THE TRIAL OF JEFFERSON DAVIS
A stage play in three acts by
Moishe Garfinkle © 2007

SYNOPSIS
The Jefferson Davis trial was probably the most highly anticipated courtroom drama that never took place. After Davis’s capture and incarceration at Fortress Monroe in late spring of 1865 there were plans afoot for a drumhead court-martial and swift execution. Secretary of War Edwin Stanton, Judge Advocate General Joseph Holt and Administration staff lawyer William Evarts advocated this approach but delayed too long before attempting the measure.

They had learned that Davis’s harsh treatment at Fortress Monroe had mollified even his worse critics in the North. Although Davis was indicted, the country was now divided over the advisability of a criminal trial. Because of the adverse repercussions in the event that Davis was acquitted of treason, by 1867 President Andrew Johnson wanted the whole legal mess to go quietly away. Instead the trial date is postponed time and time again.

In this hypothetical account the whole legal mess does not go quietly away. The prosecution was moreover convinced that Davis was involved in some manner in the murder of Abraham Lincoln. For dramatic impact I have shifted some residences and occupations to the time frame of the trial: early fall of 1868. This is to better illustrate the situation of the participants between the end of the war and the time of the trial.

FRAMEWORK
To write a work portraying an historic event that logically should have taken place but didn’t is a daunting task. Fortunately, the Civil War era is one of the best-documented periods in the history of warfare. There are virtually no quarrels about bare facts and events as they unfolded, but considerable disagreement about the motives of the principals: their purposes and incentives as the war proceeded, a most difficult task for an historian to analyze. To ascertain the mindset of historic characters from only the barest physical evidence requires an imaginative playwright rather than that of an exacting historian.

According to the biographers of Jefferson Davis, he was either an arch-traitor or a selfless patriot defending States Rights. Only when the specific points that these diverse views were in agreement could I show any confidence in the historic record. The character of Jefferson Davis was the dilemma: he was both imperturbable and sometimes callous yet animated and at times passionate, an emotional potpourri extremely difficult to explain or decipher. Many of the historic personages mentioned in the play, ranging from Beethoven and von Kötzebüe to Lord Byron and Karl Marx, are essential in relating the trial events. Because of the animosity between all of the principal characters: they either loathed one another or mortally hated each other, the principle objective of the play is to expose this tension. In doing so I had to demolish a few historically cherished reputations of a few historically cherished personages.

Characters in Order of Appearance
With exception of the court functionaries the characters represent historic personages.

Bailiff: dress court functionary
Court Recorder: dress court functionary

Judge John Underwood: age 59, previously Treasury Department auditor, heavy dark beard, moderate build, strict jurist, zealous civil rights advocate, professional, fair.


Defense Attorney Charles O’Conor: age 64, short trim beard, reactionary, sexist, racist, suave, formidable, sophisticated, debonair. Dress dark gray suit, white boutonniere.

Defendant Jefferson Davis: age 59, gaunt, small dark goatee, stiff, cold, unmoving, uncompromising. Dress Confederate gray broadcloth suit.

Witness Robert Lee: age 61, trimmed white beard, erect, courteous, dignified, balding, vain: hair across scalp. Dress Confederate general’s uniform without grade or decoration.


Witness Francis Lieber: age 70, academic, medium build, clean-shaven, gray hair, scholarly, cultured, urbane, erudite, learned. Professorial dark gray suit.

Constitution of the United States
Article III, Section 3

Treason against the United States, shall consist only in levying War against them, or in adhering to their enemies, giving them Aid and Comfort.

No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The congress shall have Power to declare the Punishment of Treason, but no attainder of Treason shall Work Corruption of blood, or Forfeiture except during the Life of the Person attained.

POSSIBLE STAGE SET

JURY
THE SCENE: The curtain is raised when the audience enters the auditorium. The stylized Federal Courtroom is in darkness. The flat sidewalls of the courtroom are angled with the flat rear wall. The wall stage-left has double doors leading to an anti-room while the angled wall rear stage-left has a door to the judges chamber. The judge’s bench and seat are on a raised dais parallel to the wall with the witness box to the left of the bench. A single large flag is behind the bench. The recorder’s high desk and stool are to the front-right of the bench. The prosecution and defense tables are stage-right parallel to the wall. Two chairs are at each table. The defense table is upstage.

Just before the play begins the following slide is projected onto the rear wall.

![The United States District Court for the Eastern District of Virginia](image)

Richmond, Virginia

Fall Session 1868

Simultaneously the following chorus is rendered as a dirge: slow and mournfully.*

Oh, I wish I was in the land of cotton; old times there are not forgotten; Look away, look away, look away Dixie Land.

**PRELUDE**

**SPOTLIGHT ON BAILIFF AND COURT RECORDER CONVERSING NEAR BENCH**

Bailiff: It’s a devilish thing, trying old Jeff after two years in Fortress Monroe.

Court Recorder: Weren’t you surprised he’d even show up for trial. He was in Canada on bail. $100,000 bail too.

Bailiff: He’s with his lawyer at the Spotswood.

Court Recorder: Well, with the Commodore putting up a chunk of the bail, Horace Greeley too, they’d make damn sure he’s back in town.

Bailiff: You can be damn sure both are going to be here.

Court Recorder: Davis’s lawyer has been running up to Montreal since the trial date was set ‘couple months back.

Bailiff: Lots of people in town. I can’t believe Evarts is going to prosecute the case himself.
Court Recorder: I hear that Johnson was against the whole thing but Evarts convinced him. Andy’s such a goddamn pushover.

Bailiff: ‘member Evarts did defend Andy at the impeachment trial. Saved his ass!

Court Recorder: Was Johnson against Evarts prosecuting or against the whole trial?

Bailiff: Probably both. Couldn’t turn Evarts down though. He’s really hot to go.

Court Recorder: If Davis gets off Johnson’s going to be in a heap of big trouble, real big trouble.

Bailiff: Everyone knows that. Probably a billion dollars in damages to rebuild the South. And imagine we won.

Court Recorder: The country won’t stand for it: paying off the rebels. Too much suffering, too many dead. The army’d probably revolt.

Bailiff: Might be bigger trouble if Davis is hanged.

Court Recorder: What’d you mean?

Bailiff: You hang their hero and the South goes berserk. Be a lot nastier the second time around: lots a bushwhacking and bombings. No holds barred.

Court Recorder: Maybe Johnson was right after all.

Bailiff: Yep! Just wanted ol’ Jeff hanged; didn’t want no trial, never wanted one.

Court Recorder: Y’know Johnson hated Davis from before the war for calling him nothing but a tailor right in the Senate.

Bailiff: You don’t say.

Court Recorder: Yep! Couldn’t read a sentence. Only good at makin’ coats and pants. He was all grown up when his wife taught him how to read and write.

Bailiff: The President of the United States? You’re pulling my leg!

Court Recorder: Yep, and a Democrat to boot! And since impeachment went down the drain the Republicans can’t get rid of him; really hate his guts.

Bailiff: Democrats think he’s a turncoat.

Court Recorder: Speaking of another turncoat Democrat: Stanton’s going to be here.

Bailiff: What for?

Court Recorder: He’s going to prosecute.
Bailiff: I thought Evarts was prosecuting. Stanton was Lincoln Secretary of War before Johnson fired him, not attorney general.

Court Recorder: He's still a lawyer. Stanton been putting the trial off. Tryin' to wear ol’ Jeff down I hears. Wants Davis hanged higher than Haman.

Bailiff: Yep! You know it was Stanton who kept Jeff in chains for two years. Wanted a no–nonsense court-marshal and a quick hangin’, just like the killers of ol' Abe.

Court Recorder: Mean bastard!

Bailiff: You can say that 'bout any lawyer.

Court Recorder: O’Conor’s said to be the best lawyer in the country. He’ll convince the jury that Jeff was really some kind of secret patriot.

Bailiff: He was once a special prosecutor for New York City, almost broke the Tweed Ring.

Court Recorder: O’Conor’s a doughface Democrat: dyed-in-the-wool southern sympathizer. Came damn close to treason himself. Stanton kept an eye on him.

Bailiff: You don’t say.

Court Recorder: In court he liked to attack the other side’s lawyer. Real smart!

Bailiff: He’s good. Got a big alimony settlement for Catherine Sinclair from Edwin Forrest in that messy divorce case bout a dozen years back.

Court Recorder: The big actor? Didn’t he accuse her of adultery?

Bailiff: Yep! I hear’d O’Conor had the jury in tears. He’s good! Broke Forrest.

Court Recorder: Lawyers can get away with anything. They’re thick as flies around here.

Bailiff: Reporters too, from London and Paris. Even the British Minister’s come down from Washington City.

Court Recorder: How’d you know that?

Bailiff: Saw it in the Examiner. The Brits were chummy with Davis during the War.

Court Recorder: So were the French! Think the judge will keep the trial fair?

Bailiff: You’re joshing! Underwood thinks Davis is the devil himself, or at least his chief toady.

Court Recorder: So does Evarts.
Bailiff: I don’t know though! Underwood’s pretty strict on the bench — never saw him favorin’ one side or the other.

Court Recorder: Did you know ol’ Sam Houston said one drop of Jeff Davis’ blood would freeze a frog.

Bailiff: Hell, his wife said that if anyone disagrees with him he’d have a fit, thinks anyone who doesn’t go along must be a fool or a schemer — or both.

Court Recorder: Stanton still thinks Jeff was behind ol’ Abe’s shootin’.

Bailiff: (Takes out pocket watch) It’s almost one o’clock. Get ready; they’re coming.

**LIGHTS BEGIN TO RISE ON COURTROOM, SPOTS DIM OUT.**

The attorneys for the prosecution file in, Evarts nods to jury, take their seats, opening briefcases, arranging notes, talking low amongst themselves. Stanton animated.

Court Recorder stands by his stool, prepares his notepads, pens. Bailiff moves next to his chair, stands in position.

Defense attorney enters courtroom, acknowledges jury, endearing smile, takes seat. A moment later Davis follows, looking straight ahead, cold, grim, takes seat. Turns to attorney.

**COURTROOM LIGHTS PARTIALLY DIM, SPOT ON DAVIS**

Davis: I still don’t understand your strategy.

O’Conor: My strategy is to save your neck. It’s that simple.

Davis: It was secure enough in Montreal. I didn’t return to Richmond to save my neck.

O’Conor: Well, Stanton wanted you hanged for killing Lincoln. He can’t have that so he’ll have you hanged for treason. Couldn’t be simpler than that.

Davis: Damn Stanton! He kept me locked up in a dungeon for two years.

O’Conor: That’s common knowledge.

Davis: Solitary confinement. Fortress Monroe was a living hell. Wouldn’t even let me see my wife. Damn his soul!

O’Conor: Keep your mind on what’s going on here, not what went on there.

Davis: I came back to vindicate the Confederate cause — and I shall vindicate it.

O’Conor: If you’re acquitted you can spend the rest of you life vindicating your cause. If you’re hanged, it really doesn’t matter, does it?
Davis: I must insist.

O’Conor: Almost a million blue soldiers were casualties of the War. Believe me, this is neither the time nor the place to vindicate your cause.

**SPOT DIMS, COURTROOM LIGHTS FULL**

Bailiff: Hear ye, hear ye! The United States District Court for the Eastern District of Virginia is now in session. All rise.

Judge John Underwood enters from chambers, takes seat during introduction.

Bailiff: The honorable John Underwood presiding. God save the United States and this honorable court.

Underwood: Be seated. Ahh, I see my distinguished colleagues Mr. Evarts and Mr. O’Conor are still present, maintaining their *modus vivendi*. Very good! I’m relieved that neither of you has bodily harmed the other.

All on stage take seats except Davis and O’Conor. Bailiff stands next to his chair. Underwood addresses Davis; reads charges from document.

Underwood: Mr. Davis, the United States has brought serious charges against you. To wit: “You have knowingly and willfully committed acts of treason and sedition as defined by the Constitution of the United States, Article III, Section 3, by organizing and directing insurrectionary forces for the express purpose of overthrowing the duly constituted Government of the United States.” These are capital felonies. You had pleaded not guilty to these charges, is that correct?

Davis: That is correct.

Underwood nods, Davis takes seat. O’Conor remains standing.

O’Conor: Your honor, before proceeding shouldn’t the matter of the bail be settled. With Mr. Davis in this courtroom the signatories to the surety bond are anxious to be released from its obligations.

Evarts: (Evarts rises) Unless the court remands the defendant he is free to wander off at any time during these proceedings.

O’Conor: As you ordered, Mr. Davis voluntarily returned to Virginia from Quebec, a venue outside the jurisdiction of this court. This being the case, he is unlikely to wander from Richmond. Your honor, you yourself imposed the surety bond arrangement at his indictment. Mr. Davis promptly returned to the jurisdiction of this court when so ordered.

Underwood: What say the prosecution?
Evarts: Mr. Davis is charged with a capital offense. He should be remanded.

Underwood: That would be a bit too extreme at this late date.

Evarts: Then the bail bond should remain in force until the completion of this trial.

Underwood: So be it. Mr. Davis remains under bond.

O’Conor, Evarts sit. Underwood pauses, reads notepad.

Underwood: This morning I have selected a jury from the venire with the advice of defense and prosecuting attorneys. I have taken the precaution of selecting only those residents of Richmond revealed by *voir dire* to have had no direct participation in the late rebellion.

