

ABSTRACT

Title of Dissertation: "TO AID THEIR REBEL FRIENDS": POLITICS
AND TREASON IN THE CIVIL WAR NORTH

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In "To Aid Their Rebel Friends" I argue that Civil War-era politicians relied on meanings of treason from old English law and Revolutionary-era America to broaden the definition of treason beyond the narrow definition found in the Constitution. In doing so, they gave new meaning to words and phrases in the Constitution that had been dormant for many years.

Treason is the only crime defined in the U.S. Constitution: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort." The next sentence states that treason must be an "overt Act," thus precluding judges or politicians from declaring that conspiracy or words might be deemed treason. In defining treason narrowly the Framers hoped to depoliticize a crime that for centuries had been political in nature. In early modern England kings could define treason however they chose and force judges to convict the accused, simply to eliminate political opposition. Moreover, since the fourteenth century it was a treasonable offence to imagine or compass the king's death. The Founders hoped to avoid such occurrences on American soil.

Despite the Founders' precaution of carefully defining treason in the nation's fundamental law, the Civil War transformed how treason was understood in American legal and political culture. The definition of treason broadened to include more than just overt acts of war. Included in its meaning were also disloyal or treasonous words. Seditious speech was punished, though not always as a defined crime. Speech codes were enforced in several northern states, and loyalty oaths were required at all levels of government and in nearly every jurisdiction. Violations of these laws, or refusals to take prescribed oaths, opened up northern citizens to charges of treason and disloyalty. In essence, the line between words and deeds blurred so that someone might be considered a traitor for speaking "traitorously" or for harboring "disloyal" sentiments. Beyond looking at the federal level, this dissertation also examines how understandings of treason broadened at the state and local levels, something that no scholar has yet attempted to do.

“TO AID THEIR REBEL FRIENDS”
POLITICS AND TREASON IN THE CIVIL WAR NORTH

By

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“If we shall constitutionally elect a President, it will be our duty to see that you submit. Old John Brown has just been executed for treason against a state. We cannot object, even though he agreed with us in thinking slavery wrong. That cannot excuse violence, bloodshed, and treason. It could avail him nothing that he might think himself right. So, if constitutionally we elect a President, and therefore you undertake to destroy the Union, it will be our duty to deal with you as old John Brown has been dealt with. We shall try to do our duty. We hope and believe that in no section will a majority so act as to render such extreme measures necessary.”

Abraham Lincoln

Speech at Leavenworth, Kansas

December 3, 1859

“When a people are mad, their representatives are seldom wise. Amid the volcanic throes of revolution the voice of reason is too seldom heeded, and passion too often rules supreme. It is only when the storm has passed and the natural calm succeeded that impartial history records her judgment of the wisdom or folly, the madness or sobriety of our actions. The extravagances of the present will amaze the future; and even we who are actors in our nation’s saddest drama will wonder at our delusions and our follies when time shall have soothed the passions and experience taught us wisdom. . . . Reason, justice, common sense have nothing to do with it; for the reason that reason, justice, and common sense have well nigh fled the land.”

Senator Willard Saulsbury

Speech in the U.S. Senate

January 29, 1862

Preface

Sir William Blackstone was not only the preeminent legal thinker of his day—he was also a poet. Although his reputation for verse is nearly forgotten, it was still remembered by many Americans of the Civil War generation. In the midst of a heated debate on the floor of the Pennsylvania legislature in 1864, one state representative noted: “It has been said somewhere—I think by Blackstone—that you can judge the character of a people by their poetry.” George Sharswood, a state-level district judge in Philadelphia, remarked in 1860 that Blackstone “devoted a large portion of his time to elegant literature, and had cultivated to a considerable extent the art of poetry.” “To his early predilection for poetry,” noted another nineteenth-century biographer, “we may reasonably attribute the formation of that exquisite style and method with which he afterwards embellished and illustrated the law.”¹

Whether or not Blackstone actually said that the character of a people could be judged by their poetry, the sentiment still seems a fitting starting point for this study of the law of treason in the North during the American Civil War. Treason, to be sure, is the only crime defined in the U.S. Constitution. At root, then, what follows is a study in constitutional, legal, and political history. Nevertheless, I take Blackstone’s point to be a valuable lesson—that we can understand the constitutional and legal culture of the Civil

¹ George Bergner, *The Legislative Record: Containing the Debates and Proceedings of the Pennsylvania Legislature for the Session of 1864* (Harrisburg: The “Telegraph” Steam Book and Job Office, 1864), 224; George Sharswood, ed., *Commentaries on the Laws of England, in Four Books, by Sir William Blackstone, Knt.*, 2 vols. (Philadelphia: Childs & Peterson, 1860), 1:x; W. N. Welsby, *Lives of Eminent English Judges of the Seventeenth and Eighteenth Centuries* (London: S. Sweet, 1846), 330.

War era more fully by looking beyond court cases, constitutions, treatises and statutes. To be sure, these traditional sources of constitutional history are both valuable and prevalent in this study. Still, they tell only part of the story. This is especially true considering the paucity of actual treason cases that went to trial during the Civil War.

To gain a more complete understanding of how Civil War era Americans defined treason, this study borrows from the sources and methods of social, cultural, intellectual, and military history. It employs sermons, poems and songs, along with letters, diaries, newspapers, and the other more traditional source materials of constitutional and political history. In doing so, my hope is that the reader will gain a more comprehensive appreciation for how definitions of words like treason, loyalty, and nationalism were molded and changed at different times and in different places during the tumultuous Civil War.

Treason was a crime against the nation. Civil War Americans believed it not only a destructive political crime, but also a grave moral transgression because it struck at the God-given liberty of all Americans. If a nation that was conceived in liberty could be overthrown, then there would be nothing left to preserve that liberty for the living and their posterity. The nation, therefore, must put down all treason in order to preserve itself and its mission. All citizens, from sea to sea, were bound to bear their portion of the burdens in this endeavor.

In a poem entitled “Not Yet,” published in the *New York Ledger* on August 17, 1861, William Cullen Bryant captured the very essence of this national struggle for republican liberty. Using metaphors that transcended the living generations and

geographical regions of the United States, Bryant argued that it was every American's duty to join in this fight against treason.² I quote here the first stanza:

Oh country, marvel of the earth!
O realm to sudden greatness grown!
The age that gloried in thy birth,
Shall it behold thee overthrown?
Shall traitors lay that greatness low?
No! Land of Hope and Blessing, No!

² Faith Barrett and Cristanne Miller, eds., *Words for the Hour: A New Anthology of American Civil War Poetry* (Amherst: University of Massachusetts Press, 2005), 61-62.

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My professors at Penn State are the reason I became a historian. I have memories of sitting in Mr. Sorkness' high school history class thinking that I would love to teach American history . . . if only it paid more. So I started college as a business major. But as a freshman at Penn State, sitting in John Frantz's U.S. survey course, I decided to switch to history. Dr. Frantz has been a good friend since then, inviting me to his home for dinner and always sending Christmas cards. Wilson Moses was a constant source of encouragement. His love of teaching and his creative mind have been inspirations to me. I was very disappointed when Gary Gallagher left Penn State for the University of Virginia—before I ever had a chance to take a course with him—but his student, Bill Blair, more than filled his mentor's shoes. Dr. Blair's writing seminar on Pennsylvania in the Civil War taught me the basic building blocks of how to do historical research and writing. Without him as an undergraduate advisor, I would not have succeeded as a graduate student. Finally, Mark Neely has been for me an historian to emulate. His

constant questioning of historical orthodoxy and received wisdom are the marks of a great scholar. His intellectual curiosity, generosity in sharing material and ideas, and constant interest in my work have been true gifts to me as a scholar.

In graduate school I have been blessed with professors and friends who have made this journey enjoyable and worthwhile. Al Moss has been a good friend from the beginning, always encouraging me to persevere, especially at times when neared quitting. Whit Ridgway and James Henretta both cultivated and grew in me a love for legal history. I have always enjoyed my conversations with them about both history and non-history-related matters, especially Bob Dylan (who, I suppose, really *is* a history-related matter). Working as Ira Berlin's research assistant for eighteen months was a valuable experience. Ira has been a fine example to me of the values of diligence and hard work in completing massive projects. I have enjoyed my many conversations with Bernard Cooperman, who has always encouraged me to think creatively about historical research. Catalina Toala and Darlene King both have been at Maryland for the duration of my time here (with a few hiatuses, during which they were both dearly missed). I appreciate their friendship and support over the past seven years. I also offer my most grateful thanks Daryle Williams, who, as Director of Graduate Studies, has been a tireless advocate for the graduate students in the department.

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Introduction

“In Word or in Arms”: The Politics of Treason during the American Civil War

Politics during the Civil War was, to borrow the phrase of historian Joseph J. Ellis, a truly cacophonous affair. Particularly notable during the war was the ubiquity of charges of treason in political debate and discourse. To be sure, it would not have been uncommon to hear one politician call another a “traitor” at any given time in the nineteenth century. But this accusation carried new weight in wartime. What might have been only a derisive political epithet in times of peace could be an actual criminal charge in wartime, for treason, as defined in the Constitution, involves an act of war against the United States. If one was called a traitor in political debate in peacetime nothing would likely come of the accusation. When charged with treason during the Civil War, however, one might find himself censured, ostracized, roused from bed at 2 A.M. by a military squadron, exiled from the country, imprisoned in a military Bastille, or worse still, at the foot of the gallows. Charges of treason mattered during the Civil War more than at any other period of American history.

Treason is a political crime in two senses of the word. First, it is “political” because it is a crime against the state. Second, it can be “political” in the sense that the sovereign (or the majority in a democratic society) might declare the partisan opposition to be traitors. The crime of treason will always be political in the first sense. The Founding Fathers hoped to prevent the partisan-political second meaning from taking root on American soil. “As new fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free governments, have usually wreaked their alternate malignity on each other,” wrote James Madison in *The Federalist*

No. 43, “the convention have, with great judgment, opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime. . .”¹

Treason is the only crime defined in the U.S. Constitution: “Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.” The next sentence states that treason must be an “overt Act,” thus precluding judges or politicians from declaring that conspiracy or words might be deemed treason. In defining treason narrowly the Framers hoped to depoliticize a crime that for centuries had been partisan-political in nature. In early modern England kings could define treason however they chose, and force judges to convict the accused simply to eliminate political opposition. This process of construing a defendant’s words or actions to be treason became known as “constructive treason.” Moreover, since 1350 it had been a treasonable offence to imagine or compass the king’s death. In 1787, James Madison and George Mason attempted to reinstitute the law of 1350, but the constitutional convention rejected their proposal.²

Despite the Founders’ precaution of defining treason in the nation’s fundamental law, the Civil War brought about profound changes in the nation’s legal and political culture. The definition of treason broadened during the Civil War to include more than just overt acts of war. Included in its meaning were also disloyal or treasonous words. Seditious speech was punished, though not always as a defined crime. Speech codes were adopted by several northern states, and loyalty oaths were required at all levels of

¹ *The Federalist* No. 43.

² U.S. Constitution, art. 3, sec. 3 (1787); Max Ferrand, ed., *The Records of the Federal Convention of 1787*, 3 vols. (New Haven, Conn.: Yale University Press, 1911), 2:345-350.

government and in nearly every jurisdiction. Violations of these laws, or refusals to take prescribed oaths, opened up northern citizens to charges of treason and disloyalty. In essence, the line between words and deeds blurred so that someone might be considered a traitor for speaking disloyally, or for harboring unpatriotic sentiments. Chapter 1 examines how this transformation took place in the legislative halls and courtrooms of the North. Each subsequent chapter shows how this broadened definition affected everyday political life. Drawing on Michael F. Holt's suggestion that students of the Civil War ought to pay more attention to politics at the "subnational level,"³ I have endeavored to examine how treason was defined not only by the federal government, but also at the state and local levels, something that no scholar has yet attempted to do.

Most historians have argued that constructive treason never reared its ugly head on American soil following the ratification of the Constitution. "The federal Constitution radically restricted this king of crimes," wrote Lawrence M. Friedman. "It defined its content, once and for all, and hedged treason trials about with procedural safeguards. . . . It shrank the concept of state crime to an almost irreducible minimum." Similarly, Willard Hurst argued that the treason clause of the Constitution "prevented the use of treason trials as an instrument of political faction." According to Hurst, the Framers had rejected the vague English precedent, derived from the 1350 statute of Edward III, that

³ Michael F. Holt, "An Elusive Synthesis: Northern Politics during the Civil War," in *Writing the Civil War: The Quest to Understand*, ed. James M. McPherson and William J. Cooper, Jr. (Columbia: University of South Carolina Press, 1998), 123.

compassing or imagining the death of the king was treason. The constitutional definition, Hurst further averred, also precluded words or riot from being deemed treason.⁴

The leading scholar of the Civil War and the Constitution, James G. Randall, also argued that Congress and the courts could not overstep the constitutional definition of treason. In the American context, he said, “‘Constructive treason’ was eliminated. There must be an actual levying of war.” Randall proceeded to argue that treason law “was of slight importance during the war” because of its impracticality as a legal weapon to put down disloyalty during such a gigantic rebellion. Instead, Congress and the Lincoln administration relied on emergency legislation aimed at “offenses involving defiance of the Government . . . which needed punishment, but for which the treason law would have been unsuitable.” Treason, in short, retained its limited constitutional definition during the war and the northern governments adopted new statutes to deal with treason and the lesser crimes of disloyalty.⁵

Against this traditional view, Bradley Chapin argued that constructive treason has been “good law” in the United States since the Federalist era. The judicial decisions that arose from the Whiskey Rebellion of 1794 and John Fries’ Rebellion of 1798 had declared that riots or other organized acts of resistance to a federal law were treasonable.

⁴ Friedman and Hurst quoted in Thomas P. Slaughter, “‘The King of Crimes’: Early American Treason Law, 1787-1860,” in *Launching the “Extended Republic”: The Federalist Era*, ed. Ronald Hoffman and Peter J. Albert (Charlottesville: University Press of Virginia, 1996), 55, 60-61.

⁵ James G. Randall, *Constitutional Problems under Lincoln*, revised ed. (Urbana: University of Illinois Press, 1964), 75-78.

According to Chapin, these judicial decisions “brought in the doctrine of a constructive levying of war, and it remains good law to this day.”⁶

Seeking to synthesize the literature and offer a more precise interpretation, Thomas P. Slaughter has recently argued that Chapin was right to see a broadened understanding of treason—even constructive treason—in the United States up through the Whiskey and Fries’ rebellions. But following the Jeffersonian ascendancy, Slaughter contends that the very Federalist judges who had so broadly construed treason in the 1790s now, ironically, “began the process of narrowing the scope of treason law and . . . sought to define clear limits to the authority of the state and broader rights and protections for those rights as they were contested in treason trials.”⁷

Up to this point, Slaughter’s argument is convincing. He continues, however, by maintaining that the law of treason narrowed during the antebellum period, and that the federal judiciary continued to move away from broad, “constructive” understandings of treason during the American Civil War. “The Civil War treason cases, which might have been expected to reverse the trend,” writes Slaughter, “actually continued the process of narrowing the definitions of key terms in Article III, Section 3, and of broadening procedural protections for accused traitors.”⁸ Slaughter comes to this conclusion because of his focus on federal case law. Examination of federal, state and military law, however, reveals a much different story. Constructive treason—treason of the heart and mind—

⁶ Bradley Chapin, *The American Law of Treason: Revolutionary and Early National Origins* (Seattle: University of Washington Press, 1964), 85-97.

⁷ Slaughter, “King of Crimes,” 109.

⁸ *Ibid.*, 132-135.

returned to American jurisprudence during the Civil War, and the procedural guarantees that the Founders intended for all accused persons in criminal cases were not nearly as well protected in wartime as they had been in other times of peace.

I.

During the secession crisis, northerners were divided over whether to compromise and conciliate the South, or offer a strong, Andrew Jackson-like response—one that would treat the southern traitors “roughly and decisively.” Theodore Dwight Woolsey, the president of Yale, called for “safeguards,” to protect the nation, including “state laws and a United States law making it sedition to advocate secession by word of mouth or in print.” Although a bit uneasy about passing sedition laws, Woolsey had come to see “this restriction on free speech, as an act of self-preservation.”⁹

Many northern states followed Woolsey’s advice and passed laws limiting liberty of conscience. Others, like Nevada, resolved to oppose “treason, whether North or South, whether *in word or in arms*” (emphasis added). Comparing antiwar northerners to “Benedict Arnold and the Cowboys of the Revolution,” the Nevada legislature “recognize[d] the lowest type of treason to humanity and our country, in that class at the North who, basking in the sunshine of free institutions, while the fires of discord and rebellion (in imitation of the type of their party) are hissing destruction to the life and honor of a nation’s existence, have said let the nation perish rather than Slavery suffer in

⁹ Theodore Dwight Woolsey to Lieber, December 20, 1860, Lieber Papers.

the contest.”¹⁰ In other words, the majority of Nevadans believed that northern Democrats were traitors to both humanity and their country because they favored southern interests over the life of the nation. Significantly, the treason of northern Democrats, in this view, was not in armed rebellion, but in words and thoughts, and in opposition to the antislavery war measures of the Republican party.

The view of the Nevada legislature was echoed in a resolution adopted at the Ohio state house in 1864. In a resolution “relative to designing, ambitious traitors,” the Ohio legislature implored its citizens not to resort to mob violence when reacting to disloyal newspaper editors. The proper state authorities, it said, would maintain law and order. In the process of making this declaration, however, the legislature brought antiwar newspaper editorializing into the constitutional meaning of treason. Newspapers in the state that were “publishing treasonable and incendiary articles and communications” were “endeavoring to alienate and destroy public confidence in the ability of the federal government to suppress the rebellion, and slanderous towards those engaged in its suppression.” These “acts of disloyalty,” concluded the legislature, “are but another means of giving aid and comfort to the enemy of our common country, contrary to the true spirit of our institutions.”¹¹ By saying that Democratic papers were disloyally

¹⁰ Nevada, *Resolutions*, adopted February 19, 1864, in *Laws of the Territory of Nevada, Passed at the Third Regular Session of the Legislative Assembly, Begun the Twelfth Day of January, and Ended on the Twentieth Day of February, Eighteen Hundred and Sixty-Four, at Carson City* (Virginia: John Church & Co., 1864), 164.

¹¹ Ohio, *Joint Resolution Relative to Designing, Ambitious Traitors*, approved March 31, 1864, in *General and Local Laws and Joint Resolutions, Passed by the Fifty-Sixth General Assembly, of the State of Ohio, at its First Session Begun and Held in the City of Columbus, January 4, 1864, and in the Sixty-Second Year of Said State* (Columbus: Richard Nevins, 1864), 184. General Burnside had taken a similar stance on “disloyal” newspapers in Ohio about a year earlier. See *O.R.*, ser. 2, vol. 5, pp. 576-577.

“giving aid and comfort” to the rebels, the Ohio legislature explicitly linked political opposition to the Article III definition of treason.

Sentiments like those of the Nevada and Ohio legislatures put northern Democrats in an awkward position. As the aims of the war changed, and as the war measures of the Republican party struck them as increasingly radical—and unquestionably unconstitutional—Democrats had to decide how they would react. Would they continue to support Lincoln and the war? Would they bear these Republican outrages in silence? Or would they become a vocal and vociferous opposition to the administration in Washington?

To be sure, some northern Democrats and citizens from the border states had opposed the war from the beginning, but it was not until the passage of the confiscation acts, the announcement of an emancipation proclamation, and the adoption of conscription, that the Democratic opposition to the Republican war effort really congealed. Once they decided to oppose the administration, however, Democrats then had to decide just what form that opposition would take.

Even after emancipation and conscription, many moderate Democrats still claimed to support the war, but only to oppose the way the administration was handling it. Others, forming the Peace wing of the party, insisted that it was impossible for war to restore the Union.¹² Democrats in the moderate wing of the party were careful with

¹² Again, some had held this position from the very beginning, but this contingent within the party grew after the first year of the war, especially at times when Union military fortunes were at a low point. Joel H. Silbey, *A Respectable Minority: The Democratic Party in the Civil War Era, 1860-1868* (New York: W. W. Norton and Co., 1977), 99-101.

whom they associated in the Peace wing. National party chairman August Belmont warned Democratic financier Samuel L. M. Barlow not to associate his name with certain Peace men because they “are disloyal & unreservedly express their sympathy with the Rebels.—I tell you this as a friend, because I know that you do not share their treasonable views.”¹³

Being divided on the major questions of the war, Democrats were also divided amongst themselves on the best ways to effect their policy positions. Some moderate Democrats hoped that they could “come up and possess the ear of the President,” rather than leave Lincoln solely to the influence of radical Republicans. If the Democratic party would only act patriotically and openly support the Union war effort, they believed, Lincoln would turn his back on the Radicals of his own party and form a coalition with pro-war members of the Opposition.¹⁴

But rather than take this approach, Democratic leadership generally “bull[ied] the Federal power,” and their “opposition became tainted with rancor, partisanship, & some treason.” Consequently, Lincoln found that the Opposition could not be trusted, and Democrats lost a unique opportunity to exert their influence on presidential decision making.¹⁵

Because opposition to the Lincoln administration and Republican war aims often led to accusations of treason, those sorts of charges can be found at every level of American society and government. Chapters 2 and 3 examine how Republican leaders in

¹³ August Belmont to Samuel L. M. Barlow, August 24, 1862, Barlow Papers.

¹⁴ T. J. Barnett to Barlow, May 18, and July 2, 1863, Barlow Papers.

¹⁵ T. J. Barnett to Barlow, May 16, and July 2, 1863, Barlow Papers.

Washington dealt with suspected traitors serving on the federal judiciary and in Congress. In most of these cases, those considered traitors never faced formal charges of treason. Accordingly, the political branches of the federal government found innovative and creative ways to punish and remove them from power. These judges and congressmen were never found guilty of the high crime of treason, but their actions were deemed treasonable and they were dealt with in a way that, in truth, was easier than charging them with treason and securing a conviction in court. Moreover, many speeches from these debates were published as pamphlets and in newspapers, and they subsequently played an important role in the shaping of public opinion on how treason ought to be defined.

Not all debates about treason and loyalty occurred in legislative chambers and courtrooms. Historian Bradley Chapin found that, during the American Revolution, the law of treason evolved alongside of the battlefield. Convictions for treason became much more frequent when the home front and the seat of war converged. So, too, as Mark E. Neely, Jr., has shown, most military arrests for disloyal behavior occurred in the border states—areas where Union and Confederate armies sometimes squared off during the war, and where roaming bands of guerrillas fought in unconventional engagements.¹⁶ These liminal spaces between North and South became contested battlegrounds in the debate over the meaning of loyalty and disloyalty. While soldiers fought and bandits pillaged, civilians were forced to prove their loyalty—often times to both the Union and Confederate armies, or to whichever government they believed more likely to succeed.

¹⁶ Chapin, *Law of Treason*, ch. 4; Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (New York: Oxford University Press, 1991), 32-50, 124-133.

During the Civil War—particularly along the border—the federal government used military trials to punish civilians suspected of disloyalty. These trials ignored many of the constitutional protections afforded to criminal defendants and allowed the government to win convictions for treason more easily than they would have been attained using normal judicial procedure (to be discussed below). The unique combination of border-state violence and military justice also opened up the law of treason to women as well as men. As women increased their roles as political opponents of the Lincoln administration—or as agents working directly for the rebels—they found themselves arrested, imprisoned, and even on trial before military commissions. Several women were arrested under Maryland’s 1862 treason law for displaying rebel flags, while many others were arrested, tried, and convicted by Union military tribunals. Military regulations made it quite clear that women, as well as men, would be held accountable for disloyal acts. “The law of war, like the criminal law regarding other offenses, makes no difference on account of the differences of the sexes, concerning the spy, the war-traitor, or the war rebels,” stated the famous Lieber Code of 1863.¹⁷ Indeed, the war along the border introduced many new and devastating hardships to civilians and their families.

¹⁷ *State v. Hetty Cary*, Baltimore City Criminal Court (Criminal Docket), January 1863 Term, case no. 80, MdHR 50,334-22 [MSA C1849-22, 3/29/14/43]; *State v. Fanny C. James*, Baltimore City Criminal Court (Criminal Docket), May 1863 Term, case no. 132, MdHR 50,334-23 [MSA C1849-23, 3/29/14/44], September 1863 Term, case no. 10, MdHR 50,334-24 [MSA C1849-24, 3/29/14/45], January 1864 Term, case no. 3, MdHR 50,334-25 [MSA C1849-25, 3/30/1/1], May 1864 Term, case no. 23, MdHR 50,334-26 [MSA C1849-26, 3/30/1/2]; Thomas P. Lowry, *Confederate Heroines: 120 Southern Women Convicted by Union Military Justice* (Baton Rouge: Louisiana State University Press, 2006), 1-76, 147-168; General Orders No. 100, “Instructions for the Government of the Armies of the United States in the Field,” April 24, 1863, in *O.R.*, ser. 3, vol. 3, p. 159.

As citizens in northern border regions found their property ravaged and often seized by the hard hand of war, they called on their state and local governments to compensate them for their losses. But many Republican leaders were not sure that just any petitioner should receive compensation. Thus, they sought to develop rules and tests to determine whether those asking to be indemnified were in fact loyal to the Union cause. To be sure, there was a legitimate state interest in ensuring that traitors did not receive compensation from the state for losses sustained during rebel raids. But Chapter 4 reveals that Republicans often required professions of loyalty to their own war aims rather than a nonpartisan adherence to the Constitution and the nation. In doing so, Republicans essentially relegated all Democratic opponents to Lincoln and the war as traitors.

Charges of treason were perhaps most prevalent during wartime elections. Basking in the glory of their 1862 electoral victories, Peace Democrats gained strength in nominating conventions during the 1863 election cycle. In April, Connecticut Democrats ran former governor Thomas H. Seymour, an ardent Peace man, for the governorship of their state. Later that year, Ohio ran former congressman Clement L. Vallandigham and Pennsylvania ran state supreme court justice George W. Woodward. Seymour and Vallandigham were both peace-at-any-price men. Woodward, on the surface at least, seems to have been close to them on the issues.

Republicans were horrified by the Democrats' choices. "I blush for my native state that such sentiments can be uttered here," wrote one New Haven Republican when describing the Democratic nominating convention as a "treasonable chapter" in his state's history. "At the same time I think it will be much more easy, politically, to defeat the

‘anti-war’ party than it would have been to defeat an ‘anti-administration’ party.’” In other words, despite Lincoln’s lagging popularity when the war was going badly, this Republican believed that most voters still supported a war to preserve the Union. Consequently, Republicans felt confident that they could defeat antiwar candidates at the polls. “The democratic party consists of a few able, designing, ambitious leaders who drag after them an immense combination of ignorant, thoughtless & vicious voters, misled by popular watch-cries, & caring nothing for the foundations of the republic. There is a very small head to the party, and an immense tail” (the writer here referring to Connecticut Democrats as disloyal Copperheads). “May Heaven defend us from their harm!”¹⁸

Heaven did defend them. Republicans handily carried all three gubernatorial elections in 1863. Chapter 5, which focuses on the contest in Pennsylvania, discusses how the charges of disloyalty that so often arose during these hard-fought campaigns, and that in some cases have been carried into the current scholarly literature, used the treason issue as a successful campaign-tool, but were not always reliable portrayals of the candidates. George W. Woodward is often lumped into the same “peace-at-any-price” category as his fellow Democratic nominees of that year, Thomas Seymour and Clement Vallandigham. Joel H. Silbey, for example, writes that he was “a peace candidate almost as notorious as Vallandigham.”¹⁹ Close examination of his statements and record, however, reveals a more complex story. While Woodward certainly had sympathies with the South, existing evidence makes it hard to conclude that he was a Peace Democrat.

¹⁸ Daniel Croit Gilman to Lieber, February 26, 1863, Lieber Papers.

¹⁹ See, for example, Silbey, *Respectable Minority*, 111-113, 147.

More likely, he came closer to the moderate wing of his party, but because of his position as a state judge, felt compelled to remain silent on the major issues of the war, when most other candidates were free to express their political sentiments openly. The nomination of Woodward, in many ways, seemed like a sensible choice on which all wings of the Democratic party could agree. Both moderates and Peace men ardently supported his candidacy, and he came the closest of any of the Democratic gubernatorial nominees to winning that year.

The presidential election of 1864, which is the subject of Chapter 6, revealed the depths of Democratic divisions during the Civil War. By the summer of 1864, as Union military fortunes were being dragged through the muddy trenches around Petersburg and Atlanta, the Democratic party was hopelessly divided between its Peace and moderate wings. The time should have seemed ripe for Democrats to regain power, had they been able to offer any positive alternatives to the Republicans' war plans. But three years into the war, the party *still* could not settle on what position it should take on the crisis. Both factions battled for the soul and voice of the party, but as war news got increasingly worse that summer, the Peace wing only increased in its power. Ultimately, this was bad news for the Democrats because no matter how badly the war was going, most northerners were still not yet willing to vote for a party that seemed intent upon surrender. Thus, the men in the party who “so often verged on disloyalty”²⁰—or perhaps even were disloyal—gained so powerful a voice that they helped contribute to their own party's defeat in one of the most important presidential elections in American history.

²⁰ Neely, *Union Divided*, 193.

Behind the leadership of Clement Vallandigham, the Democrats placed George McClellan on a Peace platform with a Peace Democratic running mate. But when General William Tecumseh Sherman finally took Atlanta, on September 1, 1864, a war-weary North awakened from its stupor, and northern voters were reminded that victory, reunion, and defeat of southern treason could soon be within their grasp. Most northern voters would not vote for a party and platform they believed to be treasonable (the Democratic platform had labeled the war a “failure”). But in 1864, this “treasonable” Peace platform was the official voice of the Democratic party. Once victory—and an honorable peace—again seemed attainable, northern voters rejected the Democratic party, lock, stock and barrel. Because the Peace wing had dictated the official war policy of the party, the entire party was branded disloyal during the election of 1864.

The final chapter, on the assassination of President Lincoln, shows how the process of broadening the definition of treason began to reverse itself in the period immediately following the war. During the course of the war, many northerners had hoped for mass executions of southern rebels. In 1862, for example, the Ohio legislature adopted a joint resolution calling for “the speedy trial and summary execution” of the “wicked and ambitious traitors” who had started the Civil War.²¹ The aftermath of Lincoln’s assassination—when many southern leaders were believed to be complicit in the murder—seemed an opportune time to carry out large-scale vengeance.

But mass executions did not happen. Chapter 7 traces two divergent paths. On the one hand, northerners who had just lost their commander-in-chief wanted blood. On the other hand, with peace on the horizon, many civilians were tired of the mass killing.

²¹ *Congressional Serial Set*, 37th Cong., 2nd sess., House Misc. Doc. No. 60.

Accordingly, two responses to the assassination manifested themselves. First, mobs became increasingly violent, recreating the violence of the antebellum era and the Civil War years. They sought disloyal Democrats or anyone who exulted in the murder of the president and made sure such offenders received a just compensation. Second, and more importantly, the courts began to constrain the law of treason to limit martial law and the curtailment of rights in peacetime civilian areas. It was in these trials that the Copperheads' voice began to gain prominence and civil liberties began to return to normal.

In the early postwar period the poet Herman Melville set a tone that would soon be adopted throughout the North. He implored his fellow Americans to show mercy toward the South. In a "*plea against the vindictive cry raised by civilians shortly after the surrender at Appomattox,*" he wrote:

The life in the veins of Treason lags,
Her daring color-bearers drop their flags,
And yield. *Now* shall we fire?
Can poor spite be?
Shall nobleness in victory less aspire
Than in reverse? Spare Spleen her ire,
And think how Grant met Lee.²²

II.

Democrats opposed Lincoln's use of martial law to suppress dissent and disloyalty in the loyal states. As one Union soldier with border state proclivities explained it: Martial law "is a contradiction in terms—as Martial Law is the absence of all Law, but the will for the time being of the Commanding General—the Lawgiver,

²² Herman Melville, "Rebel Color-bearers at Shiloh," in *Battle-Pieces and Aspects of the War* (New York: Harper and Brothers, 1866), 144-145.

Judge, Jury, and Executioner.”²³ From the very beginning of the conflict, the Lincoln administration claimed the right of the president, as commander-in-chief, to use the military to suppress traitors in the North. Moreover, argued Attorney General Edward Bates, when the nation’s life was in danger, the president had “the lawful discretionary power to arrest and hold in custody persons” suspected of complicity with the rebellion. Privately, U.S. District Judge John Cadwalader argued that Lincoln’s reading of the law was incorrect. Treason, he said, “is not an offence cognizable by a military captor, or custodian, but by civil tribunals alone.”²⁴ But Cadwalader, like most northern judges, would find himself powerless to exert any authority against the overwhelming power of the Union army. Military justice, therefore, weaves itself through the narrative of this dissertation precisely because of its centrality to the northern definition of treason.

Beginning in the spring of 1861, Lincoln employed the military to arrest civilians suspected of treason. By September 1861 the military was not only detaining civilians, but also trying them before military courts. In the process, the military defined treason broadly, often construing it to include such vague terms as “disloyal practices” and “disloyal words.” On August 8, 1862, for example, the War Department issued a set of orders authorizing the arrest and imprisonment of “any person or persons who may be engaged, by act, speech, or writing, in discouraging volunteer enlistments, or in any way

²³ Robert Winn to sister, September 11, 1864, Winn-Cook Family Papers, The Filson.

²⁴ Edward Bates, “Suspension of the Privilege of the Writ of Habeas Corpus,” July 5, 1861, in *Official Opinions of the Attorneys General of the United States*, 43 vols. (Washington, D.C.: W. H. and O. H. Morrison, 1852-1996), 10:79-84; “Judge Cadwalader’s Opinion in the Habeas Corpus Case at Baltimore respecting George Cadwalader’s action regarding a prisoner,” in Cadwalader Collection, Series VI (Judge John Cadwalader Papers), box 3, HSP.

giving aid and comfort to the enemy, or in any disloyal practice against the United States.” The order also authorized the military to try these detainees before military commissions. In a second order issued the same day the War Department suspended the writ of habeas corpus respecting any person who evaded military service or who was “arrested for disloyal practices.”²⁵ Such orders gave local military commanders an enormous amount of discretion when defining political offences.

The language of these orders derived directly from the constitutional definition of treason—“giving aid and comfort to the enemy”—but they punished new crimes that were something less than treason. The new crime of “disloyal practices” might involve “speech, or writing”—things that were less than an “overt Act” of war. Nevertheless, most northerners understood that these orders were aimed at northern traitors and those opposed to the war. Thus, in the popular mind, these orders modified and amplified the definition of treason by fusing the king of crimes with lesser crimes. The orders also made conviction more easily attained by subjecting suspected traitors to trial by military commission. The constitutional requirements of indictment by a grand jury, a warrant for an arrest, two witnesses to an overt act of treason, and trial in an open court were no longer required. Instead, the decision to arrest would be left to “all U.S. marshals and superintendents or chiefs of police in any town, city, or district.” And justice would be left in the hands of the military court.²⁶

²⁵ Neely, *Fate of Liberty*, 35; “Order Authorizing Arrests of Persons Discouraging Enlistments,” August 8, 1862, in *O.R.*, ser. 3, vol. 2, pp. 321-322; “Order to Prevent Evasion of Military Duty and for the Suppression of Disloyal Practices,” August 8, 1862, *O.R.*, ser. 2, vol. 4, pp. 358-359.

²⁶ “Order Authorizing Arrests,” *O.R.*, ser. 3, vol. 2, p. 321. Neely points out that these orders were repealed about a month after they were issued. See Neely, *Fate of*

These first two orders were issued directly by Edwin M. Stanton, Lincoln's secretary of war, based on the president's "verbal direction."²⁷ Down the chain of command, however, other military commanders quickly followed suit. Perhaps the two most famous instances of this nature came out of the Department of the Ohio in the spring of 1863.

On April 13, 1863, General Ambrose Burnside, headquartered in Cincinnati, issued his infamous General Orders No. 38. This military order informed civilians of the Old Northwest that they would be "tried as spies or traitors" if they committed any acts that would benefit the rebels. In its broadest language, the order declared that "the habit of declaring sympathies for the enemy will not be allowed in this department" and that those who violated this order would be sent to "into the lines of their [Confederate] friends." Burnside wanted all to know that "treason *expressed or implied*" (emphasis added) would face swift and condign punishment.²⁸

Two days later, Burnside's subordinate in Indianapolis, General Milo S. Hascall, issued General Orders No. 9. Intending to carry into effect Burnside's order, Hascall declared that the country would "be saved or lost" during Lincoln's time in office. Therefore, any newspaper editor or public speaker who counseled or encouraged resistance to the war measures adopted by Congress, particularly conscription, would be "treated accordingly." Linking the government to the administration, Hascall declared

Liberty, 61-65. Still, these orders still made an important contribution to northern understandings of how disloyalty was defined.

²⁷ Quoted in Robert J. Chandler, "Crushing Dissent: The Pacific Coast Tests Lincoln's Policy of Suppression, 1862," *Civil War History* 30 (September 1984), 239.

²⁸ "General Orders No. 38," April 13, 1863, in *O.R.*, ser. 2, vol. 5, p. 480.

that “he who is factiously and actively opposed to the war policy of the Administration is as much opposed to his Government.”²⁹ Opposition to Lincoln and the Republican majority in Congress, in Hascall’s view, was treason.

Democrats protested the vagueness of these orders. “We are unable to say exactly what this language means,” wrote the editors of one Indiana newspaper, while another pointed out that “there is no such crime as ‘implied treason.’” Hascall’s policy effectively squelched the Midwestern Democratic press. Several editors were arrested and their newspapers were shut down; others toned down their opposition rhetoric in order to stay in business. “However galling this may be,” stated the *Sullivan Democrat*, “we have no alternative but to quietly submit.”³⁰

Not all submitted passively, however. Ohio Peace Democrat George Pugh was infuriated by the military’s defining of treason in General Orders No. 38: “I spurn, I execrate, I trample under foot the order of any military officer *defining treason* and prescribing liberty,” he declared (emphasis added). “Come what will, come imprisonment, exile, stripes, hard labor, death, I defy Order Number 38.” More famously, Clement Vallandigham, the former Ohio congressman, denounced these orders and was consequently arrested by the military at his home at 2 A.M., on the morning of May 5, 1863. Vallandigham’s arrest caused an outcry among Democrats throughout the

²⁹ “General Orders No. 9,” April 15, 1863, in *O.R.*, ser. 2, vol. 5, p. 485. Compare with George M. Frederickson, *The Inner Civil War: Northern Intellectuals and the Crisis of the Union* (New York: Harper and Row, 1965), ch. 9.

³⁰ Stephen E. Towne, “Killing the Serpent Speedily: Governor Morton, General Hascall, and the Suppression of the Democratic Press in Indiana, 1863” *Civil War History* 52 (April 2006), 51-53.

North. Dozens of indignation meetings were held and protests calling for his release found their way onto Lincoln's desk in Washington.³¹

In the wake of Vallandigham's arrest, an anti-draft "riot sprung up" in Holmes county, Ohio. In June 1863, eighty men were indicted in the federal court in Cleveland for resisting the enforcement of the Enrollment Act in four central-Ohio counties. Four were charged with assaulting an enrollment officer, fifty-eight were charged with conspiracy to resist the execution of the law and assaulting an enrollment officer, and eighteen others were charged with conspiracy to resist the execution of the law. In Holmes county, thirteen of those charged with conspiracy and assault had been armed; they were also charged separately with treason.³²

Most of these cases were nolle (meaning the government decided not to prosecute them) or quashed (meaning the cases were annulled by the court) between 1863 and 1866. All thirteen treason cases were nolle. In fact, of the thirty-nine conspiracy and assault cases arising from the "Holmes County Rebellion," only two ever went to trial (both of these suspects had also been charged with treason). One of the defendants was acquitted for conspiracy and assault, while the other was convicted. The one convicted was pardoned on September 21, 1864.³³

³¹ Pugh quoted in George H. Porter, *Ohio Politics during the Civil War Period* (New York: Columbia University Press, 1911), 171; Frank L. Klement, *The Limits of Dissent: Clement L. Vallandigham & the Civil War* (Lexington: University Press of Kentucky, 1970), 156-172.

³² *New York Times*, June 28, 1864; Patrick J. Drouhard, *It Don't Look Right for the Times: The Factual History of the Holmes County Rebellion* (Cardington, Ohio: Privately Printed, 2005), 13-40.

³³ Drouhard, *It Don't Look Right*, 13-40.

These instances of resistance in Ohio were repeated numerous times throughout the North. There were many cases of seemingly-organized draft resistance in Pennsylvania. In Columbia county, the so-called “Fishing Creek Confederacy” involved a group of between 100 and 150 men, half of whom were said to be armed, who met at one John Rantz’s barn on August 14, 1864, intent on violently resisting enforcement of the draft. At least eleven men were arrested and tried before a military commission for “confederating” to resist the draft, for joining the Knights of the Golden Circle, for committing “acts of disloyalty,” for “publicly expressing sympathy” for the rebels, and for “uttering disloyal sentiments and opinions, with the object of defeating and weakening the power of the Government.” None of the defendants was convicted of joining the KGC, but seven of the eleven were found guilty of some combination of the charges and specifications set against them. At least twenty-five civilians in Luzerne county were tried before military commissions for joining secret societies and violently resisting the draft. Ten men were acquitted of joining a secret society allegedly known as the “Buck Shots,” but thirteen others were convicted of attempting to resist the draft violently (including the beating, murder, and burning of houses of “Union men”) and attempting to shut down coal operations in the northeastern region of the state. Finally, in Clearfield county, at least six civilians were brought before a military tribunal and convicted of forming a “Democratic Castle” intent on obstructing the draft.³⁴

In each of these cases the judge advocate (the acting prosecutor) attempted to link the accused to “secret meetings” and “secret societies.” In some cases, he succeeded, in

³⁴ Court Martial Case files LL-2687, LL-2689, LL-2946, MM-1607, MM-1611, MM-1895, NN-1400, NN-1478, NN-2823, NN-3175, NN-3348, NN-3365, NN-3412, OO-0348, OO-0349.

others he did not. Many witnesses testified that they had participated in meetings, but that they had been only Democratic meetings intent on upholding constitutional liberty and helping draftees be able to avoid service (on this point testimony differed as to whether this would amount to violent resistance or raising funds through subscriptions to pay commutation fees and bounties). Ultimately, these organizations appeared to be locally-based mutual protection societies, not part of a larger network of the Knights of the Golden Circle.³⁵

What is most significant for the purposes of this study are the different methods of trying the draft resisters in Ohio and Pennsylvania. In Ohio, those opposing the enforcement of the draft were brought before civil courts, to very little avail. All of those charged with treason were released without trial, and only one person was convicted for his role in the Holmes county riot. Thus, only one of the eighty persons arrested for draft resistance was convicted and sentenced to imprisonment.³⁶ In Pennsylvania, however, those accused of conspiring to oppose conscription were brought before military tribunals. Of the 44 individuals mentioned above, 28 were convicted and sentenced to

³⁵ Aside from the aforementioned court martial case files, see also Robert M. Sandow, “Deserter Country: Civil War Opposition in the Mountains of Pennsylvania” (Ph.D. diss., The Pennsylvania State University, 2003), ch. 4 (forthcoming with Fordham University Press in 2009); *Congressional Globe*, 38th Cong., 2nd sess., p. 108; *Senate Journal*, 38th Cong., 2nd sess., p. 46; Neely, *Fate of Liberty*, 174; Arnold Shankman, *The Pennsylvania Antiwar Movement, 1861-1865*. London: Associated University Presses, 1980), 154-157.

³⁶ These numbers bear out in other places as well. In the federal Circuit Court for the District of Illinois, at least 56 citizens were indicted for draft resistance, but only one—and he plead guilty—was convicted. See Kellee Green Blake, “Aiding and Abetting: Disloyalty Prosecutions in the Federal Civil Courts of Southern Illinois, 1861-1866,” *Illinois Historical Journal* 87 (Summer 1994), 103.

imprisonment at a military prison. Thus, whereas the civil courts produced less than a 2 percent conviction rate, the military tribunals yielded a 64 percent conviction rate.³⁷

The stark differences in attainment of convictions in military versus civil tribunals reveals the likely reason that the military was used to detain civilians accused of opposing the draft. The Ohio rebels, tried in civil courts, got away; the Pennsylvania conspirators, tried before the military, were convicted and imprisoned. While military courts did have many procedural protections (right to counsel, confrontation of accusers, transcription of all testimony, the right to call witnesses, the right to object to members of the commission, and the right to cross-examine witnesses for the prosecution), they lacked one very important legal protection: the right to be convicted by a jury of one's peers (they also were not an "open court"). Indeed, the role of the jury is the most consequential difference between civil and military tribunals. Rather than requiring a unanimous jury of local citizens to convict the accused, only a majority of the military officers serving on the court were needed to convict.³⁸

These relatively minor confrontations over the draft ought to be viewed as instances of local resistance to what the resisters believed was an unconstitutional federal

³⁷ It must be remembered that many more civilians were arrested by the military for resisting the draft but were never brought before a military commission. If these individuals were factored into the equation, the "conviction rate" of the military would be lowered. The purpose of this comparison is to show the difference in conviction rates between those indicted in the civil courts and charged by military commissions.

³⁸ Some claimed that they did not have sufficient time to obtain witnesses if their witnesses were serving in the army. Others pointed out that they were not made aware of the charges against them until the trial began.

power.³⁹ Like most Civil War-era Democrats, these local citizens believed that the draft was an unconstitutional usurpation of the state militia system and an infringement on the civil liberty of state citizens. Being pursued and arrested by U.S. soldiers and then tried before military commissions only further confirmed their worst fears. Trial by jury, in fact, served as a local protection against federal encroachment on the liberty of individuals. Rejection of that protection was, therefore, a further rejection of local autonomy and individual liberty. As such, these military tribunals may have appeared a reincarnation of the King's bench as it was used to try the political opponents of the monarch under old English law. These commissions were established by and answerable to the commander-in-chief, Abraham Lincoln.

In a historical sense, these "rebellions" in rural Ohio and Pennsylvania mirrored the Whiskey Rebellion of 1794 and Fries' Rebellion of 1798.⁴⁰ Both the Whiskey and Fries rebellions were local efforts aimed at stopping the enforcement of a federal law. In both cases the defendants' actions were construed broadly so as to make them guilty of treason. And in both cases the intention of the defendants became central to their conviction, since the prosecution was unable to find two witnesses who could tie the Whiskey rebels or John Fries to overt acts of treason. Moreover, in both cases treason was defined as public violence or riot aimed at the obstruction or overturning of a law,

³⁹ See Kenneth H. Wheeler, "Local Autonomy and Civil War Draft Resistance: Holmes County, Ohio," *Civil War History* 45 (June 1999), 147-159, and Grace Palladino, *Another Civil War: Labor, Capital, and the State in the Anthracite Regions of Pennsylvania, 1840-68* (Urbana: University of Illinois Press, 1990), ch. 5.

⁴⁰ For similar connections between resistance during the 1790s and 1860s, see Robert H. Churchill, "'The Highest and Holiest Duty of Freeman': Revolutionary Libertarianism in American History" (Ph.D. diss., Rutgers University, 2001).

and in the Fries case the judge combined two smaller crimes into the larger crime of treason. “It is the opinion of the court,” Justice Samuel Chase had written in the *Fries* case, “that any insurrection or rising of any body of people, within the United states, to attain or effect, by *force* or *violence*, any object of a great public nature, or of public and general (or national) concern, is a *levying war* against the United States, within the contemplation and construction of the Constitution of the United States.”⁴¹

Within this broad reading of Article III, riots intended to resist national conscription during the Civil War certainly amounted to treason. Rather than call these acts treason, though, the military commissions resorted to other names. The most common—used in most of the military commissions for draft resistance in Pennsylvania—read:

The commission of acts of disloyalty against the Government of the United States, and publicly expressing sympathy for those in arms against said Government, and uttering disloyal sentiments and opinions with the object and purpose of defeating and weakening the power of the Government in its efforts to suppress the unlawful rebellion now existing in the United States.

There is no doubt this charge amounted to treason. It was certainly understood as such by those facing the charge. The counsel for John Rantz of Columbia county exclaimed in exasperation: “An old man, excitable and garrulous, under strong feeling, gives vent to a few rash words, repented of perhaps before sixty seconds had gone around, and this brave and swift witness arraigns before the country for Treason! If it were not so solemn to the defendant it would be farcical.” Regarding one of the Clearfield county cases, one officer

⁴¹ Slaughter, “King of Crimes,” 89-108. Two of the leading Whiskey rebels had been convicted of treason, and John Fries was convicted twice (the first conviction was thrown out and the trial was declared a mistrial). All three were sentenced to be hanged but later pardoned by the president.

in the judge advocate general's office remarked that those who had created the "unformed and crude secret fraternity—denominated the 'Democratic Castle'" were "no doubt . . . guilty of serious offences highly treasonable in their character." Even when they did not use the word treason, the military prosecutors understood precisely of what they were accusing the defendants. In one of the Luzerne county cases, the judge advocate declared: "Peter Dillon stands charged with a crime in itself atrocious and heinous but when taken in connection with the stupendous struggle now going on in the Country, it assumes an importance and magnitude truly enormous—it strikes at the roots of the Republic—it saps the life-blood of the Governmental fabric—it joins hands with the dastardly Rebellion now in existence and apes the deeds of its inglorious predecessor."⁴² The judge advocate did not need to use the word *treason*. In fact, by avoiding it, he might have made conviction a little easier to attain.

The arrests of Vallandigham and the Pennsylvania "confederates" represent some of the possible 18,000 civilian arrests that occurred at the hands of the military during the Civil War. Instances of these arrests and military tribunals appear in nearly every chapter of this dissertation. The most thorough scholar of military justice, Mark E. Neely, Jr., has concluded that the military arrests of civilians under Lincoln were not done primarily for political reasons; neither were they intended to prevent anti-administration speech. To the contrary, he argues, most "were sincerely meant to enforce conscription rather than stifle dissent." According to Neely, even if Lincoln had not suspended the writ of habeas corpus, "a majority of the arrests would have occurred" anyway.⁴³

⁴² Court Martial Case files LL-2689, MM-1607, and NN-1478.

⁴³ Neely, *Fate of Liberty*, 233-234.

While Neely's work remains both path-breaking and persuasive in many aspects, it may too quickly discount the partisan nature of many of the arrests that occurred on Lincoln's watch. Draft resistance was, in fact, inextricably linked to opposition to the Lincoln administration. While it might not be said that all opponents of Lincoln opposed the draft, it might fairly be assumed that all opponents of the draft opposed the president.

The issue is complicated by the fact that *political* opposition to conscription *became illegal* once the conscription law was adopted. In other words, the law authorizing the draft created a new crime—opposing the draft—which hitherto had been a legitimate political position. Therefore, what was still a principled political position to the Democrats was now to the Republicans a crime. One arrested for articulating a principled political position, of course, was a martyr. One arrested for a crime was a criminal. If, therefore, one adopts a position sympathetic to Lincoln, then the arrests will appear justified, nonpartisan, and essential to the Union war effort. If, on the other hand, one subscribes to the position that opposition to the draft was legitimate political speech, then one would have to conclude that the Lincoln administration's use of the military to arrest northern opponents of the draft (and the war) was an attempt to suppress disloyal antiwar dissent.

Beyond this theoretical reasoning, Civil War-era Democrats could make a strong case that the Lincoln administration's use of military commissions to try civilian American citizens violated the text of the Constitution. The Constitution demands that treason trials, like all criminal trials of civilians, must be civil trials: "The trial of all crimes, except in cases of impeachment, shall be by jury," states Article III, "and such

trial shall be held in the state where the said crimes shall have been committed.”

Conviction for treason requires an even higher standard: “the testimony of two witnesses to the same overt act, or on confession *in open court*” (emphasis added). This provision was included in the Constitution, according to Benjamin Franklin, because “prosecutions for treason were generally virulent; and perjury too easily made use of against innocence.” The Fifth amendment further requires: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger.” It would be difficult to construe this clause to include draft resisters as being within the military, and treason most certainly qualifies as a capital and an infamous crime. Finally, the Sixth amendment states: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed.”⁴⁴

Lincoln’s suspension of habeas corpus ought not to be construed as also having suspended these other constitutional protections.⁴⁵

Military trials of civilians also, significantly, violated the text of wartime legislation *that had been adopted by Republicans* to suppress the rebellion and enforce the draft. The Conspiracies Act of July 31, 1861 required conspirators against the government to face trial in the federal civil courts, while the Enrollment Act of March 3,

⁴⁴ U.S. Constitution, art. 3, sec. 2 and 3 (1787); 5th and 6th amends. (1791); Ferrand, ed., *Records*, 348.

⁴⁵ Neely argues that the distinction between suspension of the writ and martial law was not nearly as clear before the Milligan decision. See Neely, *Fate of Liberty*, 37-38 and ch. 8. See also Herman Belz, *Abraham Lincoln, Constitutionalism, and Equal Rights in the Civil War Era*. New York: Fordham University Press, 1998), ch. 1.

1863 stated that those resisting the draft or encouraging desertion “shall, upon legal conviction, be fined, at the discretion of any court having cognizance of the same.” The Enrollment Act of 1864 added: “And in cases where such assaulting, obstructing, hindering, or impeding [of the draft] shall produce the death of such officer or other person [enforcing the draft], the offender shall be deemed guilty of murder, and, upon conviction thereof upon indictment in the circuit court of the United States for the district within which the offence was committed, shall be punished with death.” Section 30 of the Enrollment Act of 1863 also limited the jurisdiction of military courts to members of the armed forces. It specified that crimes “shall be punishable by the sentence of a general court-martial or military commission, when committed by persons who are in the military service of the United States, and subject to the articles of war.” Finally, the Indemnity Act of 1863 required the secretaries of state and war “to furnish to the judges of the circuit and district courts of the United States . . . a list of the names of all persons, citizens of states in which the administration of the laws has continued unimpaired in the said Federal courts, who are now, or may hereafter be, held as prisoners of the United States, or . . . as state or political prisoners, or otherwise as prisoners of war.” If a grand jury did not find a true bill against any of the prisoners on that list by the end of the next session of the local federal court, the prisoners were to be freed upon taking an oath of allegiance.⁴⁶

⁴⁶ *An Act to Define and Punish Certain Conspiracies*, 12 Stat. 284; *An Act for Enrolling and Calling Out the National Forces, and for Other Purposes*, 12 Stat. 735-736; *An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases*, 12 Stat. 755-758; *An Act to Amend an Act Entitled “An Act for Enrolling and Calling Out the National Forces, and for Other Purposes,” approved March Third, Eighteen Hundred and Sixty-Three*, 13 Stat. 8. When Congress intended for civilians to be tried in military courts, it explicitly said so. Aside from section 30 of the Enrollment

Regardless of their apparent extralegality, the Lincoln administration had to rely on the military because they could not have gained convictions in civil courts. Thus, the Lincoln administration acted outside of the Constitution and the laws of their own making. Military tribunals, therefore, functioned in a similar fashion to the courts of the king's bench that had been used to punish enemies of the king in early modern England. These courts were created by the executive branch, under the authority of the commander-in-chief, and beholden to him for their jobs. It is little wonder, then, that Democrats believed these tribunals not only unconstitutional, but also destructive of republican liberty.

Ohio Democrats protested that the military arrest and banishment of Vallandigham were ushering into the United States “an unusual punishment” that was “unknown to the our laws.” The president, according to the Ohioans, was claiming a boundless power for himself, one which was greater than even the kings of England had exercised. They hyperbolically worried that if a prisoner could be banished from the country he could also face torture upon the rack. “If an indefinable kind of constructive treason is to be introduced and engrafted upon the Constitution unknown to the laws of the land, and subject to the will of the President, whenever an insurrection or invasion shall occur in any part of this vast Country, what safety or security will be left for the

Act of 1863 (cited above), see *An Act Making an Appropriation for Completing the Defences of Washington, and for Other Purposes*, 12 Stat. 340, and *An Act to Prevent and Punish Frauds upon the Government of the United States*, 12 Stat. 697. It should also be pointed out that those who obstructed the draft also could have been lawfully brought to trial under state law in many northern states. The alleged anti-draft conspirators in Pennsylvania, if not brought up on charges under the federal enrollment acts could have been charged under Pennsylvania's 1861 “treason” law (see Chapter 1).

liberties of the people—The Constructive treason that gave the friends of freedom so many years of toil and trouble in England were inconsiderable compared to this.”⁴⁷

To be sure, Lincoln believed he was defusing the situation by banishing Vallandigham to the South rather than keeping him imprisoned in the North. Lincoln had found Burnside’s and Hascall’s orders and imprudent actions to be administrative nightmares, but publicly Lincoln was forced to defend the doings of his local commanders. Most famously, in his June 1863 letter to Erastus Corning, Lincoln declared that military arrests were essential to winning the war. “Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wiley agitator who induces him to desert?” Lincoln famously asked. The wiley agitator, in this instance, was Clement Vallandigham. The answer, for Lincoln, seemed to be “no.” And, in the case of Vallandigham, the federal courts agreed.⁴⁸

The War Department gave military commanders broad authority to “distinguish[] between the loyal citizen in the revolted portion of the country and the disloyal citizen.” Moreover, the military declared that in time of war “*armed or unarmed* resistance by citizens of the United States against the lawful movements of their troops is levying war against the United States, and is therefore treason.”⁴⁹ With such a wide latitude of

⁴⁷ Matthew Birchard to Lincoln, June 26, 1863, Lincoln Papers.

⁴⁸ Lincoln to Erastus Corning and Others, June 12, 1863, in Basler et al., eds., *Collected Works of Lincoln*, 6:260-269. In *ex parte Vallandigham*, 68 U.S. 243 (1864), the Supreme Court denied that it had jurisdiction to review the decision of a military commission.

⁴⁹ General Orders No. 100, “Instructions for the Government of the Armies of the United States in the Field,” April 24, 1863, in *O.R.*, ser. 3, vol. 3, p. 163-164 (emphasis added).

discretion, soldiers sometimes showed poor judgment when deciding how to deal with those suspected of treason.

Many soldiers internalized the notion that the Democratic Opposition was disloyal. An Ohio soldier stationed in his home state described to his siblings a time when his regiment came across some Copperheads: “When we was down to belle air the boys put a rope around a old copperheads neck and drew him up but the officers came along and stop[p]ed them.”⁵⁰ This is an amazing and instructive moment, for the soldiers, acting as judge, jury, and executioner, were inflicting the legally prescribed punishment—death—on a man whom they believed had committed the greatest political crime.

It is possible—perhaps likely—that the “old” Democrat in the preceding incident had committed no overt act of war. The soldiers in this case, like many northerners during the war, had internalized the notion that the definition of treason now encompassed more acts (and words and thoughts) than the definition in the Constitution allowed for.

In a rare moment of constitutional clarity, one soldier corrected his sister on how the definition of treason ought to be understood:

You look at ‘aid and comfort’ only from a logical point of view—but in a *legal* point of view, ‘aid and comfort’ is something material and tangible, and not the manifestation of an inclination to commit treason—although it is another offence, [a] little less serious. Law is very nice in its distinctions—between a man it would *hang*—and one it would *justify*—there are very of very [sic] little difference in criminality, according to the *higher law*.⁵¹

⁵⁰ William Tanner to brother and sister, August 5, 1863, William Tanner Papers, The Filson.

⁵¹ Robert Winn to Sister, April 30, 1864, Winn-Cook Family Papers, The Filson.

The “logical point of view” to which he refers seems to be the position that “aid and comfort” can mean something *immaterial* and *intangible*—an *inclination*, words, thoughts, beliefs, editorials, sympathies, speeches, sermons, songs. Anything that might, in some way, be said to aid the South or hurt the North, in this view, could be deemed treason. This was the popular understanding. In his view, however, these things did not rise to the level of treason, although they might be lesser offences. From a legal perspective, he was undoubtedly correct. In wartime, she was more so.

III.

One might reasonably expect a study of the law of treason in the North during the Civil War to include discussion of a number of treason trials. Such, in fact, will not be the case. As can be seen from the example of the “Holmes County Rebellion,” there were very few actual treason trials during the Civil War. There were hundreds of indictments brought for treason and lesser charges of disloyalty during the Civil War, but very few of these cases ever made it to trial, and even fewer saw convictions.⁵² Various reasons account for the paucity of treason trials at a time when treason was so plainly evident.

⁵² In Frederick county, Maryland, for example there were 70 indictments brought for treason in 1863, but the government attorney moved that they should be quashed because they did not allege any overt acts of treason. “It is not sufficient to say that the accused levied war,” wrote the attorney, “but the particular manner in which it was levied is essential.” See William Price to Madison Nelson, October 22, 1863, and Price to Augustus Bradford, October 24, 1863, both in Governor’s Miscellaneous Papers (S1274), Maryland State Archives, Annapolis, Md.

Perhaps the most pressing reason was that it was very difficult for government attorneys to find local juries willing to convict their peers for the most heinous political crime on the books—a crime, which, under law, merited death. Failure to bring convictions would be embarrassing to the Lincoln administration, while trials and convictions might undermine the war effort by making martyrs of the accused. It was much easier for the Lincoln administration to use military arrests and the suspension of habeas corpus to suppress those suspected of disloyalty than to go through the time, expense, and uncertainty of a civil trial. Writing in July 1861, Attorney General Edward Bates noted that it would be “better [to] let twenty of the guilty go free . . . than to be defeated in a single case. . . . Success in the selected cases is very desirable, but a multitude of cases is not only not desired, but feared, as tending to excite popular sympathy and to beget the idea of persecution.” Lincoln, himself, also tended towards leniency. In 1862 he noted that “the severest justice may not always be the best policy.” Thus, due to fear of embarrassment, creation of martyrs, limited resources, and larger fish to fry, the executive branch tended not to pursue many actual treason cases in the courts.⁵³

Some judges also expressed annoyance at having to try treason cases. When thirty-five crewmen from a Confederate privateer were tried in 1861 for “high treason” and “piracy,” Supreme Court Justice Robert C. Grier, sitting as a circuit judge in Philadelphia, declared that he did “not intend to try any more of these cases.” There was more pressing business to attend to, he declared, and he would not waste his time “trying charges against a few unfortunate men here out of half a million that are in arms against

⁵³ Randall, *Constitutional Problems*, 87-88.

the government.” According to historian James G. Randall, “This illustrates the attitude of a practical-minded judge toward the efforts which a puzzled and well-meaning district attorney was making to prosecute some of the treason cases.”⁵⁴

Perhaps less honorably than Justice Grier, Chief Justice Taney purposefully thwarted some sixty treason cases in Baltimore, many of which arose from the infamous April 19, 1861 riots that plagued the city as northern troops made their way through Baltimore. In part because he empathized with their southern sympathies, and in part because he believed that it would be impossible to conduct fair and impartial trials while Maryland was under martial law, Taney successfully kept the cases from being heard. Shortly after his death the war came to a close and there was little need for the government to pursue the cases further.⁵⁵

In New Mexico Territory some 46 indictments for treason were brought against wealthy southern sympathizing citizens of the territory. Only four ever came to trial, and of those, all were acquitted. The presiding judge, who appears to have been a Democrat, said that the term “enemy,” as used in the Constitution’s definition of treason, referred only to a “foreign enemy” and not to “merely rebellious citizens and others ‘owing allegiance’ to the United States, in insurrection against the United States.” He also denied the well-established rule that in treason cases all participants were principals. Thus severely limiting the ability of the government to prosecute treason cases,

⁵⁴ Ibid., 90-93.

⁵⁵ RG 21, Minutes of the Circuit Court for the District of Maryland, 1790-1911, M931, reel 3, NARA; Carl Brent Swisher, *Roger B. Taney* (New York: The MacMillan Co., 1935), 556-560; George William Brown, *Baltimore and the Nineteenth of April, 1861: A Study of the War* (Baltimore: Johns Hopkins University, 1887), 45.

government officials in New Mexico turned to the military confiscation of the property of suspected traitors.⁵⁶

In each of the preceding instances—Holmes county, Justice Grier, Chief Justice Taney, and New Mexico—as in many others, the Lincoln administration came to find that disloyal northerners could be more easily suppressed by the military, as well as in open political debate.

This study, therefore, is not a strict legal history, but a mix of legal, political, military, constitutional, social, intellectual, and cultural history. In as much as the issue of treason touched every aspect of life during the Civil War, so too, I have employed various methodological approaches to write the story of the law of treason during the Civil War. I begin, in Chapter 1, with the law of treason—how politicians and judges defined, interpreted, and construed the legal definition of treason throughout the war. From there, I examine various instances in which that definition emerged in northern society, and novel ways that Republicans dealt with suspected northern traitors during the war between the states.

⁵⁶ Edward D. Tittmann, “The Exploitation of Treason,” *New Mexico Historical Review* 4 (April 1929), 128-145; *The American Annual Cyclopaedia and Register of Important Events of the Year 1864* (New York: D. Appleton & Co., 1865), 773. Confiscation proceedings were much more common than James G. Randall has previously suggested. There were at least 150 wartime confiscation proceedings in the federal courts in Illinois. See Blake, “Aiding and Abetting,” 100-103.

Chapter 1

“What is Treason?”: The Revolutionary Origins of Treason in the Civil War North

Defining “loyalty” in wartime has been a challenge in American society since the time of the Revolution. Americans on the home front have often found it difficult to distinguish between loyal citizens and those guilty of treason. Never was this problem more apparent than during the American Civil War. In the 1860s the Democratic party faced charges of treason, disloyalty and “copperheadism” for opposing Republican war aims. Horatio Nelson Taft, a Patent Office employee in Washington, D.C., aptly described the Union war effort as facing “Enimies in front with arms in their hands, and Enimies in the rear giving those Enimies comfort and support.”¹ Taft’s reference to comfort and support plainly alluded to the crime of treason. Indeed, many Republicans came to believe that northern “Copperheads” were guilty of more egregious crimes than were the southern rebels.

At the outset of the war Democrats generally were not charged with treason or sympathy with secession. There were exceptions, to be sure, but most northern accusations of treason were directed towards the south. Indeed, Orville Hickman Browning, soon-to-be U.S. Senator from Illinois, observed in April 1861 that the southern “traitors must be astounded at the unanimity of feeling in the North,” while a Wisconsin man noted that in his state all citizens spoke with “one voice”: “Democrats stand shoulder to shoulder with Republicans now, ready to maintain the government at all

¹ Horatio Nelson Taft, diary entry for February 27, 1863, Horatio Nelson Taft diary, Manuscript Division, LC.

hazards.”² In the spring of 1861, the reference to “traitors” almost unmistakably referred to southerner secessionists; by the end of that year, however, it would be employed to refer to northern Democrats, perhaps more frequently than it was used to denote southern rebels.

Tracing the transformation of the concept of treason from a referent for southern insurrectionists to including members of the northern political opposition, therefore, is of utmost importance. Surprisingly, it has been neglected by historians. The reason for this omission is that most historians have failed to treat treason as a legal and constitutional concept, and have instead focused mainly on partisan usage of the term. Moreover, historians have ignored the law of treason at the state level, where state and local communities worked to punish and extirpate treason from their midst. If we start with pre-war understandings of the law of treason, however, we can then track how politicians broadened its meaning in wartime. Understanding this transformation of the concept of treason during the Civil War, in light of how treason had been defined for centuries before the war, is vital to understanding Civil War politics in general. Northern Republicans during the war relied on ancient and Revolutionary-era definitions of treason to broaden its meaning and bring the northern political opposition within its scope.

The law of treason underwent several important changes before the Civil War. Under the English statute of 1350, adopted under Edward III, seven types of action were treasonable; of these, the most significant were compassing or imagining the king’s

² Orville Hickman Browning to Abraham Lincoln, April 22, 1861, and James R. Doolittle to Lincoln, Abraham Lincoln Papers, Manuscript Division, LC. See also Hickman to Lincoln, April 18, 1861, and the article on “Patriotism” in the Democratic Harrisburg *Patriot and Union*, April 24, 1861.

death, levying war against the king, adhering to the king's enemies, or giving them aid and comfort. Over the next several centuries the law of treason fluctuated when different monarchs took the throne. Some kings kept the original statute of Edward III, while others vastly broadened the definition of treason to include any insult to the royal family. Henry VIII, for example, declared that it was high treason to criticize his current wife or his past divorces, or to declare that any of his children were illegitimate. In Elizabethan England judges also constructed new treasons, deeming certain words (spoken or written), conspiracy to levy war, or attempting to change public policy by force, to be treason. Under this doctrine of "constructive treason" (or war by construction), a conspiracy or riot that sought to stop enforcement of a law was treason.³

Many British monarchs used constructive treason to punish political rivals. "The doctrine of *constructive treasons*, created by servile judges, who held their office during the pleasure of the king, was used by them in such a way as to enable the sovereign safely to wreak vengeance upon his victims under the guise of judicial condemnation," wrote William Whiting, Solicitor of the War Department, in 1862. "If the king sought to destroy a rival, the judges would pronounce him guilty of constructive treason; in other words, they would so construe the acts of the defendant as to make them treason." The power to define treason or determine who was a traitor, under the old English law, "was

³ Bradley Chapin, *The American Law of Treason: Revolutionary and Early National Origins* (Seattle: University of Washington Press, 1964), 3-28; "Historical Concept of Treason: English, American," *Indiana Law Journal* 35 (1959-1960), 70-80; Walter G. Simon, "The Evolution of Treason," *Tulane Law Review* 35 (June 1961), 669-704.

in its nature an *arbitrary* power.” In this context, treason was often seen as a crime committed in the heart and mind of the traitor.⁴

During the Revolutionary War the Continental Congress recommended the states to adopt new constitutions and treason laws. The states acted quickly, adopting treason laws that generally incorporated the doctrines of constructive treason. Several states also defined the terms levying war, adherence, and aid and comfort. According to historian Bradley Chapin, some states defined “adherence so broadly as to include virtually all forms of cooperation with the British. They went beyond Colonial and English concepts of adherence, for example, by making trading with the enemy treason.” Many states also adopted anti-Tory laws that defined crimes of disloyalty that were less than treason.⁵ In many ways, these new laws were less arbitrary than the old English law of constructive treason. Although defined broadly, these Revolutionary-era laws were at least statutorily defined.

Following the Revolution the Founders hoped to limit the law of treason to protect against judicial constructions of the crime (at least at the the federal level). Consequently the Framers narrowly defined treason in the nation’s organic law, basing the definition on three of the seven provisions of the law of Edward III: “Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.” The next sentence required that treason must

⁴ William Whiting, *The War Powers of the President, and the Legislative Powers of Congress in Relation to Rebellion, Treason and Slavery* (Boston: John L. Shorey, 1862), 94; George P. Fletcher, “The Case for Treason,” *Maryland Law Review* 41 (1982), 197-205.

⁵ Chapin, *Law of Treason*, 29-45; quote from p. 39.

be an “overt Act,” thus precluding any judicial constructions that conspiracy or words might be deemed treason. According to one study, conspiracy and speech had been central to the English law of treason because the English law evolved along side of political struggles for power. The losers in the struggle were always deemed traitors—even if they had been the rightful heirs to the throne—and the winners changed the law of treason to maintain their own power or to exact political retribution. The Americans, by contrast, hoped to depoliticize the definition of treason. By omitting any clauses similar to those in the 1350 law correlating to compassing or imagining the king’s death, the Framers removed from the law of treason any chance that a citizen could be convicted of treason for his thoughts or words. The limited constitutional definition “removed [treason] from the political arena where for centuries it had been used as a means of punishing one’s political enemies and as a stepping stone to power. By inserting nothing in the clause comparable to encompassing the king’s death, the Framers left neither the courts nor Congress any method for creating constructive treasons which terrorized the people in former years.”⁶

The Constitution only defined treason against the nation (the states plural). By implication, the states could still define treason against themselves individually, though this interpretation was often contested. Nevertheless, the text of the Constitution tends to support this understanding: “A Person charged in any State with Treason, Felony, or

⁶ U.S. Constitution, art. 3, sec. 3 (1787); “Historical Concepts,” 76-79. Thomas P. Slaughter points out that in the 1790s Federalist judges defined treason broadly, participating in an Americanized version of constructive treason. See Thomas P. Slaughter, “‘The King of Crimes’: Early American Treason Law, 1787-1860,” in *Launching the “Extended Republic”: The Federalist Era*, ed. Ronald Hoffman and Peter J. Albert (Charlottesville: University Press of Virginia, 1996), 54-135.

other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.” This clause, which was drawn almost verbatim from the Articles of Confederation, empowers the governor of a state to seek the repatriation of a traitor who has fled his state.⁷ Presumably the traitor would have violated a state treason law; had it been a federal law the U.S. marshals or some other federal law enforcement officer would have been responsible for tracking down the criminal. Accordingly, at the beginning of the Civil War many northern states had statutes or constitutional provisions defining treason. These provisions generally followed the federal definition of treason, criminalizing only overt acts of war, adherence, or aid and comfort. Thus, treason at both the state and national levels was narrowly defined at the beginning of the Civil War.

During the four years of conflict the American law of treason underwent an important transformation. At the state level new treason and disloyalty statutes were adopted, vastly expanding the law of treason. By their very nature, these new state laws were aimed at *northern* antiwar dissenters who sympathized with the South. In several instances the states relied on Revolutionary War-era treason laws to define treason or disloyalty during the Civil War. At the federal level Congress also adopted several disloyalty statutes that federal judges used to rewrite the law of treason. In all of these ways the political actors at the state and federal levels gave new meaning to the dormant phrases of the treason clause—aid and comfort, and adherence—carving out new

⁷ U.S. Constitution, art. 4, sec. 2 (1787); Articles of Confederation, art. 4 (1781). See also “Treason. Can the Crime of Treason be Committed against One of the United States?” *American Law Magazine* 8 (January 1845), 318-350.

definitions of treason that would permeate political discussion for the duration of the war. Moreover, through various speech codes, disloyalty acts and loyalty oaths, the state and national governments brought citizens' consciences back into the criminal law, essentially revitalizing that clause of the old treason law that had included compassing the death of the king. Through the political act of constitutional construction, northern politicians and judges elaborated new meanings of treason to meet the needs of the Union war effort during the American Civil War.⁸

I.

As the southern rebels began adopting ordinances of secession, writing new state constitutions, resigning their federal commissions, and seizing federal forts and installations, the Buchanan administration was faced with a crisis of immense proportions. Following the advice of Jeremiah Sullivan Black, the attorney general of the United States, Buchanan concluded that it would be unwise, if not impossible, to fill civil offices in the South that had been vacated by southern secessionists (significantly, upon arrival in office, Abraham Lincoln followed this precedent).⁹ Nevertheless, the seizure of

⁸ My understanding of the legislative and executive branches as constitutional actors has been influenced by Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge, Mass.: Harvard University Press, 1999), as well as Abraham Lincoln's June 26, 1857 speech in response to the *Dred Scott* decision, and Andrew Jackson's 1832 veto of the Second National Bank.

⁹ Jeremiah S. Black to James Buchanan, November 20, 1860 [Opinion of the Attorney General], in George Ticknor Curtis, *Life of James Buchanan: Fifteenth President of the United States*, 2 vols. (New York, 1883), 2:319–324. At the time Black issued his opinion, no actual levying of war had yet taken place in any portion of the nation, although several state legislatures had begun preparing for war. On November 13 the South Carolina legislature resolved to raise 10,000 troops for defense of the state, while on November 18 the Georgia legislature allocated \$1 million to arm the state. See

federal forts and outposts was an overt act of hostility against the administration of the government, and government attorneys throughout the North began to take action, bringing alleged traitors into the federal courts for indictment and prosecution. Before these cases could proceed, federal judges had to charge grand juries on the law of treason. In their charges, judges explained to the juries the legal definition of treason, and what acts constituted a traitorous offence.

The grand jury charges delivered in the winter and spring of 1861 illuminate how treason was understood at the onset of the war. Indeed, charges to grand juries and jury service in the nineteenth century served an important political function. As Ralph Lerner argued, “the earliest generation of national judges consciously acted as statesmen-teachers,” teaching ordinary Americans how to be conscientious, law-abiding, republican citizens. The judges’ “main vehicle for this instruction was the charge to the grand jury.”¹⁰ Similarly, Alexis de Tocqueville observed that in America, jury service had “exceptional success in shaping people’s judgment and improving their natural wisdom.” Juries “must be looked upon as a free and ever-open classroom in which each juror learns his rights, enters into daily communication with the most learned and enlightened members of the upper classes and is taught the law in a manner both practical and within

E. B. Long, *The Civil War Day by Day: An Almanac, 1861-1865* (Garden City, N.Y.: Doubleday and Co., 1971), 4-6. Lincoln said he would not place “obnoxious strangers” in civil offices in the South. See Lincoln, “First Inaugural Address—Final Text,” March 4, 1861, in Roy P. Basler et al., eds., *The Collected Works of Abraham Lincoln*, 9 vols. (New Brunswick, N.J.: Rutgers University Press, 1953-1955), 4:266.

¹⁰ Ralph Lerner, “The Supreme Court as Republican Schoolmaster,” in *The Supreme Court Review* (Chicago: University of Chicago Press, 1967), 128, 131. Lerner argues that use of political grand jury charges as a form of republican education fell out of use in the early nineteenth century.

his intellectual grasp by the efforts of advocates, the opinions of judges and the very passions of the litigants.”¹¹ Judges therefore had a duty to teach Americans through their charges what the law of treason was.

The first grand jury charges in 1861 defined treason very narrowly, in accordance with the constitutional definition of treason, judicial precedent, and statutory law on the subject. The Constitution defines treason as an “overt Act” that consists of “levying War against” the United States, “adhering to their Enemies,” or giving “Aid and Comfort” to the enemies of the nation. The acts of a citizen or resident alien were therefore traitorous when they were actively hostile towards the government to which he owed his allegiance. Chief Justice John Marshall had construed treason narrowly in the trial of Aaron Burr in 1807.¹² Similarly, congressional statutes on the subject merely reiterated the specific language of the Constitution, adding death as the punishment for treason.¹³ Thus, when the war began, federal judges were limited in how they could instruct grand jurors on the law of treason.

“What overt acts, then, constitute treason?” asked Judge David Allen Smalley of the federal District of New York, in January 1861. “A mere conspiracy to subvert by force the government, however flagitious the crime may be, is not treason. To conspire to levy war, and actually to levy war, are distinct offences.” Seizing forts or other public

¹¹ Alexis de Tocqueville, *Democracy in America* trans. Gerald E. Bevan (New York: Penguin Books, 2003), 320-321.

¹² Leonard W. Levy, *Jefferson and Civil Liberties: The Darker Side* (Cambridge, Mass.: Harvard University Press, 1963), ch. 4; Chapin, *Law of Treason*, ch. 7.

¹³ See 1 Stat. 112 (1790). A footnote to this statute noted the judicial construction of the law: “To constitute a levying of war, there must be an assemblage of persons for the purpose of effecting by force, a treasonable purpose.”

property—as was taking place in parts of the South—constituted a levying of war. He then asked what constituted adherence or aid and comfort. Again, he answered that to be treason, offences must be overt acts, such as selling arms or munitions to the enemy, sending them materials to aid them in their treason, or inciting others to join or aid the traitors. These treasonable actions need not take place in the area of actual rebellion, but could occur far away from the locus of war.¹⁴

In the District of Massachusetts, Judge Peleg Sprague instructed several grand juries on the law of treason. Central to Sprague’s analysis was his conception of the nature of the Union. “The government of the United States is often spoken of as if it were a mere confederacy. This is a fundamental and dangerous error,” he declared in March 1861. The Constitution “emphatically established a government with the highest attributes of sovereignty” with “laws [that] operate directly upon individuals.” The state and national governments were part of a “complex system” where each had power to legislate over the same territory and persons. To protect against conflict between the state and national governments, the Founders had “marked out the sphere of the general government with all practicable clearness and precision, and within that sphere made its power supreme.” The Constitution and federal laws therefore “cannot be annulled, nor . . . be in any degree impaired by any law of a state, no matter in what form, or with what solemnity.” No constitution, ordinance, statute, or resolve could contradict or attempt to overthrow the laws of the nation: “So far as it conflicts with the constitution, or with any valid law of the United States, it is utterly nugatory, and can afford no legal protection whatever to those who act under it.” The criminal laws of the United States were,

¹⁴ Smalley, “Charge to Grand Jury—Treason,” 30 *Fed. Cases* 1033-1034 (1861).

therefore, still “in full force over all persons and places within the limits of the thirty-four states, notwithstanding any attempt to invalidate” the national laws.¹⁵

After establishing the supremacy of the federal government, Sprague proceeded to the specific legal point in question. First, he wanted to clarify what did not count as treason:

It is settled that if a body of men be actually assembled for the purpose of effecting a treasonable purpose by force, that is levying war. But it must be an assemblage in force, a military assemblage in a condition to make war. A mere conspiracy to overthrow the government, however atrocious such a conspiracy may be, does not of itself amount to the crime of treason. Thus, if a convention, legislature, junto, or other assemblage, entertain the purpose of subverting the government, and to that end pass acts, resolves, ordinances or decrees, even with the view of raising a military force to carry their purpose into effect, this alone does not constitute a levying of war.

