.com/2022/09/01/us/jan-6-nypd-officer-sentenced.html> [<https://perma.cc/UU2K-8JVY>]. The sentence was for assaulting an officer with a flagpole, alongside entering the Capital with a weapon. *Id.*

350. Thomas P. McCarty, *United States v. Khan*, 461 F.3d 477 (4th Cir. 2006); *Discovering Whether "Similarly Situated" Individuals and the Selective Prosecution Defense Still Exist*, 87 NEB. L. REV. 538, 542–47 (2008).

351. See *supra* Section II.F, the bones metaphor.