I have rejected the claim of counsel for the defense that the jury must be, by nature of their selection, prejudiced against the defendant. I have also rejected the claim of counsel for the prosecution that the jury must be, by nature of their residence, prejudiced in favor of the defendant. After considering these objections, I have concluded to the court’s satisfaction that the jury is impartial in regard to the present matter before this court.

(Sets notepad aside, looks up) Take notice: this courtroom is not to be an arena for raucous arguments. Anyone raising his voice or causing a commotion, on either side of the bar, will be severely reprimanded. I am most sensitive to disturbances in my courtroom. These proceeding will be conducted with decorum.

Attorneys nod their heads. Davis stiff, unmoving.

Underwood: Is the prosecution ready to make its opening statement?

Evarts: (Evarts rises, nods, clears throat, centers himself before the jury) If it pleases the court. It is the contention of the United States that the malignant force directing the late rebellion was the person of Jefferson Davis, formerly United States Senator from the State of Mississippi and until apprehended the alleged president of the chimerical Confederate States of America. In this capacity he declared war against the United States.

In the guise of the commander in chief of a sovereign power he waged war against the United States, attacking and occupying the property of the United States; including its arsenals, shipyards, mints, custom houses and the like, causing bodily harm to its defenders.

It is the contention of the United States that Mr. Davis in doing so committed treason as defined by Article III Section 3 of the Constitution of the United States in levying war against the United States and for open sedition against the interests of its constitutional government.
While it might be suggested that it took many individuals in addition to Mr. Davis to wage the rebellion we submit that the rebellion would not have taken place if Mr. Davis had not initiated this conspiracy and thereafter lent his hand and mind to furthering its diabolical schemes.

It is for these particulars that the United States demands that Mr. Davis suffer the most severe punishment appropriate for the high crime of treason.

Evarts returns to his seat.

Underwood: Mr. O’Conor.

O’Conor: (O’Conor rises, centers himself before the jury) Jefferson Davis is an honorable man, as even his strongest opponents and severest critics have conceded. He commanded a regiment at Buena Vista and Monterey during the Mexican War, where he was severely wounded leading his troops in defense of the United States. He fought bravely for the Union and won commendations for his courage.

He served honorably as Secretary of War under President Franklin Pierce and subsequently as a United States Senator from Mississippi. Is it possible that a man with such an unparalleled and distinguished record of public service would accede to the capital crimes that the United States attributes to him? We will demonstrate that Mr. Davis did not so dishonor himself.

ACT 1 PROSECUTION

O’Conor takes seat. Underwood shuffles papers; and Evarts prepares himself. Davis turns to O’Conor.

COURTROOM LIGHTS PARTIALLY DIM, SPOT ON DAVIS

Davis: I don’t understand the list of prosecution witnesses.

O’Conor: What is it you don’t understand?

Davis: General Lee is a dear friend whose integrity is above reproach. Johnston is an unmitigated schemer who would do anything to harm me.

O’Conor: I fully understand. Let me handle the matter.

SPOT DIMS, COURTROOM LIGHTS FULL

Underwood: Is the prosecution ready to proceed?

Evarts: (Evarts rises) Yes we are your honor.

Underwood: Bailiff, call the first witness.
Bailiff: (Bailiff glances at list, opens door) Mr. Robert Lee.


Bailiff: In your testimony do you swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Lee: I do.

Bailiff leaves bible on witness box railing, takes seat.

Evarts: State your full name?

Lee: Robert Edward Lee.

Evarts: Your present residence?

Lee: Lexington, Virginia.

Evarts: Your present occupation?

Lee: President of Washington College.

Evarts: You are a graduate of the United States Military Academy at West Point. Is that not so?

Lee: Yes. 1829

Evarts: You attained the grade of full colonel in the United States Army. Is that correct?

Lee: Yes.

Evarts: In 1852 you served as superintendent of West Point.

Lee: Yes. A three year appointment.

Evarts: You continued to serve in the United States Army until you resigned in 1861. Is that not so?

Lee: Yes. After Virginia’s secession.

Evarts: It would appear that the United States bestowed on you great honors and responsibilities. Is that not so?
Lee: It is! I feel that to the best of my abilities I repaid those favors. I served faithfully in my engineering capacity wherever posted. I served in the field in the Mexican War and in the Department of Texas, altogether for a period of some thirty years.

Stanton: (Leaps up) By waging war against the United States.

O’Conor: (Stands) Objection, your honor! Colonel Lee is not on trial here.

Underwood: Sustained; though Colonel Lee is not your witness and therefore not your concern. Will the prosecution please get to the point?

O’Conor: The prosecution appears to be undermining the testimony of its own witness.

Underwood: You’ve made your point Mr. O’Conor. Mr. Stanton, will you please sit down. Mr. Evarts, will the prosecution please continue?

O’Conor, Stanton take seats.

Evarts: After you resigned your commission you returned to Virginia.

Lee: Yes.

Evarts: Soon after returning you joined the Provisional Army of Virginia as its commanding officer. Is that not so?

Lee: Yes. Virginia had not yet joined the Confederacy.

Evarts: When Virginia joined this alleged Confederacy Mr. Davis appointed you to the grade of full general in the rebel army, third in rank. Is that not so?

Lee: Yes. My duties involved advising Mr. Davis on military matters.

Evarts: You did not take the field?

Lee: On several occasions I did in my advisory capacity — in western Virginia and along the Carolina coast.

Evarts: These excursions were under the supervision of Mr. Davis. Is that not so?

Lee: Not exactly. I was under his overall command, not under his supervision.

Stanton: (Stanton stands in place; Evarts remains standing, backs away) You stated that you went with your state. Virginia seceded some time after the alleged Confederacy was organized. That doesn’t show an overriding devotion to the Southern cause.

Lee: (Grim, shaken) My allegiance was to Virginia.
You requested a pardon soon after Appomattox, practically before anyone else. At that time there were still rebel armies active in the field. Their commanders might understand your capitulation but I wonder — betrayal?

(Interjects) Enough, Mr. Stanton!

Your request for pardon doesn’t indicate a strong commitment to the Southern Confederacy.

My commitment was to Virginia and through her the Confederacy.

And if Virginia had not seceded?

Had you not stated publicly that Mr. Davis had been one of the original fire-eaters: one of the bunch of poor politicians that brought on the war?

No!

But you mentioned it in private letters. Would you care to elaborate?

The correspondence was of a personal nature.

Mr. Stanton. Move on!

Who initiated your attack on Maryland in the fall of ‘62?

I don’t quite understand.

Colonel, who ordered the attack?

I don’t recall. Either Mr. Davis ordered the Maryland campaign or I suggested it and he approved. I would suppose the latter.

Then the operation would not have occurred without his approval?

That is correct.

Who initiated your advance into Pennsylvania in the summer of ‘63?

I did. He approved.

Then the operation would not have occurred without his approval?

That is correct.
Stanton: Then all military operations initiated by the alleged Confederacy required Mr. Davis’s approval?

Lee: I was rarely in Richmond during active military operations. I was not fully acquainted with other commands. Only as far as my own command was concerned: I would have to say yes.

Stanton: You’re quibbling.

Underwood: Enough, Mr. Stanton.

Stanton backs off, sits, Evarts stands, approaches witness.

Evarts: Colonel Lee, then as far as you can surmise Mr. Davis supervised all of the military operations of the alleged Confederacy.

Lee: I fully knew only of my own command. I am not at all certain about operations in the Trans-Mississippi.

Evarts: Did not Mr. Davis order a detachment from your command be sent to Mississippi. He wanted to re-enforce the Vicksburg garrison?

Lee: I demurred. They would have arrived too late to do any good. Worse they would’ve left Virginia vulnerable.

Evarts: That was the reason you gave Mr. Davis.

Lee: Yes. The distance from Virginia to Mississippi was too great. It would require moving a large detachment with all their accouterments.

Stanton rises in place. Evarts stares at Stanton, shifts back.

Stanton: Then this is an instance when Mr. Davis directly ordered a military operation, is it not?

Lee: It was not an order. I declined.

Underwood: Please gentlemen, one prosecutor at a time.

Stanton sits.

Evarts: On another occasion did not Mr. Davis order you to assume command in Tennessee?

Lee: Essentially. He requested that I take command of the Army of Tennessee when that state was being overrun.

Evarts: You declined?

Lee: I did. I was holding the line in Virginia. With our limited resources Mr. Davis would have to decide between Virginia and Tennessee.
Evarts: Colonel Lee, considering that the Confederacy required both states to survive, was this not an admission of defeat?

Lee: I was speaking privately, only of military requirements. I did not meddle in political affairs.

Evarts: In light of your close association with Mr. Davis might you suppose that he would keep the supervision of all military operations in his own hands?

Lee: I suppose. He was loath to delegate.

Evarts: Your honor, I have made my point.

Underwood: Thank you counselor. Mr. O’Conor?

(Evarts sits, O’Conor rises, approaches the witness box)

O’Conor: It’s a privilege to meet you, Colonel Lee. I greatly admired your masterful defensive stratagems.

Lee: (Lee relaxes) Thank you.

O’Conor: You testified that Mr. Davis did not supervise your field operations.

Lee: We only discussed overall military policy. He did not interfere in field strategies or tactical maneuvers.

O’Conor: After you succeeded General Johnston in command of the Army of Virginia you decided on and conducted all field operations.

Lee: That is correct. I only discussed military objectives with Mr. Davis.

O’Conor: How often would you suppose that Mr. Davis would take direct command of any Confederate armies in the field in his capacity as general-in-chief?

Lee: That I know of, not at all.

O’Conor: At the time of your invasion of Maryland in ’62 a simultaneous invasion of Kentucky was conducted. Was Mr. Davis involved as general-in-chief in planning the simultaneous Maryland-Kentucky operation?

Lee: As far as I know, not at all.

O’Conor: That’s rather strange, isn’t it? Did he advocate it?

Lee: No! He only acquiesced. In that particular situation he should have acted more decisively.

O’Conor: In what way?
Lee: Two armies were to be involved in the Kentucky campaign; under Generals Braxton Bragg and Edmund Kirby-Smith.

O’Conor: Go on.

Lee: The two generals petitioned President Davis to appoint one of them the ranking officer for the campaign. He declined. He simply bid them to cooperate.

O’Conor: And you felt that this refusal endangered the campaign?

Lee: It doomed the campaign.

O’Conor: In what way?

Lee: Without coordination the two generals went their separate ways into Kentucky. They only concentrated when it was too late.

O’Conor: You blamed Mr. Davis?

Lee: Mr. Davis’ refused to exercise the war-making prerogatives of his office. He was far more interested in achieving peace than in waging war.

O’Conor: Thank you Colonel Lee.

O’Conor takes seat. Lee begins to rise slowly, rheumatically. Stanton stands in place.

Stanton: If the court pleases, I have a final question for Colonel Lee.

Underwood: Proceed.

Lee slowly reseats himself.

Stanton: If Mr. Davis’s objectives were peaceful, why did he agree to the several invasions of the North?

Lee: Self-defense – as legitimate among nations as among individuals. Mr. Davis’s sole purpose was to disrupt the flow of men and munitions to the South.

Stanton: Hmm! Then you felt that Mr. Davis was indispensable to the rebellion.

Lee: Not at all. There were other competent citizens who would have been equally capable.

Stanton nods head. Takes seat. Bailiff holds door. Lee rises slowly, deep breathe, steps down, bows to jury, exits courtroom.

Underwood: (Taps gavel) This is an apt time to take a ten-minute recess.
All rise. Judge returns to chambers. All except Evarts and O’Conor exit courtroom, stand together before bench. Bailiff exits last.

COURTROOM LIGHTS DIM, SPOT ON EVARTS AND O’CONOR

O’Conor: How in the world did you ever hook up with Stanton?

Evarts: It’s a long story.

O’Conor: Make it short.

Evarts: After I saved Johnson’s job by getting him acquitted he owed me. Of course he hated Stanton for starting the whole impeachment business in the first place but he went along with the arrangement because I insisted. Stanton hates Davis with a dark passion. Still thinks Davis was behind Lincoln’s assassination. I’m accommodating him.

O’Conor: He has powerful hates and powerful enemies. He’s a mean bastard!

Evarts: Can’t deny that. Lost his young daughter to scarlet fever. A few years later lost his wife. He was only 29. Would you believe, buried her in her wedding gown. Never really got over it. Got real mean.

O’Conor: Meanest man I ever met.

Evarts: He had this little brass bell on his desk at the War Department. He’d tell visitors he just has to ring the bell once and any person he wished would be arrested on any pretense he’d imagine. They’d squirm and he’d smile.

O’Conor: He’s Quaker and an abolitionist. Probably that’s why he hates ol’ Jeff.

Evarts and O’Conor return to seats.

SPOT DIMS OUT, COURTROOM LIGHTS BRIGHTEN

All return. Judge returns to courtroom. Everyone rises.

Bailiff: The honorable John Underwood presiding.

Underwood: Is the prosecution prepared to call its second witness?

Everyone takes seat except Evarts and bailiff.

Evarts: We are your honor.

Underwood: Bailiff.

Bailiff glances at list, opens door.

Bailiff: Mr. Joseph Johnston
Davis: (Turns to O’Conor) Damn Johnston. He lost the war for us.

All stare at Davis. Johnston enters, takes seat. Bailiff takes Bible from witness box railing. Bailiff holds Bible flat before witness. Witness lays right hand on Bible. Bailiff reads from slip.