To constitute a treasonable offense, force must be used to prevent the execution of the law or to overthrow the government. Mob violence or a riot generally would not constitute treasonable action. Seizing forts or other property of the United States, however, was a “flagrant act of levying war,” and anyone playing any part, no matter how minor, was to be considered a traitor. Thus, anyone who sent “arms, provisions, money, or intelligence for the purpose of aiding” those levying war, no matter how far distant from the site of war, would still be guilty of treason, “by being in conspiracy with them, and rendering them assistance.”¹⁶ The conspiracy, in this instance, was treasonable because it was tied to direct action.

¹⁵ Sprague, “Charge to Grand Jury—Treason,” 30 *Fed. Cases* 1039 (1861).

¹⁶ *Ibid.*, 1039-1040.

Sprague concluded his charge with a strong statement of national supremacy and perpetuity. No state, he declared, possessed the authority to rend the Union or reject national laws because “the authority of the United States, within their sphere, is supreme.” While interposition and nullification had the “semblance of legality,” those theories were illegitimate modes of resisting federal authority. Secession, too, was illegal, and the national government could use force against “whoever offends against the law,” no matter in “what official robes or insignia he [the secessionist] may be clothed, or whatever state parchments he may hold in his hand.” The right to declare war was left to Congress’ “uncontrolled discretion,” even if it meant making war on a state.¹⁷

On April 24, 1861, Samuel Rossiter Betts of the Southern District of New York, according to a magazine report, defined “treason to include acts of building, manning, or in any way fitting out or victualing vessels to aid the enemy; sending provisions, arms, or other supplies to them; and raising funds or obtaining credit for them.” In the Eastern District of Pennsylvania, on May 20, 1861, Judge John Cadwalader also delivered a charge on the subject of treason, which the *New York Times* reported two days later. Following Sprague’s lead, Cadwalader argued that “the Government had become involved in a war, which it was its duty to prosecute to the end.” Any person bearing arms against the government, or who accepted a commission from the rebels, or furnished them with intelligence “was of course guilty of treason.” When, at the end of

¹⁷ Ibid., 1041-1042. In a second grand jury charge delivered on May 15, 1861, Sprague said that the judicial branch of the government was required to follow the legislative and executive departments in whether or not to recognize the seceding states as an independent nation with the full rights of a belligerent nation. If the political branches refused to recognize them as an independent nation, then crimes committed on the high seas were not only treason but also robbery and piracy. See Sprague, “Charge to Grand Jury,” 30 *Fed. Cases* 997-998 (1861).

the charge, one of the jurors asked whether frauds in government contracts constituted treasonable offences, Cadwalader “replied that so far as these frauds were to the injury of the United States, and were in violation of acts of Congress, the jury could take cognizance.” Within a few weeks of the charge, a treason case came before Judge Cadwalader’s bench.¹⁸

United States v. Greiner involved a Philadelphian who had moved to Georgia, allegedly to pursue an agricultural livelihood. Shortly before Georgia seceded from the Union, Charles A. Greiner joined a militia company in that state that, under orders from the governor, seized Fort Pulaski, occupied it for a short period of time, and then turned it over to the authority of the state. Afterwards Greiner returned to Philadelphia, where his wife and children were living. While back in the North, Greiner was arrested and charged with treason. Two important questions occupied Cadwalader’s thought in this case. First, was Greiner guilty of treason? Second, could the government imprison and try him in Philadelphia, far away from the scene of the crime?¹⁹

In order to determine whether Greiner had committed any overtly treasonable acts, Cadwalader had to weigh the evidence in the case against the “legal definition” of treason. The defense had argued that Greiner should not be convicted because the militia was compelled to act by order of the governor, that force had not been used in overtaking

¹⁸ “What is Treason?” *Scientific American* 4 (May 11, 1861), 291; “A Pennsylvania Judge on Treason,” *New York Times*, May 22, 1861. According to *Federal Cases*, the *Greiner* case was handed down in the July 1861 term, however, *Cadwalader’s Cases* dates the opinion at May 4, 1861, and *The Monthly Law Reporter* printed the case in its June 1861 issue. See 1 *Cadwalader’s Cases* 448, and *The Monthly Law Reporter* 24 (June 1861), 91-102.

¹⁹ *United States v. Greiner*, 26 *Fed. Cases* 37 (1861).

the fort, that the militia had not occupied the fort in a military fashion, that this had not happened during a period of actual war (it was prior to secession), and that the action of the militia may have prevented mobs from seizing the fort.²⁰

Upon examination of the evidence, Cadwalader had “no doubt” that there was “sufficient probable cause to support a prosecution for treason.” He noted that the Constitution limited “the legal catalogue of specific offences” that could be considered treasonable, compared with other governments, such as England, where “the catalogue of treasons is more extended.” But because the U.S. Constitution had borrowed language from the English law, a phrase like “levying war” ought to be “understood and applied in the United States in the same sense in which it had been used in England.” According to English law, “occupation of a fortress by a body of men in military array, in order to detain it against a government to which allegiance is due, is treason on the part of all concerned, either in the occupation or in the detention of the post.” In the case of Fort Pulaski, the federal government unquestionably had exclusive jurisdiction over the fort and land on which it sat. Georgia’s seizure of the fort, in light of the impending secession of the state, “by hostile force was therefore, I think, levying war against the United States.” It did not matter that the militia company faced no resistance because the militia had been armed and “mustered in military array for a treasonable purpose.” Nor did it matter that Greiner acted upon orders of the governor, for unless it could be proved that he would have been executed for disobeying the orders, legal precedent held that one in his situation was liable for his own actions. While all citizens owed allegiance to both their state and the national government, Greiner’s first allegiance was to the nation: “The

²⁰ Ibid., 37-38.

duty of allegiance to the United States was co-extensive with the constitutional jurisdiction of their government, and was, to this extent, independent of, and paramount to, any duty of allegiance to the state.” Moreover, secession had not yet occurred, so Greiner’s allegiance to the nation ought not to have been in conflict with his allegiance to the state, anyway.²¹

The crux of the case, then, was what ought to be done with the accused. Two problems quickly presented themselves. The first was that there was only one witness to Greiner’s alleged overt act, and the Constitution required two witnesses to convict. The second problem was one of jurisdiction—that no federal courts were functioning in the district where the crime had taken place. Cadwalader decided that the case could proceed, even though there was only one witness, because the Constitution required two witnesses to convict someone of treason, not merely to indict. Nevertheless, the question of jurisdiction proved fatal to the government’s case. Cadwalader denied that his court had jurisdiction because the Constitution guaranteed to accused criminals the right to a speedy trial in the district where the crime had been committed. Since no federal courts were functioning in the state of Georgia, and it was not likely they would any time soon, Cadwalader concluded that he had to release the defendant, requiring “security of the peace and for good behavior.” When the district attorney then requested that Greiner be kept in the government’s custody until he could be committed to trial at the next session of the federal courts in Georgia, Cadwalader replied that this would set a “dangerous precedent. It would sanction the imprisonment, for indefinitely long periods of time, of persons at great distances from their homes and their friends, where bail might not be

²¹ Ibid., 38-40.

found.” So Greiner was released on \$10,000 bail to ensure his good behavior and submission to the laws.²²

Judges in the border states faced even greater immediacy in 1861 as southern-born citizens might be more likely to levy war against the government. John Catron, an associate justice on the Supreme Court of the United States, while on circuit in Missouri, stated “that the crime [of treason] is committed, whenever war against the United States by those owing allegiance thereto, is raised, created, made, or carried on; or when, during war, they adhere to the enemy, giving him aid or comfort.” Quoting Chief Justice Marshall in the *Burr* case, Catron declared that levying war did not mean merely declared war, “but any combination, in military array, forcibly to prevent or oppose, *generally*, the execution of” the Constitution or the laws. Because the Constitution prescribed peaceful methods for achieving political change, it was treasonable to bring about such change by force. Treason in this understanding, then, was an act of force of a public nature. In order for a conspiracy to be treasonable, it “must be for a *public* or *general*, and not a mere private object; it must contemplate force in pursuit of its ends; it must, in order to ripen into treason, be accompanied or followed by some warlike act, such as the assembling of men in military array and in the posture of war, or in a forcible and threatening attitude, for the furtherance of the treasonable design. . . . A treasonable *design*, unaccompanied or not followed by a treasonable *act*, is not treason. A conspiracy to levy war is not an actual levying of war.”²³

²² Ibid., 37-41.

²³ John Catron, Robert Wells, and Samuel Treat, *United States Circuit Court, District of Missouri, Special July Term, 1861. . . Charge to the Grand Jury* (St. Louis: The Democrat Book and Job Office, 1861), 3-6.

In a state of war, however, anyone who aided the enemy, no matter how distant he was from the locus of war, was guilty of treason. In foreign wars, Catron noted, it is easy to determine what acts aid the enemy, “but in domestic conflicts, or rebellions and insurrections, the legal rule is not necessarily the same in all cases, and at all stages of hostile movements.” Acts may not be treasonable at one point, but “may at other times and under other circumstances be the most flagrant treasons.” Treason, Catron concluded, must be an overt act with a treasonable intent. “You should also remember,” he told the grand jury, “that mere expressions of opinion, or criticisms upon public men and movements, however severe or unjust, or free discussions concerning public measures and policy, or the peaceful advocacy of erroneous doctrines, or the exercise of any other lawful right pertaining to the privileges of citizenship, does not constitute treason in any *legal* sense of the term, and it is with treason in the legal sense only that courts can deal.”²⁴

Of these five federal judges who charged grand juries on the law of treason from January through July 1861, three were appointed by Democratic presidents, two by Whigs.²⁵ Nevertheless, they all interpreted the law of treason in similar ways. Judge Sprague, a Republican, may have taken a more circuitous approach to his conclusion, taking the opportunity to expound a strong nationalist theory of the Union, but he still defined treason as the Democratic judges had. Moreover, Democrats like Cadwalader

²⁴ Ibid.

²⁵ Smalley (1809-1877) was nominated by Franklin Pierce in 1857; Sprague (1793-1880) was nominated by John Tyler in 1841; Cadwalader (1805-1879) was nominated by James Buchanan in 1858; Catron (1786-1865) was nominated by Andrew Jackson in 1837.

and Catron proclaimed just as fundamental a right of the national government to maintain its sovereignty and supremacy as Sprague had. Catron went so far as to declare that allegiance to the nation was “the paramount duty of every citizen,” that no state could absolve any federal law when it was within its “legitimate sphere,” and that “the United States government has a legal right to send its troops into any State or Territory of the United States, and to keep them there . . . in the posture of war.”²⁶

The members of the federal bench, no matter to which party they belonged, understood treason as *only* an overt act that participated in the levying of war against the government, and they also believed that the national government had the right and responsibility to maintain its supremacy and authority. Significantly, judges of both parties also treated the issue of jurisdiction in similar manners. Cadwalader, a Democrat, released a prisoner who was clearly guilty of treason for want of jurisdiction, and Smalley, also a Democrat, instructed the grand jury that they were limited to crimes committed within the Southern District of New York or on the high seas. Before charging these Democrats with construing the law so as to show favor towards traitors, however, it is imperative to see how Sprague, a Republican, decided that matter: “If, therefore, treason has been committed at Charleston or at New Orleans, it can be tried only by a jury in South Carolina or Louisiana.” And if the courts there “cannot or will not perform their functions,” the “crimes there committed, however atrocious, cannot be punished by the regular administration of justice.”²⁷ In short, there was general

²⁶ Catron et al., *Charge to the Grand Jury*, 3-5.

²⁷ Cadwalader, 26 *Fed. Cases* 36-41; Smalley, 30 *Fed. Cases* 1034; Sprague, 30 *Fed Cases* 1040.

agreement among the various judges of differing partisan backgrounds as to the law of treason and how it could be prosecuted. Treason, as a legal concept, had an intelligible and agreed upon meaning.

II.

The federal courts maintained a restrained posture when defining treason in the formative stages of the war. The political branches of the state governments, by contrast, played an active role in the process of rewriting the law of treason. While most of the statutes they adopted referred to “high crimes” or “high misdemeanors” rather than to “treason,” it was clear that the legislative branches of the states intended to broaden understandings of the king of crimes. The new laws criminalized more acts than merely the overt act of levying war, adherence, or aid and comfort. Although the new crimes were not necessarily called “treason,” they were treated as such in popular discourse, and the press often referred to them as treason laws. One Marylander noted that his state’s law “does not use the word ‘treason,’ but it describes an offence which is treason.” After reading the law he concluded, “There we have the definition of the crime of treason against the State of Maryland.”²⁸

Several northern states adopted new legislation on the subjects of treason and disloyalty. The state of Pennsylvania, in particular, offers a telling example of how the meaning of treason broadened in wartime. Particularly significant was the Pennsylvania

²⁸ William Blair Lord and Henry M. Parkhurst, eds., *The Debates of the Constitutional Convention of the State of Maryland*, 3 vols. (Annapolis: Richard P. Bayly, 1864), 1:266.

legislature's reliance on definitions of treason that had been adopted during the Revolutionary War.

In 1776, Pennsylvania adopted a temporary statute defining treason. It decreed that any person owing allegiance to the state who “shall levy war against this state or be adherent to the King of Great Britain or others the enemies of this state or to the enemies of the United States of America by giving him or them aid or assistance within the limits of this state or elsewhere,” was guilty of treason, upon conviction in a court of law.²⁹ After adopting a new state constitution in September 1776, the 1776 law was replaced by a much more comprehensive statute that counted many more specific acts as treasonable. The law of 1777 declared that “it is absolutely necessary for the safety of every state to prevent as much as possible all treasonable and dangerous practices that may be carried on by the internal enemies thereof, and to provide punishments in some degree adequate thereto, in order to deter all persons from the perpetration of such horrid and dangerous crimes.” The list of treasonable crimes that followed is worth quoting in full:

That if any person or persons belonging to or residing within this state and under the protection of its laws shall take a commission or commissions from the King of Great Britain, or any under his authority or other enemies of this state or of the United States of America, or who shall levy war against the state or government thereof, or knowingly and willingly shall aid or assist any enemies at open war against this state, or the United States of America by joining their armies or by enlisting or procuring or persuading others to enlist for that purpose, or by furnishing such enemies with arms or ammunition, provision or any other article or articles for their aid or comfort, or by carrying on a traitorous correspondence with them, or shall form or be anywise concerned in forming any combination, plot or conspiracy for betraying this state or the United States of America into the hands or power of any foreign enemy; or shall give or send any

²⁹ Pennsylvania, *An Ordinance of the State of Pennsylvania Declaring What Shall Be Treason and for Punishing the Same and Other Crimes and Practices against the State*, act of September 5, 1776 (9 St.L. 18-19, Ch. 732).

intelligence to the enemies of this state for that purpose, every person so offending and being thereof legally convicted . . . shall be adjudged (guilty) of high treason and shall suffer death. . . .

Misprision of treason was defined to include conveying intelligence to the enemies of the state or the nation, “publicly and deliberately speaking or writing against our public defense,” “maliciously and advisedly endeavor[ing] to excite the people to resist the government of this commonwealth or persuad[ing] them to return to a dependence upon the crown of Great Britain,” discouraging enlistments in the Revolutionary armies, or leading “tumults, disorders or insurrections” that either aid the enemy or “prevent the measures carrying on in support of the freedom and independence of the said United States.”³⁰

The treason law of 1777 remained on the books until the state consolidated and revised its penal code in 1860. The state commission established to revise the penal laws naively concluded that the extensive statute “passed during our revolutionary struggle, provided against emergencies which never can again occur.”³¹ In March 1860 the Pennsylvania legislature adopted a new statute that defined treason according to the federal definition. A person would be guilty of misprision of treason, under this new law, if he knew of any treasonable actions and did not report them to the state authorities.³²

³⁰ Pennsylvania, *An Act Declaring What Shall Be Treason and What Other Crimes and Practices against the State Shall be Misprison of Treason*, act of February 11, 1777 (9 St.L. 45-47, Ch. 740).

³¹ *Report of the Commissioners Appointed To Revise the Penal Code of the Commonwealth of Pennsylvania, January 4, 1860* (Harrisburg: A. Boyd Hamilton, 1860), 12.

³² Pennsylvania, *An Act To Consolidate, Revise and Amend the Penal Laws of this Commonwealth*, act 374, title 1, sec., 1-2, *Laws of Pennsylvania* (1860), 385.

The law of 1860 was rid of all of the broad constructions of treason that had been written into the law during the Revolution. The state law written in time of peace closely resembled the federal definition of treason.

All of this would change in the early months of 1861, however, when a Philadelphia Democrat introduced a bill to the state legislature supplementing the penal code of March 1860. The law was adopted by large margins: 28-0 in the state senate and 96-0 in the state house of representatives.³³ Under the new act, any citizen or resident of Pennsylvania who

shall take a commission or commissions from any person, state or states, or other enemies of this state, or of the United States of America, or who shall levy war against this state or government thereof, or knowingly and willingly shall aid or assist any enemies in open war against this state or the United States, by joining their armies, or by enlisting, or procuring, or persuading others to enlist for that purpose, or by furnishing such enemies with arms or ammunition, or any other articles for their aid and comfort, or by carrying on a traitorous correspondence with them, or shall form, or be in anywise concerned in forming any combination or plot or conspiracy, for betraying this state or the United States of America into the hands or power of any foreign enemy, or any organized or pretended government engaged in resisting the laws of the United States, or shall give or send any intelligence to the enemies of this state or of the United States of America, or shall, with intent to oppose, prevent or subvert the government of this state or of the United States, endeavor to persuade any person or persons from entering the service of this state or of the United States, or from joining any volunteer company or association of this state about being mustered into service, or shall use any threats or persuasions or offer any bribe, or hold out any hope of reward, with like intent to induce any person or persons to abandon said service, or withdraw from any volunteer company or association already organized under the laws of this commonwealth, for that purpose; every person so offending and being

³³ Wellsboro *Agitator*, April 24, 1861; *Journal of the Senate of the Commonwealth of Pennsylvania, of the Session Begun at Harrisburg, on the First Day of January, A.D., 1861* (Harrisburg: A. Boyd Hamilton, 1861), 155, 796, 900; *Journal of the House of Representatives of the Commonwealth of Pennsylvania, of the Session Begun at Harrisburg, on the First Day of January, A.D., 1861* (Harrisburg: A. Boyd Hamilton, 1861), 1056-1057.

legally convicted thereof, shall be guilty of a high misdemeanor, and shall be sentenced to undergo solitary imprisonment in the penitentiary, at hard labor, for a term not exceeding ten years, and to be fined in a sum not exceeding five thousand dollars, or both, at the discretion of the court.

Under this statute, anyone who built, furnished, fixed, or sold vessels to the enemies of the United States, “for the purpose of making war or privateering, or other purpose, . . . to make war on the United States of America, or to resist by force or otherwise, the execution of the laws of the United States,” would “be guilty of a misdemeanor.”³⁴

The similarities between the acts of 1777 and 1861 are striking. In many cases the language of 1777 was placed directly into the act of 1861. But perhaps more important than the similarities is the one glaring difference. Under the act of 1777, “every person so offending and being thereof legally convicted . . . shall be adjudged (guilty) of high treason and shall suffer death” while under the 1861 law “every person so offending and being legally convicted thereof, shall be guilty of a high misdemeanor, and shall be sentenced to undergo solitary imprisonment in the penitentiary, at hard labor, for a term not exceeding ten years, and to be fined in a sum not exceeding five thousand dollars, or both, at the discretion of the court.” The overt actions were the same, but the crime and punishment had changed. The legislature was inaugurating a process whereby the political branches appropriated language from the law of treason to define crimes that were now legally something less than treason. In the popular mind, however, these crimes came to be synonymous with traitorous behavior. Moreover, judges began to use the 1861 law and its 1777 precedent to equate certain public speech with treason.

³⁴ Pennsylvania, *Supplementary to An Act, Entitled “An Act To Consolidate, Revise and Amend the Penal Laws of this Commonwealth,”* act of April 18, 1861, *Laws of Pennsylvania* (1861), 408-409.

Several Pennsylvania judges interpreted the new penal law in charges to grand juries. On June 3, 1861, Judge Joseph Allison, a Republican in Philadelphia, delivered a charge regarding the new law. After reading what the *New York Times* called “*the act defining treason* recently passed by the Pennsylvania Legislature” (emphasis added), Allison pointed out that the law had been adopted to prevent citizens or residents of Pennsylvania from “giving aid, comfort or support to the unnatural, wicked and causeless rebellion” of the southern states “against the rightful authority” of the national government. Allison believed that civil war would “only end when treason shall have been crushed out, never, I trust, to know another resurrection.” To attain this goal, the grand jury was “by law charged with the duty of seeing that treason shall not be allowed to find upon Pennsylvania soil even an indirect countenance or support.” Because the new state law technically punished high crimes other than treason, Allison adhered to the distinction that the federal judges had maintained: treason must be an overt act of levying war or offering aid and comfort to the enemies of the government. He concluded that “the mere expression of opinions” against the government, no matter how egregious, was not a crime punishable under the law, unless it was in correspondence with the enemy. “The law punishes only the overt act”; other utterances only subject the speaker or writer “to a well-grounded suspicion of disloyalty, of being a traitor at heart, wanting but the opportunity to consummate his treason, though not liable to indictment.” Allison correctly pointed out that only the overt act of levying war or adhering to the enemy constituted treason. The headline of the *Times*’ report, however, offered an early taste of

how many northern Republicans would equate less-than-treasonous crimes with treason.³⁵

Other state judges gave the new law a broader construction. Judge Samuel Linn, a Republican in Centre county, delivered a charge in August 1861. Linn argued that the present civil war was treason against the United States, and not against Pennsylvania, since this was a war for dissolution of the Union. Nevertheless, there were still crimes that might be committed against the state in this conflict. Linn's greatest concern was to instruct the grand jurors in a proper understanding of the right to free speech. Linn argued, following Blackstone, a federal case from 1798, and a state libel suit from 1805, that individuals were free to speak or publish whatever they chose, but that their speech or press could be punished after it was uttered. In other words, there could be no prior restraint on the speaker, but speech could be, and in some instances ought to be, punished. This view was "sound interpretation," according to Linn; "that the government by holding its citizens criminally responsible for every wilful [sic] design to interfere with its authority or its plans, in no respect infringes upon any personal right." Linn reminded the jurors of the 1777 act which had criminalized "*publicly or deliberately speaking or writing against our public defense*" (emphasis Linn's), among other verbal crimes that were enumerated in the law.³⁶ In Linn's mind, preservation of the nation

³⁵ "Treason in Pennsylvania," *New York Times*, June 9, 1861. A more extensive report of Allison's charge is available in *Philadelphia Inquirer*, June 4, 1861. Other newspapers also equated this law with treason. See, for example, *Doylestown Democrat*, April 23, 1861; *Wellsboro Agitator*, April 24, 1861; *Philadelphia Inquirer*, May 11, 1861.

³⁶ *Bellefonte Democratic Watchman*, August 29, 1861. Ironically, the editor of this paper was later arrested for disloyalty.

trumped individual liberties, and the personal freedoms guaranteed in the Bill of Rights were not absolute. Central to Linn's analysis was Pennsylvania's Revolutionary-era treason law, understanding of which he believed still served a purpose in 1861, more than a year after it had been repealed.

That same term a Democratic judge delivered a strikingly similar charge. Judge John N. Conyngham of Luzerne county declared that in a time of national emergency the government could pass laws that were "more stringent than have ordinarily been found necessary in a state of peace and general quiet." He then read the April 18 statute and pointed out that it covered a broad array of offences but had one general purpose: to punish all "who wickedly seek to give aid, comfort, or assistance to those persons who" repudiated the bonds of Union and stand "in an attitude of hostile and violent opposition and direct rebellion against the government and laws of the United States." Conyngham declined delineating a long list of offences that might fall under the cognizance of the act. "The offence, it must be borne in mind, however, consists in *action* and not in mere *opinion*; yet an opinion propagated with a wicked and evil design, may, under some of the circumstances mentioned in the law, become an offence, cognizable and punishable by the Courts; for then it will have assumed the shape of *action*." In this way, Conyngham's charge shows how the law of treason began to shift from only overt acts to also the expression of certain opinions.³⁷

In August 1862, Judge Samuel P. Johnson, a Republican in Erie county, called on the grand jurors "to do something for your bleeding country and the cause of Republican

³⁷ "Charge of Hon. John N. Conyngham to the Grand Jury, August 26th, 1861," *Luzerne Legal Observer*, September 11, 1861.

institutions throughout the world” by stamping out the treason that was ripping the nation apart. “This can only be done by giving moral, material and physical aid and comfort to the Government. . . . A passive acquiescence or an approving silence is not enough.” Every man of soldiering age, according to Johnson, ought to consider himself personally called to join the military, and there was no excuse sufficient for not enlisting. “All that a man hath should be given to his country, in the hour of her peril,” and the man who turns his back on “the best government under which man has ever lived” is unworthy of living under it. At this point Johnson dealt with the crux of the issue: “In this hour of national gloom and impending dissolution, there can be but two parties among intelligent men—the loyal and the disloyal, the patriotic and the treasonable. In an emergency like this, *treason consists not alone in the overt act*. ‘He that is not for us is against us.’—Moral aid and comfort is given to the rebel cause by any uttered sympathy with its nefarious purpose or any muttered dissuasions to halting patriots against a prompt enrolment of their names as volunteers” (emphasis added). Moreover, any northerner who blamed any portion of the North for this war was either stupid or anti-republican, and therefore “an unworthy and dangerous member of society” whose opinion was “meaner than that of southern treason, because of its insincerity and cowardice.” Johnson focused the remainder of his charge on northern men who would commit the crime of discouraging enlistments—such men who “seek to lower and betray the flag they live under, and to sting, like thawed vipers, the bosom that has nourished them.” Perhaps one of the earliest references to the antiwar movement as snakes, Johnson correctly pointed out that the law of April 18, 1861 made certain disloyal words synonymous with treason.³⁸ Similarly, in

³⁸ “Charge of the Hon. S. P. Johnson, Delivered to the Grand Jury on Tuesday, 4th

1863, another Republican state judge argued that “at a time like this, when the struggle is for national existence, *words become things*, and evil counsel cannot be lightly overlooked, or mildly dealt with, and should it lead to unlawful resistance, will probably be punished in proportion to its demerits” (emphasis added).³⁹

Pennsylvania’s legislative experience during the war was not unique. Throughout the course of the war many northern states and territories adopted similar laws. California and Maryland also passed statutes against piracy; California, Kentucky, Maryland, Ohio, and Wisconsin criminalized supporting the rebels through the shipments of goods or military supplies, while West Virginia declared that taxes could not be levied to aid the rebellion; California, Indiana and West Virginia prohibited the acceptance of rebel commissions; California, Connecticut, Kansas and Maryland criminalized the display of rebel flags or other symbols; California, Indiana, Kentucky and Wisconsin made it illegal to encourage rebel enlistments or to enlist in the southern armies; California, Colorado, Kansas, Minnesota, Oregon, and West Virginia banned traitors

of August, 1862,” *Luzerne Legal Observer*, August 27, 1862.

³⁹ “Judge Pearson’s Charge to the Grand Jury of Dauphin Co.,” *Huntington Globe*, May 6, 1863. In this charge Pearson tried to draw a fine line between legitimate and illegitimate dissent: “There is an evil of very considerable magnitude at the present time, and of almost daily occurrence, for which it is supposed that there is no adequate remedy: I allude to that of persons reviling and railing against the Government under which we live, and praising and expressing a preference for that of the rebels. . . . The proper course is to have the parties so reviling the government arrested. . . . Do not misunderstand me on this subject. Men have the most unlimited right to condemn, and if you please, rail at the *National Administration*, and object to the manner in which it conducts public affairs, but not to decry the government under which we live, or express hopes or wishes for a dissolution of the Union, the destruction or defeat of our armies, the success of the rebels or the rebellion.” The *Globe*, a Republican paper, reprinted this charge in its entirety; other Democratic and Republican papers quoted it selectively, using it to support their side of the debate. See, for example, *Erie Observer*, May 9, 1863; Waynesboro, Pa. *Village Record*, May 1, 1863.

from bringing civil actions in court; traitors were disfranchised in Colorado, Idaho, Kansas, Maryland, Nebraska, Nevada, Oregon, and West Virginia (the Maryland Constitution of 1864, for example, disfranchised any person who “by any open deed or word declared his adhesion to the cause of the enemies of the United States, or his desire for the triumph of said enemies over the arms of the United States”); harboring enemies or deserters was criminalized in Kentucky and Michigan (which also criminalized encouraging or inciting desertion); corresponding with the enemy was criminalized in Connecticut, Indiana, Kansas, Vermont and Wisconsin (this was considered misprision of treason in some states); conspiracy was criminalized in Indiana, Maryland and West Virginia; secret societies were banned in Kansas and Maryland; and various loyalty oaths were required of teachers, lawyers, militia officers, voters, jurors, civil officers, and those seeking to do business with the state government, in California, Colorado, Idaho, Kansas, Kentucky, Maryland, Missouri, Nebraska, Nevada, Oregon, West Virginia, and the District of Columbia.⁴⁰

⁴⁰ California, *An Act Supplementary to an Act Entitled an Act Concerning Crimes and Punishments, Passed April Sixteenth, One Thousand Eight Hundred and Fifty*, act of April 20, 1863, *An Act to Prevent the Arming and Equipping, within the Jurisdiction of this State, of Vessels for Piratical or Privateering Purposes, and other Treasonable Conduct*, act of April 25, 1863, *An Act to Exclude Traitors and Alien Enemies from the Courts of Justice in Civil Cases*, act of April 25, 1863, *An Act Concerning Teachers of Common Schools in this State*, act of April 27, 1863, *An Act to Provide for the Sale of Certain Lands Belonging to the State*, act of April 27, 1863; *An Act to Punish Offences against the Peace of the State*, act of April 27, 1863, all in *The Statutes of California, Passed at the Fourteenth Session of the Legislature, 1863: Begun on Monday, the Fifth Day of January, and Ended on Monday, the Twenty-Seventh Day of April* (Sacramento: Benjamin P. Avery, 1863), 350, 490-491, 566-567, 591-601, 727-728, 755; Colorado territory, *An Act to Exclude Traitors and Alien Enemies from Courts of Justice in this Territory in Civil Cases*, act of March 5, 1864, in *General Laws, and Joint Resolutions, Memorials and Private Acts, Passed at the Third Session of the Legislative Assembly of the Territory of Colorado, Begun at Golden City, on the 1st Day of February, 1864. Adjourned to Denver, on the 4th Day of February* (Denver: Rocky Mountain News

Office, 1864), 157-159; Colorado territory, *An Act Regulating Elections*, act of November 1861, in *General Laws, Joint Resolutions, Memorials, and Private Acts, Passed at the First Session of the Legislative Assembly of the Territory of Colorado, Begun and Held at Denver, Colorado Ter., Sept. 9th, 1861* (Denver: Republican and Herald Office, 1861), 73; Connecticut, *An Act in Addition to "An Act Concerning Crimes and Punishments,"* act of July 3, 1861, in *Public Acts, Passed by the General Assembly of the State of Connecticut, May Session, 1861* (Hartford: J. R. Hawley & Co., 1861), 100-101; Idaho territory, *An Act Relative to Elections*, act of January 23, 1864, in *Laws of the Territory of Idaho, First Session; Convened on the 7th Day of December, 1863, and Adjourned on the 4th Day of February, 1864, at Lewiston* (Lewiston: James A. Glascock, 1864), 560; Indiana, *An Act to Define Certain Felonies, and to Provide for the Punishment of Persons Guilty of Them*, act of May 9, 1861, in *Laws of the State of Indiana, Passed at the Special Session of the General Assembly, Begun on the 24th Day of April, A.D., 1861* (Indianapolis: Berry R. Sulgrove, 1861), 44-45; Kansas, *An Act Defining and Providing for the Punishment of Certain Crimes Therein Named*, act of May 21, 1861, in *General Laws of the State of Kansas, Passed at the First Session of the Legislature, Commenced at the Capital March 26, 1861...* (Lawrence: "Kansas State Journal" Steam Power Press Print, 1861), 182-183; Kansas, *An Act to Prevent Proceedings of Law in the Name or for the Benefit of Disloyal Persons*, act of February 26, 1863, in *General Laws of the State of Kansas, Passed at the Third Session of the Legislature, Commenced at the Capital January 19, 1863* (Lawrence: "Kansas State Journal" Steam Press Print, 1863), 50; Kansas, *An Act to Protect the Purity of the Ballot Box*, act of 1862, in *General Laws of the State of Kansas, in Force at the Close of the Session of the Legislature ending March 6th, 1862* (Topeka: J. H. Bennet, 1862), 490; Kentucky, *An Act to Prohibit and Prevent Rebellion by Citizens of Kentucky and Others in this State*, act of October 1, 1861, *An Act Adopting Rules, Articles, and Regulations for the Government of the Military Forces of the State of Kentucky, and for the Punishment of Desertion, &c.*, act of March 17, 1862, and *An Act to Amend the Jury Laws of this Commonwealth*, act of August 22, 1862, all in *Acts of the General Assembly of the Commonwealth of Kentucky Passed [1861-1863]* (Frankfort: John R. Major, and W. E. Hughes, 1861, 1862, and 1863), 15, 245-246; Kentucky, *An Act to Punish Disloyal and Treasonable Practices*, act of February 22, 1864, in *Acts of the General Assembly of the Commonwealth of Kentucky, Passed at the Session which was Begun and Held in the City of Frankfort, on Monday, the Seventh Day of December, 1863* (Frankfort: William E. Hughes, 1864), 116-117; Maryland, *An Act to Amend Section Two Hundred and Two of Article Thirty of the Code of Public General Laws, Relating to Crimes and Punishments, by Defining Treason, and Providing for the Punishment of Treason and Other Kindred Offences*, act of March 6, 1862, in *Laws of the State of Maryland, Made and Passed at a Session of the General Assembly Begun and Held at the City of Annapolis on the Third Day of December, 1861, and Ended on the Tenth Day of March, 1862* (Annapolis: Thomas J. Wilson, 1862), 250-254; Maryland, *An Act to Add the Following Section to the Fortieth Article of Public General Laws, Requiring Jurors to Take the Oath of Allegiance*, act of March 9, 1864, in *Laws of the State of Maryland, Made and Passed at a Session of the General Assembly Begun and Held at the City of Annapolis on the Sixth Day of January, 1864, and Ended on the Tenth Day of March, 1864* (Annapolis: Richard

P. Bayly, 1864), 378-379; Maryland constitution, art. 1, sec. 4 (1864); Michigan, *An Act to Punish Desertion, to Prevent Improper Interference with the Military, and to Promote Discipline Therein*, act of March 18, 1863, in *Acts of the Legislature of the State of Michigan, Passed at the Regular Session of 1863*. . . (Lansing: John A. Kerr & Co., 1863), 186-189; Minnesota, *An Act Suspending the Privileges of All Persons Aiding the Rebellion against the United States, of Prosecuting and Defending Actions and Judicial Proceedings in this State*, act of February 14, 1862, in *General and Special Laws of the State of Minnesota, Together with the Joint Resolutions and Memorials, Passed during the Fourth Session of the State Legislature, Commencing January Seventh, One Thousand Eight Hundred and Sixty-Two, and Terminating March Seventh, One Thousand Eight Hundred and Sixty-Two* (Saint Paul: William R. Marshall, 1862), 54-62; Missouri, *An Act to Authorize the Governor of the State of Missouri to Suppress Rebellion and Repel Invasion*, act of May 10, 1861, in *Laws of the State of Missouri, Passed at the Called Session of the Twenty-First General Assembly, Begun and Held at the City of Jefferson, on Thursday, May 2, 1861* (Jefferson City: J. P. Ament, 1861), 48; Missouri, *An Act to Prescribe an Oath of Allegiance for Certain Military Officers*, act of February 15, 1864, in *Laws of the State of Missouri, Passed at the Adjourned Session of the Twenty-Second General Assembly, Begun and Held at the City of Jefferson, on Tuesday, November 10, 1863* (Jefferson City: W. A. Curry, 1864), 33-35; Nebraska territory, *Elections*, in *The Revised Statutes of the Territory of Nebraska, in Force July 1, 1866*. . . (Omaha: E. B. Taylor, 1866), 145-146; Nebraska territory, *An Act to Provide for Elections*, act of February 15, 1864, in *Laws, Joint Resolutions and Memorials, Passed at the Ninth Session of the Legislative Assembly of the Territory of Nebraska, Begun and Held at Omaha City, Nebraska, January 7, A.D., 1864* (Omaha City: Taylor & M'Clure, 1864), 122; Nevada territory, *An Act Supplemental to and Amendatory of an Act Relating to Elections, and the Mode of Supplying Vacancies, Approved November 1st, A.D. 1864*, act of February 20, 1864, and *[An Act] To Prevent Disloyal Persons from Voting*, act of February 20, 1864, both in *Laws of the Territory of Nevada, Passed at the Third Regular Session of the Legislative Assembly, Begun the Twelfth Day of January, and Ended on the Twentieth Day of February, Eighteen Hundred and Sixty-Four, at Carson City* (Virginia: John Church & Co., 1864), 95; Nevada constitution, art. 2, sec. 1 (1864); Oregon, *An Act Requiring the Oath of Allegiance in Certain Cases*, act of October 16, 1862, *An Act Relating to Common Schools*, act of October 17, 1862, both in *The Code of Civil Procedure, and Other General Statutes of Oregon, Enacted by the Legislative Assembly, at the Session Commencing September 8, A.D., 1862* (Oregon: Asahel Bush, 1863), 40, 104-105; Oregon, *Of Crimes and Punishments*, act of October 21, 1864, in *The Organic and Other General Laws of Oregon: Together with the National Constitution, and Other Public Acts and Statutes of the United States, 1843-1872* (Oregon: Eugene Semple, 1874), 75-76; Vermont, *An Act Defining Offences against the Government, and Providing for Their Punishment*, act of November 21, 1864, in *Acts and Resolves Passed by the General Assembly of the State of Vermont, at the Annual Session, 1864* (Montpelier: Freeman Steam Printing Establishment, 1864), 43-44; [West] Virginia, *An Act to Prohibit County Courts and Overseers of the Poor from Making Levies, Appropriations, &c., to Aid the Rebellion against the Government of the United States*, act of July 25, 1861, *An Act to Prevent Offences against the Commonwealth, and to*

Democrats protested the use of loyalty oaths, claiming that they punished suspected traitors without requiring a conviction in court. Lawyers in California, for example, challenged that state's 1863 test oath for attorneys, claiming that it "is intended as a punishment of treason." They argued that "it punishes in advance of conviction or trial, and inflicts a punishment for an imputed offense which is not treason." The "treason" punished by the imposition of loyalty oaths, according to these attorneys, was "incipient treason," not *actual* treason (an overt act). In other words, these oaths punished citizens who may have committed no actual crime. The oaths, therefore, forced a suspected traitor to "prove himself innocent, before any evidence is produced of his guilt." Treason, according to the Constitution, must be an overt act, but "by this statute, it is made to consist of *thought unexpressed*" (emphasis added). Thus, these Democrats believed that loyalty oaths punished treason of the heart and mind, a definition that went beyond the text of the Constitution. Nevertheless, the Supreme Court of California

Provide for the Organization of Patrols during the War, act of July 24, 1861, both in *Acts of the General Assembly, Passed at the Regular Session, Held December 2, 1861, at the City of Wheeling* (Wheeling, 1862), 13, 16-17; [West] Virginia, *An Act Authorizing the Governor to Arrest Disloyal Persons as Hostages*, act of February 1, 1863, in *Acts of the General Assembly, of the State of Virginia; Passed at the Extra Session, Commenced December 4, 1862, in the 87th Year of the Commonwealth* (Wheeling, 1863), 57-58; West Virginia, *An Act to Prevent the Encouragement of Invasions and Insurrections*, act of July 16, 1863, in *Acts of the Legislature of West Virginia, at its First Session, Commencing June 20, 1863* (Wheeling: John F. M'Dermot, 1863), 15; West Virginia, *An Act to Prevent the Prosecution of Suits and the Suing out of Process by Persons Engaged in Rebellion*, act of February 28, 1865, in *Acts of the Legislature of West Virginia, at its Third Session, Commencing January 17th, 1865* (Wheeling: John F. M'Dermot, 1865), 66-67; Wisconsin, *An Act to Prevent Rendering Aid to Rebels*, act of May 25, 1861, in *General Laws Passed by the Legislature of Wisconsin in the Year 1861* (Madison: Argus Office, 1861), 329-331; *An Ordinance Defining the Qualifications of Voters and Civil Officers in this State*, RG 005, Secretary of State, Special Collections, Missouri State Constitutional Convention, 1861-1863, Box 4, Folder 2.

upheld the loyalty oath as a reasonable preventive measure to protect the state's judicial system from disloyalty.⁴¹

Speech codes, sedition laws, and other codes of conduct were also adopted by various northern states and territories. In Nevada, for example, it was a crime for a telegraph operator to fail to report a telegram with traitorous content.⁴² Kentucky made it a crime not to alert the authorities to an ensuing rebel raid or guerrilla attack.⁴³ New Hampshire declared that accessories to felonies committed outside of the state could be punished in the state.⁴⁴ Ohio declared that surrendering forts or partaking in unauthorized military expeditions was a crime.⁴⁵ Speech codes were adopted in California, Kentucky,

⁴¹ Cohen v. Wright, 22 *California Reports* 293-330 (1863); affirmed in ex parte Gregory Yale, 24 *California Reports* 241-245.

⁴² Nevada territory, *An Act for the Regulation of the Telegraph and to Secure Secrecy and Fidelity in the Transmission of Telegraphic Messages*, act of November 25, 1861, in *Laws of the Territory of Nevada, Passed at the First Regular Session of the Legislative Assembly, Begun the First Day of October and Ended on the Twenty-Ninth Day of November, 1861, at Carson City* (San Francisco: William Martin Gillespie, 1862), 46-47.

⁴³ Kentucky, *An Act to Punish Disloyal and Treasonable Practices*, in *Acts of Kentucky (1863)*, 116-117.

⁴⁴ New Hampshire, *An Act to Punish Accessories to Felonies Committed in Other States*, act of July 8, 1863, *Laws of the State of New-Hampshire, Passed at June Session, 1863* (Concord: Amos Hadley, 1863), 2705. A Democratic legislator who was later vilified as a Copperhead proposed a similar law in Pennsylvania, but it was not adopted. See Pennsylvania, *Journal of the Senate for 1861*, 68.

⁴⁵ Ohio, *An Act to Punish Treason and Other Crimes*, act of April 26, 1861, in *Acts of a General Nature and Local Laws and Joint Resolutions Passed by the Fifty-Fourth General Assembly of the State of Ohio: At Its Second Session, Begun and Held in the City of Columbus, January 7, 1861, and in the Fifty-Ninth Year of Said State* (Columbus: Richard Nevins, 1861), 110. Some members of the Ohio legislature opposed this law because they believed it made treason against the national government a crime punishable in state courts. See George H. Porter, *Ohio Politics during the Civil War Period* (New York: Columbia University Press, 1911), 78.

and West Virginia. West Virginia's law made it a crime to "attempt to justify and uphold an armed invasion of this state, or an organized insurrection therein, by publicly speaking, writing or printing, or by publishing or circulating such writing or printing, during the continuance of such invasion or insurrection."⁴⁶ Kentucky's law forbade speaking or writing that persuaded, excited, threatened, or terrified any person into supporting the rebellion.⁴⁷ The California law was the most far reaching:

Every person who shall, in time of actual war waged against the United States, whether by a foreign or domestic foe, profess adherence to the common enemy, or, maliciously abusing the freedom of speech, shall publicly wish evil to the national cause, or that disaster may befall [sic] the national arms, or who shall in any manner rejoice at any reverse of the national army, or any part thereof, or who shall in any manner by word indorse, or defend, or cheer any overt attempt, or any person engaged in such overt attempt, to subvert and destroy the lawful authority of the United States in any State thereof, shall be guilty of a misdemeanor. . . .⁴⁸

As these speech codes and other disloyalty statutes attest, the states showed little reluctance to restrict the civil rights of their citizens in wartime. Just as the Pennsylvania judges had argued in their grand jury charges, these states believed that speech and expression ought to be limited in wartime so that actions on the home front would not

⁴⁶ West Virginia, *An Act to Prevent the Encouragement of Invasions and Insurrections*, in *Acts of the Legislature of West Virginia (1863)*, 15.

⁴⁷ Kentucky, *An Act to Punish Disloyal and Treasonable Practices*, in *Acts of Kentucky (1863)*, 116-117. Unlike any other law, the Kentucky statute contained the following proviso: "That this act shall not be construed as restricting any person in his constitutional right of speaking and writing in reference to the manner of administering the government, State or National, or against the conduct of any officer of either, when done in good faith, with the intent of defending and preserving either of said governments, or of exposing and correcting the maladministration of either of said governments, or the misconduct of any officer, civil or military, of either of them."

⁴⁸ California, *An Act to Punish Offences against the Peace of the State*, in *Statutes of California (1863)*, 755.

harm the military efforts in the field; the guarantees of free speech and press found in the federal and state bills of rights, according to this interpretation, only protected citizens against prior restraint of speech. Further, these laws revolutionized the law of treason at the state level. Though not using the word treason, laws like the California speech code punished citizens who possessed treasonable thoughts, uttered traitorous statements, published disloyal sentiments, or even cheered for the enemy.

Not all attempts to limit freedom of speech were successful. One delegate to the 1864 constitutional convention in Maryland proposed that the new state constitution ought to protect free speech “except when used for treasonable purposes.” The measure was voted down 46 to 10. The author of the proposal, Edwin A. Abbott, had, prior to the war, been strongly pro-slavery, but the lawlessness of the rebellion infuriated him and he now desired to see the South and slavery soundly defeated. One opponent of Abbott’s amendment argued that the guarantee of free speech in the constitution was “intended merely to assert a general principle.” There were many “ways in which a paper can be stopped from making treasonable utterances. But if this broad exception[] is made to the rule, then the question is—who is to decide what are treasonable purposes? who is to have the right to decide that question?” Abbott replied that without this exception, treasonable utterances could not be legally suppressed.⁴⁹ But the majority of the convention had had enough wartime experience to know that the military (and mobs) would do their part in suppressing “treasonable” speech and press. Accordingly, speech deemed disloyal by the majority of the citizenry was perhaps even less protected under a blanket constitutional guarantee of freedom.

⁴⁹ Lord and Parkhurst, eds., *Debates*, 1:387, 742.

Several states and territories adopted actual treason laws (or constitutional provisions) during the Civil War. Most of these—Arizona, Indiana, Maryland, Montana, Nevada, Ohio, and West Virginia—were patterned after the federal definition.⁵⁰ Some, however, incorporated older English doctrines of constructive treason. The Dakota law specified that when “persons rise in insurrection with intent to prevent in general by force and intimidation, the execution of a statute of this Territory, or to force its repeal, they are guilty of levying war.” Similarly, Oregon defined levying war as a “combination of two or more persons, by force, to usurp the government of the state or to overturn the same, evidenced by a forcible attempt made within this state to accomplish such purpose. . . . Where persons rise in insurrection, with intent to prevent in general, by force and intimidation, the execution of a statute of this state, or to force its repeal, they are guilty of levying war.” Vermont went a step further and made conspiracy to levy war a treasonable offence.⁵¹

⁵⁰ Several of these have been cited in previous notes; the remainder are: Arizona territory, *Of Crimes and Punishments*, in *The Howell Code. Adopted by the First Legislative Assembly of the Territory of Arizona. Session Begun on the Twenty-Sixth Day of September, and Ended on the Tenth Day of November, 1864, at Prescott* (Prescott: The Arizona Miner, 1865), 50-51; Indiana, *An Act Defining Treason, and the Concealment of Treason, and Prescribing the Punishment Thereof*, act of May 11, 1861, in *Laws of the State of Indiana, Passed at the Special Session of the General Assembly, Begun on the 24th Day of April, A.D., 1861* (Indianapolis: Berry R. Sulgrove, 1861), 84-85; Maryland constitution, art. 1, sec. 7 and art. 3, sec. 47 (1864); Montana territory, *Criminal Practice Acts*, in *Acts, Resolutions and Memorials of the Territory of Montana, Passed by the First Legislative Assembly, Convened at Bannack, December 12, 1864* (Virginia City: D. W. Tilton & Co., 1866), 243; Nevada constitution, art. 1, sec. 19 (1864); West Virginia, *An Act to Punish Treason against the State*, act of March 3, 1864, in *Acts of the Legislature of West Virginia, at its Second Session, Commencing January 19, 1864* (Wheeling, 1864), 35; West Virginia constitution, art. 2, sec. 10 (1864).

⁵¹ Dakota territory, *Of Treason*, in *General and Private Laws, and Memorials and Resolutions, of the Territory of Dakota, of the Fourth Session of the Legislative Assembly, Commenced at Yankton, December 5, 1864, and Concluded January 13, 1865* (Yankton:

While Connecticut did not incorporate the doctrine of constructive treason into its statutory law, an 1862 commentary on the state criminal law included a full discussion and explanation of constructive treason. The Republican-controlled state senate in Connecticut was also accused of developing its own unique law of constructive treason during the war. When, in 1861, the Connecticut senate removed portraits of two former, living Democratic governors from the state capitol, a Democratic newspaper responded that “this is certainly carrying the doctrine of constructive treason to an unheard of extent.” Some states passed resolutions that broadened the definition of treason by implication. The legislature in Michigan, for example, passed a joint resolution in 1862 condemning wartime capitalists who profited by defrauding the government. These “traitors, in the disguise of patriots, [who] have plundered our treasury, destroyed our substance, and paralyzed our efforts, by a stream of fraud and peculation” ought to be convicted of “a felony, punishable by imprisonment for years, or for life; or if the exigencies of the case shall require it, during the war, like treason, by death upon the gallows.”⁵²

Borrowing directly from the language of treason law, at least one border state revoked the citizenship of any citizen who continued to serve the rebel government in any

G. W. Kingsbury, 1864-1865), 41; Oregon, *Of Crimes and Punishments*, act of October 21, 1864, in *The Organic and Other General Laws of Oregon: Together with the National Constitution, and Other Public Acts and Statutes of the United States, 1843-1872* (Oregon: Eugene Semple, 1874), 75-76; Vermont, *Act Defining Offences*, in *Acts of Vermont (1864)*, 43-44.

⁵² Henry Dutton, *A Revision of Swift’s Digest of the Laws of Connecticut*, 2 vols. (New Haven: Peck, White & Peck, 1862), 2:290-292; Gettysburg, Pa. *Compiler*, November 4, 1861; Michigan, *Joint Resolution in Regard to Frauds upon the Treasury of the United States*, January 11, 1862, *Acts of the Legislature of the State of Michigan, Passed at the Extra Session of 1862* (Lansing: John A. Kerr & Co., 1862), 60-61.

“civil or military capacity.” According to the statute, any Kentuckian who “shall take up or continue in arms” against the Union forces [read: levy war], “or shall give voluntary aid and assistance to those in arms” against the United States [read: aid and comfort], “shall be deemed to have expatriated himself, and shall no longer be a citizen of Kentucky, nor shall he again be a citizen.” One could only regain citizenship by the adoption of a statute by the legislature. This law, which was adopted over the objection of the governor, again reveals how language was borrowed from the law of treason to define a new and different crime. In a border state where families were sharply divided, authorities in the state did not likely wish to execute mass numbers of its people.⁵³

Three states—Maryland, Nevada, and West Virginia—debated treason in constitutional conventions during the war.⁵⁴ The proposed constitution for West Virginia included a treason clause that gave unambiguous meaning to the word adherence: “Every attempt to justify and uphold an armed invasion of the State, or an organized insurrection within the limits thereof, by publicly speaking, writing or printing, or the publishing or circulating of any such writing or printing during the continuance of such invasion or insurrection, shall be deemed an adhering to the enemies of the State.” Substantial debate

⁵³ Kentucky, *An Act to Amend Chapter 15 of the Revised Statutes, Entitled “Citizens, Expatriation, and Aliens,”* act of March 11, 1862, in *Acts of Kentucky, 1861-1863*, 70-71.

⁵⁴ Illinois also held a constitutional convention in 1862, but treason was not included in the proposed constitution (which was rejected by the voters), nor does it appear as a heading in the index. There are two possible reasons for its exclusion from the debate. First, the convention was controlled by Democrats who would have been less likely to include a provision that might later be used against them. Second, there was no treason clause in the Illinois Constitution of 1818; the delegates might simply have wanted to leave that aspect of the constitution as it was. See *Journal of the Constitutional Convention of the State of Illinois, Convened at Springfield, January 7, 1862* (Springfield: Charles H. Lanphier, 1862).

ensued regarding this clause. Some members of the convention wanted it included to ensure that seditious speech would be punished. Furthermore, they argued, such a clause in the constitution warned citizens of the limits of dissent so that they might not violate the law. Other delegates opposed the clause because they believed it too severely *restricted* the meaning of adherence. One argued that the “plain words” of the federal definition of treason were all that were needed in the state’s definition. “Any man can understand what adhering to the enemies of his country and giving them aid and comfort means,” he declared. “You cannot express it in plainer terms; and the terms, after all, mean just what a common man would take them to mean. If I support the rebellion and give it aid, it is treason. If I adhere to the enemies and give them aid, it is treason, whether I enlist in their armies; whether I furnish those armies with munitions of war; whether I supply them with provisions; or whether I aid them in any way. When the fact that a war is levied exists what plainer language could you use to give information to the people as to acts that are prohibited than to say, you shall not adhere to that rebellion and give it aid?” Unless the convention wished to delineate every action that might be considered adherence, this delegate recommended leaving “the plain terms which already give us the law of treason and to which any man applying his own good sense to the meaning of common language can give a reasonable construction.”⁵⁵

This debate over the definition of adherence in West Virginia reveals how constitution makers differed when it came to who should give precise meaning to a clause

⁵⁵ Charles H. Ambler, Frances Haney Atwood, and William B. Mathews, eds., *Debates and Proceedings of the First Constitutional Convention of West Virginia (1861-1863)*, 3 vols. (Huntington, W.V.: Gentry Brothers, [1939-1940]), 1:593-639; 658-673; quotes from pp. 593 and 668.

in the constitution. Both sides believed a wide variety of actions should be deemed treasonable, but they disagreed over whether that decision should be made by the convention or the legislature. Some thought a constitutional definition of treason should include forms of the crime to ensure that they would be punished, while others believed that the political and judicial branches of the government should be left to define the term. In the end, the sentence was struck out of the state constitution and the legislature was left with the task of giving meaning to the “plain words” of the state constitution’s treason clause (it will be recalled that the legislature later adopted the language of this proposed constitutional provision in its 1863 sedition law).

As the states and territories worked through the process of defining treason and disloyalty they became important actors in the constitutional system, giving meaning to words and phrases in constitutional law that were not rigidly defined. In some instances, as with the Pennsylvania law, they relied on their Revolutionary heritage—or even the older English traditions—to give meaning to constitutional texts. The governor of Maryland likened secession sympathizers in his state to Tories during the Revolution. In 1862, he warned the state legislature not to allow treasonous behavior to overrun the state. “Our ancestors manifested their appreciation of this principle when they passed the act of February session, 1777, entitled, ‘An act to punish certain crimes and misdemeanors and prevent the growth of toryism;’ and whilst all its provisions may not be applicable at this day, it may at least furnish serviceable suggestions, as well as recall to our attention the manner in which the men of the Revolution dealt with such

offences.”⁵⁶ Later that year the legislature adopted a law that criminalized many of the treasonous and disloyal acts that had been criminalized in 1777.

In other instances, state officers acted in innovative ways to give meaning to constitutional concepts of treason. The Delaware legislature, which was Democratically controlled, passed a law in 1863 “to prevent illegal arrests” in the state by the Lincoln administration. In Delaware the governor could not veto any legislation adopted by the general assembly, so in response, Governor William Cannon, a Unionist, declared that he would not enforce the law. “The preservation of the Government is the highest duty of those charged with its administration; and the personal liberty of the individual is only to be regarded when compatible with its safety.” He conceded that citizens had the right to discuss political issues and peacefully assemble to seek the redress of grievances, “but there is a wide difference between the exercise of this right and the disloyal opposition which proceeds from sympathy with a public enemy.” “The idea that the Government is bound to await the development of a conspiracy until the actors shall have perfected their plans and committed some overt act necessary to bring them within the technical definition of treason, is, to my mind, absurd. The object is not punishment, but prevention.” If a citizen wished to avoid arrest, Cannon suggested he show unfailing and unequivocal loyalty to the national government. In the mean time, he pledged to aid in the disclosure or arrest of “any one guilty of disloyal practices or treasonable designs

⁵⁶ *Inaugural Address of Hon. Augustus Bradford, Governor of Maryland; Delivered in the Senate Chamber, before the Senate and House of Delegates, January 8, 1862* (Annapolis: Thomas J. Wilson, 1862), 14.

against the Government.”⁵⁷ The terms were vague; the governor never defined treason or disloyalty, nor did he delineate which acts or what speech merited punishment or prevention. In a sense, he followed the “plain words” doctrine of the West Virginia convention—he or Lincoln simply would know when someone deserved arrest for treason. Such a subjective approach vastly expanded the scope of possible treasonous offences.

Some state-level politicians protested these expansions of the law of treason. Many border state Democrats, like the majority in the Delaware General Assembly, believed that citizens should be protected from arrest when they had not been convicted of any treasonable offence. In Indiana, members of the legislature from the southern region of the state protested against a law that restricted commerce with citizens of rebellious states (a crime that had been considered treason in several states during the Revolution). Several legislators opposed the law on constitutional grounds, pointing out that only Congress possessed the authority to regulate interstate commerce. Others opposed it for economic reasons, claiming that it would place an undue burden on Indiana farmers whose main source of income was through trade with the South. “The bill will interrupt the business of innocent persons,” argued one state legislator. “The passage of this bill would be ruinous to the Southern part of the State,” said another.

⁵⁷ Delaware, “An Act to Prevent Illegal Arrests in this State,” act of February 24, 1863, in *Laws of the State of Delaware, Passed at the Session of the General Assembly, Commenced and Held at Dover, on Tuesday, the Sixth Day of January A.D. 1863* (Wilmington: Henry Eckel, 1863), 288-290; *Philadelphia Press*, March 16, 1863.

Several legislators from southern Indiana declared that they would only support the restriction on commerce if a relief bill was concurrently adopted.⁵⁸

State-level politicians and constitution makers in the 1860s struggled with determining how similar America's revolutionary heritage was to the present civil war. In the end, many decided that the two situations were close enough to merit some of the same severe measures. The state of Maryland adopted a new constitution in 1864 that included provisions for the permanent forfeiture of property owned by traitors. Such a provision had been included in the state constitution of 1776 but was omitted from the constitution of 1851. That a majority of the delegates believed it was again necessary in 1864 reveals how similarly they viewed the two conflicts. Opponents of forfeiture complained that this provision punished innocent wives and children and went beyond the federally-sanctioned punishment for treason, but the majority believed that extraordinary times called for revolutionary measures. "I wanted to call attention to the fact that here, in this hall, during the times that tried men's souls, our fathers legislated just as we propose our Legislature shall have power to legislate," declared one delegate. A member of the minority replied in protest that there were too many differences between the Revolution and the present civil war, and that provisions of the Revolutionary-era law had no bearing on the present day. "I might refer to many such acts which were passed during that period, but which have no application whatever to our condition now. The very men who participated in the passing of those laws, as soon as the conflict was over,

⁵⁸ Ariel and W. H. Drapier, eds., *Brevier Legislative Reports: Embracing Short-Hand Sketches of the Journals and Debates of the General Assembly of the State of Indiana, Convened in Extra Session on the 24th Day of April, 1861* (Indianapolis: Daily Indiana State Sentinel, 1861), 25-26, 34-36, 54-63, 93-99, 110-111; quotes from p. 97.

went to the Convention of 1787 and assisted in framing this very Constitution of the United States, in which they declared that forfeiture should not extend beyond the life of the person attainted.”⁵⁹ Despite such sentiments the forfeiture provision prevailed; the people of Maryland in 1864 reinstated a severe punishment for treason, just as their forebears had done during the Revolutionary War.

The pattern of treason and disloyalty laws that emerged during the Civil War in many instances resembled statutes that had been enacted during the nation’s struggle for independence. Many northern legislators, governors, judges, and constitution makers believed the exigencies of war demanded an expanded criminal law, and they found in the Revolution an example to follow. Of course, the Revolution predated the Constitution’s strict definition of treason. By relying on pre-1787 understandings of terms like “adherence” and “aid and comfort,” the states gave new meaning (in fact, based on much older meaning) to these often ambiguous constitutional terms. In this way, the political branches of the states entered a constitutional debate that altered political and popular understandings of what constituted treason during the American Civil War.

III.

Most politicians at the federal level were hesitant to address the law of treason. Whereas the states had considerable authority to define and punish treason however they

⁵⁹ Maryland constitution, Declaration of Rights, art. 24 (1776); Maryland constitution, Declaration of Rights, art. 24 (1851); Maryland constitution, Declaration of Rights, art. 27 (1864); Lord and Parkhurst, eds., *Debates*, 1:239-271; quotations from p. 262.

chose, treason against the United States was specifically defined in the Constitution. Still, the Constitution gave Congress broad “Power to declare the Punishment of Treason,” provided that “no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.”⁶⁰ These archaically-worded phrases confounded many congressmen. Many were unsure exactly what constraints the Constitution placed on their ability to punish traitors, and they moved with caution to do so. Nevertheless, during the four years of war, Republicans in Congress passed significant legislation that punished traitors and demanded loyalty in more stringent ways than at any other time since the Revolution. As evidence of their hesitancy to deal with treason in a legal sense, however, few congressmen based their support for these laws on Congress’ power to punish treason. Instead, they found other constitutional justifications for their legislative actions—namely, the war powers of the government.

On August 6, 1861, Congress mandated that all federal employees take an oath of loyalty, affirming their future allegiance to the Union. By early-1862, loyalty oaths were required of all “civil servants, shipmasters, military officers, postal contractors, pensioners, applicants for passports, [and] telegraphers.” By mid-1862, jurors and anyone who wished to bid on a federal contract had to take a loyalty oath, and in August 1862 Congress approved the “ironclad test oath” that required the past, present and future loyalty of every elected and appointed official in the civil government, the military, and the navy, excepting the President of the United States. In January 1865 this law was further applied to attorneys who wished to practice in federal courts. The ironclad oath

⁶⁰ U. S. Constitution, art. 3, sec. 3 (1787).

permanently disfranchised all rebels, or at least until it was no longer required by Congress.⁶¹

Beyond requiring public professions of loyalty, Congress also broadened the scope of what many considered treasonable activities (though, like most of the state laws, they were not called “treason” in the statutes). On July 31, 1861 a law went into effect making conspiracies against the government a “high crime.” The so-called Conspiracies Act borrowed directly from the language of the constitutional definition of treason, punishing any persons who “shall conspire together to overthrow, or to put down, or to destroy by force, the Government of the United States, or to levy war against the United States, or to oppose by force the authority of the Government of the United States; or by force to prevent, hinder, or delay the execution of any law of the United States; or by force to seize, take, or possess any property of the United States against the will or contrary to the authority of the United States; or by force, or intimidation, or threat to prevent any person from accepting or holding any office, or trust, or place of confidence, under the United States.”⁶² This act, therefore, criminalized the types of actions that had led to the Civil War; it also associated treason and the Rebellion with the forcible resistance of any U.S. law (it will be recalled that under the doctrine of constructive

⁶¹ Harold M. Hyman, *Era of the Oath: Northern Loyalty Tests during the Civil War and Reconstruction* (Philadelphia: University of Pennsylvania Press, 1954), 12, 20-32, 157-159; William A. Russ, Jr., “The Struggle between President Lincoln and Congress over Disfranchisement of Rebels (Part 1) *Susquehanna University Studies* 3 (March 1947), 185.

⁶² *An Act to Define and Punish Certain Conspiracies*, 12 Stat. 284. In 1807, in light of the Burr conspiracy, the U.S. attorney general had recommended that Congress adopt a law punishing conspiracies to commit treason. See C. A. Rodney, “Letter from the Attorney General, Accompanying the Bill to Punish Conspiracies to Commit Treason against the United State,” *American Register* (January 1, 1808), 466-477.

treason, as well as in the treason cases from the Early Republic, such resistance to a law was treason).

The Second Confiscation Act of July 1862, which James G. Randall calls “the Treason Act of 1862,” declared in its first section that any person convicted of treason could either suffer death and the loss of his slave property, or at the discretion of the court, could be imprisoned, have his slaves set free, and be fined. Chief Justice Salmon P. Chase, writing after the war, declared that the Second Confiscation Act was actually an act of mercy towards the South: “In some respects the forbearance and liberality of the nation exceed all example,” he wrote. “While hostilities were yet flagrant, one act of congress practically abolished the death penalty for treason subsequently committed. . . .” The Second Confiscation Act thus softened the punishment for treason, which under the 1790 law had been death. With so many actual traitors in arms against the United States, few northerners believed that all traitors should be punished with death. In truth, the Second Confiscation Act was aimed primarily at the leaders of the southern rebellion. Section 5 of the act authorized the confiscation of all property of rebel leaders or of rebels owning property in the loyal states and territories.⁶³

Randall notes that the 1862 confiscation act was not only a treason law, but also defined other crimes that were less than treason. The second section of the act made it a crime to “incite, set on foot, or engage in any rebellion or insurrection against the authority of the United States,” or “to give aid and comfort” to those who did. “Engaging

⁶³ *An Act to Suppress Insurrection, To Punish Treason and Rebellion, To Seize and Confiscate the Property of Rebels, and for Other Purposes*, 12 Stat. 589-591; James G. Randall, *Constitutional Problems under Lincoln*, revised ed. (Urbana: University of Illinois Press, 1964), 77-81; *Shortridge et al. v. Macon*, 22 Fed. Cases 22 (1867).

in rebellion was thus declared to be distinct [from] the crime of treason,” writes Randall. Some members of Congress likewise argued that they were creating new crimes. Senator Daniel Clark, a New Hampshire Republican, for example, said, “The offense described in the second section is a new offence—the offense of inciting and setting on foot rebellion. . . . Or assisting it in any way. It might amount to treason, or it might not.”⁶⁴ Thus, a suspected traitor could be tried and convicted in court without the protections secured for traitors in Article III of the Constitution.

Others, however, denied that Section 2 created a new crime. In one of the few notable treason cases of the war (*United States v. Greathouse*), Justice Stephen J. Field, sitting as a circuit judge in California, contended that the second section of the confiscation act did not create a new crime; rather, it delineated acts that amounted to levying war. According to Field, the word “enemies,” as it appeared in the constitutional definition of treason, applied only to citizens of foreign nations. Consequently, American citizens could not be charged with treason for adherence, but only for levying war. Americans who adhered to the rebels, offering them aid and comfort, therefore, were principals in the rebels’ treason and were equally culpable in their levying of war against the government (this line of reasoning was based on John Marshall’s arguments in the *Swartwout*, *Bollman*, and *Burr* cases of 1807, that all involved in the conspiracy were guilty of levying war no matter how far they were from the overt act—provided that an overt act of war did take place).⁶⁵

⁶⁴ Randall, *Constitutional Problems*, 77-81; 12 Stat. 590; *Congressional Globe*, 37th Cong., 2nd sess., pp. 2166-2173.

⁶⁵ *United States v. Greathouse et al.*, 2 *Abbott’s Reports* 364-381 (1863).

The indictment in the *Greathouse* case was based on the second section of the Second Confiscation Act (in which Congress claimed to define a lesser crime than “treason”). Still, Field argued that the indictment amounted to a charge of treason. The indictment did not need to use the words “treason” or “levying war” for the defendants to be adjudged guilty of treason, according to Field, because the actions listed in the second section amounted to levying war (and therefore were treasonable). “It is not necessary now to use specifically the term ‘levying war,’” declared Field, “it will be sufficient if the indictment follows the language of the [second section of the second confiscation] act, as the indictment does in the present case. . . . The defendants are therefore in fact on trial for treason,” concluded Field. Judge Ogden Hoffman, the other circuit judge, concurred. “If, then, every species of aid and comfort given to the present rebellion constitutes a levying of war, it follows that in the two sections of the act referred to, congress has denounced the same crime; and that a party amenable to the second section for having ‘engaged in the rebellion and given it aid and comfort,’ must also be guilty of treason by levying war against the United States.”⁶⁶ These judges rejected Congress’ attempt to define treasonable offences as lesser crimes. By declaring that the second section of the confiscation act enunciated treasonable offences, the circuit court, at least in this one case, limited the ability of the political branches to move beyond the constitutional definition of treason or the judicial procedures mandated for treason trials.

The sixth and seventh sections of the Second Confiscation Act also faced a challenge in the courts. These sections, which punished traitors without any of the judicial protections or requirements for a civil trial that were demanded by the

⁶⁶ *United States v. Greathouse et al.*, 2 *Abbott’s Reports* 364-381; 26 *Fed. Cases* 25 (1863).

Constitution, provided for the confiscation and condemnation of a traitor's property in *in rem* proceedings without the alleged traitor being present in court, without two witnesses to an overt act of treason, and without his or her conviction by a unanimous jury. One suspected southern sympathizer in New Mexico, for example, had his property confiscated based on the scant written testimony of one witness. "His conduct, actions, deeds and speech up to the time of his leaving with the so-called Confederate troops, in April 1862," according to the deposition, "was adverse to the government of the United States and in favor of the Confederate States." No further specific information was necessary to deem this individual's property liable to confiscation.⁶⁷

The Supreme Court of Kentucky warned that the framers of the Constitution had defined treason and carefully prescribed the mode of trying citizens with treason to protect against political abuses; "its framers did not contemplate a suspension of its provisions by civil war, nor a denial to traitors of its guaranties." The court therefore held the confiscation act unconstitutional because it attempted "to punish citizens for treason, or for aiding or abetting the rebellion" but "it authorizes a trial of those crimes in a mode different from that required by the constitution." Such a law hearkened back to "the gross injustice, oppressions and tyranny of the common law, British statutes, and the machinery of the English government, often invoked to crush and ruin those who had become obnoxious to the reigning dynasty, as well as the unjust and oppressive acts of the American states, passed under the deep and excited resentments of the Revolution." The Founders had sought to protect against such a politicization of the crime by defining

⁶⁷ Edward D. Tittmann, "The Exploitation of Treason," *New Mexico Historical Review* 4 (April 1929), 138-145.

treason in the Constitution, by carefully prescribing how suspected traitors would be tried, and by requiring all suspected criminals to be tried in civil courts. Kentucky's high court, however, believed that Congress had construed treason so broadly that it had "nearly opened the broad door of the common law to constructive treasons and extreme punishments, not only of the offender, but of all those who are in any way to inherit or receive from him."⁶⁸

Like the confiscation law, the Homestead Act also borrowed language from the law of treason, prohibiting those who had "borne arms against the United States Government or given aid and comfort to its enemies" from becoming homesteaders.⁶⁹ In a similar way, in February 1862 Congress authorized the secretary of the interior to strike from the pension rolls the names of all persons who "have or may hereafter take up arms against the Government of the United States, or who have in any manner encouraged the rebels or manifested a sympathy with their cause."⁷⁰ In February 1863, Congress passed an act preventing correspondence with insurrectionists.⁷¹ Lastly, the Enrollment Act of

⁶⁸ *Norris v. Doniphan*, 61 *Kentucky Reports* 385 (1863).

⁶⁹ *An Act to Secure Homesteads to Actual Settlers on the Public Domains*, 12 Stat. 392.

⁷⁰ *An Act Authorizing the Secretary of the Interior to Strike from the Pension Rolls the Names of Such Persons as Have Taken up Arms against the Government, or Who May Have in any Manner Encouraged the Rebels*, 12 Stat. 337.

⁷¹ *An Act to Prevent Correspondence with Rebels*, 12 Stat. 696. In 1863, the military also declared that one who "gives information of any kind to the enemy, or holds intercourse with him," in any place under martial law, was a "traitor" or "war-traitor." Any "unauthorized or secret communication with the enemy" was also considered "treasonable by the law of war." Serving as a guide for the enemy was also "treason." See General Orders No. 100, "Instructions for the Government of the Armies of the United States in the Field," April 24, 1863, in *O.R.*, ser. 3, vol. 3, p. 158. In fact, the military had been confiscating private mail since the beginning of the war. See Edward

March 3, 1863 made it a criminal offense to impede the draft or discourage enlistments in any way, which at least one state supreme court interpreted as “levying war” against the United States.⁷²

These acts were clearly intended to prevent and punish treasonable actions; nevertheless, they were rarely discussed as such in congressional debate. In most instances these laws were based on Congress’ war power rather than on Congress’ power to punish treason. Senator Charles Sumner of Massachusetts based confiscation on the power of Congress to take whatever measures were necessary to win the war; rebels, as public enemies, could be punished according to the law of war. “Thus, sir, we have seen that Congress is invested with the whole power of war, and that confiscation of the enemy’s property is one of its powers,” argued Senator Lot M. Morrill of Maine. “Confiscation, sir, is the fate of the property of the belligerent—the penalty of war—and there can be no fair pretense that these principles do not apply in the case of a domestic enemy.”⁷³

G. Longacre, ed., “‘Come Home Soon and Dont Delay’: Letters from the Home Front, July, 1861,” *Pennsylvania Magazine of History and Biography* 100 (1976), 395-406.

⁷² *An Act for Enrolling and Calling Out the National Forces, and for Other Purposes*, 12 Stat. 731-737. See also *An Act to Amend an Act Entitled “An Act for Enrolling and Calling Out the National Forces, and for Other Purposes,” approved March Third, Eighteen Hundred and Sixty-Three*, 13 Stat. 8. The Supreme Court of Wisconsin ruled that forcibly resisting the draft was “levying war” against the United States. See *Druecker v. Salomon*, 21 *Wisconsin Reports* 621-632 (1867).

⁷³ Charles Sumner, *War Powers of Congress. Speech of Hon. Charles Sumner, of Massachusetts, on the House Bills for the Confiscation of Property and the Liberation of Slaves Belonging to Rebels, in Senate of the United States, June 27, 1862* (Washington, D.C.: Scammel & Co., 1862), 1; L. M. Morrill, *Speech of Hon. L. M. Morrill, of Maine, on the Confiscation of Property. Delivered in the Senate of the United States, March 5, 1862* (Washington, D.C.: L. Towers, 1862), 10.

Nevertheless, some congressmen believed these statutes could be based both on Congress' war powers and their power to punish treason. During a civil war, argued Republican William Kellogg of Illinois, "traitors . . . may be treated, not only as rebels guilty of treason by the law of the land, but may be treated also as a public enemy." Kellogg further pointed to confiscation during the Revolution as a punishment for adherence to the Crown as a "precedent in our own country." Similarly, Representative James Garfield of Ohio reminded his colleagues "that the Union had its origin in a revolution, and that confiscation played a very important part in the war of that Revolution." How the founders dealt with disloyalty offered a solution "full of instruction": "Every one of the thirteen colonies, with a single exception [South Carolina], confiscated the real and personal property of Tories in arms," stated Garfield. "Not only so, but they drove Tory sympathizers from the country; they would not permit them to remain upon American soil."⁷⁴ Why treat rebel traitors better than Loyalists had been treated during the War for Independence?

⁷⁴ William Kellogg, *Confiscation of Rebel Property. Speech of Hon. William Kellogg, of Illinois, Delivered in the House of Representatives, May 24, 1862* (Washington, D.C.: Scammell & Co., 1862), 8, 12; James A. Garfield, *Speech of Hon. James A. Garfield, of Ohio, on the Confiscation of Property of Rebels. Delivered in the House of Representatives, January 28, 1864* (Washington, D.C.: Lemuel Towers, for the Union Congressional Committee, 1864), 2-3. Senator Lyman Trumbull of Illinois, the prime mover in Congress behind confiscation, argued that the restrictions against bills of attainder and permanent forfeiture in Article III did not apply to the confiscation act because confiscation reached only rebels who were beyond the reach of the judicial process. Similarly, William Whiting, Solicitor of the War Department, argued that Congress had an unlimited power to punish treason because the confiscation act was not, in a legal sense, a bill of attainder. Moreover, he argued that the Framers never intended to forbid seizures of property beyond the life of a traitor; they only sought to limit how those seizures could be accomplished. See John Syrett, *The Civil War Confiscation Acts: Failing to Reconstruct the South* (New York: Fordham University Press, 2005), 4-53; Whiting, *War Powers*, 84-128.

Debate over the Enrollment Act followed a similar pattern. An early version of the bill required provost marshals to report all “treasonable practices” within their districts to the Provost Marshal General. Democrats opposed this provision, claiming it was too vague and destructive to constitutional liberty. Republicans chided their rivals across the aisle and believed that Democrats wanted this clause removed from the bill so that they could continue to aid and comfort the South. Representative William McKee Dunn, a Republican and army officer from Indiana, argued that the meaning of “treasonable practices” could easily be deduced: “Just reverse the order of the expression, and make it ‘practices of treason,’ and by the aid of the Constitution you have a plain definition.” Dunn believed that this provision would strike at secession sympathizers in the North—those “who, by an unjustifiable opposition to the Administration, are giving aid and comfort to the enemy.” He knew “that ‘the rebels of the South are leaning on the northern Democracy for support.’ Strike that prop from under them and the rebellion tumbles to the ground.”⁷⁵

Representative Thaddeus Stevens of Pennsylvania, the powerful and outspoken radical who chaired the Ways and Means Committee, pointed out that the “treasonable practices” clause authorized no arrests, only that the provost marshals ought to “keep an eye on the traitors and report them to the proper authorities. Gentlemen on the other side do not like that kind of machinery. They do not like to have the traitors watched and reported to the proper authorities, not because they have any sympathy with them, but because they think it criminal to watch innocent men who do nothing but try to save the country and prevent the destruction of its liberties, and to have them reported.” Stevens

⁷⁵ *Congressional Globe*, 37th Cong., 3rd sess., pp. 1254.

read an extract of a speech given by Clement Vallandigham of Ohio, concluding that it came “very near to ‘treasonable practices.’” To protect the likes of Valliant Val, Stevens said he would move to strike that provision from the bill. “For the partition between treason and treasonable practices, and between treasonable practices and the sentiments of that speech, is so very thin that any deputy marshal not learned in the law, not skilled in these nice distinctions, would be very likely to do great injustice by reporting the gentleman [Vallandigham].” Stevens’ speech was greeted by bursts of laughter. His mocking argument against the “treasonable practices” clause made it clear that he believed the Democrats only wished to aid their rebel friends with impunity.⁷⁶

Congress’ desire to create the new statutory offence of “treasonable practices” reveals the broadening definition of treason. Almost any opposition to the draft certainly would have been considered a practice of treason (to borrow the language of Representative Dunn of Indiana). By including this provision in the conscription bill, Congress was attempting to equate opposition to the draft to treason. Although this clause was ultimately excluded from the final law, the Enrollment Act still brought draft resisters and civilians who encouraged desertion directly under the authority of the military. In truth, therefore, it was unnecessary for Congress to include a “treasonable practices” clause in the Enrollment Act. The military had already issued orders punishing “disloyal practices,” and soon the military would equate draft resistance to treason. Just two months after this debate in the House, General Ambrose Burnside issued his infamous Orders No. 38. This order, which in large measure was intended to support enforcement of the draft, was the basis for the arrest, conviction, and banishment of the

⁷⁶ Ibid., 1262.

now former congressman Vallandigham from Ohio.⁷⁷ Where Congress would not define war-related crimes, the military filled in the gaps.