Bailiff: In your testimony do you swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Johnston: I do.

Bailiff returns to seat, leaving bible on witness box railing.

Evarts: State your full name?

Johnston: Joseph Eggleston Johnston

Evarts: Your present residence?

Johnston: Savannah, Georgia

Evarts: Your present occupation?

Johnston: I’m presently investigating prospective employment in the insurance field.

Evarts: I see. You are a graduate of the United States Military Academy at West Point. Is that not so?

Johnston: Yes sir. 1829

Evarts: Since graduation you served in the United States Army until you resigned in 1861. Is that not so?

Johnston: Yes sir, with a short interruption, before Virginia had seceded.

Evarts: You attained the permanent grade of brigadier general in the United States service. Is that not correct?

Johnston: Yes sir. I commanded the quartermaster corps.

Evarts: It would appear that the United States bestowed on you great honors and responsibilities. Is that not so?

Johnston: Yes sir. The most painful decision I had to make was to resign my commission. I appreciate that the United States took me, educated me, and made me both an officer in the United States Army and a gentleman in the highest sense of the term. As you stated the United States bestowed upon me great honors and responsibilities.

Evarts: Yet you resigned anyway.
Johnston: I was against succession to the very marrow of my bones. I thought Virginia had made a great mistake. When that happened I had to choose between my loyalty to my country and my loyalty to my family. I choose my family and the state to which we belonged.

Evarts: After Virginia joined the Confederacy you commanded at Bull Run against General McDowell, correct?

Johnston: Not exactly. General Beauregard commanded. I was stationed beyond the Blue Ridge.

Evarts: The Shenandoah Valley?

Johnston: Exactly, the Valley of Virginia. I was to keep General Patterson from reinforcing McDowell’s invading army.

Evarts: Then how was it that you participated at Bull Run?

Johnston: When McDowell approached Manassas Junction I was recalled.

Evarts: To Bull Run?

Johnston: Exactly. We quietly broke contact with Patterson. He never knew we were gone till we reached Manassas Junction.

Evarts: How did you reach Manassas Junction?

Johnston: Patterson was in the War of 1812. He must have been in his 70s. Why in the world he was still in the field I can't imagine.

Evarts: General, how did you reach Manassas Junction?

Johnston: The Manassas Gap Railroad took us from the Shenandoah directly to Manassas Junction. The tracks crossed the battlefield.

Evarts: Is that so!

Johnston: We arrived in the nick of time. Flanked McDowell and turned the tide of battle. I might add that Manassas Junction was the first time in history that an army was reinforced by rail — in the midst of battle, mind you.

Evarts: How was Mr. Davis involved in the planning of this engagement?

Johnston: The men were under fire as soon as they left the cars.

Evarts: Thank you. Now please answer the question. Uh! Might the Court Recorder restate my question?

Underwood: Court Recorder!

Court Recorder: “How was Mr. Davis involved in the planning of the engagement?”
Johnston: As far as I know, he wasn’t.

Evarts: Who was in command at Bull Run, you or Beauregard?

Johnston: That is a matter for debate, and still is.

Evarts: Was Mr. Davis involved?

Johnston: He was not! Wouldn’t even name a ranking officer.

Evarts: But he was at Bull Run.

Johnston: He arrived at the battlefield after McDowell retreated – more of a rout. Tried to claim credit for the victory. Always reminding everyone of his prerogatives. He started sounding like Charles the First.

Davis raps tabletop with his fist. Attracts everyone's attention.

Evarts: (Glances at Davis) An apt comparison. I understand that king lost his head.

Johnston: (Smiles) Davis got in a row with Beauregard. Appeared in the papers. Beauregard got his full generalship anyway.

Evarts: But you already held a full generalship? Wouldn’t you have been the ranking officer?

Johnston: Normally, but General Beauregard was familiar with the disposition of the forces involved.

Evarts: Then the row didn’t amount to much?

Johnston: Davis never forgave Beauregard, thought he was claiming all the credit. He only got promoted because Congress and the newspapers raised a ruckus. Remember Beauregard was a public hero after Fort Sumter.

Evarts: And you?

Johnston: As I said, the matter is still being debated.

Evarts: Next you commanded the Army of Virginia. Is that not so?

Johnston: That is correct.

Evarts: You were wounded during the Peninsula campaign?

Johnston: Yes, laid up for four months.

Evarts: After you recovered you were then reassigned. Is that not so?
Johnston: Yes, to the newly created Department of the West.

Evarts: You commanded an army?

Johnston: Not exactly. I supervised two armies, the Army of Tennessee and the Army of Mississippi. My task was to coordinate the operations of these two armies.

Evarts: That was your duty?

Johnston: Actually, I had little idea of my duties. Mr. Davis never made clear exactly what were my responsibilities and my duties.

Evarts: Did Mr. Davis interfere in your command?

Johnston: I had assumed that any officer under my command would communicate any of his concerns with my headquarters, not outside the army. That meant not with Richmond or any other command.

Evarts: Isn’t that the usual procedure?

Johnston: Of course, in any army to maintain the chain of command. What I had discovered that even before the fall of Vicksburg Mr. Davis had given both Generals Bragg and Pemberton the opportunity of communicating directly with him.

Evarts: You had a problem with this arrangement?

Johnston: How would I know in framing orders whether or not they would be implemented. I wouldn’t have any knowledge of any contrary instructions that Mr. Davis might have sent.

Stanton: (Stands. Evarts stands back) So Mr. Davis did exercise the prerogative of issuing direct orders to his field commanders?

Johnston: He sent a detachment from Bragg’s army to Pemberton’s without my knowledge. His greatest pleasure seems to have been in continually rearranging the command structure of the armies.

Evarts sits.

Davis: (Davis shouts at Underwood) How would he know? He never exercised the authority I gave him!

Stanton turns and momentarily stares at Davis.

Underwood: Mr. O’Conor, please control your client.

Stanton: You thought Mr. Davis exceeded his authority?
Johnston: An experienced general-in-chief would never have allowed the situation to develop. Unfortunately Mr. Davis was his own general-in-chief.

Stanton: You were disturbed by his taking command?

Johnston: Worse! I had no idea whether these moves were politically motivated or not. I’m not so naïve as to suppose that politicians don’t have political favors to repay but too many of his friends ended up in high command. I found it deplorable that Mr. Davis would use the army for this purpose.

Stanton: Would this be the extent of his interference?

Johnston: Not at all! My responsibility was to protect Vicksburg. I had only 40,000 troops in Mississippi for this purpose. The task would be impossible with this few troops.

Stanton: Is that so?

Johnston: I immediately began to assembly a new army at Jackson from detached regiments. That was some fifty miles east of Vicksburg. Unfortunately General Grant struck first.

Stanton: Then what occurred?

Johnston: I advised Pemberton that if he is invested he would lose the army and the city. Before this occurs he must abandon Vicksburg. Our armies would then combine to face Grant. We'd outnumber him.

Stanton: Well, what happened?

Johnston: Grant began encircling the city. I gave Pemberton the preemptive order to breakout while he still had the chance. He refused my direct order. I found out later that Mr. Davis ordered Pemberton to hold Vicksburg at all hazards. A stupid inexcusable order!

Stanton: Mr. Davis directly interfered with your orders?

Johnston: Exactly. Pemberton had the choice of obeying his military commander or his civilian superior. He chose the latter.

Stanton: Again Mr. Davis directly interfered with your orders?

Johnston: Mr. Davis had wanted me to break though Grant’s line and relieve Vicksburg. I have no doubt that General Grant would have cherished the idea. I refused and Mr. Davis blamed me for the loss of the city and the army. Better the blame than the loss of both armies.

Stanton: To conclude: Mr. Davis was directly involved in military operations.

Johnston: Absolutely.
Stanton: Thank you. (Sits)

Evarts: (Rises) Thank you General Johnston.

Evarts sits. Johnston rises to leave. Underwood leans over:

Underwood: Mr. O’Conor may wish to have a few words with you.

Johnston angrily resumes his place. O’Conor stands apart from witness box.

O’Conor: General, you were acquainted with Mr. Davis before the war?

Johnston: Yes.

O’Conor: At West Point?

Johnston: Yes.

O’Conor: A cordial relationship?

Johnston: Hardly.

O’Conor: Might you explain?

Johnston: We were not the best of friends.

O’Conor: That’s hardly an explanation.

Johnston: Our differences are hardly a matter for these proceedings.

O’Conor: That is a matter for the defense to decide.

Underwood: Actually it’s a matter for the court to decide. Mr. O’Conor, what’s your point?

O’Conor: To demonstrate that a grudge had existed between the General and Mr. Davis for an extended period. This animosity might color his responses to my questions.

Underwood: Very well. Proceed.

O’Conor: When you joined the Confederate service was your relationship with Mr. Davis cordial?

Johnston: I would assume so.

O’Conor: Mr. Davis was given the authority not long after he assumed office to appoint full generals in the Confederate service. Is this not so?

Johnston: That’s right, but Mr. Davis ignored the expressed instructions of Congress.
O'Conor: The Confederate Congress?

Johnston: Of course!

O'Conor: And these instructions were?

Johnston: Their instructions were quite explicit. The ranks assigned within the grade of full general in the Confederate States service would depend on the highest grade that that officer attained at the time of his resignation from the United States service.

O'Conor: I understand that Mr. Davis named four general officers.

Johnston: That is correct, and since I held the grade of brigadier general in the United States service, second only to Major General Winfield Scott, I should have ranked first.

O'Conor: How were they ranked?

Johnston: Samuel Cooper was ranked first; then Sidney Johnston — we were not related — then Robert Lee and finally me.

O'Conor: What was Samuel Cooper’s grade at the time he resigned from the United States service?

Johnston: Full Colonel.

O'Conor: Sidney Johnston?

Johnston: Full Colonel.

O'Conor: Robert Lee?

Johnston: Full Colonel.

O'Conor: So instead of being properly first in rank you were last.

Johnston: Exactly.

O'Conor: I would suppose that you were quite perturbed over this ranking.

Johnston: Quite! I was very angry. I disputed the decision.

O'Conor: And how was this dispute resolved?

Johnston: Mr. Davis made the lame excuse that he placed line officers before staff officers.

O'Conor: You weren’t satisfied?
The response was totally fraudulent. Samuel Cooper, a close friend of Mr. Davis, held a staff position in the old army and Mr. Davis ranked him first.

O'Connor: I take it you assumed a personal animosity prompted Mr. Davis to ignore the law and place you last rather than first?

Johnston: Exactly, particularly since I had field experience.

O'Connor: Nevertheless he appointed you to command the Department of the West, did he not?

Johnston: I suspect the reason was to get me out of Richmond. I was probably unsettling his sycophants.

Davis: (Davis bangs table with fist; rises, shouts) You were totally unfit for duty!

Underwood: Mr. Davis, you are out of order. Be seated and be silent.

Davis: You miscreant. You never had your heart in our Cause.

O'Connor quickly approaches, whispers to Davis. Davis reseats himself, angrily. O'Connor approaches witness box.

O'Connor: Mr. Davis did assign you to an important command.

Johnston: Important hell! It wasn’t a command position. It was an insult.

Underwood: General!

Johnston: I apologize for my intemperate language.

Underwood: I regret that members of the jury and women in the gallery were exposed to such an outburst. Please continue.

Johnston: Again I apologize.

O'Connor: It wasn’t a command position? Please explain.

Johnston: The department of the West encompassed the Army of Tennessee under Braxton Bragg and the Army of Mississippi under John Pemberton.

O'Connor: How well did you get along with these subordinates?

Johnston: I was not intimate with either of them.

O'Connor: What did you know of them?

Johnston: Primarily, they were both prewar acquaintances of Mr. Davis.
O’Conor: Braxton Bragg?

Johnston: A competent enough officer: a good administrator and strategist, a strict disciplinarian, perhaps too strict. His problem was that he couldn't get along with his subordinates. He made enemies too easily. He either patronized his corps commanders or treated them with contempt.

O’Conor: And what was the effect of this dissatisfaction?

Johnston: Their resentment largely rendered his army ineffectual.

O’Conor: Wasn’t it for this reason that Mr. Davis sent you to Tennessee to investigate the situation?

Johnston: That is correct.

O’Conor: You were to recommend any changes in high command that might be necessary.

Johnston: That is correct.

O’Conor: Yet you recommended that Bragg be retained.

Johnston: After considering the precarious position held by the Army of Tennessee at that time, I couldn’t recommend a change in command.

O’Conor: When the trouble persisted Mr. Davis instructed you to reinvestigate. You again recommended no change in command.

Johnston: Mrs. Bragg was seriously ill at that time and for this reason my decision stood.

O’Conor: If Mrs. Bragg were ailing wouldn’t it have been a fitting time to relieve General Bragg? He could render his wife his full attention?

Johnston: Perhaps. I didn't think so at the time.

O’Conor: From your testimony it would seem that your enemy Mr. Davis asked you to decide whether his friend General Bragg should be removed from command. Does a person ask his enemy to decide whether or not a friend should be retained?

Johnston: Only Mr. Davis could answer that question.

O’Conor: Perhaps your resentment clouded your judgment at that time.

Johnston: I resent your inference.

O’Conor: Perhaps your resentment of Mr. Davis was no more than jealousy of his position as commander in chief and you as his subordinate.
Underwood: Mr. O’Conor; was that a question or an opinion?