Despite congressional insecurity about basing legislation on congressional power to punish treason, these laws had a profound effect on the federal law of treason. Treason was still only an “overt Act,” but many overt acts came to be seen as treasonable. Between late 1861 until early 1863, several charges were delivered to grand juries on the law of treason. These continued to construe the law narrowly.⁷⁸ The turning point came in a charge delivered by Peleg Sprague in March 1863.

“Until the year 1861,” declared Judge Sprague of the District of Massachusetts, judges were bound to the text of the Constitution and a 1790 statute on the subject—“these were the only provisions of the criminal law for the suppression of acts directly tending to the destruction of the government.” The paucity of statutes on the subject left treasonably-inclined Americans a wide array of activities by which they might subvert their government. One could “obstruct, resist, or impede the execution of legal process, or . . . assault, beat, or wound any” federal officer, or “endeavor corruptly, or by threats or force, to influence any juror, witness, or officer in any court in the United States.” And these actions “were regarded as minor offences.” Under the old law, if a federal

⁷⁷ *Enrollment Act*, 12 Stat. 735; “Order Authorizing Arrests of Persons Discouraging Enlistments,” August 8, 1862, in *O.R.*, ser. 3, vol. 2, pp. 321-322; “Order to Prevent Evasion of Military Duty and for the Suppression of Disloyal Practices,” August 8, 1862, *O.R.*, ser. 2, vol. 4, pp. 358-359; “General Orders No. 38,” April 13, 1863, in *O.R.*, ser. 2, vol. 5, p. 480. Governor David Tod of Ohio hoped to see his state’s treason law amended to include opposition to the draft. See Porter, *Ohio Politics*, 151.

⁷⁸ See Humphrey Howe Leavitt, “Charge to Grand Jury—Treason,” 30 *Fed. Cases* 1036 (1861); Samuel Nelson, “Charge to Grand Jury—Treason,” 30 *Fed. Cases* 1034 (1861).

marshal was “forcibly resisted” or even murdered “the courts of the United States could sentence the offenders to no higher punishment than imprisonment for one year, and a fine of three hundred dollars.” Sprague continued:

Such was the condition of our criminal jurisprudence for the protection of the life of the government, and to secure the enforcement of the laws, up to the time of the breaking out of this Rebellion. How far it fell short of the duty of congress, is now seen by the light of the conflagration which was permitted to be kindled. *The Criminal Code touched no measure that had not ripened into an overt act of levying war, or actual interference with the administration of the law. All the incipient and preparatory measures, leading to the overthrow of the government, were left without punishment or reprehension.* (emphasis added)

But since the commencement of interstate hostilities, Sprague noted the action Congress had taken to elaborate on the meaning of treason. Congress had passed several new loyalty oaths “affixing the penalties of perjury to their violation” and “creating new offences” against the government. There was also the act of July 1861 against conspiracy to overthrow the government, and the act of July 1862 that made “it a criminal offence to incite, set on foot, assist or engage in, any rebellion or insurrection, or to give aid and comfort thereto” with the intent of preventing “the incipient steps which lead to resistance and rebellion.” Before these statutes had been adopted,

any person might, by words or acts, stir up and incite others to rebellion, or actually enter into conspiracies, and take preparatory measures for the destruction of the government, without being subject to any legal penalty. Those who were plotting and preparing treason were not compelled to secrecy or concealment. They were not driven to cellars or caverns, the appropriate scenes for such dark and nefarious machinations. But they were carried on in open day, in public buildings and halls of legislation. . . . and they have prosecuted their work by public ordinances and declarations, and made preparations for actual hostilities; and all this with legal impunity, there being no statute of the United States by which any one of these conspirators could be arrested as a criminal.⁷⁹

⁷⁹ Sprague, “Charge to Grand Jury—Treason,” 30 *Fed. Cases* 1042-1046 (1863).

These new wartime statutes, and others (such as that of August 1861 which made it a criminal offence to recruit soldiers for the Confederacy, or the Enrollment Act of March 1863), however, broadened the meaning of treason by linking various disloyal acts and opinions in the North to the rebel cause in the South. In the process, treason moved from the legal and constitutional sphere into a partisan realm that touched many political issues. Opposition to war measures such as conscription, centralization of the government, confiscation, emancipation, restriction of speech and the press, was now statutorily linked to treason, even though that opposition was not treason in the strictest constitutional sense. The partisan political acts of war critics, which implicated military matters through a web of circumstances, now could legitimately be brought under government surveillance in a premonitory and preventive way. As Congress passed these new statutes, treason was transformed from a criminal act into a concept for popular political discourse. Indeed, Judge Sprague's charge to the grand jury was circulated in pamphlet form for the Republican-affiliated Union League of Salem, Massachusetts under the title *What is Treason?* and was later praised by major politicians.⁸⁰ The pamphlet title, *What is Treason?*, indicated that whether or not the crimes delineated by

⁸⁰ Peleg Sprague, *What is Treason? A Charge Addressed by the Hon. Peleg Sprague, Judge of the U. S. District Court for the District of Massachusetts, to the Grand Jury, at the March Term, A. D., 1863. Printed for the Union League* (Salem, Mass.: Charles W. Swasey, 1863); Richard Henry Dana, Jr., *A Tribute to Judge Sprague: Remarks of Richard H. Dana, Jr., Esq., at a Dinner Given to the Officers of the "Kearsarge," in Response to a Toast in Honor of the Judiciary* (Boston: Alfred Mudge & Son, 1864), 9-10.

Sprague were technically defined as “treason” in the statutory law, they would be seen as treason in the popular discourse and in wartime political dialogue.⁸¹

The federal law of treason was also reinterpreted by some lower-level state judges. In May 1863, Judge John J. Pearson, a Republican in Harrisburg, Pennsylvania, argued that the “exigency of the times” required him to take the extraordinary step of discussing congressional laws in a grand jury charge that typically would have focused solely on state penal laws. Pearson argued that the government had the power to adopt legislation necessary to win the war. One of these necessary military measures was the Enrollment Act. Pearson noted that some northerners might oppose the enforcement of this act based on “an honest difference of opinion among our citizens as to the best method of” raising troops. Most resistance to the law, however, came from “those who, out of disaffection to the Government, or sympathy with the rebellion, are opposed to any system which would strengthen the military force of the country.”⁸²

The Enrollment Act contained severe penalties for resisting or counseling resistance to the draft, as well as for encouraging desertion. Pearson then reminded the

⁸¹ Several other federal grand jury charges were published as partisan pamphlets in 1863. While not defining treason as broadly as Sprague had, these charges, in their partisanly-published form, clearly linked the new loyalty laws to treason, underscoring the popular understanding of treason that was emerging during the war. See R. S. Field, *A Charge to the Grand Jury of the United States for the District of New Jersey, April 21, 1863* (Trenton: State Gazette and Republican Print, 1863); *Treason and Rebellion: Being in Part the Legislation of Congress and of the State of California thereon, Together with the Recent Charge by Judge Field, of the U.S. Supreme Court, Delivered to the Grand Jury in Attendance at the June Term, Eighteen Hundred and Sixty-Three, of the U.S. Circuit Court for the Northern District of California* (San Francisco: Towne and Bacon, 1863).

⁸² “Judge Pearson’s Charge to the Grand Jury of Dauphin Co.,” *Huntington Globe*, May 6, 1863.

jury that “combinations formed to resist the law are themselves high crimes, and those so uniting or combining, may, even, without the commission of any overt act, be indicted for a conspiracy, and if resistance by force occurs, the parties so resisting are guilty of high treason.” Moreover, Pearson reminded the grand jury of the well-established principle that in treason there are no accessories—all are principals. Thus, if one counseled draft resistance and the counselee later forcibly resisted the draft, the counselor would be equally guilty of the conspiracy and the overt act of treason. “The public speakers, and editors or writers for newspapers, who so flippantly advise resistance to the laws can certainly but little reflect on their actions. Should those whom they address take them at their word, and resort to forcible resistance, not only would the advised, but the advisor, be involved in one common ruin. All would forfeit their lives to the offended law of their country.” In the past the government could afford to overlook “such ravings, . . . but at a time like this, when the struggle is for national existence, *words become things*, and evil counsel cannot be lightly overlooked, or mildly dealt with, and should it lead to unlawful resistance, will probably be punished in proportion to its demerits” (emphasis added).⁸³ In this way, Pearson argued that words became an integral part of the overt act of treason.

Indeed, an Ohio newspaperman, John McElwee, was indicted on four counts of treason in the U.S. Circuit Court for the Southern District of Ohio for editorials he had written in opposition to conscription and the war. “Five hundred thousand men for what?” he had asked regarding an upcoming draft. “Who but an idiot believes in the restoration of the Union and the equality of the black and white races?” After being indicted, McElwee remained defiant: “Come what punishment may, nor jot nor tittle will

⁸³ Ibid.

we abate of the opinion set forth in the article which seems to form the principal count of the indictment.” The treason charge against McElwee was based on the Second Confiscation Act. That he was formally charged with treason reveals how written and published opposition to the draft melded with other federal treason statutes to become seen as an overt act of war. Although McElwee was never convicted, it was not until 1869 that his case was finally dismissed.⁸⁴

As these grand jury charges and the McElwee case reveal, some judges believed that these new federal disloyalty laws broadened the federal law of treason. While treason in the Constitution is defined only as an “overt Act,” certain types of speech as well as some inaction began to be seen as treasonable during the war. In his July 4, 1861 address to the special session of Congress, Abraham Lincoln argued that border-state neutrality “recognizes no fidelity to the Constitution, no obligation to maintain the Union; and while very many who have favored it are, doubtless, loyal citizens, it is, nevertheless, treason in effect.”⁸⁵ Two years later John Forney’s *Philadelphia Press* declared that “Indifference, in a time like the present, is constructive treason, and the man who is

⁸⁴ Kellee L. Blake, “Ten Firkins of Butter and Other ‘Traitorous’ Aid,” *Prologue* 30 (Winter 1998), 290; *The American Annual Cyclopaedia and Register of Important Events of the Year 1864*, 14 vols. (New York: D. Appleton & Co., 1862-1875), 4:422; Robert S. Harper, *Lincoln and the Press* (New York: McGraw-Hill Book Company, 1951), 204; Frank L. Klement, *The Copperheads in the Middle West* (Chicago: University of Chicago Press, 1960), 230-235.

⁸⁵ Lincoln, “Message to Congress in Special Session,” July 4, 1861, in Basler et al., eds., *Collected Works of Lincoln*, 4:428-441. This view had been articulated earlier in the spring by other northern politicians. See, for example, *Philadelphia Inquirer*, May 8, 1861; *Brevier Reports*, 34-36; *Pittsburgh Daily Commercial*, October 9, 10, 13, 1863. Some Democrats also took this position. See *Harrisburg Patriot and Union*, April 20, 1861, which argued that “armed neutrality is only another name for armed resistance.”

infected with it, or who instils [sic] it into others, should be avoided as a leper.”⁸⁶ As the popular definition of treason evolved to include calculated or intentional inaction—especially with some Republicans calling such overt inaction “constructive treason”—we observe a recurrence to the early English statutes and judicial constructions that punished treason of the heart and mind.

IV.

At the same time that the statutory and legal definitions of treason were being amplified to take into account the new kind of war that the country was engaged in, the popular understanding of treason was evolving accordingly. From late 1861 until well beyond the war years, Republican politicians used the broadened definition of treason to describe Democrats as Copperheads, secession sympathizers, traitors, and enemies in the rear. Although in early 1861 Democratic judges defined treason and loyalty in nearly the same terms as Republicans, by late 1861 Republicans no longer trusted them to uphold the law as they were supposed to. One Republican wrote to Secretary of War Simon Cameron about a “treasonable” newspaper in northeastern Pennsylvania. “You will see by the tone of the paper that it is a dangerous sheet, and we would like to have it suppressed if it could be done. The last grand jury here found a true bill against it, but as

⁸⁶ *Philadelphia Press*, July 4, 1863. These ideas had also been present during the Revolution. Historian Bradley Chapin writes, “Anyone, alien or citizen, permanent resident or visitor, who enjoyed the protection of the government, owed allegiance to the American states. The states followed the broad, long-established English rule. . . . State officials rejected the fiction of neutrality. They refused to protect the lives and property of men who shunned the risk of war in hope of guaranteeing to themselves identification with the victor.” See Chapin, *American Law of Treason*, 71.

our judge is a Democrat it is uncertain that anything will be done with it.”⁸⁷ In this case, both the Democratic editor and judge were ostensibly guilty of treason. Such accusations would proliferate over the next few years.

Under the emerging wartime doctrines, treason was often less a matter of overt acts than a matter of the heart and mind, just as it had been under the 1350 statute of Edward III and the constructive treasons of early modern England. Nathaniel Hawthorne wondered how many people in nation’s capital “were true at heart to the Union, and what part were tainted with treasonable sympathies and wishes.” Years after the war, Walt Whitman claimed that there were more traitors in the North than anyone had ever imagined at the time.⁸⁸ One wonders that it was not more apparent who was a traitor at the time. Their overt acts must not have matched their “sympathies and wishes.” Both Hawthorne and Whitman had been pre-war Democrats who adopted the Republican view of loyalty and treason during the war.

Accusations of treason were so wide-spread during the Civil War, and are so well-known by historians, that only a few examples are needed to see how the popular political discourse over loyalty had appropriated language from the constitutional definition of treason. One abolitionist preacher, Miles Sanford, chose Ezra 7:26 as his text for a sermon: “And whosoever will not do the law of thy God, and the law of the king, let judgment be executed speedily upon him, whether it be unto death, or to banishment, or

⁸⁷ William L. Richards to Simon Cameron, December 3, 1861, in *O.R.*, ser. 2, vol. 2, p. 169.

⁸⁸ Nathaniel Hawthorne, “Chiefly about War Matters,” *Atlantic Monthly* 10 (July 1862), 61, quoted in Hyman, *Era of the Oath*, 21; Walt Whitman, “Death of Lincoln” (1879).

to confiscation of goods, or to imprisonment.” This passage, according to Sanford, demonstrated that disobedience to both God and the state constituted treason. While most of Sanford’s ire was directed toward southern slaveholders, he also castigated northerners who harbored pro-slavery sympathies and were complicit in southern treason: “While only those who have levied war against the United States, are guilty of the *overt act*, and punishable by legal penalties, there is a large class of men in the free States who stop short of treason within the meaning of the Constitution. But though guiltless of the *overt act*, they are, nevertheless, guilty of *secret treason* in their hearts, and *spoken treason* on their tongues. In other words, they are, as a slight reflection will enable you to see, *morally* guilty of treason.” These northerners who denounced abolitionism, justified the rebellion, showed sympathy for southerners, or claimed neutrality in the conflict “call themselves Union men, but it is patent to every man of candor, that they are disloyal at heart . . . traitors, and nothing else.”⁸⁹ Through sermons like this one, northern preachers recovered the old English doctrines of treason of the heart and mind. This secret treason that rejoiced in Union setbacks or sympathized with rebel enemies surely equated to compassing or imagining the death of the king.⁹⁰

⁸⁹ Miles Sanford, *Treason and the Punishment it Deserves: A Sermon Founded on Ezra 7:26, and Preached before the Berkshire Baptist Association, at its Thirty-Fifth Anniversary at Sandisfield, Wednesday Evening, October 8, 1862* (Boston: J. M. Hewes, 1862), 3-18. Emphasis in the original. Sanford also pointed out that the Second Confiscation act implemented three of the four punishments prescribed for traitors in Ezra 7:26. Banishment to the South, as in the case of Vallandigham, was not an uncommon punishment during the war.

⁹⁰ “Traitors to human freedom are also traitors to Christianity,” read the title page of another abolitionist tract. See “Christianity versus Treason and Slavery. Religion Rebuking Sedition,” (Philadelphia: H. B. Ashmead, 1864).

Some of the most colorful evidence for this expanded understanding of treason can be found in the popular music of the day. One widely-sung melody, “Just Before the Battle, Mother,” described northern Democrats taking an active role in the fight on the battlefield. The intended irony, however, was that they warred *against* the Union. In the song, a fictional soldier writes home to his mother:

Tell the traitors all around you,
That their cruel words we know,
In every battle kill our soldiers,
By the help they give the foe.⁹¹

Copperheads, according to this song, were directly aiding and abetting the rebel war effort—the antiwar words they spoke played an integral part in the levying of war against the government. Their “cruel words,” in this view, were an overt act that killed Union soldiers. The argument of this song was remarkably similar to that made by Lincoln in his famous Corning letter, in which he argued that antiwar politicians who discouraged enlistments or encouraged desertions did as much damage to the Union armies as rebel bullets.

Some songs accused Copperheads of directly plotting with the rebels.⁹² Another song warned

All traitors living at the North,
And sympathising with the South,
They ought to have a double share
Of what is due to traitors there.

⁹¹ George F. Root, “Just Before The Battle, Mother,” (Chicago: Root & Cady, 1863).

⁹² John Ross Dix, “Ye Sons of the North!” (New York: Charles Magnus, 1864), Rare Book and Special Collections Division, LC.

This song further alleged, like the Michigan legislature's 1862 joint resolution, that northern traitors protracted the war in order to profit from it, "causing thousands for to die."⁹³ A song published during the 1864 presidential campaign said that voting for the Democratic candidate, General George B. McClellan, would "encourage and aid" the rebels.⁹⁴ A song allegedly written by a wounded soldier told a Democratic editor to "go hang yourself" because "your breath is rank with treason" and treason was "stamp'd upon your every feature." The editor would have a "*high* old time," like Judas who "hung himself upon the nearest tree." And if he could not find a rope, "Just call on *us*, we'll find a halter for you!":

Then breathe one word of treason, if you dare,
So bold, so brave, behind the soldier's back,
We'll leave your bones to dangle in the air,
You crawling, slimy, sycophantic pack!

Songs like this one demonstrate the immense hatred that many northern Republicans felt towards Copperhead politicians because of their alleged ties to their "southern brethren."⁹⁵ If Copperheads were aiding and comforting the rebels, then they deserved a traitor's death, which was often execution at the gallows. The multiple allusions in this song to the ultimate penalty for treason could not have been more clear.

⁹³ Mrs. B. Capron, "Traitorism," (Boston, Massachusetts: Davis & Co., 1862), American Song Sheets, ser. 1, vol. 9, LC.

⁹⁴ M. B. Ladd, "I Cannot Support Him! Can You?" (Philadelphia: James D. Gray, 1864), Civil War Song Sheets, ser. 1, vol. 2, Rare Book and Special Collections Division, LC.

⁹⁵ Enarc [pseudonym], "Lines to a Copperhead," American Song Sheets, ser. 1, vol. 5, Rare Book and Special Collections Division, LC.

Politicians, too, believed that Copperheads' actions and sentiments aided the rebels in their cause. When President Lincoln got wind of the number of writs of habeas corpus being issued by Democratic judges in the North, he became "more angry than I ever saw him," wrote Attorney General Edward Bates after a cabinet meeting. Lincoln "declared that it was a formed plan of the democratic copperheads, deliberately *acted* out to defeat the Govt., and *aid* the enemy."⁹⁶ One letter to Abraham Lincoln argued that those who opposed abolition "are in fact the worst of all foes" and "hidden traitors." These men, "who do not hesitate to utter treasonable language, and speak in terms of vituperation of the chief Magistrate of a great Republic, should be visited with condign punishment. We allude to such *overt acts* as Governor Seymour, Benwood, James Brooks, Vallandigham and a host of others have committed. The consignment of such persons to durance vile as *traitors and abettors of treason* would be hailed with acclamation by tens of thousands of the great wise and good."⁹⁷ The letter writer did not actually specify any "overt acts" that had been committed by the three congressmen and governor. That they were prominent Democrats who opposed some of the Lincoln administration's war policies was enough evidence for him that they had aided and comforted the enemy and ought to be punished.

⁹⁶ Edward Bates, diary entry for September 14, 1863, in Howard K. Beale, ed., *The Diary of Edward Bates, 1859-1866* (Washington, D.C.: G.P.O, 1933), 306 (emphasis added).

⁹⁷ J. Wilson "and 100 others" to Lincoln, November 8, 1864, Lincoln Papers (emphasis added).

It is unclear how many northerners were indicted for treason during the Civil War. U.S. Attorney General Edward Bates discouraged local district attorneys from prosecuting too many treason cases:

It is not desirable to try many cases of treason. It is a crime hard to prove, being guarded by a variety of legal technics [sic]. And even conviction makes the convict all the more a martyr in the eyes of his partisans. In a clear case against a person of eminence, of notoriety, I would be glad to see a conviction for the public effect rather than the punishment of the individual. But it would be unfortunate to be defeated in many such cases. It is far better policy I think when you have the option to prosecute offenders for vulgar felonies and misdemeanors than for romantic and genteel treason. The penitentiaries will be far more effectual than the gallows. Prosecute your best cases—not the weak and doubtful. It will not do for us to be habitually beaten.⁹⁸

Bates understood that numerous treason trials were not the most effective way to bring wayward citizens back into their allegiance to the Union government.⁹⁹ By arresting a prominent traitor for treason the northern antiwar movement might find renewed vigor. Imprisoning northern dissenters for lesser crimes of disloyalty was a more effective way to quell dissent and support the northern war effort. Nevertheless, prudence required that some northern citizens be arrested for treason to keep before the public a clear understanding of what was at stake.¹⁰⁰

Some northerners arrested for treason were charged with crimes that fell more under adherence than levying war. Two women arrested under the Maryland state

⁹⁸ Edward Bates to R. J. Lackey, January 19, 1863, in *O.R.*, ser. 2, vol. 5, pp. 190-191.

⁹⁹ This view is similar to Alexander Hamilton's discussion of the presidential pardoning power in cases of treason in *The Federalist* No. 73.

¹⁰⁰ See Lincoln to Erastus Corning and Others, June 12, 1863, in Basler et al., eds., *Collected Works of Lincoln*, 6:260-269.

treason law exemplify the point. Fanny C. Jones was arrested at Baltimore for corresponding with the South.¹⁰¹ Hetty Cary was also arrested at Baltimore for “flaunting a rebel flag in the faces of a New York regiment drilling in front of her father’s residence.”¹⁰² At the federal level charges might even be more of a stretch. A Lieutenant Commander Barrett of the Brooklyn Navy Yard was tried before a court martial “for constructive treason” for ordering his men “to groan for the Abolitionists” as they walked to a Union meeting in New York City.¹⁰³ Whether a groan constitutes speech or an overt act may be a sticky legal issue, but his arrest for counseling others to groan in the face of abolitionist passers-by reveals how speech now fell under the reinvigorated law of constructive treason. Moreover, as the Union war effort became increasingly tied to emancipation, any dissent from that political and military policy could now be seen as treasonable, just as the Rev. Miles Sanford had argued in his 1862 sermon on treason.

V.

In the early months of the crisis, judges of both political parties adopted nonpartisan definitions of treason based on the text of the Constitution, a congressional statute that dated from the early national period, and judicial precedent. Republicans found these definitions to be wanting, however, and they doubted the capacity of Democratic judges to deal appropriately with treason in the North. So Congress and many northern states adopted new legislation that broadened the criminal law and popular

¹⁰¹ *New York Times*, May 17, 1863; *Huntington Globe*, May 27, 1863.

¹⁰² *Chicago Tribune*, December 30, 1862.

¹⁰³ *Chicago Tribune*, September 2, 1862.

understandings of treason. As the legal definition of treason expanded, more political activities were included within its meaning. Thus, as Republican politicians conflated their party platform with preservation of the Union, they could also charge the Democrats with treason simply for opposing their policy agendas. They identified Democrats as disloyal traitors to both the Union and the government because Democrats opposed many Republican war aims. Such a symbolic maneuver was possible because of the semantic transformation taking place. Politicians abandoned the old legal meaning of treason for a new partisan understanding, adapting the definition of treason to their own political advantage for the duration of the war.

Mark E. Neely, Jr., has taken more seriously the constitutional definition of treason than most historians of the Civil War. In *The Fate of Liberty* he points out that treason was “a crime carefully defined in the United States Constitution” and that it “must consist of an ‘overt Act’ of levying war against the U.S. or adhering to its enemies in war by giving them aid and comfort.” Therefore, “an ‘attitude of open rebellion’ did not fit the constitutional definition.”¹⁰⁴ As the grand jury charges from 1861 demonstrate, this understanding of treason was true in the early months of the war, but once Congress and the states broadened the criminal law, judges like Peleg Sprague and John J. Pearson reinterpreted it, and politicians and ordinary Americans formulated new uses of treason in partisan dialogue, the concept of treason took on a wholly new political meaning. In *The Union Divided*, Neely charges Republicans with “misidentification of

¹⁰⁴ Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (New York: Oxford University Press, 1991), 42. Neely also heeds the constitutional definition of treason in *The Union Divided: Party Conflict in the Civil War North* (Cambridge, Mass.: Harvard University Press, 2002), 94-98.

treason,” “carelessly pressing charges of treason,” and “mistaking organized political opposition for treason.”¹⁰⁵ Neely comes to these conclusions because of his proper consideration of Article III of the Constitution. But his assessment of Republican understandings of treason overlooks the changing conceptions of the term from a legal concept into a political one, as well as the redefinition of treason at the state level. Exploring these transformations is the key to understanding the charges that politicians were levying against one another during the tumultuous Civil War.

Many scholars have noted the extreme and invective language used in political debate during the Civil War. Charges of treason flailed about freely, from the rural campaign stump speaker to legislators on both sides of the aisle in state houses throughout the North. Explanations for the impolitic political behavior of the era have relied on references to “the paranoid style” of American politics and the republican rhetoric of the Commonwealth tradition. These explanations reveal, perhaps, the irrational and extreme nature of wartime political discourse, but they mask the gravity and sincerity of the charges that Civil War-era politicians were leveling at one another. If historians merely dismiss charges of treason as partisan rhetorical artifacts of a bygone era, or as misidentifications of treason, they will miss the underlying significance of what politicians were saying about treason and loyalty in wartime in American society.

During the Civil War certain words and speech became seen as overt acts equivalent to treason. As this process took place it became increasingly dangerous to participate in oppositional political discourse. One might oppose a bill in Congress, but once it became law, opposition to the measure—or the enforcement of that measure—

¹⁰⁵ Neely, *Union Divided*, 191.

became a treasonous act. When Republicans charged Democrats with treason they did so in this context—opposition to Republican war measures was, in a very real sense, constructive treason. Opposition to conscription, confiscation, emancipation, legal tender, the income tax, or any other war measure intended to aid the Union war effort became a treasonable offence because opposition harmed the war effort and therefore aided the rebellion.¹⁰⁶ Political opposition became treason, just as it had been in many eras under the old English law.

In this way, Republicans (both politicians and ordinary citizens) amplified the constitutional language of treason into wartime politics. They believed their opponents' thoughts, speech, and actions could be detrimental to the effort to preserve the Union. Political opposition, in this view, potentially *aided* the enemy in wartime. As the war progressed, popular, political and legal understandings of treason effectively changed so that thoughts and speech were often considered treasonable. The speech codes adopted by various northern states, the limits on free speech and press imposed by the federal government and the military, and the loyalty oaths required by all levels of government, all restricted freedom of conscience and expression during the war. Just as civil liberties had been limited during the Revolution, so too, northern Republican leaders during the Civil War believed they must be restricted again to preserve the nation.

¹⁰⁶ For this reason, even the arch-Copperhead Clement L. Vallandigham never publicly counseled resistance to conscription. Vallandigham violently opposed the measure, but he told his audiences that if they wanted the policy changed they had to vote for congressmen who would repeal it. See Frank L. Klement, *The Limits of Dissent: Clement L. Vallandigham & the Civil War* (Lexington: University Press of Kentucky, 1970), 142.

Chapter 2

“Collision” of Powers: How Congress and the President Check and Balance the Least Dangerous Branch

In 1861, disloyalty seemed to lurk in every department of the government.¹ The possibility of treason in the courts was especially frightening to Republicans, as Democratic presidents had been filling the federal judiciary for most of the previous fifty years. Republicans, therefore, looked for ways to rid themselves of disloyal judges, or to check their power to interfere with the northern war effort. In doing so, Republicans in the political branches of the government found ways to check the judiciary—some new, some well-established. Historically, politicians attempt to limit the power of the courts when they are perceived as having stepped beyond proper judicial roles, or beyond what societal norms will allow. In these instances, political realities allow politicians to call for a limitation of judicial power. The power of the courts has been challenged in this way in times of war and national emergency, especially when disloyalty was suspected from the bench.

The Constitution establishes several institutional checks on the judiciary: first, judges are placed on the bench through the selection, advice, and consent of the other two branches of the government. Moreover, a judge may be removed from office through impeachment and conviction by Congress. Congress is also given the power to establish the jurisdiction of the courts. Thus, Congress may strip the courts of jurisdiction in various types of cases to prevent them from intervening in certain political areas. Related

¹ See, for example, “Loyalty of Clerks and Other Persons Employed by Government,” in *Congressional Serial Set*, 37th Cong., 2nd sess., House Report No. 16.

to the jurisdiction question is an even greater power held by Congress to create and abolish “inferior courts” through legislation. Aside from these checks, which are expressly defined in the Constitution, the political branches of the government also have at least one implicit power at their disposal—namely, to ignore a judicial decision. To adopt this position is in effect to make a claim for departmental review of the Constitution—that the courts are not the only lawful interpreter of the Constitution, but that the political branches, and the People, also have the right to interpret it. This is precisely what Abraham Lincoln so eloquently argued for in his first inaugural address, in 1861.

Republicans focused their attention on judges who appeared to impede the Union war effort, whether through active obstruction or through what they believed was too narrow a reading of the Constitution. One Republican senator, when remarking on how the Constitution ought to be construed in his chamber, declared that it was “moral treason” to “stand upon nice points when the country is in danger. What folly to cavil about the rules for governing a family while the house is on fire!” He believed that loyal northerners, like he, should “do all that is in my power to preserve my country . . . even if some phrase in that instrument [the Constitution] may seem to conflict.”² If strict construction of the Constitution was “moral treason” for senators, it certainly was for judges as well. And many Republicans believed that judges who so interpreted the Constitution ought to be chastened before they caused real damage to the war effort.

In the most extreme cases, Republicans advocated the military arrests of disloyal judges. Indeed, in his important *War Powers under the Constitution of the United States*,

² *Congressional Globe*, 38th Cong., 1st sess., p. 1595.

William Whiting, the Solicitor of the War Department, argued that judges who impeded the war effort (even in the proper discharge of their duties), ought to be arrested by the military. Noting that many disloyal northerners sought to use sympathetic judges and juries to protect them from punishment, Whiting asked, “Why should a judge be protected from the consequences of his act of hostility more than the clergyman, the lawyer, or the governor of a State? . . . The more eminent their position, the more dangerous their disloyalty.” Issuing writs of habeas corpus to discharge prisoners held in military custody was an act harmful to the war effort, declared Whiting, and judges who did so ought to be arrested and imprisoned, “if necessary.” Whiting continued with a passage advocating strong military suppression of judges who interfered with military affairs:

So long as the courts do not interfere with military operations ordered by the commander-in-chief, litigation may proceed as usual; but if that litigation entangles and harasses the soldiers or the officers so as to disable them from doing their military duty, the judges and the actors being hostile, and using legal processes for the purpose and design of impeding and obstructing the necessary military operations in time of war, the courts and lawyers are liable to precautionary arrest and confinement, *whether they have committed a crime known to the statute law or not* (emphasis added).

In short, Republicans believed that judges who too narrowly construed the law in times of war—whether motivated by legitimate legal reasoning or by a disloyal desire to aid their rebel friends—ought to be summarily imprisoned by the military.³

Judges who opposed emancipation or who impeded Republican war measures were considered disloyal in many Republican circles. Indeed, in December 1861,

³ William Whiting, *War Powers under the Constitution of the United States*, 10th ed. (Boston: Littleton, Brown, & Co., 1864), 159, 171-172.

Republican John P. Hale of New Hampshire introduced a resolution in the Senate that sought to inquire into the viability of abolishing the Supreme Court of the United States. Hale claimed that the Court “has utterly failed” and “is bankrupt.” The judges had been placed on the bench to be “politicians,” he argued. “This Supreme Court has been a part of the machinery of the old Democratic party, just as much as the Baltimore conventions were.” And the only reason the justices had been confirmed by the Senate, according to Hale, was because of how they would rule in cases like *Dred Scott*. While Hale’s resolution did not gain much traction, a bill did pass in the House reorganizing the district courts in Missouri and Kentucky to rid the federal judiciary of one avowed secessionist and a judge who had issued an opinion in a habeas case that had chastised the Lincoln administration and the military for suspending the writ of habeas corpus. These bills failed in the Senate, however.⁴ When, in 1863, Lincoln placed judges sympathetic to abolition and the war on the federal bench in Washington, D.C., Republicans throughout the North rejoiced, claiming that loyalty would finally administer justice in the nation’s capital city.

To be sure, most Democratic judges were not arrested by the Lincoln administration. But these broadened notions of loyalty, as well as the threat of punishment for diverging from the Republican platform, did seem a real danger to the Democrats. “If a Democrat expresses an opinion against Mr. Lincoln’s war policy, the Republicans forthwith denounce him a ‘traitor,’” wrote the editors of a Democratic paper

⁴ *Congressional Globe*, 37th Cong., 2nd sess., pp. 26-28; Carl B. Swisher, *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States, Vol. V: The Taney Period* (New York: Macmillan Publishing Co., Inc., 1974), 854-856; In re McDonald, 16 *Fed. Cases* 17 (1861); H.R. 70, 37th Cong., 1st sess. (1861).

in Pennsylvania. “The Republicans can abuse Judge Taney, very much a wiser and better man than Lincoln is or can be and it is all right. Praise Abolitionism and you are a patriot; support the Constitution in a consistent, truthful way, and you are a traitor—so say these Republican judges!”⁵

During the Civil War, Republicans in the executive and legislative branches used many methods to silence unruly members of the judiciary. In doing so, they saw themselves as ridding the courts of treason. Because members of the judiciary are given life tenure by the Constitution, and impeachment proceedings are very difficult to bring to a successful conclusion, the political branches of the government pulled out all of the stops and checked the judicial branch in all of the ways they believed they had at their disposal.

I.

Upon his arrival in Washington, president-elect Abraham Lincoln had, what he previously termed, “a task before me greater than that which rested upon Washington.”⁶ One thing that made Lincoln’s job so difficult was the fact that the nation’s capital was surrounded by slave states. The rebels were raising their troops for action, and it was necessary to transport troops to Washington, D.C. to defend the capital and to make sure that border states like Maryland remained in the Union. Out of this situation arose one of the most interesting and consequential treason cases of the war, involving the arrest and

⁵ *Gettysburg Compiler*, July 8, 1861.

⁶ Lincoln, Farewell Address at Springfield, Illinois, February 11, 1861, in Roy P. Basler, et al., ed., *The Collected Works of Abraham Lincoln*, 9 vols. (New Brunswick, N.J.: Rutgers University Press, 1953-1955), 4:190.

confinement of an alleged rebel bridge-burner in northern Maryland. This case led to a collision between the chief judicial officer and the chief executive officer of the United States.

Roger B. Taney, the Chief Justice of the United States, was more than 80 years old when he swore in Abraham Lincoln as president on March 4, 1861. As they stood together on the east portico of the U.S. Capitol, neither could have foreseen the epic constitutional struggle in which they would be engaged within three months. Indeed, they had stood on opposite sides of the slavery divide in the 1850s, and Lincoln was one of the most articulate critics of the chief justice's 1857 *Dred Scott* decision. Taney's opinion in that case, one of the most notorious instances of judicial activism in American history, had revealed the judge to be an ardent defender of slavery and, at least on the slavery issue, a partisan from the bench. In 1861, he would again emerge in a partisan fashion, this time in an attempt to embarrass the Lincoln administration in favor of his southern sympathizing friends. Constitutionally speaking, Taney's position in 1861 was much more defensible than his 1857 position on slavery. Nevertheless, his anti-Lincoln motivation—and private sympathy for southern secession—were clear to most observers of the day, and left the president with a peculiar decision to make.⁷ Should he follow a

⁷ Privately, Taney wrote: "The paroxysm of passion into which the country has suddenly been thrown, appears to me to amount almost to delirium. I hope that it is too violent to last long, and that calmer and more sober thoughts will soon take its place: and that the North, as well as the South, will see that a peaceful separation, with free institutions in each section, is far better than the union of all the present states under a military government, and a reign of terror preceded to by a civil war with all its horrors, and which end as it may will prove ruinous to the victors as well as the vanquished. But at present I grieve to say passion and hate sweep everything before them." See Roger B. Taney to Franklin Pierce, June 12, 1861, in "Some Papers of Franklin Pierce, 1852-1862," *AHR* 10 (January 1905), 368.

judicial mandate that he believed would, in essence, threaten the existence of the Union, or should he ignore the chief justice so that the Union might be preserved?

Maryland, a border slave state, sat in a peculiar position in the spring of 1861. Many Marylanders hoped the state would secede from the Union, while Maryland's governor, Thomas H. Hicks, wavered over whether to support secession or preservation of the Union. Unlike the governor, Lincoln's mind was clear: Maryland must be kept in the Union, and northern troops must be permitted to pass through the state to defend the national capital. When, on April 19, a Baltimore mob attacked the Sixth Massachusetts Regiment as it passed through the city, the political leadership in Maryland faced a vexing situation. The people, and many Democratic leaders, clamored to stop the passage of troops through the Old Line State, while Lincoln insisted that the national emergency and the authority of the federal government necessitated their safe passage.⁸

On the night of April 19 a meeting was held at the home of Baltimore's mayor, where the governor was also staying. While accounts of the gathering vary, it is clear that the participants all opposed the passage of Union troops through the state and desired to find a way to stop their route. Burning railroad bridges seemed the most efficient way. Some members of the meeting claimed that Governor Hicks specifically authorized the burning of bridges, but Hicks later denied ever giving such explicit consent. Either way,

⁸ George L. P. Radcliffe, *Governor Thomas H. Hicks of Maryland and the Civil War* (Baltimore: The Johns Hopkins University Press, 1901), 51-56; Lincoln to Thomas H. Hicks and George W. Brown, April 20, 1861, and Lincoln, "Reply to Baltimore Committee, April 22, 1861, all in Roy P. Basler, et al., ed., *The Collected Works of Abraham Lincoln*, 9 vols. (New Brunswick, N.J.: Rutgers University Press, 1953-1955), 4:340-342.

word quickly spread that the state government had authorized the destruction of bridges north of Baltimore, and within an hour of the meeting at the mayor's house, multiple railroad bridges were ablaze.⁹

John Merryman, a prominent Maryland farmer from Baltimore county, held a commission in the Maryland state militia, and was accused of participating in the burning of bridges between Cockeysville and the Mason-Dixon Line. Under orders from General William High Keim of Pennsylvania, a military force entered Merryman's home at 2 A.M. on the morning of May 25, 1861, arrested him, and confined him at Fort McHenry, in Baltimore harbor. In prison, Merryman was given free access to counsel and friends. He therefore immediately petitioned Chief Justice Taney, a fellow Marylander, for a writ of habeas corpus. This writ, one of the bulwarks of freedom for Englishmen, required the arresting officer to bring "the body" of the prisoner before a court so that the prisoner could either be charged and recommitted to prison, or set free. On May 26 Merryman's petition was given to Taney, who came to Baltimore to sit as a circuit judge in the case. The chief justice issued the desired writ, ordering General George Cadwalader, the commander at Fort McHenry, to bring Merryman to his courtroom at the Masonic Hall in Baltimore at 11 A.M. the following day.¹⁰

About 2,000 people crowded outside the Masonic Hall on the morning of May 27. As the chief justice passed by, walking slowly while leaning on his grandson's arm, "the crowd silently and with lifted hats opened the way for him to pass." The northern press

⁹ Radcliffe, *Governor Hicks*, 56-57; Charles W. Mitchell, ed., *Maryland Voices of the Civil War* (Baltimore: Johns Hopkins University Press, 2007), 62-66.

¹⁰ *Brooklyn Daily Eagle*, May 25, 1861; *Baltimore Sun*, May 27, 1861; *Baltimore Sun*, May 31, 1861; ex parte Merryman (1861), 17 *Fed. Cases* 144-146.

reported that 150 men, “armed to the teeth,” had lined the courtroom to force Merryman’s release if he was brought into court.¹¹

At 11 A.M. sharp Taney took his seat in the courtroom. After a few minutes a colonel who served under General Cadwalader appeared before the court in full military regalia. He presented to the court a letter from the general that explained why Merryman could not be brought before Taney at this time. Merryman was charged with “various acts of treason” and was an officer in a military company that was armed against the United States. Moreover, Cadwalader argued, the president had authorized him “in such cases to suspend the writ of Habeas Corpus for the Public Safety. This is a high and delicate trust and it has been enjoined upon him that it should be executed with judgment and discretion, but he is nevertheless also instructed that in times of civil strife errors, if any, should be on the side of safety to the Country.” Cadwalader then asked the judge to postpone any further action in this case to avoid further embarrassment to the national government.¹²

As might be expected, Chief Justice Taney was indignant, and he immediately ordered an attachment against General Cadwalader for contempt. The following day the U.S. marshal went to Fort McHenry to deliver the attachment, but he was denied admittance to the fort, so he returned to the court with the attachment still in his

¹¹ George William Brown, *Baltimore and the Nineteenth of April, 1861: A Study of the War* (Baltimore: Johns Hopkins University, 1887), 89; *New York Daily Tribune*, June 6, 1861.

¹² *ex parte Merryman* (1861), 17 *Fed. Cases* 146. All quotations from the *Merryman* proceedings are taken from the manuscript documents which are held by the U.S. District Court for the District of Maryland, copies of which are available at the Maryland State Archives.

possession. Taney informed the marshal that he could summon a *posse comitatus* to aid in the seizure of General Cadwalader, but as the military force was vastly superior to any force the marshal might be able to muster, the chief justice released him from any further duties in the case. Taney stated that he had issued the attachment for contempt because the president did not possess the authority to suspend the writ of habeas corpus (nor may he authorize a military commander to do so); furthermore, the military had no right to arrest and detain a civilian except when aiding the judicial authorities of the United States. Taney then stated that he would file an official opinion in the case, being sure that a copy was laid before the eyes of the president.¹³

In his opinion, Taney argued that Merryman's arrest and detention were illegal because they had been done without a warrant or any specific charges. He chastised the president for never declaring martial law or officially suspending the writ of habeas corpus, but he also argued that only Congress could lawfully suspend the writ (because the suspension clause is in Article I), and that civilians were not liable to trial by a military tribunal. In short, Taney believed "that the president has exercised a power which he does not possess under the constitution." Moreover, "He certainly does not faithfully execute the laws, if he takes upon himself legislative power, by suspending the writ of habeas corpus, and the judicial power also, by arresting and imprisoning a person without due process of law." Taney chastised the military authorities for "thrust[ing] aside" the judicial powers in Maryland when there was no danger of obstruction of justice by the civil authorities (Taney must have been unaware that the civil authorities had ordered the burning of the railroad bridges). And he reprimanded the military for

¹³ *ex parte Merryman* (1861), 17 *Fed. Cases* 147.

undertaking the judicial function of defining the legal concepts of treason and rebellion, and for ignoring the protections of the Bill of Rights. Taney concluded on a sorrowful note:

Such is the case now before me, and I can only say that if the authority which the constitution has confided to the judiciary department and judicial officers, may thus, upon any pretext or under any circumstances, be usurped by the military power, at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found.

Taney then closed with a stern admonition to the president: “I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome. . . . It will then remain for that high officer, in fulfillment of his constitutional obligation to ‘take care that the laws be faithfully executed,’ to determine what measures he will take to cause the civil process of the United States to be respected and enforced.”¹⁴

Newspaper reaction to the Merryman affair was swift and pointed. Republican papers held that executive discretion trumped the judicial power in wartime. The *New York Tribune* said that Chief Justice Taney—“the hoary apologist for crime”—had issued the writ without any necessity or warrant, but only because he wanted to side with the traitors. In time of peace, the editors of the *Tribune* conceded, a writ of *habeas corpus* ought to be issued, but it is “not a weapon of war.” “The attempt to rescue [Merryman]

¹⁴ Ibid., 148-149, 152-153. After this proceeding, Taney told an observer in the audience “that he had been brought up to study, & revere, the English Common Law, and that, pained as he was to be so obliged, at such a moment, he would not shrink from asserting its glorious principles, which were likewise those of the Constitution of the United States.” See Frederic Bernal to Lord John Russell, May 30, 1861, Records of the Foreign Office (FO 5/784), National Archives of the United Kingdom.

by writ of habeas corpus was wholly unnecessary, and eminently unpatriotic. No Judge whose heart was loyal to the Constitution would have given such aid and comfort to public enemies.” Merryman was certainly a traitor; he therefore should be confined at Fort McHenry until it was safe to release him or commit him to a civil trial. In the meantime, the courts ought not to interfere. “The times are perilous,” wrote the editors of the *Tribune*. “We advise [the judges of the Supreme Court] to attend to their appropriate duties in the Courts, and leave the task of overthrowing this formidable conspiracy against Liberty and Law to the military and naval forces of the United States.” The editors concluded that Taney was “the leader of the Secessionists of Maryland” and a “rebellious judicial autocrat,” whose opinion was “as full of aid and comfort for the traitors generally as an egg is of meat.”¹⁵

Similarly, the *New York Times* accused Taney of wanting “to bring a collision between the Judicial and the Military Departments of the Government, and if possible to throw the weight of the judiciary against the United States and in favor of the rebels,” for Taney was “at heart a rebel himself.” The *Times* found the controversy between the courts and the military unfortunate: “A collision of civil and military authority is always to be, if possible, shunned; because the majesty of law must, in all cases, succumb to the necessities of war, and the respect which the magistracy must assert for itself in a period of peace, is impaired by the sight of a fruitless struggle for supremacy at a period when military law is in the ascendant. In the case of John Merriman, the interposition of Chief Justice Taney can only be regarded as at once officious and improper.”¹⁶

¹⁵ *New York Daily Tribune*, May 29, 30, June 1, 5, 1861.

¹⁶ *New York Times*, May 29, 1861.

Even nonpartisan presses were critical of the chief justice. The New York *World*—in 1861 a politically independent paper, though later to become a strong Democratic organ—criticized Taney for the injudicious tone of his courtroom remarks towards the president: “It is consistent neither with dignity nor courtesy for one high public functionary either to lecture another on the necessity of doing his duty or to give notice of such an intended lecture.” The *World* further chastised Taney for writing an opinion that was “so obviously intended as a grave inculpation of the President of the United States” and for seeking “to weaken and undermine the confidence of the country in the President. In the midst of a rebellion which threatens the very existence of the government, its highest judicial officer volunteers the weight of his influence and of the influence of his high position in favor of the rebels.”¹⁷

Democratic papers, by contrast, reprinted Taney’s opinion and lavished it with praise. The *Crisis*, in Columbus, Ohio, argued that the military should only interfere in civilian affairs if the judiciary had failed to do its duty. Moreover, the editors of the *Crisis* worried that the nation had reached a “point in our history when men on mere *suspicion of political opponents*, are deprived of their liberty, and incarcerated in our jails, or held by military power.” The judiciary was on the verge of being “converted into mere partisan assemblies” with newspaper editors acting as judges and the government administering “*vengeance instead of justice*.”¹⁸ The *New York Weekly Journal of Commerce*, a staunchly Copperhead paper, saw the Merryman affair as “a collision

¹⁷ New York *World*, May 29 and June 7, 1861.

¹⁸ Columbus, Ohio *Crisis*, June 6, 20, 1861.

between the law as it stands recorded, and its sworn administrators.” Its editors pointed out that the writ was not intended to protect the loyal only, but also those accused of treason:

The remark of one of the New York papers that the writ was “originally intended to secure the liberty of loyal men,” and that “it would be a gross perversion of its powers to employ it as the protecting shield of rebels,” is a specimen of the very tyranny which the writ of *habeas corpus* is designed to overcome. The writ was originally and always intended as a defence of the subject against the tyranny of the government; and nowhere is such defence more needed than under a government like our own. The article in the Tribune, to which we refer, is the grossest perversion of right and of free principles that ever disgraced the pages of a New York paper. Says the Tribune,—“of all the tyrannies that afflict mankind, that of the Judiciary is the most insidious, the most intolerable, the most dangerous.”!!

To the editors of the *Journal of Commerce*, all of Lincoln’s constitutional abuses justified the South in the course of action it had taken. If Lincoln so freely deprived northerners of their constitutional rights, southerners, of course, could only expect worse. The *Brooklyn Daily Eagle*, another Democratic paper, simply remarked that the “collision” between Taney and the military was not a “conflict of laws” but “simply a conflict between law and illegal violence, in which law suffered total defeat” because military commanders, at their own discretion, could arrest civilians suspected of “political offences,” and “the Supreme Court of the United States is summarily set aside by order of President Lincoln.”¹⁹

To be sure, Taney privately professed to want no collision with the president. “I certainly desire no conflict with the Executive Department of the Government; and would be glad, as you will readily suppose, to pass the brief remnant of life that may yet be

¹⁹ *New York Weekly Journal of Commerce*, June 6, 1861; *Brooklyn Daily Eagle*, July 8, 1861.

vouchsafed to me in peace with all men, and in the quiet discharge of every-day judicial duties,” wrote the aged chief justice. “Yet, I trust I shall always be found ready to meet any responsibility or any consequence that my official duty may require me to encounter.” While he was alarmed and saddened by the reaction of much of the North to Lincoln’s suspension of the writ, he still found it gratifying “to see the judiciary firmly performing its duty and resisting all attempts to substitute military power in the place of judicial authorities.” The *Merryman* case had placed a “grave responsibility” upon the old Democrat. “But my duty was plain—and that duty required me to meet the question directly and firmly, without evasion—whatever might be the consequences to myself.”²⁰

His duty was plain to others as well. Following one session of the *Merryman* proceedings, the mayor of Baltimore approached the bench and thanked Chief Justice Taney for the position he was taking. “I am an old man, a very old man,” replied the judge, “but perhaps I was preserved for this occasion.” “Sir, I thank God that you were,” replied the mayor.²¹

This occasion for which Taney was preserved proved to be a major turning point in the Lincoln administration’s dealings with the courts. Here was the chief judicial officer of the United State reprimanding the president, ordering him to perform certain duties. Perhaps the most pressing question for Lincoln was, What is to be done? Early in the affair Taney believed that he would be arrested, and rumors circulated throughout the

²⁰ Taney to George W. Hughes, June 8, 1861, in Samuel Tyler, *Memoir of Roger Brooke Taney, LL.D., Chief Justice of the Supreme Court of the United States* (Baltimore: J. Murphy & Co., 1872), 430-431; Roger B. Taney to Samuel Treat, June 5, 1861, quoted in Carl Brent Swisher, *Roger B. Taney* (New York: Macmillan Co., 1935), 554; Taney to Franklin Pierce, June 12, 1861, in “Some Papers of Franklin Pierce,” 368.

²¹ Brown, *Baltimore and the Nineteenth of April*, 90.

North that he had resigned, or that his functions as a judge would be suspended. “There is a fear abroad among the rebels that . . . [Taney] will suddenly find himself in the embraces of the strong arm of that same military power which he is so defiant of,” editorialized the *New York Tribune*. The *New York World* suggested that a civil trial for Merryman would be preferable, but if Taney did not impartially fulfill his duty as a trial judge, then Congress could impeach him.²²

But none of these things happened. Taney continued to sit as a judge; articles of impeachment were never brought against him; he was never arrested. Instead, Lincoln simply ignored both the judge and his opinion. Lincoln then directed Attorney General Edward Bates to write an opinion on suspension of habeas corpus, which, of course, justified all of the president’s actions.²³ Finally, on July 4, 1861, Lincoln defended the course he had taken in a special message to Congress, which he called into session on the nation’s eighty-fifth birthday.

In answer to Taney and his critics, Lincoln argued that this momentous issue of civil war “presents to the whole family of man, the question, whether a constitutional republic, or a democracy . . . can, or cannot, maintain its territorial integrity, against its own domestic foes.” Or put another way, “Must a government, of necessity, be too strong for the liberties of its own people, or too weak to maintain its own existence?” In Lincoln’s mind, it was neither of these things. The People’s liberty would be protected,

²² Swisher, *Taney*, 551; Columbus, Ohio *Crisis*, June 6, 1861; *New York Times*, May 31, 1861; *New York Daily Tribune*, June 2, 1861; *New York World*, June 5, 1861.

²³ Edward Bates, “Suspension of the Privilege of the Writ of Habeas Corpus,” July 5, 1861, in *Official Opinions of the Attorneys General of the United States*, 43 vols. (Washington, D.C.: W. H. and O. H. Morrison, 1852-1996), 10:74-92.

but the government would also flex its muscle enough to stamp out treason and insurrection. “So viewing the issue,” said Lincoln, “no choice was left but to call out the war power of the Government; and so to resist force, employed for its destruction, by force, for its preservation.”²⁴

At this point Lincoln explained the course of actions he had taken. After calling out the militia for the nation’s defense, he authorized his commanding general, Winfield Scott, to suspend the writ of habeas corpus and, at his own discretion, to detain “such individuals as he might deem dangerous to the public safety.” Nevertheless, this authority was to be exercised “sparingly.” Still, because Lincoln’s actions were being challenged in the courts and by the Democratic press, Lincoln felt obliged to answer his detractors with the constitutional grounding for his actions. He reminded the nation that all of the laws were being resisted in a large part of the Union. Lincoln wondered if those laws should all be allowed to fail even if he could preserve them by violating one single law. “To state the question more directly,” continued Lincoln, “are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?” But Lincoln denied that any law had been broken, for the Constitution allowed the writ to be suspended “in cases of rebellion or invasion, the public safety may require it,” and Lincoln certainly faced a case of rebellion. For those who claimed that only Congress could suspend the writ, Lincoln replied that “the Constitution itself, is silent as

²⁴ Lincoln, Message to Congress in Special Session, July 4, 1861, in Basler, et al., eds., *Collected Works of Lincoln*, 4:426.

to which, or who, is to exercise the power; and as the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion.²⁵

In this passage Lincoln touched on the intent of the framers, thus showing his desire to understand and construe the meaning of the document. The text itself was ambiguous. It declared that the writ could be suspended, but it never clearly stated by whom. Considering the circumstances—a rebellion in process and Congress out of session—Lincoln deemed it necessary, expedient and constitutional to authorize suspension of the writ himself. In doing so, Lincoln was performing an act of constitutional construction—he was determining the meaning of the Constitution for himself, independent of what Taney or any other member of the courts had to say.

Lincoln’s argument in his July 4 address was cogent and sound, and would be repeated and amplified by law professors at Harvard and Yale, as well as eminent lawyers and jurists throughout the North.²⁶ In ignoring Chief Justice Taney’s opinion in the *Merryman* case, Lincoln was acting on the statement in his first inaugural address in which he had argued that the Supreme Court was not the sole and final arbiter on the

²⁵ *Ibid.*, 429-431.

²⁶ [Henry Dutton], “Writ of Habeas Corpus,” *American Law Register* 9 (October 1861), 705-717; William Whiting, *War Powers under the Constitution of the United States*, 10th ed. (Boston: Little, Brown, & Co., 1864); Horace Binney, *The Privilege of the Writ of Habeas Corpus under the Constitution* (Philadelphia: C. Sherman and Son, 1862); Joel Parker, *Habeas Corpus and Martial Law: A Review of the Opinion of Chief Justice Taney, in the Case of John Merryman* (Philadelphia: John Campbell, 1862).

meaning of the Constitution. He, as a lawyer, statesman, and constitutionally elected president, could also weigh in on what the great charter intended. And when he found the courts' understanding of the Constitution to be wanting, or potentially harmful to the Union cause, he would act under his own understanding of the text. This was not extra-constitutional, in his mind—it was, in fact, constitutionally responsible for a chief executive to interpret the Constitution in a reasonable manner and to act accordingly. In so doing, Lincoln asserted his authority as a constitutional actor. In ignoring Chief Justice Taney, Lincoln checked the power of the judiciary; he refused to allow a disloyal—or potentially disloyal—judge to disrupt the Union war effort and aid the rebel cause.

II.

When the Civil War broke out, many southern judges on the federal bench cast their lot with the rebel cause. Thirteen federal judges resigned their commissions, seven of whom accepted judicial positions in the newly organized Confederate court system.²⁷ Judge West Hughes Humphreys, a district judge in Tennessee, took a different path. He simply stopped holding sessions of the federal court, and instead opened court for the Confederate States of America. Humphreys therefore left the Lincoln administration with an awkward predicament. The Republicans in Washington wanted to replace him without acknowledging the legitimacy of the Confederate government and the rebel commission he held. But if they simply replaced him with a loyal judge, they would be

²⁷ Emily Field Van Tassel, *Why Judges Resign: Influences on Federal Judicial Service, 1789 to 1992* (Washington, D.C.: Federal Judicial Center, 1993), 51-122.

implicitly recognizing that the nation had been severed and that his federal commission was now null and void in Tennessee. This Congress would not do, for no good Union man would concede that Humphreys' new rebel commission was valid, nor that it was issued by a legitimate, *de jure* government. His federal commission, in this view, was still binding. Consequently, Humphreys had to be removed from office in a constitutional manner before he could be replaced. Proceeding in this way, Congress intended to demonstrate its authority over a seceded state, as well as a rebellious civil officer.

West Hughes Humphreys was the son of a state judge and one-term U.S. congressman. Born in 1806, Humphreys was educated at Transylvania University, but, owing to poor health, he had to leave school before he could graduate. He completed his legal education at his father's office and was granted a license to practice law in 1828, at the age of twenty-two. In the three decades preceding the Civil War, Humphreys gained prominence within the Tennessee legal community. He served as a delegate to the 1834 state constitutional convention, he spent several years in the Tennessee legislature, and for more than a decade he served as the Attorney General of Tennessee and as the reporter for the Tennessee Supreme Court. In the latter capacity he edited eleven volumes of the state high court's reports.²⁸

Appointed to the federal bench in 1853 by President Franklin Pierce, Humphreys, a native of Tennessee, was a strong advocate of state rights and slavery. When the move for secession began, he threw his support behind the southern cause. According to

²⁸ Kermit L. Hall, "West H. Humphreys and the Crisis of the Union," *Tennessee Historical Quarterly* 34 (Spring 1975), 49-51; West H. Humphreys file, Federal Judicial History Office, Federal Judicial Center, Washington, D.C.

historian Kermit Hall, “Humphreys’ support of secession in late 1860 marked the culmination of a thirty-year evolution in his thinking about government, political parties, and the place of the South in the Union.” In 1832, for example, he opposed nullification, seeing it as a corollary to the Federalist party’s disunion schemes during the War of 1812. Nevertheless, according to Hall, Humphreys “harbored suspicions about the federal government.” In the 1830s he opposed expanding the jurisdiction of the federal courts, as well as federally-funded internal improvements and federally-sanctioned monopolies, like the Second National Bank. In many ways Humphreys feared that the North sought to use the central government to take political and economic advantage of the South. He distrusted northern Whigs and Democratic followers of Martin Van Buren, many of whom opposed tariff protection for southerners and the expansion of slavery into the western territories after the Mexican War. By the time Lincoln won the election of 1860, Humphreys had concluded that southern interests would not be protected in a nation ruled by Republicans.²⁹

In late 1860 and early 1861 Humphreys delivered stump speeches and wrote newspaper editorials in favor of secession. On December 29, 1860, in a public speech outside of his Nashville courthouse, Humphreys defended the right of South Carolina to leave the Union. One witness of the speech noted that Humphreys was one of “the speakers and agitators on the side of revolution” and that his remarks indicated “strong disloyalty.” Others believed his actions were unbecoming of a federal judge. During the speech, Henry S. Foote, a former U.S. Senator from Mississippi and later to become a

²⁹ Hall, “Crisis,” 52-54. In some instances Humphreys seemed willing to support federal internal improvements, such as a nationally-financed transcontinental railroad system, which he believed would provide economic benefits to both North and South.

Confederate congressman from Tennessee, asked Humphreys “how he could, consistently with his oath as a judge of a court of the United States, make the remarks he had; which, in their tendencies, were to excite rebellion against the Government of the United States.” In February 1861 Humphreys published two editorials castigating the New England “Federalists” and “Black Republicans” for making “war on the Constitution and the rights of the people of the South.” Because the North had disregarded the constitutional rights of the South, Humphreys believed the southern states had a constitutional right to secede.³⁰

In April 1861 Humphreys refused to begin the regular term of the federal district court. He did charge a grand jury on the law of treason, however; and he used the occasion to chastise President Lincoln for his April 15 call for 75,000 members of the militia. Humphreys maintained that Lincoln’s proclamation was unconstitutional and that the governor of Tennessee ought to disregard it. Moreover, he argued that “in the present collision between the North and the South there is no such thing as treason, and that the parties taken on the one or the other side should be held as prisoners and not as traitors.”³¹ In taking such a position, Humphreys was arguing for the *de jure* nature the Confederate nation. Treating Tennessee Unionists or rebels as prisoners of war (depending upon who captured whom), rather than as traitors, would signify that the United States and Confederate States stood as co-equals among the nations and under the

³⁰ Testimony of John Lellyett, in *Congressional Serial Set*, 37th Cong., 2nd sess., House Report No. 44, pp. 7-8; *Congressional Globe*, 37th Cong., 2nd sess., pp. 2947-2948; *Nashville Union and American*, February 6 and 9, 1861, quoted in Hall, “Crisis,” 54-55; *Philadelphia Press*, May 7, 1862.

³¹ *Nashville Union and American*, April 17, 1861.

laws of war. Moreover, this constitutional position indicates why Humphreys did not bother to resign from his federal post. In his mind, his ties to the government in Washington were completely severed—he had no obligation to resign, for he was now the citizen of a new political community.

Humphreys' actions in favor of the rebel cause caught the attention of Confederate leaders in Tennessee and Richmond. One man from Nashville recommended Humphreys for a seat on the Confederate bench, declaring that his "position . . . is right and his conduct highly praiseworthy." On July 24, 1861, Confederate President Jefferson Davis nominated Humphreys for the judgeship in the District of Tennessee. Although Humphreys served in that capacity from the beginning of the war, it does not appear that he was confirmed by the Confederate Senate until March 29, 1862.³²

As a judge on the rebel court Humphreys gained a reputation as a fair-minded adjudicator. Indeed, during the war he was criticized from both sides of the political-rebellion spectrum. Several leading Confederates complained that Humphreys released too many unionists on writs of habeas corpus, including "several prisoners who are beyond doubt guilty of burning the railroad bridges."³³ On the other side, "Parson" William G. Brownlow, a famous Knoxville editor who strongly favored the Union and

³² S. R. Cockrill to General Walker, May 14, 1861, in *O.R.*, ser. 1, vol. 52, pt. 2, p. 99; *Journal of the Congress of the Confederate States of America, 1861-1865*, 7 vols. (Washington, D.C.: GPO, 1904), 1:282-283; 2:108-109; Nashville *Union and American*, July 21, 1861; John Catron to William Carroll, October 9, 1861, Lincoln Papers.

³³ William Carroll to Judah P. Benjamin, November 29, 1861, in *O.R.*, ser. 1, vol. 7, p. 720 and ser. 2, vol. 1, p. 850; Robertson Topp to Robert Josselyn, October 26, 1861, in *O.R.*, ser. 2, vol. 1, p. 834; West Hughes Humphreys to Whom It May Concern, October 5, 1861, John Page Nichols Papers, The Huntington.

became a victim of Humphreys' judicial ire, called him "a vile man" who was "despised and disgraced." According to Brownlow, Humphreys "was always speechifying on the bench, making violent political harangues" and was "a terror to the Union men of East Tennessee all the time."³⁴ Kermit Hall concludes that, as a general rule, Humphreys "refused to mete out harsh judgments" on Tennessee Unionists. As a judge, he occasionally delivered pro-Confederate political speeches from the bench, but he steadfastly maintained the procedural rights of defendants. Moreover, he almost always gave Unionists the opportunity to avoid punishment by taking an oath of loyalty to the Confederacy. Neither side—rebels or Unionists—was fully content with Humphreys' style of justice.³⁵

As the Union armies pushed through Tennessee in early 1862, Confederate leaders fled Nashville, and Lincoln appointed Senator Andrew Johnson military governor of the state. Humphreys moved his court eastward to Knoxville. According to one U.S. congressman, "When the Federal troops arrived in the city of Nashville, he hastened away with great speed." Unionists in Tennessee saw their political fortunes taking a sharp swing for the better. Under these improving circumstances, they hoped to punish the rebel traitors who had brought civil war to their homes. Thus, Congressman Horace Maynard, a native of Massachusetts who relocated to East Tennessee in the late 1830s, introduced a resolution in January 1862 calling for an investigation of Judge Humphreys'

³⁴ Forrest Conklin, ed., "'Parson' Brownlow on the Impeachment of Judge Humphreys and Other Matters in Washington, D.C.—June, 1862," *East Tennessee Historical Society's Publications* 56-57 (1984-1985), 124, 127; *Congressional Globe*, 37th Cong., 2nd sess., p. 2948.

³⁵ Hall, "Crisis," 56-60.

dereliction of duty as a federal judge. In February the Judiciary Committee of the House held hearings on the subject, and in May 1862 the Committee reported back to the House that there was “no room for doubt” that Humphreys had neglected his duties as a federal judge and was now serving under a rebel commission, upholding and applying “the treasonable acts of the [Confederate] congress.”³⁶

On May 19, 1862, by a unanimous vote, the House of Representatives adopted seven articles of impeachment against Judge Humphreys. Members of the House also began to look for witnesses to testify against the judge in the Senate’s court of impeachment. The first article stated that Humphreys had neglected his duties as a United States citizen and his oath of office as a federal judge, and that during his December 29, 1860 speech he had sought to incite rebellion. The second article stated that he had abused the high trust reposed to him and that he had openly supported secession. The third article claimed that he had organized rebellion and levied war against the United States. The fourth article stated that he had conspired to oppose by force the authority of the national government. The fifth article charged him with neglecting to hold sessions of the federal court in Tennessee. The sixth article stated that he had illegally acted as a judge in an illegal court and had violated the rights of Unionists in Tennessee, including Senator Andrew Johnson and Associate Justice of the Supreme Court John Catron. The seventh article stated that Humphreys had intended “to

³⁶ Hall, “Crisis,” 60-61; *Congressional Serial Set*, 37th Cong., 2nd sess., House Report No. 44, p. 2; *Congressional Globe*, 37th Cong., 2nd sess., p. 1966; Biographical Directory of Congress.

injure” William G. Brownlow, the Knoxville editor, and had caused him to be arrested in violation of the U.S. law.³⁷

For the purposes of this study, the most significant article was the third, which declared that Humphreys had, in 1861 and 1862, “unlawfully, and in conjunction with other persons, organize[d] armed rebellion against the United States and lev[ied] war against them.” Significantly, the word “treason” never appeared in any of the articles of impeachment, but the House of Representatives understood clearly what charges it was levying against Judge Humphreys. Charles R. Train, a Republican from Massachusetts, stated that “The third article charges the defendant with high treason; that within the State of Tennessee he did unlawfully, and in conjunction with other persons, organize armed rebellion against the United States, and levy war against them.” Train argued that the House did not need two witnesses to the same overt act of treason because that constitutional stipulation only applied to indictments for treason. “We shall, however, offer evidence which, I think, will satisfy the Court [of Impeachment] beyond any question that he participated in the conduct of the rebellion, so as to bring him precisely within the meaning of the terms ‘levying war’ against the Government of the United States.”³⁸

³⁷ *Congressional Serial Set*, 37th Cong., 2nd sess., House Misc. Doc. No 76; *Congressional Globe*, 37th Cong., 2nd sess., p. 2134; *Journal of the House of Representatives of the United States: Being the Second Session of the Thirty-Seventh Congress* (Washington, D.C.: GPO, 1862), 150, 400, 646; Horace Maynard to Andrew Johnson, May 19, 1862, in Leroy P. Graf and Ralph W. Haskins, eds. *The Papers of Andrew Johnson*, 16 vols. (Knoxville: University of Tennessee Press, 1967-2000), 5:406. There are several other similar letters in this volume asking for information or for Johnson to do what he can to aid in the trial.

³⁸ *Congressional Globe*, 37th Cong., 2nd sess., p. 2943.

The House selected five members to serve as managers of the impeachment trial. The House also called twenty-three witnesses to testify against the judge. These witnesses included Andrew Johnson (who was excused from attending the trial) and Horace Maynard (the East Tennessee congressman who had introduced the first resolution against Humphreys), as well as Confederate civil servants who had worked in Humphreys' court, Tennessee attorneys, and victims of Humphreys' anti-Unionist form of justice. In the meantime, the Senate had sent for Humphreys to come and defend himself, but he never appeared. The Senate, therefore, allowed the House managers to proceed with the case and the calling of witnesses. The witnesses substantiated the charges that Humphreys had neglected to hold sessions of the federal court after April 1861, that he was acting as a Confederate judge, that he had fined, imprisoned and confiscated the property of Tennessee Unionists, that he had openly advocated for secession before the outbreak of the war, that he had acted as a partisan for secession from the bench, and that he had cooperated with the rebel military to help defeat the North. After the calling of only five witnesses the House managers rested their case. The Senate then voted and convicted Humphreys on all seven articles, with the exception of the second count of the sixth article—that Humphreys had illegally ordered the confiscation of the property of Andrew Johnson and John Catron. The Senate then voted to remove him from office and disqualify him from ever again holding a federal office.³⁹

³⁹ Ibid., 2262, 2617-2618, 2621, 2942-2953.

One periodical summed up the proceedings this way: “Full proof of his treason was given, and the vote for conviction was unanimous.”⁴⁰

It appears that Tennessee Unionists had a replacement for Humphreys in mind for some time before the impeachment took place. On March 4, 1862, Congressman Maynard, Andrew Johnson, and Emerson Etheridge, a former congressman and the present clerk of the U.S. House of Representatives, sent a letter to the Lincoln administration urging Connally F. Trigg, an East Tennessee lawyer and one of the witnesses against Humphreys, for the federal judgeship. President Lincoln was apparently leaning towards General John B. Rogers, but Johnson and his Tennessee friends urged Lincoln not to give Rogers the appointment. “I hope you will make no nomination of Judge for Tennessee for the present,” telegraphed Johnson to the president. “There is ample time & we must have the right man, one who will meet the present requirements.” When, in July 1862, Lincoln still seemed set on Rogers, “Parson” Brownlow told Lincoln and Attorney General Edward Bates “that if they could not appoint a better *Lawyer* than Rogers, to leave the office vacant, for the next fifty years, as we did not wish to be made fun of by secesh.” Finally, on July 6 Johnson informed Lincoln: “Rodgers [sic] is my personal friend but he will not do for Judge at this time.” Johnson then said that if he were permitted, he will tell Lincoln who ought to be selected.

⁴⁰ *Christian Advocate and Journal*, July 3, 1862. For all intents and purposes, Humphrey’s conviction in the court of impeachment was a conviction for treason. See U.S. Constitution, art. 2, sec. 4 (1787).

Lincoln seems to have followed Johnson's advice. Ten days later he nominated Trigg as the judge of the U.S. district courts in Tennessee.⁴¹

Judge Humphreys was arrested by the Union military in late 1864 and exchanged as a prisoner of war in early 1865.⁴² Ironically, treating him as a prisoner of war arguably sustained the legal view that he had taken all along—that this was a war between co-equal, sovereign nations that could exchange enemy combatants.⁴³ After the conflict ended an indictment for conspiracy—not treason—was brought against the former judge in the U.S. circuit court at Nashville. Unless he could secure a pardon from the president, Humphreys' fate would be decided by the very judge who had been chosen to replace him.

III.

Judges who had committed no actual crime still were not secure from interference by the political branches of the government. By the U.S. Constitution federal judges are given life tenure—they “shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished

⁴¹ Horace Maynard, Andrew Johnson, and Emerson Etheridge to Edwin M. Stanton and William H. Seward, March 4, 1862; Andrew Johnson to Lincoln, May 18, 1862; William G. Brownlow to Johnson, July 1, 1862, all in Graf and Haskins, eds. *Papers of Andrew Johnson*, 5:185, 403, 524, 526; Johnson to Lincoln, July 6, 1862, Lincoln Papers; *Senate Executive Journal*, 37th Cong., 2nd sess., p. 416.

⁴² William P. Lyon to Sam. M. Kneeland, December 21, 1864, in *O.R.*, ser. 1, vol. 45, pt. 1, p. 638; R. O. Ould to John E. Mulford, January 18, 1865, in *O.R.*, ser. 2, vol. 8, pp. 86-87.

⁴³ To be sure, prisoner exchanges were conducted by the Union more out of the need for convenience and the maintenance of human dignity than out of any recognition of the southern confederacy.

during their Continuance in Office.” They may “be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”⁴⁴ But Congress and the executive branch have not always found it practical to impeach a sitting federal judge, and in several instances have found novel ways to rid the judiciary of a nuisance on the bench. Prior to Thomas Jefferson’s ascendance to the presidency, for example, the Federalist Congress passed the Judiciary Act of 1801, which created sixteen new judgeships for the Federalist President Adams to fill. In 1802, after the Jeffersonian-Republican takeover of Congress, the Judiciary Act of 1801 was repealed, removing the recent Federalist appointees from office, and a new act was passed, giving the privilege of filling the courts to President Jefferson.⁴⁵

The impeachment and conviction of Judge Humphreys was an easy case, for his complicity in the rebel war effort was beyond doubt. Other instances arose, however, in which the actual disloyalty of a federal judge was not so easily dealt with. The most prominent case was that of William Matthew Merrick, an associate justice on the Circuit Court in the District of Columbia. Merrick, at age forty-three, had been on the bench since 1855, being appointed by President Franklin Pierce. Although a Democrat, Merrick came from Whig ancestry—his father, William Duhurst Merrick, had served in the U.S.

⁴⁴ U.S. Constitution, art. 3, sec. 1, and art. 2, sec. 4 (1787).

⁴⁵ *An Act to Provide for the More Convenient Organization of the Courts of the United States*, 2 Stat. 89; *An Act to Repeal Certain Acts Respecting the Organization of the Courts of the United States; and for Other Purposes*, 2 Stat. 132; *An Act to Amend the Judicial System of the United States*, 2 Stat. 156.

Senate as a Whig from 1838 to 1845. Merrick's wife, however, came from a Kentucky family with many rebel ties.⁴⁶

From the beginning of the war Merrick was suspected of disloyalty. An anonymous letter, sent to General Winfield Scott in January 1861, implied that Merrick hoped to see Washington overrun by secessionists. Later that spring, he allegedly refused to administer the oath of office to one of Lincoln's appointees to the Treasury Department, telling the civil servant, "I consider a man holding your political opinions, as being unfit to hold any office, and I will not be a party to qualify you to do so." Many newspapers referred to him as having sympathy for the rebellion, and Secretary of the Navy Gideon Welles noted that "the hearts and sympathies of the present judges [of Merrick's court] are with the Rebels."⁴⁷

In the early months of the war, Merrick made a name for himself issuing writs of habeas corpus demanding that minors who had enlisted in the Union army be sent home. Lawyers in the nation's capital who sought these writs, according to one newspaper account, "seemed to have a willing assistant in Judge Merrick, who readily granted orders, citations, and the thousand and one processes by which lawyers obtain fees and

⁴⁶ H. Levin, ed., *Lawyers and Lawmakers of Kentucky* (1897; reprint, Easley, S.C.: Southern Historical Society Press, 1982), 628-631; Virginia Jeans Laas, ed., *Wartime Washington: The Civil War Letters of Elizabeth Blair Lee* (Chicago: University of Illinois Press, 1991), 249, 271, 285, 446.

⁴⁷ *O.R.*, ser. 2, vol. 2, p. 1021; J. C. Derby, *Fifty Years among Authors, Books and Publishers* (New York: G. W. Carleton & Co., 1884), 645; diary entry for March 6, 1863, in Edgar Thaddeus, ed., *The Diary of Gideon Welles, Secretary of the Navy under Lincoln and Johnson*, 3 vols., (Boston: Houghton, Mifflin & Co., 1911), 1:800.

annoy people.”⁴⁸ According to court records, Merrick issued about twenty of these writs in the late summer and autumn of 1861.⁴⁹ Merrick was faithful to the law—for it was illegal to enlist a minor without a parent’s consent—but his actions were an embarrassment to the Lincoln administration and an administrative aggravation to military commanders.⁵⁰ Each time a writ was issued Merrick ordered a military commander to appear before his bench with “the body” of the soldier to explain why the soldier was being held by the military.

Arguments by military commanders do not appear to have convinced the judge. Merrick ignored several high-ranking officers who claimed that the boys were old enough to serve, and he even called one brigadier general in on contempt for ignoring the writs he had issued. In this instance the general ignored Merrick’s first writ because the secretary of war had ordered him to do so; only after Merrick issued a second writ and an order to bring the general in for contempt of court did the general release the soldier and issue a statement “that he [the general] has not as he conceives defied the authority of your Hon. Court—that it never was his intention to treat with disrespect your Honor nor the authority of your Hon’s Court—that he has acted in strict conformity with the law of the land and literally obeyed the order of his superior officers.”⁵¹ In issuing these orders

⁴⁸ *Chicago Tribune*, October 25, 1861; *New York Daily Tribune*, October 22, 1861.

⁴⁹ RG 21 (Records of the United States District Court for the District of Columbia), Entry 28 (Segregated Habeas Corpus Papers, 1820-1863), microfilm M434, reel 2, frames 1058-1269 (not inclusive), NARA.

⁵⁰ War Department, *Revised Regulations for the Army of the United States, 1861* (Philadelphia: J. G. L. Brown, 1861), 130, 344.

⁵¹ M434, at frames 1073-1097 and 1179-1182; *Chicago Tribune*, October 9, 1861.

Merrick adamantly upheld the rule of civil authorities over the military; his actions were a bold statement that he would not submit his court to what he saw as overreaching executive authority.

Few of these habeas cases caught the attention of the press until the Lincoln administration decided to take action against the judge. On October 21, Secretary of State William H. Seward directed Brigadier General Andrew Porter, the provost marshal in Washington, “to establish a strict military guard over the residence of William M. Merrick.” Porter asked whether “the judge should be confined to his house” but Seward replied that house arrest was not necessary: “Indeed it may be sufficient to make him understand that at a juncture like this when the public enemy is as it were at the gates of the capital the public safety is deemed to require that his correspondence and proceedings should be observed.” That same day, in plain violation of the Constitution, President Lincoln ordered that Merrick’s pay be suspended.⁵²

The habeas case that brought such a forceful response from the executive branch had to do with a seventeen-year-old boy, James Murphy, who had enlisted in the 12th New York Volunteer Infantry. James’ father, John Murphy, demanded a writ be issued as his son was underage and had enlisted without his parents’ consent. Moreover, the father contended that his “son is now anxious to return [home], and your petitioner is desirous of having him discharged from” his military unit. Murphy quickly procured a lawyer, D. D. Foley of Washington, who petitioned Judge Merrick for the writ.⁵³

⁵² *O.R.*, ser. 2, vol. 2, pp. 1021-1022.

⁵³ *U.S.*, ex rel John Murphy v. Andrew Porter, Provost Marshal, D.C., 2 Hay. & Haz. 394-395. The original materials for this case can be found in RG 21, Entry 2

Judge Merrick issued the writ to Foley, who then took the unusual step of personally delivering it to Brigadier General Andrew Porter, the provost marshal in D.C. Under normal circumstances a writ would be delivered by the deputy marshal of the District, but it being a Saturday that the writ was issued, and “by reason of the many engagements of the Deputy Marshal,” Foley opted to deliver the writ himself. General Porter was so incensed at Foley’s action that he had the lawyer arrested. On Monday, Porter placed the armed guard outside of Merrick’s residence, at 425 F Street, which Merrick discovered when he returned home from dinner with his fellow judges sometime between 7 and 8 P.M. “I learned that this guard had been placed at my door as early as five o’clock,” wrote the judge. “Armed sentries from that time continuously until now have been stationed in front of my house. Thus it appears that a military officer against whom a writ in the appointed form of law has issued, first threatened with and afterwards arrested and imprisoned the attorney who rightfully served the writ upon him. He continued, and still continues, in contempt and disregard of the mandate of the law, and has ignominiously placed an armed guard to insult and intimidate by its presence the Judge who ordered the writ to issue, and still keeps up this armed array at his door, in defiance and contempt of the justice of the land.”⁵⁴

While Seward had not intended to have the judge confined to his home, but only kept under strict surveillance, Merrick considered himself under house arrest, and the

(Minute Books, 1801-1863), October 1863 Term, pp. 90-93, 100-104 (M1021, reel 6), and Entry 6 (Case Papers, 1802-1863), civilian trial case files #1097 and 1098, NARA.

⁵⁴ Murphy v. Porter, 396-397.

Chicago Tribune, a Republican paper, called him “a prisoner.”⁵⁵ Subsequently, he sent a letter to the two other judges on the circuit court, informing them why he was unable to attend the court’s present session. Upon receiving Merrick’s letter, his fellow judges—James Sewall Morsell and James Dunlop—protested that General Porter had obstructed the process of the law, and Morsell declared that “this was a palpable and gross obstruction to the administration of justice, to prevent a Judge of this Court from taking his seat because he issued a writ just such as the law requires.” Merrick’s arrest, in their view, had been made “for the purpose of embarrassing him in this particular subject, and to prevent his appearance in Court.”⁵⁶

The judges complained that the executive branch was keeping them in the dark on its current policy decisions. “What is the real state of things?” asked Judge Morsell. “If martial law is to be our guide, we look to the President of the United States to say so.” The court would “not pretend to controvert the right of the President to proclaim martial law, but let him issue his proclamation.” The court then ordered the deputy marshal to deliver a rule to General Porter, ordering him to appear before the Court within four days to show why he should not be held in contempt.⁵⁷

⁵⁵ *Chicago Tribune*, October 23, 1861. The *New York World*—at this time an independent newspaper (later it would become Democratic)—also referred to Merrick as “a prisoner” in his own home. The *World* also noted that the habeas case had never been specified as the reason for Merrick’s confinement: “It should be stated that the above named cause of arrest is the general impression, though nothing is known upon the subject. It may be for some other reason.” *New York World*, October 23, 1861.

⁵⁶ Morsell had been placed on the court in 1815 by President Madison; Dunlop had received a recess appointment to the court in 1845 by President Polk and a second recess appointment as chief judge in 1855 by President Pierce.

⁵⁷ *Murphy v. Porter*, 397-399.

General Porter never appeared at Washington's City Hall, where the circuit court held its sessions. Instead, on the fourth day, the District Attorney appeared on behalf of the deputy marshal to explain that he had not issued the rule to General Porter "because he had been ordered by the President not to serve it, and because the privilege of the writ of *habeas corpus* had been suspended for the present by the President, in regard to soldiers in the army of the United States, within the District of Columbia." The deputy marshal claimed that he did not intend to "disrespect the orders of this honorable Court," but explained that he had to follow the orders of the president.⁵⁸

The court determined that it would not take any steps against the Deputy Marshal because, as Judge Dunlop explained, "the existing condition of the country makes it plain that that officer is powerless against the vast military force of the Executive." Still, this case was "without parallel in the judicial history of the United States, and involves the free action and efficiency of the Judges of this Court." Rather than take care that the Constitution and laws of the United States be faithfully executed, the president "has seen fit to arrest the process of this Court, and to forbid the Deputy Marshal to execute it." Dunlop pointed out that the writ of *habeas corpus* had been issued before the president's order suspending the writ, and that the suspension could certainly not be seen as retrospective. Consequently, whether or not the president could lawfully suspend the writ, the writ had been lawfully issued and therefore ought to be executed. Since the provost marshal was only acting under orders, the president, therefore, must assume the responsibility for General Porter's actions. "The issue ought *to be* and *is* with the

⁵⁸ *Ibid.*, 399.

President,” declared Judge Dunlop, “and we have no physical power to enforce the lawful process of this Court on his military subordinates against the President’s prohibition.”⁵⁹

Judge Morsell filed a separate opinion, declaring that “the law in this count[r]y knows no superior,” that the civil authorities must be superior to military power, and that “this Court ought to be respected by every one as the guardian of the personal liberty of the citizen.” Morsell concluded, “I therefore respectfully protest against the right claimed to interrupt the proceedings in this case.”⁶⁰

Like Taney in the *Merryman* case, these judges mounted a minor challenge to Lincoln’s executive authority, but they ultimately found themselves powerless to effect any change. They subsequently backed down and moved onto other business.⁶¹ Other judges later in the war would follow this example, citing the judiciary’s lack of power against the executive as an excuse to refuse granting writs of habeas corpus to civilians held captive by the military.⁶² For the duration of the war, federal judges knew that they would be ignored (or worse) by the Lincoln administration if their opinions seemed out of step with the military necessities of the times.

It is unclear whether Judge Merrick was actually confined to his home, as he claimed, or if he stayed there as some sort of publicity stunt, knowing that his letter of

⁵⁹ *Ibid.*, 400-401.

⁶⁰ *Ibid.*

⁶¹ The headline for the *New York World*, for example, was “The Washington Judges Protest against the President’s Suspension of the Habeas Corpus” (October 31, 1861).

⁶² See, for example, *ex parte Vallandigham*, 28 *Fed. Cases* 874 (1863).

protest would make it into the press.⁶³ Such a strategy might have been successful. William Howard Russell, a British journalist covering Civil War Washington, remarked that Merrick was a “brave, upright, and honest judge” who did what he was “duty bound” to do in issuing the writs. When Merrick and the lawyer, Foley, were arrested, Russell proclaimed it the “heaviest blow which has yet been inflicted on the administration of justice in the United States, and that is saying a good deal at present” and he blamed Lincoln for “doing that terrible thing which is called putting his foot down on the judges.” Russell also took notice of the judge’s wife. “As the sharp tongues of women are very troublesome,” he said, “the United States officers have quite little harems of captives, and Mrs. Merrick has just been added to the number. She is a Wickliffe of Kentucky, and has a right to martyrdom.”⁶⁴ The Washington *Evening Star*, by contrast, emphatically reminded its readers that “Judge M is *not* under arrest, as is being alleged.” Rather, he had been placed under surveillance because of his “disposition to defeat the measures for the preservation of the Union which the President has felt it to be his duty to take through his officer—the Provost Marshal.” “The President,” continued the editor of the *Star*, “is not likely to permit his military measures to be thwarted by what he may deem legal shifts and evasions on the part of lawyers, especially if their loyalty may, in his judgment, be questionable.”⁶⁵

⁶³ Washington *National Intelligencer*, October 24, 1861; Washington *National Republican*, October 23, 1861.

⁶⁴ William Howard Russell, *My Diary North and South* (Boston: T. O. H. P. Burnham, 1863), 550, 559-560.

⁶⁵ Washington *National Intelligencer*, October 22, 1861.

Democrats were indignant about the arrests. Later during the war, William B. Reed of Philadelphia reminded Democrats of Secretary Seward's role in the affair. "It was Mr. Seward who applauded the Provost-Marshal at Washington for resisting a *habeas corpus* for a minor, and threatening to imprison, or, indeed, imprisoning the officer who brought it. It was Mr. Seward who placed a sentinel at Judge Merrick's door, for the double and kindred purposes of insult to him and intimidation to the electors of Maryland, and so avowed it."⁶⁶ Republicans, by contrast, praised the summary action of the Lincoln administration. "Troublesome Lawyers not Tolerated" ran the headline of the *Chicago Tribune*, while Horace Greeley's paper headlined "A Meddlesome Lawyer in a Trap." The *New York Evening Post* declared that if Merrick should continue to embarrass the national government "he will be visited with punishment. The course he has already taken has fanned anew the secession flames in Washington." Accordingly, the *New York Times* surmised that the military had done Judge Merrick a favor by instituting the guard. "If the populace should take it into their heads that the Judge sympathized with the rebels, they might make violent demonstrations—in which case it would be convenient to have the timely interposition of the sentry."⁶⁷

In mid-November the guards were removed from Judge Merrick's house and he resumed his place at the bench. But his troubles were far from over. When, in 1862, Congress enacted a federal income tax, Merrick protested that the money withheld from

⁶⁶ [William Bradford Reed], *The Diplomatic Year: Being a Review of Mr. Seward's Foreign Correspondence of 1862* (Philadelphia, 1863).

⁶⁷ *Chicago Tribune*, October 25, 1861; *New York Daily Tribune*, October 22, 1861; *New York Evening Post*, October 25, 1861, quoted in Swisher, *History of the Supreme Court*, 865; *New York Times*, October 24, 1861.

his income constituted a reduction in his salary in violation of Article III of the Constitution. Merrick sent a letter to Francis E. Spinner, the Treasurer of the United States, explaining that it was unconstitutional to tax the salaries of federal judges. Spinner responded in a rude and unprofessional manner. In his reply, Spinner enclosed a letter he had received from another federal judge who thought he had not paid his full share of the income tax and who hoped to rectify the situation. Spinner enclosed this letter to Merrick, as he later explained, “to point out to him the difference between a *loyal judge and himself*; and that, while I would not discuss with him the question whether Congress had, or had not, the constitutional right to tax the salaries of United States judges, I would suggest to him, that it certainly had the right to abolish his damned rebel court.”⁶⁸

Merrick was outraged. He immediately sent Spinner’s letter to Secretary of the Treasury Salmon P. Chase. “In response to my official communication to the Treasurer,” Merrick informed Chase, “I have this day received a paper containing expressions and imputations of a character so unusual in official correspondence that I feel it to be my duty to enclose that paper for such consideration and action as the head of the Treasury Department may think the occasion requires.”⁶⁹ Chase asked Spinner to explain himself, to which Spinner replied that had he known that Chase would eventually see it, “I would

⁶⁸ *Brooklyn Daily Eagle*, November 19, 1861; *Chicago Tribune*, October 16 and November 20, 1862 and August 14, 1864; *New York Independent*, April 2, 1863; Derby, *Fifty Years*, 645-646.

⁶⁹ William M. Merrick to Salmon P. Chase, October 15, 1862, RG 56 (General Records of the Department of the Treasury), Entry 140 (Correspondence of the Office of the Secretary of the Treasury: Letters Received from Judges, Marshals, Clerks, Attorneys, and Other Members of the Judiciary), box 1, NARA, College Park, Md.

have written it a damned sight stronger.” The Secretary then gave Spinner a stern “lecture on official etiquette, urging that the different branches of the government should act in harmony with each other, and that comity required respectful language in all communications passing between them.” But finding that Spinner would acknowledge no wrongdoing, Chase concluded, in a good-natured manner, “Well, General, while I feel that your letter is *very pertinent to the subject*, it is *very impertinent to the judge*.”⁷⁰

Secretary Chase sent an apology to Merrick, explaining the necessity of the tax and that he had confronted the Treasurer on the proper tone of official correspondence. But the matter was far from settled. According to Spinner, Chase gave the details of the situation to Whitelaw Reid, a Cincinnati journalist, who published the story, which was then widely reprinted throughout the nation. “Members of Congress saw it, laughed at it, as a good joke: but, after a little, viewed it in another light, and came to the conclusion to carry out the joke. So a bill was introduced in Congress, and became a law, by which the then United States Court of the District of Columbia *was abolished*, and the judges were *abolished* as well.”⁷¹

Within a few months of the income tax episode the Republicans in Washington had had enough, and they decided to rid themselves of Judge Merrick once and for all. They could not impeach him, for he had committed no overt act of treason, nor anything that constituted a high crime or misdemeanor. Thus, they took a play from the old

⁷⁰ Derby, *Fifty Years*, 646.

⁷¹ Salmon P. Chase to William M. Merrick, October 20, 1862, RG-56 (General Records, Department of the Treasury), Entry 27 (Miscellaneous Letters Sent, K Series), vol. 34, NARA, College Park, Md.; Derby, *Fifty Years*, 646; *Cincinnati Daily Gazette*, October 16, 1862.

Federalist and Jeffersonian playbooks of 1801 and 1802—the idea that Francis Spinner had advocated in his impertinent letter to Merrick. They would abolish the court he sat on and create a new one, affording President Lincoln the opportunity to appoint a whole new slate of judges who would be more overtly sympathetic to the Union cause and Republican war measures. As mentioned before, this had been unsuccessfully attempted by the Republicans on three occasions in 1861—with the Supreme Court and the lower federal courts in Kentucky and Missouri. Whereas the leaders of those efforts did not have the votes they needed to alter the judiciary, Republicans in 1863 believed they had enough popular support to abolish the federal circuit court in D.C.

In 1863 there were two federal courts in the District of Columbia (aside from the Court of Claims, which had been created in 1855). The circuit court, which had been created by the Judiciary Act of 1801, had three judges—Merrick, Dunlop, and Morsell. The criminal court, which had been established in 1838, had one judge, Thomas H. Crawford. On January 23, 1863 Crawford died, after several months of ill-health. Morsell had been a judge on the circuit court for nearly fifty years and was, according to many Republicans, “almost superannuated.” Thus, there were only two judges left to handle the work of four.⁷² The time was ripe, they believed, for Spinner’s “good joke” to be told.

⁷² Job Barnard, “Early Days of the Supreme Court of the District of Columbia,” *Records of the Columbia Historical Society* 22 (1919), 1-2; 2 Stat. 89; *An Act to Establish a Criminal Court in the District of Columbia*, 5 Stat. 306.

The bill “remodeling the courts of the District of Columbia” was read on the Senate floor in February 1863. Debate began on the 18th, and the Senate approved it on the 20th. The Democrats could do little to stop its passage.⁷³

Democrats argued that the bill’s sole purpose was to rid the D.C. courts of a “disloyal” judge. “And yet,” declared Senator Willard Saulsbury of Delaware, “we have had no complaint, by petition, by remonstrance, or otherwise, sent to Congress against these judges.” Republicans, of course, professed no desire to remove any particular judges from the bench; it just happened to be a byproduct of the bill. “I would be the last man to legislate merely for the purpose of turning a man occupying a judicial position out of his place,” announced Senator Ira Harris of New York, the architect and sponsor of the bill. “I think I may disclaim any such motive on the part of the Judiciary Committee who authorized this bill to be reported.” But Democrats called their bluff. Lazarus Powell of Kentucky suggested that rather than abolish the present judgeships, additional judges be authorized to sit on this court with the old ones. “The Senator from New York, who presented this bill, . . . disclaims the intention by this bill to get rid of the present judges. The amendment I have offered will test the sincerity of the Senators on that subject.” Further, Powell argued, politicizing the judiciary in this way would set a bad precedent for the future. Whenever one party gained control of the legislative and executive

⁷³ *Congressional Globe*, 37th Cong., 3rd sess., pp. 894, 1049, 1140. A different bill to reorganize the D.C. courts had been introduced on May 23, 1862, but no action was taken on it. This bill would have abolished the circuit court and created a court of common pleas, a court of equity, and a criminal court, each which would have had one judge; sitting together, the three judges would have also sat as judges on the newly-created court of appeals. See Senate Bill 322, 37th Cong., 2nd sess.; *Journal of the Senate*, 37th Cong., 2nd sess., p. 946. The bill that eventually became law was introduced in June 1862, when it was referred to the Senate Judiciary Committee. See Senate Bill 359, 37th Cong., 3rd sess.

branches, they too would be tempted to “pass a bill baptizing the courts by some other name, and turning judges out and putting in partisan favorites.” If a judge had committed an impeachable offence, the Constitution prescribed a method for his removal.⁷⁴

On two days’ notice Senator Garrett Davis, a Kentucky Unionist with increasingly Democratic proclivities, produced the signatures of forty-nine members of the D.C. bar who opposed any reorganization of the federal courts in the District.⁷⁵ Such political tampering with the courts, Davis argued, would damage the independence of the judiciary and allow “political hacks” to infiltrate the federal bench. This bill was an “assault upon the judiciary” and a barefaced attempt “to substitute the present impracticable incumbents with supple tools who will carry the abolition dogmas into the courts of the District.” Saulsbury repeated the oft-said contention: “There can be but one motive, and that is to give the present Executive of the United States the power to render the judiciary of this District subservient to his will, by such appointments as he shall choose to make. Sir, it is a dangerous precedent to set in the Senate. And can you hope it will not be

⁷⁴ *Congressional Globe*, 37th Cong., 3rd sess., pp. 1050-1051, 1128-1129.

⁷⁵ This number represented somewhere between one third and one half of the members of the bar. The 1863 city directory for Washington, D.C. listed 111 individual lawyers or partnerships. At the first session of the new Supreme Court of the District of Columbia, in May 1863, the court had 122 members on its bar. As will be discussed below, some lawyers refused to join the new court’s bar to protest the abolition of the previous court. “Petition of the Members of the Bar in the District of Columbia, Remonstrating against the Passage of the Bill to reorganize the Courts in the District of Columbia,” *Congressional Serial Set*, 37th Cong., 3rd sess., Sen. Misc. Doc. No. 28; Thomas Hutchinson, comp., *Boyd’s Washington and Georgetown Directory* (Washington, D.C.: Thomas Hutchinson, 1863), 265-266; *Rules of Practice in the Supreme Court of the District of Columbia* (Washington, D.C.: GPO, 1863), 4-5.

followed?”⁷⁶ Saulsbury’s fear of judges being subject to the will of the executive had a long lineage in the history of English jurisprudence.

Finally, towards the end of the debate, some Republicans were willing to admit their true motives in the affair. From the beginning Senator Harris had insisted that President Lincoln could re-nominate any of the sitting judges if he chose. Later, Harris admitted that he preferred that judges with questionable loyalty not be re-nominated. Senator Henry Wilson of Massachusetts was more direct and to the point: “I have not, I say, the greatest faith in these courts. As to one of their judges, I mean Judge Merrick, I believe his heart is sweltering with treason. He has been under arrest since this rebellion broke out. I believe that during this session of Congress his home has been the resort where sympathizers with disloyal men have held councils, and secret councils, and I have good reason to believe this to be true.” Knowing that the Republicans’ motivation was in question, Wilson proposed an amendment that would add two additional judges to the bench (while keeping the present judges), but when that was voted down, he supported abolition of the circuit court. In the end, the Senate adopted the bill with the provision for abolition.⁷⁷

On the House side the bill met the same fate, though even more quickly. Republicans rammed the bill through the House, permitting hardly any debate. They believed reorganization of the courts had the “very desirable effect of legislating out of office one judge very old, and another very disloyal.” Democrats, meanwhile, repeated the claims that the bill set an awful precedent and was unwanted by the citizens of D.C.

⁷⁶ *Congressional Globe*, 37th Cong., 3rd sess., pp. 1136-1138.

⁷⁷ *Ibid.*, 1051, 1136, 1139-1140.

Through parliamentary maneuvering Democrats mounted several filibuster attempts, but were ultimately unsuccessful, and the bill passed 86 to 59, the day after it was first read in the House. Former president James Buchanan privately deplored the Republicans' tactics: "Such acts of wanton tyranny will surely return to plague the inventors. There will be 'a tit for a tat.'"⁷⁸

Under the provisions of the law, the new court was called the Supreme Court of the District of Columbia. When the time came for Lincoln to make his four new appointments to the Supreme Court of D.C., he made sure to choose wisely. Like all shrewd presidents, he wanted nominees whom he could trust to uphold his policies and constitutional principles. A year later, when given the opportunity to replace Roger B. Taney as Chief Justice of the United States, Lincoln remarked, "We wish for a Chief Justice who will sustain what has been done in regard to emancipation and the legal tenders. We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it. Therefore, we must take a man whose opinions are known."⁷⁹ These sentiments guided his decision making in 1863 as well.

Aside from certain policy concerns, Lincoln also appears to have wanted to change the nature of the court from a local one to a national one. The judges who sat on the present circuit court were all from Washington, D.C., or Maryland, and local newspapers assumed that other local attorneys would be chosen to fill the new

⁷⁸ Ibid., 1480-1483, 1537-1539; John B. Blake to James Dunlop, May 16, 1863, Dunlop Family Papers, LC.

⁷⁹ *An Act to Reorganize the Courts in the District of Columbia, and for Other Purposes*, 12 Stat. 762; Lincoln quoted in William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* (New York: Alfred A. Knopf, 1998), 116.

positions.⁸⁰ Lincoln's new appointees, however, hailed from the entire United States—Ohio, New York, Delaware, and Virginia.

Lincoln's four choices were men of solid Republican standing. For chief justice he tapped David Kellogg Cartter of Ohio. A Democrat until 1856, Cartter was firmly within the Republican fold by the time of the Civil War. In 1860 he was chairman of the Ohio delegation to the Republican National Convention in Chicago and was instrumental in swinging that delegation's votes from Salmon P. Chase to Lincoln. Subsequently he was considered by many to be a strong possibility for a spot on Lincoln's cabinet. In 1880, a Washington magazine remarked, "Certainly no man ever got closer to Mr. Lincoln or was more often appealed to for consultation and advice than Judge Cartter." Cartter also showed unfailing loyalty to the Union cause. While serving as U.S. Minister to Bolivia, he received word of his son's death at Fort Leavenworth, Kansas. Though utterly distraught, he still supported his other son joining the army in 1863.⁸¹ While some

⁸⁰ Washington *Evening Star*, March 4, 1863. Ironically, several of the possible nominees listed in this editorial had opposed abolition of the old court.

⁸¹ Barnard, "Early Days," 3; Washington, D.C. *The Republic*, October 30, 1880, Nancy H. Cartter to David K. Cartter, August 25, 1862, William H. Cartter to Mother, March 11, 1863, and Salmon P. Chase to David K. Cartter, April 4, 1860, all in Cartter Family Papers, LC; on Cartter as a possible cabinet choice, see Lincoln to John G. Nicolay, November 3, 1860, Hannibal Hamlin to Lincoln, December 4, 1860, George G. Fogg to Lincoln, January 4, 1861, Albert G. Riddle to Lincoln, January 9, 1861, Horace Y. Beebe to Lincoln, January 10, 1861, Benjamin Eggleston et al. (the Ohio Delegates to the Chicago Convention) to Lincoln, January 11, 1861, Thomas Corwin and Benjamin F. Wade to Lincoln, January 20, 1861, O. S. Comstock to Lincoln, January 29, 1861 (opposes Cartter being placed in the cabinet), Jonathan Renich to Lincoln, February 18, 1861, William H. Seward to Lincoln, March 1861, all in Lincoln Papers, LC.

cabinet members, most notably Salmon P. Chase, preferred to see Cartter receive a different appointment, the president was content that he was the right man for the job.⁸²

Lincoln's other choices for the bench—George P. Fisher, Abram Baldwin Olin, and Andrew Wylie—were also qualified Republican choices. Fisher, a Unionist member of Congress from Delaware, was a firm supporter of Lincoln's plan for gradual emancipation in the border states and had voted for the bill abolishing the old circuit court and creating the Supreme Court of the District of Columbia. Thurlow Weed considered him "an able and reliable Republican." In 1862 he failed in his reelection bid for Congress, and his term expired on March 3, 1863. Eight days later, Lincoln appointed him to the new court in D.C.⁸³ Abram Baldwin Olin, a Republican congressman from New York since 1857, was a firm defender of the Lincoln administration and had been the floor manager of the conscription bill in the House.⁸⁴ Lastly, Andrew Wylie, a lawyer from Alexandria, Virginia, was reputed to be the only person to vote for Lincoln in Alexandria City in 1860. Prior to the election Wylie had received threats that he would be shot if he voted for Lincoln, but he braved the hazards

⁸² Salmon P. Chase to Cartter, March 9, 1863, Salmon P. Chase Papers, LC. Not all members of Lincoln's cabinet supported Cartter's nomination. Edward Bates called him "a fierce partizan, an inbred vulgarian and a truculent ignoramus." See Edward Bates, diary entry for October 17, 1863, in Howard K. Beale, ed., *The Diary of Edward Bates, 1859-1866* (Washington, D.C.: GPO, 1933), 310.

⁸³ *Congressional Globe*, 37th Cong., 3rd sess., p. 1538; George P. Fisher to William H. Seward, September 24, 1862, William H. Seward Papers, LC; George F. Wiswell to Fisher, June 16, 1862, George P. Fisher Papers, LC; Thurlow Weed to Leonard Swett, December 2, 1860, A. J. Clemens et al. to Lincoln, July 15, 1862, Fisher to Lincoln, August 14, 1862, Jacob Moore and George P. Fisher to Lincoln, August 28, 1862, all in Lincoln Papers, LC.

⁸⁴ Barnard, "Early Days," 3-4; Abram B. Olin to Frederick W. Seward, August 10, 1863, William H. Seward Papers, LC.

and did so anyway. Following the election, as he sat on his front porch in Alexandria, a bullet whizzed through the air and shattered the drinking glass he held in his hand. Enough was enough already, and he decided to move into Washington. Earlier in 1863 Wylie had been tapped to serve as the judge of the criminal court in D.C., but it was abolished with the circuit court before his nomination ever went up for a vote. Upon the creation of the new Supreme Court, Lincoln put Wylie's name forward again. Although some Republicans in the Senate had doubts about Wylie's ability to be a good judge, Secretary of War Edwin M. Stanton spoke for many when he said that Wylie's "merits and qualifications & service are sufficiently known."⁸⁵

The most notable distinction of Lincoln's appointees is that only one of them hailed from the Washington D.C. area; the other three came from New York, Ohio, and Delaware. In the process of choosing his nominees, Lincoln consciously turned the D.C. court into a national tribunal. No longer would he choose judges only from Maryland or the District (areas that were notorious for sympathy with secession and slavery); for this new court he would choose nominees with a national reputation—and many Republicans were pleased with this decision. "Under the existing condition of affairs here, therefore, it is by no means strange that in making these appointments he should have sought nominees known well to the whole country having this momentous stake involved, rather than gentlemen of this community, who, however well known and confided in at home, are unknown to the country in connection with the troubles of the times," wrote the editors of the Washington *Evening Star*. "We sincerely believe their selection to be a

⁸⁵ Barnard, "Early Days," 4; *Senate Executive Journal*, 37th Cong., 3rd sess., pp. 103, 158; Edwin M. Stanton to Wylie, February 4, 1862, Lincoln Papers, LC.

subject of congratulation to the community. Some of our fellow citizens would doubtless have preferred others, on personal grounds. But personal considerations should not and could not safely be permitted to influence the President's action in such a case." Horace Greeley's *Tribune* noted that "the result will be the administration of justice in the District upon Anti-Slavery, instead of Pro-Slavery principles." In making his appointments, Lincoln replaced localism and perceived treason with nationalism, loyalty, and judges who understood his sense of the common good.⁸⁶

In keeping with Congress' and Lincoln's vision for this court, the new justices placed more stringent standards on admission to the bar than was required by federal law. In order to be admitted to the bar, lawyers had to take the ironclad test oath, which Congress had adopted in 1862. This oath, which was required of all federal employees and appointees, demanded affirmation of past and future loyalty. Some Democrats refused to take the oath. Upon hearing that one of his friends had refused to take it, James Buchanan remarked, "If he cannot conscientiously take it, there is an end of the question. If he has refused simply because the Court has no right to require it, I think he has not acted prudently." In requiring the ironclad oath the new judges established their court as a beacon of loyalty amidst a sea of southern sympathy—it was not until January 1865 that Congress would require the oath of all lawyers practicing before the federal bench.⁸⁷ The court, it seems, hoped to set a new, national, standard for loyalty.

⁸⁶ Washington *Evening Star*, March 11, 1863; *New York Daily Tribune*, March 5, 1863. See also John G. Roberts, Jr., "What Makes the D.C. Circuit Different? A Historical View," *Virginia Law Review* 92 (May 2006), 382-384.

⁸⁷ *An Act to Prescribe an Oath of Office, and for Other Purposes*, 12 Stat. 502; James Buchanan to John B. Blake, April 10, 1863, in Moore, ed., *Works of Buchanan*, 11:335; *An Act Supplementary to an Act Entitled "An Act to Prescribe an Oath of Office,*

IV.

The constitutional issues raised in these three collisions between the judicial and political branches of the government reveal the means that political actors would use to rid the judiciary of perceived treason. All three instances had precedent. In the Humphreys case Congress took what might be considered the most routine step—routine, at least to the extent that impeachment is explicitly contemplated in the Constitution. The *Merryman* case, too, had precedents. Presidents Jefferson and Jackson had both famously ignored judicial decrees in their own times. Nevertheless, Lincoln’s response to Taney revealed a presidential assertiveness that many Americans found disconcerting. Jefferson had merely ignored an order to appear in court, and when Jackson ignored a Supreme Court ruling that would have benefited Cherokee Indians, many white Americans were pleased with his decision. Lincoln’s ignoring of the court, however, opened a pathway to the arrest and detainment of upwards of 18,000 American civilians who no longer had any recourse to the writ of habeas corpus.

The Merrick affair was perhaps the most ominous assertion of power by the political branches. Although it involved far fewer individuals than Lincoln’s suspension of habeas corpus, the suspension of Merrick’s pay (not to mention the later income tax deduction, which Chief Justice Taney also believed was unconstitutional) was a blatant violation of the text of the Constitution, the surveillance and guarding of Merrick’s home could be perceived as an illegal intimidation of judicial officers (who had broken no law),

and for Other Purposes,” Approved July Two, Eighteen Hundred and Sixty-Two, 13 Stat. 424.

and the abolition of his court was an assertion of the supremacy of the political branches over the inferior federal courts. Only the first of these three actions against Merrick violated an express provision of the Constitution, but the second two certainly raised eyebrows. In all three of these instances—Taney, Humphreys, Merrick—the political branches of the government checked the judicial branch, placing substantial limitations on the power and independence of the federal judiciary.

Establishing judicial independence in America had been a priority for the Founding Fathers because they believed it was essential to the doctrines of separation of powers and checks and balances. This was especially true regarding the issue of treason. Judges who were not dependent upon the executive branch for their pay or their jobs would be less likely to create “constructive treasons” that could be used to help keep the chief executive in power. Indeed, the issues of judicial salaries and tenure were so important to the Revolutionary generation that they found mention in the Declaration of Independence. Of King George III, Thomas Jefferson wrote: “He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”⁸⁸ With these sentiments fresh in their memory, the Founders hoped to prevent executive and legislative usurpations of judicial power. Nevertheless, the system of checks and balances set up in the Constitution requires that Congress and the president check the courts. Ultimately, it is up to the legislative and executive branches to determine just how this ought to be done.

In truth, Lincoln, Congress, and the military dealt with the federal judiciary much more leniently than they did with some state judges suspected of disloyalty. In what is

⁸⁸ Declaration of Independence (1776).

perhaps the most notorious example, Richard B. Carmichael, a Maryland state judge and former U.S. congressman, was arrested while presiding at his bench in May 1862.

Beaten, pistol whipped and bloodied, Carmichael, an avowed secessionist, was arrested in his courtroom and thrown in prison for more than six months without any charges ever being levied against him.⁸⁹ While the Carmichael episode was something of an anomaly, its brutality and celebrity perhaps caused the administration to shy away from further arrests of judges. When the issue of incarcerating disloyal state judges arose in a cabinet meeting in 1863, the leadership in the executive branch decided against making the detainment of judges a common occurrence.⁹⁰ Aside from arresting judges, the political branches of the federal government had little power over state courts. Their attention, therefore, focused on the federal bench.

By imposing checks and balances on the federal judiciary, Lincoln and the Republicans in Congress hoped to reshape the least dangerous branch. When appointments could be made, and southern-sympathizing judges could be replaced, Lincoln chose nominees with national reputations and unfailing fidelity to the Union cause. After Congress impeached Judge Humphreys, Lincoln submitted to the will of Tennessee Unionists by placing Connelly F. Trigg, a staunch Unionist from East

⁸⁹ Bayly Ellen Marks and Mark Norton Schatz, eds., *Between North and South: A Maryland Journalist Views the Civil War* (Rutherford, N.J.: Fairleigh Dickinson University Press, 1976), 308-312. At least one other Maryland judge was also arrested in 1862. See Brown, *Baltimore*, 93-94; George Vickers to Bradford, June 4, 1862, George Vickers to Chrisfield, August 21, 1862, and John A. Dix to Bradford, February 10, 1862, all in Governor's Miscellaneous Papers (S1274), Maryland State Archives, Annapolis, Md.

⁹⁰ Bates, diary entries for September 14 and 15, 1863, in Beale, ed., *Diary*, 306-307. Several other state judges, including Charles H. Constable of Illinois and Joshua F. Bullitt of Kentucky were also arrested by military authorities.

Tennessee, on the bench. And, after Congress abolished the D.C. circuit court, Lincoln completed the legislature's action by turning the new D.C. tribunal into a national court through his choice of nominees. Moreover, Lincoln's appointees to the Supreme Court demonstrate the ultimate fulfillment of this pattern. When Justice Campbell resigned to join the southern Confederacy, Lincoln replaced him with David Davis of Illinois; following the death of Justice Daniel of Virginia, Lincoln placed Samuel F. Miller of Iowa on the bench; and when the old thorn in his side, Chief Justice Roger B. Taney of Maryland, finally died in October 1864, Lincoln replaced him with his secretary of the treasury, Salmon P. Chase of Ohio.⁹¹ Lincoln replaced southerners with northerners, and also placed the first two justices on the bench from west of the Mississippi River. He had a vision of a national and loyal judiciary.

Shortly after his arrest John Merryman was turned over to the civil authorities and indicted for treason in the U.S. Circuit Court for the District of Maryland. Republicans likely hoped he would hang; Democrats hoped the case would be "disposed of by the courts in proper form." But the case never went to trial, and Merryman was released on bail. In July 1863 another indictment was drawn up against Merryman, but nothing came of that case, either. That same year Merryman sued General Cadwalader in the Maryland state courts for wrongful arrest, claiming \$50,000 in damages. The suit was removed to the federal courts, and Merryman let the matter drop. The U.S. circuit court dismissed the case the following year. According to one account, he was beaten very severely by

⁹¹ Lincoln's other two appointments, were Noah H. Swayne of Ohio, who replaced another Ohioan, and Stephen J. Field of California, who was appointed to a new seat on the Court.

Union soldiers in the spring of 1864. Afterwards, his assailants “sung rally around the bridge burners,” presumably to the tune of “Battle Cry of Freedom.”⁹²

Merryman remained a prominent figure in Maryland politics and agriculture after the war, and the home, Hay Fields, where he was arrested still stands in Baltimore county. But that old stone house was not the only legacy of his famous arrest that Merryman hoped to leave to posterity. He left one other enduring symbol of his gratitude to the aged chief justice who had risked so much to secure his freedom in 1861. When, in 1864, Merryman had a son, he named him Roger Brooke Taney Merryman.⁹³

Chief Justice Taney lived out his final days during the war a frustrated judge. Anticipating that certain types of war-related cases would come before his bench, he drafted opinions that never saw the light of day. They were only discovered after his death, which occurred on October 12, 1864. “The Hon. old Roger B. Taney has earned the gratitude of his country by dying at last,” rejoiced George Templeton Strong of New York. “Better late than never.” Similarly, historian Don E. Fehrenbacher noted that the chief justice’s death “put an end to the anomaly of a nation’s fighting a war with its highest judicial officer bound in sympathy to the enemy.” Ironically, Taney’s death came on the first day of a two-day referendum in which his home state ratified a new state

⁹² Baltimore *American and Commercial Advertiser*, July 4, 12, 1861; Baltimore *Sun*, July 11, 1861; Federal and state court records related to Merryman, RG 21, NARA Mid-Atlantic Branch, Philadelphia, include records of the federal indictments and Merryman’s state-level suit; Bruce A. Ragsdale, *Ex parte Merryman and Debates on Civil Liberties during the Civil War* (Washington, D.C.: Federal Judicial Center, 2007), 26-27; Mitchell, ed., *Maryland Voices*, 198.

⁹³ Jean H. Baker, *Affairs of Party: The Political Culture of Northern Democrats in the Mid-Nineteenth Century* (1983; reprint, New York: Fordham University Press, 1998), 160; Ragsdale, *Merryman*, 27.

constitution that permanently abolished slavery in Maryland. The long-time defender of slavery would die on the same day as his peculiar institution. “Two ancient abuses and evils were perishing together,” concluded Strong.⁹⁴

In February 1865 a bill was introduced in the House of Representatives to honor the late chief justice with a marble bust in the Supreme Court’s room in the Capitol. The bill quickly passed in the House but was rejected by the Senate. Charles Sumner argued that “an emancipated country” should not honor the author of the *Dred Scott* decision, while John P. Hale of New Hampshire pointed out “that when the slave-masters had raised the banners of civil war, Judge Taney, who had been swift for thirty years to utter their decrees, had no aid to give his struggling country. In its hour of humiliation, trial, and agony, he never gave one cheering word nor performed one act to protect or save. He sank into his grave without giving a cheering word or a helping hand to the country he had vainly sought to place forever by judicial authority under the iron rule of the slave-masters.” In short, the chief justice was a traitor. It would not be until 1874 that a bill was passed to honor Taney with a bust in the courtroom—and then, it was attached to a bill honoring the now-late Chief Justice Chase as well.⁹⁵

⁹⁴ Philip G. Auchampaugh, ed., “A Great Justice on State and Federal Power: Being the Thoughts of Chief Justice Taney on the Federal Conscription Act (An Undelivered Opinion),” *Tyler’s Quarterly Magazine* 18 (1936), 72-87; Swisher, *Taney*, 570-572; Fehrenbacher, *Slavery, Law, and Politics*, 298; George Templeton Strong, diary entry for October 13, 1864, in Allan Nevins and Milton Halsey Thomas, eds., *The Diary of George Templeton Strong*, 4 vols. (New York: The Macmillan Co., 1952), 3:500-501; William Blair Lord and Henry M. Parkhurst, eds., *The Debates of the Constitutional Convention of the State of Maryland* (Annapolis: Richard P. Bayly, 1864), 3:1925-1926.

⁹⁵ H. R. 748, 38th Cong., 2nd sess.; *Congressional Globe*, 38th Cong., 2nd sess., pp. 666, 671-672, 742, 1012-1017; H. R. 3788, 42nd Cong., 3rd sess.; *An Act Providing for Busts of the Late Chief Justice Roger Brooke Taney and of Samuel Portland Chase*, to

Shortly after the end of the war Judge Humphreys sought amnesty from his old political rival and now-president, Andrew Johnson. In April 1865, only a week after Lincoln's death, Humphreys' brother wrote to President Johnson asking clemency for the disloyal judge.⁹⁶ In September 1865, the judge petitioned the president on his own behalf. Humphreys stated that "my course of conduct has been much misunderstood and misrepresented" so he wished "to place on record some corrections." The rebel judge denied ever being an avowed advocate for secession. To the contrary, he claimed that he "sincerely desire[d] the preservation of the Union" provided the constitutional rights of the states were protected. "At no time was I ever *per se* a disunionist," he wrote. But Humphreys also believed that the central government was not vested with the coercive powers over the states, and he was opposed to subjugation of the South by the North. Thus, when the North violated the constitutional rights of the southern states and then fought to subdue them, Humphreys saw no chance for maintenance of the Union. "It was for these reasons that I voted with my state, *after the war had began*, for 'separation and representation'; and this action of my state I considered as terminating my official situations with the government of the United States." Nevertheless, Humphreys claimed to have shown "utmost leniency" to Tennessee Unionists who were brought before his court, and he worked hard to shape Confederate public policy accordingly. As a charge of conspiracy had been brought against him at the federal court in Nashville, he asked the president for a pardon, and the right to "live and die" in Tennessee. He had taken the

be Placed in the Supreme Court Room of the United States, act of January 29, 1874, 18 Stat. 6.

⁹⁶ Robert W. Humphreys to Andrew Johnson, April 22, 1865, in Graf and Haskins, eds. *Papers of Andrew Johnson*, 5:403.

loyalty oath required by the government and had vowed to uphold the laws of the United States—even those “in reference to the emancipation of slaves.” Andrew Johnson, Humphreys’ old political foe, granted the disloyal judge the boon he desired.⁹⁷ Little did Johnson know that the Humphreys impeachment trial would soon become the model for his own.

As for Judge Merrick—he put his house in the District up for rent and moved back to Maryland, where, among other things, he worked to get at least one former Confederate—Senator David Yulee of Florida—released from military prison.⁹⁸ In the years following the war Merrick resumed his practice as a lawyer and served as a professor of law at Columbian College (what is now the George Washington University). He also served as a delegate to the 1867 Maryland state constitutional convention, he spent one term in the Maryland legislature (1870), and he served one term in Congress, from 1871 to 1873. When he failed in his reelection bid in 1872, Merrick’s career in public life appeared to be at a close.

Writing about 1884, Francis E. Spinner—the Treasurer of the United States who had withheld Merrick’s pay and who harshly chastised him for sympathizing with the rebels—recalled the “good joke” that had been had in 1863 when Congress abolished Judge Merrick’s court. “The present judges have, no doubt, enjoyed the joke hugely,

⁹⁷ Petition of West H. Humphreys to the President of the United States, September 21, 1865, RG 94, photocopy on file at the Federal Judicial History Office, FJC; Hall, “Crisis,” 68.

⁹⁸ William M. Merrick to Ward H. Lamon, August 5, 1863, Ward H. Lamon Papers, The Huntington, San Marino, Cal.; see the approximately 30 letters between Merrick and Yulee from 1865 and 1866, in the David Levy Yulee Papers, Smathers Libraries, University of Florida.

ever since,” exclaimed a gleeful Spinner, “but, it is believed that it has never been fully appreciated by Judge Merrick.”⁹⁹

In truth, Spinner did not yet know the real punch line. On May 1, 1885, President Grover Cleveland appointed Merrick to a seat on the Supreme Court of the District of Columbia—a seat that was vacated by Andrew Wylie, one of Merrick’s original replacements. He served on that bench until his death, on February 4, 1889.¹⁰⁰ Merrick, it appears, had the last laugh.

⁹⁹ Derby, *Fifty Years*, 646.

¹⁰⁰ *Judges of the United States*, 2nd ed. (Washington, D.C., 1983), 341; *New York Times*, May 2 and 28, 1885.

Chapter 3

“If That Be Treason. . .”: The Demand for Loyalty in the U.S. Congress

On January 27, 1863, the U.S. Senate was engaged in a heated debate on the Indemnity Bill—a law intended legalize Abraham Lincoln’s suspension of the writ of habeas corpus and to protect the president and his subordinates from civil or criminal proceedings for wrongful arrest. Republicans generally supported the law, while Democrats vehemently opposed it. Senator Willard Saulsbury, a Democrat from Delaware, cast his lot against the bill, arguing that military arrests in the North did “more to render that disunion of these States, which now is a fact, permanent and eternal, than anything else,” and that the Indemnity Bill would only legalize an illegal act. Continued submission to such despotism for the sake of Union, he exclaimed, would only further deprive the people of their liberties and centralize the national government.¹

Senator Jacob Howard, a Republican from Michigan, replied that Saulsbury’s speeches in the Senate were harmful to the Union war effort: “The effect of these speeches has already, in my judgment, produced the most unhappy effects in the Army. Yes, sir, even in the Army it has produced, and is to-day producing, a spirit of insubordination and even of mutiny, which, if not checked by the strong and honest arm of power, may bring about results most disastrous to us and to the nation itself.”

Saulsbury shot back that he had a right to represent the people of Delaware as he best saw fit, that secession was illegal and that the South was wrong to secede, but that he was a southern slaveholder who believed the peculiar institution should be forever preserved on

¹ *Congressional Globe*, 37th Cong., 3rd sess., pp. 542-543.

his native soil. These were the nation's founding principles, he argued, and he would continue to live by them. Moreover, he insinuated that Delaware would never submit to a centralized authority that ordered her to free all of her slaves. "If that be treason, everybody who chooses so to consider it may make the most of it," Saulsbury declared.²

Turning the bill on its head, Saulsbury argued that, rather than indemnify the president, Congress ought to appropriate money to compensate those who had been wrongfully arrested. He did not believe the president should be personally responsible for the damages, but this was more from his low view of Lincoln's abilities than a belief that the president was actually innocent of wrongdoing. Saulsbury called Lincoln "a weak and imbecile man; the weakest man that I ever knew in a high place." He was called to order, but was allowed to continue. "Sir, it is out of order, I am told, so to characterize the act of an Administration; but if I wanted to paint a tyranny; if I wanted to paint a despot, a man perfectly regardless of every constitutional right of the people, whose sworn servant, not a ruler, he is, I would paint the hideous form of Abraham Lincoln. If that be treason. . . ." Again the Senator was called to order. He thundered back: "The voice of freedom is out of order in the councils of the nation!" So the Vice President had him escorted from the Senate Chamber by the Senate's sergeant at arms.³

Debate on the bill continued and Saulsbury made his way back into the chamber. When he again began to speak, Senator Charles Sumner, a Massachusetts radical, called him to order, but Saulsbury would not be quiet. "I am not a slave to power," he proclaimed. Again the sergeant at arms approached the Delawarean, but this time he

² Ibid., 544-546.

³ Ibid., 548-550.

would not submit and leave the chamber. When the presiding officer ordered the sergeant to apprehend Saulsbury, the defiant senator replied, “Let him do so at his expense.” With that, he drew a pistol from his coat and pointed it at the sergeant at arms. It was some time before he could be escorted peacefully from the floor.⁴

A resolution was introduced to expel Saulsbury from the Senate, but after he publicly apologized, the matter was dropped.⁵ Still, word spread throughout the nation of what had happened. Sidney George Fisher of Philadelphia lamented the “disgraceful scene” which had occurred in the Senate, while Saulsbury’s colleague, James A. Bayard, Jr., himself an outspoken Peace Democrat, believed Saulsbury would be calm for the remainder of the term:

He was cowed, & I trust will remain so, & was far more fearful of expulsion than sensitive about the degradation. His nature is unrefined and it would be impossible to make a gentleman out of him—nor has his early training benefited him—His worst feature is that when drunk he is rashly defiant . . . but when sober he is an arrant coward—We must do the best we can with him, but such conduct injures our cause & State—It will not be repeated, as timidity will restrain him.

Indeed, Bayard had feared a collision between Saulsbury and the Republicans for some time. Saulsbury had gone into the Senate drunk on several other occasions, and on January 10, 1863—just two and a half weeks before the pistol incident—Bayard wrote his son that “Saulsbury made a good speech the other day, but in some respects

⁴ *Liberator*, January 30, 1863; *Congressional Globe*, 37th Cong., 3rd sess., pp. 552.

⁵ *Congressional Globe*, 37th Cong., 3rd sess., pp. 558-559, 584.

imprudent for it excites party passion—He has I fear just rashness enough to get himself in a scrape without determination enough to abide the issue.”⁶

Perhaps it was exasperation that caused Saulsbury to go into the Senate drunk with a concealed weapon. Perhaps he could no longer bear to see the citizens of his state arrested by the military with no charges ever being brought against them. Perhaps he could bear no more acts of tyranny in silence, and at the prospect of the president being let off the hook, Saulsbury had had enough. But in the course of his remarks Saulsbury touched on an important issue—the issue of treason. He recognized that some senators on the other side of the aisle might deem his words in defense of personal liberty and in opposition to emancipation to be treasonable, and he rashly stated that he would deal with the consequences. In the end Saulsbury was not dealt with as a traitor, but other congressmen were. It is therefore imperative to examine these debates and “trials” to see how Congress dealt with disloyalty in its midst.

Congressional debates on the disloyalty of sitting members reveal a wide range of understandings of the law of treason. Many congressmen professed to hold to the belief that treason must consist of an overt act of war; yet, when placed in the position of judging their colleagues, several majorities in Congress found that “treasonable words” were sufficient to warrant punishment. Whether that punishment was for *actual treason* was never fully settled. But that Congress punished several members for articulating

⁶ Sidney George Fisher, diary entry for January 28, 1863, in Jonathan W. White, ed., *A Philadelphia Perspective: The Civil War Diary of Sidney George Fisher* (New York: Fordham University Press, 2007), 183; James A. Bayard to Thomas F. Bayard, December 18, 1862, and January 10 and 31, 1863, Thomas F. Bayard Papers, LC.

reasonable sentiments reveals that there was little room for dissent on certain war issues, and that words became evidence of treason in the legislative “courts” of the nation.

This chapter examines the cases of approximately thirty congressmen who were suspected of disloyalty. Several were censured or expelled, others were arrested by the military, and a few escaped disciplinary proceedings or attempts to prevent them from taking their seats in Congress. Whatever the case, these proceedings reveal the broadening definition of treason—treason of the heart and mind—in action. Peace Democrats were punished for harboring peace sentiments and sympathy for the rebels. While they were never prosecuted for treason, they were accused of it by their Republican opponents, they were censured or expelled for their beliefs, and some were arrested for aiding the rebel war effort. Thus, they can, in a practical sense, be seen as having been prosecuted for treason.

In most cases, these “trials” seem to have come to pretty fair conclusions. Those who were “convicted” were those for whom evidence suggests that they had been complicit with the rebel war effort, while those “acquitted” seem to have only been the objects of the partisan ire of the Republicans.

I.

During the secession winter and spring of 1860-1861, compromise efforts abounded in Congress. Northern and border state congressmen from both sides of the aisle hoped to stave off secession and prevent civil war. For a variety of differing reasons, many northerners believed that the South should be allowed to secede in 1861. Many abolitionists, for example, believed the Union would be better off without the

immoral blight of slavery. Others believed that the South would see the folly of its action and return to the Union within a matter of months or years. Finally, pro-slavery northerners believed that the South was justified in the action it was taking. The northern states, in this view, had not fulfilled their obligations to the people of the South. Each of these groups believed the North should consent to southern secession and let the South go in peace.

Whatever view was taken, advocates of each of these positions believed that secession should occur peaceably—without bloodshed. Within a constitutional context, peaceable secession was not treason because it would be done consensually and without an overt act of war. The acts of a citizen, in this view, became treasonable when they were actively inimical towards the government to which allegiance was owed. The answer to the question of whether secession was treason then depended upon the means by which it was carried out, or the timing of those actions. If secession were undertaken by force and violence, by levying war against the United States, then it would be difficult to argue that such action did not constitute treason. This would be true, in a practical sense, even if secession was claimed as an exercise on the ground of violation of constitutional rights, as southerners claimed, because the Union government disputed the constitutional ground claimed by the South.

Many southern-sympathizing northerners viewed the matter in the context of nonviolence. They advocated a peaceful separation of the Union, if it had to be divided at all. They called for reason, reflection, and deliberation to dissuade the South from leaving. However, if the southern states could not be persuaded to stay, they ought to be allowed to go in peace. This point is significant, for most nineteenth-century Democrats

believed that the Union was rightly constituted and maintained by reason and consent, not by force. Under the definition of treason provided in the Constitution, secession would not be treasonable if it was peaceful. If enough people in the northern states had consented to secession, then the southerners would not be guilty of treason, because their peaceful withdrawal from the Union would have had the consent of the other states. During the debate in which he drew his pistol, Willard Saulsbury argued that “the error of these southern gentlemen” was that “they thought when they entered into a compact or agreement and they considered it violated, they had a right to stop the whole machinery of government.” This mode of secession was not constitutional, according to Saulsbury. Either a people must assert their revolutionary right to form a new government—based on the principles of the Declaration of Independence—or they must gain the consent of the other members of the compact.⁷ Far fetched as it may seem, such an outcome was within the realm of constitutional possibility.

The northern efforts at compromise worked within this context. Therefore, northerners who advocated southern independence *before war commenced* ought not to be charged with treason. But the firing on Fort Sumter produced an entirely different context. Once war had been levied, sympathy with those making war against the government of the United States could be considered treasonable, and words or actions seen as helpful to that rebel war effort become liable to be seen as traitorous. This constitutional context sets the stage for examination of the cases of congressmen who were suspected of disloyalty.

⁷ *Congressional Globe*, 37th Cong., 3rd sess., pp. 546.

Movements in Congress for censure and expulsion occurred in four major waves. Those targeted in the first two waves were primarily from seceded states; however, as the war progressed and disloyalty was perceived throughout the North, northern congressmen also became the targets of disloyalty prosecutions in the House and Senate. The first wave of expulsions occurred between January 21 and March 14, 1861, during the secession crisis. These proceedings all targeted senators from the Deep South. The second wave occurred during the summer of 1861. The “defendants” in these cases were mostly members of Congress from the Upper South and border states. The third wave occurred during the winter of 1861 and spring of 1862. The objects of these proceedings were mostly from the border states of Missouri and Kentucky, although two northern senators were also subject to investigation for treason and disloyalty. The fourth wave happened in the spring of 1864. As with the third wave, the four congressmen involved in loyalty proceedings in 1864 were also citizens of northern and border states that had remained loyal to the Union. In the first two waves congressmen prosecuted for disloyalty were charged with overtly and actively supporting secession; by the third and fourth waves, however, the charges began to embrace motives, sympathies, and words. Overt acts were no longer needed to prove one guilty of a treasonable offense.

The timing of these cases most obviously correlates with the opening and closing of the different sessions of Congress. More importantly, however; the timing of these cases also corresponds with larger events and crises outside of the nation’s capital. The first wave occurred during the secession crisis; the second wave in the week leading up to the First Battle of Bull Run; the third wave during the winter of 1861-62, when Union

military fortunes in the East seemed at a stand-still; and the fourth wave, in the spring of 1864, when Union hopes again seemed to be falling.

These cases served several functions, aside from ostensibly preserving the integrity and loyalty of one branch of the federal government. More than a purge of the disloyal, these cases became show trials, both within the House and Senate chambers, and throughout the nation. Dozens of pamphleteers published speeches, newspapers reported on the proceedings, and even state legislatures, in at least two cases, debated whether senators from other states deserved to keep their seats in the national legislature.⁸ The

⁸ Some of the various pamphlets of congressional speeches were: *Speech of Hon. Andrew Johnson of Tennessee, on the Expulsion of Mr. Bright. Delivered in the Senate of the United States, Friday, January 31, 1862* (Washington, D.C.: L. Towers & Co., 1862); *Speech of Hon. Andrew Johnson, of Tennessee, on the Proposed Expulsion of Mr. Bright; Delivered in the Senate of the United States, January 31, 1862* (Washington, D.C.: Congressional Globe Office, 1862); *Rede des achtb. Andrew Johnson von Tennessee: Gehalten im Senat der Vereinigten Staaten am Freitag, den 31. Januar 1862: über die Ausstossung des Senators Jesse D. Bright von Indiana* (Washington, D.C.: Scammell & Co., 1862); *Expulsion of Mr. Bright: Speech of Hon. Andrew Johnson, of Tennessee, in the Senate of the United States, Friday, January 31, 1862* (Washington, D.C.: Scammell & Co., 1862); *On the Expulsion of Mr. Bright from the Senate: Speech of Hon. M. S. Wilkinson, of Minnesota, Delivered in the Senate, January 20, 1862* (Washington, D.C.: Scammell & Co., 1862); *Speech of the Hon. J. D. Bright, of Indiana, on the Resolution Proposed for His Expulsion* (Washington, H. Polkinhorn, 1862); *Speech of Hon. J. A. McDougall, of California: On the Expulsion of Mr. Bright, Delivered in the Senate of the United States, January 21, 1862* (Washington, D.C.: L. Towers & Co., 1862); *Speech of Hon. Daniel Clark, of New Hampshire: On the Expulsion of a Senator, Delivered in the Senate of the United States, January 24, 1862* (Washington: Congressional Globe Office, 1862); *Speech of Hon. Willard Saulsbury, of Delaware on the Resolution Proposing to Expel the Hon. Jesse D. Bright, Delivered in the United States Senate, Jan. 29th, 1862* (Washington, D.C.: H. Polkinhorn, 1862); *The Expulsion of a Senator: Speech of Hon. Charles Sumner, in the Senate of the United States, January 20, 1862* (Washington, D.C.: Office of the Congressional Globe, 1862); *Speech of Hon. James A. Bayard, on Delaware, on the Expulsion of Mr. Bright. Delivered in the Senate of the United States, February 5, 1862* (Washington, D.C.: L. Towers & Co., 1862); *The Expulsion of Senator Bright: Speeches of Hon. Ira Harris, of N.Y., Delivered in the Senate of the United States, January 24 and February 5, 1862* (Washington, D.C.: Scammell & Co., 1862). For speeches in the New York and Pennsylvania legislatures, see: Charles J. Folger, *Remarks of Mr. C. J. Folger, in the Senate of the State of New York: On the Resolution of*

cases attracted much attention throughout the nation, and in Washington people flooded to the respective chambers to observe the proceedings. “Long before the hour of business had arrived” wrote the Washington correspondent of the *Liberator* regarding one expulsion case in the Senate, “the Senate galleries were one jammed mass of humanity of both sexes, of all ages and conditions—the men’s side containing a lively sprinkle of soldiers. The House had well-nigh emptied itself into the Senate Chamber before the proceedings began.”⁹

As show trials, these proceedings were cases in which the life and values of the nation were at stake. If the Union was to stand or fall in this crisis, it would do so because of the action taken in the Capitol. Senator Morton Wilkinson, a Minnesota Republican who introduced punitive resolutions against several Democrats, argued that these trials were the time “when men must stand up straight if they would serve their country; it is no time for faltering, for hesitation, or for doubt.” “Surrounded as we are with treason and with corruption in the high places of this Government,” he continued, “if

Instruction to our Senators in Congress to Vote for the Expulsion of Jesse D. Bright (Albany, N.Y.: Weed, Parsons and Co., 1862); Folger, Henry R. Low, and Lyman Truman, *Remarks of Messrs. Folger, Low & Truman, in the Senate of the State of New York on the Resolution of Instruction to Our Senators in Congress to Vote for the Expulsion of Jesse D. Bright* (Albany, N.Y.: Weed, Parsons, 1862); *Remarks of Messrs. Low and Truman in the Senate of the State of New York on the Resolution of Instruction to Our Senators to Vote for the Expulsion of Jesse D. Bright: January 30, 1862* (Albany, N.Y.: Weed, Parsons and Co., Printers, 1862); Winthrop Wells Ketchum, *Speeches of Hon. W.W. Ketcham of Luzerne County on the Joint Resolutions Relative to the Abolition of Slavery in the District of Columbia, and the Subject of Slavery in the States Delivered in the Senate of Pennsylvania, on Thursday, March 13, 1862, and the Resolution Relative to the Expulsion of Jesse D. Bright, United States Senator from the State of Indiana, Delivered in the Senate of Pennsylvania, on Thursday, January 30, 1862* (Harrisburg, Pa.: Telegraph Steam Print, 1862).

⁹ *Liberator*, February 19, 1864.

the Senate fails to discharge its whole duty without any regard to fear or to favor, or without being moved from the right line of duty by personal considerations, this country will be lost.” Similarly, Charles Sumner of Massachusetts argued that “the Senate itself is on trial just as much as the Senator,” and Andrew Johnson, the Tennessee Unionist, implored his fellow Senators to “show your courage here as Senators, and impart it to those who are in the field.”¹⁰

Significantly, these debates occurred mainly during times of great anxiety during the war—at times when Union prospects were not particularly hopeful, and when positive battlefield news did not appear to be anywhere in sight. Senator James Dixon, a Connecticut Republican, recognized the encouragement that the people, both at home and in the field, needed at these times—the encouragement that expulsion or censure proceedings could give them. The people had been persevering in hardship, and yet did not shrink from their duties to the nation. “Shall we not, with the same courage and resolution, perform ours?” he asked his colleagues.¹¹ Painful as it might be to expel a fellow senator, such action was necessary if the nation was to survive.

Senator Timothy O. Howe, a Wisconsin Republican, argued that it would be “better that these seats should be utterly vacant” and that every senator be removed from office “than that one traitor, one man disloyal to the Government of the country, should have a seat here.” The Senate’s “first duty—the duty you owe to your own consciences and to your country—is to know that no man holding a seat here is disloyal, is a

¹⁰ *Congressional Globe*, 37th Cong., 2nd sess., p. 391, 628, 588.

¹¹ *Ibid.*, 626.

traitor.”¹² Accordingly, Republicans in both houses of Congress expended great amounts of time and energy seeking to punish treason and expel it from their midst.

II.

The first two waves of expulsions from Congress occurred during the secession winter and prior to the first Battle of Bull Run, in July 1861. In these, the primary targets were southerners and men from the border states. Wave one resulted in the seats of six Deep South senators being declared vacant. Wave two saw eight Upper South and two Texas senators, and one border state congressman expelled. Proceedings were also brought against another border state congressmen for alleged disloyalty. In each of these cases those prosecuted could be charged with some sort of overt act—joining their state in secession, joining the rebels in arms, or seeking to aid the rebel cause.

By mid-January 1861, four Deep South states—South Carolina, Mississippi, Florida, and Alabama—had seceded from the Union. Accordingly, on January 21, 1861, five of the Democratic senators from these states rose to announce their withdrawal from that body. David Yulee of Florida began the proceedings. Because Florida had seceded, he declared, “my colleague and myself are of the opinion that our connection with this body is legally terminated.” Yulee was followed Stephen R. Mallory of Florida, Clement Clay and Benjamin Fitzpatrick of Alabama, and Jefferson Davis of Mississippi. Mallory, soon to be the rebel Secretary of the Navy, stated that the southern states desired “to go in peace” but was clear that, if attacked or in any way coerced, would fight for their freedom and rights. Clay argued that the North had not upheld its constitutional obligations to the

¹² *Ibid.*, 563.

South, and Fitzpatrick stated that he owed “no loyalty to any other Power than that of my sovereign State.” Jefferson Davis, soon to be the Confederate president, justified his state’s decision to secede, but stated that he would carry with him “no hostile remembrance” of past political battles. None of these senators used the words “resign” or “resignation” to describe the actions they were taking. Rather, they were withdrawing from the Senate. Each believed that because their states were no longer members of the Union, they were no longer entitled to seats in the legislative branch.¹³

The fact that none of these senators filed an official resignation—either in the Senate or with their respective state governments—caused great consternation for those who remained in the Senate. The day after these five senators issued their farewells, the Senate entered into a debate on the nature of what had just transpired. Presiding over the Senate was Vice President John C. Breckinridge of Kentucky, the southern Democratic nominee for the presidency in 1860 and soon to be a Confederate general and later secretary of war. Breckinridge noted that the proceedings of the previous day had not been recorded in the *Senate Journal* and he asked the Senate what should be done. Upon this question there was very little agreement. Stephen A. Douglas, the prominent Illinois Democrat, and his Republican colleague, Lyman Trumbull, argued that the southerners had resigned their seats. Republican Henry Wilson of Massachusetts, and Democrat Willard Saulsbury of Delaware, by contrast, said that they had not resigned and were still members of the Senate. Judah P. Benjamin of Louisiana, soon to be the Confederate Secretary of War, wanted it plainly on the record that these senators had withdrawn from the Senate because their states had seceded. “That fact ought to appear upon our

¹³ Ibid., 484-487.

Journals. It is a fact in the history of the country,” he declared. According to Benjamin, who clearly believed in the right of secession, the senators no longer had a place in the Senate because their states no longer were part of the Union. William Henry Seward of New York hoped the previous day’s “transaction” would be kept out of the record. “I think the less there is said about it, the sooner it will be mended.” But most senators were not content with this reasoning, and Benjamin kept pressing the Senate’s constitutional obligation to keep an accurate record of its events.¹⁴

Several other senators entered the debate, disagreeing over whether the senators had resigned their seats or withdrawn because of the actions of their respective states. If the former, then they were out of the Senate and it mattered not why they had resigned. If the latter, the circumstances surrounding their withdrawal mattered a great deal. If secession was a nullity, then the seats were either vacant and could be filled, or should not be considered vacant at all; if secession was a legitimate act, then the seats no longer existed. Unable to come to an agreement the Senate laid the subject on the table on January 22.¹⁵

Regardless of any uncertainty in the Capitol, the “dissolution wagon” kept moving. On January 28 Senator Alfred Iverson of Georgia withdrew, and on February 4, Judah P. Benjamin and John Slidell of Louisiana withdrew. The issue of how to deal with withdrawn senators did not come up again during the 36th Congress, which adjourned on March 3. March 4, however, saw a new Congress with a new Republican

¹⁴ Ibid., 500-501.

¹⁵ Ibid., 501-505.

majority that was ready to reconsider the situation. But even this new majority could not agree on how to handle the situation.¹⁶

On March 14 debate began anew over how to treat the “senators from the seceding states.” Republican William Pitt Fessenden of Maine, doing the best he could to follow the language of the Constitution, offered a resolution that declared the seats of Senators Brown, Davis, Mallory, Clay, Toombs, and Benjamin vacant.¹⁷ Senator Bayard of Delaware proposed to omit the names of these senators from any future roll calls since they had “announced that, by the secession of their respective States they were no longer members of the Senate.” Bayard opposed Fessenden’s resolution because it implied that the southern senators had resigned. “The absence of a Senator does not vacate his seat; the withdrawal of a Senator from his seat does not vacate it. It may be the mal-performance of duty, but it does not disturb his right to come here and claim his seat again.” Bayard claimed not to want to get into questions of the effect of secession, but rather only to omit the names of the absent senators from the roll and to continue with the Senate’s normal business. “I think that is the wiser course, under the circumstances, unless it be the desire of any portion of the Senate to complicate the affairs of the country, already sufficiently complicated; to irritate passions already sufficiently aroused;

¹⁶ “The Southern Wagon,” American Song Sheets, ser. 2, vol. 1, LC; *Congressional Globe*, 36th Cong., 2nd sess., pp. 589, 720-722; Anne M. Butler and Wendy Wolff, *United States Senate: Election, Expulsion and Censure Cases, 1793-1990* (Washington, D.C.: GPO, 1995), 90-91.

¹⁷ This resolution did not include Yulee, Fitzpatrick, Iverson, Hammond, or Slidell because their terms in Congress had expired and they had not been reelected to the 37th Congress. Butler and Wolff, *Cases*, 91.

and to afford additional chances for the utter destruction of the Union, when it is already sufficiently endangered.”¹⁸

Bayard’s arguments were in vain. Some senators from the Upper South argued that the seats were not vacant because they no longer existed because the states they had represented were out of the Union. But the Senate rejected Bayard’s resolution and the pro-secession arguments of the southern senators. Fessenden’s resolution was adopted and the seats were declared vacant.¹⁹

On July 4, 1861 Congress reassembled to hear a special message from President Lincoln. Thus began the first regular session of the 37th Congress. One week later, Senator Daniel Clark, a New Hampshire Republican, introduced a resolution to expel ten southern senators, mainly from the Upper South, but also from South Carolina and Texas. Because these senators had “failed to appear in their seats in the Senate and to aid the Government in this important crisis,” and because they were complicit in a conspiracy to destroy the Union, Clark moved that they ought to be expelled from the Senate. The senators named in this resolution were James M. Mason and Robert M. T. Hunter of Virginia, Thomas L. Clingman and Thomas Bragg of North Carolina, James Chesnut, Jr., of South Carolina, A.O.P. Nicholson of Tennessee, William K. Sebastian and Charles B. Mitchel of Arkansas, and John Hemphill and Louis T. Wigfall of Texas.²⁰

Senator Bayard of Delaware jumped at the opportunity to oppose this resolution. Why not simply declare the seats vacant, he asked, as the Senate had done in March?

¹⁸ *Congressional Globe*, 37th Cong., special sess., pp. 1454-1455.

¹⁹ *Ibid.*, 1456.

²⁰ *Congressional Globe*, 37th Cong., 1st sess., pp. 62-63.

Moreover, Bayard argued that there was no conspiracy against the government. Rather, the actions of the southern states had been done in open daylight; they were not conspiratorial, but the claiming of a revolutionary right. Bayard argued that secession was not constitutional, but that the South would be justified in claiming the right of revolution. “There is a difference. Shall I exercise the power of expulsion against a Senator on the ground of conspiracy, because he may be erroneous in point of law as to the effect of the action of his State?” Expulsion was not a remedy for wrong political positions. Nor ought it be used to punish an individual for the actions of his state. Instead, it was intended to punish misbehavior on the part of individual congressmen. If the resolution was adopted as worded, Bayard predicted, it would simply “create additional feeling and additional hostility between the already sufficiently excited people of this country.”²¹

Clark replied that a “tame measure,” such as declaring the seats vacant, would not suffice at a time like this. At the last session the senators had withdrawn and so the Senate declared their seats vacant. “But now, sir, this revolution has gone on; it has made rapid progress; they have taken up arms against the Government; they have not only seized your arms, but they have assaulted your fortifications; their guns are now within sound of your capital; and shall we sit here in the Senate and deliberate and doubt whether we shall turn out of this Senate the very men who are ready to explode those guns against your capital?” No. The Senate must act decisively and expel the traitors from “the councils of the nation.”²²

²¹ Ibid., 63.

²² Ibid.

Bayard raised another protest, as did Senator Milton Latham, a California Democrat, who argued that not all of those senators named had openly espoused secession.²³ But their arguments were met by California Democrat James McDougall. He argued that the senators ought not be expelled because their states had seceded, but because they had shown their support for secession by refusing to attend their duties in the Senate. “Treason was always a gentlemanly crime, and in ancient times a man who committed it was entitled to the ax instead of the halter. However, it is none the less a crime, and the greatest; and espousing a cause against the Republic, if it be not treason, is akin to that crime.”²⁴

The Senate agreed with Clark and McDougall and voted 32 to 10 in favor of expulsion. Nearly six months later, Senator Ira Harris of New York recalled the previous July when “nearly one third of this body” was expelled. “These vacant seats are a constant and an impressive memorial of the extent and the desperate character of that treason which has not only desolated this Senate, but our whole country.”²⁵

The debate in the Senate during the 1st session of the 37th Congress was mild and short-lived compared to what took place in the lower house. On July 13, two days after the expulsion of the ten southern senators, Francis P. Blair, Jr., a Missouri Republican,

²³ Nine of the ten senators who were expelled in July 1861 became active in the Confederate cause. Only William K. Sebastian of Arkansas did not actively support the rebellion. In 1877, twelve years after his death, the Senate revoked his order of expulsion compensated his surviving children for the money he would have made if he had continued to serve in the Senate. See Butler and Wolff, *Cases*, 98.

²⁴ *Congressional Globe*, 37th Cong., 1st sess., pp. 63-64.

²⁵ *Congressional Globe*, 37th Cong., 1st sess., pp. 64; *Congressional Globe*, 37th Cong., 2nd sess., p. 473.

introduced a resolution to expel his Democratic colleague, John B. Clark, for holding a commission in the Confederate militia in Missouri and for taking up arms against the government of the United States. These facts were “perfectly well known,” according to Blair. “His district is loyal to the Government of the United States, and ought to have a loyal Representative upon this floor.” Debate ensued in which some congressmen professed not to know that it was any more than a rumor that Clark had joined the rebel forces, and one Democrat compared the proceedings to the star chamber in England. Some Democrats called for an investigation to determine the facts of the case, claiming that that was the only fair and deliberate way to handle the case. But the Republican majority held firm, and the resolution was carried 94 to 45, just barely attaining the two-thirds majority necessary for expulsion.²⁶

Two days later, on July 15, a resolution was introduced inquiring into the conduct of a newly elected Unionist representative from Maryland. The resolution called for an investigation as to whether Henry May had been “holding criminal intercourse and correspondence with persons in armed rebellion against the Government of the United States.” Earlier in July May had traveled to Richmond to meet with Jefferson Davis and other Confederate leaders, but no one in Washington was quite sure of the specific purpose of his visit. The press had reported that in Richmond he had denounced the Lincoln administration for arbitrary arrests and announced that thirty-thousand citizens of Baltimore were in arms ready to uphold southern secession. When the resolution was offered on July 15, May had not yet taken his seat in the House because he was sick, though Republicans claimed that he was faking illness to avoid the consequences of his

²⁶ *Congressional Globe*, 37th Cong., 1st sess., pp. 116-117.

trip. “His recent visit to Richmond and his subsequent *illness*, were mere dodges to escape from his pledge [to support the Union],” intimated the *Chicago Tribune*. “May is undoubtedly a rebel at heart, although his necessities compel him to seem to be for the Union.”²⁷

The debate in the House became “a great rumpus.” Clement Vallandigham and other leading Democrats claimed that May had traveled to Richmond with a pass issued by General Winfield Scott, and with the approval of President Lincoln (with whom May had met twice before departing). They chastised the Republicans for basing a resolution “of this kind on a mere newspaper report.” May had gotten the permission of the president to go to Richmond “as a private individual,” not on any official government business. But that was permission nonetheless. Despite these protestations, the resolution to inquire into May’s actions was adopted by the House.²⁸

On July 18 the Judiciary Committee reported against the resolution, citing that its author was “unable to produce any evidence tending to prove any of the matters referred to in the resolution, but that they were grounded upon newspaper articles only.” May then rose before the House and asked to make an explanation. May expressed his “indignation and disgust” at the attempt to strip him of his right to represent his constituents based only on the “idle gossip of the hour.” He expressed his opposition to secession and said he went to Richmond to converse with the southern leaders to do

²⁷ *Congressional Globe*, 37th Cong., 1st sess., pp. 131-132; *Chicago Tribune*, July 13 and 18, 1861; *New York Times*, July 8, 1861. If the resolution had been adopted, May most likely would have lost his seat in the House. See *New York Times*, September 30, 1861.

²⁸ *Chicago Tribune*, July 16, 1861; *Congressional Globe*, 37th Cong., 1st sess., pp. 131-132.

anything he could to avert the impending civil war. “Sir, it was a private mission that I undertook; but it was a blessed one.”²⁹

May spent the bulk of his “explanation” chastising the president and the military for suspending the writ of habeas corpus and for making military arrests in Baltimore. His constituents, he said, were facing unimaginable humiliation, degradation and injustice, and he called on the House “to emancipate the down-trodden people of Baltimore from the military tyranny under which they are now groaning, and which has so utterly prostrated their constitutional liberties.”³⁰

Several times May was called to order, and Republicans began to doubt that the newspaper rumors about him were untrue. His statements in the House against Lincoln were remarkably similar to what he was reported to have said in Richmond. Still, May denied the reports. “It is absolutely untrue that I communicated any such information to any one; and it is equally untrue, in point of fact, that such a state of things exists.” But May continued: “That there are thirty thousand men—ay, and more—who, unless the heel of oppression is lifted from them, will, if they can get the opportunity, vindicate their constitutional rights and liberties, is absolutely true.”³¹

Such sentiments were precisely why the Republicans doubted his loyalty. “I should not be surprised if that rebel government should have regarded him more as a sympathizer than as a mediator,” stated Schuyler Colfax of Indiana. But May insisted

²⁹ *Congressional Globe*, 37th Cong., 1st sess., pp. 196-198; *Congressional Serial Set*, 37th Cong., 1st sess., House Report No. 2.

³⁰ *Congressional Globe*, 37th Cong., 1st sess., pp. 196-197.

³¹ *Ibid.*, 198.

that oppression and tyranny must be opposed everywhere and at all times. The “courts and a jury of the land” ought to judge cases of disloyalty, he argued. “Not in time of war,” replied a Maryland Republican.³²

The issue of May’s trip to Richmond was not pursued any further, but May would not drop the issue of arbitrary arrests in Maryland. On July 31 he introduced a long resolution condemning the military for violating the Constitution in arresting civilians. Again on August 5 May offered another lengthy resolution blaming the Republican party for being sectional and uncompromising in nature, and for thus bringing about the war. The resolution further called for Congress to appoint peace commissioners “to procure an armistice between the contending armies, and restore peace at all events; and . . . to arrange a compromise to preserve the Union, if possible; but if not, then a peaceful separation of the respective States.”³³

Republicans were indignant at May’s resolutions. Thaddeus Stevens of Pennsylvania called May to order, saying that the first resolution was “nothing but a speech.” The second one elicited a resolution against “treasonable resolutions” from Alexander Diven of New York:

Resolved, That at a time when an armed rebellion is threatening the integrity of the Union and the overthrow of the Government, any and all resolutions or recommendations designed to make terms with armed rebels, are either cowardly or treasonable.

But Valliant Val retorted: “It is neither cowardly nor treasonable for the stronger to propose terms of peace to the weaker.” He called Diven’s resolution “unjust, unfounded,

³² Ibid., 198-202.

³³ Ibid., 367, 445.

and offensive.” Vallandigham’s fellow Ohioan, Samuel S. Cox, offered a resolution to censure Diven for proposing an unparliamentary resolution. But on August 6, the final day of the session, Diven and Cox offered explanations and withdrew their resolutions. The matter of May’s loyalty, for the moment, appeared to be laid to rest.³⁴

May’s troubles appeared to be over, but during the autumn recess he faced a new and even more challenging ordeal. On September 13 he was arrested at his home, by the order of Secretary of War Simon Cameron. He first was committed to Fort McHenry, in Baltimore Harbor, but then transferred to Fort Monroe, in Virginia, and then to Fort Lafayette, in New York Harbor. May was held in custody for nearly a month, until he was paroled in mid-October to attend the funeral of his brother.³⁵

May’s arrest was actually tied to larger issues in Maryland politics at the time. It was widely believed that the Maryland legislature was preparing to convene to vote the state out of the Union. In order to prevent this occurrence, Cameron issued orders to arrest several members of the Maryland legislature, pro-secession newspaper editors, the mayor and some policemen of Baltimore, and Congressman Henry May. They were to be held “in close custody” and to be kept from any outside communication. “The exigencies of the Government demand a prompt and successful execution of this order.”³⁶

³⁴ *Ibid.*, 367, 445, 448, 458.

³⁵ *O.R.*, ser. 2, vol. 2, pp. 102, 225-229, 790.

³⁶ *O.R.*, ser. 2, vol. 2, pp. 790-795. May was also accused of “loitering about” Baltimore “with other rebels” and “taking observations” of Fort McHenry. See Charles W. Mitchell, ed., *Maryland Voices of the Civil War* (Baltimore: Johns Hopkins University Press, 2007), 163.

Defenders of May charged that he had only been arrested for political purposes. His “only crime,” according to May’s brother, “is that while endeavoring to keep the peace in his own State at all times and on all occasions he has been opposed to the policy of your Administration in regard to the unhappy difficulties in which our country is now involved.” May’s health in prison began to fail due to the cramped quarters and the “foul atmosphere” of the prison—“a treatment more suitable to a felon than to a gentleman whose honor is as pure as any man’s in this land.” So after the death of one of his brothers, May was released on parole.³⁷

May’s views of the war and how it ought to be prosecuted were the cause of his troubles in Congress and of his arrest two months later. After shots had been fired it was seen as treasonable to oppose the war or to favor peaceable separation. Peaceful separation did not make sense on August 5, when May offered his second lengthy resolution. War had begun in earnest. The rebels had fired on Fort Sumter in April, and on July 21 a momentous battle had been fought within earshot Washington, at Bull Run. The Union had been defeated there, and confusion and disarray pervaded the national capital.

The Washington correspondent for the Philadelphia *Inquirer* chastised May for his views, and the article was carried in papers around the country. “So far as Mr. May himself is concerned, I am positive in saying that he is ardently and sincerely attached to the Union, and wishes it reconstructed. But he is opposed to the war, which he believes to be unjust and unnecessary.” May believed further that war could not reconstruct the Union, and that the longer it was waged, the less likely reconciliation of the states would

³⁷ *O.R.*, ser. 2, vol. 2, pp. 799-801.

be. The correspondent noted that May's mission to Richmond, "if it was a mission for peace, has been fruitless. War is now the word—a sharp and decisive war."³⁸

This last sentence captured why May was being targeted for disloyalty. He had campaigned as a Unionist. But now that war had come—and his efforts to maintain peace and compromise had failed—he appeared to oppose any attempt to coerce the South back into the Union. He was willing to let them go in peace even though war was now on the table. "His speeches and his action in Congress are at war with his professions of patriotism during the canvass," reported the *New York Times*. "While professing a love for the Union, he goes even beyond Breckinridge or Burnett in denouncing its defenders." And it was a "National misfortune" to have such men in Congress. "They mar the harmony of that body, though, thanks to its patriotism, they cannot influence its action. They give courage and hope to the rebels, by fostering the delusion that there is a party even in the loyal States who sympathize with their treason, and are ready to consent that this Union shall be dissolved." The editors of the *Times* took heart in the fact that such disloyal congressmen as May would lose in the next election and "expire into oblivion from which there will be no recall—political graves from which there will be no resurrection."³⁹

As the editors of the *Times* correctly noted, the fact of war had changed the situation. By the summer of 1861, efforts at compromise were no longer legitimately on the table. Congressmen had to fall into line or face the consequences—whether they be

³⁸ Quoted in the *New York Times*, July 14, 1861.