Stanton: (Stanton stands) I object to counsel’s entire line of questioning. He is baiting the witness.

Johnston rises to leave, angry.

Underwood: General, please calm yourself and remain seated. Objection sustained.

Johnston reseats himself.

O’Conor: I apologize for any discomfiture I might have caused the witness.

Johnston nods.

Underwood: Please continue.

O’Conor: What of John Pemberton?

Johnston: Pemberton was in command of coastal defenses in the Carolinas. Mysteriously this brigadier general was then assigned to command the Mississippi Army.

O’Conor: So?

Johnston: He was promoted two grades to lieutenant general; he had never commanded even a regiment.

O’Conor: As far as we know, neither have you.

Johnston half rises, again expresses rage. Bangs railing.

Underwood: Mr. O’Conor, your last comment was not a question. Please frame your questions with more congeniality. I don’t wish to rebuke you so save your personal opinions for your closing statement.

O’Conor: I apologize your honor. Let us return to your relationship with Mr. Davis in regards to the Department of the West.

Johnston: Too few troops were in either Tennessee or Mississippi for the defense of both states and one or the other must fall if the armies were combined. Mr. Davis knew that.

O’Conor: And Mr. Davis did nothing?

Johnston: How could he? He would have to either sacrifice Tennessee or Mississippi. He couldn’t do either, so he did nothing. He probably realized that Vicksburg was lost so he assigned me to the west to take the blame.

Davis slams fist on table. O’Conor glances at Davis, grimaces, shakes head.
O’Conor: But your attitude about the whole operation was negative, was it not.

Johnston: Not at all! I had thought that adequate troops were available. They were not.

O’Conor: Accepting the situation as you found it, could you not have done more than you did?

Johnston: Such as?

O’Conor: Threaten Grant’s siege line from the rear.

Johnston: I did approach Grant’s siege line from the east. I could have brought my army to striking distance.

O’Conor: But you didn’t.

Johnston: I was greatly outnumbered. It would have been foolish to engage Grant unless Pemberton was willing to breakout. He was not.

O’Conor: But could you not have done something further?

Johnston: Perhaps, but as long as Pemberton followed Mr. Davis’s directive rather than his direct superior’s orders my hands were tied. Mr. Davis directly interfered in military operations.

O’Conor: You never planned to relieve Vicksburg.

Johnston: As I said; as long as Pemberton followed Mr. Davis’s directive my hands were tied.

O’Conor: Your resentment of Mr. Davis colored you entire testimony. You Honor. I am finished with this alleged witness.

Underwood: Mr. O’Conor, your final comment was uncalled for.


Underwood: We will adjourn until tomorrow morning. Court proceedings will resume at ten o’clock sharp.

All rise. Judge returns to chambers. All except Evarts and O’Conor exit courtroom, stand together before bench. Bailiff exits last.

**COURTROOM LIGHTS DIM, SPOT ON EVARTS AND O’CONOR**

Evarts: Charlie, you really think the jury will buy your hokey story? Davis an honorable but misunderstood patriot who stumbled into the Confederacy.
O’Conor: This whole trial is a terrible mistake. You should have left the whole thing alone — just kept postponing.

Evarts: He’s a traitor. Traitors should be hanged. Justice done!

O’Conor: *Fiat justitia pereat Mundus!*

Evarts: (Pauses) My Latin’s rusty: Justice be done…

O’Conor: “Let justice be done though the world perish”.

Evarts: Ah yes: Ferdinand the Great: Imperial Roman Emperor.

O’Conor: Actually Ferdinand the First: Holy Roman Emperor

Evarts: Bravo! Should I have known that?

O’Conor: Bill, what you don’t realize is that our world might just perish. The South has been so devastated that it will probably take a generation or more to just repair the damage. Its economy is paralyzed.

Evarts: If you hadn’t been kissing the slavemongers’ asses there might not have been a war.

O’Conor: I’m talking about right now. The south’s largest cities have been burned out, its bridges and railroads gone, its population decimated. There’s destitution and hunger everywhere. They’re seething with rage.

Evarts: They got caught on the short end of a war they started?

O’Conor: If the war’s rekindled it will be far more ferocious than before: guerilla warfare at its worst. All it needs is a spark. Such a war will go on for God knows how long and probably ruin America for good.

Evarts: What’s your point?

O’Conor: Hanging Jeff Davis would be the spark that sets it off. The Irish and the Brits have been going at it for five hundred years. They’re still at it. It’ll be a lot worse here, spread over thousands of square miles. They’ll send terrorists north, blowing-up railroad bridges and tossing bombs into crowds, just to make us pay.

Evarts: That’s really not my concern. All I know is that you tried to turn the free states into slave states in the Lemmon case. If you had won any slaveholder could have lived in any free state with his slaves protected for as long as he wished. You’d have turned all the states into slave states.

O’Conor: It was just another case.

Evarts: Hell! I beat you then and I can beat you now.
O’Conor: Its just revenge. If justice is your real concern why not arrest the 700 or so secessionists who actually voted their states out of the Union?

Evarts: At times justice must be tempered with practicality. Davis will do.

O’Conor: (Shakes head, both move towards exit) Just as I figured! So much for ‘Justice be done’!

Both exit courtroom.

COURTROOM LIGHTS OUT, HOUSE LIGHTS ON, INTERMISSION

ACT II PROSECUTION

HOUSE LIGHTS OFF, COURTROOM LIGHTS ON

All are back in place.

Bailiff: Hear ye, hear ye. The United States District Court for the Eastern District of Virginia is now in session. All rise.

Judge enters from chambers, seats himself.

Bailiff: The honorable John Underwood presiding. God save the United States and this honorable court.

Underwood: Be seated.

All in courtroom take seats except bailiff.

Underwood: Is the prosecution ready to call its next witness?

Evarts: Yes we are your Honor.

Bailiff: (Bailiff glances at list, opens door) Mr. John Pemberton

Pemberton enters courtroom, head lowered, deep in thought.

COURTROOM LIGHTS PARTIALLY DIM, SPOT ON DAVIS

Davis: I have no doubts as to the integrity of General Pemberton. Cheerfully obedient to a fault. A true gentleman, a true patriot.

O’Conor: We’ll see.

Davis: Faithful is the only term I could use to describe him. He gave up much to join our cause.

SPOT DIMS, COURTROOM LIGHTS FULL
Pemberton takes seat. Bailiff takes bible from witness box railing.
Bailiff holds bible flat before witness. Witness lays right hand on Bible. Bailiff reads from slip.

Bailiff: In your testimony do you swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Pemberton: I do.

Bailiff returns to seat, leaving bible on witness-box railing.

Evarts: State your full name?

Pemberton: John Clifford Pemberton

Evarts: Your present residence?

Pemberton: Philadelphia, Pennsylvania

Evarts: Your present occupation?

Pemberton: Scrap iron and cotton broker.

Evarts: You father was a distinguished world trader and traveler, was he not?

Pemberton: Yes sir.

Evarts: And, as I understand, your ancestors accompanied William Penn on his first voyage to America.

Pemberton: Yes sir.

Evarts: You are a graduate of the United States Military Academy at West Point. Is that not so?

Pemberton: Yes sir. 1837

Evarts: You attained the grade of captain and brevet major in the United States service. Is that correct?

Pemberton: That is correct.

Evarts: You served in the Seminole Wars in Florida?

Pemberton: Yes, and then in the Mexican War.

Evarts: Subsequently you were posted where?

Pemberton: In the south where I met my wife. Thereafter I was posted primarily in the south or southwest.
Evarts: Since the Mexican War?

Pemberton: Yes. Till recently, I’ve made my home in Virginia.

Evarts: Since commissioned you served in the United States Army until you resigned in 1861. Is that so?

Pemberton: Yes sir. After Virginia had seceded.

Evarts: As a native Pennsylvanian might you explain?

Pemberton: I had spent most of my life in the South and my wife and all of our friends are Virginians. I went with my family and friends.

Stanton: (Stanton leaps up) Couldn’t you wait till Pennsylvania seceded?

Pemberton: I did what I thought was right.

Stanton: Bah! For your friends you betrayed your country.

O’Conor: (O’Conor rises) The prosecution is impugning its own witness.

Stanton: The man is simply a traitor. There is no other explanation.

Underwood: Mr. O’Conor, I can hear as well as you. Mr. Stanton, might you wait till you have a pertinent question before you rise?

Evarts: We apologize.

Stanton: I can do my own apologizing.

Underwood: Please apology to this court.

Stanton: I apologize to the court.

Evarts and Stanton angrily grimace at each other. Stanton, O’Conor sit.

Underwood: May I have the attention of the prosecution. Are you finished with this witness?

Evarts: No you honor. We will continue.

Underwood: (Resigned) Very well.

Evarts: You entered the Confederate service as a brigadier general.

Pemberton: Actually as a colonel. I was then promoted to brigadier.

Evarts: Supervising coastal defenses in the Carolinas.

Pemberton: Yes sir.
Evarts: You were then promoted two grades to lieutenant general, correct?

Pemberton: Not exactly. I was promoted to major general for my Carolina service, then later to lieutenant general to take command of the Army of Mississippi at Vicksburg.

Evarts: Were your measures adequate?

Pemberton: I would think so. We drove off both Generals Grant and Sherman in their initial attacks.

Evarts: What happened after General Grant attained the east shore of the Mississippi, just south of Vicksburg?

Pemberton: When I realized that he was moving east towards Jackson I attacked Grant; hit him moving back towards Vicksburg.

Evarts: What was the outcome?

Pemberton: At Champion Hill we were outflanked. We were grossly outnumbered.

Evarts: What did you do then?

Pemberton: I brought the Army back to Vicksburg and prepared to resist a siege.

Evarts: Did General Johnston send you any instructions?

Pemberton: Yes he did. He advised me to vacate the city to preserve my army.

Evarts: Did Mr. Davis send you any instructions?

Pemberton: Yes. He advised me to hold the city at all hazards.

Evarts: When Grant began to encircle to the city did General Johnston send you any further instructions?

Pemberton: He preemptively ordered me to abandon the city and combine with his army.

Evarts: Apparently you had conflicting orders.

Pemberton: I was the commanding officer at the scene and I had to decide for myself and for my command the best course of action.

Evarts: And what did you decide?

Pemberton: To hold the city till General Johnston broke the siege.

Evarts: Mr. Davis’s orders?
Pemberton: Mr. Davis’s advice. Mr. Davis was not my commanding officer. I treated his advice as advice, not as an order.

Evarts: General Johnston never relieved the city?

Pemberton: That is correct.

Evarts: Do you feel any animosity towards General Johnston?

Pemberton: Considerable! He never delivered what he had promised. Didn’t even try.

Evarts: Did you wish him to break through Grant’s siege line?

Pemberton: Yes I did.

Evarts: General Johnston testified that such a course would have doomed both armies. He words were …uh! . Will the Recorder please recite General Johnston’s respond.

Underwood: Court Recorder.

Court Recorder: (Recorder rummages through his records) Here it is!
“Mr. Davis had wanted me to break though Grant’s line and enter Vicksburg in its defense. I have no doubt that General Grant would have cherished the idea. I refused and Mr. Davis blamed me for the loss of the city and the army. Better the blame than the loss of both armies.”

Evarts: Do you disagree with this assessment?

Pemberton: I do. Both armies might have done what a single army could not have done.

Evarts: So you held Vicksburg in agreement with Mr. Davis advice despite that advice, as I understand you.

Pemberton: You might interpret my response in that manner.

Evarts: Perhaps you might explain: when is a presidential directive an order or when is it simply advice?

Pemberton: Only the recipient can make that choice.

Evarts: You were the recipient.

Pemberton: Yes, and I made the choice.

Evarts: Doesn’t advice from your commander in chief have greater weight than orders from your immediate superior?

Pemberton: Perhaps.
Evarts: Then you chose to follow Mr. Davis’s advice rather than General Johnston’s orders.

Pemberton: (Agitated) I did not! I chose on military necessities alone.

Stanton rises, Evarts steps back.

Stanton: Wasn’t Mr. Davis responsible for your two promotions from brigadier general to lieutenant general?

Pemberton: I never denied that.

Stanton: Then you owed him for the favor.

Pemberton: I did not consider the promotions in that light.

Stanton: Whatever you wished to call it you owed him.

Pemberton: I did not see the situation in that light.

Stanton: I’ll bet you didn’t. A man does you a good turn and you would ignore it.

Pemberton: I made the choice I thought best.

Stanton: Quibble, quibble, quibble. You held Vicksburg because Davis told you to. That’s why you didn’t save your army and you know it.

O’Conor: (Stands) The prosecution is attacking its own witness again.

Underwood: (Slams gavel) This has gone on long enough. Mr. Stanton, either ask a question or sit down.

Stanton: (Stanton, O’Conor sits) The witness is lying through his teeth.

Underwood: You’re asking for a contempt citation. Please continue.

Evarts: After an almost six week siege you capitulated.

Pemberton: Our resources were exhausted.

Evarts: You capitulated on the Fourth of July.

Pemberton: I thought we would receive better terms.

Evarts: Did you?

Pemberton: The officers and men was paroled rather being sent north to prison camps.

Evarts: The South did not take too lightly to your surrender nor the date, did they?
Pemberton: No, they did not.

Evarts: Many thought you betrayed them didn’t they, citing your northern birth?

Stanton: (Emphatically, from seat) That’s rich! A betrayer betrayed.

Underwood: One more outburst and I will have you expelled from this courtroom.

Stanton: (Rises) John!

Underwood: (Slams gavel) First: In this courtroom I am addressed as ‘Your Honor’. Second: You are in contempt. The fine is fifty dollars. Pay on your way out.

Davis: (Davis shouts at Stanton as he passes) Damn you to hell Stanton, damn you!

Underwood: Mr. Davis; this court does not appreciate your *ad hominem* outbursts. They will cease.

Stanton slouches out. Chair vacant. Evarts smiles.

Evarts: Your witness.

**COURTROOM LIGHTS PARTIALLY DIM, SPOT ON DAVIS**

Evarts sits. Davis turns to O’Conor who is shuffling papers:

Davis: A fine soldier. After Vicksburg there were no vacancies open for a lieutenant general. He graciously accepted an artillery position as a lieutenant colonel. An honorable gentleman! A true patriot!

O’Conor: He betrayed the North. The jury won’t forget that.

Davis: None of my armies wanted him, cited his northern birth. Vicksburg didn’t help either. I did all I could. Damn Johnston!

**SPOT DIMS, COURTROOM LIGHTS FULL**

O’Conor: (Rises) Major, you held a staff position in Mexico?

Pemberton: On several occasions I was on the firing line.

O’Conor: Let’s return to Vicksburg. Was your position in Vicksburg secure?

Pemberton: As long as the city was not invested. The city is located on high bluffs along the eastern shore of the Mississippi. We could withstand any assault. We intercepted river traffic. Union shipping was so slow against the current that we sank or disabled just about everything that tried to pass.

O’Conor: If the city were invested?
Pemberton: The city had one link to the outside world: the Jackson-Vicksburg railway. Jackson was 45 miles east of Vicksburg.

O’Conor: The only link?

Pemberton: The only means suitable for military supplies and reinforcements.

O’Conor: Were such supplies stockpiled at Vicksburg?

Pemberton: Not nearly enough as it turned out. We had all the ordinance we needed. What we lacked was commissary stores. We discovered that too late. We were the last outpost of a long supply line.

O’Conor: How long could you hold out?

Pemberton: About a month.

O’Conor: You held out for six weeks.

Pemberton: Waiting for Johnston.

O’Conor: Who never appeared.

Pemberton: Unfortunately he calculates the odds of winning a battle with mathematical precision; then acts accordingly.

O’Conor: Then Vicksburg was lost.

Pemberton: I had hoped that he would have relieved the city despite the odds. He had no intention to do so.

O’Conor: Then your decision to remain at Vicksburg you thought was sound?

Pemberton: Exactly!

O’Conor: Mr. Davis’s advice was simply advice and accepted as such. It did not influence your decision?

Pemberton: Not at all!

O’Conor: (Turns to jury) Just advice! (Turns to Witness) Thank you major.

Underwood: The witness is excused.

Bailiff open door. Pemberton leaves courtroom, troubled. Head down, oblivious to jury.

Underwood: This is an apt time to take a ten-minute recess.

All rise. Judge returns to chambers. All leave courtroom except bailiff and court recorder.
Bailiff: (In front of bench) Did’ja know that Davis lost his son Joe when the boy fell from their second-story balcony, back in ’64.

Court Recorder: No!

Bailiff: Yep! Was balancing himself on the railing. Jeff never got over it.

Court Recorder: He really is a cold fish. Probably only made him worse.

Bailiff: Probably so! Had the balcony torn down. (Return to stations)

SPOT DIMS, COURTROOM BRIGHTENS

Stanton quietly takes seat with others before Underwood returns. Evarts grimaces. All rise.

Bailiff: The honorable John Underwood presiding.

Underwood: Be seated. Is the prosecution prepared to call its next witness?

Evarts: Yes your Honor.

Underwood: Bailiff.

Bailiff: (Bailiff checks notes) Mr. James Seddon.

COURTROOM LIGHTS PARTIALLY DIM, SPOT ON DAVIS

Davis turns to O’Conor.

Davis: A fine gentleman, a true Southerner: a man of integrity, of culture.

O’Conor: They’re often the worse witnesses. They’ll do you in without knowing it.

SPOT DIMS, COURTROOM LIGHTS FULL

Seddon takes seat. Bailiff takes bible from witness box railing.
Bailiff holds bible flat before witness. Witness lays right hand on Bible. Bailiff reads from slip.

Bailiff: In your testimony do you swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Seddon: I do.

Bailiff returns to seat, leaving Bible on railing.

Evarts: State your full name?

Seddon: James Alexander Seddon
Evarts:

Your present residence?

Seddon:

Goochland County, Virginia

Evarts:

Your present occupation?

Seddon:

Restoring my law practice and repairing the war damages to my estate.

Evarts:

Mr. Davis appointed you to the post of Secretary of War, is this not correct.

Seddon:

That is correct.

Evarts:

You held the office from late 1862 to early 1865, correct?

Seddon:

Correct, almost three years.

Evarts:

You could appraise at first hand Mr. Davis’s conduct and competence as commander in chief?

Seddon:

I believe so.

Evarts:

Did Mr. Davis essentially leave you alone to carry out your duties?

Seddon:

That would have been a dereliction of duty. I served at his pleasure.

Evarts:

Does your answer imply that you simply carried out his orders or that you initiated military directives?

Seddon:

My sole duty was to run the War Department so as to maintain the Confederate armies in the field.

Evarts:

Inasmuch as Mr. Davis had not appointed a general-in-chief, the commissary general and quartermaster general and other such high military functionaries reported directly to you, is this correct.

Seddon:

That is correct. He did not interfere in such matters as supply or transport.

Evarts:

You were given a free hand?

Seddon:

large measure.

Evarts:

Meaning?

Seddon:

Mr. Davis reserved for himself the appointment or dismissal of personnel such as you mentioned.

Evarts:

You had some reservations about certain of his appointees?

Seddon:

Yes. They were simply incompetent and should have been dismissed.
Evarts: You mean people like your old commissary general Lucius Northrop?

Seddon: I would prefer not to open old wounds. The people I alluded to were old army comrades. Mr. Davis was loyal to a fault – perhaps too loyal.

Evarts: An occupational hazard of all chief executives. A good politician knows when to release himself from inconvenient loyalties and obligations.

Seddon: And promises, I have no doubt.

Evarts: Indeed! Now let us consider military operations. Did Mr. Davis dictate overall military strategy?

Seddon: He would have to — after all he was general-in-chief.

Evarts: To what degree did he actually dictate field strategy?

Seddon: Seldom. In fact all too often his field commanders would initiate strategic maneuvers and only inform Mr. Davis when they were so far advanced that his hands were tied.

Evarts: He acquiesced?

Seddon: Of course. What else could he do. They forced his hand. This included virtually all his commanders, one time or another.

Evarts: Did that list include Colonel Lee?

Seddon: Of course. Although Lee spoke to Mr. Davis in generalities about a second invasion of the north after Chancellorsville, his Pennsylvania adventure was well underway before he officially notified me at the War Department.

Evarts: Wouldn’t that indicate that his field commanders thought Mr. Davis a weak commander in chief?

Seddon: I wouldn’t know. I do think that his failure to appoint a competent general-in-chief fatally wounded the Confederacy.

Evarts: Why do you think he failed to do so?

Seddon: He was jealous of his prerogatives. With a minimum of military experience he thought himself competent in directing military operations.

Evarts: And he was not?

Seddon: Exactly. He was a commander in chief who sorely needed a general-in-chief to inform and advise him on military operations — to translate his executive objectives into military directives.
Evarts: So many southern generals are preparing books or alibis to explain their operations that your reason for defeat is just one among many.

Underwood: Gentlemen, truly I am enjoying this discourse but aren’t we forgetting the purpose of these proceedings?

Evarts: Thank you for reminding us, your Honor. Is there any occasion when Mr. Davis directly dictated a strategic maneuver?

Seddon: Mr. George Randolph, my predecessor, had independently ordered a large detachment of troops from eastern Arkansas to cross the Mississippi to aid in the defense of Vicksburg. Mr. Davis countermanded the order.

O’Conor: (Stands) Objection! That’s pure hearsay?

Seddon: Not at all! The orders and counter-orders are in the War department records now deposited in the National Archives. By the time Mr. Davis realized the enormity of his error the troops had been moved too far inland to be recalled.

O’Conor takes seat. Davis nervously tapping table with his fingers.

Evarts: And the significance of this recital?

Seddon: Mr. Randolph was asked to resign his position because of his independent activities and opinions — and probably, I’m afraid, because he was right and Mr. Davis wrong.

Davis slams table with his fist. Everyone glances. O’Conor shakes head.

Evarts: Then Mr. Davis interfered in military operations?

Seddon: Mr. Davis was an exceedingly competent legislator thrust into an executive position. He was a fine administrator; he was a disaster as a general-in-chief.

Evarts: Thank you Mr. Seddon.

Seddon: He was legalistic and inflexible. Lincoln would have trashed the Constitution if he thought it would help the war effort. Mr. Davis could not even consider such an illegal course.

Stanton leaps up. Underwood glares at him. Stanton reseats himself, rises slowly.

Underwood: Perhaps a question, Mr. Stanton?

Stanton: Yes, your Honor.

Evarts takes seat.
Underwood: Proceed!

Stanton: You didn’t really answer the question posed: did Mr. Davis direct any military operations?

Seddon: Only if you mean appointing, assigning or removing military personnel.

Stanton: That is not what I meant.

Seddon: Well, he did move Beauregard and his troops from Charleston to protect Richmond from a thrust by General Butler.

Stanton: Was that the only occasion?

Seddon: He did peremptorily order General Johnston to initiate offensive operations during the initial stages of the Atlanta campaign. Mr. Davis hoped to thwart General Sherman’s anticipated invasion of Georgia.

Stanton: Were his orders obeyed?

Seddon: General Johnston demurred.

Stanton: Why?

Seddon: Johnston thought he was too greatly outnumbered for offensive operations at that time. On top of that he complained that the army lacked sufficient ordinance and commissary stores for a prolonged campaign.

Stanton: Did he?

Seddon: Apparently. An experienced general-in-chief would have studied the situation in detail before issuing any such order.

Stanton: What do you think an experienced general-in-chief would have recommended?

Seddon: There were thousands of idle troops on coastal watch duty that could have been employed. He could have transferred most of our forces in eastern Mississippi to Johnston’s command. There were too few Union forces in that vicinity anyway to tie down so many of our troops.

Stanton: Did Mr. Davis do so?

Seddon: I must remind you, he was his own general-in-chief. I served him best by keeping my counsel to myself unless asked. He didn’t even sic Nathan Forrest against Sherman’s supply line until it was too late to do any good. Said Forrest had more important duties.

Stanton: Mr. Davis did nothing?
Seddon: My God, a single track from Louisville four hundred miles south to Chattanooga: Sherman’s jumping-off point. The line ran through dense forests in the middle of nowhere: a no-mans land.

Stanton: Your saying the line was vulnerable if Mr. Davis had noticed?

Seddon: Vulnerable? There were so many bridges and tunnels I can’t recall the number; too many to be well guarded — or even guarded at all.

Stanton: Well, what did you recommend?

Seddon: I was not asked. It should have been obvious to Mr. Davis. Sherman’s invasion of Georgia depended on that single track. Military stores were being stockpiled at Chattanooga. Supply trains ran day and night.

Stanton: (Agitated) And you recommended that the line be broken?

Seddon: It would have been child’s play to wreck that line. Wheeler tried it but it was a botched-up job. A few days later the trains were running.

Stanton: (Heated, emphatically) Well, did you recommend the line being broken?

Seddon: I was not asked. I learned soon after my appointment that Mr. Davis would not take too kindly to his Secretary of War meddling in military affairs. As a reminder I had my predecessor Mr. Randolph.

Stanton: (Getting angrier, shriller) And you call yourself a Secretary of War? Ha! You should have resigned. I would have!

Seddon: (Angry) You weren’t there!

Stanton: (Walks towards seat. Sarcastically, over shoulder) For all the good you did; neither were you.

Underwood: Your witness Mr. O’Conor.

O’Conor: (O’Conor rises, approaches witness) Good morning Mr. Seddon.

Seddon: (Relaxes, nods) Good morning Mr. O’Conor.

O’Conor: As I understand the situation, you felt constrained in acting in any capacity as a military advisor to Mr. Davis.

Seddon: That is correct.

O’Conor: Although you were restrained from acting, you could observe.

Seddon: Of course.

O’Conor: Did Mr. Davis fulfill his role as commander in chief?
Seddon: Frankly no. He could promote, assign or dismiss personnel with aplomb. That was the extent of it.

O’Conor: Did Mr. Davis actually act as a general-in-chief?

Seddon: He played at being a general-in-chief. He was hesitant and unsure of himself when considering actual military operations. He often left his field commanders wondering exactly what he had in mind.

O’Conor: Could you give me an example?

Seddon: Consider for a moment the fabled invasion of Kentucky in late ’62, at the same time Lee invaded Maryland. An experienced general-in-chief would have carefully planned the Kentucky operation because it involved two armies moving separately.

O’Conor: Go on.

Seddon: He would have placed a single general in command with adequate supplies in strategic depots to be readily available to the invasion forces. He would have tried to anticipate as many contingencies as possible.

O’Conor: Go on.