³⁹ *New York Times*, July 20, 1861.

punitive action in Congress, arrest by the Lincoln administration, or failure at the polls. Once war began, the terms of debate were considerably altered.

III.

The early winter months of 1861 and 1862 were an eventful and consequential time for the U.S. Congress. On December 2 the House expelled Democrat John W. Reid of Missouri for “having taken up arms against the United States,” and on December 3 the House expelled Henry C. Burnett of Kentucky for being “in open rebellion against the Government.” Francis P. Blair, Jr., quipped, “So many new members are coming in, I think it would be as well to get rid of one or two.”⁴⁰ The following day the Senate took up this work, expelling John C. Breckinridge of Kentucky.

Breckinridge, as vice president, had presided over the Senate during the debate over declaring the seats of southern senators vacant during the final session of the 36th Congress. On March 4 he began a new term in the Senate to which he had been elected. A Kentuckian, Breckinridge hoped his state would remain neutral during the war, but when he learned that he was to be arrested by the military, he escaped to the Confederacy and was made a brigadier general by Jefferson Davis. Breckinridge sent a letter of resignation to the Senate in October 1861, but on December 4 a resolution was introduced to expel him from the Senate. Lyman Trumbull moved to amend the resolution to state that Breckinridge was a “traitor” who “has joined the enemies of his country, and is now in arms against the Government he had sworn to support.” Lazarus Powell of Kentucky protested that Breckinridge had already resigned his seat and

⁴⁰ *Congressional Globe*, 37th Cong., 2nd sess., pp. 5, 7-8.

therefore ought not to be expelled, but the resolution passed 36-0, with several Democrats not voting.⁴¹ For all practical purposes, Breckinridge was legislatively convicted of treason.

In the next two and a half weeks three more resolutions were introduced to expel members of the Senate. Two of these were aimed at Missouri's two senators, Waldo P. Johnson and Trusten Polk. The resolution against Johnson said that his "sympathy with, and participation in, the rebellion" had made him "guilty of conduct incompatible with his duty and station as a Senator." The resolution against Polk said he ought to be expelled for being a "traitor."⁴²

Senate Democrats fought to have the resolutions investigated by the Judiciary Committee, or some other special committee. "There is no doubt, sir, that Judge Johnson has been guilty at least of aiding the so-called confederates, and that is good ground for expulsion," argued Willard Saulsbury of Delaware, "but I take it that the Senate of the United States should not assume to expel a member from this body without, at least, some evidence that he has been guilty of something unbecoming the character of a Senator. . . . If Mr. Johnson has been guilty of any disloyal act to the Government, I for one am prepared to vote for his expulsion; and I am ready to vote for the expulsion of any other Senator who has been guilty of like conduct." But such charges could not be based on newspaper scribble. They ought to be proved before voted upon. Furthermore, argued James McDougall of California, expelling senators without proof would set a

⁴¹ *Congressional Globe*, 37th Cong., 2nd sess., pp. 9-10; Butler and Wolff, *Cases*, 102-103.

⁴² *Congressional Globe*, 37th Cong., 2nd sess., pp. 70, 126.

dangerous precedent for the future. “If the Senate cannot take the trouble to make a proper record, in the proper form, on the grave matter of determining whether a man has been guilty of treason, and therefore unfit to occupy a place on this floor; and if we cannot take time to inquire into that and place it on record, the haste must be great, the enemy must, indeed, be at our gate.”⁴³

The Senate Judiciary Committee recommended that both resolutions pass, and on January 10, 1862, the Senate expelled both Missouri senators by a unanimous vote. The significance of these two cases was the reliance on a more judicious process in dealing with suspected traitors. Unlike the expulsion cases from the summer of 1861, these cases were first referred to the Judiciary Committee, which gathered evidence and then issued a report. Procedure and proper form were again becoming a concern of the Senate, unlike during the early months of the war when feelings against secession were new and ran high.⁴⁴

The fourth senator to face a resolution of expulsion in December 1861 was Jesse D. Bright of Indiana. A Doughface who had supported Breckinridge for president in 1860, Bright was well-known for his sympathy for the South. The debate over Bright’s expulsion was more complicated than those of Breckinridge, Johnson, or Polk, for Bright had never taken up arms against the Union as had the other three. Nor had he abandoned his seat. In fact, Bright sat at his seat during the debate over his expulsion, from December 16, 1861, until February 5, 1862.

⁴³ Ibid., 70-71.

⁴⁴ *Congressional Globe*, 37th Cong., 2nd sess., pp. 263-264; *Congressional Serial Set*, 37th Cong., 2nd sess., Senate Reports Nos. 4 and 5; Butler and Wolff, *Cases*, 104-105.

On March 1, 1861, Bright had addressed a letter of introduction “To His Excellency Jefferson Davis, *President of the Confederation of States.*” The body of the letter was short and to the point, in typical fashion for a letter of that kind:

My Dear Sir: Allow me to introduce to your acquaintance my friend Thomas B. Lincoln, of Texas. He visits your capital mainly to dispose of what he regards a great improvement in fire-arms. I recommend him to your favorable consideration as a gentleman of the first respectability, and reliable in every respect.

Very truly, yours, Jesse D. Bright

Bright and Thomas Lincoln had known each other since about 1837, the latter being a small-scale merchant, and the former doing legal work for him. On at least one other occasion Lincoln had procured a letter of introduction from Bright, but this one, being addressed to Jeff Davis as President of the Confederacy, was probably the most consequential piece of perfunctory writing that Bright would ever pen.⁴⁵

In 1861 Thomas Lincoln was arrested in Ohio and charged with treason. Upon his person were found two letters of introduction by Bright, one of which was the soon-to-be infamous letter to Davis. The letter made its way into the press, and, on December 16, 1861, Senator Morton Wilkinson, a Republican from Minnesota, introduced a resolution to expel Bright from the Senate. The Judiciary Committee decided that the facts did not warrant expulsion, but when the issue came before the whole Senate, a heated and acrimonious debate ensued.⁴⁶

Several issues came up in the debate over Bright’s expulsion. The primary issue, of course, was whether the sitting senator had disqualified himself from holding high

⁴⁵ *Congressional Globe*, 37th Cong., 2nd sess., p. 89.

⁴⁶ *Ibid.*, 89, 287, 396, 652.

office in the national government. Very closely related to that was on what grounds a senator ought to be expelled. The senators disagreed over whether only the contents of the letter, the surrounding circumstances, or past political positions could also be used as evidence against Senator Bright. Democrats saw the debate over Bright's expulsion as a further expansion of the definition of treason because not only his actions, but also his motives, opinions, and political beliefs were being judged. The southern senators had been justly expelled, for they had abandoned their country and government and were in arms against the Constitution to which they had sworn their allegiance. Not so with Bright. He maintained his seat on the floor, participated in the day-to-day work of the Senate, and professed to be loyal. The situations were distinct, and consequently much more divisive.

The most important question for the Senate in determining Bright's fate was to determine the state of the country on March 1, 1861, when the letter of introduction had been written. If the nation was at war, and Jefferson Davis was the leader of the traitors, then Bright's letter was obviously treasonable and he deserved not only expulsion from the Senate, but also prosecution in a court of law. But if war had not yet commenced by that date, then the meaning of Bright's action was less clear. Certainly, it was an indiscretion; but was it a disloyal attempt to aid the rebels in their ability to make war against the Union? Did it reveal where Bright's sympathies really lay, or was it nothing more than the careless fulfillment of an obligation to a longtime friend? Bright admitted that he had probably written the letter, for it was in his style. But he claimed not to recollect it specifically.⁴⁷

⁴⁷ Ibid., 396.

Senators Wilkinson and Sumner were Bright's chief adversaries in the debate. Both believed that, considering the circumstances in which the nation found itself in the winter of 1861, no loyal senator could address Jeff Davis by the title he assumed. The rebels had already fired on the *Star of the West* in January and seized federal property all over the South. "Facts which were known to everyone, which transpired before the date of that letter, made it inevitable that war was to be the result of this southern rebellion," declared Wilkinson. War would come, and both Bright and Thomas Lincoln knew it. Why else would Lincoln want to sell arms to the rebels, except he knew "that his improvement would find a ready purchaser in the leader of this rebel army."⁴⁸

Charles Sumner continued the barrage, comparing Bright to Catiline and Benedict Arnold.⁴⁹ Sumner insisted that Jeff Davis was levying war on the United States; thus, in writing the letter, Bright was adhering to the enemy, giving him aid and comfort. Citing early American case law and Blackstone, Sumner argued that "an act of sympathy and friendship extended to persons in rebellion—though minute or remote—would be evidence to help bring the offender even within the cautious grasp of our Constitution." The letter was "flat treason" and "an overt act of adherence," for Blackstone had said that treason included "giving them intelligence, by sending them provisions, *by selling them arms*, by treacherously surrounding a castle, *and the like*." "And when an American Senator, without any disguise, sends 'a great improvement in firearms' to the rebel Chief,

⁴⁸ Ibid., 391-392.

⁴⁹ For an excellent discussion of Catiline, the destroyer of the Roman Republic, in early American political discourse, see Joseph J. Ellis, *Founding Brothers: The Revolutionary Generation* (New York: Random House, Inc., 2000), 42-44.

then engaged in levying war against his country, he mixes himself in the rebellion, so that under municipal law he is a traitor.” Moreover, Bright was too intelligent to forget writing such a letter at such a time.⁵⁰

Other Republicans and Unionists added to the chorus of disgust. Andrew Johnson recounted the horrors that Tennessee Unionists were facing at the hands of merciless rebels, and wondered why Bright would not take a stronger stand against them, while Orville Hickman Browning of Illinois argued that Bright’s record during the war gave no indication that he wanted the North to win.

I state it in this form: he who desires the success of the rebellion, the permanent separation of the States, and the recognition of the southern confederacy as an independent government, is guilty of moral treason against the United States. . . . He who is opposed to coercive measures for the suppression of the rebellion does desire the success of the rebellion, the permanent separation of the States, and the recognition of the southern confederacy. . . . Then, sir, I state, the Senator from Indiana is . . . guilty of moral treason against the United States; and for that cause I think it would be our duty to expel him.

In this way, Bright’s sentiments had ripened “into an overt act calculated to give them practical effect,” and thus were “actual treason, subject to indictment and punishment.” He was a traitor who had acted purposefully to aid his rebel friends.⁵¹

Part of the record in the case was a letter Bright had written in September 1861 in which he argued that coercion of the southern states was unconstitutional and should never be attempted—and he continued to argue against coercion on the Senate floor during his trial. This sentiment, connected with his known southern political sympathies, caused many senators to believe he was a traitor. Senator Dixon of Connecticut pointed

⁵⁰ *Congressional Globe*, 37th Cong., 2nd sess., 412-415.

⁵¹ *Ibid.*, 623.

out that aiding a public enemy in the purchasing of fire arms was, beyond doubt, giving them aid and comfort. “When I couple that fact with his avowed opposition—now, then, and at all times—to what he calls the entire doctrine of coercion, I am compelled to believe him a friend of the rebellion.”⁵²

As the debate continued, it appeared that many Republicans were willing to convict Bright for various political positions he had taken in the past. Garrett Davis, the Kentucky Unionist, argued that Bright had “never, in a solitary measure, shown any sympathy with the Government in its life and death struggle.” And neutrality was not an option. Considering his sentiments and lack of a positive proposals to win the war, Davis believed that Bright ought to have resigned his seat from the Senate. “Not having done so, it seems to me to be the imperative duty of this body to expel him from it.” Similarly, Senator Timothy Howe of Wisconsin argued that Bright had taken positions in the Senate against coercion “for the purpose and with the intent of strengthening and multiplying the forces of the rebellion, of fomenting insurrection.” When one Democrat accused Republicans of wanting to expel Bright for his political opinions, Garrett Davis replied that one could not be expelled for his opinions alone, but if his opinions were incompatible with his duties as a senator, and he acted upon them, then he was liable to expulsion.⁵³

Other Republicans were intent on proving that Bright’s letter made him guilty of an overt act of treason. Senator Lyman Trumbull of Illinois argued that senators “may disapprove the acts of the Administration” and “the policy that is pursued to put down

⁵² Ibid., 624.

⁵³ Ibid., 432, 448, 543, 562.

this rebellion,” but when a senator acted “in favor of the men in arms against this Government, then I say he is giving aid and comfort to the enemy, and he becomes criminally culpable.”⁵⁴

Most Republicans believed the war had begun by the time Bright wrote his infamous letter. Some senators argued that the South had been waging war on the North for more than thirty years. Others said it began in December 1860 or January 1861. Certainly, according to any of these views, the war had commenced by March 1861. Senator James R. Doolittle of Wisconsin argued that, “although no blood had been shed, war already existed against the Government of the United States.” No thinking man, according to Doolittle, could have believed that the Union would have fallen to pieces without a fight.⁵⁵

Democrats countered that it was unfair to say that Bright knew war was inevitable by March 1, 1861. James Alfred Pearce, a Maryland Democrat, argued that civil war had not yet begun when the letter was written: “The revolution was perfectly bloodless at that time, and, for aught we knew, might never lead to blood. . . . Not a gun had been fired, except the two or three that were fired into the Star of the West; northern sentiment had not then been developed; nor was it until the South Carolina batteries opened upon Fort Sumter that the storm of public wrath seemed to arise.” Without actual war, it did not follow that Bright could have written a “treasonable communication.” Moreover, James Bayard of Delaware pointed out that Bright wanted peace, not civil war, so his intention in writing the letter could not have been to arm the rebel troops. “You must

⁵⁴ Ibid., 397.

⁵⁵ Ibid., 416, 625.

take the condition of the country at the time the letter was written, in order to arrive at any fair interpretation of its meaning,” argued Bayard. “When this letter was written no hostilities had taken place; no war was imminent. . . . The people generally did not believe that coercion would be attempted, or that war would grow out of the struggle which was then commencing on the part of the confederate States.” As evidence, Bayard pointed to President Lincoln and Secretary of State Seward, whose administration began on March 4. Both professed to want compromise as late as April. “We are not enemies, but friends. We must not be enemies,” Lincoln had stated in his first inaugural address. If Lincoln and Seward believed compromise still within reach, could Bright really be charged with *knowing* that war was inevitable?⁵⁶

Bayard argued that war would never restore the Union, and if it was disloyal to say so, the Senate could expel him too. “I am perfectly aware that there are men who think that even opposition to the Republican party is disloyalty to the Union,” he continued. “I, for one, no matter what the consequences, never mean to submit to it.” Bayard insisted that if opposition to coercion and abolition made a senator disloyal, then the Republicans would have to expel more members than just the Senator from Indiana. In a similar vein, Senator Willard Saulsbury of Delaware wondered when opposition to coercion had become disloyal, and who had made that decision. He chided the Republicans for thinking themselves the only truly loyal northerners:

Those who have dissented from the wisdom of your policy, instead of being regarded, as they profess to be, as much desirous as you for the preservation of the Union and Constitution of their fathers, have been the objects of your distrust and reproach. Spurning their counsels simply because you are accidentally in the majority in this body, you demand

⁵⁶ Ibid., 393-394, 397, 541-542, 649-650.

acquiescence in your views of public policy, under the penalty of the brand of disloyalty, to be followed by that of expulsion.

Democrats were placed on the defensive regarding the salutation and content of Bright's letter—the selling of an improvement in firearms to the president of the rebel nation. Bayard and Saulsbury argued that it was normal to address people by the title they claimed—this was not a recognition of his title, but merely an act of courtesy.⁵⁷

One of the more important questions that arose in the debates over the expulsion of Jesse Bright was what function the Senate was exercising in the process—were they acting in a judicial capacity, bound by the same rules and procedures as a court of law? Or was this a purely political and disciplinary action? Bright's defenders argued that the Senate was exercising judicial powers, and was therefore bound by rules of judicial procedure. It was on this question that the Republicans who voted against expulsion came to the embattled senator's defense.⁵⁸

Senator Edgar Cowan of Pennsylvania, one of the few Republicans to vote against the resolution, argued that Bright had to be charged with a specific offense and that those charges had to be proved beyond a reasonable doubt. Although not fettered by judicial rules, Cowan argued that “we must still be satisfied that an offense has been committed in fact.” He therefore believed that Bright ought to be presumed innocent until proven guilty. The charge against Bright, Cowan continued, was “treason—treason in its worst aspect; neither more nor less; either treason or nothing. There is no half-way place, there is no intermediate point at which you can stop between the guilt of the Senator from

⁵⁷ Ibid.

⁵⁸ Ibid., 654.

Indiana upon this evidence or his innocence. . . . He is either guilty of treason or he is guilty of nothing.” The Senate, therefore, had to prove treasonable intent in Bright’s writing of the letter, or Cowan believed he should be acquitted. And if Bright really had opposed secession and war, then it did not follow that he was committing a willful act of levying war.⁵⁹

Similarly, Republican Ira Harris, of New York, argued that this was “a *quasi* case of impeachment” and a trial for “the highest crime known to the laws of this or any other country.” Accordingly, Harris argued that it was unfair for the Senate to judge Bright in light of events subsequent to his writing of the letter. “Were it a political question,” Harris declared, “I should not hesitate to vote” for expulsion. But “standing here as a judge called upon to decide, according to the rules of law and evidence, upon the guilt or innocence of the Senator on trial,” Harris concluded that the evidence “is not sufficient” to warrant expulsion.⁶⁰

Democrats echoed these convictions. Most forceful in the argument were the two Democrats from Delaware. Senator Bayard insisted that all expulsion cases were judicial in nature because they deprived a person of his office for allegations of misconduct. Senator Saulsbury argued that it was out of place for Republicans to review “the past political action, party associations, and social relations of the Senator arraigned, and find in these sufficient cause for his expulsion.” Such extraneous information was foreign to the record and never would be allowed as evidence in a court of law. The admission of such evidence in this case was a gross injustice that even the most barbarous courts and

⁵⁹ Ibid., 471, 655.

⁶⁰ Ibid., 473, 646.

judges would not allow. Republicans, according to Saulsbury, sought to include “*any conduct, any opinions, any line of action*” they could to impeach Senator Bright’s character, no matter how extraneous to the case that information was. In short, the Republicans were broadening expulsionable crimes to include past political opinions—even though many northerners had believed, and still believed, that coercion was not the right policy.⁶¹

Ultimately these arguments were rejected by the Republican majority. Orville Hickman Browning of Illinois, after “a careful examination of the constitutional provision upon the subject of expulsion,” concluded that Bright not need be found guilty of any criminal offence. It “would be a proper exercise” of the Senate’s power to expel a senator who had committed no overt act of treason, but who was known to have “disloyal and treasonable sentiments.” Similarly, James H. Lane of Kansas argued that “disloyalty may exist without actual treason” if the intent was there but had not yet been acted upon. Even still, Lane believed that disloyal sentiments were sufficient to warrant expulsion of a senator. (Lane proceeded to argue that Bright’s letter was an overt act of treason.) Garrett Davis of Kentucky argued that the Senate need only decide the reasonableness of the case against Bright—whether they believed his opinions and actions had rendered him “unfit and unsafe” to continue as a member of that body: “That is the standard; and a just and a reasonable and a common-sense standard it is.” One Democrat, James A. McDougall of California, argued that the Senate was “no court; and more than that, we are controlled by no record.” Rather, the senators were to be controlled by their first instincts—what they first felt when they saw the letter in print—for “I believe that

⁶¹ Ibid., 540-541, 647-648.

instinct after all is higher than reason.” Charles Sumner summed up the Republican argument when he concluded that “under the Constitution the Senate, in a case like the present, is the absolute judge, free to exercise its power according to its own enlightened discretion. . . . A Senator may deserve expulsion without deserving death; for in the one case the proceeding is in order to purge the Senate, while in the other case it is as a punishment of crime.” It mattered not to Sumner whether Bright’s offence was called treason or disloyalty so long as he received a just punishment for his actions and opinions.⁶²

Bright was silent throughout much of the debate. He made occasional interjections to correct what he saw as misstatements of his record, and he delivered two longer speeches in his own defense. The first speech went unrecorded, which some Republicans believed was a sign of things he wished to hide.⁶³ In the second, Bright charged that the “always remorseless and unreasoning” “spirit of party” was the cause of the charges against him. He pointed out that many Republicans, such as Horace Greeley, had favored peaceable secession, and that President Lincoln, too, had referred to southerners as “friends.” To punish him for corresponding with southerners—something that many others in the North were doing at the time, and which was not illegal, would be instituting an “*ex post facto* tyranny.” Moreover, Bright argued that he would not have written such a letter after the fall of Fort Sumter. Bright still claimed to oppose coercion,

⁶² Ibid., -413, 417, 434, 583, 623, 628.

⁶³ Orville Hickman Browning, diary entry for February 5, 1862, in Theodore Calvin Pease and James G. Randall, eds., *The Diary of Orville Hickman Browning*, 2 vols. (Springfield: Illinois State Historical Library, 1925), 1:529; *Congressional Globe*, 37th Cong., 2nd sess., 627.

believing that war could not restore the Union—but he also did want reunion of the states. Speaking of his own position, he said: “It may be very wrong, but as I am thirty years of age, the Constitution supposes that I am capable of thinking, voting, and speaking for myself.” Lastly, Bright pointed out that when the letter had initially been published it included the words “private and confidential”—words he never would have written on a letter of introduction. These words, he claimed, changed the meaning of the letter and prejudiced the public mind against him. Moreover, “I was charged in some of the western papers with having received a commission as a brigadier general in the southern army. That went the rounds of the public press. It was charged again, that at my farm in Kentucky I had a headquarters for recruiting rebel soldiers. Calumny upon calumny of that kind was heaped upon me.”⁶⁴

Privately, Bright had always vowed to act and vote according to his conscience. “You discover that the threats of the assassins of character in the West, who have been pursuing me in their licentious sheets because I will not adopt there [sic] opinions, and allow them to control my action, did not prevent me from exercising all the rights of a citizen, & Senator,” he wrote a close friend. “I am here, with a stout heart—pure conscience and dare do what I think right. There is not power on earth to make an Abolitionist out of me.” Upon hearing rumors of the threats of expulsion, Bright doubted their veracity, but sighed, “Let it come.” Earlier in the war Bright had vowed to “act as my judgment prompts, regardless of all consequences political or personal to myself.” After Wilkinson’s resolution was put forth, Bright exulted that “my Abolitionist Enemies” will come out of the scrape “Second best.” In large, bold letters he informed a

⁶⁴ *Congressional Globe*, 37th Cong., 2nd sess., 650-653.

friend that he was not “*Skeered.*” But the pressure of the situation began to wear down on the senator, and he expressed bewilderment over the situation. “[I] assure you that there never was the slightest ground for the clamor that has been raised against me,” he wrote to a leading New York Democrat. “I have treated the whole thing with indifference.”⁶⁵

On February 5, 1862, the Senate finally voted on the resolution. Senator Waitman Thomas Willey, a Virginia Unionist and later Republican, declared it “the most solemn moment of my life.” Throughout the debate Willey was one of only a few senators who seemed unsure of how to vote. In the end, he was not satisfied that Bright knew that war was imminent. He thought it unfortunate that Bright had not shown more ardent support for the Union cause, but he did not think the Senate should “punish [men] for what they have not done.” Willey, however, was in the minority. The vote was 32-14 in favor of expulsion. The galleries cheered. The Vice President called the chamber to order. And Bright sat in his seat, dejected. “He seemed to take the matter pretty hard,” wrote a soldier who observed the proceedings from the gallery.⁶⁶

Democrats were divided over the outcome. Following the affair, many Democrats declared that Bright was “repugnant” to them. James Buchanan acknowledged that “there was room for honest differences of opinion” on many of the issues involved in the case. Buchanan had known that Bright had “sympathized with the

⁶⁵ Jesse D. Bright to William H. English, July 7, December [no day], and December 27, 1861, January 8, 1862, English Family Papers, Indiana Historical Society; Jesse D. Bright to Samuel L. M. Barlow, January 19, 1862, Barlow Papers, The Huntington.

⁶⁶ Francis Pollard to Brother and Sisters, February 6, 1862, Francis Pollard Letter, Indiana Historical Society; *Congressional Globe*, 37th Cong., 2nd sess., 626, 655.

ultras of the Cotton States in condemning my absolute refusal in December 1860, on the demand of the self styled commissioners from South Carolina, to withdraw the troops from Charleston: yet I had no idea he remained in the same state of feeling after the inauguration of the hostile Confederacy, until I read his letter & late speech.” Buchanan had always considered Bright a friend and “therefore felt deep sorrow” when he saw Bright’s letter to Davis in the press.⁶⁷

Others were more sympathetic towards the fallen senator. One student at Pennsylvania College in Gettysburg complimented Senator Saulsbury for delivering “one of the ‘ablest defenses’ of an ‘*injured man*’!” The expulsion of Bright gave Senator Bayard pause for the future. “The case is a monstrous one, but will be followed by others,” he predicted. “Starke [sic] will be rejected, and it would not surprise me if Powell was attacked—They hardly dare at present assail me for they have nothing of semblance to go upon.” Bayard knew an attack on him might come, though, and he professed to welcome it. “They shall hear the truth then—calmly but without disguise.”⁶⁸

Bayard’s predictions proved true. Most Republicans, of course, exulted in the outcome, and it became a catalyst for two more expulsion attempts in the third wave. The two senators Bayard mentioned—Benjamin Stark of Oregon, and Lazarus Powell of Kentucky—both became the subjects of investigations and debates about disloyalty.

⁶⁷ James Campbell to Franklin Pierce, February 12, 1862, Pierce Papers, LC; James Buchanan to Willard Saulsbury, February 8, 1862, Saulsbury Papers, University of Delaware.

⁶⁸ Frank E. Beltzhoover to Saulsbury, April 4, 1862, Saulsbury Papers, University of Delaware; James A. Bayard, Jr., to Thomas F. Bayard, February 8, 1862, Thomas F. Bayard Papers, LC.

In October 1861 Senator Edward D. Baker of Oregon was killed at the Battle of Balls Bluff. Oregon's Democratic governor, John Whittaker, appointed Benjamin Stark his successor. Both Whittaker and Stark were well-known Breckinridge Democrats and were also widely suspected of sympathizing with the South. When Stark appeared at the Senate to present his credentials and be sworn in, a debate began over whether he should be seated or referred to the Judiciary Committee for investigation. A number of signed affidavits and letters had been sent from citizens of Oregon to the Senate and the Secretary of State giving evidence of Stark's disloyalty. William Pitt Fessenden of Maine argued that these ought to be referred to the Judiciary Committee to determine whether Stark was "an open and avowed secessionist," as the evidence seemed to indicate. Democrats, and some Republicans, protested this action, arguing that the state of Oregon had a right to appoint whomever it chose, and that Stark possessed the three constitutional qualifications to hold office—he was thirty years old, had been a citizen of the United States for at least nine years, and he was a resident of the state that had sent him. If he was disloyal, he ought to be expelled by a two-thirds supermajority, not denied admission to the Senate by a simple majority vote. "The question of loyalty is too indeterminate in itself," argued Senator Bayard of Delaware. "It rests in opinion. What one man may say is disloyal another may not think disloyal." Nevertheless, the Senate committed the case to the Judiciary Committee for further examination.⁶⁹

Without taking a position on the evidence presented against Stark, the Judiciary Committee decided that Stark was entitled to his seat in the Senate. Senator Ira Harris of New York, speaking for the committee, argued that Stark's credentials were in due form

⁶⁹ *Congressional Globe*, 37th Cong., 2nd sess., 183-185, 265-269.

and that he met the qualifications in respect to age, citizenship and residence. He therefore ought to be sworn in. Charles Sumner rose to counter these arguments. He claimed that the committee's report amounted to the following declaration: "Free admission to traitors here and no questions asked." It was not only foolish, but also dangerous, to admit one suspected of disloyalty only to expel him later. The Senate, argued Sumner, could determine Stark's qualifications before or after the oath of office was administered. Moreover, Sumner rejected the notion that age, citizenship and residence were the only qualifications. "There is another [qualification], mentioned at a later part of the Constitution, more important than either of the others; so that, though the last in place, it is the first in consequence. *It is loyalty*, which I affirm is made a qualification under the Constitution [by the oath of office]." Loyalty, according to Sumner, was "the first qualification" of office.⁷⁰

Timothy O. Howe, a Wisconsin Republican, argued that Stark ought to be admitted because two representatives were owed to each state, and it would be unfair to deny this right to Oregon. "The case is this: the State of Oregon says Mr. Stark is loyal; commands us, in the name of the Constitution, to admit him to represent her upon this floor. On the other hand, we hear that certain individuals of the town of Portland say he is disloyal, and advise us not to admit him? Shall we listen to the State, whom we know, or to these individuals, whom we do not know?" Howe did not believe the evidence against Stark proved the case, and besides, the Framers of the Constitution never would have intended a simple majority in the Senate to exclude an elected member based on

⁷⁰ Ibid., 696, 861-863, 869.

allegations of disloyalty, a term, in itself, which could be defined in many different ways.⁷¹

Supporters of admitting Stark argued that he was, in effect, expelled every day that he was not permitted to take the oath of office. The oath, they believed, was the only constitutional test of loyalty. If Stark could take it in good conscience, that should be sufficient to admit him. They asked Stark's opponents to define disloyalty, but these requests tended to elicit examples rather than definitions. "I asked for an egg and received a stone," commented Edgar Cowan of Pennsylvania. "I wanted a definition; I was treated to an example. Now, I am just as wise as I was when I started. What is the definition of the word disloyalty—what does it mean?" Finally David Wilmot of Pennsylvania mustered a definition: "It is infidelity to the country, sympathizing with and adhering to and supporting its enemies, not by overt acts which constitute treason, but by open expressions of sympathy and adherence and support." Similarly, Jacob M. Howard of Michigan argued that loyalty meant "simply to support the Constitution of the United States in all its functions, at all times, and in all places, fervently, cordially, earnestly, as a dutiful son would act in defense of his own mother, never for a moment yielding an inch of ground so far as that Constitution is concerned." Disloyalty, by contrast, was "the reverse" of loyalty—"a disposition to attack and overthrow and break down the Constitution of the United States; to defeat its operations at some time, in some places, and, perhaps, in all places; to overthrow and overturn the Government; to disorganize it; to get rid of it. . . . It is as simple as A B C, to my understanding."⁷²

⁷¹ Ibid., 927-929.

⁷² Ibid., 966-969, 991.

In these definitions of disloyalty, the senators borrowed from the constitutional language of treason, but rather than connecting words like “adherence” to overt acts, they spoke of sympathies, expressions, and dispositions. Disloyalty was treason of the heart. And disloyalty was plainly evident—it took only common sense to recognize—according to these senators. As simple as A, B, C. Still, many senators were not satisfied. Senator Howe pointed out that the dictionary defined disloyalty as “all degrees of falsehood, from treachery to a government to infidelity to a mistress. According to one definition of disloyalty, I should be compelled to declare the Senator from Massachusetts [Sumner] disloyal, and he in turn would be compelled to declare me so. In my judgment, the Senator from Massachusetts is not true to his obligations under the Constitution because he does not uphold the constitutional right of the States to representation. He thinks me untrue to my constitutional obligations, because I do not uphold the constitutional prerogatives of the Senate.”⁷³

The Senate began to grow weary of this debate, and several senators called for a vote. Benjamin Stark, who was not allowed to speak since he had not yet been sworn in, indicated to Senator Harris that, once admitted, he would introduce a resolution calling for the question of his loyalty to be resubmitted to the Judiciary Committee. This the Senate accepted, and he was admitted and administered the oath on February 27, 1862. The majority that voted to admit Stark was a coalition of Democrats who supported him politically, Republicans who did not believe the affidavits were admissible evidence in this case, and Republicans who believed Stark to be disloyal but believed that Oregon

⁷³ Ibid., 928.

was entitled to have him as their representative since he had been duly appointed according to the law.⁷⁴

As promised, on February 28, Stark introduced a resolution to have his case resubmitted to the Judiciary Committee. Charles Sumner expressed his disgust at the previous day's vote, so much so that William Pitt Fessenden protested the "lecture" he received from Sumner's self-claimed "lofty" position. Sumner, in a fit of exasperation exclaimed, "Let us finish this," to which his Massachusetts colleague, Henry Wilson, replied, "I think this is pretty well finished now; we have been bored with it enough." The following day, after more harsh words between Sumner and some Republicans who had voted to admit Stark, the Senate, by a vote of 37 to 3, decided to create a special committee to examine the records of the case.⁷⁵

After nearly two months the committee issued its report. The committee unanimously found that Stark had been "an ardent advocate of the cause of the rebellious States," that he had "openly declared his admiration" for the Confederate constitution and his desire that the northern states should become part of the southern Confederacy "as the only means of peace," and that he was "disloyal to the government of the United States." All five members of the committee agreed to the first two findings, but Senator Willey of Virginia refused to sign off on the third. The committee was careful to define disloyalty, knowing that that had been a major point of contention during the earlier debates on admittance. "By disloyalty the committee mean the want of fidelity to his allegiance to the country, and a disregard of the duty he owes her in this her hour of need and peril."

⁷⁴ Ibid., 973, 992-994.

⁷⁵ Ibid., 1011-1014, 1261-1266.

All of Stark's utterances of sympathy for the South, as reported in the many affidavits, showed that he truly lacked loyalty. And these expressions "all are calculated to *encourage the rebellion*, and *discourage the efforts* to suppress it."⁷⁶

After issuing the report, the members disbanded their committee and brought no further action on the Senate floor. Perturbed by this, Senator Sumner introduced a resolution on May 7 calling for Stark's expulsion. But the Senate had had enough of this case. The debates for an expulsion would take many days, and this late in the session there was more pressing business to accomplish. The Senate postponed debate on Sumner's resolution until June 6, when it was finally voted down. More important bills needed to be passed and Stark would be out of the Senate by the next session, at which time the Oregon legislature would have elected a new senator to fill the remainder of Edward Baker's term. Wearied of all of these expulsion attempts, the Senate let Stark quietly live out his few months in Congress.⁷⁷

Throughout this entire process Stark expressed dismay at the proceedings against him. When his case was initially referred to the Judiciary Committee in January he wrote a friend, "What will be the result, God only knows, (if he does). . . . The determination of the question, *Am I loyal, or not*, is in the discretion of the majority of this body, which discretion may be controlled by considering how my rejection may be received, at the other end of the Avenue." Significantly, in mid-March Stark praised Lincoln for not blindly following the radical wing of his party into abolitionism. "If the President does

⁷⁶ *Congressional Serial Set*, 37th Cong., 2nd sess., Senate Report No. 38; for the affidavits, see Senate Report No. 11.

⁷⁷ *Congressional Globe*, 37th Cong., 2nd sess., pp. 1983, 2216, 2248, 2571-2572, 2596.

not falter we have nothing to fear. On the other hand, should he yield to the importunities of his professed friends, we are gone with John Brown without any of the glory, hallelujah.”⁷⁸

At the same time that Stark’s case was before the Senate, and only one month after Bright’s expulsion, a resolution was introduced to expel Lazarus Powell of Kentucky. The resolution, which in an unusual fashion ran about three pages in the *Senate Journal*, was introduced by Senator Wilkinson of Minnesota, but turned out to have been written by Powell’s Kentucky colleague, Garrett Davis. The resolution claimed that Powell had participated in pro-secession rallies in Kentucky and that Powell’s “purposes, if not his acts, have been treasonable,” so he therefore ought to be expelled from the Senate.⁷⁹

Senator Davis acted as the sole prosecutor in the case of his Kentucky colleague. He argued that Powell had exhibited his disloyalty by voting against all measures intended to help the Union war effort and that Powell “boldly” took “a position of treason” when he argued that Kentucky ought to remain neutral in the conflict and that the northern states could not coerce the southern states back into the Union. Such recognition of the Confederacy was a treasonable sentiment, and all that the South desired anyway. And such positions offered aid and comfort to the enemy. “I have no doubt that his example, these precepts of treason and of crime that he has published to the young men and the old men of Kentucky, have seduced hundreds and hundreds into the

⁷⁸ Benjamin Stark to Samuel Butterworth, January 4, 1862, and Stark to Barlow, March 16, 1862, both in Barlow Papers.

⁷⁹ *Senate Journal*, 37th Cong., 2nd sess., pp. 224-227.

rebellion and into the crime of treason.” All of Powell’s speeches and votes, according to Davis, “were against his country and against his Government, for secessia and for rebellion.”⁸⁰

In his defense, Powell claimed that, yes, he had advocated that Kentucky adopt a neutral position at the beginning of the war. But so had Davis, and so had nearly all Kentuckians. So Powell did not see the distinction between his position and that of the other Kentucky Unionists. Powell claimed to support neutrality until September 10, 1861, when the state legislature officially abandoned that position. “Did I ever advocate it afterwards?” he asked rhetorically. “No, sir. I stood where the State stood, and when the Legislature went against it I acquiesced.” As for opposing coercion, Powell claimed that this was an old doctrine. It had been advocated by John Quincy Adams in the 1830s and Edward Everett in 1861. “It is possible that I may have erred in it; but if I did, I honestly erred. . . . I believed we could do more by compromise and conciliation than by coercion. That was my position from the beginning.”⁸¹

Davis had worked hard to tie Powell to prominent secessionists and pro-secession rallies at the beginning of the war, but Powell denied being at some of the meetings Davis claimed he had attended. Moreover, if Powell was connected to John C. Breckinridge (whom he had supported for president in 1860), Davis could just as easily be connected to John Bell (whom he had supported). Both Breckinridge and Bell were now prominent Confederate leaders. Why would Davis not be considered as equally connected to treason as Powell was? Finally, Powell claimed that Davis had culled his speeches and

⁸⁰ *Congressional Globe*, 37th Cong., 2nd sess., 1209-1216.

⁸¹ *Appendix to the Congressional Globe*, 37th Cong., 2nd sess., 77-78, 80.

drew things from their context to portray him as a secessionist. In doing so, Davis completely lost the sense and meaning of Powell's positions.⁸²

"I have always been for the reconstruction of the Union and for peace, and opposed to coercion," Powell declared. And he was not ashamed of his votes in the Senate against supplies. "I acted conscientiously," he declared. "I believed I was right, and have no regrets telling my colleagues that I did what I believed was right." Powell insisted that "honorable gentlemen, patriotic gentlemen, gentlemen who love their country, may speak, and vote even, against men and money without being censured and driven from their places on the ground of disloyalty." Finally, Powell claimed that his expulsion was being pushed merely for his opinions. "I suppose this is the first time in the history of this nation that it was ever attempted to expel a Senator because he held opinions that were not palatable to the majority. . . . In this long list of charges brought against me by my colleague charging disloyalty he does not point to overt acts. He says my purposes, if not my acts, are disloyal. . . . I protest against my colleague sitting in judgment upon my motives. He is so filled with animosity, spite, and spleen, that he is incapable of doing me justice."⁸³

In response Davis argued that it was in the interest of Kentucky to rid its representation in Congress of treason, and that Powell's votes and speeches against the war were overt acts worthy of expulsion. But the Senate overwhelmingly rejected these contentions. Lyman Trumbull of Illinois argued that neutrality had been widely

⁸² Ibid., 71-77.

⁸³ Ibid., 79-80.

advocated in Kentucky, and though he opposed the position, “good Union men doubtless did take that position.”⁸⁴

There were also two cases of suspected disloyalty in the House during the third wave. On February 19, 1862, an article appeared in the *Baltimore Clipper* stating that Clement Vallandigham and Senator Bayard had sent letters to a secessionist newspaper in Baltimore, *The South*. These letters, which, according to the *Clipper*, “contain[ed] touching sentiments of poor bleeding Dixie, and various suggestions how the Yankees might be defeated,” had allegedly been seized by the police when *The South* was shut down for disloyalty.⁸⁵

The same day as the *Clipper*’s report appeared in the press, Representative John Hickman, a Pennsylvania Republican, introduced a resolution in the House to refer the case to the Judiciary Committee for further examination. A debate between Hickman and Vallandigham ensued in which the latter claimed never to have written any such letters, and he chastised Hickman for basing such a resolution on the reports of “an irresponsible newspaper.” Hickman proceeded to accuse Vallandigham of making “disloyal” speeches both in and out of Congress, but Vallandigham replied: “I have differed with the majority of this House, differed with the party in power, differed with the Administration, as, thank God, I do and have the right to differ, as to the best means of preserving the Union, and of maintaining the Constitution and securing the true interests of my country; and that is my offense, that the crime and the only crime of which I have been guilty.” Hickman expressed surprise at Vallandigham’s reaction, saying that the resolution did not

⁸⁴ *Congressional Globe*, 37th Cong., 2nd sess., pp. 1230-1234.

⁸⁵ *Ibid.*, 879.

accuse him of disloyalty but only sought to investigate the charges—something he believed Vallandigham would have desired. But since Vallandigham had, in this little debate, expressed his devotion to the Union, Hickman withdrew the resolution.⁸⁶

In June 1862, Vallandigham referred to Senator Benjamin F. Wade of Ohio, by name (which was against the rules of the House), as “a liar, a scoundrel, and a coward.” A resolution was introduced in the House to censure him for this language, but Democrats charged that the resolution was out of order and it was never brought up for a vote. A year later Republicans finally got to see Vallandigham punished for his alleged disloyalty when he was arrested at his home in Dayton, Ohio, by Union general Ambrose Burnside. By this time, however, Vallandigham was no longer a member of Congress.⁸⁷

The other case in the House during the third wave had to do with Benjamin Wood of New York. As early as 1861 Wood, a newspaper editor, had been suspected of disloyalty. “Ben Wood is threatened with expulsion from the HR if he is as ‘treasonable’ *there* as is the News,” wrote an official in the Department of the Interior. And evidence began to surface that his paper was conveying both Union secrets and personal messages to the rebels. Consequently, on June 11, 1861, John Bingham of Ohio introduced a resolution to have the Judiciary Committee investigate Wood’s case. The resolution was

⁸⁶ Ibid., 879-881.

⁸⁷ Ibid., 1828-1831. For information on Vallandigham’s arrest, see Frank L. Klement, *The Limits of Dissent: Clement L. Vallandigham & the Civil War* (Lexington: University Press of Kentucky, 1970), 156-172.

adopted and the committee gathered a large amount of evidence, but the committee never issued a report on the subject and the matter was eventually dropped.⁸⁸

The expulsion debates during the third wave reveal four significant aspects of the debate over loyalty and disloyalty in Congress. First, the targets of these expulsions and investigations were moving northward. Each of the senators and representatives suspected of disloyalty were from states that had remained loyal to the Union—Missouri, Kentucky, Indiana, Oregon, Ohio and New York. By late 1861 both houses of Congress appeared more willing to search for and weed out disloyalty closer to home. Second, the debates over these expulsions and investigations reveal the constitutional limitations of congressional punitive action, once the patriotic enthusiasm of the spring and summer of 1861 began to settle down. In the Bright and Stark proceedings in the Senate, as well as those of Ben Wood and Vallandigham in the House, the cases were referred to each house's respective judiciary committee to ensure fairness and a thorough investigation.

Third, when the interests of the nation appeared to be at stake, the House and Senate were more likely to “convict” the person accused. The cases of Bright, Breckinridge, and the Missouri senators all seemed to implicate national matters. Thus, the senators were convicted and expelled. Those seeking to punish Powell and Stark, however, seemed to be actuated by local concerns, if not political grudges. Powell was “prosecuted” only by his Kentucky colleague, while Stark’s case seemed to involve the

⁸⁸ T. J. Barnett to Samuel L. M. Barlow, Barlow Papers; *Congressional Globe*, 37th Cong., 2nd sess., p. 2666-2667; Original Testimony on Whether Congressman Benjamin Wood of New York had been Engaged in Transmitting Intelligence to the Confederate Rebels, 1 vol., in RG 233 (Records of the U.S. House of Representatives), Entry 9.8 (Judiciary Committee Records), NARA.

right of a state to be fully represented in the national legislature. When expulsion seemed to be for a less than national purpose, the attempt ultimately failed.

Fourth, these later expulsion attempts seemed to indicate a growing weariness among Congress. There were bigger fish to fry. There were more traitors in arms facing the Union armies than there were in the Capitol, and it was more important to most congressmen to pass measures towards their defeat than to expel a few members of Congress who could do little to impede necessary war legislation. By the mid-point of the war, Congress decided that its energies would be best spent suppressing the rebellion. Overt acts of loyalty—passing legislation to accomplish the defeat of the rebels—became seen as more important than dealing with the trifling expressions of a few disloyal men. Besides, the military handled disloyalty much more efficiently than the civil government ever could.

IV.

There were no major disciplinary actions attempted in Congress in 1863. The most notable action against a congressman suspected of disloyalty that year was the military arrest of former congressman Clement Vallandigham of Ohio. Eighteen sixty-three was generally a good year for the Union armies. With victories at Gettysburg, Vicksburg and Chattanooga, prospects for the Union cause looked high. In the first few months of 1864, however, there were three expulsion and censure attempts, and one semi-forced resignation. Many tensions were beginning to reveal themselves in the war-weary North. War had been raging for three years now, the aims of the war had changed dramatically, and many northerners were beginning to doubt that the Union armies could

succeed. With General Grant stalled outside of Richmond, and not much movement in the West, peace sentiment was increasing and congressional opponents of the war were becoming increasingly emboldened.

Within this context, the U.S. Congress increased the qualifications of holding congressional office also to include “loyalty” (this, of course, was something that had been rejected during the debate over Benjamin Stark’s admittance). The majority also moved to punish the most outspoken opponents of the war. In the House, when expulsion measures failed to get the necessary two-thirds majority, the House settled for censures that only required a majority vote. Censure was nearly as severe a punitive measure as expulsion, however, for it placed a permanent mark on both the words and career of a congressman. In some ways it was an even more dangerous punishment, for it required only a simply majority to accomplish, whereas expulsion required a two-thirds supermajority.

On January 5, 1864, Senator Garrett Davis of Kentucky introduced a series of resolutions denouncing many allegedly unconstitutional actions of the Lincoln administration. These resolutions, which took up five pages in the *Journal* of the Senate, were characterized by one senator as harsher than the accusations against King George III in the Declaration of Independence. Davis accused Lincoln of destroying the rights of free speech, free press, and free elections; he argued that Lincoln had overstepped his proper authority when making certain policy decisions; and he believed that Lincoln and the Republicans only hoped to subjugate the South and revolutionize its political and social systems by abolishing slavery and stripping all southern whites of their liberty, property and rights. He called on all conservatives, North and South, to turn against their

war leaders and call a national convention to turn their leaders out of office and bring an end to the war. These resolutions revealed the changing sentiments of a border state Unionist who had strongly favored the war early on, but had become disillusioned by the changing goals and tactics of the Republicans in power. To Davis—an antebellum Whig—the war was no longer about Union, but conquest, subjugation, abolition, and centralization. Perhaps the Democrats had been right all along. Perhaps he had acted too rashly when prosecuting Senator Powell for disloyalty two years earlier.⁸⁹

A few days later Henry Wilson of Massachusetts introduced a resolution calling for Davis' expulsion. Wilson focused on one of Davis' resolutions: "in which, among other things, it is declared that 'the people North ought to revolt against their war leaders and take this great matter into their own hands,' thereby meaning to incite the people of the United States to revolt against the President . . . and those in authority who support him in the prosecution of the war to preserve, protect, and defend the Constitution and the Union, and to take the prosecution of the war into their own hands." Davis immediately protested that this was "a garbled version of my resolution." And he was right. The resolution, as he had presented it, declared that "the people North and the people South ought to revolt against their war leaders, and take this great matter into their own hands, and elect members to a national convention of all the States to terminate a war" that was becoming increasingly destructive to the interests of all Americans. Davis declared that Wilson's "jaundiced, narrow mind" made him "wholly incompetent to give a proper

⁸⁹ *Senate Journal*, 37th Cong., 1st sess., pp. 51-55; *Congressional Globe*, 38th Cong., 1st sess., p. 392.

rendering of those resolutions.”⁹⁰ Indeed, Wilson had blatantly misrepresented them. By omitting any mention of the South or of the calling of a national convention, Wilson portrayed Davis as wanting to inflame civil war and bloodshed in the North, when in reality, Davis hoped to end the war by uniting the peace elements in both sections.

Garrett Davis described the limits of dissent that he believed the popular Republican majority was imposing on opponents of the war: “If any man has the *audacity* to question their measures, their justice, their wisdom, their constitutionality, their compatibility with the continuance of popular liberty, the man who dares to attempt to perform that task is branded and denounced by them as disloyal, as a traitor.” Davis argued that the president and the Republican majority were not the government. Criticism of them was not criticism of the government, but only of those currently administering it. He disclaimed attempting to incite rebellion in the North, and he pointed out that it was easy for Wilson to attack him when sitting in such a large majority, when he had an “army to back him in any line of conduct he chose to adopt. . . . oh, how wondrously brave is the Senator from Massachusetts!” Taking the offensive, Davis assailed the state of Massachusetts for the disloyal positions it had taken during the War of 1812 and the Mexican War, and he chastised both senators from Massachusetts for supporting their state’s personal liberty law—a statute that he believed violated the Constitution, a Supreme Court precedent, and the fugitive slave law enacted as part of the Compromise of 1850. Abolition, and not fidelity to the Constitution, according to Davis, was their top priority.⁹¹

⁹⁰ *Congressional Globe*, 38th Cong., 1st sess., p. 139, 175-176.

⁹¹ *Ibid.*, 177-182, 344.

During the debate it became quite clear that the Senate would not support Wilson's resolution. William Pitt Fessenden of Maine argued that Davis' words had been taken from their context in order to distort his meaning. Debate the issues, Fessenden argued, and let the people decide. Republican John P. Hale of New Hampshire claimed that Davis was being punished not for what he said but for how Senator Wilson had chosen to interpret it. Punishing Davis would be a sign of weakness, according to Hale. The resolutions should be answered, not censured. Similarly, Reverdy Johnson, claiming to find little in the resolutions that he could support, argued that it would be difficult to justify punishing a senator for adhering to the position held by so many in his state. Moreover, no antiwar senator had ever been expelled in the past. Lastly, Lazarus Powell, just two years previously Davis' target, argued that it was "love of country" that compelled Davis to assail the Lincoln administration. Any senator "who believes there has been maladministration of the Government" but "has not the courage or manhood" to "sound the alarm . . . is an unworthy representative of a free people."⁹²

As it became apparent that two-thirds of the Senate would not vote to expel Davis, Senator Jacob M. Howard of Michigan proposed censuring, rather than expelling Davis. "Like other rights," Howard declared, "this [free speech] is to be used in subordination to the public welfare—used to support and not to destroy the Government; and he is little better than a madman who claims to use it for the very purpose of breaking in pieces the shield by which it is protected." Similarly, Senator Wilson argued that freedom of speech could be limited "when those words and acts give aid and comfort to

⁹² Ibid., 343-350, 363-371.

enemies who are seeking to blot it from the muster-roll of nations.” Nevertheless, this proposition struck many senators as even more insidious than expulsion. Censure could be attained with only a majority vote, and yet it was nearly as serious a punishment as expulsion. Censure or expulsion, according to Republican Henry S. Lane of Indiana, would do more to silence free speech in the Senate than the caning of Charles Sumner. Moreover, most senators agreed that Davis’ explanation that he was calling for a nonviolent convention, rather than a violent revolt against the Union government, was entitled to be the official understanding of Davis’ resolutions.⁹³

Realizing that this effort had little momentum left, Wilson withdrew his resolution on January 28. Although unsuccessful on the floor of the Senate, Wilson’s claim that Davis had given “aid and comfort” to the rebels had a national effect on popular discussions of treason. A teenage girl in Kentucky noted the debate over Davis’ expulsion in her diary. “He used to be a good Union man, but lately he has become exceedingly Copperish and delivered some very treasonable resolutions in the Senate.” Similarly, a northern newspaper called Davis’ resolutions “incipient treason,” likening Davis to the southern secessionists in the Senate during the winter of 1860-1861. The Union League in Boston passed a resolution thanking Wilson for “heading off treason in the United States Senate,” and a Pennsylvania newspaper noted that “The Davises, Jeff. and Garrat [sic], are at the head of two co-operating factions. Jeff. leads the rebels, and

⁹³ Ibid., 345, 363, 392.

Garret [sic] the Copperheads.” Wilson may not have won on the floor of the Senate, but he made great headway in the battle of ideas across the nation.⁹⁴

At the same time that the proceedings over Garrett Davis’ expulsion were pending in the Senate, another issue was coming to a head regarding the loyalty of James A. Bayard of Delaware. In March of 1863 Charles Sumner had introduced a resolution to require that all Senators swear to the ironclad test oath of 1862. This oath, which required professions of both past and future loyalty, demanded that a person had never born arms against the United States, voluntarily given “aid, countenance, counsel or encouragement” to those in hostilities against the government, and that those swearing to the oath would “support and defend the Constitution” and “bear true faith and allegiance to the same.”⁹⁵

Democrats opposed this new requirement, claiming that Congress could not require a new oath of members who had already been sworn in by the old oath. After a short debate the Republicans in the Senate voluntarily subscribed to the oath. Reverdy Johnson of Maryland then stepped forward and stated two objections to the requirement of the oath—that members of congress were not civil officers but that the oath was intended for civil officers, and that the oath was retrospective, whereas the

⁹⁴ *Congressional Globe*, 38th Cong., 1st sess., p. 394; Frances Dallam Peter, diary entry January 16, 1864, in John David Smith and William Cooper, Jr., eds., *Window on the War: Frances Dallam Peter’s Lexington Civil War Diary* (Lexington, Ky.: Lexington-Fayette County Historic Commission, 1976), 46; *The Independent*, January 28, 1864; *Liberator*, January 29, 1864; *Wellsboro Agitator*, August 10, 1864.

⁹⁵ *Congressional Globe*, 38th Cong., special sess., pp. 1555-1562; *An Act to Prescribe an Oath of Office, and for Other Purposes*, adopted July 2, 1862, 12 Stat. 502-503.

requirement for an oath in the Constitution was promissory. Adopting Johnson's objections as an explanation, several Democratic senators also voluntarily took the oath.⁹⁶

By December 1863 all but two senators had voluntarily taken the ironclad test oath. Sumner's resolution to require the oath of all senators was brought back to the floor. Republicans, arguing in favor of the resolution, claimed that one of the purposes of the 1862 oath "was to keep from this body traitors in arms against the Government." Democrats, by contrast, reiterated their complaints that the oath was unconstitutional because it went beyond what the Constitution required. Requirement of the oath, in their view, was an *ex post facto* law, and they argued that it added a new qualification—loyalty—to serving in the Senate.⁹⁷

Both sides recognized that the resolution was aimed at Senator Bayard. Accordingly, Bayard claimed that his "past life and conduct ought to be a sufficient answer" to any charges against his patriotism. If he did not believe it was unconstitutional to require the oath of congressmen, he declared, he would take it "without a moment's hesitation as readily as any member of this body." Despite their best efforts, Democrats were unable to defeat the resolution and it passed on January 25, 1864. The following day Bayard took the ironclad test oath and immediately resigned his seat.⁹⁸

⁹⁶ *Congressional Globe*, 38th Cong., special sess., pp. 1555-1562.

⁹⁷ *Ibid.*, pp. 48-57; quotation from p. 51.

⁹⁸ *Congressional Globe*, 38th Cong., 1st sess., pp. 48-57, 253-254, 320-331, 263; quotation from p. 52; *Appendix to the Congressional Globe*, 38th Cong., 1st sess., pp. 31-37.

In his final act as a senator during the Civil War, Bayard delivered a speech explaining his actions. He recounted how he had favored peaceable separation since before firing had commenced. The effects of the civil war now raging only seemed to confirm the propriety of his initial instincts and convictions. The war was a war of subjugation, and the liberties of northerners had also been sacrificed at the altar. Elections in his home state had been controlled by the military, and citizens of Delaware were daily arrested without warrants, known accusers, charges, hearings, or trials—even though the courts of that state were open. But very few, if any, of his colleagues shared his beliefs. “Standing therefore almost alone in this body, I have lost the hope that I can longer be of service to my country or my State,” Bayard declared. “And now, Mr. President, the Senate of the United States have, by their decision enforcing an expurgatory and retrospective test-oath, repugnant to both the letter and spirit of the Constitution, made a precedent which, in my judgment, is eminently dangerous, if not entirely subversive of a fundamental principle of representative government. . . . I cannot doubt that the precedent now made will be followed, and yet I regard all test-oaths as useless and demoralizing acts of tyranny.” He continued:

With a firm conviction that your decision inflicts a vital wound upon free representative government, I cannot, by continuing to hold the seat I now occupy under it, give my personal assent and sanction to its propriety. To do so, I must forfeit my own self-respect and sacrifice my clear convictions of duty for the sake merely of retaining a high trust and station with its emoluments. That will I never do, but, retiring into private life, shall await, I trust with calmness and firmness, though certainly with despondency, the further progress of a war which it is apparent to my vision will in its continuance subvert republican institutions, and sever this Federal Union into many arbitrary Governments.

In his speech Bayard implied that he had not previously considered resignation. In truth, he had been contemplating resigning for at least a year, and many back in Delaware

expected it to happen. “I never was more tired of Washington in my life, and shall rejoice when I leave it for good,” he wrote his daughter when the oath was brought up in December 1863. Many Delawareans wished Bayard would retain his seat in the Senate after taking the oath, but he “acted in reference to my resignation as I thought honor, and duty required.”⁹⁹

Senator Bayard professed indignation at the prospect of having to take the ironclad test oath. In truth, it is a wonder he could take it conscientiously. His private correspondence reveals a man who wanted the South to win their war for independence. “In embarking in this war therefore, you enlist in a war for invasion of another people,” he told his recently commissioned son-in-law in September 1861. “If successful it will devastate if not exterminate the Southern people, and this is miscalled Union. . . . Why in the name of humanity can we not let these states go?” Bayard thus discouraged Union enlistments, telling his son-in-law that after experiencing the realities of war, “you will I am sure yet regret your determination to embark actively in its prosecution.”¹⁰⁰

Privately Bayard expressed pain and sadness whenever the rebels suffered military defeats. “There can be now no doubt that the Confederates have been most disastrously defeated at Roanoke Island,” Bayard wrote his son in February 1862. “Its ultimate effect when the conflict comes, off the water remains to be seen, but the war will

⁹⁹ *Congressional Globe*, 38th Cong., 1st sess., 341-343, 418; Bayard to Florence Bayard Lockwood, January 9, 13, 26, and December 20, 1863, all in Bayard Papers, Historical Society of Delaware; F. Weems to Thomas Francis Bayard, January 6, 1864, W. Sharpe to Thomas Francis Bayard, January 20, 1864, J Frank Hazel to Thomas Francis Bayard, January 26, 1864, all in Thomas Francis Bayard Papers, LC; Bayard to Barlow, February 4 and March 1, 1864, Barlow Papers.

¹⁰⁰ Bayard to Benoni Lockwood, September 1, 1861, Bayard Family Papers, Historical Society of Delaware.

be prolonged.” Upon hearing news that was greeted by many northerners with exultation, Bayard felt only sorrow: “I feel very sad to-day for I believe there is truth in the report that New Orleans has fallen, and I think Savannah will follow. Yet all this will not end but only prolong this wretched war, & its devastation.” Throughout the war Bayard somehow held onto the increasingly untenable position that only “peaceful separation” would bring the war to a close.¹⁰¹

Bayard, like many Peace Democrats, believed the war was being waged to “exterminate” white southerners. He believed that the Republicans did not want to reconstruct the Union, but only “desire[d] vengeance against the South.” In this view, lasting peace would only come through separation: “Better, far better, that there should be two, or even four, confederacies on this continent than continued civil war.” Bayard believed that compromise efforts in 1861 could have stayed secession. To think that war could restore the Union was, however, “a sheer hallucination.”¹⁰²

Prior to the presidential election of 1864, Bayard believed that the Lincoln administration would use the military to suppress Democratic votes in his state. “I cannot advise the people to resist a large force because the *duty* of resistance depends upon the power of successful resistance to lawless oppression,” Bayard wrote privately. “If the State had a million, or even half a million of people, I would advise resistance to any the slightest interference by the forces with the exercise of the elective franchise.”¹⁰³

¹⁰¹ Bayard to Thomas F. Bayard, February 18, March 27, and April 28, 1862, all in Thomas F. Bayard Papers, LC; Bayard to Barlow, October 8, 1862, Barlow Papers.

¹⁰² Bayard to Barlow, December 28, 1862 and February 4, 1864, Barlow Papers.

¹⁰³ Bayard to Barlow, October 29, 1864, Barlow Papers.

Bayard's position on the war, from the very beginning, favored recognition of the Confederacy. He was saddened when Union forces won military victories. It is important to note that this was a political, not a partisan position. Bayard did not favor Confederate victory because he thought it would benefit the Democratic party in elections, but because he believed that war would only bring disaster and desolation. He wanted peace, and he was willing to accept Confederate independence in order to attain it. Nevertheless, one wonders whether he could really have taken the ironclad test oath in good faith. In light of his private sentiments could he really have said that he had never "yielded a voluntary support to any pretended government, authority, power or constitution within the United States, hostile or inimical thereto"?¹⁰⁴ Perhaps because Bayard believed the rebels had established their own separate nation and government, he might have argued that they were neither "pretended" nor "within the United States." Still, this position would hardly seem like a case of ironclad loyalty.

The radicals in the Senate must have long wished to rid themselves of Senator Bayard, but he had committed no crime, nor any public indiscretion upon which they could seize to expel or censure him. Bayard's refusal to take the ironclad oath, however, opened a window of opportunity that proved much easier than expulsion. The length of debate (in terms of hours) over the oath was much shorter than the debates in the Bright or Stark cases, and yet, with only a majority vote the Senate attained the same result as it had with Bright. The Republicans were able to change the rules for holding office to force a conscientious traitor to resign his seat.

¹⁰⁴ James A. Bayard to Sir, October 10, 1861, Bayard Family Papers, Historical Society of Delaware; 12 Stat. 502-503.

The final two expulsion attempts during the Civil War occurred in the House in April 1864. On April 8, Representative Alexander Long of Ohio delivered a speech in which he said he would favor recognition of the Confederacy rather than see continued devastation on the battlefield. The following day, Speaker of the House Schuyler Colfax descended from his chair to introduce a resolution calling for Long's expulsion. It declared that in advocating recognition of the southern Confederacy Long had violated his oath of office (now the ironclad oath) and given "aid, countenance, and encouragement" to the rebels.¹⁰⁵

Many Democrats used this expulsion attempt to expose what they believed was hypocrisy in the Republican party. Samuel S. Cox, a War Democrat from Ohio, argued that Long's position was no different from that of the radical Republican, Thaddeus Stevens. Stevens had claimed that the southern states had set up a *de facto* government and therefore could, in some instances, be dealt with as if they were out of the Union. Similarly, Peace Democrats Fernando Wood of New York and Daniel W. Voorhees of Indiana argued that abolitionists and Republicans had been the true disunionists for more than thirty years. Wood read many snippets of speeches to prove his point, although the Republican side of the House challenged his intellectual honesty, claiming he pulled these quotations from their context.

Nearly every Democrat who took part in this debate claimed to oppose Long's position on the war but stated that he should never be denied the right to say what he believed. The Constitution, they argued, only permitted expulsion for "disorderly behavior." Moreover, if the Republican attempt succeeded, argued Francis Kernan of

¹⁰⁵ *Congressional Globe*, 38th Cong., 1st sess., pp. 1505-1506.

New York, “You will have no debate except that which runs in one groove, the majority silencing by mere numerical power all who oppose them.” Similarly, James C. Allen of Illinois argued that abandoning free speech in the House would allow the majority to “wreak their vengeance on members of the Opposition on this floor.” If Long’s views were wrong, open debate should be permitted and truth should be allowed to prevail. “Are you afraid his arguments will convince you?” asked George Pendleton of Ohio. Pendleton underscored that time of war was exactly when it was most important to protect the rights of free speech and debate.¹⁰⁶

The Republicans answered that congressmen were not guaranteed the right to free speech by the Constitution, and that speech sometimes must be limited in wartime. Robert C. Schenck of Ohio, a former Union general who had done much to silence dissent in Maryland (see Chapters 4 and 5), argued that soldiers would be shot for advocating the views Long had articulated. The words may not actually be enough to convict Long of the crime of treason, according to Schenck, “yet such words being uttered here and at this particular time, *flagrante bello*, with the rebel force at our very doors, they become in their tendency and effect encouragement to the rebellion and an instigation to the enemies of the nation to go on in their attempts to overthrow it.” Godlove Orth of Indiana argued even more stringently for the limited nature of free speech: “A man is free to speak so long as he speaks *for* the nation; when he speaks *against* the nation he shall not, with my consent, do so with impunity on this floor.” Orth argued that the Lincoln administration had not done enough to silence sedition in the

¹⁰⁶ *Congressional Globe*, 38th Cong., 1st sess., pp. 1577, 1549, 1513, 1585; U.S. Constitution, art. 1, sec. 5 (1787).

North, and that if more antiwar northerners had been arrested the nation would be the better for it. Finally, Henry Winter Davis of Maryland argued that the Republican majority sought to “punish him for meaning what he declares he does mean to do.” “Sir, let me say to this House that if it were a constitutional right so to speak,” Winter Davis continued,

in my judgment this is one of those cases which so far transcends the ordinary rules of law, one of those cases which carries us so near to the original right of self-defense, one of those cases which appeals so directly to the inalienable right of self-protection, that without law and in spite of law the safety of the people requires his expulsion, and I would be one to do it. But, sir, I do not think the Constitution does confer the right so to speak. I think we are within the limits of written law which the wisdom of our forefathers gave us with which to protect ourselves in every emergency, and this among others.

Republicans, in these instances, argued that the safety of the nation trumped any rights claimed to free speech. Treason was not an error of opinion, argued Winter Davis. It was a crime that could be punished—and it certainly would not be tolerated in the councils of the nation. Words also could be considered “aid and comfort,” according to a Pennsylvania congressman, and they therefore could be punished. “It is enough to say that liberty of speech is not license of speech; that the liberty of speech justifies no man in imperiling the safety of his country; that liberty of speech is a luxury to be enjoyed to its fullest extent only in a time of profound peace,” argued John Broomall of Pennsylvania.¹⁰⁷

Sensing that they did not have the numbers necessary to carry a resolution for Long’s expulsion, Broomall offered an amendment to censure, rather than expel, Long

¹⁰⁷ *Congressional Globe*, 38th Cong., 1st sess., pp. 1539, 1546-1547, 1550-1551, 1595.

for his speech. Colfax accepted the amendment, noting that censure “will accomplish the same purpose as my original resolution, registering the solemn condemnation of the House of the gentleman from Ohio’s views.” Nevertheless, Democrats argued that the House had no more right to censure than to expel. “Censure would, within the meaning of the Constitution, abridge the freedom of speech,” according to Andrew Jackson Rogers of New Jersey. This was just what the Framers had hoped to guard against in adopting the first amendment.¹⁰⁸

Both sides in the debate pointed out the hypocrisy they saw on the other side of the aisle. Republicans chastised Democrats for never having been advocates of free speech in the past, while Democrats claimed that Republicans (mainly as Whigs at the time) had advocated positions similar to Long’s during the Mexican War. The arguments revealed the partisan nature of the attack against Long. Although claiming to be acting out of duty and patriotism, rather than partisanship, there can be little doubt of the Republicans’ true motivation. Their previous actions were inconsistent with the claims they made about the harmful nature of Long’s speech.

When Long delivered his speech he asked for, and, without objection, was given additional time to finish. Had Republicans believed his speech was treasonable, they should have, under the rules of the House, called him to order during the speech, rather than grant him additional time. Moreover, Republicans ordered hundreds of copies of the speech to distribute as a campaign document in the upcoming presidential election. “If that speech gives aid and comfort to the enemy,” remarked William Finck of Ohio, “why do gentlemen on the other side of the House give so much aid and comfort to the

¹⁰⁸ Ibid., 1593, 1625, 1620.

speech?” Republicans clearly wanted Long’s dogmas read as widely as possible so as to discredit Democratic leadership among northern Democratic supporters of the war.

Finally, Democrats reminded their colleagues that in January 1863 Congressman Martin F. Conway, a Kansas Republican, had introduced resolutions in the House calling for the cessation of hostilities and recognition of the Confederacy. “Where, let me ask, were the gentlemen then with their resolutions of expulsion?” asked Finck. They offered none. “The reason is obvious,” concluded Representative Rogers. “Conway was an abolitionist and a disunionist, while my friend from Ohio is a Democrat.”¹⁰⁹

Republicans had the numbers and carried the resolution of censure by a simple majority.¹¹⁰ Their view of limited speech in the House in time of war prevailed. Moreover, their position on free speech resonated throughout the nation. The captain of the 14th Rhode Island Heavy Artillery, a black regiment, wrote: “I don’t object to free speech in a way, but it is a military necessity that speech of that kind shouldn’t be quite so free at this time and so I say suspend it as you would the writ of habeas corpus, which copperheads make so much fuss about.” This soldier believed firmly that the speech of congressmen was no more protected than that of anyone else:

To speak plainly—So much the worse if a man *dare* express himself as Long did *in the Legislative Hall*. I want no such men to govern me, or help direct the affairs of the Country, if he talks in that way. Therefore expel him—not for freedom of speech, but for being a copperhead—a man who inculcates evil in the breasts of lukewarm and undecided men—who is a nuisance in the country, a rotten hound who by his *free speech* would overturn the laws and the country, and do all in his power to aid and abet the Rebel cause. Why should a man be tolerated right in the heart of the country, in the *Legislative Halls*, disseminating his vile precepts, who

¹⁰⁹ Ibid., 1632, 1552-1553, 1620.

¹¹⁰ Ibid., 1634-1635.

would be hung for high treason the first word he uttered in the Army? If we must fight and kill, for God's sake show us some word of encouragement at home, instead of fostering vipers in your midst who scoff at us, and say its no more than we deserve when the Rebs butcher five or six thousand of us in cool blood. . . . If we must fight—fight with all might, heart and soul, and spend no time in deciding whether a traitor in *Legislative Halls* should be expelled or not, but put him into the front rank of the Army, and charge every rebel work, if he refuses to go & it takes more trouble to force him than he is worth, then shove him into prison or still better put him out of the way quietly and say no more about him.¹¹¹

Another soldier anonymously wrote to Long suggesting he mind his words carefully. “If you value your safety I would not advise you to utter such sentiments again in public as you will find that your life may be in danger,” he warned. “I think you ought to be treated like any other traitor” and either “sent across the line or else to Fort Lafayette [sic].” This soldier stressed that he was “not . . . down on free speech but when any man goes so far as you have I think that free speech is carried to[o] *far*.”¹¹²

During the debate over Long's expulsion and censure, all but one Democrat claimed to oppose Long's position on the war. His lone supporter, Benjamin Gwinn Harris of Maryland, was delighted to find a kindred spirit on the floor of the House. “When I came here at this session of Congress I was solitary and alone . . . but now, thank God! there is another soul saved.” Although many of his comments elicited laughter from the floor and galleries, Harris refused to shrink from his position. “I am a peace man, a radical peace man; and I am for peace by the recognition of the South, and I

¹¹¹ Sam Farnum to Frank, May 13, 1864, War Letters, 1861-1865, NYHS.

¹¹² A Returned Soldier to Alexander Long, May 18, 1864, Long Papers, Cincinnati Historical Society. Other soldiers also believed Long and Harris deserved “to be expelled immediately.” See Morris W. Chalmers to Sister, August 28, 1864, Chalmers Letters, Civil War Miscellaneous Collection, USAMHI.

am for acquiescence in the doctrine of secession.” After some time Harris was called to order for “talk[ing] treason in this Hall,” and, under House Rules 61 and 62, the chair forbid Harris from continuing his speech (this is what should have happened during Long’s speech). Elihu Washburne of Illinois then presented a resolution calling for Harris’ expulsion. It declared that Harris’ “language is treasonable, and is a gross disrespect of this House.” When put to a vote, 81 representatives voted for it and 58 against, so it was rejected, two-thirds not voting in its favor. Robert Schenck immediately offered a new resolution that “severely censured” Harris for speaking words that were “designed to encourage” the rebellion and declared him “an unworthy member of this House.” This resolution was carried by a vote of 93 to 18.¹¹³

Two days later, in the midst of the renewed debate over Long’s expulsion, Godlove Orth called Harris a “traitor.” Raising his fist in a burst of rage, Harris called Orth a “liar” and a “coward.” A point of order was raised regarding Orth’s language and the presiding officer decided that the word “traitor” could be used to refer to Harris. The chair’s decision was greeted by “applause and laughter” from the Republican side of the chamber.¹¹⁴

The four cases in the fourth wave of disciplinary action against disloyal congressmen reveal the changing nature of punishment for disloyalty and treason in Congress. All four members represented states that had remained loyal to the Union, and all four members were punished for words they said, or refused to say, on the floor in

¹¹³ *Congressional Globe*, 38th Cong., 1st sess., 1515-1519.

¹¹⁴ Gertrude K. Johnston, ed., *Dear Pa—And So It Goes* (Harrisburg: Business Service Co., 1971), 287; *Congressional Globe*, 38th Cong., 1st sess., 1545-1546.

their respective house. Finally, in none of these cases could Republicans muster the requisite two-thirds supermajority needed for expulsion. Instead they worked with only simple majorities to punish those suspected of disloyalty or to change the rules of Congress to force the hand of Bayard.

While the Republican majority may be charged with partisanship and unfair treatment of these dissenting congressmen, it would be remiss to pass over these instances without carefully considering the private political positions taken by these four individuals—Bayard, Davis, Long, and Harris. Bayard, Long, and Harris clearly wanted the Confederacy to win. Bayard expressed sadness whenever news reached him of Union victories, and both Long and Harris proclaimed that they believed the rebels should be allowed to form a separate nation in peace.¹¹⁵ Could they, in good conscience, really have subscribed to the oath required of them? And if they could not take the oath—an oath which demanded loyalty—can they really be considered to have been part of a *loyal* opposition?

The case of Garrett Davis is more complicated. He, like many Democrats, originally supported the war in earnest but became disillusioned by the changing nature of the conflict. He, like many Democrats, believed he had been lied to by the administration about the cause for going to war and now believed that the means (“subjugation” of the South and loss of liberty in the North) were not justified by the new

¹¹⁵ In May 1865 Harris was arrested and convicted by a military commission for harboring two Confederate soldiers at his home. He was sentenced to three years in prison and forever barred from again holding office in the U.S. government, but his sentence was commuted by President Andrew Johnson. See RG 153, Court Martial Case file MM-1957; *Hon. Benjamin G. Harris*, House Executive Document No. 14, *Congressional Serial Set*, 39th Cong., 1st sess.

end (“abolition”). Nevertheless, Davis did not support recognition of the Confederacy. He hoped the people—both North and South—would rise up in a moment of democratic unanimity to remove from office their *extremist* leaders—the fire eaters of the South and the abolitionists of the North. He hoped that moderate, conservative, deliberative leaders would lead and reunite the distracted country. As infeasible as such a plan might have been, even President Lincoln still considered Davis “to be of the highest moral character.”¹¹⁶

In all four cases, therefore, the verdicts appear to have hit their mark. The three who favored southern independence were convicted, while the one who did not was acquitted.

V.

Public feeling on the war hit a low point in the summer of 1864, but no further expulsions or censures were attempted in Congress. With the presidential election of 1864 quickly approaching, Republicans turned their attention to much larger political stakes than the expulsion of a few offensive members of the opposition in Congress. Nevertheless, the punitive measures taken in Congress over the preceding three years reveal much about how northern politicians defined and dealt with treason. In the debates that arose both parties grappled with how they understood the war between the states and what it meant to be “loyal.”

¹¹⁶ Abraham Lincoln, “Endorsement Concerning Garrett Davis,” February 13, 1865, in Roy P. Basler, et al., ed., *The Collected Works of Abraham Lincoln*, 9 vols. (New Brunswick, N.J.: Rutgers University Press, 1953-1955), 8:293.

Republicans used these expulsion and censure debates to argue that Democrats were disloyal to both the government and the Union. As Republicans understood the situation, northern Democrats had been the allies of the slaveholding South for many years, and it was only natural that, in wartime, they continued to aid their rebel friends. Their antiwar speeches and resolutions in Congress could only give hope to the South, and hope was, in effect, aid and comfort. Aid and comfort, constitutionally speaking, constituted treason. For this they should be punished. Their treasonable words and disloyal sentiments clearly made them unworthy to hold their seats in the councils of the nation.

Democrats, on the other hand, argued that Republicans were traitors to the Constitution. If the purpose of the war was truly to restore the Union, most Democrats claimed to support such a cause. But the direction of the war, they believed, had broken new ground. By late 1862 the war was no longer about Union, but emancipation, centralization of the government, subjugation of the South, and abandonment of all personal liberties guaranteed in the Constitution. To Democrats, the punitive measures adopted in the House and Senate represented the Republican desire to take away representation of the states in the national legislature, to deny loyal northerners of their personal liberty, and to stifle any opposition to emancipation and other Republican war measures. The Republicans, in this view, were disloyal to the Constitution and the ideals of the Founding Fathers.

Nevertheless, the Republicans held large enough majorities in both houses to attain convictions against most congressmen charged with disloyalty. The debates in these proceedings reveal something about the nature of treason trials more broadly—

namely, that it was very difficult to get convictions for treason. Attorney General Edward Bates had noticed this fact in the judicial realm, and it was just as true in the political sphere.¹¹⁷ Few Democrats were willing to support the censure or expulsion of their colleagues, and even some Republicans were unwilling to go along in the majority's attempts. Part of this stemmed from disagreement over the nature of the "crimes" being prosecuted. "If Mr. Bright is expelled from this Senate, and I am asked . . . what was the charge against him, what was the specific, distinct offense of which the Senate of the United States found him guilty, I could not tell," stated Republican Edgar Cowan of Pennsylvania. A few other Republicans believed some of the accused were innocent. Senator Ira Harris, a New York Republican, was one of the most vocal opponents of the expulsion of Senator Bright. "Bright is expelled, and yet—I *survive*," he wrote cryptically from his seat in the Senate chamber.¹¹⁸ A minority of Republicans, it seems, felt wary about some of the proceedings. If these cases reveal anything about the populace at large, it is that there were so few actual treason trials during the Civil War because it would be nearly impossible to find a unanimous jury willing to convict.

As highly public trials, these cases successfully reached broad audiences throughout the nation. The debates over Bright's expulsion alone were published in some twenty different pamphlets, and excerpts were reprinted in hundreds of newspapers

¹¹⁷ See Edward Bates to R. J. Lackey, January 19, 1863, in *O.R.*, ser. 2, vol. 5, pp. 190-191, discussed in chapter 1.

¹¹⁸ *Congressional Globe*, 37th Cong., 2nd sess., p. 654; Ira Harris to Manton Marble, February 7, 1862, Marble Papers, LC. Following Bright's expulsion the New York legislature adopted a symbolic resolution praising the Senate for punishing Bright and praising New York's other senator for voting in favor of expulsion. See *New York Times*, February 5, 1862.

throughout the North. The debate over Long's expulsion also captivated the nation. One newspaper correspondent commented on the "exciting interest" that the case generated: "Day after day and night after night not only the spacious galleries, but the floor of the great Hall have been crowded and packed almost to suffocation with eager, anxious listeners, while many hundreds have gone away, unable to get within seeing or hearing distance of the doors."¹¹⁹ The speeches delivered during the various proceedings became campaign documents and were gratuitously distributed for the benefit of northern voters. In this way, northern congressmen helped shape public perceptions of treason.