Seddon: A competent general-in-chief would have determined exactly what enemy armies and resources were to be reduced. Instead the armies wondered about without guidance. Buell’s army should have been their objective. At one point they were actually north of Beull. Together they could have blocked him.

O’Conor: Poor coordination?

Seddon: No coordination! Mr. Davis would not choose a ranking officer. He relinquished the responsibility. Worse, Bragg and Lee had this hare-brained scheme that the Kentuckians and Marylanders would rise en-mass and settle the issue.

O’Conor: But they didn’t.

Seddon: It’s nice to believe they would, and to some degree it might have happened. To plan such an occurrence as part of a military operation was foolhardy.

O’Conor: Then you are implying that Mr. Davis rarely played the role of general-in-chief but when he did he was ineffectual.

Seddon: Precisely. He left his armies dangling on a cruel hook. They could only react to northern pressure.

O’Conor: What about Lee’s march into Pennsylvania?
Seddon: Whilst I supported in principle a thrust across the Potomac with a fixed objective, I could never figure out Lee’s goal. He seriously thought that by invading Pennsylvania Grant would lift his siege of Vicksburg. Preposterous! Vicksburg was a thousand miles away.

O’Conor: Lee did not discuss his objectives with you?

Seddon: Not at all. We didn’t have the resources to maintain a field army north of the Potomac for any length of time. Win or lose Lee would have to return to Virginia. No matter how he explained it ordinary people would take it as a retreat.

O’Conor: An experienced general-in-chief was needed?

Seddon: An experienced general-in-chief would have studied the entire operation. He would have determined the possible benefits involved and whether they were worth the risks. Perhaps there would be political gains but no such study was made. Every move was ad hoc. No one considered the Confederacy as a whole.

O’Conor: There was no advanced planning?

Seddon: None at all. To this day I still have no idea what Lee’s objective was in Pennsylvania — perhaps the Harrisburg crossing. I’m not certain he knew.

O’Conor: Thank you Mr. Seddon.

Seddon: Can you imagine, Lee requested that Mr. Davis have Beauregard march north from Charleston. He would pickup detachments as he moved to create a new Army to march on Washington City from the south.

O’Conor: I see!

Seddon: Lee proposed this measure after he started for Pennsylvania.

O’Conor: I see. Thank you Mr. Seddon.

Seddon: (Getting agitated) An insane idea: creating an army on the march. Lee had no strategic sense, never did. Never thought about anything outside Virginia. Wouldn't even consider a field command elsewhere. A brilliant tactician, I will grant that. What we needed was a strategist: a real general-in-chief to map out our overall plan of resistance.

O’Conor: Thank you Mr. Seddon.

Seddon: A competent general-in-chief might have planned the whole operation. It might have worked: Lee hitting Washington City from the west and Beauregard from the south. It might have worked.

Underwood: Thank you again Mr. Seddon. You may step down.
Seddon starts to get up, Stanton starts to jumps up, Seddon reseats himself then eases up.

Stanton: A question, your Honor.

Underwood: (Sighs, nods head, low voice) Go ahead.

Stanton: Accepting that Mr. Davis was incompetent, why should that observation alter our contention that he was the driving force behind the rebellion?

Seddon: Mr. Davis was little more than an appointee to the presidential chair. He certainly didn't covet the position. He took office after secession. He was basically an administrator. I cannot accept that any single person was responsible for the war or its conduct.

Stanton: And for its conclusion?

Seddon: I will keep those views to myself.

Stanton: (Sarcastically) Thank you for the views you cared to share.

O’Conor, Stanton sits.

Underwood: Thank you Mr. Seddon.

Bailiff stands, opens door. Seddon dignified, exits head up.

Evarts: The prosecution rests.

Underwood: This would appear to be a good time to take a short recess for lunch. We will reconvene at one o’clock sharp.

All rise. Judge leaves courtroom. All filter out.

LIGHTS DIM OUT, HOUSE LIGHTS ON, INTERMISSION

ACT III DEFENSE

HOUSE LIGHTS OFF, COURTROOM LIGHTS DIM, SPOT ON BAILIFF

Only bailiff and court recorder in courtroom near bench, spot on bailiff.

Bailiff: Did you know that Evarts once argued in a case that the crew of a rebel privateer were really pirates because there was no actual war going on, just a local insurrection.

Court Recorder: ‘zat so!

Bailiff: And then argued in another case that the blockade was legitimate because there really was a war going on, not a local insurrection.
Trial of Jefferson Davis

Court Recorder: Son of a bitch! He’s a slippery bastard.

Bailiff: A real Philadelphia lawyer!

Court Recorder: No difference.

Bailiff: (Glances at pocket watch) Judge’s on his way.

**SPOT DIMS, COURTROOM LIT**

Lawyers and Davis enter, take seats. Court Recorder stands at his seat, prepares his notepads, pens. Bailiff stands by his post. Judge enters from chambers. All rise

Bailiff The honorable John Underwood presiding.

Underwood: Be seated. Is the defense prepared to call its first witness?

Bailiff remains standing.

O’Conor: Yes your Honor.

Underwood: Bailiff.

Bailiff glances at notes. Opens door.

Bailiff: Mr. Francis Lieber

**COURTROOM LIGHTS DIM, SPOT ON DAVIS**

Lieber enters. Davis turns to O’Conor, who prepares to rise, leans towards Davis.

Davis: Why are you calling this Mr. Lieber? I’ve never heard of him.

O’Conor: He’s probably your best defense. He lived in South Carolina twenty years.

Davis: I do hope you know what you’re doing. What do you know of him?

O’Conor: I’ve studied his writings. I interviewed him. He seems solid.

**SPOT DIMS OUT, COURTROOM LIGHTS SLOWLY RISE**

Lieber takes seat.

Bailiff holds bible flat before witness. Witness lays right hand on Bible. Bailiff reads from slip.

Bailiff: In your testimony do you swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Lieber: I do.
Bailiff takes seat. O’Conor approaches witness.

O’Conor: State your full name?
Lieber: Francis Lieber

O’Conor: Your present residence?
Lieber: New York City

O’Conor: Your present occupation?
Lieber: Professor.

O’Conor: At what school do you teach?
Lieber: Columbia College.

O’Conor: What is your field of study?
Lieber: Political science.

O’Conor: Political science?
Lieber: A term I popularized for the comprehensive study of political history, philosophy and organization. It’s a term now academically accepted.

O’Conor: Political science! Impressive! You were born in Prussia, is that correct?
Lieber: Yes, Berlin, 1798 — or perhaps 1800. Mother wasn’t certain.

O’Conor: You fought in the Napoleonic Wars as a Prussian volunteer at Ligny and Waterloo. You were severely wounded in the assault on Namur.
Lieber: That is correct.

O’Conor: After your recovery you matriculated from the University of Jena in your fields of study: mathematics, law and history. You received a doctorate in mathematics.
Lieber: That is correct.

O’Conor: Dr. Lieber, you migrated to this country in 1828, correct?

O’Conor: You have published extensively on a variety of subjects.
Lieber: I have.
O’Conor: (Reading from list) “Educational Program for Girard College”

Lieber: In 1834 while residing in Philadelphia. The college was newly organized.

O’Conor: "Manual of Political Ethics".

Lieber: Yes, in 1838. It was adopted by Harvard College as a textbook. The politicians who needed it most didn’t bother reading it.

O’Conor: As might be expected.

"Principles of Interpretation and Construction in Law and Politics"

Lieber: Yes, again in 1838.

O’Conor: "Laws of Property: Essays on Property and Labor”

Lieber: In 1842.

O’Conor: "Civil Liberty and Self-Government"

Lieber: In 1852. It was adopted as a textbook by Yale College.

O’Conor: “Instructions for the Government of the Armies of the United States in the Field”

Lieber: Yes, 1863. President Lincoln expressly requested that I write such a text.

Underwood: As I recall President Lincoln issued that text as General Order Number 100. Mr. Stanton was highly impressed.

Underwood turns and smiles at Stanton.

O’Conor: Thank you Your Honor. Mr. Stanton’s approbation is noted, as is no doubt his deep respect and admiration for Dr. Lieber and his expertise.

Stanton embarrassed, squirms. Evarts stares at Stanton as if he’s an idiot. Shakes head.

Underwood: Now counselor, if you are attempting to establish the academic credentials of Dr. Lieber as an authority in political philosophy you have admirably succeeded. Must you continue ad infinitum in the same vein?

O’Conor: Thank you for the court’s recognition of Dr. Lieber’s credentials. I will finish in a moment.

O’Conor: (Turning to the witness) Dr. Lieber, You have written extensively on prison reform, the jury system and constitutional law?

Lieber: Yes.
O’Conor: Several months ago you made the widely quoted statement concerning the outcome of this trial: “Davis will not be found guilty and we shall stand there completely beaten.”

Lieber: Yes, but it was a private remark.

O’Conor: It became public. Do you regret making such a statement?

Lieber: I only regret its wide circulation. It was a private appraisal mentioned to very few friends. Nevertheless the appraisal stands.

O’Conor: Does the appraisal stand because Mr. Davis is not guilty *de facto* or not guilty *de jure* of disloyalty?

Lieber: Evidently the latter. The prosecution must not only first prove *de facto* that certain alleged activities occurred but they must prove *de jure* that these activities constituted the crime of treason as defined by the Constitution of the United States: Article III, Section 3.

O’Conor: As a recognized authority on Constitutional Law, please explain.

Lieber: Essentially, Article III, Section 3 defining treason was lifted from a specific section of the 1351 Act of Parliament under Edward the Third.

O’Conor: 1351? Amazing! That’s a 500 year old statute. Could you elaborate?

Lieber: It was the first known codification of the act of treason. Persons were guilty of treason under the act if they levied war against the King in his Realm or adhered to the King’s enemies by giving them aid and comfort in his Realm or elsewhere.

O’Conor: Uncanny! That’s essentially how it appears in the Constitution.

Lieber: It was the earliest precedent the framers could find. They used it. Accordingly, Article III, Section 3 states: “Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.”

O’Conor: But aren’t there are people in the United States who believe precisely that Mr. Davis did levy war against them? Many have wounds to show for it. Many still painfully mourn their dead.


O’Conor: You’re implying that a person so accused must be a citizen of the country he is accused of betraying.
Precisely! In this case the United States of America. When Mr. Davis committed the purported acts he is accused of, was he a citizen of the United States?

Then that would settle the matter.

During the secession winter a number of states ostensibly withdrew from the Federal Union for the purpose of organizing a Southern Union. During that period Mr. Davis remained at his post in the United States Senate. From these facts we can ascertain that the Southern Confederacy was already organized before Mr. Davis vacated his position.

Then Mr. Davis remained a citizen of the United States.

Absolutely!

During this period did he commit any acts hostile to the United States?

Nothing that I know of could be regarded as acts of treason or sedition.

Then according to your reasoning he could not be guilty of treason.

Precisely!

And after he withdrew from the senate?

With Mississippi’s secession Mr. Davis resigned his Senate seat. He no longer held any office or trust under the United States. The ostensibly independent State of Mississippi summoned him home.

Then he could not be guilty of treason after he withdrew.

Exactly. In seceding Mississippi presumably carried its people out of the Union unless they expressly declined and departed. Mr. Davis did not so decline, severing his old allegiance.

Meaning?

By publicly assuming the Presidency of the Confederate States Mr. Davis affirmed his new allegiance — and before hostilities commenced.

Then an act of treason could not have occurred. Now what about the charge of sedition?

Essentially sedition is similar to treason but without any overt act required. It includes writing and broadcasting views that might be construed as aiding and abetting an enemy.

Is there any problem with your interpretation?
Lieber: The real problem for any prosecutor is to distinguish sedition from the normal and often heated criticism which constitutes a charter right of any citizen of a democracy.

O’Conor: The operational term in the present case is again “citizen”.

Lieber: Exactly.

O’Conor: Thank you Dr. Lieber.

Underwood: Is the prosecution ready to respond.

O’Conor takes seat. Evarts rises.

Evarts: We are, your Honor.

Underwood: Proceed.

Evarts: (Approaches witness) You matriculated from the University of Jena where your received your degree.

Lieber: That is correct.

Evarts: You returned to Prussia and joined a banned group dedicated to political intimidation and assassination, correct?

Lieber: (Hesitates, looks at O’Conor, back at Evarts) That is not correct.

Evarts: The Prussian authorities thought so and placed you under close surveillance, correct?

Lieber: (Hesitates, looks at O’Conor, back at Evarts) That is not correct.

Evarts: The Prussian authorities thought so and placed you under close surveillance, correct.

Lieber: Yes, I was very closely watched, generally the prelude to arrest. I fled Prussia and took refuge in Dresden.

Evarts: You sympathized with and actively promoted the Greek rebellion against an established government, one we recognized. Correct!

Lieber: That I fully sympathized with the Greek partisans in their War for Independence is correct. Many notables participated and suffered. The Baron of Rochdale comes to mind — died in Greece aiding the partisans.

Evarts: Of course, Lord Byron, not exactly a picture of moral rectitude.

O’Conor: Objection. What is the point of this entire discourse?

Evarts: I will rephrase. With your liberal proclivities would you not favor partisan warfare?

Lieber: It might be the sole means of defense for a weak country attacked by a strong aggressor.
Evarts: You wrote "Guerrilla Parties considered with Reference to the Law and Usages of War," did you not?

Lieber: Yes I did in 1863.

Evarts: A work promoting guerrilla warfare?