These trials do confirm one other thing about the Democratic opposition during the Civil War, and that is, that there *was* disloyalty in high places. There can be little doubt that the sentiments of Bayard, Long and Harris were disloyal. They wanted the South to win. Jesse D. Bright, too, recommended a firearms salesman to the president of the Confederacy. And this was not the only letter of recommendation that Senator Bright sent south. Archival research has turned up another letter addressed to Robert Toombs as "Sec of State of Confederated States," dated March 9, 1861. In this letter Bright introduced a fellow Indianan who was "a radical true democrat always faithful to the Constitution in reference to the rights of the South." The bearer of this letter hoped to find an appointment in some department of the newly established rebel government.¹²⁰ He was faithful to the Constitution, according to Bright, in reference to southern rights. But apparently this Indianan was not faithful enough to the Constitution to stand by it

¹¹⁹ Evelyn Leasher, ed., *Letter from Washington, 1863-1865* (Detroit: Wayne State University Press, 1999), 108.

¹²⁰ Jesse D. Bright to Robert Toombs, March 9, 1861, Miscellaneous Manuscript Collection, NYHS.

during secession, even though *his* state remained in the Union. This is one example to go along with Bright's letter to Jeff Davis; there may be more.

Yet most historians of the Democratic party during the Civil War have glossed over these examples. Joel H. Silbey described Bright's expulsion as being "for what appeared to be only sordid political reasons."¹²¹ Similarly, James A. Bayard, according to Jennifer L. Weber, was "a senator from Delaware with Copperhead leanings." If Bayard had *only* "Copperhead leanings," then Weber's analysis of "Copperheads" surely misses the mark. She writes:

For their many faults, though, most Copperheads were not traitors. Though some made no bones about their Southern sympathies, most were genuinely committed to the well-being of the nation. Their efforts may have been misguided and at times damaging, and they may have been blind to or ignorant of the consequences of their actions, but the vast majority were loyal to the Union. . . . They did not want the Confederacy to win or the Union to split. They just wanted the nation to return to the *status quo ante bellum*.

Just after describing Senator Bayard, Weber writes that conservative opposition to the war "may have been principled, but it also hindered the war effort." She continues: "Whether Peace Democrats *intended* to do so remains unclear. There is no direct evidence in the archives."¹²² Bayard's private correspondence, held at archival repositories in California, Delaware, and Washington, D.C., certainly indicates otherwise.

For the past generation or two it has been fashionable to argue that the Democratic party during the Civil War was basically loyal—a respectable minority. And

¹²¹ Joel H. Silbey, *A Respectable Minority: The Democratic Party in the Civil War Era, 1860-1868* (New York: W. W. Norton & Co., 1977), 46-47.

¹²² Jennifer L. Weber, *Copperheads: The Rise and Fall of Lincoln's Opponents in the North* (New York: Oxford University Press, 2006), 6-7, 88, 191.

to be sure, those who held the positions of Long, Bayard and Harris were a minority within the Democratic minority. Nevertheless, the Democratic party as a whole came to the defense of the Peace Democrats whenever trouble for them arose. When Vallandigham was arrested (essentially for treason) in May 1863, for example, Democrats held mass rallies throughout the North and included pro-Vallandigham planks in many of their state party platforms that year. For all their differences, the respectable part of the minority was very quick to defend the unrespectable part. It is little wonder, then, that Republicans had trouble distinguishing between the loyal and the disloyal opposition. Party unity, between 1861 and the spring of 1864, held many Democrats together, regardless of the Peace wing's taint of disloyalty.

Following the Democrats' failure to win the presidency in 1864, many hawkish Democrats were frustrated by their Peace brethren. The party was divided in that election (a war candidate on a peace platform), and moderate Democrats blamed their defeat on the influence of those who favored peace at any price. "Ben Wood, Long & Co.—Peace men—par excellence—are the growlers at these attempts on our side," wrote Samuel S. Cox in February 1865. "They are infamous. They ought to be read out of the party—by a *slasher* from the World."¹²³ But two months later peace came, so it was a moot point.

Many questions related to treason during the Civil War are too contested and ambiguous to be definitively answered. When did the war begin, and how was it defined? Whether an act like Jesse Bright's letter to Jefferson Davis was treason depends precisely upon the answers to these questions. There was much disagreement on this issue, but, in this context at least, the answer the Senate gave must be followed—that war

¹²³ Samuel S. Cox to Barlow, February 8, 1865, Barlow Papers.

had begun by March 1861 and therefore he was guilty of a crime that made him unworthy of his seat in the Senate. This crime was never *defined* as treason, but it was certainly treated as such. The supermajority that expelled him from the Senate understood that they were doing so because he had committed a treasonous act.

Equally vexing is the question of whether speech can be considered an overt act. Again, the House decided in 1864 that it could be. Both Long and Harris were censured for speech that was deemed “to aid” the rebel war effort. In this way, the majority of that house of Congress demonstrated that speech, when in favor of southern victory, or when it could be seen as an aid to the rebel cause, could be punished, just as if it were an overt act of aid and comfort to the enemy. “We have before this high court a man charged with crime—not the crime of overt, but of expressed treason,” declared Amos Myers of Pennsylvania. “Must this House wait before we can expel a man until he has his weapons in his hands?”¹²⁴ The answer, to most Republicans’ minds, was no.

¹²⁴ *Congressional Globe*, 38th Cong., 1st sess., p. 1587.

Chapter 4

“When the Enemy is at Our Gates”: The Effect of Rebel Raids on Loyalty in the North

During the American Revolution the law of treason evolved alongside of military engagements. Where the armies went, there traitors were found and punished.¹ The same was generally true of the American Civil War. The presence of armies—whether formal military units or marauding bands of guerrillas—forced local citizens and authorities to grapple with the delicate problems of treason and disloyalty. An invading army might force the local civilians to declare their loyalties to a government to which they did not sympathize. Under these circumstances and in order to protect themselves and their families, noncombatants often aided whichever army currently occupied their town, whether or not they truly identified with them.

Loyalty in the border regions was a more fluid concept than it was in areas not touched so severely by the war. In the face of constant threats of harm from irregular warfare, civilians were forced to choose their sides carefully. War-ravaged Missourians often changed their professions of loyalty depending on whether rebel guerrillas or Union troops occupied their town. “I never saw such a complete change in so short a time,” observed one witness to these nearly-instant political transformations. “When the troops came, the citizens were all Union.”² Public declarations of allegiance, therefore, were not always a reliable indicator of where a person stood on the war question. Consequently,

¹ Bradley Chapin, *The American Law of Treason: Revolutionary and Early National Origins* (Seattle: University of Washington Press, 1964), 29-80.

² Michael Fellman, *Inside War: The Guerrilla Conflict in Missouri during the American Civil War* (New York: Oxford University Press, 1989), 40, 44-45.

civil and military authorities issued blanket proclamations that punished all civilians in certain border areas. They also used the military to arrest, try, and punish noncombatants. In the process, government and military leaders punished not only overt acts of treason, but also things that were done or said in private.

Missouri, Kentucky, and West Virginia were all plagued by fierce and deadly guerrilla warfare. Under Republican-Unionist political and military dominance, they also became the scenes of some of the strictest treason and loyalty laws. In these regions, as throughout much of the North, political dissent was often deemed equivalent to disloyalty and treason. Unlike the rest of the North, however, differing political viewpoints among neighbors along the border often led to murder, vicious reprisals, and unspeakable personal suffering. In order to quell such violence, military commanders in border regions demanded high standards of loyalty. But these standards rarely took the form of positive law. Instead, they were articulated in the orders of local military commanders. Thus, treason, in the border regions, often was a locally defined political and military crime, rather than the constitutional one. Citizens were punished for their partisan affiliations, their thoughts, their words, their sympathies, things said in private, and sometimes even for crimes they were expected to commit. Consequently, the border regions—particularly Missouri—were the scenes of the most military arrests for treasonous and disloyal conduct in the North. Numerous northern civilians were also arrested for violating the laws of war.

The type of debates over treason and loyalty that were omnipresent in the border states also reached into the North when rebel armies invaded the free states. Following several rebel incursions into Pennsylvania, and as far north as Vermont, rebel raids

influenced northern state legislative decisions and brought about the passage of stricter treason and loyalty laws. Thus, just as in the War for Independence, the law of treason followed the armies, broadening the way that northern citizens defined and dealt with disloyalty.

Most significantly, war along the border broadened the law of treason to include women as well as men. Many border state women became vocal opponents of the war, if not active participants on behalf of the Confederacy. As border state society became increasingly violent and orderless, traditional gender norms fell by the wayside. Senator James A. McDougall of California had declared in July 1861 that “Treason was always a gentlemanly crime, and in ancient times a man who committed it was entitled to the ax instead of the halter.” As the war progressed the authorities increasingly noticed the significant amount of treason committed by women. Although the trials of women for treason and disloyalty make up only a small percentage of the whole, they are still a striking example of the expansion of treason law in the United States during the Civil War. Women were arrested, tried and punished for crimes that they had never before been held liable. Many expressed dismay that the military would try and punish them. Others stated that they had not known that women were liable to punishment for crimes of disloyalty. But military authorities determined that women would be held responsible for their actions just as men had been. As with military arrests and trials of men, the vast majority of arrests of disloyal women occurred in the border regions.³

³ *Congressional Globe*, 37th Cong., 1st sess., pp. 63-64; Thomas P. Lowry, *Confederate Heroines: 120 Southern Women Convicted by Union Military Justice* (Baton Rouge: Louisiana State University Press, 2006), 1-75, 147-167, 179-185; James Harrison to Barlow, September 18, 1864, Barlow Papers; Judith van Buskirk, “They Didn’t Join

Irregular warfare in the border states and rebel raids into the North generated new, temporary definitions of loyalty and disloyalty that transformed the crime of treason for the duration of the war. Throughout the war Republicans defined loyalty to include *open* political support for any Republican war measures deemed necessary to winning the war. During rebel invasions, however, and in the border regions, loyalty also came to demand *private* adherence to Republican war aims. Citizens who expressed disdain for the Republicans, their war measures or their racial policies found themselves tried and punished for things they said in conversations on street corners, amongst strangers in taverns, or even in their own homes. Private conversations, which no doubt could be evidence of a disloyal heart, now became a crime punishable upon conviction by a military commission. This, in part, explains why women were held liable for crimes of treason and disloyalty. As the home was increasingly brought under military surveillance, so too were the words and actions of border state women. The requirements, responsibilities and duties of loyal citizenship became all the more stringent when the enemy was at the gates of the North.

I.

The border regions in the Civil War era were some of the more dangerous places to live in United States history. "I am armed like a desperado," wrote one West Virginia statesman to his fiancée in Baltimore. "My revolver has been my constant companion for the last two weeks. I am ashamed sometimes when I think of it. Everybody is armed

the Band: Disaffected Women in Revolutionary Philadelphia," *Pennsylvania History* 62 (Summer 1995), 311-312.

here. Such a spirit as is now rife in the land is destructive of good government, social order and morality.”⁴ But this form of self-protection was often necessary in places where guerrilla warfare threatened innocent civilians. Equally threatening, however, could be government efforts to subjugate disloyal and treasonous behavior along the border. Military orders intended to root out disloyalty in several instances had devastating consequences on the lives of civilians, both loyal and disloyal.

The dangerous situation along the border had a particularly pernicious effect on treason and loyalty laws, as well as on the suppression of dissent. In border regions civilians were held to much higher standards of loyalty than were civilians in peaceful regions of the North. They were frequently subject to laws that were not made by the normal legislative process, and to courts that did not have the same safeguards as the civil judicial system. Martial law and ordinances adopted by conventions governed in the border regions more than in any other part of the North. Moreover, some border regions had two sets of governing officials—with Union governors and legislatures claiming authority against Confederates who claimed the same titles and mantles of power. Under these peculiar circumstances, civilians were forced to make difficult decisions over how to express their political sentiments on the war. Like many locales during the American Revolution, civilians were confronted with a very present civil war.

War-torn Missouri demonstrates most profoundly how irregular warfare along the border affected the treatment of treason and loyalty in the law. Many Missourians—some civilians, some partisan rangers—were captured and convicted in military courts.

⁴ John J. Davis to Anna Kennedy, May 2, 1861, in Gerald Ham, ed., “The Mind of a Copperhead: Letters of John J. Davis on the Secession Crisis and Statehood Politics in Western Virginia, 1860-1862,” *West Virginia History* 24 (January 1963), 97.

Others were displaced from their homes by Union military officials. Military actions aimed at individuals, such as military arrests and trials by military commission, looked to punish only those who were known to be disloyal. Policies aimed at the population as a whole, however, indiscriminately punished both the loyal and the disloyal.

Throughout the war, Union military commanders in Missouri levied taxes on southern sympathizers. The money raised was used to repay Unionists for lost or damaged property, to relieve Unionist refugees and widows, and to fund the Unionist enrolled militia. “Military taxation of disloyal citizens,” according to one historian, “was a refinement of the practice of forced contributions, a tactic introduced in the eighteenth century, when occupying armies realized it was more politic to exact requisitions in provisions or money from the enemy population than to plunder the land.”⁵

In late 1861, General Henry W. Halleck ordered that a “list . . . be prepared of the names of all persons” who were “known to be hostile to the Union.” Three classes of citizens would come under this category: “1st, Those in arms with the enemy who have property in this city; 2d, Those who have furnished pecuniary or other aid to the enemy or to persons in the enemy’s service; 3d, Those who have verbally, in writing, or by publication given encouragement to insurgents and rebels.” Halleck also established a board of assessors to determine who would pay the taxes and how much would be assessed each individual.⁶

⁵ W. Wayne Smith, “An Experiment in Counterinsurgency: The Assessment of Confederate Sympathizers in Missouri,” *Journal of Southern History* 35 (August 1969), 361-370.

⁶ General Orders No. 24, in *O.R.*, ser. 1, vol. 8, p. 431.

As might be expected, this system was prone to fraud, corruption, and faulty management. Often times these taxes struck both loyal and disloyal citizens. Neighbor testified against neighbor, with their statements, according to one scholar, sometimes evincing “more personal hostility than proof of disloyalty.” Finding oneself placed on *the list* also often became a mark more of one’s political loyalties than of their loyalty to the nation. “To vote for men opposed to the policy of the Government is a disloyal act,” declared a circular published by one board of assessors. “Every such voter *places himself on the disloyal list, and becomes a proper subject for taxation.*”⁷ Democratic citizens of Missouri, who may have supported the war effort, were faced with a difficult decision. If they voted against the Republicans they would be placed on the list and taxed as if they were rebels or rebel sympathizers. Such a broad scheme of taxing those “known” to be disloyal was likely either to punish both the loyal and the disloyal alike, or to stifle free political discussion. It would also, likely, increase resentment among the opposition.

The assessment scheme persisted in Missouri for the duration of the war. The first two classes of disloyal citizens could certainly be deemed traitors guilty of levying war. By equating the third class—those who wrote, spoke, or published words that were interpreted by military authorities as encouraging to the rebels—with the first two classes, however, the tax program brought crimes of the heart and mind under the mantle of treason. By punishing those “known” to be disloyal—and adding them to “a list”—rather than officially indicting, trying, and convicting them in open court, the assessment plan broadened the law of treason and linked it to pre-1787 understandings of how to deal with public enemies. It was much easier to punish suspected traitors by taxing them than

⁷ Smith, “Experiment in Counterinsurgency,” 368-375.

by following the judicial processes mandated by the Constitution. Moreover, the circular published by the assessment committee reveals how politicized the definition of treason had become. The tax board publicly announced that those who voted (in the future) against the Lincoln administration would be declared disloyal. The board, it seems, could hardly sit as an impartial judge or jury.

The violence in Missouri would soon necessitate even more drastic measures than taxation. On August 18, 1863, Brig. Gen. Thomas E. Ewing issued General Orders No. 10, which ordered the arrest of “all men (and all women not heads of families) who willfully aid and encourage guerrillas.” Written proof of the evidence against them was required, and arresting officers were ordered to “discriminate as carefully as possible between those who are compelled, by threats or fears, to aid the rebels and those who aid them from disloyal motives.” Those who had “borne arms against the Government,” but who had voluntarily surrendered themselves to the military authorities would be “banished, with their families,” to some place outside of this volatile military district, where they would remain, “exempt from other military punishment on account of their past disloyalty, but not exempt from civil trial for treason.”⁸

Ewing’s Orders No. 10 differentiated between loyal and disloyal citizens, and although not requiring any judicial trial for the accused, it at least required a written statement of proof against those accused of disloyalty. More importantly, Orders No. 10 also sought to differentiate between civilians who aided guerrillas out of sympathy or duress. This distinction was important, for basic legal principles held that citizens could not be convicted of treason if they had not voluntarily acted treasonably. Still, the order

⁸ General Orders No. 10, in *O.R.*, ser. 1, vol. 22, pt. 2, p. 460-461.

drastically limited the constitutional rights of civilians in a loyal state. First, the order left open the possibility of double jeopardy. Citizens might be punished for their disloyalty by banishment, but they were still liable to a “civil trial for treason.” Thus, the military punished acts of treason (called disloyalty) but left open the door to further prosecution under normal legal procedures. Second, as Mark E. Neely, Jr., has pointed out, the order “proves the tendency of guerrilla warfare to cause the breakdown of distinctions between soldier and civilian,” creating a “limitless” potential for civilian arrests by the military.⁹

The arrest and deportation of civilians by the military would soon seem lenient when compared to an order that was issued just a week after Orders No. 10. Three days after the issuing of General Orders No. 10, William C. Quantrill led nearly 500 Confederate guerrillas on a raid of Lawrence, Kansas. They murdered, plundered, pillaged, and burned much of the town. Although General Ewing had been contemplating action more drastic than Orders No. 10 for some time, the sacking of Lawrence necessitated immediate action. On August 25, General Ewing issued General Orders No. 11, which ordered the depopulation of four Missouri counties within the next fifteen days. Nearly 20,000 civilians evacuated their homes, which were then burned by soldiers from Kansas. Missourians who could prove their loyalty were permitted to move to areas within one mile of military bases in the state. But still, in a larger way, as historian Michael Fellman writes, “General Orders #11 did not distinguish between the loyal and the disloyal—all became war refugees.”¹⁰

⁹ Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (New York: Oxford University Press, 1991), 48.

¹⁰ General Orders No. 11, in *O.R.*, ser. 1, vol. 22, pt. 2, p. 473; Fellman, *Inside War*, 25, 95.

How one would prove his or her loyalty was left to the discretion of military commanders. General Orders No. 11 stated that Missourians who could “establish their loyalty to the satisfaction of the commanding officer of the military station near their present place of residence will receive from him a certificate stating the fact of their loyalty, and the names of the witnesses by whom it can be shown.” Any civilian receiving one of these certificates would be “permitted to remove to any military station in this district, or to any part of the State of Kansas, except the counties of the eastern border of the State.” All other Missourians—meaning Missourians who could not “establish their loyalty to the satisfaction of the commanding officer”—simply had to leave.¹¹

Procedurally, General Orders No. 11 appears to have required witnesses as proof of one’s loyalty. Beyond that, however, military commanders were left with a broad range of discretion, and a wide latitude by which to determine *how* they would define and determine disloyalty. In order to receive protection from the government, one Union soldier stated that a suspected traitor ought to prove that “*he is, was and ever has been true and loyal*” with corroborating testimony from “*known and unflinching Union men of the neighborhood.*” Most Unconditional Unionists recognized that some innocent parties would be punished in the process; but in such desperate times as these “some innocent men must suffer,” for nothing less than the utter destitution of the disloyal was necessary to quell guerrilla violence in Missouri.¹²

¹¹ General Orders No. 11, in *O.R.*, ser. 1, vol. 22, pt. 2, p. 473.

¹² Fellman, *Inside War*, 44.

Depopulation was not the only way the army sought to rid Missouri of its disloyal citizenry. Military commissions also became a frequently used vehicle to define and punish treason and disloyalty. As Mark E. Neely, Jr., notes, there were some 2,000 military trials of civilians in Missouri during the Civil War (although this number does not include civilians who were detained by the military but never put to trial).¹³ Many of those tried for treason were Confederate guerrillas.

A perusal of the military trial records reveals that, when captured, border state guerrillas were much more likely to be charged with treason than were members of the regular Confederate army. Several reasons account for this. First, there were fewer guerrillas than regular soldiers. While the average rebel soldier could easily be charged with levying war against the United States, trying all regular soldiers for treason would be an impossible and undesirable task. Charging the smaller body of captured rebel guerrillas seemed more manageable, and also more justifiable considering the ferocity and indiscriminate violence that these roving bands of villains perpetrated. Their violent and heinous actions against loyal border state Unionists prompted such fear and outrage that military commanders had fewer compunctions with charging them with treason. Whereas it would be unwieldy to contemplate charging all Confederate soldiers with treason, it seemed reasonable and just to so charge rebel guerrillas.¹⁴

¹³ Neely, *Fate of Liberty*, 129, 168.

¹⁴ It must be added that because military commissions did not need unanimity to convict, and only required a two-thirds vote to sentence death, military convictions for treason (though of questionable constitutional validity) were much more easily attained than were convictions in a civil trial.

A military commission found nine Missouri men guilty of treason for taking up arms against the federal government in early September 1861. All nine were convicted; the young ones were pardoned and allowed to return home because in their youth they had been persuaded to act unwisely. As was typical in the border states, many Unionists believed that border youths were seduced into joining guerrilla bands. The others were sentenced to hard labor for the duration of the war and having their “property confiscated for the benefit of the General Government.”¹⁵ This punishment, which was given prior to the adoption of the Second Confiscation Act, showed that military commissions would act outside of the law and according to their best judgment when meting out punishments. The treason law of 1790 required death for traitors, and it was not until 1862 that confiscation was authorized as a punishment for treason.

At a military commission assembled in late 1861, eight Missouri citizens were charged with “Treason against the Government of the United States” for “assum[ing] an attitude of open rebellion against the Federal Government by taking up arms against the same, and by assuming and exercising the functions, duties and powers of a soldier or officer in the Rebel army within the limits proper of the State of Missouri.” Three of the prisoners were released when no evidence could be presented against them, four pled guilty and were ordered to remain in military custody, and one was convicted of bridge burning, giving aid and comfort to bridge burners, and treason. He pled not guilty to the

¹⁵ Court Martial Case file II-0476; Amy E. Murrell, “Union Father, Rebel Son: Families and the Question of Civil War Loyalty,” in *The War Was You and Me: Civilians in the American Civil War*, ed. Joan E. Cashin (Princeton, N.J.: Princeton University Press, 2002), 365-368.

first charge and guilty to the second and third, but said he was acting under orders.

Found guilty of all three charges, this last prisoner was sentenced to be shot to death.¹⁶

Death sentences were not the typical outcome for military commission trials, but they did occur. Jeremiah Hoy, a citizen of Kansas, was charged with violation of the laws of war, murder, and “Acts of a treasonable character” for taking part in one of Quantrill’s raids into Missouri (which the commission rightly called “levying war”). Hoy pled not guilty, but a government detective testified against him, giving a very detailed and gruesome description of Quantrill’s band and the murder of a man in Missouri. Hoy was found guilty of first and third charges (even though there was only one witness), but not of murder. He was sentenced to be shot, and the execution was carried out on July 28, 1862.¹⁷

Like Hoy, other border state men were charged with treason or violating their oaths of allegiance for joining guerrilla outfits. Also like Hoy, they were usually convicted of treason or violation of the oath, but not of the other charges. Regarding murder charges, or in the case of one man who was charged with the “Unlawful killing of a Loyal Citizen of the United States” and “Threatening to kill or hang a Union Man,” (new crimes that specifically infused loyalty into their names and definitions) it was usually difficult to prove that the defendant had been *the one* among the band of horsemen who had actually pulled the trigger. Civilians charged with political offences and speech crimes—“repeatedly utter[ing] treasonable and incendiary language against the United States,” for example—were likely to be convicted if they had spoken publicly

¹⁶ Court Martial Case file KK-0838.

¹⁷ Court Martial Case file KK-0151.

and not as part of a large group. Ironically, then, it was often easier in the border regions to gain a conviction for treason and other political offences than for non-political offences like murder. Thus, one St. Louis man was convicted of “Uttering treasonable and disloyal language” for saying “Abe Lincoln is a damned sight bigger traitor than Jeff. Davis” in July 1864, by which, according to the commission, he “sought to bring in contempt the President of the United States, and encourage disloyalty” in Saint Louis. His sentence was mild considering the times. He was imprisoned for 30 days and fined \$50.¹⁸

The presence of disloyal women in the border states posed a difficult situation for military commanders. “I find that a large number of women have been actively concerned both in secret correspondence and in collecting and distributing Rebel letters,” wrote the provost marshal in St. Louis. “I have for some time been thinking of arresting them, but the embarrassment is in knowing what to do with them. Many of them are wives and daughters of officers in Rebel service. These women are wealthy and wield great influence.” In corresponding with the enemy (and aiding them in other ways), border state women forced military authorities to deal with women in a military and political sphere in which they were unaccustomed to encountering them. Moreover, in

¹⁸ Court Martial Case files KK-0825, LL-2674, and NN-0100. In at least one case in which the evidence was not sufficient to support a conviction for “uttering treasonable and disloyal sentiments,” the commanding general overturned a conviction, giving the prisoner a stern warning that “for any violation of law or orders in the future, he will be severely punished.” See Court Martial Case file OO-0134.

working to aid the enemy, many women rejected traditional notions that they were helpless, passive, and submissive to authority.¹⁹

Despite such fears of a public outcry, the military detained and tried many border state women. One woman, who tried to help a rebel prisoner of war escape, was banished to the South “on account of [her] known disloyalty.” If she returned to the North during the war she would instantly be imprisoned. Another woman, in a letter to a rebel guerrilla, made use “of many other wicked and disloyal expressions intending thereby to give aid and comfort to the rebel enemies of the United States to inflame their passions and furnish them intelligence in aid of said rebellion.” She was convicted and imprisoned for the duration of the war. Hannah Martin of Missouri, who had two brothers serving in General Sterling Price’s Confederate army, was charged with “disloyal conduct” for spitting on a United States flag at her Baptist church. Several witnesses corroborated the story and she was convicted by a military court and sentenced to be sent to the South. On account of her “youth and inexperience” and her “want of good sense and good manners,” her sentence was commuted and she was forced to post \$1,000 bond and take an oath of allegiance to the Union. Each of these women injected themselves into political debates that in peacetime had been largely closed to them.

¹⁹Lowry, *Confederate Heroines*, 5-6; Rosemarie Zagarrri, “The Rights of Man and Woman in Post-Revolutionary America,” *William and Mary Quarterly* 55 (April 1998), 205; Barbara Welter, “The Cult of True Womanhood: 1820-1860,” *American Quarterly* 18 (Summer 1996), 158-163; Mary Beth Norton, “Eighteenth-Century American Women in Peace and War: The Case of the Loyalists,” *William and Mary Quarterly* 33 (July 1976), 405-408.

Hannah Martin, in particular, rejected traditional understandings of a true woman's role when she publicly declared herself for the Confederacy in a very unfeminine way.²⁰

The unmatched ferocity and wanton destruction in Missouri led to a larger number of civilians who were tried before military commissions than in any other state. The unique level of such violent warfare and distrust among neighbors was precisely what led to an increased military presence in the policing of treasonable and disloyal actions. Still, some of the disasters endured by Missourians were also experienced in other border regions of the Union.

The situation in northwestern Virginia was truly unique in American history. There, before the creation of the new state of West Virginia, a loyal counter-government was established as *the* official government of Virginia. In that capacity, the government adopted ordinances and laws to demand loyalty of those serving in the new government and also to punish disloyal citizens within their midst. But disloyal citizens were not unknowns—they were friends, neighbors, and family members. Such kinship ties complicated debates about loyalty and disloyalty. “Friends have become enemies to one another[,] neighbor is arrayed against neighbor & Kinsman against Kinsman,” wrote one conservative Unionist in West Virginia. “From morning until late at night groups of anxious looking & despairing faces may be seen congregated in the streets, confused & bewildered by what is transpiring around them.”²¹

²⁰ Lowry, *Confederate Heroines*, 10-12, 34-35; Welter, “True Womanhood,” 151-174.

²¹ John J. Davis to Anna Kennedy, May 2, 1861, in Ham, ed., “Mind of a Copperhead,” 97; Richard O. Curry, “A Reappraisal of Statehood Politics in West Virginia,” *Journal of Southern History* 28 (November 1962), 405-411.

On June 19, 1861 the Virginia Unionist convention adopted an ordinance appointing officials to serve in a new state government. Each member of the government and soldier in the state's militia was required to swear future fidelity to the constitution and laws of the United States, notwithstanding anything to the contrary in the laws or constitution of Virginia. Moreover, the oath taker had to swear to "uphold and defend the government of Virginia as vindicated and restored by the convention which assembled at Wheeling" in June 1861. Any officeholder who violated his oath, "by any overt act, or by writing or speaking," would lose his office and be subject to punishment for perjury. That same day the convention also passed an ordinance (patterned after a rebel ordinance that had been adopted just two days earlier), authorizing the governor to arrest "all suspicious subjects or citizens of any foreign state or power at war with the United States." Any citizens of Virginia professing allegiance to the rebel government, according to the ordinance, would be considered members of a foreign society at war with the Union. Moreover, if the governor *believed* that a group of two or more persons were assembling to make war against the government, or if anyone "furnish[ed] any money, arms, military equipments or munitions of war, or aid or other support to the said confederate states," the governor could authorize their arrest and confinement, or expulsion from the state, either by the civil or the military authorities. The ordinance provided one procedural safeguard to protect citizens from arbitrary arrest and expulsion: any actions must be based "only upon satisfactory evidence and with the concurrence of a majority of his council." Although not nearly the protection afforded to accused

criminals by the U.S. Constitution and constitution of Virginia, it at least, in theory, protected citizens from the arbitrary will of the state executive.²²

During the summer of 1861 the state's new legislature adopted several laws to punish disloyal Virginians. One such law authorized the governor to deputize patrols to arrest any citizens suspected of violently opposing or aiding or inciting "others to oppose by violence" any act of the Wheeling convention, or of the newly constituted government of the state. Those who "shall aid, council or incite others to attempt the overthrow of said re-organized government, or shall raise any riot, or incite others to raise a riot, or shall by violence, intimidate" any civil officer or "loyal citizens" of the state were also subject to arrest, and, if convicted, fine and imprisonment.²³

These crimes, although borrowing language from the constitutional and constructive definitions of treason, nevertheless provided "that any person guilty of treason, may be tried, convicted and punished, as if this act had not passed." Thus, the legislature hoped to punish traitors either through this act or through Virginia's existing treason law, or both. The legislature further enacted that any persons who "voluntarily" left their homes, business, or property to join the rebel armies, and who remained in the

²² *An Ordinance for the Reorganization of the State Government*, adopted June 19, 1861, and *An Ordinance to Authorize the Apprehending of Suspicious Persons in Time of War*, adopted June 19, 1861, *An Ordinance to Provide for the Punishment of Certain Offenses, and for Other Purposes*, adopted August 12, 1861, and *An Ordinance Ascertaining and Declaring in what Cases Offices are Vacated under the Declaration of June 17, 1861*, adopted August 20, 1861, all in *Ordinances of the Convention Assembled at Wheeling on the 11th of June, 1861* (Wheeling, Va., 1861), 6-9, 20.

²³ *An Act to Prevent Offences against the Commonwealth, and to Provide for the Organization of Patrols during the War*, act of July 24, 1861, in *Acts of the General Assembly, Passed at the Extra Session, Held July First, 1861, at the City of Wheeling* (Wheeling, Va.: The Daily Press Book and Job Office, 1861), 20-22.

rebel service more than twenty days after the passage of the act, “shall be deemed a non-resident.”²⁴ On February 8, 1862, the legislature extended the loss of residency to “any person or persons *reputed to be in sympathy* with the Southern Rebellion, or with the so-called Confederate States,” who had left their home (emphasis added). Two days later the legislature adopted legislation requiring loyalty oaths of any Virginian who needed a license from the state, including lawyers, doctors, ministers, brides, grooms, agents of mining, timber, coal and manufacturing companies, toll collectors, surgeons, county clerks, clerks of county courts, commissioners in chancery, notaries public, and jurors. In May 1862 the legislature revised the law so that it did not apply to any foreigner from a nation at peace with the United States who was residing in the state, or to residents from other loyal states temporarily residing in the state. Thus, the oath was directed against Virginians suspected of disloyalty, intending to prohibit them from participating in civil, civic, economic, political, or matrimonial life in the state.²⁵

Conservative Unionists opposed the imposition of the loyalty oath. “It is an unjust and extreme measure and I have been opposing its passage,” wrote Delegate John

²⁴ Ibid; *An Act Staying the Collection of Certain Debts*, act of July 26, 1861, in *ibid.*, 24-25.

²⁵ *An Act Declaring Certain Persons Non-Residents, and Providing for Proceedings against them as Such*, act of February 10, 1862, *An Act to Amend and Re-Enact the Act Passed July 26th, 1861, Entitled, “An Act Staying the Collection of Certain Debts*, act of February 8, 1862, and *An Act Prescribing Oaths in Certain Cases, and Providing for the Registration of the Same*, act of February 10, 1862, all in *Acts of the General Assembly, Passed at the Regular Session, Held December Second, 1861, at the City of Wheeling* (Wheeling, Va.: The Daily Press Book and Job Office, 1862), 58-59, 69-73; *An Act to Amend and Re-Enact the Act Entitled An Act, Prescribing Oaths in Certain Cases and Providing for the Registration of the Same*, act of May 14, 1862, in *Acts of the General Assembly, Passed at the Extra Session, Held May Sixth, 1862, at the City of Wheeling* (Wheeling, Va.: The Daily Press Book and Job Office, 1862), 12-16.

J. Davis to his fiancée. In opposing such “radical & tyrannical measures,” Davis drew the ire of his Republican constituents. They believed he had “gone over to the South side” and called for his resignation. But Davis continued to oppose the test oath, calling it “the grandest nonsense in the world” and pointing out that it “makes more enemies than friends to the Government.” He opposed the imposition of loyalty oaths on both moral and legal grounds, and he believed that their widespread use signaled the coming of “a military despotism. This swearing and arresting men for opinion sake is the first step towards it, and is as plain a violation of the Constitution as can be committed.” But Davis would not speak publicly on the matter for fear of “bayonets.” Thus, the use of loyalty oaths, in Davis’ mind, stifled free speech and the right of individuals to advocate certain political positions (including opposition to the oath itself).²⁶

But the legislature went well beyond the requirement of test oaths. In February 1863 the general assembly passed an even further-reaching piece of legislation. Citing the fact that “evil disposed persons” under orders from the Confederate government had been kidnapping “loyal citizens” of West Virginia and imprisoning them in the South, the legislature “authorized and requested” the governor to retaliate. “In all cases of the seizure of the persons of loyal citizens of this state by any parties acting under the authority of the so-called southern confederacy, the pretended state government at Richmond or other military organizations acting in sympathy or concert with them, or either of them,” the governor was requested “to seize and hold as hostages for the safe

²⁶ John J. Davis to Anna Kennedy, January 24, February 10, March 12, and July 1 and 13, 1862, all in Ham, ed., “Mind of a Copperhead,” 104-107.

rendition of such person or persons so seized and held, so many persons of known disloyal sentiments as in his discretion may be necessary to effect said rendition.”²⁷

This retaliatory legislation is extraordinary on several levels. First, it never defined disloyalty nor stated what sort of evidence would be required to consider one disloyal. It simply assumed that the governor would *know* who was disloyal. Beyond that, the law did not seek to punish those who had *acted* disloyally, but persons who were “known” to have “disloyal sentiments.” Thus, citizens of Virginia’s northwestern counties were liable to be punished for their private thoughts and sympathies. The law contained none of the procedural requirements or protections of an arrest warrant or trial, perhaps because those being held as hostages had not necessarily committed any overt criminal act; they would merely be *suspected of thinking* disloyally. The state of affairs in West Virginia, where kidnapping and guerrilla warfare were ubiquitous, enabled the legislature to adopt dangerous and careless legislation—a law that would punish noncombatants who had never even been formally accused of having committed a crime.

Just east of West Virginia, in Maryland—a border state that experienced very little by way of unconventional warfare—the military still went to great lengths to define treason more broadly than it was defined in the Constitution. As will be seen in Chapter 6, several military officers declared that Democratic ballots would not be accepted because only Republican ballots were “loyal.” Military officers also took it upon themselves to expel disloyalty from churches other public places. In doing so, military

²⁷ West Virginia, *An Act Authorizing the Governor to Arrest Disloyal Persons as Hostages*, act of February 4, 1863, in *Acts of the General Assembly of the State of Virginia, Passed at the Extra Session, Commenced December 4, 1862, in the 87th Year of the Commonwealth* (Wheeling, John F. McDermot, 1863), 63.

commanders used conflicts among border state civilians to articulate and enforce broadened understandings of treason and disloyalty.

In many ways, Major General Robert C. Schenck must have seen himself as the gatekeeper of loyalty in the North, first as the military commander in Baltimore and later in the U.S. House of Representatives. On February 8, 1863, one of Schenck's subordinates placed large American flags in several houses of worship in Baltimore. Upon hearing that some parishioners were not fond of seeing the American flag, Schenck issued the following order:

I understand that considerable disgust is excited in the view of a class of persons, who assemble at your rooms, in consequence of the American Flag being displayed there. You will hereafter cause constantly to be displayed, in a conspicuous position, at the head of the hall, a large sized American Flag until further orders.

The stewards of the Central, Chatsworth, and Biddle Street Methodist Episcopal churches in Baltimore wrote to the governor of Maryland deploring Schenck's tactics and audacity. Schenck, according to the complaint, was depriving them "of the right and privilege of holding public worship, except upon conditions prescribed by military authority." They therefore asked the state authorities for protection of their constitutional rights. But little could curtail Schenck's enthusiastic suppression of disloyalty in Baltimore. He also issued orders banning the sale of music or photographs in any way deemed favorable to the South. "National" and "loyal" songs were the only ones permitted to be sold.²⁸

²⁸ John M. Buck et al. to Augustus Bradford, March 3, 1863, Governor's Miscellaneous Papers (S1274), Maryland State Archives, Annapolis, Md.; J. Thomas Scharf, *History of Maryland from the Earliest Period to the Present Day*, 3 vols. (Baltimore: John B. Piet, 1879), 3:526-529; Henry May, *Speeches of Hon. Henry May, of Maryland, Delivered in the House of Representatives, at the Third Session of the Thirty-Seventh Congress* (Baltimore: Kelly, Hedian & Piet, 1863), 45.

As in Missouri, military commissions and courts martial were also used to try disloyal citizens in Maryland. When three rebel soldiers from Maryland were captured and charged with treason for serving in the rebel army, they pled guilty to the specification (having joined the rebel army), but not guilty of treason (claiming that secession was not treason). They were found guilty and sentenced to be hanged, but both Judge Advocate General Holt and President Lincoln disapproved of the sentence, saying that they had to be exchanged as prisoners of war.²⁹ For reasons of humanity and practicality, soldiers in the regular Confederate army, unlike border state guerrillas, were treated as belligerents, not as traitors.

Treason came to be more broadly defined in a series of trials by military commissions in Baltimore. Sarah Hutchins, a Baltimore civilian, was charged with holding intercourse with the enemy of the United States “in a place under martial law,” with violating the laws of war, and with “Treason under the laws of war.” The specifications in these various charges all involved her working to purchase and send a sword (to which cause she contributed one dollar), along with several pieces of correspondence, to Harry Gilmor, a rebel cavalryman from Baltimore. The charges

²⁹ Court Martial Case file MM-0148. For other rebel soldiers from Maryland who were captured and sentenced to death, but were not charged with treason, see Court Martial Case files MM-0147 and MM-0149. In both of these cases, Lincoln also commuted the sentences because, he said, they had to be treated as prisoners of war. In West Virginia, the legislature adopted a resolution asking for rebel guerrillas to be taken from military custody and tried under state law so that they would be treated as criminals rather than as prisoners of war. See Virginia, *Joint Resolution Authorizing the Governor to Take Such Steps as He May Think Proper for the Apprehension of Certain Offenders*, adopted January 31, 1862, in *Acts of the General Assembly . . . December Second, 1861*, 96-97.

against Hutchins all hinged on the existence of war and martial law in the city of Baltimore.³⁰

Immediately, Hutchins protested the jurisdiction of the court. Moreover, she claimed that she had never actually accomplished any of the actions set forth in the charges and specifications. She had not held intercourse with Gilmor, she declared, because she had not been successful (in the same way that attempted murder is not the same crime as murder). “At the utmost, it was an attempt, in pursuance of a purpose, to send the letter and sword; and may be properly characterized as an *attempt* to hold intercourse; but no intercourse was, in fact, held; because the attempt was frustrated.”³¹

Most importantly, however, Hutchins challenged the manner and construction of the charges that were brought against her. All of them were martial in character, yet she was a civilian living in a loyal state. Not only was she being tried before a military court, but she was being charged with crimes against military law. Ought she not to be tried under civil law, by a jury of her peers in the civil courts and with the protections of the Constitution? “The crime of Treason,” she wrote, “under the Constitution of the United States is clearly defined; & the mode of trial, and the amount of proof required, and the punishment, are all prescribed. But the charge preferred against me is not a charge of treason, under the Constitution of the United States, but a charge of treason under the

³⁰ Court Martial Case file NN-3028. Indictments for treason were also brought against Gilmor and several other leading rebels, including those who later burned Chambersburg, Pennsylvania, but it is likely that nothing ever came of these. See *Friends' Review*, September 9, 1865; *Franklin Repository*, May 10 and June 14, 1865; *Waynesboro Village Record*, September 9, 1865; Carl Brent Swisher, *Roger B. Taney* (New York: The MacMillan Co., 1935), 556-560.

³¹ Court Martial Case file NN-3028.

laws of war.” She surmised that she had not been charged with treason under the constitutional or statutory law of the United States, for then she “could only be tried in the civil courts of the United States, & no where else” and a conviction “could be sustained, only, by the proof of two witnesses to the same overt act, or by confession of the party in open court.”³²

Having established that her trial had proceeded unlawfully, she next turned to defining this new crime under which she was being charged: “Now what is meant by ‘*Treason* under the laws of war?’” she asked. She suggested that this sort of treason—as distinct from the constitutional definition of treason—must mean “acts, amounting to Treason, [that] were committed in a time of actual, pending, war; & after the war had been committed—an act done, *flagrante bello*.” Still, she believed that “treason under the laws of war” must require the same level of proof demanded by Article III of the Constitution. In her own case, she was charged with treason for contributing one dollar towards a sword for Harry Gilmor. The proof of this treasonable act was based on one man’s testimony (in court) that she had, prior to the trial, confessed to him that she had given that dollar for the sword. This, she believed, was “a clear defect of proof.”

(Article III of the Constitution requires a confession or the testimony of two witnesses, both of which must be in open court.) She recounted the evidence against herself:

It is proved that I wrote the two letters, which have been produced, and handed them, with the sword, and two other letters, not produced, to the colored man Baker, with direction to him to carry the letters & sword into Virginia, & to deliver one of the letters, & the sword, to a rebel officer; & that I gave the man ten dollars for his expenses and services;—that this

³² Ibid.

man was forthwith arrested, & that the letters & sword never reached their destination, or left this city.³³

But had these acts amounted to treason? And would they have, had they been successful?

Hutchins did not believe these questions mattered, for no treason, in her mind, had been committed. “Now whether or not *treason* would have been committed, if these articles, or any one of them, had reached their destination, it is not necessary to enquire: but the evidence shews an abortive *attempt* to commit the crime, whatever it would have been, but does not shew the actual commission of the crime. . . . Whatever punishment might be appropriate for a conviction for attempting to commit a crime, I respectfully claim, that upon the proof, I am not guilty of the alleged treason.”³⁴

Hutchins admitted to committing an “act of imprudence and folly” and asked for the court to show mercy accordingly. She closed her argument by quoting from General Orders No. 100, which called on those who administered martial law “to be strictly guided by the principles of justice, honor and humanity.” Nevertheless, she was found guilty and sentenced to imprisonment for five years at labor and fined \$5000. General Lew Wallace approved of the sentence and sent her to Fitchburg Prison in Massachusetts.³⁵

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid. William Ives, a citizen of New York City, was also charged with violation of the laws of war as laid down in General Orders No. 100 and “Treason under the laws of war” for working with Sarah Hutchins to procure the sword for Gilmore. He pled not guilty to all charges and specifications and was acquitted. See Court Martial Case file NN-3080.

Ann Kilbaugh, a washerwoman in Baltimore, was charged with “conduct and the use of language tending to promote sedition and encourage rebellion” for verbally disparaging Union soldiers, the federal government, and women who carried “their damned old Union flag.” She was found guilty of all charges and specifications (excepting her remarks that Union soldiers were “Black Republican Nigger Worshippers”). Like many other border state women, Kilbaugh repudiated prevailing gender assumptions by speaking out against the war. But like many antiwar speakers, both male and female, she was arrested and punished for her actions. Kilbaugh was found guilty and sentenced to sixth months of *hard labor*! General Wallace, however, commuted the sentence to 30 days imprisonment.³⁶

Many Marylanders renounced their allegiance to the United States and moved south to join the rebel army or serve the Confederate war effort in other capacities. When several citizens of Baltimore—John W. Scott, Simon J. Kemp, and Pierre C. Dugan—who had moved to Richmond to work for the rebel government, were captured by Union military authorities, they were brought before a military commission on charges of treason for taking an oath of allegiance to the Confederacy. The defendants pled guilty to the specification (taking the oath) but not to the charge (treason), saying that they had renounced their residence in Maryland and their United States citizenship. All three were found guilty of treason and sentenced to hang. Judge Advocate General Joseph Holt

³⁶ Court Martial Case file NN-3030; compare with Norton on Revolutionary-era women in “Case of the Loyalists,” 405-408.

approved of the sentences, but Lincoln commuted them to imprisonment for the duration of the war.³⁷

Significantly, these three Baltimoreans were convicted of treason and sentenced to death merely for taking an oath of allegiance to the Confederate government. The taking of an oath was considered an overt act of treason. This reveals the great reverence with which many in the North viewed loyalty oaths. In fact, Union loyalty oaths played an important role in the handling of those detained for harboring rebel sympathies. As Harold M. Hyman has shown, loyalty oaths were also often used as a “key to freedom.” When imprisoned for disloyal conduct or disloyal sentiments, a southern sympathizer need only take an oath of allegiance to the federal government to be set free.³⁸ Many military commissions imposed the oath as a punishment for those convicted by military commissions. But not everyone thought the imposition of an oath was an adequate punishment.

General Lew Wallace did not believe requirement of an oath of allegiance was a sufficient punishment for certain disloyal civilians. He disapproved the outcome of one military commission when it sentenced a female spy from Maryland to take an oath before being sent north of New Jersey away from the rebel lines she had been traversing: “To take the Oath of Allegiance!” he wrote incredulously regarding her punishment. Wallace admitted that “one of the most difficult problems of the war” for military commanders along the border was determining adequate punishments for “female rebels

³⁷ Court Martial Case file MM-0751.

³⁸ Harold M. Hyman, *Era of the Oath: Northern Loyalty Tests during the Civil War and Reconstruction* (Philadelphia: University of Pennsylvania Press, 1954), 33-47, 152.

and felons.” But the imposition of oaths simply was not accomplishing its intended goals. “The astonishing feature of the invention is that the loyal people of the United States have all along misunderstood the Oath of Allegiance,” wrote General Wallace. “To them, it has been a solemn obligation, precious in estimation, to be sacredly observed, honorable in the taking, and elevating in the taker. Suddenly, but at the end of three years of the war, it is ascertained to be a dishonor, fit for convicted traitors, a punishment alternative to degrading imprisonment, an infamizing act, therefore a proper element in an infamizing sentence for infamous crimes.” Wallace disapproved of the sentence and the military commission re-sentenced her to imprisonment at a female prison in Massachusetts.³⁹

This incident reveals the problems that many military commanders along the border dealt with when determining how to punish rebel women. Some women refused to take the oath. Others denied that it or other military orders had any bearing on their behavior. One Missouri woman who violated her loyalty oath by corresponding with a rebel soldier told a military commission: “I never considered the Oath binding.” Meta Mason, a seventeen year old orphan in Kentucky, was tried by court martial for violating Ambrose Burnside’s General Orders No. 38 (the same order used to arrest Clement Vallandigham), which was, for all practical purposes, being charged with treason. She had written a letter full of personal, but war-related, news to her brother who was serving under John Hunt Morgan’s command. For this she was charged with “giving comfort to the enemy” and of “giving the position and conduct of Federal soldiers,” in violation of

³⁹ Lowry, *Confederate Heroines*, 47-52.

Burnside's infamous order. Mason claimed she did not know the order, nor that military orders applied to "ladies."⁴⁰

Mary Beth Norton has found that during the American Revolution femininity "provided a ready and plausible excuse for failures of action or of knowledge." In like manner, Mason admitted to writing the letter, but claimed to have done so "not with a view to benefiting the rebellion or injuring the soldiers or cause of the federals. It was simply the result of fraternal affections." Her defense further alleged: "Her only concern was love for her brother. Repeating neighborhood gossip is hardly conveying military secrets." The judge advocate disbelieved Mason's claimed ignorance, saying that "the very great *furor* Orders No 38 created and is creating among the *female* traitors, is surely sufficient in proving that the accused was not in ignorance of 'Orders No 38.'" She was found guilty and sentenced to banishment to the South for the duration of the war. "Let the punishment of the accused Miss Mason stand forth as a warning and we will succeed," declared the judge advocate. Following her conviction, the members of the court martial petitioned to have her sentence commuted on account of her alleged ignorance of the order and her "extreme youth." Deeming her actions "bad but not willful," her sentence was eventually commuted, and, after taking the oath of allegiance, she was released.⁴¹

Women in border areas were able to carry on certain illicit activities that their male counterparts could not. This was, in part, because women were not expected to take

⁴⁰ Lowry, *Confederate Heroines*, 12, 26, 72, 153. For the text of General Orders No. 38, see the Introduction.

⁴¹ Court Martial Case file MM-1102; Norton, "Loyalist Women," 405.

part in such clandestine enterprises. Judge Advocate General Joseph Holt opposed the release of one woman who had taken mail to the rebel army near Cumberland, Maryland. “The accused is one of a class of persons whose very sex and apparent guilelessness enable them to carry on a system of communication between our lines and those of the enemy, and in many cases almost with impunity. Protected by their womanly character, they readily pass to and fro.” The interest of the government, according to Holt, “urgently require . . . that she should be restrained from renewing her disloyal practices.”⁴² Thus, in many ways, women could be more dangerous traitors than men. Accordingly, military commissions generally sentenced them to punishments similar to those given to men.

In some rare cases, civilians were punished for stating that they intended to commit a crime. One Missouri woman, who was charged with planning to feed rebel bushwhackers (she had apparently been overheard at home saying as much), pled innocence on the grounds that she did not realize her actions were a crime. Using her femininity and exclusion from the political sphere as a point of reference, her defense claimed immunity for the things she had said: “With refference [sic] to uttering disloyal sentiments, her being a lady and unaccustomed to being held responsible for anything she might say, she does not really know what was loyal or disloyal.” What is perhaps more significant is that she had not yet committed any crime. She had been overheard at home saying that she *would* feed the guerrillas. This woman was banished from the state of

⁴² Lowry, *Confederate Heroines*, 53-55.

Missouri by the military commission, but the commanding general suspended the sentence.⁴³

Proving one's loyalty in the border regions often meant proving one's adherence to the Lincoln administration's war measures. Still, some rebel sympathizers were unconcerned with how they were perceived by federal troops or Republican politicians. "I am a Rebel and a Southern sympathizer and I don't care who knows it!" declared one Missouri woman rashly. "It's no man's business what a woman's politics are!" Others complained that they had become martyrs who were facing unjust persecution at the hands of a despotic central government. "Is the conviction of this poor woman calculated to add to the dignity, honor or glory of this great republic?" asked one suspected traitor's counsel.⁴⁴ This second woman, like many other citizens of the border states, believed that her trial and conviction was little more than political theater used to stifle dissent and punish helpless civilians.

Some Confederate sympathizers along the border, however, realized that they could use various means other than oaths or professions of patriotism to prove their "loyalty" to the Union cause. Some "proved" their own loyalty by squealing on their neighbors. "Their loyalty would be reaffirmed at relatively low risk by their naming names to the authorities," writes historian Michael Fellman. "If their loyalty had ever been called into doubt, secret impeachment of neighbors could be a means of clearing their names." Other Missourians played on the weaknesses of their Union-soldier tormentors. One Missouri woman claimed that she could prove her loyalty by flattering

⁴³ Ibid., 19-20; Norton, "Loyalist Women," 405-408.

⁴⁴ Lowry, *Confederate Heroines*, 6, 42.

and bribing Union soldiers: “Those ‘Bastilles’ that the Lords of our land term prisons, are *groaning* with the *agonies* of our poor friends and relatives and not one comfort will they allow us to administer unless you bow to their majesties,” she wrote of the political prisoners being held captive by the Union military. “I have learned that to flatter is the key to their consciences and what we term Golden Salve goes a good way towards proving your loyalty to Abe Lincoln’s Government. I have always contended that right—‘was might’ and now I feel convinced.” Indeed, this woman, in many ways, adhered to traditional gender norms. Her greatest desire was to bring comfort, peace and cheer to her family and imprisoned menfolk. The realities of war caused her to take these domestic traits beyond the home, however; and also to employ some nefarious means to accomplish them. In the process, she bribed and lied to the military to prove her “loyalty to Abe Lincoln’s Government.”⁴⁵

Proving one’s loyalty during the Civil War was more a political problem than it was a legal or constitutional one. The danger in how the states and the military demanded proof of loyalty, in fact, was in their rejection of the normal judicial processes. They thus reduced treason to a mere partisan accusation that the accused became responsible to refute. When indicted for treason, one would have to *be proved* guilty to the satisfaction of twelve jurors, based upon the testimony of two witnesses to the same overt act. When accused of disloyalty, however, citizens had to *prove* their own loyalty. Thus, being able to charge citizens with disloyalty, and to punish or arrest them based solely on the charge (often only a suspicion), was, in many respects, more insidious than

⁴⁵ Fellman, *Inside War*, 46-47; Lowry, *Confederate Heroines*, 24; Welter, “True Womanhood,” 162-164.

actually charging them with treason. Now the burden of proof was on the “defendant.” Those “known” for their disloyalty could be arrested and punished, held as hostages in West Virginia, or taxed in Missouri, all without any formal charges. They now had to prove that the *knowledge* about them had been faulty.

These political matters were complicated by the fact that very few people could agree on the status of the southern Confederacy or the type of war being waged. If the South had seceded and become a separate nation, then adherents to the southern cause deserved to be treated as prisoners of war, lawful belligerents, and enemy combatants. They could not, therefore, be charged with treason. Operating under this assumption, those who claimed to have renounced their American citizenship and had taken an oath to the Confederacy might well believe they had made a lawful political decision, not committed a treasonable act of war. Along similar lines, many in the North believed that their support of the rebels was a political position, not a treasonous act.

Military officials chose not to see things this way. Treason, expressed or implied, as General Burnside had declared in Orders No. 38, would be treated the same. Moreover, neutrality was not an option in the border regions of the war. Just as Lincoln had declared to Congress on July 4, 1861—that neutrality was “treason in effect”—so too, feigned neutrality in border regions would be seen as *evidence* of disloyalty. “All who do not enroll their names [in the militia] are to be considered as spies and traitors and are to be treated as such,” stated one ardent Missouri Unionist.⁴⁶ By this logic, all truly loyal men would actively devote themselves to military service for the cause of their

⁴⁶ Fellman, *Inside War*, 51-52.

nation. Their loyalty would be evident by their actions. The trees would be known by their fruit.

Whether by military commissions, tax assessment boards, or by neighbors testifying to a local military commander, suspected traitors were often “convicted” and punished without the benefit of a civil trial. Although their actions were generally considered treasonable, because the government and military chose not to call them “treason,” suspected traitors could be punished by far less stringent standards than the Constitution necessitated for treason trials (or any criminal trials, for that matter). In this way, the law of treason in the border regions was broadened to encompass thoughts, sentiments, and neutral inaction that might be deemed somehow, directly or indirectly, supportive of the rebel war effort. The process of defining disloyalty in ways that included common understandings of treason enabled border state Unionists to expand the definition of treason while also making “convictions” for treason much easier to obtain. Along the border, therefore—where military law tended to trump civil authorities—the law of treason expanded in ways that would have been unthinkable to the Founding Fathers.

II.

Rebel troops invaded the North on several occasions between 1862 and 1864. In September 1862, Robert E. Lee brought his Army of Northern Virginia northward in a campaign that culminated in the Battle of Antietam. Shortly after Antietam, Lee sent his cavalry commander, Jeb Stuart, into Pennsylvania. His three day raid resulted in the capture of some 1,200 horses, several convalescing soldiers, and large amounts of shoes

and boots. In the process, Stuart burned a railroad depot that contained Union military supplies, and he terrorized the countryside.⁴⁷ In June and July 1863, Lee mounted a major invasion into Pennsylvania, which culminated in the Union victory at Gettysburg. Then, in 1864, Confederate General Jubal Early invaded Maryland and Pennsylvania, threatening the national capital and burning the Pennsylvania town of Chambersburg. Each of these rebel raids into the North would have major implications for how treason and loyalty were defined during the war.

Rebel raids into Maryland, Ohio and Pennsylvania forced northern civilians and government officials to reevaluate how they defined treason, loyalty, and disloyalty. Both parties in the North believed the other party benefited from rebel raids. Democrats believed that the Republicans enjoyed seeing rebel invasions into the southern regions of the North because there the rebels would strip bare the fields of Democratic farmers. Republicans, by contrast, often accused Democrats of welcoming, comforting and feeding rebel soldiers. Along these lines, rebel troop movements into the North revealed the awkward position in which that the Democratic party found itself as an opposition party. By 1863, as more and more Democrats opposed the Lincoln administration's apparent radicalizing of the war, Democrats came under frequent fire for actually wanting to see the South prevail, even if that meant invasions into the North. Some moderate Democrats feared that "too ultra [of an] opposition" to the Lincoln administration might end up hurting the party. As one moderate Democrat in Washington noted of divisions

⁴⁷ Edward L. Ayers, *In the Presence of Mine Enemies: War in the Heart of America, 1859-1863* (New York: W. W. Norton, 2003), 322-331.

within his own party during Lee's invasion into Pennsylvania in June 1863, "We must put down opposition to the war and do the best we can when the enemy is at our gates."⁴⁸

In fact, most Democrats—even Peace Democrats—believed in fighting the rebels when they came looking for a fight on northern soil.⁴⁹ Still, Maryland and Pennsylvania became contested battlegrounds in the political war being waged over how to define loyalty. Rebels making their way north forced the treason and loyalty issues onto northern noncombatants in new and often discomfiting ways. Furthermore, in bringing the war to the homes and firesides of northern civilians, rebel incursions into the North revealed some of the tensions and disconnects that existed between northern soldiers and civilians, causing many Union soldiers to doubt whether those who remained at home were truly loyal.

Many Union soldiers complained that northern civilians took advantage of the troops who came to protect their homes and farms. More than a year after Gettysburg, one Union soldier stationed near Atlanta told his father that he had "no sympathy" for citizens of southern Pennsylvania who were now "very much alarmed about the 'Raid.'" He recalled that during the Gettysburg campaign some civilians just "sat upon the fences by the road side and in the doors of the Village houses 'looking at the show,'" while other "men and women inside did not know how *much* they ought to ask for a loaf of bread. I had to pay several times 50 cents for a loaf of bread, 5 to 8¢ apiece for eggs, 75¢ for a

⁴⁸ T. J. Barnett to Barlow, June 22, 1863, Barlow Papers.

⁴⁹ See, for example, the remarks of Clement Vallandigham at *Congressional Globe*, 37th Cong., 3rd sess., p. 1262.

chicken &c. If men will not defend their own homes and firesides they deserve to lose them.”⁵⁰

Another soldier noted the difference between Marylanders and Pennsylvanians when Union soldiers came to protect them from rebel invaders. “In the southern part of Pennsylvania we found Dutch *animals* and once and a while a woman would shake her handkerchief,” he wrote his sister. “In Maryland we found fine people who could appreciate the danger we had rescued them from, and when we asked them to sell us a loaf of bread or a pie, almost invariably their answer would be, ‘Indeed, sir, we have none to sell, but will *give* you all we have got.’ Is’nt [sic] there more Union in that, than in waving handkerchiefs? In Pennsylvania we were often charged 50 cents for a loaf of bread, 15 cents per quart for milk, and 40 cents for a pound of butter.” This soldier concluded that he “wish[ed] Lee would go there again. . . . Copperheads had better improve the time for their day of grace is short.”⁵¹ Loyalty, to these soldiers, meant giving aid to Union soldiers when they were protecting the northern countryside.

Others were disappointed in Pennsylvania’s slow response to rebel invasions into the Keystone State. When Lee invaded Pennsylvania, one New Yorker wrote to a Pennsylvania congressman on July 1, 1863, saying, “I will say nothing about the war except the Union men of our state are sadly grieved at the backwardness of Pennsylvania

⁵⁰ John McCowan to Father, August 9, 1864, Anderson-Caperhart-McCowan Family Papers, Civil War Miscellaneous Collection, USAMHI.

⁵¹ C.R. Dart to sister, July 18, 1863, newspaper clipping, probably from *Monroe Republican*, RG-7 (Military Manuscript Collection), Box 3 (General Correspondence), Item 75 (Folder 14a), Dart Collection, PHMC. See also George Henry Herbert to Jack, September 13, 1862, George Henry Herbert Papers, British Library, London, U.K.

in bringing her troops in the field. We think the scare is over but the disgrace remains.”⁵²

A Baltimorean visiting Philadelphia in late June 1863 noted the extreme indifference of many Philadelphians:

I have been two days in this City and I will say to you that here there is a most extraordinary & inexplicable calm. The “invasion” not only fails to alarm the people, but I see evidences at every turn that great numbers of the people are at least indifferent to it. I assure you there is *no* excitement here. Many say “let them come”—others say “we are ready to trade off the scoundrels in power, for gentlemanlike enemies.”

This observer believed that the North had grown weary of Lincoln’s “abolition Crusade,” but he still believed that the Union would be restored: “There is in the others as with me a strong hope that by & by, the spirit of the Union may be revived; but there is no hope that it can be revived thro existing agencies—there is a solid belief that the existing government stands *between* the true lovers of the Union and the restoration of the Constitution. . . . My whole soul—all I am & all I hope for—is identified with the Union—I *believe* it can be restored; but to restore it, surely, we must first put down its real enemies. I would call things by their right names. He is not my enemy because he lives in New York or Boston, but because he assails my character & my interests.”⁵³ This Democrat’s real enemies, it seems, were the abolitionists. Many Democrats and Republicans distrusted each other perhaps more than they distrusted the enemy to the south.

Both sides accused the other of wanting the rebels to invade the North, and both believed that they were the better protector of the home front. According to the

⁵² Oscar Coles to Hendrick B. Wright, July 1, 1863, Hendrick B. Wright Papers, Luzerne County Historical Society, Wilkes-Barre, Pa.

⁵³ S. M. Johnson to Barlow, June 26, 1863, Barlow Papers.

Bellefonte *Democratic Watchman*, the “most prominent abolitionists” in Pennsylvania hoped that Lee’s troops would make it to the central part of the state to “ravage and plunder everything in their course because, as these *patriots* affirmed, they would thus be sure to burn out and destroy all the ‘d—d Copperheads.’” Democrats protested that they were the true patriots of the North. “In order to see that class of our citizens whom they denominate ‘Copperheads,’ burnt out and killed off, they [Republicans] would be willing to have the country indiscriminately pillaged and ruined from Chambersburg to Bellefonte. That is what *they* call patriotism! It is, however, nothing but fanaticism, and shows the rancorous party feeling which has taken complete possession of their souls.”⁵⁴

Republicans, by contrast, believed that the rebels had been invited into Pennsylvania by their Democratic friends. Congressman Thaddeus Stevens criticized Democrats for wanting to be conciliatory and compromising, and for referring to the southerners as their brethren. After describing the destruction, stealing, re-enslavement, and violence that the rebels introduced into Pennsylvania, Stevens exclaimed: “Thieves, robbers, traitors kidnappers! *They* our ‘*brethren of the South.*’ God forbid that I should thus treat them. They are no kindred of mine. I would as soon acknowledge fellowship with the sooty demons, whose business and delight it is, to torture the damned! Let Copperheads embrace them. They will find together an appropriate place, in the great day of Accounts.”⁵⁵

⁵⁴ Bellefonte *Democratic Watchman*, July 17, 1863; *Doylestown Democrat*, June 30 and July 21, 1863.

⁵⁵ Thaddeus Stevens, “Speech on State Elections,” September 17[?], 1863, in Beverly Wilson Palmer and Holly Byers Ochoa, eds., *The Selected Papers of Thaddeus Stevens*, 2 vols. (Pittsburgh, Pa.: University of Pittsburgh Press, 1997), 1:407-408.

This charge of Democratic complicity in rebel raids began to stick. In 1863 the Pennsylvania legislature adopted a law to compensate the “loyal citizens” of the commonwealth who had lost property during Confederate General Jeb Stuart’s 1862 raid into the state. In 1864 the legislature debated several bills intending to supplement this act so as to include citizens who had lost property during the Gettysburg campaign. Very early in the debate one Republican in the lower house introduced a resolution stating that because disloyal Pennsylvanians had encouraged the rebels to invade the state, that any persons claiming compensation for lost property must “furnish positive proofs of their loyalty.” This resolution generated a great deal of debate despite the fact that the bill, as it was written, included a lengthy test-oath that required pledges of past and future loyalty.⁵⁶

Democrats instantly raised their voices in protest. “I desire to know from the gentleman who offers this resolution, what the standard of loyalty is to be,” stated one Democrat from central Pennsylvania. “Is a test-oath to be administered by the committee? Are they to make claimants swear that they are loyal? or must the claimants bring positive testimony?” This legislator denied the right of a legislative committee to determine just how loyalty would be defined or proved. “Some members of this House

⁵⁶ Pennsylvania, *An Act to Provide for the Adjudication and Payment of Claims Arising from the Loss of Horses, and Other Property, Taken, or Destroyed, in the Border Counties by the Rebels, in October, Anno Domini One Thousand Eight Hundred and Sixty-Two, and for Property and Horses Impressed for the Use of the Military of the State, in September, One Thousand Eight Hundred and Sixty-Two*, act of April 22, 1863, in *Laws of the General Assembly of the State of Pennsylvania, Passed at the Session of 1863, in the Eighty-Seventh Year of Independence* (Harrisburg: Singerly & Myers, 1863), 529-530; George Bergner, *The Legislative Record: Containing the Debates and Proceedings of the Pennsylvania Legislature for the Session of 1864* (Harrisburg: The “Telegraph” Steam Book and Job Office, 1864), 172-175; *Franklin Repository*, February 24 and March 2, 1864. The resolution was later amended to require “satisfactory proofs.”

have been in the habit here of calling men disloyal who are just as loyal as themselves.”⁵⁷ By this, he meant that Republicans were in the habit of calling Democrats disloyal just because they disagreed about political matters.

Some border county legislators claimed that they represented no disloyal constituents. The idea “that certain disloyal citizens invited the rebels over into Pennsylvania,” according to one border county Democrat, “is preposterous.” Had not border county Democrats volunteered for the army, paid their taxes, and “done everything that good citizens should do to support the Constitution of the United States?” To this border county Democrat, loyalty meant fidelity to the Constitution and “to the Government of our fathers.” It was not adherence to “a certain platform, or the particular notions of a certain President or a certain Governor.”⁵⁸

Republicans countered with their own version of loyalty. Loyalty, to them, meant unconditional commitment to winning the war, regardless of constitutional niceties.

I will say that my ideas of loyalty are these: That a man shall support and defend the Constitution and the Union at all costs and at all sacrifices. A man who is willing to sacrifice everything and to do everything in his power to maintain, preserve and perpetuate the Union of these States as cemented by the blood of the patriots of the Revolution, is, according to my idea, a loyal man. It is not for a man to stand up and quibble on certain constitutional points, saying “this is not constitutional,” “that is not constitutional;” “this way of conducting the war is not constitutional and that way is not constitutional,” but a man must go for the Union at all hazards, if he would entitle himself to be considered a loyal man.

⁵⁷ Bergner, *Legislative Record*, 173. Some Democrats believed that the deeper purpose of this resolution “was to kill the bill by engulfing it in a political whirlpool.” See *Gettysburg Compiler*, February 22 and May 30, 1864.

⁵⁸ Bergner, *Legislative Record*, 174. The claim that there were no disloyal civilians in Pennsylvania was certainly untrue, and some newspaper editors were sure to point that out. See *Franklin Repository*, February 17, 1864.

At root, this definition of loyalty was wholly partisan and incompatible with a republican form of government that depended upon debate, disagreement, and compromise.

Knowing that Democrats believed many of the war measures of the Republican party were unconstitutional, this state legislator knew that his definition of loyalty automatically excluded the majority of the opposition party.⁵⁹

For this reason, most Democrats believed that the Republican party was politicizing the concept of loyalty. “I do not understand what the term ‘loyalty’ means as it is used by the Republican party of the present day,” stated one Democrat. “It is a new word, sir, in politics, and it had its birth as a political phrase in the Republican party.” Did loyalty mean one is “for the Union as it was and the Constitution as it is? or, sir, does his term loyalty extend so far that a man must be for the new Union and the new Constitution, as conceived by the expounders of the Republican faith and about to be inaugurated upon an unwilling people.” Loyalty, according to the Democrats, was fidelity to the Union and the Constitution as they had been prior to the war. They would not tolerate changes to the Constitution that appeared to be made only for immediate partisan purposes. If loyalty meant supporting President Lincoln, the Democrats proudly railed, “then, Mr. Speaker, I am not loyal, and the Democratic party is not loyal; for we hold . . . that this self-same President has violated time and again—times without number—the Constitution of the United States. . . . Every man who does not entirely agree with them in all their views, is charged by them with being ‘disloyal’—a ‘copperhead’ and a ‘traitor.’”⁶⁰

⁵⁹ Bergner, *Legislative Record*, 174.

⁶⁰ *Ibid.*, 181-182.

The debate raged for several days. Democrats (and even some Republicans) feared that the vague requirement for “positive proofs” would allow partisan claims commissioners to reject all claims from Democrats. They feared, in essence, that Republican-appointed commissioners would treat Democrats the same way that the Republican press did. Beyond that, most Democrats were not willing to relinquish their political principles just to be considered “loyal” so that they could receive compensation. They opposed emancipation and conscription, among other Republican measures. But unless a Democrat was willing “to abandon his politics and to support the party in power,” Democrats believed that they would not be considered “loyal” by those in control of the government. Most Democrats believed that a person’s disloyalty ought to be a judicial question rather than one of legislative determination. Along those lines, one Democrat suggested that Pennsylvania’s 1861 “treason” law ought to be used as the standard by which claimants would be judged.⁶¹

Republicans believed that a loyalty requirement would prevent disloyal civilians from bleeding the public treasury, only to invite the rebels back into the state so that they could claim more money for their losses. They also impugned the devotion of the Democrats to actually winning the war. One Republican loudly declared that when Democrats made pro-war remarks or claimed to want to defeat and punish the South, these “protestations are mere lip-service—that they make them up to suit the place which they are in; and such professions are all hollow-hearted.” Finally, the Republican who introduced the resolution said that he had not intended to impugn the Democratic party at

⁶¹ Ibid., 174-176, 181. For discussion of the Pennsylvania law, see chapter 1.

all, but by going on the defensive, the Democrats had become their own accusers. “That the Democratic party should be thin-skinned, when any question touching loyalty is mentioned, is to be expected; for their leaders have, since the rebellion began, been the allies of Jefferson Davis and the right wing of Lee’s army.” Evidence of their treason existed in their opposition to all efforts made by the Republicans to suppress the rebellion. Claiming that Republican actions were unconstitutional was merely “the screen behind which Northern treason has continually veiled itself.”⁶²

Republican P. Frazer Smith of Chester county argued that loyalty to the Constitution and Union were closely linked to nationalism. American democracy, according to Smith, transcended party politics. Accordingly, a loyal citizen would not assail the government just because his candidate had lost a presidential contest. No, in the democracy of Washington, Jackson, Lewis Cass, and Stephen A. Douglas, the “true citizens” of the country would come “up to sustain the Government under all circumstances in which it may be placed, and especially in the putting down of such a rebellion as we are now witnessing.” To Smith, a truly loyal citizen would follow the elected leader when the nation was in trouble. This form of loyalty “puts the Government of the United States above every government that is formed under it” and “recognizes no pestilent heresy of State rights which would lead a man to say, ‘My State calls upon me to do so, and I am therefore a loyal man, whilst I am obeying that State, although she may

⁶² Bergner, *Legislative Record*, 177, 204-208.

be in rebellion against the Government of the nation.’ Out such loyalty! Let us never hear of that in these halls.”⁶³

This “great nation” was not “a mere compact of States,” according to Smith. “We read it there as plain as A, B, C, that ‘we, the people,’ form this great government . . . [and] that when the government enacted laws . . . those laws were supreme, and the man was a traitor and a scoundrel—(those were our sentiments then, and they are mine now)—who deliberately says, that any State has rights which will put it above the government of the United States, and that we, as citizens of this State or any other State, should obey the behests of our State to the overturning of the government of the United States.” Accordingly, loyal men would support expelling rebels from northern soil, they would “not throw discredit upon the currency of the country,” and they would not discourage enlistments. While claiming that the majority of the Democratic party was loyal, Smith argued that its leaders were not. “You will find them prating about the Constitution, when every act shows that they are in sympathy, if not in co-operation, with those who are assailing it with armed hands. You find them glorying in the defeat of our armies, and you will find them rejoicing when our adversary succeeds, mourning when he fails. . . . The Democracy which will put the country above everything else is the Democracy that we all love. I care not whether the man calls himself a Democrat or a Republican, if he places his party above his country—if he desires to grind out of the groans and tears of the people that which will make him rich—he is disloyal, according to

⁶³ Ibid., 222-223; see also Melinda Lawson, *Patriot Fires: Forging a New American Nationalism in the Civil War North* (Lawrence: University Press of Kansas, 2002), ch. 3.

the test which I think ought to be applied—according to the test which I am willing to be applied to myself.”⁶⁴

In closing, Smith described a hypothetical mother who had lost her son on the battlefield. If you asked her to denounce the president she would not, but rather would say: “My boy went into the service of his country, and love him as I did, I love my country more.” Country was more important than family, than personal hardship, than local state or community, than constitutional niceties, than political principles, than life itself. The Republican version of loyalty, as articulated by such spokesmen as P. Frazer Smith, involved suppressing one’s own desires or beliefs for the sake of preserving the nation. This included a woman placing her country’s needs above those of her family.⁶⁵

The debate in the Pennsylvania Senate covered the same topic of loyalty, but in a much different manner. There, Republicans openly opposed the bill, while Democrats universally supported it. The Democrats argued that because border county citizens had paid their taxes, volunteered for the military, and been subject to the draft, they ought to be compensated for their losses if the government had not been able to protect them. Republicans countered that the bill was unprecedented—that at no other time in the history of warfare had a state or a nation compensated its citizens for losses that had occurred as a result of a battle. Beyond that, they argued that while the border counties had lost whiskey and chickens and mules, the rest of the state had lost children, fathers,

⁶⁴ Bergner, *Legislative Record*, 223-225. See also Adam I. P. Smith, *No Party Now: Politics in the Civil War North* (New York: Oxford University Press, 2006).

⁶⁵ Bergner, *Legislative Record*, 225; cf. Welter, “True Womanhood,” 172.

and husbands. “Which was the richer or which was the greater loss?” asked one Republican.⁶⁶

Throughout the war the Democratic party had warned that the Civil War would bring financial devastation upon the nation. The Republicans now countered that this indemnity bill was intended to speed up that coming fiscal disaster. By compensating every citizen for lost property, the Democrats were seeking to saddle the state with an insurmountable debt. “The Northern allies of Southern traitors are crying down the credit of the nation and predicting financial ruin, and praying for national bankruptcy as the means of forcing us to acknowledge the independence of the traitors’ confederacy,” argued one Republican senator, “and by the unanimous support that this measure is receiving at the hands of that party in this Senate, we must regard this as one of the means adopted by them to bring to pass the bankruptcy which they prophesy.” Moreover, another Republican argued that disloyal Pennsylvanians would now be tempted “*to invite* raids into this Commonwealth” so as to put the state into further financial trouble all while lining their own pockets and aiding the rebels.⁶⁷

One Republican senator, whose throat became hoarse during the debate, declared in rather hyperbolic language that the compensation bill was “the most dangerous piece of legislation that was every proposed before this Legislature,” and that he would rather “see this capitol in flames” than see the bill become law, for “if it passed there is nothing but destruction left for this Government.” Beyond that, those northern traitors who were willing to help rebels invade the state and pillage their neighbors would not hesitate to

⁶⁶ Bergner, *Legislative Record*, 781-782, 810, 995.

⁶⁷ *Ibid.*, 781-783.

commit perjury to fill their own pockets with government money. “Treason,” another Republican added, “is the sum of all villainies and embraces all minor crimes.”

Consequently, Republicans doubted that a test oath would ensure that claimants were loyal. “A man who will give aid and protection to the rebels against our Government,” stated one Republican, “is one who will disregard his oath. The oath of such a man is of no account. To me, it would be no evidence of his loyalty, none in the least.” For these reasons, Republicans believed that the bill would raise taxes on the loyal only to compensate the disloyal.⁶⁸

In an extraordinary speech, one Democrat argued that if the government would not protect its citizens from rebel incursions, and later refused to compensate them for their losses, then they no longer owed it any allegiance. Citizens gave up some of their rights, and paid their taxes, in exchange for protection from the government. “If it is unable to save the citizen from wrong, then it must compensate him in damages; and if the Government is unable to do that, or if it will not do it, then the citizen is released from his fealty and allegiance to that Government, which is false to its trust, and he is at liberty to look around for such other sources of reliance as will be likely to protect him, his home and his family.” Justice demanded that the citizens of southern Pennsylvania receive compensation for their losses, he continued. “You must protect your citizens, or if wronged compensate them, or else you must release them from their allegiance and the duty which you impose upon them to give their money and the lives of their children to

⁶⁸ Ibid., 781, 783, 995, 1035.

defend your Government, . . . because, sir, the Government that fails to protect its citizens ought not to exist longer among a free people.”⁶⁹

The debate over compensation took on a partisan tone and breadth that extended well beyond the particular issue at stake. Hoping to unite the state senate behind the measure, one border county Democrat called on his colleagues to put party politics aside and to adopt the bill as a way to aid his constituency who had suffered so much. The bill guarded against the citizen who had “been faithless in his obligations and allegiance to his Government” by requiring an oath that stated that the claimant had never borne arms against the state or national governments, nor “given aid, information or encouragement” to the rebels, nor discouraged enlistments. Moreover, he reckoned that there was “no doubt” that the federal government would eventually reimburse the state.⁷⁰

Having seen and experienced the devastation of the rebel raids, the Republican press along the border tended to support compensation for losses. Although they agreed that the House resolution demanding “positive proofs” of loyalty was objectionable and too indefinite, they believed that some proof of past loyalty ought to be required of those making claims against the government.⁷¹

Democrats feared that any demand for loyalty would automatically disqualify all Democrats from receiving compensation—not because they were disloyal, but because

⁶⁹ *Ibid.*, 810.

⁷⁰ Bergner, *Legislative Record*, 783, 811, 1035-1037; *Franklin Repository*, March 9, 1864; E. Harmon to Jeremiah S. Black, September 10, 1863, Jeremiah S. Black Papers, LC. Several Republicans had also argued that the federal government, and not the state government, should compensate citizens who had lost their property during a rebel invasion.

⁷¹ *Franklin Repository*, February 17, 24, 1864.

the Republican party said they were. “This oath is now the great test of ‘loyalty’ in the eyes of the party in power,” wrote one Democratic newspaper. “They stigmatise the whole Democratic party as ‘disloyal;’ and as a matter of course every Democrat who presents his claim for damages must take this oath, or present other ‘positive proof’ of his ‘loyalty.’ In the good old times that have gone by, every man was presumed innocent until he was proved guilty; but under the new regime the citizens of the border counties are all considered guilty of treason, unless they purge themselves of the charge by ‘positive proof,’ before a partizan commission. And what justice can be expected from such a commission as this, with full authority to decide upon the ‘loyalty’ or ‘disloyalty’ of their fellow citizens?”⁷²

Border county Democrats who had borne the full brunt of rebel raids were particularly sensitive to discussions of disloyalty. They recognized that in the debate over compensation they were being convicted of treason without a trial or any judicial procedure. They also denied that the accusations made against them were anything more than partisan attacks intended to discredit the Democratic opposition.