Lieber: Hardly! I wrote the treatise at the express request of then General-in-Chief Henry Halleck. There was fear that a defeated South would resort to partisan warfare. Bushwhacking comes naturally to them.

Evarts: You thought that at times guerrilla warfare might be legitimate?

Lieber: I have already answered that question. Our revolutionary patriots practiced partisan warfare quite extensively.

Evarts: Yes they did. What I find very perplexing in this regard is that you authored General Order Number 100 that subjected the South to any activity by our armies that might be required by military necessity…

Lieber: (Overlaps Evarts) As President Lincoln requested.

Evarts: … no matter how that necessity might be defined; yet you associate yourself with the cause of Mr. Davis?

Davis: (Stands, screams at Lieber) You! You burned our homes; you pillaged our villages; butchered our innocent. I will see you in hell Lieber, in hell!

Underwood: (Slams gavel) You must control yourself Mr. Davis, or you will be reprimanded. Be seated. This is my last warning. There are women in the galleries. Mr. Evarts, please continue.

Davis slams table, sits.

Evarts: You associate yourself with the cause of the defendant Mr. Davis?

Lieber: (Still shook, hesitant, short glance at Davis) I have spent a considerable part my life fighting against everything that Mr. Davis represents.

Evarts: Yet you are here nevertheless defending his views, are you not?

Lieber: I hold no admiration for either Mr. Davis or his views. I despise everything he represents: slavery, plutocracy, secession. I have seen first-hand overbearing men under the guise of law exalt themselves over defenseless people, whether in Prussia or in South Carolina.

Evarts: But you are here defending him.

Lieber: I detest Mr. Davis personally as a bigot and for his activities in promoting human slavery.
Evarts: You could be describing counsel for the defense.

O’Conor: (Leaps up angry. Shouts) Your honor!

Underwood: Strike that comment. The jury will please disregard that statement. Mr. Evarts, you are totally out of order. Apologize to the defense counsel, and no more of that.

Evarts: Very well; I apologize.

O’Conor nods, takes seat.

Evarts: Dr. Lieber, which in particular of Mr. Davis’ activities did you detest?

Lieber: Waging war against the United States. In this regard I am here for the same reason I oppose the bigoted views of Mr. Davis: to oppose condemning a man because he is considered a pariah by many.

Evarts: Then you concede he led the rebellion?

Lieber: I only concede that he was not a citizen at that time.

Evarts: Dr. Lieber, would you agree that acts performed by Mr. Davis before he surrendered his seat in the United States Senate could be construed as treason if they involved adhering to enemies of the United States, conspiring to give them aid and comfort?

Lieber: Of course.

Evarts: Might directly involving himself in the rearming of the State of Mississippi be such an act?

Lieber: Did such as act take place?

Evarts: Presumably.

O’Conor: Objection. Presumable constructions have no place in these proceedings.

Evarts: Your Honor, I must beg leave of the court to allow me to develop my point.

Underwood: Very well. Make your point, but make it quickly.

Evarts: Well the Recorder please repeat my last query.

Court Recorder: “Might directly involving himself in the rearming of the State of Mississippi be such an act?”

Lieber: On the face of it, no! The arming or rearming of an individual state is of no concern to the United States. No Constitutional sanctions pertain to such activities.
Evarts: If Mr. Davis had been a signatory of the following document would this act constitute treason:

Evarts reads document.

Evarts: “The honor, safety, and independence of the Southern people require the organization of a Southern Confederacy. The primary objection of each Slaveholding State ought to be its speedy and absolute separation from a Union with Hostile States.”

Lieber: No!. The document constitutes protected speech. You must demonstrate that the statement would lead to an activity such as inciting open rebellion against the Federal Union.

Evarts: Might the next example fit the bill. Could the statement as follows be construed at seditious?

“...I hope we shall soon have a Southern Confederacy. We are probably soon to be involved in the fiercest of human strife: a civil war”.

Lieber: The statement does not advocate civil war. It simply recognizes such an occurrence is likely.

Evarts: And the reference to a Southern Confederacy?

Lieber: It is certainly not a statement that I would attribute to a patriotic citizen, but it does not constitute sedition: neither advocating nor giving aid and comfort to our enemies.

Evarts takes seat, Stanton approaches witness.

Stanton: Are you still a member of the Communist Party?

Pause. Lieber stares at Stanton, then at O’Conor.

O’Conor: (Leaps up) Objection! What is the relevance of this question?

Stanton: Dr. Lieber’s answers have a political context. The court should be aware of his political leaning to properly interpret his answers.

O’Conor starts to object, changes mind, sits.

Underwood: Very well, you can proceed.

Stanton: Well, were you?

Lieber: I have never been a Communist or a Communist sympathizer. My distaste of absolutism extends to the philosophy of Dr. Marx. I have no sympathy for the political opinions of Dr. Marx.
Dr. Marx directly attacked the views of the counsel for the defense by name: "Attorney Charles O'Conor", calling him an extreme southern sympathizer. Do you agree with Dr. Marx's opinion?

Lieber hesitant, knowing O'Conor’s proclivities, realizing his dilemma: he already stated he doesn’t agree with Marx’ opinions. He is unable to answer.

Underwood: Mr. Stanton, this has gone on long enough., move on.

Stanton: Have you ever joined a radical group?

Lieber: That would depend on how you define “radical”.

Stanton: Quibble, quibble, quibble.

Underwood: Enough of that.

Stanton: Instead of defining the term let us examine your record.

Lieber nods.

Stanton: After you were discharged from the Prussian army you returned to your college studies.

Lieber: Yes.

Stanton: You were then arrested and held for several months before being released, but prohibited from attending any Prussian universities because of your radical associates.

Lieber: The term they used was “liberal” — a particularly nasty epithet in Prussia specifically reserved for students promoting democratic reforms.

Stanton: (Stanton withdraws to prosecution table to examine a document) Are you a lawyer?

Lieber: I am well-versed in jurisprudence though I have not practiced law.

Stanton: (Returns to witness) I see!

Lieber: I have met very few practicing attorneys interested in scholarship, particularly the history and philosophy of law.

Stanton: Your favored the impeachment of President Johnson?

O’Conor: (O’Conor jumps up) Don’t answer that! Objection, your Honor, the prosecution is doing nothing but badgering the witness with irrelevancies.

Underwood: Mr. Stanton, now where is your line of questioning leading?
Stanton: To demonstrate that Dr. Lieber has taken the position he has for strictly political reasons. He has personally opposed settled administration policy in regard to the late rebellious states.

Underwood: Overruled. Please proceed.

O’Conor shakes head, takes seat.

Stanton: You oppose administration policy concerning racial adjustment, is this not correct?

Lieber: Under the present policy slavery is being reintroduced into the southern states under the guise of loitering and vagrancy laws.

Stanton: That has not been shown to be the case.

Lieber: Only because the term “slavery” has been deliberately proscribed from all pertinent state statutes. Perhaps peonage or serfdom will eventually find favor. The term “apprenticeship” is certainly gaining adherents.

O’Conor: Your Honor, where is all this leading?

Underwood: Will the prosecution please restrict itself to the matter at hand. This is a legal proceeding, not a debating society.

Stanton: Dr. Lieber, inasmuch as the rebels were not recognizes by the United States as a legitimate nation how could the question of citizenship arise for a nonexistence country?

Lieber: I believe I read somewhere that after the colonists declared their independence from England they proclaimed themselves purely as Americans, even though England had not recognized their independence.

Stanton: A different kettle of fish.

Lieber: Only because in one instance the rebels won and in the other they lost.

Stanton: Do you really believe the rebels weren’t citizens?

Lieber: The United States has promulgated edicts that former rebels must meet certain obligations to regain their citizenship. I rest my case.

Stanton moves to prosecution table, carefully studies and shuffles several documents.

COURTROOM LIGHTS PARTIALLY DIM, SPOT ON DAVIS

Davis: Truly I despise everything about that wretched man; no doubt an abolitionist — or worse.

O’Conor: Evarts running scared. Stanton’s doing his dirty work!
Davis: He’s contemptible. You say that Lieber lived in South Carolina for twenty years? I can’t believe that he learned absolutely nothing from his stay.

O’Conor: Whether he did or not, he’s still your best defense.

**SPOT DIMS, COURTROOM LIGHTS FULL**

Stanton returns to witness box holding a document. Again glances at document. Pauses.

Stanton: You are familiar with the celebrated dramatist August Friedrich von Kötzebüe?

Lieber: (Startled, long pause, low voice) I knew of him.

Underwood: Please speak up, Dr. Lieber.

Lieber: (Frustrated, loudly) I knew of him.

Stanton: He was renowned for his operatic librettos. Beethoven, Schubert, von Weber and other distinguished composers set his librettos to music.

Underwood: Mr. Stanton …

Stanton: Many of his works were pirated by others; sadly many by Americans.

Underwood: (Emphatically) Mr. Stanton, aren’t we again drifting from the matter at hand?

Stanton: (Stanton points at Lieber, steps back, raises voice) You were directly involved in the assassination of von Kötzebüe, were you not?

Underwood stares at Stanton, shocked. O’Conor leaps up, hesitates, slumps back. Lieber angry:

Lieber: He was a swine: a German in the pay of the Russian secret police.

Stanton: You enticed your dear friend Karl Ludwig Sand to undertake the assassination, did you not?

Underwood: Take care Mr. Stanton. You’re treading on very thin ice. You need not answer Dr. Lieber.

Lieber: He was the Czar’s mouthpiece in Germany.

Stanton: (Looks at sheet) Actually he was their Consul General in Königsberg, acting legitimately for Russian interests. You were intimately involved with Sand, were you not?

Lieber: He advocated suppressing all liberal activities in Germany.
Dr. Lieber, I regret that I allowed this entire line of questioning to continue but because it has been allowed I’m afraid you must answer the question — unless you wish to plea self-incrimination.

I was accused!

You still didn’t answer the question. You immediately fled Prussia, didn’t you — perhaps that’s answer enough?

I did, as did many other students. Prussian jurisprudence differs somewhat from ours. For liberal students guilt is presumed.

You still didn’t answer the question.

(Stanton starts towards his seat. Over shoulder comments:) No wonder you were called Lincoln’s Machiavelli: the dark presence.

(Stands, shouts) As I recall, you found my ‘dark presence’ quite congenial.

I will assume that the witness is excused.

You still didn’t answer the question.

(Stanton starts towards his seat. Over shoulder comments:) No wonder you were called Lincoln’s Machiavelli: the dark presence.

As I recall, you found my ‘dark presence’ quite congenial.

I will assume that the witness is excused.

Damn! I hope his testimony wasn’t damaged. I should’ve taken a closer look at his background.

Yes you should have, before calling a depraved plunderer and vile assassin to testify.

As for you testifying: I repeat, I am absolutely opposed to your taking the stand. This is not the place to justify secession.

It’s my decision.

A decision that might cost you your life.

I’ll accept that hazard.

Is the defense prepared to call its final witness?

Yes we are your Honor.

We are thankful. Bailiff.

Bailiff looks at list, opens door, hesitates, remembers, closes door, turns to Davis.
Bailiff: Mr. Jefferson Davis.

Davis and O’Conor stand in place.

Underwood: Mr. Davis, as you’re well aware, you are under no obligation to testify. However, if you do so you can be subject to a rigorous cross-examination.

Davis: Thank you.

Davis, stiff, staring straight ahead, takes seat in witness box. Bailiff takes Bible from railing. Bailiff holds bible flat before witness. Witness lays right hand on Bible. Bailiff reads from slip.

Bailiff: In your testimony do you swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Davis: I do.

Bailiff returns to seat, leaves Bible on railing.

O’Conor: State your full name?

Davis: Jefferson Davis

O’Conor: Your present residence?

Davis: Primarily Quebec Province.

O’Conor: Your present occupation?

Davis: Participating in a trial.

O’Conor: I meant, how do you manage to support yourself and your family?

Davis: Through the largesse of close friends and old comrades.

O’Conor: Were you a loyal citizen of the United States?

Davis: Whilst I enjoyed the citizenship of the United States I was always, without exception, a loyal and patriotic citizen.

O’Conor: You are a graduate of the United States Military Academy at West Point?

Davis: Yes, 1828.

O’Conor: Did you ever take up arms in defense of the United States?

Davis: Yes, during the Mexican War.

O’Conor: You served with distinction at Buena Vista and Monterey?
Davis: So I have been told.

O'Connor: You were severely wounded at Buena Vista leading your regiment, were you not?

Davis: I was. The First Mississippi Rifles.

O'Connor: The effects of which you still feel?

Davis: Occasionally.

O'Connor: As a citizen did you ever act in a manner detrimental to the interests of the United States?

Davis: I did not.

O'Connor: The prosecution quoted two documents that they contend were detrimental to the interests of the United States. What is your contentions?

Davis: The documents quoted were not calls to action. They simply reflected the reality of the times.

O'Connor: Were you a citizen of the United States when you accepted the presidency of the Confederate States?

Davis: Assuredly not.

O'Connor: Were you a citizen of the United States when you declared war against the United States.

Davis: (Emphatically) No!

O'Connor: Were you a citizen of the United States when you waged war against the United States.

Davis: Again no.

O'Connor: Did you wage war against the United States for the preservation of chattel slavery.

Davis: Only for the preservation of the rights guaranteed the southern states by the Constitution of the United States.

O'Connor: Please explain!