Throughout the course of the debate Republicans had conjured up many stories of alleged acts of disloyalty on the part of border county Pennsylvanians during Lee’s 1863 invasion into the state. Many of them were hearsay; one story that can be documented is that of Joseph Fisher, “a transient person,” who was tried before a court martial in Pennsylvania in November 1863. Fisher was charged with “lurking as a spy in behalf of the enemy” just north of Gettysburg in June 1863, and with subsequently “giving intelligence to the enemy” with the intention of aiding the rebels in seizing and

⁷² Gettysburg *Compiler*, February 22, 1864.

destroying “arms and property belonging to the United States, and to loyal citizens thereof.” Fisher was convicted of both charges and sentenced to be hanged. According to court records, he was “a drunken, loafing vagabond,” who spoke broken English, had only one arm, and had lived as a beggar for three years. His death sentence was consequently commuted to imprisonment for ten years. A few months later, President Lincoln remitted his sentence.⁷³

Joseph Fisher’s description is hardly that of a Peace Democrat or Copperhead devoted to helping the South win its independence. It is also possible that he was not an actual citizen of Pennsylvania. Thus, in using stories like Fisher’s, Pennsylvania Republicans relied upon evidence of questionable validity to impugn the opposition party, to embroil the relief bill in partisan controversy, and ultimately to kill border claims. After much heated debate the House rejected all proposals to compensate loyal citizens for lost property and only passed a bill to adjudicate their claims; the Senate rejected both compensation and adjudication.⁷⁴ Thus, a partisan debate about meanings of loyalty sidelined a moderate bill that would have given financial relief to many suffering citizens of Pennsylvania.

On July 30, 1864, less than three months after the border claims bills had been defeated in the Pennsylvania legislature, Confederate General Jubal Early sent forces into

⁷³ Court Martial Case file NN-1005.

⁷⁴ *Gettysburg Compiler*, May 30, 1864; *Journal of the Senate of the Commonwealth of Pennsylvania, of the Session Begun at Harrisburg, on the Fifth Day of January, 1864* (Harrisburg: Singerly & Myers, 1864), 294, 795-796, 806, 818, 968, 992, 1027, 1029, 1039; *Journal of the House of Representatives of the Commonwealth of Pennsylvania, of the Session Begun at Harrisburg, on the Fifth Day of January, 1864* (Harrisburg: Singerly and Myers, 1864), 53, 156, 165, 171, 175-176, 194, 206, 208-210, 214-215, 231, 260, 271, 491, 612, 794-798, 932, 964-965.

Pennsylvania with orders to burn the city of Chambersburg. With more than 2,000 citizens left homeless, border county legislators made a bipartisan attempt to get a relief bill through the State House. They failed during the 1865 session, and only through some backroom dealing were they able to secure the legislation in 1866. The new law excluded disloyal citizens of Chambersburg who had lost property. Each claimant was required to sign an affidavit stating that he or she had “never, directly, or indirectly, by word, or act, given aid, comfort, countenance, or encouragement, to the traitors, whether in arms, or otherwise; that he, or she, has never communicated, or attempted, or taken means, to communicate with them, or any of them, any information which could, in any way, be of advantage to them.”⁷⁵ The positive proofs of loyalty that had been so hotly debated in 1864 now were carefully written into the law.

Several other states also contemplated government compensation for citizens who lost property during rebel raids. Kentucky, Maryland, and Pennsylvania each sent resolutions to their members of Congress requesting them to seek legislation for federal compensation.⁷⁶ In 1864, Ohio adopted legislation to adjudicate the claims of taxpaying

⁷⁵ Pennsylvania, *An Act for the Relief of Certain Citizens of Chambersburg and Vicinity, Whose Property was Destroyed by Fire, by the Rebels, on the Thirtieth of July, Anno Domini One Thousand eight Hundred and Sixty-Four*, act of February 15, 1866, in *Laws of the General Assembly of the State of Pennsylvania, Passed at the Session of 1866, in the Ninetieth Year of Independence* (Harrisburg: Singerly & Myers, 1866), 43-45; Alexander K. McClure, *Old Time Notes of Pennsylvania*, 2 vols. (Philadelphia: John C. Winston, 1905), 2:170-180.

⁷⁶ Kentucky, *Preamble and Resolutions in Relation to the Adjustment and Payment of Claims of Kentucky against the United States*, approved January 20, 1864, and *Resolution Requesting Our Senators and Representatives in Congress to Procure the Passage of a Bill to Reimburse Kentucky for Loss Sustained by Rebel Raids*, approved January 20, 1864, both in *Acts of the General Assembly of the Commonwealth of Kentucky, Passed at the Session which was Begun and Held in the City of Frankfort, on Monday, the Seventh Day of December, 1863* (Frankfort: William E. Hughes, 1864), 140-

victims of John Hunt Morgan's 1863 raid into that state. According to one federal officer who took part in the capture of Morgan's men, the rebel raiders "took literally every horse within miles of the road, leaving none for us to recruit from, his way was sprinkled with broken down horses, left on the road. Men & women were standing on the road & complaining of their losses. 'Catch him if you *kin*,' 'Has took every horse I had,' 'Kill the last one of them,' were frequent expressions." The raid cost Ohioans roughly \$897,000. In 1869, the state appropriated money to pay out the claims, but the state's supreme court struck down the legislation saying that a quorum had not been present in the legislature when the second claims bill had been adopted.⁷⁷ The state of Kansas assumed the claims of citizens who lost property during Confederate General Sterling

142; Maryland, *Resolution No. 17*, approved March 10, 1862, in *Laws of the State of Maryland, Made and Passed at a Session of the General Assembly Begun and Held at the City of Annapolis on the Third Day of December, 1861, and Ended on the Tenth Day of March, 1862* (Annapolis: Thomas J. Wilson, 1862), 374-375; Pennsylvania, *Joint Resolution Relative to Compensating Citizens of Pennsylvania for Losses Sustained by the Rebel Raid into this State, on the Tenth and Eleventh Days of October*, approved February 21, 1863, in *Laws of Pennsylvania (1863)*, 607-608.

⁷⁷ Ohio, *An Act to Provide for the Appointment of Commissioners to Examine Claims Growing out of Morgan's Raid, and Prescribing their Duties*, act of March 30, 1864, in *General and Local Laws and Joint Resolutions, Passed by the Fifty-Sixth General Assembly, of the State of Ohio, at its First Session Begun and Held in the City of Columbus, January 4, 1864, and in the Sixty-Second Year of Said State* (Columbus: Richard Nevins, 1864), 85-86; *Fordyce v. Godman*, 20 *Ohio Reports* 1 (1870); Lowell H. Harrison, "A Federal Officer Pursues John Hunt Morgan," *Filson Club History Quarterly* 48 (April 1974), 134; Frederick Converse Beach, ed., *The Americana: A Universal Reference Library* (New York: Scientific American Compiling Department, 1912), section on Ohio (no page number given). As in Pennsylvania, some northerners helped Morgan's raiders make their way through Ohio in July 1863. Edward L. Hughes, an Ohioan who had helped Morgan navigate his way through the state, claimed that he could not be punished for his actions because he had taken Lincoln's December 1863 amnesty oath. According to one historian, "The district attorney said that Lincoln did not mean it for Northern traitors, but the judge said he did and ended the case." See William A. Russ, Jr., "The Struggle between President Lincoln and Congress over Disfranchisement of Rebels (Part 1) *Susquehanna University Studies* 3 (March 1947), 204.

Price's 1864 raid into the state, although the law contained no provisions regarding loyalty.⁷⁸ Following the war, loyal West Virginians were permitted to sue former rebel guerrillas for compensation for property they had lost during the war.⁷⁹

During one invasion into the Bluegrass State, the Kentucky legislature adopted a resolution calling on the federal government "to expel the invaders from the soil of Kentucky." In the process of doing so, however, the legislature stated that "no citizen shall be molested on account of his political opinions; that no citizen's property shall be taken or confiscated because of such opinions, nor shall any slave be set free by any military commander; and that all peaceable citizens and their families are entitled to, and shall receive, the fullest protection of the Government in the enjoyment of their lives, their liberties, and their property."⁸⁰ Unlike in Pennsylvania, the right to hold slaves was zealously clung to by the political leadership in Kentucky. By specifically rejecting a

⁷⁸ Kansas, *An Act to Provide for the Expenses of the Militia, and for the Payment of Claims and Damages Arising out of the Price Raid in 1864*, act of February 11, 1865, in *The Laws of the State of Kansas; Passed at the Fifth Session of the Legislature, Commenced at the State Capital, on Tuesday, January 10, 1865* (Topeka: S. D. MacDonald & Co., 1865), 124-127; Kansas, *An Act to Provide for the Auditing and Payment of Claims and Damages Arising out of the Price Raid, in 1864*, act of February 26, 1866, in *The Laws of the State of Kansas; Passed at the Sixth Session of the Legislature, Commenced at the State Capital, on Tuesday, January 2, 1866* (Lawrence: Speer and Ross, 1866), 99-101; Kansas, *An Act to Provide for the Assumption and Settlement of the Claims Growing out of the Price Raid in 1864, and Indian Expedition under General Curtis, in July and August, 1864*, act of February 26, 1867, in *General Laws of the State of Kansas, Passed at the Seventh Session of the Legislature . . . 1867* (Lawrence: Kansas State Journal Steam Press Print, 1868), 63-66.

⁷⁹ Bastress, *West Virginia State Constitution*, 1; Echols v. Staunton, 3 *West Virginia Reports* 574 (1869); Hedges v. Price, 2 *West Virginia Reports* 192 (1867).

⁸⁰ Kentucky, *Resolutions in Regard to the Expulsion of Confederate Troops from the Soil of Kentucky*, adopted September 20, 1861, in *Acts of the General Assembly of the Commonwealth of Kentucky Passed [1861-1863]* (Frankfort: John R. Major, and W. E. Hughes, 1861, 1862, and 1863), 110-111.

political definition of loyalty that included support for abolition, the Kentucky legislature sought to protect its pro-slavery citizenry from the political and economic disabilities that so often resulted from partisan charges of disloyalty. Many Unionists in Kentucky, unlike most Republicans in the North (and the military commanders who would be stationed in Kentucky), did not equate loyalty to nationalism and abolition. Their view tended to be more of the Democratic view—that loyalty was devotion to “the Union as it was and the Constitution as it is.”

The final significant rebel raid into the North was Jubal Early’s dash towards the national capital in July 1864. After the battle of Monocacy, near Frederick, Maryland, on July 9, Early launched an abortive attack on Washington before retreating back into Virginia on the night of July 12. Early had hoped to draw Union forces out of the Shenandoah Valley and away from Petersburg, to threaten and possibly capture the national capital, and to lessen Lincoln’s chances of being reelected. None of these goals were fully attained, but Early did force U.S. Grant to reevaluate the situation around Petersburg and to send several thousand troops back to Washington to defend the capital city.

During the antebellum era Washington, D.C. had been considered a southern city (slavery existed there until Congress abolished it in 1862). Many residents had southern ties and sympathies, and during the war many of them were arrested for disloyalty and imprisoned in the Old Capitol Prison. Typically these residents were released after a short detention. Early’s attack on the city in 1864, however, led to more severe punishments for some of these indiscreet civilians.

During Early's raid, several civilians in the District took the opportunity to cheer the rebels and disparage the Union. James H. Veitch, a citizen of Georgetown, was tried before a military commission in August 1864 for "Aiding and abetting the enemy, by the utterance of disloyal and treasonable sentiments in the District of Columbia, when the enemy were invading the same," for violating his oath of allegiance, and for discouraging enlistments. Veitch, who had already been imprisoned in the Old Capitol four times previously, allegedly said, on July 10, that "The damned Capital (meaning the City of Washington,) should be burned to the ground." He also was accused of using "abusive and contemptuous" language regarding Union soldiers and those volunteering to defend the capital city. This "treasonable and disloyal language," according to the specification, had been said "openly and in the presence of various citizens" (in fact, according to the testimony against him, it had been said in the upstairs room of his home). Veitch's intentions, according to the charges against him, had been "to give aid and assistance to the enemy" when they "were attacking said city of Washington in force."

Veitch was found guilty of all of the charges and specifications except for doing or saying anything to discourage enlistments. He was sentenced to imprisonment at hard labor for five years and was sent to Fort Delaware. What is perhaps most significant about Veitch's case is that his disloyal words were said during a conversation in the upstairs room of a private residence. The fact of the rebel invasion is what made Veitch's speech so heinous. In March 1865, his wife petitioned President Lincoln for clemency, saying that her husband's main accuser (who had allegedly heard Veitch from another room downstairs) had testified lies against her husband out of spite. The War Department responded that there was not sufficient reason to release him "for uttering

treasonable sentiments in the District of Columbia, when the same was invaded by rebels & for violation of the oath of allegiance taken by him.”⁸¹

Addison Brown, “one of the worst men about here,” according to the assistant provost marshal of Washington, had allegedly said that he hoped the Union soldiers going out to defend the city would not return home alive (Brown later claimed only to have meant the black soldiers). He was charged with “Aiding and abetting the Enemy, by the utterance of disloyal sentiments in the District of Columbia when the Enemy were invading the same,” as well as with violating his oath of allegiance. Clearly, Brown’s language, which was spoken in his shoemaking shop and on the side of the street, did not literally aid the enemy in its attempt to capture the capital city. But at a time when the national capital was in danger, there was little room for antiwar dissent or opposition to the Union. Brown was convicted and sentenced to hard labor for five years, and shortly thereafter he too was sent to Fort Delaware.⁸²

Finally, Frank R. Reading, a British subject residing in Washington, was tried before a military commission in August 1864 for “Uttering disloyal and treasonable language in the District of Columbia, when it was threatened by the enemy.” In the presence of many people, he had denied that the *C.S.S. Alabama* had been sunk and said that he would bet \$1000 that she had not sunk. Moreover, he stated that he hoped the *U.S.S. Kearsage* was “sunk, with all her crew,” and he proudly proclaimed himself a rebel, that he would “go South if I could get there,” and that “The official reports of the

⁸¹ Court Martial Case file NN-2216.

⁸² Court Martial Case files NN-2198 and NN-2216. Both Veitch and Brown were pardoned and released by President Andrew Johnson in May 1865.

Army and Navy Departments cannot be relied upon; they have issued so many false reports, nobody believes a word they say.” All of these things, according to the charges, had been said “when the enemy were threatening of [the] District of Columbia, and said language being calculated to give aid, comfort, and assistance to the enemy, and to discourage the friends of the Union. All this in violation of the laws and customs of war.” Reading pled not guilty, but was found guilty and sentenced to imprisonment at the Dry Tortugas or some other military prison at hard labor for five years.⁸³

Reading’s counsel pointed out that he had said these things in a boarding house, not in a public assembly. “In the beginning it appears to have been merely an expression of an opinion by Mr. Reading, about the sinking of the Alabama. And I may state here that many reports both of reverses and successes of our army have come to us, that have been entirely groundless, and not in one or two instances but in many instances.” The rest of Reading’s statements, according to the defense, had “simply” been “windy words, that amount to nothing. It was in a little group of four persons. The conversation was all together between them, differing perhaps in politics; two of them employees of the Government, and not unmindful of the fact that to be very vigilant would entitle them to promotion.” Shortly after Andrew Johnson took office, Reading was released, in May 1865, upon taking an oath of allegiance.⁸⁴

Both Veitch and Brown had previously been arrested and detained by military authorities for disloyalty, but when they were arrested for disloyal speech during Early’s

⁸³ Court Martial Case file NN-2277.

⁸⁴ Ibid. In 1873, Reading was awarded \$15,400 by the American-British Claims Commission. See *Papers Relating to the Treaty of Washington*, 6 vols. (Washington, D.C., GPO, 1872-1874), 4:65-66.

raid, the government pushed for actual military trials and longer, harsher punishments. The significance of these D.C. cases—and there may be others—is that the charges brought against these defendants all referred to the existence of a rebel raid into the North. The existence of the raid being incorporated into the charge, therefore, involved the creation of a new set of crimes (disloyal or treasonable speech *during* a particular event, or *when* the enemy was threatening a city). Such charges were innovations on the law of treason; conviction under these new charges carried heavier sentences than these disloyal speakers had previously received for uttering their obnoxious sentiments. Thus, rebel raids into the North became a powerful force of change to broaden the law of treason in wartime.⁸⁵

Just as in these D.C. cases, the debate over compensation in Pennsylvania also exposed how Republican politicians used rebel raids to broaden the definition of treason beyond that found in the Constitution. In an ingenious argument before the Pennsylvania House of Representatives, Henry Hakes of Wilkes-Barre argued that in a strictly legal sense, it was the Republicans, and not the Democrats, who were traitors. In the process, Hakes demonstrated that Republicans had bastardized the constitutional definition of treason by infusing it with the vague, imprecise, and extra-constitutional concept of loyalty. “Loyalty,” he said, “as it is used here in these days, means almost anything or absolutely nothing.”⁸⁶

⁸⁵ It is worth noting that Ambrose Burnside defended his arrest of Vallandigham, in part, on the presence of rebel troops in the Department of the Ohio. See *O.R.*, ser. 2, vol. 5, p. 576.

⁸⁶ Bergner, *Legislative Record*, 213.

Hakes began his argument by criticizing the resolution that called for “positive proofs” of a claimant’s loyalty. Specifically, the resolution declared that there was “reason to believe that the rebel invasions of Pennsylvania were, in a great measure, brought about through the connivance and by the encouragement of disloyal persons in our own State.” These words—encouragement, connivance, and disloyal—amounted to one crime and one crime only: “treason.” Hakes suggested that the framer of the resolution may have been “afraid to say here in plain terms that he means by these words ‘treason,’ [but] I will speak that word for him, for that is what they amount to, if they amount to anything. The persons who have done these things should be called by their proper names. A man who is a traitor, I will call a traitor. This half and half thing of calling a man ‘disloyal,’ a sort of half-way treason, because he chooses to differ in opinion with the administration party, seems to me entirely out of place.”⁸⁷

Hakes spent quite some time impressing upon the House why it was important to charge those who aided and comforted the rebellion with treason, rather than with disloyalty. “If the allegations of these gentlemen who propose this resolution be true, they are guilty of a high crime, for which *disloyalty* is not the proper name.” In fact, any person who gave aid and encouragement to the rebels—who “connived or winked at their invasion”—was guilty of treason as defined in the Constitution and must be punished accordingly. “Disloyalty is too mild and uncertain a word,” Hakes declared, for it was defined in neither the Constitution nor any other law of the land.⁸⁸

⁸⁷ Ibid., 212.

⁸⁸ Ibid., 212-213.

Loyalty, according to Hakes, was “a proper and favorite word” of kings who forced their “slavish subjects [to] bow in silence” and to stand “in subjection to laws made for them and not by them.” Americans were not subject to such tyranny. “The proper term for us, when we mean giving aid and comfort to the enemies of our government, is ‘treason.’ There is a certain meaning to that term, and there is a reason why the gentlemen on that side wish to avoid using that term, because by using the word disloyal they can pounce with iron hands upon their political opponents, and can screen the treasonable acts of their friends.”⁸⁹ Republicans, in short, could use the vague concept of loyalty to punish political opponents just as English monarchs had using the fluid and ever-changing doctrine of constructive treason.

Hakes further criticized the resolution for reversing the rules of judicial procedure. A suspected criminal was innocent until proven guilty, but by this resolution the citizen would have to stand before a “smelling court” and “political inquisition” in order to prove his innocence. The resolution, in short, would deprive suspected traitors of their day in court (in a state where the civil courts were open), of trial by jury, and of due process of law. In contrast, Hakes declared that Democrats desired a government that would not only deprive traitors of compensation, but would also punish them for their treason. “Men who have given aid and comfort to the enemies of the State are guilty of treason and must be punished for that crime.” He criticized the resolution for proposing, “in an indirect manner, to cast suspicion upon a man, or rather to convict him of treason. . . . Gentlemen on the other side ought to be as willing as I am to call treason by its proper name; and when a man has been guilty of that crime they should be willing,

⁸⁹ Ibid.

not only to refuse payment for property that he may have lost, but to pursue him as they would a serpent, and never to stop in the pursuit till he has been punished for his crime.”⁹⁰ Calling a spade a spade, Hakes argued that forcing citizens to prove their “loyalty” was a partisan and illegal way of convicting them of treason in effect.

Hakes finally turned his devastating aim directly at the Republicans. For several days now they had loudly recited stories of traitors who lived in the districts they represented. Knowing that such traitors lived in Pennsylvania, Republicans insisted that loyalty must be tested to ensure that these traitors did not receive any taxpayer money as compensation for lost property. But Hakes was incredulous. “I was astonished that those gentlemen should reveal such a knowledge of treason and treasonable practices in this State. Yet I will venture to say that not one of those gentlemen has entered a complaint in any court against any of these men.” But reporting traitors to the proper authorities was precisely what the law required! He read from Pennsylvania’s treason law, adding emphasis to the relevant provisions:

If any person, having knowledge of the treasons aforesaid . . . shall *conceal* them, and not as soon as may be, disclose and make known the same to the [government] . . . *such person shall, on conviction, be adjudged guilty of misprison of treason, and shall be sentenced to pay a fine not exceeding one thousand dollars, and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding six years.*

His reading of the statute was greeted with loud applause. He feigned charity, surmising that the Republicans’ stories about traitors in Pennsylvania had not been based in fact but had been mere “suspicions” and the outcome of overly excited “political feelings.” But if they *did* know of treason, and they had not reported it to the proper authorities, then they

⁹⁰ Ibid., 213-214.

had not only neglected “their duty as good and patriotic citizens,” but had, in fact, committed a treasonable offence themselves. Were these the people who would save the struggling nation? Ought they to get away with such irresponsible criminality with impunity? Should they be the ones who got to define what loyalty to the nation entailed?⁹¹

Hakes’ rhetorical tactic was brilliant. He not only exposed the partisan motivation of the Republicans, but also the inherent unfairness of requiring “positive proofs” of loyalty. Loyalty and disloyalty, it must be remembered, were never statutorily defined. Therefore, not only did requiring “loyalty” neglect the constitutional requirements of a trial and conviction before one could be punished for treason (or any other crime, for that matter), but Hakes’ speech also revealed how fervently Republicans spoke of disloyalty in their midst when the evidence was probably little more than circumstantial rumor mongering that took place among disgruntled and fearful neighbors. “This mere suspicion that is to be cast upon men for political opinions does not conform to the true standard of the law,” Hakes declared. Traitors must be found guilty, and the innocent must be protected. But these determinations should be done according to the law and formal judicial procedures, not by modern-day witch trials.⁹²

III.

Most rebel raids were intended, at least in some small way, to affect elections in the North. Most southerners believed that having Democrats in power would greatly

⁹¹ Ibid., 214-215.

⁹² Ibid., 214.

improve their chances at independence. In truth, this view was only partially accurate. While Peace Democrats were generally resigned to the creation of a southern confederacy, moderate members of the party supported a war for reunion (with preservation of slavery). The Democrats, for their part, never quite came to understand how committed to independence the southern rebels were. They naively believed that the rebels would come back into the Union provided the right compromises were offered. Jefferson Davis, on the other hand, was totally committed to the creation of a separate southern nation. He would not yield.

Still, most southerners knew that their task would be easier if Democrats controlled the northern state and national governments. Republicans also believed this to be the case. In October 1864, Edwin M. Stanton's War Department received "information that the rebel agents in Canada design to send into the United States, about this time, a large number of refugees, deserters, and enemies of this Government, and to colonize them at different points for the purpose of voting at the approaching Presidential election, and also, perhaps, with the view of organizing a system of robbery and incendiarism in such cities, towns, villages, and districts as they may find unprotected."⁹³ Secretary Stanton, of course, assumed that these rebel voters would not be casting any ballots for President Lincoln's reelection.

Democrats resented the imputations of disloyalty related to rebel raids during election season. When a Union League formed in Doylestown, Pennsylvania, in the summer of 1863, the local Democratic paper complained that only seven of its 130

⁹³ Edwin M. Stanton to John A. Dix, October 24, 1864, Edwin M. Stanton Papers, LC.

members went to defend the state during the rebel invasion. “It is easier to abuse Copperheads than fight rebels,” concluded the Democrats.⁹⁴ But Republicans had little reason to doubt that the rebels always wanted Democrats to win.

Rebel raids and invasions were often timed to coincide with political campaigns in the North. In 1862 Braxton Bragg marched his Confederate forces into Kentucky, hoping to influence the October congressional elections, to inaugurate a rebel governor in the state, and to recruit new soldiers to the rebel cause. The Confederates, hoping to appeal to those who had been branded disloyal by the Lincoln administration, told them: “Your property has been stolen or destroyed; your slaves have been taken from you on the plea that you are disloyal—disloyal to the tyranny and the usurpation which seek to take from you even the right of peaceful remonstrance.” But, surprisingly to the rebels, they did not find the support among Kentuckians that they had expected, and after the Battle of Perryville in October 1862, Bragg led his forces out of the state.⁹⁵

General Lee’s Antietam campaign was intended, in part, to influence the autumn congressional elections in the North, as well as to encourage Great Britain and France to recognize the Confederacy. Early’s subsequent raid into Pennsylvania, then, also seems to have been intended to have some impact on northern congressional elections. Sidney George Fisher of Philadelphia noted the “startling news” in the morning newspaper on October 11, 1862, that the “rebels have made a dash into Pennsylvania with 3000 cavalry and 6 pieces of artillery.” Fisher believed it might have been a “foraging raid” to obtain

⁹⁴ *Doylestown Democrat*, June 30, 1863.

⁹⁵ E. Merton Coulter, *The Civil War and Readjustment in Kentucky* (Chapel Hill: The University of North Carolina Press, 1926), 166-169; Thomas Speed, *The Union Cause in Kentucky, 1860-1865* (New York: G.P. Putnam’s Sons, 1907), 212-224.

much needed supplies, but local Pennsylvania papers believed the raid had larger objectives. “The election comes off next Tuesday,” wrote Fisher. “A much larger proportion of Republicans or Union men have gone to the war than of Democrats, which greatly increases the chances of the latter. An invasion of the state at this time would withdraw still greater numbers of Union men. The Democrats, being opposed to the war, would stay at home to vote. The rebels are well informed of our affairs, indeed, it is hinted, may have received intelligence of this very predicament from Democrats here, & so timed their incursion to aid the cause of the party which is their ally.”⁹⁶

The rumors that Fisher discussed here—that northern Democrats had invited the rebels into the Keystone State—would, two years later, become the basis for demanding loyalty when those who lost property petitioned the state government for compensation. Fisher also carefully noted how rebel raids may have been intended to win northern elections for the Democrats. By causing northern voters to think that the Lincoln administration was failing to protect them, by making them believe that the North was losing the war, and by hoping to draw more Republican voters into the army (and thereby disfranchising them, as the Pennsylvania Supreme Court had just a few months earlier ruled that it was unconstitutional for soldiers to vote), Fisher believed that the 1862 rebel raid was intended to help bring Democrats into state and national office.

The Gettysburg campaign occurred during the summer of 1863, while the Democratic party in Pennsylvania was assembled in nearby Harrisburg, choosing its candidate for governor (see Chapter 5). One Republican congressman claimed that the

⁹⁶ Sidney George Fisher, diary entry for October 11, 1862, in Jonathan W. White, ed., *A Philadelphia Perspective: The Civil War Diary of Sidney George Fisher* (New York: Fordham University Press, 2007), 169.

Democrats “seemed to have no fear of the rebels, and I suppose had no reason to fear them.” Not only did this alleged Democratic sympathy for the South become a bitterly contested political issue, but so did the matter of compensation for victims of the rebel invasion. “You can form no idea of the losses endured by the people of these counties, and the suffering consequent therefrom,” wrote one border county Democrat. “It extends to nearly every family.”⁹⁷ Accordingly, border claims became a significant factor in the upcoming state election.

Many Democrats, including the Democratic candidate for governor, George W. Woodward, favored compensation for Pennsylvanians who had lost property during the rebel invasion. They knew that the Republican incumbent, Governor Andrew G. Curtin, would come out in favor of compensation, and believed that if Woodward opposed it, “the vote of these counties will be against him by overwhelming majorities.” Although he favored compensation, Woodward curiously chose not to publish a letter he had written on the subject, even though he knew that “its circulation in those border counties would help me.”⁹⁸ In October 1863, Woodward lost to Curtin in a very close race.

The following year, when Republicans in the legislature subsequently killed the compensation bill, as discussed above, Democrats protested what they now perceived as a hollow campaign promise. “Many of our citizens were seduced into voting for Curtin

⁹⁷ *Congressional Globe*, 38th Cong., 1st sess., 1595; Harmon to Black, September 10, 1863, Black Papers.

⁹⁸ Harmon to Black, September 10, 1863, Black Papers; S. N. Baily and J. S. Shillito to Woodward, September 15, 1863; and H. J. Stable to James F. Shunk, September 26, 1863; Junius [pseudonym] to Woodward, September 29, 1863, all in Biddle Family Papers, HSP; Woodward to Jeremiah S. Black, September 24, 1863, in White, ed., “Pennsylvania Judge,” 220; Gettysburg *Compiler*, October 12, 1863.

under this specious, but, as it now has turned out, treacherous promise,” wrote the editors of Chambersburg’s Democratic paper. “Curtin before the election, and Curtin after the election were quite different individuals.”⁹⁹

The Republican party carried all of the major elections in 1863. In Pennsylvania, the issue of border claims played at least a minor role in helping Governor Curtin win the election. Morgan’s raid into Ohio also helped push voters to the Republican-Unionist ticket. “If there was before any doubt about the Ohio election,” exclaimed Senator Lyman Trumbull, “Morgan’s raid has settled it. No campaign before ever damaged a political friend so much as Morgan’s damaged Vallandigham.”¹⁰⁰ It did not help that during his raid Morgan burned more than 100 treason indictments on file in a Kentucky courthouse.¹⁰¹ Such a symbolic gesture was bound to anger northerner voters who wished to see the North triumph over traitors North and South. (It should be added that at least ten federal treason indictments were brought against Ohio civilians who aided Morgan’s raiders, but none of the accused was ever convicted.)¹⁰²

Some loyal Unionists believed that rebel raids did double damage to disloyal northerners, first by exposing their weakness and timidity, and secondly by subjecting

⁹⁹ Chambersburg *Valley Spirit* quoted in *Gettysburg Compiler*, May 30, 1864. See also, ” *Pennsylvania Archives*, 130 vols., (Harrisburg: William Stanley Ray, 1902), ser. 4, vol. 8, pp. 457-458, 561-564.

¹⁰⁰ Allan Nevins, *The War for the Union*, 4 vols. (New York: Scribner, 1959-1971), 3:159; Gary Robert Matthews, *Basil Wilson Duke, CSA: The Right Man in the Right Place* (Lexington: University Press of Kentucky, 2005), 146.

¹⁰¹ *New York Evangelist*, September 4, 1862.

¹⁰² Kellee L. Blake, “Ten Firkins of Butter and Other ‘Traitorous’ Aid,” *Prologue* 30 (Winter 1998), 290.

them to the harsh realities of the battlefield. One Tennessean serving in the Union army noted that Lee's raid into Pennsylvania and Morgan's incursion into Ohio had revealed the weaknesses of the "cowardly copperheaded fraternity commonly called K.G.C." The Copperheads had had their "supplies consumed by an invading *friend*," while the rebels were forced to reckon with "the cowardise [sic] of their [sic] northern allies."¹⁰³

Some soldiers and Republicans hoped for more rebel raids to help bring the Democrats to their senses about the reality of the danger that they faced. Writing from Philadelphia while the battle of Gettysburg was still raging, one man told his son in the army that "the majority of the people thought it [Lee's invasion] was a hoax, in fact a trick of the Government to get men to enlist for six months and thus evade the enforcement of conscription." Along these lines, many Republicans believed that rebel raids into the North would force Democrats to acknowledge the danger the nation was in and the reality of the enemy they were fighting. "There should be one raid per year to bring those infernal Copperheads to their senses," wrote one Pennsylvania cavalryman.¹⁰⁴

Confederate leaders, on the other hand, hoped that rebel raids would have the opposite effect—that they would stir antiwar peace sentiment and help increase the chances of Democrats to win elections. For these reasons, many rebels hoped to invade the North prior to the presidential election of 1864. Successful invasions into the North, they believed, would increase northern calls for peace. Confederate General James Longstreet proposed to Jefferson Davis that he lead a major invasion into Tennessee and

¹⁰³ William Brunt to Martha Weir, July 26, 1863 (GLC7006.02), GLI.

¹⁰⁴ Fred Steffan to John Martin Steffan, July 2, 1863, Steffan Family Letters, and Paul Hersh to Jim, July 10, 1864, Paul Hersh Letters, both in Civil War Miscellaneous Collection, USAMHI.

Kentucky prior to the election, but by that late in the war the South was unable to mount such an offensive.¹⁰⁵ Still, some smaller efforts did materialize.

In September 1864, Confederate General Sterling Price led an invasion from Arkansas into Missouri, hoping to take military pressure off of Georgia and Virginia by diverting troops, and also to influence voters in the upcoming elections. There was “abundant evidence,” according to Union General William Starke Rosecrans, “to show that Prices invasion had the gravest designs, no less than turning the Election in this State [Missouri] for McClellan & preventing in Kansas & by the aid of the insurrectionists here & OAKs [Order of American Knights] from Illinois & Indiana the occupation of it till the new Administration should come in.” The rebels reached as far north as St. Louis and Independence before retreating back to Arkansas.¹⁰⁶

A small group of rebels also attacked Vanceburg, Kentucky, at 4 a.m. on the morning of October 29, 1864, “intend[ing] that this (Lewis) county shall vote for McClellan.” One Union general in that state feared that the rebels were planning to scatter “small detachments” of their cavalry throughout Kentucky “to interfere with the election, and then to concentrate their detachments and join Breckinridge’s main force for a grand raid over the State.” Rebel guerrilla bands were also harassing Republican campaigners. Only if the federal government sent troops “to protect every exposed

¹⁰⁵ Nelson, *Bullets*, 25-26.

¹⁰⁶ Nelson, *Bullets*, 147; William S. Rosecrans to Lincoln, November 15, 1864, Lincoln Papers.

voting precinct,” according to this commander, would Lincoln carry the Bluegrass State.¹⁰⁷

Several other smaller raids in the Northeast and New England also caused great alarm in the late summer and autumn of 1864. In July, three Confederate raiders in Canada went to Calais, Maine, intent on robbing a bank. Their effort was reported before they arrived, however, and they were captured, tried, and convicted on charges of “conspiracy to rob.” They were sentenced to imprisonment for three years. Shortly before the presidential election, several rebel agents (one of whom had been a colonel under John Hunt Morgan) attempted to start large fires in New York City. Union officials caught wind of their plan and they were forced to wait until after the election to enact their scheme. Ultimately, their terrorist activities proved abortive, but they still caused a great deal of alarm. Most famously, in October, a band of Confederates made their way from Canada to St. Albans, Vermont, robbing three banks, attempting to set the town ablaze, and terrorizing the citizenry generally. They forced bank tellers to pledge their allegiance to the rebel government and made off with more than \$200,000 in cash. One soldier in the 100th New York Volunteers wrote his sister in upstate New York regarding the fears that were spreading “that a like raid might be made on Buffalo.” If proper precautions were taken, he warned her, then such future raids would be prevented.¹⁰⁸

¹⁰⁷ Nelson, *Bullets*, 147; Lewis M. Clark to Stephen G. Burbridge, October 31, 1864, in *O.R.*, ser. 1, vol. 39, pt. 1, pp. 882-883; Burbridge to Joseph Holt, October 16, 1864, in *O.R.*, ser. 1, vol. 39, pt. 3, pp. 320-322.

¹⁰⁸ Edward Foley, “The Great Rebel Raid on Calais, Maine,” *Civil War Times Illustrated* 31 (September/October 1992), 40, 60, 62; Phil Scott, “Attack on New York,” *American History* 36 (January 2002), 52-56, 58, 60, 62, 64; E. B. Long, *The Civil War*

Indeed, the Vermont legislature quickly adopted a new statute to prevent similar disasters from happening. After broadening the state's definition of treason to include conspiracy to levy war, the law stated that any person convicted would be subject to execution by hanging. Any person who knew of a traitor's future actions but did not report them to the proper state authorities within fourteen days would be guilty of misprision of treason and would be imprisoned at hard labor from five to ten years and fined up to \$2,000.¹⁰⁹ The raid on Vermont, therefore, not only aroused concerns about war in the North during election season, but also led directly to a statutory broadening of the law of treason.

While Jubal Early's 1864 raid into Maryland was launched largely for military reasons, some southerners believed that it would help increase calls for peace in the North. To be sure, not all rebel leaders approved of the scheme, fearing that it would unify the North for further prosecution of the war, and that it was a misuse of soldiers who were badly needed in Atlanta. But Jefferson Davis and others believed the raid would help weaken the northern resolve to keep fighting. Jubal Early, according to the editor of the *Richmond Examiner*, "has gone over to stump the States of Maryland and Pennsylvania for the Peace party." The *Augusta Constitutionalist* added that Early's raid had "not increased the armies of Abraham Lincoln a man or made him a vote; but have

Day by Day: An Almanac, 1861-1865 (Garden City, N.Y.: Doubleday and Co., 1971), 585-586, 600-601; Charles E. Walbridge to Louise, October 31, 1864 (GLC4663.52), GLI.

¹⁰⁹ Vermont, *An Act Defining Offences against the Government, and Providing for Their Punishment*, act of November 21, 1864, in *Acts and Resolves Passed by the General Assembly of the State of Vermont, at the Annual Session, 1864* (Montpelier: Freeman Steam Printing Establishment, 1864), 43-44.

given the peace party in the North another argument against the war—our strength and audacity.” Incidentally, Early’s raid into Maryland also forced the 1864 constitutional convention being held at Annapolis that summer to recess for ten days.¹¹⁰

Some observers noted that Early’s raid seemed to expose a “growing distaste to the continuation of the war.” Charles E. K. Kortright, the British consul in Philadelphia, wrote to Lord John Russell that Governor Curtin’s call for 30,000 militiamen to defend the state’s borders had been met with a “general apathy.” The people were weary of the war, he said, and were tired of bearing its heavy costs and burdens. After three years of “unparalleled & sanguinary struggle,” with so little to show for it, this British diplomat believed that “a large portion of the thinking community” of Pennsylvania were beginning to see “the danger of an indefinite duration of the struggle for supremacy and the impracticability of a reconstruction of the Union, on the terms prescribed by the Republican party.”¹¹¹

Responding to these feelings of discontent and despair, the Peace Democrats became increasingly vocal in their criticisms of the Lincoln administration. Rebel raids into the North offered a particularly strong talking point to Democrats. Their success in winning back the White House, predicted Kortright, “will mainly depend upon the triumph of the Southern Forces in its attempt to invade the North.” Not believing that the North could actually defeat the South, Kortright wrote that it was “only by transferring the horrors and privations of war to northern homes, that the exhausting course upon

¹¹⁰ Nelson, *Bullets*, 59-61; Dan Friedman, *The Maryland State Constitution: A Reference Guide* (Westport, Conn.: Praeger, 2006), 7-8.

¹¹¹ Charles E. K. Kortright to Lord John Russell, August 8, 1864, Records of the Foreign Office (FO 5/974), National Archives of the United Kingdom.

which the North is embarked will become apparent to the popular mind.” In other words, the northern people must suffer a little more of the hell of war before they would give up the effort—but then peace would finally be restored.¹¹²

Rebel raids, then, were important to elections, to the defining of treasonable offences, and to the final outcome of the war. Loyalty and treason became malleable terms, transformed by the tangle of wartime experiences that permeated the border regions. These terms developed meanings that were particularly useful to Republican war leaders. By using words like loyalty and disloyalty, and by trying civilians in military courts under new and sometimes vague charges, northern Republicans were able to punish suspected traitors in ways that would not have passed muster under the normal processes of law. Democrats protested the new tests for loyalty that became fashionable in border regions during the war, but they were powerless to effect any change. Perhaps in the long run, the Republicans’ definitions and actions—extra-constitutional as they were—were precisely what was needed to mobilize the Union to the point that the North could actually win the war and reunite the nation. That was a contested point then, and it has remained so ever since.

¹¹² Ibid.

Chapter 5

“For Woodward and Treason”: State-Centered Nationalism and Treason in the Pennsylvania Gubernatorial Election of 1863

Historians often note how extraordinary it was for the North to hold a presidential election in 1864. This view, though widely repeated, really misunderstands the nature of politics in the nineteenth century. Wartime politics, to be sure, was different than politics in peace. But even in war, politics remained an unavoidable part of nineteenth-century American life. The election cycle in mid-nineteenth-century America was a never-ending spectacle. State and national elections happened somewhere in the North, on average, every four weeks.¹ Local and municipal elections, as well as state-level constitutional referenda, filled in the election calendar even more. Thus, to truly understand how politics functioned in wartime, more attention ought to be given to important state elections in the North. As Michael F. Holt has suggested, historians ought to examine the Democratic opposition “at the subnational level” in order to attain a better view of their policy preferences and political beliefs.²

In 1861 several “no-party” movements arose in the North in an attempt to circumvent the divisiveness of normal party competition, but Democrats saw these as

¹ With the exception of the presidential election, there was no uniform national election day in the United States at the time of the Civil War. There were, consequently, twelve different days that the various northern states had designated for their own state and local elections. See Mark E. Neely, Jr., *The Union Divided: Party Conflict in the Civil War North* (Cambridge, Mass.: Harvard University Press, 2002), 38.

² Michael F. Holt, “An Elusive Synthesis: Northern Politics during the Civil War,” in *Writing the Civil War: The Quest to Understand*, ed. James M. McPherson and William J. Cooper, Jr. (Columbia: University of South Carolina Press, 1998), 123.

little more than partisan shams.³ In 1862, with war-weariness bearing down on the North, the Democrats handily won the off-year elections, capturing more than thirty additional seats in Congress, two state governorships, and control of several state legislatures. Feeling overly confident after these astounding successes, the Democrats found great disappointment during the 1863 election cycle. Three notable gubernatorial elections took place that year. The three Democratic candidates—Clement Vallandigham of Ohio, Thomas Seymour of Connecticut, and George Woodward of Pennsylvania—were all considered part of the Peace wing of the Democratic party, and have been associated as such in the years since the war.⁴ Branded as Copperheads, two of these three candidates are all but forgotten, and one, Vallandigham, is mainly remembered for the extraordinary circumstances surrounding his gubernatorial run. Indeed, if Vallandigham had not been arrested and tried by the military before becoming a candidate for governor while an exile in Canada, he, too, would likely be unknown today. Yet Vallandigham's notoriety is precisely why he is not a good case study of the northern dissenter during the Civil War. Valliant Val was extreme enough to vote against supplies for the troops, thus committing the cardinal sin in American political democracy.⁵ Yet,

³ *Doylestown Democrat*, June 9, 1863; *Philadelphia Inquirer*, October 5, 1861; Melinda Lawson, *Patriot Fires: Forging a New American Nationalism in the Civil War North* (Lawrence: University Press of Kansas, 2002), 79-82.

⁴ See Holt, "Elusive Synthesis," 123, where Holt calls them all "strident antiwar Democrats," and Joel H. Silbey, *A Respectable Minority: The Democratic Party in the Civil War Era, 1860-1868* (New York: W. W. Norton, 1977), 111.

⁵ The Federalist party voted against supplies for the troops during the War of 1812; by the end of that decade the party had fallen out of existence. As a Congressman, Lincoln opposed the Mexican War, but he always made it a point to vote money and supplies for the troops. See Neely, *Union Divided*, 11, 119-121; Lincoln to William H. Herndon, February 1, 1848, in Roy P. Basler et al., eds., *The Collected Works of*

for as little as most Americans today know about Copperheads, they vaguely recall the incredible story of that Copperhead congressman from Ohio.

Rather than Vallandigham, the story of a judge from Pennsylvania may be a more useful case study for understanding northern politics in wartime. In 1863 the Democratic party in Pennsylvania chose George W. Woodward, a judge on the state's supreme court, to run for governor against the popular Republican incumbent, Andrew G. Curtin. From his position on the bench, Woodward had been largely silent on the major political issues of the day. Because so many Democrats had been branded "Copperheads" for publicly speaking out against the Lincoln administration's handling of the war, Woodward's few public statements appeared to make him an ideal candidate. Democrats likely believed that there was little material for Republicans to use against his candidacy. Nevertheless, Republicans portrayed Woodward as a traitorous follower of Jeff Davis, and the Democrats lost the election by a mere 15,335 votes out of the 523,667 cast.⁶ A less sensational character than Vallandigham, Woodward's gubernatorial campaign reveals the tensions that arose for less turbulent northern Democrats who were charged with disloyalty in wartime. But whereas Vallandigham might have actually favored southern victory after the commencement of hostilities, Woodward does not appear to have been in like manner disloyal.

Abraham Lincoln, 9 vols. (New Brunswick, N.J.: Rutgers University Press, 1953-1955), 1:446-447.

⁶ Jacob Ziegler, *A Manual for the Government of the Senate and House of Representatives of the Commonwealth of Pennsylvania* (Harrisburg: "Telegraph" Steam Print, 1864), 415.

Democrats in Pennsylvania believed that Woodward would protect them from the Lincoln administration's infringements on their civil liberties. In choosing him as their candidate, they looked for a governor who would restore balance to American federalism and who could strike at federal power when it stepped beyond its proper sphere. But in wartime this sort of opposition to the Lincoln administration was considered treasonable by most northern Republicans. The story of Woodward's campaign for governor, therefore, reveals how the fundamental Democratic principle of state-centered nationalism made northern Democrats susceptible to charges of treason and disloyalty during the war between the states. Because state-centered nationalism and state rights were so often linked to southern defenses of slavery, northern Democrats faced accusations of disloyalty for adhering to these and other Democratic principles. At root, state-centered nationalism and state rights were not defenses of slavery. Northern Democrats who adhered to these constitutional theories did so because they believed their state government would protect them from any unconstitutional power exercised by the federal government.

In December 1860 Woodward had advocated for peaceable secession if a suitable compromise between North and South could not be reached. In his view, if enough northern states consented to separation, then secession would be peaceable, consensual, and therefore legally accomplished. This view, of course, was annulled once the war began. But it was a legitimate constitutional position when Woodward articulated it in December 1860. That the Republicans mischaracterized it during the 1863 gubernatorial campaign reveals how easily theories of state-centered nationalism could be linked to rebellion and treason.

I.

In the spring of 1863, Pennsylvania Democrats began to worry in earnest about who would be their next candidate for governor. “I fear disaster in the nomination for Governor,” wrote Warren J. Woodward, a state judge and the nephew of the eventual nominee. “Who shall be Governor?” asked the editors of the *Doylestown Democrat*, “. . . Democratic Governor, we mean,” they added. The editors then listed what they believed were the qualifications for a good nominee. He must be an experienced statesman with an honorable personal character. Moreover, he must be a patriot “who will throw the whole weight of his personal and official influence on the side of the National Government in a vigorous prosecution of the war under the Constitution of the United States, for in time of war it is more necessary to make the Constitution our guide than in time of peace. These qualities we say *must* stand out in bold relief, and nothing less will satisfy the great patriotic masses of the Democratic party.” The *Doylestown Democrat*, a pro-war paper whose editor was serving in the army, was nationalist in its outlook, yet adhered to a strict, state-centered view of the Constitution. Regarding the draft, for example, the editors believed that New York Governor Horatio Seymour “will so shield his people from oppression, that the Federal Government will know that New York is *not* a province.”⁷ The *Democrat* hoped that this sort of leader would be elected in Pennsylvania as well.

Indeed, many Democrats wanted a governor who would oppose Abraham Lincoln and his “despotism, with all its brood of enormities in the shape of peerage, a pension list,

⁷ Warren J. Woodward to Charles R. Buckalew, March 1863, Buckalew Papers; *Doylestown Democrat*, April 21, July 21 and 28, 1863.

a standing army, a muzzled press, and a political police.” A cowardly, “untried,” equivocating candidate simply would not do. Only by carrying the election with a candidate “of tried principle—of formed character—of experience with public men and public affairs—of settled policy, and of firm nerves” could the Democratic party hope to “save” the people of Pennsylvania.⁸ Former president James Buchanan, who supported a war for reunion, wanted a man who was “able, discreet, and above all of unshaken firmness.”⁹ In short, Democrats wanted a candidate who steadfastly adhered to Democratic principles, policies, and constitutional understandings.

Several Democrats began to petition Lewis S. Coryell, an elder statesman of the party, to draft Judge George W. Woodward of the state supreme court. Among Coryell’s correspondents was Woodward’s nephew, who assured Coryell that his uncle “has no interested or selfish plans. He will act in full sympathy with all earnest and upright men.”¹⁰ So Coryell wrote to Woodward, asking if the judge had any interest in running.

Judge Woodward replied that he had “no personal aspirations” or “selfish wishes to gratify” but “only want an honest, bold, true, and competent democrat—one who will stand by the few state rights that are left, and not surrender them to any usurper. If we are permitted to elect any body in the fall (of which I have doubts) I hope we shall choose such a man.” As for himself, Woodward preferred the judiciary to the executive branch,

⁸ Warren J. Woodward to Lewis S. Coryell, April 6, 1863, Lewis S. Coryell Papers, HSP. See also George H. Bowman to Jeremiah S. Black, March 6, 1863, Jeremiah S. Black Papers, LC.

⁹ Adam J. Glossbrenner to James Buchanan, June 4, 1863, Buchanan Papers. Glossbrenner was quoting a letter he had received from Buchanan.

¹⁰ Warren J. Woodward to Lewis S. Coryell, April 6, 1863, and Thomas Morris to Lewis S. Coryell, April 13, 1863, both in Coryell Papers.

“but if the democratic people think proper, without solicitations on my part, to make me their Governor I will do my best to administer the constitution & laws as they are written. Whilst I do not seek the nomination I will not decline it.” Woodward closed his letter lamenting the current state of affairs. “Did you ever expect to see such times as these?” he asked old Coryell. “You are almost the only remaining link between the present generation & a class of men whom I learned to revere and love in my youth. They were constitution loving citizens whose hearts were large enough to embrace the whole country, and whose heads were clear enough to see that a centralized despotism would be the death of popular liberty.”¹¹ Woodward thus revealed himself to be in the mainline Democratic mold: he was a state-rights, strict constructionist who believed the Lincoln administration had trampled the Constitution. Only the Democrats, he believed, could bring the nation back to the way it was.

The Democratic state convention convened at Harrisburg on June 17, 1863, just as Robert E. Lee and his troops were approaching the Keystone State. In the face of impending crisis, the delegates adopted a platform that pledged fidelity to the “Constitution as it is” as the only protection to the citizens’ liberties. Specifically, they affirmed the due process clause of the Fifth amendment as the safeguard of life, liberty and property; denounced the arbitrary arrests of “free citizens for the expression of their honest opinions on public affairs,” pointing to Clement Vallandigham as a martyr of their cause; maintained that a free press was essential to a free society; and argued that the

¹¹ George W. Woodward to Lewis S. Coryell, June 1, 1863, in Jonathan W. White, ed., “A Pennsylvania Judge Views the Rebellion: The Civil War Letters of George Washington Woodward,” *Pennsylvania Magazine of History and Biography* 129 (April 2005), 216-217.

governor of a state must stand up against any infringement upon the liberty of his citizens, “come from whatever quarter they may.” The delegates insisted that the Democratic party wholly favored the preservation of the Union and had never entertained “the slightest sympathy with the present gigantic rebellion, or with the traitors in arms against the Government, or would ever consent to a peace upon any terms involving a dismemberment of the Union.” Finally, they held that the Lincoln administration had been “acting under the influence of a small faction of ultra abolitionists, always opposed to the Union” against the wishes of the northern populace that an honorable peace be obtained.¹² This last clause was a shot at the abolitionists, many of whom for years had damned the Constitution has a covenant with death and who had declared that they would have no Union with slaveholders.

After the platform was unanimously adopted, the delegates began voting for the candidate for governor. On the first ballot William H. Witte of Montgomery county received 47 votes, Hiester Clymer of Berks county received 33 votes, and seven other candidates received a combined total of 44 votes (Woodward received 9 votes, tying for fourth place). By the eighth ballot only four candidates remained: Clymer: 62, Witte: 51, Woodward: 19, General William B. Franklin: 7. At this point, Witte’s floor manager announced that Witte was withdrawing his name in favor of Woodward. The ninth ballot followed with 75 votes for Woodward and 53 for Clymer. Amidst “tremendous cheering” Woodward’s nomination was given the unanimous consent of the convention.¹³

¹² *Doylestown Democrat*, June 23, 1863.

¹³ *Ibid.* According to Christopher Dell, Witte was a War Democrat, while Clymer was a Peace Democrat. See Dell, *Lincoln and the War Democrats: The Grand Erosion of the Conservative Tradition* (Rutherford, N.J.: Fairleigh Dickinson University Press,

Woodward's nomination pleased Democrats throughout the state. James Buchanan believed it the best that could have been made, while Woodward's nephew thought that his election would signal "the end of the terrible ordeal into which the Union of Yankee fanaticism with all the dirty elements of politics precipitated the country."¹⁴ The *Doylestown Democrat* called the nominee a man of "undoubted honor and unquestionable Democracy, well selected for the times and responsibilities . . . an able lawyer, a sound jurist, a man eminent for talent, and his private character unspotted and above reproach."¹⁵ Many Democrats who found Woodward "personally objectionable" were willing to offer their "hearty and earnest support" in such dark and perilous times.¹⁶ Even some Republicans praised the Democratic nominee. The Philadelphia *Inquirer* believed Woodward was "a citizen of unimpeachable character, an able jurist, and a

1975), 208, 246-247, 409, 454. See also Philadelphia *North American and United States Gazette*, August 25, 1862.

¹⁴ Warren J. Woodward to Lewis S. Coryell, June 27, 1863, Coryell Papers; James Buchanan to James Buchanan Jr., July 10, 1863, and James Buchanan to George C. Lieper, September 22, 1863, both in Buchanan Papers; James Buchanan to Ellis Lewis, August 28, 1863, Ellis Lewis Papers, HSP. It is significant that Buchanan pledged support for Judge Woodward. In previous times, the two had expressed great enmity for one another. See Daniel J. Curran, "Polk, Politics, and Patronage: The Rejection of George W. Woodward's Nomination to the Supreme Court" *Pennsylvania Magazine of History and Biography* 121 (July 1997), 163-199, and Woodward to John Kintzing Kane, December 22, 1847, John Kintzing Kane Papers, American Philosophical Society, Philadelphia, Pa.

¹⁵ *Doylestown Democrat*, June 23, 1863. See also *Erie Observer*, July 4, 1863.

¹⁶ R. Haslett to Charles R. Buckalew, July 17, 1863, Biddle Family Papers, HSP.

patriotic gentleman,” while the Philadelphia *Evening Bulletin* said that the nominee was one of the Democrats’ “strongest men.”¹⁷

Selection of a nominee was slightly more contentious for the Republicans. During the spring of 1863, the conservative Republican incumbent, Andrew G. Curtin, wearied from the hardships of his wartime governorship, was leaning against seeking another term. In hopes of forming a Union party that could unite all Pennsylvanians behind a strong pro-war candidate, Curtin recommended that General William B. Franklin, a War Democrat, receive the nomination of both parties. In the meantime, on April 13, Lincoln offered Curtin the opportunity to serve as a high-ranking diplomatic officer. Since he did not expect to run for reelection, Curtin expressed willingness to accept the position and two days later officially announced that he would not seek the Republican nomination.¹⁸

With Curtin’s announcement, the more radical Cameron wing of the Republican party began to dream of placing a firm abolitionist in the governor’s chair. Cameron’s main choice was John Covode, a former Republican congressman from western

¹⁷ Philadelphia *Inquirer*, June 19, 1863; Philadelphia *Daily Evening Bulletin*, June 19, 1863. On June 18, the *Evening Bulletin* published a letter from Harrisburg which claimed that the “excited and inebriated Democrats” had just nominated Judge Woodward, “and to be frank, they might have made a much worse choice.” For a balanced, though not wholly accurate, antebellum assessment of Woodward, see David Paul Brown, *The Forum; or Forty Years of Full Practice at the Philadelphia Bar*, 2 vols. (Philadelphia: Robert H. Small, 1856), 2:134-140.

¹⁸ Alexander K. McClure, *Old Time Notes of Pennsylvania*, 2 vols. (Philadelphia: John C. Winston Co., 1905), 2:53-55; McClure, *Lincoln and Men of War Times* (1892; reprint, Philadelphia: Rolley and Reynolds, Inc., 1962), 231-232; *Chicago Tribune*, June 23, 1863; Lincoln to Curtin, April 13, 1863, and Curtin to Lincoln, April 14, 1863, both in Lincoln Papers; Curtin, “Farewell Message to the Assembly of 1863,” in *Pennsylvania Archives*, 130 vols., (Harrisburg: William Stanley Ray, 1902), ser. 4, vol. 8, p. 501.

Pennsylvania. Curtin, meanwhile, began to waffle over his decision. After the Democratic convention chose Woodward to head their ticket, Curtin decided that he would have to continue as governor to keep a Copperhead from succeeding him. Followers of Cameron were dismayed. “What is Curtin about?” asked one Cameronite. “Does he mean to be a candidate, notwithstanding his ostentatious declination?”¹⁹ But the Curtin train was gaining speed. At every public appearance he was greeted by throngs of enthusiastic supporters who hoped to see him reelected, and on July 15, the *Franklin Repository* announced that Curtin would not turn down the nomination if it was tendered to him. Papers from the Cameron wing of the party reacted with outrage.²⁰ The party was divided, but most reasonable Republicans knew they would have to choose the man “who can command the most votes.”²¹

Democrats were gleeful at the dissension within the Republican ranks. “There is a very pretty quarrel going on in the Republican party in this State,” editorialized the *Philadelphia Sunday Mercury*. “Andy Curtin, the present incumbent of the office, has a strong party backing him for the nomination, while a certain faction, led by Cameron and Forney, are trying hard to ‘postpone’ Curtin in favor of some ‘loyal’—that is, bastard—

¹⁹ John S. Richards to Simon Cameron, June 2, 1863, Simon Cameron Papers, Dauphin County Historical Society, Harrisburg, Pa. (hereafter DCHS). See, also, Simon Cameron to C. A. Walborn, June 2, 1863, Autograph Collection, HSP. Many Republicans just wanted Curtin to make a decision one way or the other so that the party could choose a candidate and begin the canvass. See William M. Meredith to Eli Slifer, July 31, 1863, Slifer-Dill Papers, Dickinson College, Carlisle, Pa.

²⁰ Erwin Stanley Bradley, *The Triumph of Militant Republicanism: A Study of Pennsylvania and Presidential Politics 1860-1872* (Philadelphia: University of Pennsylvania Press, 1964), 166-167.

²¹ Thomas Pomeroy to Samuel Calvin, April 3, 1863, Samuel Calvin Papers, HSP.

‘Democrat.’ The true democracy of the State can afford to look on complacently while this family row proceeds, though they are not a little surprised to see such factious squabbling for office among the politicians of an organization whose boast hitherto has been, that its zeal for the country is above all party spirit and party contests.”²²

When the nominating convention met at Pittsburgh on August 5, John Covode read a carefully-worded letter of withdrawal, hoping that the governor would follow suit. “Conscious that the triumph of our principles, and the success of our Candidate, at this time, is of paramount importance, to individual gratification, and personal advancement,” Covode declared, “and . . . believing that Victory points to the selection of a *new man* as our standard bearer in the approaching contest, and *one* upon whom the entire support, and strength of our organization can be centered, I have determined to withdraw my name from your consideration and improve this opportunity for doing so.”²³ Curtin did not withdraw, however, and received the nomination by a substantial majority on the first ballot.

The Cameronites were sorely disappointed. But once the convention chose its candidate, Cameron’s radical wing of the party fell quickly into line behind the conservative Andrew Curtin. Indeed, one Cameron man felt “very sick the time of the Pittsburgh Convention—but we have got to swallow Curtin shoddy & all and pick our teeth after the Election.” The wife of another anti-Curtin Republican wondered if her husband had voted against Curtin’s nomination. She, too, was sorry about the result of

²² *Philadelphia Sunday Mercury*, August 2, 1863.

²³ John Covode to the President of the National Union State Convention, August 5, 1863, Edward McPherson Papers, LC; *New York Times*, August 6, 1863.

the convention, “but hope it will prove for the best. I suppose you prefer C[urtin] to Woodward!!” Indeed, this woman understood the importance of party unity at this pivotal stage of the Civil War, and most Republicans supported their nominee as the canvass got underway.²⁴

Simon Cameron had great disdain for Governor Curtin. “There are many good republicans and pious Christians who would see him in Hell first,” wrote Cameron to President Lincoln. “He will cheat us, when it is over,—and if he can sell us after it is over to our enemies he will do so.” Nevertheless, Cameron and his friends would support him, believing he was the only candidate who supported the Union. “My heart is too much engaged in the struggle for ending the rebellion, to allow me to hesitate, at even the support of Mr. Curtin.” To another friend Cameron wrote that the nomination was “most unfortunate,” but “I support Curtin as the less evil.”²⁵ Cameron’s associates quickly followed suit. “As loyal Union men we have but one course to pursue,” wrote one Republican to Cameron. “We must support the nominees of our Convention with all our might. The cause demands this of us whatever objections we may have personally or

²⁴ C. W. Ashcino[?] to McPherson, September 29, 1863; Annie to McPherson, August 6, 1863, both in McPherson Papers; M. H. Cobb to Simon Cameron, June 10, 1863, and J. K. Moorhead to Simon Cameron, June 20, 1863, both in Simon Cameron Papers, LC. Followers of Simon Cameron were angered that the Curtin faction took the support of the Cameron faction for granted. See L. W. Hall to Simon Cameron, September 17, 1863, Cameron Papers, DCHS.

²⁵ Simon Cameron to Lincoln, September 18, 1863, Lincoln Papers. See also, Simon Cameron to C. A. Walborn, June 2, 1863, Society Small Collection, HSP; Simon Cameron to Samuel Calvin, September 24, 1863, Calvin Papers.

otherwise to the candidates.”²⁶ Members of Lincoln’s cabinet praised Cameron for acting “wisely as well as patriotically in subordinating personal resentments to public interests.”²⁷ Thus, by the time the campaign began in earnest, both parties were firmly united behind their respective gubernatorial nominees.

II.

One of the striking features of nineteenth-century elections—though it might be argued virtually any election in American history—was the amount of deception that took place at the hands of politicians. Stump speakers often took great liberties with the information they *knew* about their opponents. During the gubernatorial campaign of 1863, there were dozens of scurrilous charges hurled at Woodward, and many fabricated stories told about him. These were concocted in an attempt to reelect Governor Curtin by proving that Woodward was disloyal. As most southern slaveholders had been antebellum Democrats, Republicans worked diligently to portray northern Democrats as participants in southern treason and rebellion. A few brief accounts will demonstrate success these stories achieved.

During the course of the campaign several Republican politicians publicized fabricated conversations they claimed to have had with Woodward, attempting to discredit him as a disloyal Copperhead. At a Republican rally in Pittsburg, one T. J.

²⁶ R. G. White to Simon Cameron, September 18, 1863, Cameron Papers, LC. See, also, Judge D. Krause[??] to Simon Cameron, September 26, 1863, and Samuel Calvin to Simon Cameron, both in Cameron Papers, LC.

²⁷ Salmon P. Chase to Simon Cameron, September 23, 1863, Cameron Papers, LC.

Bigham claimed that after Gettysburg, Woodward went to the battlefield to find his son, Major George A. Woodward, who had been wounded in the foot. According to Bigham, the judge believed his son “might be thankful he got off so well” because he “ought to have been wounded in the heart for fighting in such a cause.”²⁸ Major Woodward refused to allow this libel against his father to go unanswered. He immediately penned a letter to Bigham calling his statement “a wicked and deliberate falsehood.” Major Woodward had, as a consequence of earlier battlefield wounds and confinement in Libby Prison, become “crippled for life.” After being paroled, he returned to his parents’ home, where he was cared for by his father, mother and sisters. For four months he was confined to his bed, “suffering intensely,” but “no father could be more kind, more solicitous for a son’s welfare, than was mine.”²⁹

During that period of recuperation, the judge and his son had “almost daily conversations” related to the war, “and, although he freely criticised, and often condemned, the manner in which the war was managed by the Administration, never did he utter a sentiment in sympathy with the doctrine of secession, nor a syllable of approval of the course taken by the people of the South; and never did he say aught which was not calculated to encourage me in the performance of my duty as a soldier.” Major Woodward concluded his letter by pointing out how disheartening it was for soldiers who

²⁸ *Pittsburgh Daily Commercial*, September 17, 1863.

²⁹ George A. Woodward to T. J. Bigham, September 23, 1863, in *Soldiers Read!! Citizens Read!!! Address of the Democratic State Central Committee. Letter of Major Geo. A. Woodward. Letter of Judge Woodward* (Philadelphia: The Age Office, 1863).

were “toiling and fighting for their country” to know that “lying politicians at home are using them as instruments of their partisan malice.”³⁰

Bigham replied in an insulting public letter to the father: “I have not the honor of [your son’s] acquaintance, and unless he fights better than he writes, the active service has not lost much by his retirement.” After repeating his accusations of disloyalty, Bigham suggested that Woodward’s views on the war might even merit impeachment. All this did not stem from “personal unkindness toward you,” Bigham assured the judge, but only “what I deem my duty to my country.”³¹

Another Republican politician also appears to have been misleading from the speakers’ platform. At a speech in Philadelphia, on August 26, Nathaniel B. Browne, a former Democrat, declared that he had an “intimate acquaintance with the political principles” of Judge Woodward, and that Woodward’s positions on the sectional crisis were no different than those of John C. Calhoun. “[Woodward] declared that to write about slavery is a crime, to think about it is a sin. He is an open, avowed Secessionist, conscientious though he may be. He has always believed in it, and he has declared that no man in the South carried the doctrine of States rights further than he does.” Woodward, according to Browne, wanted unconditional peace as fervently as Clement

³⁰ Ibid.

³¹ T. J. Bigham to George W. Woodward, September 30, 1863, in *Pittsburgh Daily Commercial*, October 1, 1863. Bigham and Woodward appear to have had at least a slight acquaintance before the war. In the 1850s they served together on a committee of the Pennsylvania Agricultural Society. See the first and second *Annual Report of the Transactions of the Pennsylvania Agricultural Society* (Harrisburg: A. Boyd Hamilton, 1854-1855), 1:101, 2:8.

Vallandigham and Fernando Wood, and if Woodward was “elected Governor, Gettysburg must be repealed.”³²

These charges bore some measure of truth. Indeed, Woodward had “studied Mr. Calhoun when I was a young man” and found many of his constitutional opinions convincing.³³ While Woodward would have condoned peaceable secession, if the northern states consented to it, he never stated that open and armed rebellion was permissible. To be sure, Woodward’s pre-war speeches were ardently pro-southern and pro-slavery—he believed that northern abolitionists had purposefully agitated the southern states to deprive them of their rights and to compel them to leave the Union. But while he was sympathetic to the southern cause, and believed the South was *almost* justified in seceding, he always spoke of secession, if it must happen, as a peaceable process, not an act of aggression. As to the specific charges (which Browne based on a speech Woodward had delivered behind Independence Hall in December 1860), Browne was wholly misleading. A brief review of the speech is therefore necessary to understand what Woodward said, and how Browne misrepresented it.

Woodward opened his speech by pointing to Abraham Lincoln’s “House Divided” speech and William H. Seward’s “Irrepressible Conflict” speech. Lincoln had

³² *Philadelphia Inquirer*, August 27, 1863. The *Philadelphia Press*’s account of Browne’s speech said that Browne had claimed to know Woodward personally, not just his political principles: “The speaker was intimately acquainted with that gentleman [Woodward] and he would say that, if it were possible to call from his grave that arch traitor John C. Calhoun, and place him in the Gubernatorial chair of Pennsylvania, he would not be of more service to the Southern cause than Judge Woodward will be if elected. . . . No man in the South carries the doctrine of Secession further than he.” See *Philadelphia Press*, August 27, 1863.

³³ Woodward to Jeremiah S. Black, December 10, 1863, in White, ed., “Pennsylvania Judge,” 215.

said that the entire nation would eventually become either all slave or all free because a “house divided against itself cannot stand.” Similarly, Seward had stated that the political battle over slavery was “an irrepressible conflict between opposing and enduring forces, and it means that the United States must and will, sooner or later, become either entirely a slaveholding nation, or entirely a free-labor nation.”³⁴ Woodward believed, along with most southerners, that these words of aggression were dangerous and unnecessary because they signified that all of the states would eventually become free since the ecology of the North virtually prohibited slavery. The “full scope and meaning” of the Lincoln and Seward message, then, was that the North would eventually deprive white southerners of their rights and property, first by prohibiting slavery in the national territories, and eventually by extinguishing the right to own slaves in the South.³⁵

Accordingly, the South was mobilizing in self-defense, “and it appears to me,” declared Woodward, “that there must be a time, in the progress of this conflict, if it be indeed irrepressible, when slave-holders may lawfully fall back on their natural rights, and employ, in defence of their property, whatever means of protection they possess or can command.” But that time, he believed, had not yet come. The remainder of his speech was an encomium to the institution of slavery and call for conciliation of the South. Taking a strong pro-slavery stance, Woodward argued that blacks were well-

³⁴ Abraham Lincoln, “Speech at Springfield, Illinois,” June 16, 1858, in Basler et al., eds., *Collected Works of Lincoln*, 2:461; William H. Seward, *The Irrepressible Conflict. A Speech by William H. Seward, Delivered at Rochester, Monday, Oct. 25, 1858* (New York: Office of the New York Tribune, 1858), 2.

³⁵ George W. Woodward, *Speech of George W. Woodward, at the Great Union Meeting, Held December 13, 1860, in Independence Square, Philadelphia* (Philadelphia: Ringwalt & Brown, 1860), 3-4.

suites to work as slaves in the South, and he reminded his audience that slavery provided an “incalculable blessing” to the North (cotton, he argued, had been central to America’s prosperity). He called on Pennsylvania to begin the process of amending the U.S. Constitution to guarantee the property rights of southern slaveholders. This action, Woodward believed, was the only way to save the Union.³⁶

For commercial, political, constitutional, and foreign policy reasons, Woodward believed the Union was worth preserving and he blamed northern abolitionist agitation for the “irrepressible conflict” that had brought about the present crisis. “We hear it said, let South Carolina go out of the Union peaceably. I say let her go peaceably, if she go at all, but why should South Carolina be driven out of the Union by an irrepressible conflict about slavery?” He implored Pennsylvanians to “appeal to the South to stand by us a little longer, till we have proved, not by fair words, but by deeds, that we will arrest the irrepressible conflict” and reject abolitionism. Woodward called on his listeners to “renew our vows to the Union and send salutations to our brethren. Talk not of secession—go not rashly out of the Union—dim no star of our glorious flag—give us time to place ourselves right in respect to your ‘peculiar institution,’ and to roll back the cloud that now obscures, for the moment, our devotion to the Union as it is. Speak thus to the Southern States, and follow our words by fitting deeds, and Pennsylvania can stop secession or cure it if it occurs. We can win back any State that may stray off, if only we can prove our own loyalty to the Constitution and Union as our fathers formed them.”³⁷

³⁶ Ibid., 4-15.

³⁷ Ibid.

Of course, Woodward's position was contestable; many believe that lasting compromise was impossible after Lincoln's election. Still, even Lincoln held out for compromise. As late as his first inaugural address in March 1861, he referred to southerners as friends and implored them to stay in the Union. If much of the South, by December 1860, had committed to leaving the Union no matter what concession Woodward and his friends had to offer, his efforts at compromise cannot be held out as sympathy with secession. Woodward's speech was a call for preservation of the Union. Granted, he desired a Union with slavery—as did millions of other loyal Americans—but that was still peace and Union. Browne's accusations were, therefore, unfounded. The speech of December 1860 did not reveal Woodward to be “an open, avowed Secessionist,” and no where in the speech did Woodward say it was a crime or sin to discuss slavery.³⁸

Democrats immediately challenged Browne's “intimate acquaintance” with either the judge or his principles. Charles J. Biddle, the chairman of the Democratic party in Pennsylvania, wrote to Browne, asking him “when and where you have had the intimate acquaintance with Judge Woodward upon which you impute to him opinions which he has never uttered to his friends or the public?” Browne responded that the speech, as it was published, was “obviously incomplete, and not intended to be full or literal.” Moreover, he stated that he had not spoken with Judge Woodward since the outbreak of the war. He admitted to basing his comments on Woodward's December 1860 speech as

³⁸ Brown was here likely alluding to the gag rule in Congress and in many southern states that forbade discussion of slavery or abolition. See Michael Kent Curtis. *Free Speech, “The People's Darling Privilege”: Struggles for Freedom of Expression in American History* (Durham, N.C.: Duke University Press, 2000), chapters 6, 7, 12, and 13.

well as newspaper reports published during the gubernatorial campaign. Browne enclosed with his letter a copy of his written notes for the speech. Significantly, the notes did not include any phrase resembling the words “intimate acquaintance.” Thus, either the phrase was added extemporaneously from the stage or it was deliberately taken out of Browne’s notes before they were sent to Biddle. Either way, as various newspapers reported the speech, it is obvious that Browne had made some reference to having an “intimate acquaintance” with the judge, but such a claim was plainly untrue. A few weeks later, Woodward referred to “the liar Browne” in a private letter to a close friend.³⁹ He obviously did not believe what Browne had said about him.

Small-town Republican newspapers and pamphleteers throughout Pennsylvania did precisely what Browne had done, excising portions of Woodward’s 1860 speech from their context to portray the judge as an extreme northern secessionist. One article warned mechanics and laborers that the aristocratic Woodward, being “the candidate of Jeff. Davis,” preferred slave labor to free labor and would degrade them “to the condition of a slave.” The editors, in several other articles, claimed that Woodward was a “Secession sympathizer” who was “counseling rebellion.”⁴⁰ Democratic papers, by contrast, were

³⁹ Woodward to Jeremiah S. Black, September 10, 1863, in White, ed., “Pennsylvania Judge,” 218.

⁴⁰ *Mifflinburg Telegraph*, October 8, 1863. This claim was also circulated on a broadside entitled “White Slaves,” which is available in the Printed Ephemera Collection at LC. For some of the pamphlets that selectively quoted Woodward’s speech, see, William A. Cook, *Hon. Geo. W. Woodward and the Gubernatorial Contest in Pennsylvania. Review of his Speech in Independence Square, Philadelphia, December 13, 1860. A True Exposition of His Principles and Purposes* ([Washington, D.C.]: Chronicle Print, 1863), *Democratic Opinions on Slavery! 1776-1863* (n.p., [1863]), *The Views of Judge Woodward and Bishop Hopkins on Negro Slavery at the South: Illustrated from the Journal of a Residence on a Georgian Plantation* (Philadelphia, 1863), *Opinions of a Man Who Wishes to be Governor of Pennsylvania: Extracts from a Speech of Judge*

proud of Woodward's speech; they reprinted it in its entirety for subscribers to read and evaluate for themselves.⁴¹

Republican papers used more than just selective quotations to damage Woodward's reputation. In many cases they told incredible stories about Judge Woodward and his coterie. One former Democrat from western Pennsylvania claimed that Woodward believed "our only course was to WITHDRAW ALL OUR ARMIES north of Mason and Dixon's line and OFFER TERMS TO THE REBEL STATES."⁴² Another editorial criticized Woodward for *discouraging* draft resistance because, they said, Woodward knew that draft riots only hurt the Democratic party. "His plan of restoring peace, was, by turning every Republican out of power," concluded the editors, but Woodward said "nothing . . . about turning out the Rebels."⁴³ Others claimed that the Knights of the Golden Circle were conspiring to get Woodward elected. "The would be Governor, pretends to be on a visit to his friends in Centre Co., but our readers will remember that the treasonable organization known as the Knights of the Golden Circle is

Woodward, delivered on Thursday, December 13, 1860, at Independence Square, Philadelphia (Philadelphia: C. Sherman Son & Co., 1863), *A Picture of Slavery, Drawn from the Decisions of Southern Courts* (Philadelphia: Crissy & Markley, 1863), *Woodward in 1860 & 1863* (Philadelphia: Crissy & Markley, 1863).

⁴¹ See, for example, Bellefonte *Democratic Watchman*, July 24, 1863, *Montrose Democrat*, October 1, 1863, and *Crawford Democrat*, September 29, 1863. See also *Speech of Hon. George W. Woodward, Delivered at the Great Union Meeting in Independence Square, Philadelphia, December 13th, 1860: The Democratic Platform, Adopted by the State Convention at Harrisburg, on the 17th June, 1863* (Philadelphia: The Age Office, 1863).

⁴² *Mifflinburg Telegraph*, October 8, 1863.

⁴³ *Union County Star and Lewisburg Chronicle*, August 14, 1863.

made up of his ‘friends,’ and these he has been visiting all over the State.’⁴⁴ Woodward was, in short, the candidate of a “treasonable organization,” the existence of which historian Frank L. Klement has seriously called into doubt.⁴⁵

The *New York Tribune* informed its readers that the former vice president, George M. Dallas, had left the Democratic party after it nominated Woodward for governor. The *Philadelphia Age* adamantly denied the story (which had started in the *Philadelphia Press*, a staunchly Republican paper). When word of the denial reached the offices of the *Tribune*, the editors released a half-hearted apology, stating that if their information was incorrect they felt more sorry for Dallas for remaining a Democrat than they “felt for the mistake, as that has given us the inestimable privilege of thinking well of his judgment for three days.”⁴⁶

In one instance, Republican creativity in the Curtin—Woodward contest had lasting consequences, influencing many voters in the presidential election the following year. The *Pittsburg Daily Commercial* declared that General George B. McClellan “makes no secret of his earnest desire that Andrew G. Curtin should be [re]elected” and

⁴⁴ *Mifflinburg Telegraph*, October 8, 1863.

⁴⁵ See Frank L. Klement, *Dark Lanterns: Secret Political Societies, Conspiracies, and Treason Trials in the Civil War* (Baton Rouge: Louisiana State University Press, 1984); Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (New York: Oxford University Press, 1991), xii.