Davis: The general government, by interfering in the internal affairs of the southern states in violation of the Constitution, effectively dissolved the compact then existing between the southern states and the United States.

O'Connor: Thank you.
Are you at present a citizen of the United States?
O’Conor: Were you not offered the opportunity to have your citizenship restored?

Davis: I was, but only if I requested a pardon.

O’Conor: But you did not?

Davis: I was a citizen of a foreign country at the time of the alleged infractions. I could not now request a pardon for actions legitimate in my country of citizenship at that time.

O’Conor: Then by offering to restore your citizenship the United States admits that you were not a citizen at the time the alleged treasonable acts were discharged. Is that not so?

Davis: Precisely.

O’Conor: Thank you Mr. Davis.

O’Conor takes his seat.

Underwood: Is the prosecution prepared to respond?

Evarts: (Evarts rises) We are your Honor.

Underwood: Let us not waste time.

Evarts: (Approaches witness box with notes) You testified that you waged war only for the preservation of the rights guaranteed the southern states under the Constitution, not for the preservation of slavery.

Davis: That is correct.

Evarts: Hadn’t you stated, and I quote: “Slavery is just, wise and beneficial?”

Davis: Though I truly believe that there never was a happier dependence of labor and capital on each other, I don’t recall using the phrase quoted.

Evarts moves to table rummages through papers.

Evarts: My mistake! My notes are a muddle. That was a statement made on another occasion by counsel for the defense. A regrettable error! A thousand pardons.

O’Conor slams table, starts to rise, angry.

Underwood: Remain seated Mr. O’Conor. Recorder, strike that quotation regarding slavery and all the statements that followed. The jury will disregard those statements.
Mr. Evarts, another such affront to this Court and you will be held in contempt, and the punishment will not be a fine. Apologize to this Court and to Mr. O’Conor. My patience is exhausted.

Evarts: (To each in turn) I sincerely apologize, your Honor. I sincerely apologize, Counselor.

Underwood: (Underwood, O’Conor nod) Please proceed with more circumspection.

Evarts: Mr. Davis, there has been brought against you the charges of treason and sedition.

Davis: Quite.

Evarts: (Evarts reads from notes) I quote: “The honor, safety, and independence of the Southern people require the organization of a Southern Confederacy. The primary objection of each Slaveholding State ought to be its speedy and absolute separation from a Union with Hostile States.” You were a signatory to this document.

Davis: I am not a lawyer, but I surmise that that document does not meet the requirements for the charge of sedition. I said nothing that might bring harm to the United States.

Evarts: What about dismembering the Federal Union?

Davis: Advocating the dissolution of the Union does not constitute sedition.

Evarts: We are here to demonstrate that it does.

Davis: The Constitution was not framed to endure in perpetuity. The Union constitutes no more than a simple association of independent states — a compact if you wish. The states voluntarily joined the confederation with their sovereign power unimpaired and could voluntarily leave the same.

Evarts: It would appear that you are confusing the Constitution of the United States with the Articles of Confederation: the latter a simple compact between the several independent states.

Davis: I hardly think so.

Evarts: You stated that the states entered the Union with their sovereign power unimpaired. A simple glance at the Constitution would reveal the sovereign powers voluntarily surrendered by the states. They are enumerated.

(Evarts pauses, examines copy of Constitution, paraphrases) Only the United States can now coin money, establish post offices, establish patent rights, set standards of weights and measures, establish military arsenals and naval shipyards, treat with foreign nations and declare war, among others. These are sovereign powers that the states willingly surrendered.
Davis: Sovereign powers willingly surrendered can be as easily reasserted.

Evarts: These sovereign powers once surrendered are gone forever. The states on joining the Federal Union willingly acknowledged and freely accepted the Supremacy Clause of the Constitution, giving up their pretenses to statehood. (Exclaiming) They became mere provinces.

Underwood: How long are these civics lessons to continue? Counselor, make your point.

Evarts: Whilst the Constitution does allow for its own dissolution when the Union no longer serves the need of the people, this can only be effected in a prescribed manner.

Davis: Thank you. My point exactly.

Evarts: Mr. Davis, the framers allowed for the bonds of union to be dissolved only in a legitimate manner, not by armed rebellion.

Underwood: Please get to the point you’re making.

Evarts: If in convention two-thirds of the total number of states agree to amend the Federal Constitution out of existence and three-quarters of the state legislatures concur, then the Constitution is a nullity, the Union is dissolved, and the United States is no more.

Underwood: Perhaps before all of these dire events occur you might ask a question. Is there a question tucked away in your address?

Evarts: Mr. Davis: was this the procedure adopted by the South?

Davis: It was not. A sovereign power is not answerable to any other power.

Evarts: (Voice rising in anger) That’s the reason the South was smote by fire and sword and you yourself are on trial for the high crime of treason. I’m through here.

Underwood: Mr. Davis, please step down.

Evarts stomps to his seat. With a broad smile, slight bow to jury, Davis returns to his seat.

Underwood: Is the Prosecution prepared to make its closing address?

Evarts: (Evarts rises, still angry) We certainly are your Honor. (Moves to stage center, clears throat) Jefferson Davis is guilty of the high crimes of treason and sedition. Regardless of the farcical yarn the defense has attempted to wind about the facts to hide them from view, they remain: Mr. Davis knowingly waged war against his own country: The United States of America.
Mr. Davis took personal command of the armies arrayed against the Union. His own commanders related this information: Mr. Davis was his own General-in-Chief, and in this capacity he led these fearful armies, if not in person at least in spirit. They obeyed his commands.

We contend that it was this unyielding spirit that drove the murderous southern war craze. It was Jefferson Davis who personified everything sinister about southern society. He saw nothing beautiful about our glorious Union nor the great benefits it has bestowed on untold millions. Jefferson Davis made war against the Union of our fathers and now his retribution is at hand.

Mr. Davis is guilty of the high crimes of treason and sedition. You must do your duty as patriots and citizens and consign him to a hell of his own making. Only a verdict of guilty can vindicate the devotion of the countless dead and wounded who suffered on our battlefields in defense of our tormented country.

Only you can justify the sacrifices of those who toiled on behalf of the Union by finding Jefferson Davis guilty of treason and sedition. Gentlemen of the jury, thank you.

Evarts returns to seat.

Underwood: Is the Defense prepared to make its closing address?

O’Conor: We are your Honor. (Moves to stage center, clears throat) We are not here to simply try for the high crime of treason a man who happens to bear the name of Jefferson Davis. There is far more involved here than a trial for a capital crime. We have to deal with Constitutional issues. Treason is the only capital crime against the United States specified in the Constitution. It is simply defined as “levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.”

I would not suppose that Mr. Davis was particularly patriotic when he commented on the dissolution of the Union, but did such comments constitute treason? Two conditions must be met:

The first: “levying War against them” In no manner was such a phrase spoken, meant or implied. He said nothing of war.

The second: “in adhering to their Enemies, giving them Aid and Comfort.” Again he said nothing about adhering to their enemies. He neither said nor did anything that could be mistaken for either treason or sedition whilst a citizen of the United States.

At that time Mr. Davis was a respected member of the United States Senate. In no manner did he betray his office. In this regard you must acquit him of the charges of treason and sedition. There are however more important issues at stake. Can the United States construe as it pleased the
constrains placed by the framers in the Constitution to protect the citizens of the United States from the arbitrary exercise of powers forbidden by the Constitution.

If you decide in the affirmative then all citizens are in danger; if not today, then tomorrow, and if not tomorrow then next year or the year after. The Constitution is no more than a frail sheet of paper. Only you the citizen can protect it and yourselves from the arbitrary exercise of arbitrary power. In this regard you must acquit Mr. Davis of the false charges of treason and sedition. Thank you.

O’Conor takes seat.

Underwood: Testimony is completed. My only remaining duty is to charge the jury. (Clears throat. Turns to jury)

Gentlemen, the prosecution has brought charges of treason and sedition against the defendant. First: they contend that Mr. Davis acted in a manner detrimental to the interests of United States by committing overt acts that harmed the United States and second: they contend that Mr. Davis voiced or broadcast seditious opinions detrimental to the interests of the United States.

You must decide whether or not such activities constituted levying war against them, in adhering to their enemies, giving them aid and comfort. The prosecution has produced several witnesses they contend confirm the overt acts of treason and sedition, thereby satisfying the Constitutional requirements.

If in fact the prosecution has satisfied your concerns to a reasonable degree of certainty then you must convict the defendant of the capital offenses of which he is accused. In contrast, if the prosecution did not fulfill the Constitutional requirements to your satisfaction then you must acquit the defendant. In either case your decision must be rendered unanimously.

Bailiff stands, faces jury.

Underwood: Bailiff. Please escort the jury to the jury room to begin their deliberations.

Bailiff: (Faces jury) Please come this way.

Bailiff exits courtroom.

Underwood: These proceedings are in recess until the jury reaches its verdict. Counsel will be notified at that time.

All rise, Judge retires to chambers. Courtroom vacates.

LIGHTS DIM OUT. LONG PAUSE
SPOTLIGHT AT ENTERENCE TO JUDGES CHAMBERS


Underwood: Well! Has the jury reached a verdict?

Bailiff: I’m afraid the jury is deadlocked, Sir, about evenly divided.

Underwood: I was afraid of this. I don’t think I have the patience to go through this rigmarole again. Damn, they should have just left him in Canada. Go back to the jury room and remind them that they will be sequestered until they reach a verdict.

Bailiff: Yes sir.

Underwood: Don’t tell them this but if they are still divided by six o’clock escort them back to the courtroom and notify the attorneys.

Bailiff: Yes sir.

SPOTLIGHT OUT, LONG PAUSE, COURTROOM LIGHTS RISE.

All return to their seats. Bailiff and court recorder standing in place. Judge enters courtroom.

Bailiff: All rise. The Honorable John Underwood presiding.

Judge takes seat. All but bailiff sit.

Underwood: Counselors, I have sad news. The jury has not reached a verdict. They are evenly divided. I am satisfied that they are hopelessly deadlocked. I don’t believe further deliberations will be remedial. Obviously these proceeding have not reached a prescribed conclusion. I must declare a mistrial. The jury is dismissed with the thanks of the court. Bailiff, please escort the jury out of the courthouse.

Bailiff leaves courtroom. Evarts rises.

Evarts: Your Honor, in anticipation of this possible outcome Mr. Stanton has an announcement to make.

Evarts sits, Stanton rises.

Underwood: Does your announcement specifically pertain to these proceedings.

Stanton: It does.

Underwood: Proceed.
Stanton: Inasmuch as these proceedings have consumed an extraordinary amount of both the resources and time of the United States, the prosecution has decided not to further pursue this matter against the arch-traitor Jefferson Davis until a later date.

Stanton sits, Evarts rises.

Davis: (Davis leaps to his feet, shrieking) NOOOO…!

Underwood: Mr. Davis control yourself.

O’Conor tries to quiet him. Davis Shouts at Stanton. Shakes fist. Bailiff returns to station.

Davis: (Shrill) I returned to defend myself! Do you hear: to defend myself!

All ignore Davis. Bailiff sizes up situation, moves to center of courtroom, facing Davis.

Underwood: (Overlaps Davis) Am I to understand that all charges against Mr. Davis are to be dismissed with prejudice?

Davis: Instead I am branded a traitor by political hacks without having a chance to exonerate myself.

Evarts: (Evarts overlaps Davis) It is not the intention of the prosecution to have the charges dismissed without the United States having recourse to retrial.

Davis: Stanton, you craven coward, you vile degenerate!

Underwood: (Underwood overlaps Davis) So be it. Far better if Mr. Stanton had not made that announcement at all.

(Emphatically) This court is adjourned. (Underwood slams gavel)

Lawyers stand, gather papers. Bailiff returns to station. Davis shouts at Stanton:

Davis: You couldn’t prove your case against me so this is your lily-livered way out: postpone, postpone, postpone!

Underwood quickly beats a retreat to chamber door, turns to O’Conor, overlaps Davis.

Underwood: Mr. O’Conor, I will speak to you tomorrow about discharging the surety bond.

O’Conor: Thank you, your Honor.

Evarts: (Stands) We don’t concur.

Underwood: (From doorway) You’ve already done enough damage. You’ve turned my courtroom into a circus with your asinine announcement.

Evarts: That was Stanton’s idea.
Davis: Yes, you Stanton, damn you to hell: you arch-coward.

Stanton rushes out. Judge closes chamber door. Evarts walks out. O’Conor takes seat.

Davis: (Shouts) You couldn’t harass me one way so you devised another.

Court Recorder gathers papers, leaves. Bailiff remains. Davis shouts at door:

   LIGHTS DIM

Davis: You couldn’t prove your case against me. Damn you. You besmirched my honor.

Davis slumps down in seat, sobbing. O’Conor tries to comfort Davis. Bailiff leaves courtroom.

O’Conor: We had better leave now.

O’Conor helps Davis up, gently guides him out of the courtroom.

   LIGHTS OUT

As the lights dim out the following slide is projected onto the rear wall.

    The indictment against Jefferson Davis was quashed by the Supreme Court of the United States in December 1868, thus denying Davis any opportunity of ever vindicating himself or his cause before a court of law.

Simultaneously the following chorus is rendered as a dirge: slow and mournfully.*

    In Dixie Land I'll take my stand; to live and die in Dixie; Look away, look away, look away Dixie Land.

*Lyrics by Daniel Decatur Emmett. Tune adapted from an old plantation song.

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