⁴⁶ *New York Tribune*, quoted in the *Gettysburg Compiler*, October 19, 1863. In another instance, Republican newspapers fabricated correspondence between Jefferson Davis and James Buchanan that had allegedly been discovered by Union soldiers in the South. Democrats believed these stories were also calculated to help Curtin win reelection. See the correspondence between John B. Blake and James Buchanan in 1863, particularly Blake to Buchanan, August 6, 1863, Buchanan Papers, and *Erie Observer*, August 15, 1863.

that he would campaign and vote for the governor.⁴⁷ The *Philadelphia Press* made similar claims, telling its readers that McClellan had rebuffed Democratic leaders in Allentown. Democrats in the state were furious, and they convinced a reluctant McClellan to rebut these blatant lies. McClellan penned a letter to Charles Biddle saying that while he had hoped to stay out of partisan politics, he could no longer remain silent in the face of such gross “misrepresentations.” To the contrary, after having had a lengthy conversation with the judge, McClellan concluded that Woodward’s election was in the best interests of the nation. “I understand Judge Woodward to be in favor of the prosecution of the war with all the means at the command of the loyal states, until the military power of the Rebellion is destroyed.” Both Woodward and McClellan believed that while the war ought to be “waged with all possible decision and energy,” the

⁴⁷ *Pittsburgh Daily Commercial*, September 23, 1863. General McClellan was not the only Union general falsely portrayed to support Governor Curtin. On August 28, 1863, Governor Curtin made a sword presentation to General George Gordon Meade. Prior to the ceremony, a Republican politician approached General Meade and said, “If you can say anything in favor of Curtin, it will help us greatly.” Meade replied that he did not know what was meant by “helping you” and that it was common knowledge that “I have nothing to do with politics.” Of course, Meade continued, he did intend to “allude to Governor Curtin and his services in behalf of the volunteers of Pennsylvania.” “Well, that is all we want,” replied the Republican. Upon the stage, Meade delivered an address praising the service of “the gallant officers and brave soldiers” of his corps, particularly those who had fallen on the battlefield. Strangely enough, however, when Meade read the reports of his speech in the newspapers the following day, he found that they did not fully represent the opinions he had expressed. “The speech is accurately reported, with one exception, and that is where I am made to say, ‘I hoped the people of Pennsylvania would re-elect Governor Curtin.’ I said nothing of the kind, and made no allusions to elections.” Meade went on to complain that some members of the press were editorializing in favor of Curtin, “quoting my speech in italics.” Republican newspapers across the North picked up the misquoted speech; many newspapers italicized the section calling for Curtin’s reelection, thus emphasizing the one section that was not even true. See George G. Meade to wife, August 31, 1863, in George Gordon Meade, ed., *The Life and Letters of George Gordon Meade, Major-General United States Army*, 2 vols. (New York: Charles Scribner’s Sons, 1913), 2:145; *New York Tribune*, August 31, 1863; *Union County Star and Lewisburg Chronicle*, September 4, 1863.

government ought not to assail citizens' "rights and property not demanded by military necessity and recognized by military law among civilized nations." Lastly, both Woodward and McClellan agreed that "the *sole* great objects of this war are the restoration of the unity of the nation, the preservation of the Constitution, and the supremacy of the laws of the country." Believing that he and the judge "entirely agree upon these points," wrote McClellan, "I would, were it in my power, give to Judge Woodward my voice and my vote."⁴⁸

McClellan's letter was widely circulated on October 13, but, coming as it did, on election day, it had very little effect. Ironically, McClellan's letter proved disastrous to his presidential campaign the following year, as many northern observers believed it linked his opinions to those of an "avowed Secessionist." After receiving the Democratic nomination for president in 1864, McClellan penned a letter of acceptance repudiating the peace platform upon which he had been nominated, but in his "Woodward letter" of 1863, McClellan clearly linked himself to that notorious Pennsylvania Copperhead, and many voters in 1864 refused to forgive him for such a disgraceful alliance.⁴⁹

⁴⁸ George B. McClellan to Charles J. Biddle, October 12, 1863, in Stephen W. Sears, ed., *The Civil War Papers of George B. McClellan: Selected Correspondence, 1860-1865* (New York: Ticknor & Fields, 1989), 558-559; *Philadelphia Inquirer*, October 13, 1863; *New York Times*, October 13 and November 19, 1863. See also Biddle to McClellan, September 2, 1863; Biddle to Woodward, September 30, 1863; and Biddle to Andrew Porter, October 2, 1863, all in Biddle Family Papers; Joseph Chambers McKibben to Barlow, October 1, 1864 and David H. Williams to Samuel L. M. Barlow, September 29, 1863, both in Samuel L. M. Barlow Papers, The Huntington. McClellan's letter of October 12 was written in response to the Allentown incident that had been reported in the *Philadelphia Press*.

⁴⁹ T. J. Barnett to Barlow, c. October 1864, Barlow to Thurlow Weed, May 1864, Montgomery Blair to Barlow, April 28, 1864, May 1, 1864, and May 4, 1864, all in Barlow Papers.

To Democrats, such chicanery proved that Republicans would resort to “desperate and disreputable means” to maintain power. The *Brooklyn Daily Eagle* criticized the Republican party for passing off so many barefaced lies about the Democratic candidate in Pennsylvania. The Republicans had sought “to stigmatise their political opponents as traitors” in order to win the election, editorialized the *Eagle*, but this only showed how the Republicans put the interests of their party above the country.⁵⁰ Republicans, by contrast, saw McClellan’s letter as evidence that he had “joined the Copperheads,” endorsed “the Rebel calumny,” and thrown his support behind northern treason.⁵¹ One Republican observer noted that McClellan’s so-called “Woodward letter” revealed that the general was a not only a “nincompoop,” but “a little traitor, a little fool, and not much of anything.”⁵²

The accusations of treason are perhaps the most notable aspect of the political rhetoric of the Pennsylvania campaign in 1863. “Traitors . . . will support the Rebellion by voting for its friend, George W. Woodward,” wrote editors of the *Pittsburgh Daily Commercial*. “Vote by all means, for Curtin and the right, if you are a patriot, or for Woodward and treason if you are a traitor.”⁵³ An anonymously published pamphlet further stated that while Woodward appeared to be “of fair private character, and a

⁵⁰ *Brooklyn Daily Eagle*, October 13, 1863.

⁵¹ Diary entry for Oct. 13, 1863, in Adam Guroski, *Diary*, 3 vols. (1862-1866; reprint, New York: Burt Franklin, 1968), 2:344; George P. Smith to Edwin M. Stanton, October 13, 1863, Edwin M. Stanton Papers, LC; *Chicago Tribune*, October 23, 1863.

⁵² Samuel W. Pennypacker to Aunt, October 18, 1863, Pennypacker Mills, County of Montgomery, Schwenksville, Pa.

⁵³ *Pittsburgh Daily Commercial*, October 7, 1863.

professor of religion,” “unfortunately the Devil is never so dangerous as when he is robed as ‘an angel of light.’” After referring to Jefferson Davis, the rebel president, as “the great model of Judge Woodward,” the pamphleteer concluded that Woodward’s 1860 Independence Hall speech was “an insult to the intelligence and patriotism of the people.”⁵⁴

As in most nineteenth-century campaigns, songs became a powerful medium for spreading the word of Woodward’s disloyalty. A Philadelphia lady composed a song in favor of Governor Curtin’s reelection. While most of the song celebrated the governor’s patriotism, two verses pointed out that only disloyal Pennsylvanians would vote for the Democratic challenger:

We’ll rally round the people’s choice,
And we must needs go early,
To guard the polls from traitor foes,
Who would but deal unfairly.
. . . .
And every patriot true will vote,
For Curtin at election;
Then sympathizers with “Secesh,”
Will surely meet detection.⁵⁵

In the view of this songstress, those who voted for Woodward were secession sympathizers, traitorous enemies of the government, and election stealers. The first two

⁵⁴ *Woodward in 1860 & 1863* (n.p., [1863]), 3-7.

⁵⁵ Kate Moncrieff, “Hurrah for Andrew Curtin,” (October 5, 1863) *Civil War Song Sheets*, ser. 1, vol. 2, Rare Book and Special Collections Division, LC.

charges were direct accusations of treason, while the third also implied that Democrats sought to subvert constitutional democracy.⁵⁶

Unfortunately for Woodward and the Democrats, such charges stuck. Sidney George Fisher of Philadelphia recorded in his diary that Woodward “sympathizes wholly with the rebellion, its motives, passions and purposes, justifies it, advocates the right of secession and defends slavery as a divine and beneficent institution that should be fostered and extended.”⁵⁷ George Templeton Strong, the famous New York City diarist, believed that Woodward stood for “peace-on-any-terms.”⁵⁸ The gubernatorial campaign in Pennsylvania also caught the attention of members of Lincoln’s cabinet. Secretary of the Navy Gideon Welles wrote that Woodward “is a party secessionist.”⁵⁹ Even an old family friend who was now serving in the army was convinced that the reelection of Curtin was “at once the most politic, and the most certain way to end the war speedily,” though he felt “some regret that I can’t sympathize with Judge Woodward’s family, who

⁵⁶ Charges of election fraud were, of course, widespread in nineteenth-century America. See Richard Franklin Bense, *The American Ballot Box in the Mid-Nineteenth Century* (New York: Cambridge University Press, 2004).

⁵⁷ Sidney George Fisher, diary entry for October 12, 1863, in Jonathan W. White, ed., *A Philadelphia Perspective: The Civil War Diary of Sidney George Fisher* (New York: Fordham University Press, 2007), 205-206. Ironically, Fisher had published strikingly similar views to those of Judge Woodward in the 1850s. See Fisher’s *Kansas and the Constitution* (Boston: Damrell and Moore, 1856) and *The Laws of Race, as Connected with Slavery* (Philadelphia: Willis P. Hazard, 1860).

⁵⁸ George Templeton Strong, diary entry for October 14, 1863, in Allan Nevins and Milton Halsey Thomas, eds., *The Diary of George Templeton Strong, 1835-1875*, 4 vols. (New York: The Macmillan Co., 1952), 3:364.

⁵⁹ Gideon Welles, diary entry for October 13, 1863, in Howard K. Beale, ed., *Diary of Gideon Welles: Secretary of the Navy under Lincoln and Johnson*, 3 vols. (New York: W. W. Norton and Co., 1960), 1:470.

always received me in the politest manner possible.”⁶⁰ The accusations against Woodward were roundly successful to the point that they have even convinced many modern historians. The charge that Woodward was pro-slavery is accurate and beyond doubt, but whether he supported the rebellion after the war began is debatable, perhaps even doubtful.

III.

When the Civil War began, Pennsylvania was the only state with a law on the books permitting soldiers to vote. In the October 1861 elections, thousands of soldiers voted at their camps in Pennsylvania and as far away as Virginia, but fraud permeated those elections, and several court battles arose challenging the legitimacy of the soldier vote. Neither party took an official position on the issue; in some cases Democrats challenged the soldier vote, in others the Republicans wanted it thrown out. Finally, in 1862 several cases came before the Supreme Court of Pennsylvania, and the Democratically-controlled bench ruled that the law permitting soldiers to vote violated the text and spirit of the state constitution. Democrats immediately praised the Court’s ruling. Republicans, by contrast, generally ignored the decision. It was not until the Democrats won major electoral victories in October 1862 that the Republicans decided that soldiers ought to have the right to vote.⁶¹ “The National cause lost the advantage of

⁶⁰ Daniel Garrison Brinton to Pap, August 20, 1863, Daniel Garrison Brinton Letters, Chester County Historical Society, West Chester, Pa.

⁶¹ Jonathan W. White, “Citizens and Soldiers: Party Competition and the Debate in Pennsylvania over Permitting Soldiers to Vote, 1861-64,” *American Nineteenth Century History* 5 (Summer 2004), 47-70.

the late State elections,” wrote a Republican to Governor Curtin, “just because the men who fight, were not allowed to vote. The soldiers who cannot be defeated by armed traitors in the field, may be defeated by unarmed traitors, like the Woods, in the councils.”⁶²

In 1863 and 1864 Republicans championed the cause of regaining for soldiers the right to vote. Amending the state constitution was a two-year process because a proposed amendment had to pass the legislature in two successive secessions.⁶³ Thus, permitting soldiers to vote became a significant campaign issue that occupied the minds of politicians for several election cycles. Caught in the middle of the debate were Judge Woodward and the Democratic nominee for the state supreme court, Chief Justice Walter H. Lowrie. Both Woodward and Lowrie had been in the majority ruling soldier voting unconstitutional. In fact, Woodward had written the opinion.⁶⁴

Republican newspapers chastised Woodward and Lowrie for disfranchising the soldiers, and the Republican state platform included a plank in favor of amending the state constitution to allow Pennsylvania soldiers to vote.⁶⁵ Meanwhile, U.S.

⁶² Amasa McCoy to Curtin, January 3, 1863, Slifer-Dill Papers. This sentiment was held by Republicans in other states as well. After Horatio Seymour was elected governor of New York in 1862, one soldier from the Empire State complained of “the *bad news, bad news*, that old Seymour is elected Governor of the state. Oh! that the warriors had been home I do not believe it would have been so.” See William Henry Walling to Sisters, November 6, 1862, Walling Letters, Civil War Miscellaneous Collection, USAMHI. See, also, Abraham Lincoln to Carl Schurz, November 10, 1862, in Basler, et al., eds., *Collected Works of Lincoln*, 5:493-495.

⁶³ Pennsylvania Constitution (1838), art. 10.

⁶⁴ Chase v. Miller, 41 *Pennsylvania Reports* 403-429 (1862).

⁶⁵ *Mifflinburg Telegraph*, October 8, 1863; *Union County Star and Lewisburg Chronicle*, August 18, 28, September 1, 4, 1863.

Representative Thaddeus Stevens took to the stump to deride the two justices for their decision. “As the surest way to aid their rebel friends, and punish those who oppose them,” proclaimed Stevens at a Republican rally in Lancaster, “both Judge Woodward and judge Lawry, have denied the soldiers the right to vote, although the Legislature twenty four years ago passed a law to allow them to vote wherever they were.”⁶⁶ This accusation bore all of the marks of a charge of treason. Woodward, in Stevens’ view, was an ally of the southern traitors, and he sought to “aid” them in their rebellion, language borrowed directly from the constitutional definition of treason. Democrats in the army, like Fitz-John Porter, noted that the Republicans made use of Woodward’s ruling in the soldier voting case “to prejudice soldiers against him—and successfully,” though General Porter believed that Woodward’s decision in that case had been the correct one.⁶⁷

The soldier vote thus became a galvanizing issue for the Republican party. Alexander K. McClure, a prominent Republican politician and journalist, remembered four decades later that “the greatest problem of the campaign” for the chairman of the Republican party “was how to bring the influence of the disfranchised soldiers in the field into practical effect upon the fathers, brothers and immediate friends at home.”⁶⁸ Indeed, soldiers’ letters flooded Republican newspapers saying that Curtin’s defeat at the polls

⁶⁶ Thaddeus Stevens, “Speech on State Elections,” September 17[?], 1863, in Beverly Wilson Palmer and Holly Byers Ochoa, eds., *The Selected Papers of Thaddeus Stevens*, 2 vols. (Pittsburgh, Pa., 1997), 1:408.

⁶⁷ Fitz-John Porter to Biddle, September 24, 1863, Biddle Family Papers.

⁶⁸ McClure, *Old Time Notes*, 2:57.

would be worse than a Union defeat in the field.⁶⁹ Of course letters published in the partisan press are immediately suspect. More striking are the number of soldiers who wrote personal letters opposing the Democrats.

Many Union soldiers had a favorable predisposition towards Governor Curtin from the time of their enlistment. Curtin was well known among the troops as the “Soldier’s Friend” for the attention he paid to their many needs and the needs of their families. Moreover, many soldiers had been addressed by the governor in large ceremonies before marching off to war. The governor’s speaking ability was second-to-none. Before hearing Curtin speak, in August 1863, General Meade expected to “be overwhelmed with his eloquence and perhaps dumfounded.”⁷⁰ Many soldiers, too, wrote home of the noteworthy experience they had upon hearing Governor Curtin give an address.⁷¹ Thus, it did not take much to convince the troops that Curtin was worthy of reelection.

Many soldiers who favored Curtin’s reelection did so because they believed that the election of Democrats would only hurt the Union war effort. One soldier noted that Curtin was “certainly one of the Soldiers warmest friends” and believed that if the

⁶⁹ See, for example, *Union County Star and Lewisburg Chronicle*, September 8, 1863, *Philadelphia Daily Evening Bulletin*, October 12, 1863, or the resolutions adopted by various Pennsylvania units in *Philadelphia Inquirer*, October 1, 1863, and *Wellsboro Agitator*, September 30, 1863.

⁷⁰ Meade to wife, August 27, 1863, in Meade, *Life and Letters*, 2:145.

⁷¹ See, for example, M. H. Richards to Sophie, September 16, 1862, Richards Family Papers, Civil War Miscellaneous Collection, USAMHI.

soldiers were at home they would have voted for him.⁷² Another soldier stationed in South Carolina said he was “in favor of the reelection of Curtin for Governor, and the defeat of all the d—d Copperheads placed in nomination.” He regretted that the rebels would find “consolation” in having so many “friends in the north” and feared that “they will be induced to prolong the war until there is a change in the administration at Washington and their friends get into power.”⁷³ Other soldiers simply sent their letters home in patriotic envelopes featuring flags, shields, and eagles, and mottos like, “Three Cheers For Govner Andrew Curtin.”⁷⁴

Perhaps the most frequently noted reason the soldiers gave for opposing Woodward and Lowrie was their ruling in the 1862 soldier voting case. The Republican press portrayed these judges as anti-soldier, even telling a story that Judge Lowrie had turned several “noble-hearted soldiers” away from his door when they asked him for something to eat. According to the story, Lowrie shouted that he “*would prefer GIVING BREAD TO REBELS, RATHER THAN UNION SOLDIERS!*”⁷⁵

Such stories, along with the repeated emphasis in the press about how Woodward and Lowrie opposed the right of soldiers to vote, were successful in turning the boys in

⁷² Allan L. Bevan to Sister, August 11, 1863, Bevan Letters, Civil War Miscellaneous Collection, USAMHI. For a similar sentiment, see Jacob B. Dannaker to Father, August 30, 1863, Dannaker Letters, Civil War Miscellaneous Collection, USAMHI, and Jacob Heffelfinger diary entries for October 8-14, 1863, Jacob Heffelfinger Diaries, *Civil War Times Illustrated* Collection USAMHI.

⁷³ Jacob Swartzlander to Cousin Han, October 24, 1863, Hanna Eliza Delp Collection, Civil War Miscellaneous Collection, USAMHI.

⁷⁴ See, for example, George C. Booze to Sister, October 2, 1863, Booze Letters, Civil War Miscellaneous Collection, USAMHI.

⁷⁵ *Mifflinburg Telegraph*, October 8, 1863.

blue against the Democratic nominees. One soldier, who might have been a pre-war Democrat, noted that the Democratic party in Pennsylvania had given up its true principles. “True Democracy allows no sympathy with traitors,” he wrote. “They talk of giving the South her rights, just as if a traitor had any rights. They have two rights. A Constitutional right to be *hung* and a Divine right to be *Damned*. . . . Southern men are traitors out and out, but those contemptible leaders of a deluded set of men, Fernando Wood, Vallandigham, Woodward &c are a cross between Traitor and Dam Fools.” Yet this soldier noted that Woodward was too smart to be considered a fool, “for he was sharp enough to deprive us of the right to vote against him.”⁷⁶

The 149th Pennsylvania Volunteer Regiment held a meeting in camp in favor of Curtin’s reelection. One soldier wrote home to his parents telling them about the meeting and how the soldiers were angry that the Copperheads would not allow them to vote.⁷⁷ Even Democratic soldiers were furious at the judges. One soldier who ardently supported George B. McClellan for president as early as 1863, wrote angrily that “Woodward and Lowrie made out that the soldiers had no right to vote for govner if they aint got no right to vote they aint got no right to fight.” This soldier wondered if Woodward might like to try joining the army: “let woodward come out and fight himself and see how he likes it I will Bet he will Pull Back and say let them fight it out.”⁷⁸ Another soldier, who claimed

⁷⁶ W. H. Dieffenbach to Friend, September 27, 1863, James Randolph Simpson and George Simpson Papers, Civil War Miscellaneous Collection, USAMHI.

⁷⁷ Henry Wallace to Parents, September 12, 1863, Letters, Articles and Reminiscences of the 149th Pennsylvania Volunteer Infantry, Civil War Miscellaneous Collection, USAMHI.

⁷⁸ Cyrus W. Beamenderfer to Musser, October 24, 1863, Daniel Musser Papers, MG-95, PHMC.

to retain his “democratic proclivities,” knew he had to support Curtin and Lincoln, “right or wrong,” in order to bring the war to a close.⁷⁹ Regretting that they could not vote in the field, many soldiers hoped “to get home at the time of the election so as to give A. G. C. my little help.”⁸⁰

Before the election, many soldiers wrote to Governor Curtin expressing their hope that he would be reelected. One wounded soldier in the invalid corps offered his aid in Curtin’s reelection effort, noting “I would rather die with my old comrades in front than live among traitors at home.” A lieutenant colonel told Curtin that “no honest man of Union feelings will cast his vote for any other man.” “The soldiers here don’t feel like letting the copperheads have it all their own way at the ballot box this Fall,” wrote a preacher who had left his pulpit to join the army. When news reached the army that Curtin had won, many soldiers exulted in the news. “I most heartily rejoice in your reelection, and congratulate you that the loyal hearts of Penna soldiers in the field have been made glad by the loyal voters at home triumphantly sustaining your patriotic and able administration,” wrote the colonel of the 23rd Pennsylvania Volunteers. He informed Curtin that 95 percent of his troops would have voted for his reelection “had we been given the opportunity.” For a sergeant stationed at Camp Stoneman, Curtin’s

⁷⁹ Jack Willoughby to Daul, September 12, 1863, James Randolph Simpson and George Simpson Papers, Civil War Miscellaneous Collection, USAMHI.

⁸⁰ Samuel Z. Maxwell to Aunt and Cousin, October 1, 1863, Maxwell Letters, Civil War Miscellaneous Collection, USAMHI. See, also, John Guest to Sister, October 18, 1863, John Guest Correspondence, Civil War Miscellaneous Collection, USAMHI.

reelection “over the cursed traitors of the north” was evidence that “the north is Loyal” and that the rebellion would soon be defeated.⁸¹

Republicans went to great lengths to win the votes of the soldiers in the gubernatorial election of 1863. Although soldiers could not vote in the field, because of the Supreme Court’s ruling, soldiers still were allowed to vote “*within the limits of Pa.*”⁸² A massive drive thus ensued to get soldiers and government officials sent home to vote.⁸³ Governor Curtin wrote to Lincoln asking for extensions for “our friends from the Army” who were already on furlough in Pennsylvania, but who were scheduled to return to the field a few days before the election.⁸⁴ Secretary of War Edwin M. Stanton ordered fifteen hundred convalescents from their military hospitals back to Pennsylvania in time for the election, noting that it “is my desire to do everything that can be properly done to carry the election in Pennsylvania.” Stanton also directed the military commanders in Pennsylvania “to grant furloughs and give transportation, home and back, to all electors

⁸¹ Edwin Z. Judson to Curtin, October 1, 1863, Lt. Col. Charles Parham to Curtin, October 7, 1863, W. R. Whitman to Curtin, August 30, 1863, John Ely to Curtin, October 17, 1863, Sgt. Joseph E. Cramer to Curtin, October 20, 1863, all in Records of the Department of the Military, Office of the Adjutant General, RG-19, series 29, boxes 19-20, PHMC.

⁸² J. Hoffman to Eli Slifer, August 1863, Slifer-Dill Papers. See also H. J. Stable to Jeremiah S. Black, September 23, 1863, Black Papers, LC; George W. Hamersly to Thaddeus Stevens, September 29, 1863, Thaddeus Stevens Papers, LC.

⁸³ James Chatham to Eli Slifer, October 2, 1863; see also Adam Grittinger to Eli Slifer, September 1, 1863, and William Griffith to Alexander Fry, October 6, 1863, all in Slifer-Dill Papers; see also R. G. White to Simon Cameron, September 18, 1863, and C. S. Minor to Simon Cameron, September 23, 1863, both in Cameron Papers, LC; T. Good to Simon Cameron, September 25, 1863, Cameron Papers, DCHS; and C. W. Ashcino[?] to McPherson, September 29, 1863, Edward McPherson Papers, LC.

⁸⁴ Curtin to Lincoln, September 17, 1863, Lincoln Papers.

who may be in your command, and may desire to exercise the elective franchise next Tuesday.”⁸⁵

Soldiers heard reports “that everything possible is being done” to get the troops home to vote. “The rumor now is that 500 leaves of absence are to be granted to the Division about the elections which is an absurdity.”⁸⁶ One Pennsylvania Republican worried that the Union armies were “in great danger” with so “many thousands of soldiers having come away to be in the state elections in Ohio and Pa. Everything here yields now to the contest for Governor.”⁸⁷ Some Pennsylvania politicians sent letters to the Curtin administration with names of soldiers who ought to be furloughed to return home to vote for the governor’s reelection, noting that the soldiers were “good talkers and will make good use of the time given them.” One Pennsylvanian reported to Eli Slifer, the Secretary of the Commonwealth, that ten imprisoned deserters who were “Rank Democrats,” members of the K.G.C., and “life long locofoco[s],” would vote for Curtin if Slifer could get them discharged from prison.⁸⁸

⁸⁵ Stanton to Generals Couch, Brooks, and Cadwalader, October 8, 1863, in letter books; [Stanton] to Sir, September 28, 1863, all in Stanton Papers. Other departments of the government also granted leaves of absence to allow Pennsylvanians to return home to vote. See, for example, Salmon P. Chase to Edward McPherson, October 5, 1863, McPherson Papers, LC.

⁸⁶ Jack Willoughby to Daul, September 12 and 26, 1863, James Randolph Simpson and George Simpson Papers, Civil War Miscellaneous Collection, USAMHI.

⁸⁷ Hiram Corson, diary entry for October 11, 1863, in Louis A. Meier, ed., “The Diaries of Hiram Corson, M.D.: Civil War Years, 1862-1865,” *Bulletin of the Historical Society of Montgomery County* 33 (Fall 2002), 232.

⁸⁸ William C. Duncan to Eli Slifer, September 18 and 21, 1863, W. G. Herrold to Eli Slifer, September 23, 1863, all in Slifer-Dill Papers.

Such politicking reveals the extent that politicians in power would go to maintain their place in the government. “Our business is to elect the ticket,” wrote one Pennsylvania Republican. “It can and must be done regardless of work and expense.” Victory could only be accomplished, according to this partisan, “by bringing every regiment into Penna for the *purpose of voting*,” and the federal government must be brought to see the necessity of such an action.⁸⁹ Another Republican called for the use of “all proper means to obtain a majority of votes for our Governor.” All proper means, according to this partisan, meant making sure draftees received the pay that was due them and having Governor Curtin “connect his name as having moved in the matter, to obtain the pay.”⁹⁰ Republican politicians went to great lengths to make their candidate appear most friendly to the soldiers in the field.

Some of the greatest electioneering took place in Centre county, where one Republican, fearing his county would give a majority for Woodward, asked the Curtin administration to send some soldiers home for the election. “A vote here might do us more good tha[n] killing rebels on the battle field,” he wrote. “We have some hopes of beating the Rebs in Centre Co. but cannot do it without help.”⁹¹ In order to ensure that only Republican soldiers obtained furloughs to return home for the election, another

⁸⁹ J. Hoffman to Eli Slifer, August 1863, Slifer-Dill Papers.

⁹⁰ Adam Grittinger to Eli Slifer, September 1, 1863, Slifer-Dill Papers. Another letter seeking furloughs for soldiers who would vote for Curtin: William Griffith to Alexander Fry, October 6, 1863, Slifer-Dill Papers. When soldiers were furloughed home they were ensured that it was the work of the Curtin administration that secured their furlough and travel expenses. See John W. Bailey, diary entry for September 29, 1863, John W. Bailey Diary, Harrisburg Civil War Round Table Collection, USAMHI.

⁹¹ William C. Duncan to Eli Slifer, October 1, 1863, Slifer-Dill Papers.

politician, Hugh McAllister, requested Colonel James A. Beaver of the 148th Pennsylvania Volunteers to send him “a list of the men in your regiment.—voters in Centre county—who can render most aid at and before the Election. Place them in the order of their relative importance proposing *democrats* in case they can be relied upon.”⁹² An officer from Colonel Beaver’s regiment, Captain Henry Forster, was running for a seat in the state legislature, and McAllister believed it would be “most beneficial” if the regiment openly endorsed his candidacy. Such cooperation of the soldiers in the field, along with the effort being put forth by Republicans at home, gave McAllister “strong hopes of carrying our ticket in this county.”⁹³

Colonel Beaver regretted that military operations prevented him and his command from going home to vote the Republican ticket, but the soldiers did their part from the field by writing letters home in support of the Republicans, and many did receive furloughs home to vote.⁹⁴ Following the elections, Democratic newspapers from Centre county were outraged by the Republicans’ duplicity. “They pretend that no pledge was exacted from any soldier, and that *Democratic* and Republican soldiers were sent home

⁹² Hugh McAllister to James A. Beaver, September 12 1863, James A. Beaver Papers, 1855-1914 (bulk 1881-96), Accession 1941-000H, Historical Collections and Labor Archives, Special Collections Department, University Libraries, Pennsylvania State University.

⁹³ McAllister to Beaver, September 10, 1863, *ibid.*

⁹⁴ James A. Beaver to Mother, September 18, 1863, and Beaver to My Dear Friend, September 7, 1863, both in James A. Beaver Papers, MG-389, PHMC.

indiscriminately,” the Bellefonte *Democratic Watchman* angrily exclaimed. “The radical journals have no readers so stupid as to believe that ‘cock and bull story.’”⁹⁵

Believing that soldiers had to pledge themselves for Curtin in order to receive a furlough, Democratic leaders hoped that some soldiers took the pledge for Curtin but cast their ballot for Woodward. Most Democrats, however, were convinced that they had been cheated out of a fair election. “It is certain that if the democratic soldiers of the state had been allowed to come home to vote Woodward would have been elected by a large majority,” wrote one man from Towanda. “I therefore look upon the fact of sending home the soldiers of one party to vote and not the other as a corrupt prostitution of the right of suffrage and an eternal disgrace to the party guilty of it.”⁹⁶ Either way, the glaring fact is that most soldiers opposed the Democratic ticket, believing that its frontrunner was a secession-sympathizing Copperhead who had found personal satisfaction in striking down their elective franchise. Republican efforts to portray Woodward as disloyal—even a traitor—won the hearty approbation of the troops. Writing before the election, one soldier claimed “It is as necessary to defeat Woodward as it is to defeat Lee.”⁹⁷ When one soldier from New Jersey met the invalid Major George A. Woodward nearly a year later, he wrote home to his wife: “he is the son of

⁹⁵ Bellefonte *Democratic Watchman*, November 13, 1863. See also J. D. Shugert to Charles J. Biddle, October 16, 1863, Biddle Family Papers.

⁹⁶ Thomas B. Florence to Charles J. Biddle, October 10, 1863, and W. Patton to Charles J. Biddle, October 16, 1863, both in Biddle Family Papers.

⁹⁷ Lemuel D. Dobbs, quoted in Joseph Gibbs, *Three Years in the Bloody Eleventh: The Campaigns of a Pennsylvania Reserves Regiment* (University Park: Penn State Press, 2002), 232.

that sechess Judge Woodward of Pennsylvania.”⁹⁸ Others simply thought it was “glorious to hear of the copperhead being defeated and old Andy reelected.”⁹⁹ Indeed, one Republican newspaper told its readers, “Woodward is a traitor at heart, and every old soldier will tell you so.”¹⁰⁰

The success Republicans found in persuading soldiers that Democrats like Woodward were traitors reveals the sensitivity soldiers felt towards the issues of treason and disloyalty. Those on the front lines were more likely to be persuaded by the Republican rhetoric of loyalty, especially when a candidate could be portrayed as hostile to the rights of the troops. Most soldiers came to believe what the Republican press had told them: that Woodward’s election would “send a thrill of joy throughout the desolated land of traitors.”¹⁰¹ Many Democratic soldiers wrote home to their families telling them

⁹⁸ Charles F. Johnson to Mary, June 26, 1864, in Fred Pelka, ed., *The Civil War Letters of Colonel Charles F. Johnson, Invalid Corps* (Boston: University of Massachusetts Press, 2004), 251.

⁹⁹ John I. Faller to Brother, October 19, 1863, in Milton E. Flower, ed. *Dear Folks at Home: The Civil War Letters of Leo W. and John I. Faller with an Account of Andersonville* (Carlisle, Pa.: Cumberland County Historical Society and Hamilton Library Association, 1963), 108. Soldiers from other states also rejoiced in Curtin’s victory. See, for example, Nelson Chapin to wife, October 19, 1863, Nelson Chapin Correspondence, *Civil War Times Illustrated* Collection, USAMHI; Joseph Jones to Nancy E. Jones, October 21, 1863, Gilder Lehrman Institute (GLC2739.80).

¹⁰⁰ Wellsboro *Agitator*, October 9, 1863. This issue of the *Agitator* also declared that “Every man on the Copperhead State and local tickets, in Pennsylvania, is an ally of treason. He may not know it, or so intend to bear himself; but he is none the less an ally of treason for all that. Ignorance cannot excuse him, neither can lack of intention.” The editors called on their readers to “Smite them, hip and thigh, as Israel smote the hosts of Amalek. So vote that treason shall never be popular in our midst. Make it a capital crime to connive at the overthrow of the Government.”

¹⁰¹ Chambersburg *Franklin Repository*, October 7, 1863, quoted in Arnold Shankman, “For the Union As It Was and the Constitution As It Is: A Copperhead Views the Civil War,” in *Rank and File: Civil War Essays in Honor of Bell Irvin Wiley*, ed.

not to vote for Woodward. Some civilian Democrats also came to support the incumbent governor, believing Woodward “was not assuredly loyal,” that his election would be “an incalculable National Calamity,” and that only Curtin “has been true to the country, and my country rises far above all political or party issues.”¹⁰² The Republican strategy to win the support of the troops through the rhetoric of loyalty, and to charge the Democratic nominee with treason, was central to Governor Curtin carrying the election of 1863.

IV.

The election of 1863 was a hard fought one; both sides knew that much was at stake in the outcome. Democrats felt certain that “trouble will last in Pennsylvania until we can get a democrat for Governor. *Then* some respect will be shewn to popular sentiment.”¹⁰³ James Buchanan believed that there had never been a more important political contest in the history of the nation, while Charles Mason, the head of the Society for the Diffusion of Political Knowledge in New York, thought the contest in

James I. Robertson, Jr., and Richard M. McCurry (San Rafael, Cal.: Presidio Press, 1976), 105.

¹⁰² William C. Logan to Gen. A. L. Russell, August 15, 1863; Martin Ryerson to Curtin, August 14, 1863; Daniel E. Davis to Curtin, September 30, 1863, Records, all in Records of the Department of the Military, Office of the Adjutant General, RG-19, series 29, box 19, PHMC.

¹⁰³ Warren J. Woodward to Charles R. Buckalew, October 17, 1862, Buckalew Papers.

Pennsylvania was more crucial than the one in his own state.¹⁰⁴ Jeremiah S. Black believed that losing this election would mean “our whole social fabric will be torn to pieces,” while his son, Chauncey, argued that “life, liberty, and property . . . are now all staked upon the fearful chance of the coming elections.”¹⁰⁵ With so much riding on the election, Warren J. Woodward, the judge’s nephew, believed that “no effort by sound men should be spared. If political liberty and the rights of the citizen are to be saved from the grasp of unscrupulous and arbitrary power, it must be this contest.”¹⁰⁶ Democrats thus became highly organized, setting up local meetings and rallies to garner support for their candidates state-wide.

Democrats went to Democratic Club meetings to hear the teaching of “sound doctrine.”¹⁰⁷ In fact, some Democrats were arrested by the military for their participation in Democratic meetings leading up to the election.¹⁰⁸ To Republicans, the Democrats were far from a principled group of politicians seeking to save the country and preserve constitutional liberty. The country was “alive with *Copperheads*,” noted one Republican,

¹⁰⁴ James Buchanan to Ellis Lewis, August 28, 1863, Ellis Lewis Papers, HSP; Charles Mason to Peter McCall, August 31, 1863, Cadwalader Collection, Peter McCall Section (Series X), HSP.

¹⁰⁵ Jeremiah S. Black to James Buchanan, July 20, 1863, Buchanan Papers; *Speech of Chauncey F. Black, of York, To the Democracy Assembled at Hawley, Wayne County, Pa., Sept. 21, 1863* (n.p., [1863]), 1.

¹⁰⁶ Warren J. Woodward to Lewis S. Coryell, June 27, 1863, Coryell Papers.

¹⁰⁷ James B. Weaver, diary entry for September 21, 1863, Diaries and Journals Collection, MG-6, Box 5, PHMC.

¹⁰⁸ RG 153, Court Martial Case file NN-1478, NARA.

and they must be beaten.¹⁰⁹ Another Republican went to Independence Square one evening to watch a “Copperhead” meeting. “There was a large collection of patriots,” he noted sarcastically, who “exhibited their contempt for ‘ould Abe’ and their determination to uphold the principles of constitutional liberty and freedom of speech by continuous shoutings, clappings, and hurrahings the vigor of which sundry potations of whiskey materially increased. In fact about the best point I heard made, and the one which received the greatest applause, was that in a few years, if the war continued and taxes increased, the price of whiskey would be raised so high that none but shoddy contractors would be able to buy it.”¹¹⁰ Another Republican faulted Democratic stump speakers for being “so mean and hostile . . . in relation to the war” and for being “savage on the Administration and the abolitionists.”¹¹¹ Woodward rarely took the stump, and Republicans castigated him for it, insinuating that he had more to hide than to say.¹¹²

Both sides thoroughly organized their troops for battle. “The political contest for Governor in this state is now waxing terribly hot,” confided one Republican to his

¹⁰⁹ John F. Woods to Brother, September 10, 1863, Woods Family Collection, MG-188, PHMC.

¹¹⁰ Samuel W. Pennypacker to Grandfather, September 19, 1863, Pennypacker Mills.

¹¹¹ Hiram Corson, diary entry for June 21, 1863, in Louis A. Meier, ed., “The Diaries of Hiram Corson, M.D.: Civil War Years, 1862-1865,” *Bulletin of the Historical Society of Montgomery County* 33 (Fall 2002), 219.

¹¹² See, for example, *Pittsburgh Daily Commercial*, October 7, 1863, *Philadelphia Press*, August 27, 1863, *Philadelphia Daily Evening Bulletin*, August 7, 1863, *Wellsboro Agitator*, September 30, 1863, and “Excursion” ticket in the possession of the author which can be seen in Jonathan W. White, “An Unlikely Database: Using the Internet Creatively in Historical Research,” 44 *Perspectives: Newsmagazine of the American Historical Association* (March 2006), 52-53.

diary.¹¹³ Republicans formed Union Leagues in many towns to help “bring to the polls . . . every qualified voter who can be relied on to vote for our nominees.”¹¹⁴ Many of these admittedly “secret political associations” required loyalty oaths that were “exceedingly solemn and binding.”¹¹⁵

Local politicians made great efforts to convince their neighbors how to vote. “I speak German well enough to make it amusing and Get votes,” wrote one Cameron disciple, “and as the latter is the most important it will not make much difference about the Grammatical part.”¹¹⁶ Both parties also worked urgently to get their friends to the polls. “Was at David Yeager’s and Geo. D. Deibler’s & encouraged them to go to the election,” wrote one excited Democrat.¹¹⁷ Meanwhile, a Republican wrote to the Curtin administration requesting \$25, with which he “could make 10 vots in Wayn township on the day of lection.”¹¹⁸ An 86 year old man from Pittsburgh hoped that he would live long enough to give his franchise to Judge Woodward. “Life is uncertain,” he wrote to former president Buchanan, “but I have strong hopes to live till the second Tuesday of October

¹¹³ Corson, diary entry for June 21, 1863, in Meier, ed., “Diaries,” 219.

¹¹⁴ R. G. White to Simon Cameron, September 18, 1863, Cameron Papers, LC.

¹¹⁵ Corson, diary entry for September 15, 1863, in Meier, ed., “Diaries,” 230.

¹¹⁶ A. Oppenheimer to Simon Cameron, August 18, 1863, Cameron Papers, LC.

¹¹⁷ James B. Weaver, diary entry for October 12, 1863, Diaries and Journals Collection, MG-6, Box 5, PHMC. See also Hiester Clymer to Charles J. Biddle, September 11, 1863, Biddle Family Papers.

¹¹⁸ William Brothers to Eli Slifer, October 9, 1863, Slifer-Dill Papers.

to vote for Judge Woodward and the entire Democratic ticket which I have no doubt will succeed.”¹¹⁹

One of the foremost concerns for the Republican party was maintaining party unity. “I believe that if we can be united we have reason to expect success,” wrote one Republican early in the campaign. With the party divided between the conservative Curtin wing and the radical Cameron wing, staying united proved a difficult task. But Governor Curtin devoted himself to suppressing “all personal considerations, and all political and personal differences and disagreements” in order to “give the Contest all my time and energies.” Republicans at the state level also earnestly sought the support of the Republicans in the federal government. On several occasions Governor Curtin wrote to Lincoln asking that he comply with the “reasonable requests of our state committee.” The chairman of the state Republican party also wrote to Lincoln inviting him to deliver a campaign speech in Pennsylvania.¹²⁰ Although the president was not able to lend Curtin his superb speech-making abilities, many other Republicans were up to the task.

Members of both parties traveled the state taking the stump. “The people came to hear words of truth and soberness,” recalled Alexander McClure forty years later.¹²¹ Nevertheless, much harsh rhetoric was hurled through the air. Democrats criticized Andrew Curtin for being a Know Nothing, and Daniel Agnew, the Republican candidate

¹¹⁹ John Anderson to James Buchanan, August 3, 1863, Buchanan Papers.

¹²⁰ Thomas Pomeroy to Samuel Calvin, April 3, 1863, Calvin Papers; Curtin to Lincoln, September 4 and 18, 1863 and Wayne McVeagh to Lincoln, September 7, 1863, all in Lincoln Papers.

¹²¹ McClure, *Old Time Notes*, 2:60. For a personal description of a Union mass rally in 1863, see Adam Jasper Best to Salindy Saltsgiver, October 23, 1863, Best Letters, Civil War Miscellaneous Collection, USAMHI.

for Supreme Court, for supporting black suffrage at the 1837 constitution convention. Republicans countered that Woodward had been an opponent of free speech in the 1830s.¹²² One speech delivered by Jeremiah Black was reprinted in Democratic papers and was widely read. “The democrats are in extacies over it,” reported Black’s nephew, and “the ‘abolitionists’ cant swallow it, but they don’t know why.”¹²³

Political pamphlets in this campaign tended to say little about the candidate they endorsed; their primary purpose was to denigrate the opposition. While Republican pamphleteers were accusing Woodward of treason, Democrats castigated the Curtin administration for its handling of the war. Significantly, the Democrats drew on the pre-nomination dissension within the Republican ranks, publishing several pamphlets that fully reprinted anti-Curtin editorials from the Cameron-supporting *Pittsburgh Gazette*. These editorials accused Curtin of corruption when acquiring supplies for the military, clothing the soldiers “*in rags*, with shoddy vestments, shoes whose soles were stuffed with shavings, and blankets almost as thin and transparent as a window-pane.” They also blamed Curtin for signing legislation that he knew had been “procured by corrupt and illegal means,” and of being too soft on the South. Curtin’s closest friends and counselors, according to the anti-Curtin Republicans (and the Democrats who quoted them), “have thought and said this was a negro war; . . . that for every South Carolina rebel they would hang a Massachusetts abolitionist—that the rebels could not be

¹²² Bellefonte *Democratic Watchman*, October 9, 1863; *The Liberator*, September 25, 1863.

¹²³ Jamison Black to Jeremiah S. Black, September 24, 1863, Black Papers. See also James Buchanan to George C. Lieper, September 22, 1863, Buchanan Papers; Buchanan to Jeremiah S. Black, October 9, 1863, Black Papers.

whipped—that the war ought therefore to be stopped—and that they would be glad to see it done even by foreign intervention, if not otherwise.” Moreover, Curtin was “weak and nervous, timid and vacillating,” and wholly unfit for command in these times of crisis. These Republicans (and Democrats) further claimed that Curtin was unpopular with the soldiers (because of the shoddy), and that his dishonest political dealings ought to disqualify him for office.¹²⁴

Republicans often criticized the Democrats for being harder on Lincoln than they were on the rebels.¹²⁵ This was a pretty accurate assessment, as a quick perusal of nearly any Democratic set of resolutions would reveal. The Democrats attacked the Republicans so severely, however, because they believed themselves to be the true victims of the war. After discussing a litany of the tyrannical war measures of the Lincoln administration, one Democratic orator complained that there were no constitutional protections left to the people. Describing the arrest of Judge Richard Carmichael of Maryland (see Chapter 2), this speaker told how the judge was dealt “repeated blows in the face; so leaving his blood to stain the outraged sanctuary of justice. Bruised and bleeding, he is dragged away to prison.” But while these events would seem incredible to most listeners, “they actually have been done with the connivance and approval of an American President, and a political party has been found to applaud his crime.” Many Pennsylvanians had been similarly arrested, but Governor

¹²⁴ *The Political Portrait of Andrew G. Curtin, By One of His Own Party* (n.p., [1863]), 3, 9, 11-12, 21. See also *A Black Record! Gov. Curtin's Portrait Drawn by a Black Republican Editor. Who Clothed Our Soldiers in Shoddy? Who Plundered Our Brave Volunteers? Voters Read!* (Philadelphia: The Age Office, [1863]).

¹²⁵ See, for example, *Philadelphia Inquirer*, June 19, 1863.

Curtin only “faintly condemned” the arrests. What the Democrats wanted was a governor like Woodward—one who would protect the citizens of his state from the despotic and unconstitutional actions of the federal executive.¹²⁶

As election day approached, both sides were confident of victory. “I cannot doubt Woodward’s election, unless the Kentucky game is re-enacted in Pennsylvania,” wrote one Democrat, referring to the military supervision of elections in the border states (see Chapter 6). This fear of fraud among the opposition party was prevalent; few doubted that a fair vote would be had on October 13. “*The Despotic Party* is resolved to maintain itself in power by any and all means that may be necessary to that end,” wrote one Democrat to James Buchanan, even if that meant putting Pennsylvania “under martial law to prevent the democrats, or as they are pleased to call us ‘copperheads,’ from voting.”¹²⁷

October 13 was a day of great excitement in Pennsylvania. Some observers noted that it “was a very rough election—a great deal of quarreling was going on.” A Democratic soldier who had gone home to vote claimed that “the Republicans tried to put Guards at the polls to keep the Democrats from voting” but that the Democrats would not stand for it. As election day proceeded, Republican leaders in Pennsylvania telegraphed “cheering” news to Lincoln in Washington. By 10:45 P.M. the Republicans were certain

¹²⁶ *Speech of Chauncey F. Black*, 9-11. For Curtin’s message to the legislature, see Curtin, “To the Assembly Concerning the Treatment of Citizens of Pennsylvania Hostile to the Union,” in *Pennsylvania Archives*, ser. 4, vol. 8, pp. 492-494. The Republican platform adopted at Pittsburgh in 1863 praised Lincoln for the arrests of traitors wherever they were.

¹²⁷ Nimrod Strickland to William Bigler, August 17, 1863, William Bigler Papers, HSP; John B. Blake to James Buchanan, August 6, 1863, Buchanan Papers.

that the governor had won. Republicans in the state rejoiced. “Most of the snakes are in their holes,” noted one jubilant partisan. This was a “splendid triumph of loyalty,” headlined a Republican paper in Philadelphia.¹²⁸

In the days following the election, Democrats hoped that their candidate would successfully oust the Curtin administration, but as each day passed, their expectations grew increasingly dim. When, on October 16, one Democrat finally admitted that Curtin had won the election, he confided to his diary that the Republicans overstated the margin of their victory, and that he felt “very sorry for my country. Lord save it.” Many Democrats alleged that only Republican soldiers had been furloughed home to vote, and many others were convinced that fraudulent votes and practices had carried the election for the Republicans, but few believed that anything could be gained by contesting the election as the state legislature was controlled by Republicans.¹²⁹ “The election in your state resulted pretty much as I predicted it would,” wrote one of James Buchanan’s frequent correspondents. “I felt satisfied that the party in power would resort to every

¹²⁸ James B. Weaver, diary entry for October 13, 1863, Diaries and Journals Collection, MG-6, Box 5, PHMC; William T. Shimp to Annie, November 8, 1863, William T. Shimp Papers, Civil War Miscellaneous Collection, USAMHI; Wayne McVeagh to Lincoln, October 13, 1863 (two telegrams of this date), James M. Scovel to Lincoln, October 11, 1863, Titian J. Coffey to Lincoln, October 13, 1863, Wayne McVeagh to Lincoln, October 14, 1863, all in Lincoln Papers; William Davis to Samuel Calvin, Calvin Papers; Philadelphia *Daily Evening Bulletin*, October 14, 1863.

¹²⁹ James B. Weaver, diary entries for October 14, 15, 16, 18, 1863, Diaries and Journals Collection, MG-6, Box 5, PHMC; W. Patton to Charles J. Biddle, October 16, 1863; W. C. Patterson to Biddle, October 20, 1863; J. G. Jones to Biddle, November 3, 1863; W. H. Hutter to Biddle, November 6, 1863; W. J. H. Cauley to Biddle, November 10, 1863; T. B. I. to Biddle, November 13, 1863; F. W. Grayson to Biddle, November 19, 1863; H. W. Weir to Biddle, November 30, 1863, all in Biddle Family Papers. See also A. Logan Grim to J. Simpson Africa, October 22, 1863, and Charles J. Biddle to J. Simpson Africa, October 30, 1863, both in J. Simpson Africa Papers, MG-14, PHMC; New York *World*, October 14, 1863.

means to achieve a triumph and there is no doubt but that thousands of illegal votes have been polled in Pennsylvania and Ohio.”¹³⁰

Woodward and Biddle thought about contesting the election. “I have no personal desire for a successful impeachment of the late election and no belief that it is possible,” wrote the judge to his campaign manager. “I should however be very glad to see an accurate history of the great frauds by which we were cheated out of our rights, and to this end I hope the facts will be collected from local sources.” If enough evidence of fraud surfaced, Woodward would contest the result. Biddle solicited information from Democrats throughout the state and received many letters full of scandalous election-day chicanery, but ultimately the Democrats decided not to inaugurate a challenge. Charles Biddle took heart in knowing he had made a valiant fight in the face of many disadvantages. Not only did he have less money to work with, but “considering that Federal, state, and municipal governments, military, ecclesiastical, and money powers were against us, the Democracy were not so very badly beaten after all,” he wrote to a Republican friend.¹³¹

The ecclesiastical powers, indeed, had been a point of great contention during the election. A devout Episcopalian, Woodward’s position on slavery had in many ways

¹³⁰ John B. Blake to James Buchanan, October 24, 1863, Buchanan Papers. Partisans on both sides believed that fraud had be perpetrated by the other side. See Stanton Ling Davis, *Pennsylvania Politics, 1860-1863* (Cleveland, Ohio: Western Reserve University Bookstore, 1935), 315-317.

¹³¹ Woodward to Charles J. Biddle, October 24, 1863, Biddle Family Papers; Charles J. Biddle to Edward McPherson, October 24, 1863, McPherson Papers, LC. Following the election Chief Justice Lowrie planned to return to private practice: “My defeat was certainly a great disappointment to my wishes, though my fears had foreboding of it.” Walter H. Lowrie to Benjamin H. Brewster, March 7, 1864, Society Miscellaneous Collection, HSP.

turned his church into a house divided. During the campaign, Democrats reprinted and distributed a biblical defense of slavery written by the Bishop of Vermont, John Henry Hopkins. In response, one hundred sixty members of the clergy signed a protest that was issued in both pamphlet and broadside form. Republican newspapers declared that Bishop Hopkins' "disloyal" sentiments had been put to use by the "Northern traitors," and many preachers took public stances against Woodward and Hopkins.¹³² Feeling he had been libeled, Woodward contemplated suing the Bishop of Philadelphia for spearheading the protest.¹³³ While he did not follow through with the suit, he did sell his pew at Holy Trinity Church in Philadelphia because his rector there, Rev. Phillips Brooks, had preached against his political position on slavery. Brooks was sorry to see Woodward go, "for he is a very pleasant man, and has been one of my kindest friends. I presume we shall get along without him, but I wish he could have stayed among us."¹³⁴

¹³² John Henry Hopkins, *Bible View of Slavery* (1861; reprint, New York: Society for the Diffusion of Political Knowledge, 1863); Alonzo Potter's "Protest of the Bishop and Clergy of the Diocese of Pennsylvania against Bishop Hopkins' Letter on African Slavery" was issued in Philadelphia in 1863 in various formats, including as a broadside, *The Voice of the Clergy* (Philadelphia, 1863); *Philadelphia Press*, August 26, 1863. For other publications in this pamphlet war, see Biblicus [pseudonym], *The Bible View of Slavery Reconsidered: A Letter to the Right Rev. Bishop Hopkins*, 2nd ed. (Philadelphia: Henry B. Ashmead, 1863), James May, *Remarks on Bishop Hopkins' Letter on the Bible View of Slavery* (n.p., 1863), John Patterson Lundy, *Review of Bishop Hopkins' Bible View of Slavery, by a Presbyterian of the Church in Philadelphia* (Philadelphia, 1863), Stephen M. Vail, *The Bible against Slavery, with Replies to the "Bible View of Slavery," by John H. Hopkins, D. D., Bishop of the Diocese of Vermont; and to "A Northern Presbyterian's Second Letter to Ministers of the Gospel," by Nathan Lord, D. D., Late President of Dartmouth College; and to "X," of the New-Hampshire Patriot* (Concord: Fogg, Hadley & Co., 1864).

¹³³ Woodward to Peter McCall, October 23, 1863, in White, ed., "Pennsylvania Judge," 221-222.

¹³⁴ Phillips Brooks to William, October 17, 1863, in Alexander V. G. Allen, *Life and Letters of Phillips Brooks*, 2 vols. (New York, 1900), 1:460-463.

More partisan Republicans, however, found the situation comical. “Woodward is acting like a boy since his defeat,” wrote Morton McMichael, Jr., the son of a leading Philadelphia Republican. “He has actually sold his pew in church because the Rector signed the anti-Hopkins memorial and stopped his subscription to a church paper published here because it approved of the anti-slavery protest!” That Woodward had taken these actions “within a week after his defeat make him very ridiculous.”¹³⁵

V.

As this brief sketch of the campaign reveals, many of the impressions of Woodward were at best based on half-truths. Certainly, this realization should not elicit too much surprise. Nevertheless, the picture painted of Democrats like Woodward has, in many ways, lasted to the present. If not all Democrats were traitors, the saying goes, all traitors were Democrats. Along these lines, most Republicans at the time believed that Woodward was one of those “Copperhead” Democrats. It is important, therefore, to take a close look at Judge Woodward’s judicial and political views, and also his response to the many accusations of treason that he faced during the gubernatorial campaign in order to ascertain whether the standard view of Woodward as a traitor, or near-traitor, is correct.

The Democratic responses to allegations of treason are less well-known than the accusations themselves. This might be because the Republicans were so effective at charging Democrats with treason. The election of 1863 was one instance when

¹³⁵ Morton McMichael, Jr. to Edward McPherson, October 23, 1863, McPherson Papers, LC.

Republican allegations of treason were at their most profuse and effective. The Union League's Board of Publications had its "first serious political fight," according to historian Frank Freidel, and the "editors developed skillful techniques for repudiating Judge Woodward," portraying him as a pro-slavery, pro-secession, anti-immigrant candidate, reminding "readers that in 1860 Woodward had favored allowing the South to secede peacefully—not adding, of course, that at that same time Horace Greeley and others held similar views." In 1863, according to Freidel, "they asserted with dubious accuracy, Woodward still wished to compromise with the South."¹³⁶ A few years after the war, the League claimed to have distributed more than one million campaign pamphlets in English and German in 1863. This effort on behalf of the Republican incumbent, according to the Union League, was a "real service to the country" and "reflected . . . true and lasting honor upon the League . . . at that most critical period in our country's history, the autumn of 1863, when Governor Curtin was a candidate for re-election."¹³⁷ The success of the Republicans' charges of disloyalty, therefore, make the

¹³⁶ Frank Freidel, ed., "Introduction," *Union Pamphlets of the Civil War, 1861-1865*, 2 vols. (Cambridge, Mass: Harvard University Press, 1967), 1:6-7. As had been the case in previous campaigns, Woodward was also accused of nativism in 1863. This accusation had first surfaced in 1845, when Woodward ran for the U.S. Senate, and again in 1852, when he was a candidate for the state supreme court. All of the available evidence, both public and private, indicates that this was a false and scurrilous charge. See, for example, "Judge Woodward's Reply," September 14, 1852, in "Judge Woodward and the Contest in Pennsylvania," *The Old Guard: A Monthly Journal, Devoted to the Principles of 1776 and 1787* 1 (September 1863), 224; Woodward to Bigler, September 15, 1852, Bigler Papers. For the Republican side of this debate, see *Woodward on Foreigners* (Philadelphia: H. B. Ashmead, 1863), which was also published in German as *Woodward über die Fremden*.

¹³⁷ George Parsons Lathrop, *History of the Union League of Philadelphia, From its Origin and Foundation to the Year 1882*. Philadelphia: J. B. Lippincott & Co., 1884), 67-69.

election of 1863 an ideal opportunity to examine how Democrats reacted to the changing understandings of loyalty and treason.

In truth, the Democrats made themselves vulnerable to charges of treason by including a plank in their platform sympathizing with Clement Vallandigham. When Republican newspapers noted “Woodward’s Disloyalty,” they frequently linked Woodward’s name with Vallandigham’s, which in turn, seemed to link Woodward to Jeff Davis. A Republican sheet in Pittsburgh declared that the election was a battle between those “in favor of the Union or of Jeff Davis’ confederacy, of freedom or slavery, of civilization or of barbarism.” In fact, the paper declared, “Woodward and Lowrie are no less lieutenants of Jeff Davis than are Lee, Longstreet, Beauregard, Bragg, Price, and Polk; and the rank and file who follow the lead of the two first of this half dozen worthies, are as much doing battle on the side of the slave-holders’ rebellion as are those who follow the lead of the four last.”¹³⁸ Such an accusation, in substance, made every Democratic voter morally equivalent to the rebel soldiers on the battlefield.

Thoughtful Democrats recognized that the “Vallandigham resolution in the platform hurt us a little while it could do us no possible good.”¹³⁹ After the election, another Democrat wrote to the editor of the New York *World* that the Democrats had erred in linking Woodward to Vallandigham. While Val had been “greatly wronged,” the party could not allow his “mischievous errors” to damage the cause of the whole Democratic party. As this Democrat saw it, “the nomination of Val. has identified the

¹³⁸ *Pittsburgh Daily Commercial*, October 3, 1863. See also *Wellsboro Agitator*, September 30, 1863.

¹³⁹ James Brediu to Charles J. Biddle, October 16, 1863, Biddle Family Papers.

whole Party with him throughout the Country & no doubt caused as disastrous results as his [in Ohio]" throughout the North. If the Democratic party was to succeed, they could not follow Peace men like Ben Wood, Vallandigham, or James Brooks of New York, but rather "such calm & wise Counsellors" as Governor Horatio Seymour of New York and Judge George W. Woodward of Pennsylvania. "There is no mistake about one point," continued the writer, "the democratic party must plant itself immovably on the war footing—that is it must distinctly & inexorably take the ground of prosecuting the war until the rebellion is subdued—cost what it may of time, money or men. It must do this so plain that there can be no cavil about it & those who cannot unite with us in this must be cut loose & sent a drift."¹⁴⁰ In short, the Democrats had chosen the wrong person for martyrdom since Vallandigham had purposefully voted against supplies for the troops. Woodward, to Democrats like this one, stood for wholly loyal principles.

When the Army of Northern Virginia marched into Pennsylvania in June 1863, the chairman of the state's Democratic party, Charles J. Biddle, resigned his position to fight against the rebel invaders. Woodward accepted Biddle's resignation and published a letter in which he "cheerfully consent[ed], so far as I have any interest in your movements, to your resort to arms in defence of the state. Indeed, much as I regret to lose your services at the head of the Committee, I nevertheless earnestly desire you to go, and, if possible, to take with you men enough to expel the invaders from our borders." Woodward also believed that enough young men ought to respond to Governor Curtin's

¹⁴⁰ J. N. Baldwin to Manton Marble, October 14, 1863, Manton Marble Papers, LC.

call for emergency troops to “be sufficient to assure the public safety, and to teach the world that no hostile foot can, with impunity tread the soil of Pennsylvania.” The “main purpose of our correspondence,” Woodward later wrote privately to Biddle, “was to explain ourselves to the public thro. the morning paper,” and to some extent, it worked.¹⁴¹ The moderate Republican *Philadelphia Inquirer* considered the action of these two Democrats “an example to be followed.”¹⁴² Biddle’s plans fell through, however, and he was unable to raise an entire company of men. Woodward was sorry to learn of Biddle’s misfortune, so he offered Biddle the chairmanship back if he would like it. Biddle replied that he had relinquished “the post, to give, with yourself, an emphatic expression and direction to the party sentiment, on the question of state defence.” After some deliberation, Biddle resumed his position as party chairman.¹⁴³ This exchange reveals one very important aspect of the judge’s beliefs about the war: Woodward was a state-centered nationalist. If any hostile army invaded the state, he would ardently support its defense.

Woodward’s state-centered nationalism had major implications for northern civilians during the war. The Democrats who supported Woodward believed that he could bring salvation to the state. “You *must* be elected, or the state be blotted out in the

¹⁴¹ Woodward to Charles J. Biddle, June 29 and 30, 1863, Biddle Family Papers.

¹⁴² *Philadelphia Inquirer*, June 30, 1863. Other Republican organs were less gracious: “Woodward has been smoked out, in part. He went so far as to say he was in favor of resisting Lee’s raid into Pennsylvania. He has not got so far, yet, as to declare in favor of putting down the Rebels.” See *Union County Star and Lewisburg Chronicle*, July 28, 1863. This criticism is fair, but it should be remembered that Generals McClellan and Meade also spoke of expelling invading armies from northern soil.

¹⁴³ Woodward to Charles J. Biddle, July 6, 1863; Biddle to Woodward, July 7, 1863, both in Biddle Family Papers.

hopeless anarchy sure to follow a triumph of the heartless fanatics, and plundering villains who rule us at present,” wrote one Democratic leader to Woodward. Only in his victory would “peace and prosperity” be restored to the land. Indeed, Pennsylvania Democrats believed that Woodward could also redeem the nation. As the people were groaning under the heavy hand of executive tyranny, they turned to him to protect their liberty and to stand against President Lincoln’s usurpations of power. In this way, Democrats hoped that Woodward, relying on the 1798 doctrine of interposition, would use the power of the state to protect Pennsylvanians from an overreaching centralized power.¹⁴⁴

Still over-confident from their 1862 electoral victories in early 1863, Pennsylvania Democrats believed that war-weary northerners would continue to elect Democrats to office. “Discontent always seeks relief in *change*,” wrote a former Democratic congressman to Biddle, and discontent must “work to our advantage. . . . I feel the deepest interest in Judge Woodward’s success, regarding the salvation of our country as almost dependent upon it.”¹⁴⁵ A Democratic editor praised Woodward for his unimpeachable public and private character, claiming he would protect “the rights of *all* the citizens under the Constitution” and “the honor and integrity of old Pennsylvania.”¹⁴⁶ A young man in central Pennsylvania hung a U.S. flag on his house with the inscription,

¹⁴⁴ C. L. Ward to Woodward, July 9, 1863 and Findley Patterson to Charles J. Biddle, July 25, 1863, both in Biddle Family Papers.

¹⁴⁵ J. Glancy Jones to Charles J. Biddle, August 10, 1863, Biddle Family Papers.

¹⁴⁶ Bellefonte *Democratic Watchman*, June 26, 1863.

“Woodward, Lowrie, and our WHOLE country.”¹⁴⁷ Using almost messianic terms, these Democrats viewed their standard bearer through the lens of state-centered nationalism. They believed the Union as a whole should be preserved, but they also believed that their rights were best protected by strong leadership at the state level.

In many instances, Democrats tried to turn the charges of treason back on their accusers. When Jeremiah S. Black delivered a speech in September 1863, he declared Woodward had “the most fervent devotion to the Union” and, indeed, was a “Union Saver.” “In a hundred conversations or a score of written communications, I, and many others, have seen the evidence of his love for the Federal Union and his hatred for every species of treason that might weaken or overthrow it.” For Black, it was the “black Abolitionist, who believes the Constitution to be a covenant with hell, and who by destroying the Constitution would make an end of the Union as certainly as you take the life of a man by cutting the heart out of the body.”¹⁴⁸ Black repudiated the charges of the Republicans and placed them back on Woodward’s accusers, claiming that it was the sectionalism of the Republican party that had led to interstate hostilities. While it may have been a stretch to consider Woodward a Union saver, for he was never vocal on the subject, Black was certainly right to point out that Woodward had strongly wanted preservation of the Union before the war began.

¹⁴⁷ Bellefonte *Democratic Watchman*, September 11, 1863. In 1863, the Lewistown *True Democrat* featured an American flag with the slogan, “Our Whole Country!” as its banner. See Lewistown *True Democrat*, July 8, 1863.

¹⁴⁸ Jeremiah S. Black, *Speech of the Hon. Jeremiah S. Black, at the Democratic Mass Convention in Lancaster City, September 17, 1863* (Harrisburg, Pa., 1863), 3-4. Black went to great lengths in this speech to underscore his personal friendship with Woodward in contrast to N. B. Browne’s alleged “intimate acquaintance.”

Democratic supporters of Woodward believed that he was faithful to the true principles of Democracy: state-rights, white supremacy, constitutional liberty, limited government, and government by consent. The Lincoln administration had, in their minds, violated all of these principles. One editor disparaged what he termed “The War for Niggers, Subjugation and Plunder.” Many Democrats also believed that the abolitionism of the Lincoln administration was the source of “a great share of our troubles.”¹⁴⁹ If Democrats supported a vigorous prosecution of the war, it was only on the terms of the Constitution, not on what they believed were Lincoln’s extra-constitutional actions.

Judge Woodward’s personal response to Republican allegations illuminates how northern Democrats decried the accusations of treason being levied against them. Significantly, Woodward sought to vindicate his past and present loyalty. Whether consciously or not, Woodward articulated a view that would have satisfied even the “ironclad test oath” adopted by Congress in August 1862. When his personal friend, Jeremiah Black, wrote him asking what information he could include in a campaign speech, Woodward replied: “If I am a traitor I pray you tell the people of Penna. so, but tell them also *to* whom I would betray a people among whom I was born and have always lived & with whom my all of earthly goods & honor is embarked.” He continued with a long enumeration of evidence he believed absolved him of disloyalty:

If I have not venerated the constitution which established this confederacy of free & slave states—if I have not thank’d God again & again for the men who fixed up this Union for you & me and our children—if I have not scorned and denounced the transcendental, hypocritical, canting philanthropy that would overthrow the work of the founders & set up a negro despotism upon its ruins—if I have not paid my taxes, contributed

¹⁴⁹ Bellefonte *Democratic Watchman*, July 17, 1863; John Morris to Woodward, June 23, 1863, Biddle Family Papers; *Philadelphia Age*, August 4, 1863.

money and sons to fight our battles, and in general performed the duties of an humble but loyal citizen then testify against me. If all this has been done, not as it ought to have been, but in much weakness then give me the benefit of your testimony. My Grandfathers fought the battles of the revolution. If my father had not lost one of his hands he would doubtless have fought in the war of 1812. My sons have taken part in the present war. The family have been in the country since 1640—is widely diffused & very numerous. Two things I have never heard alleged against any individual of my race either on the paternal or maternal side—1st. that he betrayed or opposed his Country—2d. that he ever received a dollar from the Government of the U.S. on a contract or civil office.

Woodward closed his letter in a tone of near disbelief at the charges that were being levied against him: “Now cant. you convince the people of Penna. that no traitor blood lurks in my veins?” he asked Black. “I rather think they are the last people I shall prove unfaithful to. Indeed I do not know to whom I would sell them if I was bent on a bargain.”¹⁵⁰

The substance of Woodward’s private response more than adequately answers the Republicans’ accusations. Republicans charged Woodward with disloyal sentiments, not overt acts. One Republican pamphlet claimed that the Democrats had nominated Woodward because of his “zeal and alacrity in thus attacking the soldiers and their right to vote, and for his declared sentiments *directly justifying the southern rebellion.*”¹⁵¹ The first accusation pertains to his state supreme court decision, the second to his 1860 Independence Hall speech, neither of which were relevant to the condition of

¹⁵⁰ George W. Woodward to Jeremiah S. Black, September 10, 1863, in White, ed., “Pennsylvania Judge,” 218-219. I have silently corrected the word “canting,” which I mis-transcribed in the published version of the Woodward letters.

¹⁵¹ William E. Chandler, *The Soldier’s Right to Vote. Who Opposes It? Who Favors It?, or, The Record of the M’Clellan Copperheads Against Allowing the Soldier Who Fights, the Right to Vote While Fighting* (Washington, D.C., 1864), 8-9. Emphasis in the original.

Woodward's loyalty in 1863. The court case was based on sound textual analysis of the state constitution, and his sentiments in 1860—in favor of a peaceable separation, as a last resort—were held by members of both parties.¹⁵² Nevertheless, Republicans attacked Woodward not by pointing out any “overt Act” by which the judge had levied war against the government or aided or comforted the enemy during the war, but by questioning his thoughts, a pre-war speech, and his opinions from the bench. Ordinary Republicans had internalized the logic that treason could be found in something other than overt acts of war against the United States. They also exploited any opposition Woodward had to Republican war measures as evidence of the treason that was lurking in his heart.

The Democrats, by contrast, pointed to Woodward's overt acts in support of the Union. He had sought to avert the sectional crisis, he had continued to serve in the administration of government, he had paid his taxes in support of the war, and he had sent two sons off to fight, and he had paid the bulk of the cost to raise a company of troops. To underscore the proof of his past loyalty, Woodward even evoked the memory of his genealogy. Since the time of the Revolution his family had supported the government without ever profiting from it. All overt acts, in Woodward's mind, proving that he was truly loyal to the Constitution and Union. It was the Republicans, in his view, who were the sectional traitors to the national cause.

¹⁵² For the soldier voting case, see White, “Citizens and Soldiers,” 53-55. Horace Greeley is the most prominent Republican who advocated allowing the South to leave the Union, but many others shared the sentiment, at least for a short while. See, for example, Benjamin Brown French, diary entries for November 27, 1860 and March 9, 1862, in Donald B. Cole and John J. McDonough, eds., *Witness to the Young Republic: A Yankee's Journal, 1828-1870* (London: University Press of New England, 1989), 336, 390; White, ed., *Philadelphia Perspective*, 63-64, 69-70.

Contrary to the false stories about his sons in the Union army, Woodward took great pride in their service to the country. In fact, when the judge heard rumors of one of his son's promotion, Woodward wrote to the Secretary of the Commonwealth to ascertain whether the rumors were true. "I have understood that his superior officers give an excellent account of George," wrote Woodward with great satisfaction, "and I should feel highly gratified to know that he had been promoted."¹⁵³ When, during the gubernatorial campaign, Woodward sat on a train next to Alexander K. McClure, the Republican asked the Democrat "whether he or I in the opposing positions with the soldiers was best supporting the cause of the soldiers in the field. He answered with visible pride that his sons were soldiers, and as soldiers they would do their duty."¹⁵⁴ McClure's recollection may be tainted—he was writing more than forty years after the fact. But even so, the words he attributes to Woodward were not disloyal. Such were not the sentiments of a man who sought to aid his rebel friends, as the Republicans so frequently charged.

Despite Woodward's public and private professions of loyalty, Pennsylvania Democrats were faced with a difficult task in 1863, and they ultimately were unable to convince a majority of the voters that their candidate was loyal. Nevertheless, the public debate over loyalty in this campaign reveals much about how political discourse had co-opted the terminology of the criminal law. Woodward was most harshly criticized for his judicial opposition to conscription, legal tender, and allowing soldiers to vote (privately,

¹⁵³ George W. Woodward to Eli Slifer, October 28, 1861, Slifer-Dill Papers. For another example of Woodward taking pride in his son's promotion, see Woodward to Edwin M. Stanton, September 16, 1866, Stanton Papers.

¹⁵⁴ McClure, *Old Time Notes*, 2:61. Some Republicans claimed that having two sons in the army did not prove Woodward's loyalty. See Wellsboro *Agitator*, September 2, 1863.

he also opposed emancipation).¹⁵⁵ All of these were political issues; his opposition to them therefore in no way proved that he had committed the crime of treason. That he was convicted of treason in the court of public opinion reveals how understandings of treason were changing during the war. While the Constitution gives a precise legal definition of treason, it does not exhaust the meaning of treason in political life. In politics, treason came to mean something broader than an overt act of war against the United States; treason had come to be understood mainly in terms of one's political opinions. Likewise, loyalty no longer meant fidelity to the nation ("the Constitution and Union" or "the Constitution as it is," as Democrats so often said); it meant adherence to Republican war aims. But few Democrats would ever endorse most of the Republican war aims. "Loyalty to the Constitution and the Union," according to one Democrat, was "treason in the eyes of Abolitionists."¹⁵⁶

The perception that Democrats were complicit in southern treason appeared to Republicans to be confirmed by the fact that the stock of the Democratic party rose whenever the fortunes of the Union armies fell. Republicans were always quick to point

¹⁵⁵ During the election, the Supreme Court of Pennsylvania was hearing arguments in a case on the constitutionality of federal conscription. Woodward and Lowrie were expected to rule the draft unconstitutional—which they did a month after the election. One pre-election article that appeared in a Republican paper headlined: "Our Supreme Court Giving Aid and Comfort to the Rebels." See *Pittsburgh Daily Commercial*, September 26, 1863.

¹⁵⁶ Leonard P. Curry and Jean H. Baker have argued that congressional Democrats generally supported non-war legislation put forth by Republicans in Congress. Michael F. Holt criticizes this view, claiming that Democrats at the state and local levels were probably less supportive of Republican policies. See Curry, "Congressional Democrats: 1861-1863," *Civil War History* 12 (September 1966): 213-227; Baker, "A Loyal Opposition: Northern Democrats in the Thirty-Seventh Congress," *Civil War History* 25 (June 1979): 139-155; Holt, "Elusive Synthesis"; *Doylestown Democrat*, June 2 and 30, 1863.

out this trend. The North “must have military success or we are in great jeopardy,” wrote one Republican in June 1863. A member of the Curtin administration believed that “all the people” of Pennsylvania were happy with the success of the Union armies at Gettysburg, “save here and there a Copper head.” Another Republican from Pottsville feared that the rebels would attack the state to prevent Curtin’s reelection. In these ways, the Republicans successfully linked the northern Democrats to the southern traitors. Accusing Woodward of wanting to draw the Confederate boundary north of Pennsylvania had a particularly solemn resonance at a time when Lee’s army had just invaded the state.¹⁵⁷

Woodward’s views on the war were more defensible than Republican oratory suggested. He has conventionally been described as a Copperhead through and through; a more nuanced, and probably more exact account, is that he wanted the Union to remain intact but would have allowed the South to secede peaceably if it had shown the ability to refrain from violence and if the northern states had consented to secession. He opposed a war for secession, and he sought to preserve the integrity of his state when it was invaded by his so-called rebel friends. In one instance Woodward laid out his views of the conflict; this was in a case that came before his bench in February 1863 but was not resolved until 1864. Woodward’s opinion in this case, one of the most brilliant and

¹⁵⁷ Fisher, diary entry for May 8, 1863, in White, ed, *Philadelphia Perspective*, 189-190; *Chicago Tribune*, September 19, 1863; J. K. Moorhead to Simon Cameron, June 24, 1863, Cameron Papers, LC; Eli Slifer to William M. Meredith, July 7, 1863, Slifer-Walls Collection; E. M. Owen Parry to A. L. Russell, September 11, 1863, in RG-19, series 29, box 20, PHMC; *Philadelphia Inquirer*, October 1, 1863; *Chicago Tribune*, October 2, 1863.

profound court opinions written during the Civil War, offers insight into how northern Democrats like Woodward understood the nature of the rebellion.

In July 1861 a ship insured by a Pennsylvania firm was sailing in the Atlantic Ocean when it was attacked and seized by a privateer, the *Jeff Davis*, which was carrying letters of marque issued by the Confederate government. At issue was whether the seizure was an act of piracy, or an act of war. The insurance policy covered piratical losses but not captures *juri belli*. To determine whether the case involved piracy or legitimate prize, Woodward had to determine the true nature of the Confederate government.

After a brief review of the facts of the case, Woodward stated the problem, as he saw it: “The distinction between privateering and piracy is the distinction between captures *juri belli* under colour of governmental authority and for the benefit of a political power organized as a government *de jure* or *de facto*, and mere robbery on the high seas committed from motives of personal gain, like theft or robbery on land. In the one instance the acts committed enure to the benefit of the commissioning power, and in the other to the benefit of the perpetrators merely.” Thus, if the Confederate government was either a government *de jure* or *de facto*, then the captures were a legitimate act of war; if the Confederate government was neither such government, then the capture was a mere act of piracy. “If the *Jeff Davis* was not a privateer she was a pirate, if she was a privateer she was made so by the commission she bore. The legal effect of that commission, therefore, must depend upon the *status* of the Southern Confederacy.”¹⁵⁸

¹⁵⁸ *Fifield v. The Insurance Company of the State of Pennsylvania*, 47 *Pennsylvania Reports* 166-170 (1864).

Woodward first declared that the Confederate government was not a government *de jure*, pointing out that “no man who is faithful to the Constitution of the United States will for a moment contend” that it was.¹⁵⁹ But was it a government *de facto*? This question, for Woodward, was much more complicated. Andrew Jackson, in 1836, had declared that “all questions relative to the government of foreign nations, whether of the old or new world, have been treated by the United States *as questions of fact only*.” From this, Woodward concluded that “there is no doubt . . . that the Federal Government is accustomed to concede, not only belligerent rights, but civil authority also, to governments *de facto*.” The rebel government even exhibited “one of the highest attributes of sovereignty”—the ability to make war. “It is a very unquestionable part of the history of the times that this government has carried on war, offensive and defensive, for more than three years, and that its belligerent rights have been recognized by the principal states of Europe, though, as a civil power, it has not obtained recognition by any of the nations of the earth.”¹⁶⁰ In many ways, therefore, the Confederate government appeared to exist *de facto*.

All that said, Woodward would not yet recognize the legitimacy of the Confederate government as a foreign nation because of his view of the nature of the federal Union. The U.S. Constitution was “perpetual and irrevocable, except by common consent.” When the southern states seceded, they did so “without the consent of

¹⁵⁹ Chauncey Forward Black, the son of Woodward’s close friend Jeremiah Black, argued that Woodward “now regards southern secession simply as a stupendous and gigantic treason without a decent pretext of any sort.” See *Speech of Chauncey F. Black*, 11.

¹⁶⁰ 47 *Pennsylvania Reports* 170-171.

the other states, and in flagrant violation of the Federal compact.” Thus, a new central government was claiming jurisdiction over land that was also claimed by the United States. This posed a serious difficulty for the claim that the rebel government was a government *de facto*. “If secession did not dissolve the Union, as to the seceded states, and place them beyond the pale of the Constitution, then they are still under the Constitution,” which, among other things, forbade the states from entering into confederations, coining money, forming treaties and alliances, and issuing letters of marque. The rebels could not, therefore, have a government *de facto* any more than they could have a government *de jure* because two sovereignties could not exist for the same purposes in the same place. “If the Federal Government, who alone has power under our constitution to issue letters of marque and reprisal, still exists in the seceded states, however its functions may be hindered and suspended,” wrote Woodward, “I see not how the government of the Confederate States can have power to issue letters of marque and reprisal. It is a governmental power expressly lodged with the Federal Government, and unless secession has had the effect to withdraw it, there it exists still in all the plenitude and exclusiveness of the original grant.”¹⁶¹ In short, Woodward viewed secession without national consent as a legal nullity; the federal government was still sovereign over the South.

Having established that a rebel government could not co-exist with the federal government, Woodward turned to the political branches of the government for resolution of the issue. There were two views, according to Woodward. First, some “treated secession as a nullity.” In this view, the South was still part of the Union and was waging

¹⁶¹ Ibid., 170-172.

a “mere insurrectionary resistance” to the Constitution, and the United States was still sovereign over the seceded territory. The other view was that secession initiated “a revolution which took the seceded states entirely out of the Union, and made them, in respect to the Federal Government, foreign states.” To support this position, Woodward quoted Republican congressman Thaddeus Stevens (although not by name), who had said that the rebel states had “organized a distinct and hostile government,” “an independent power *de facto*,” and that “the Constitution and Union are abrogated so far as they are concerned.” The question, for Woodward, was which position he as a judge ought to adopt. In this regard, Woodward felt he should follow the President’s lead.¹⁶²

As Woodward’s discussion of secession revealed, the president and Congress had not taken a unified, official position on the nature of secession and the rebellion, but in this one instance, Lincoln’s actions gave Woodward a solution to the puzzle. The crew of the *Jeff Davis* had been captured at sea, and Lincoln exchanged them with the South as prisoners of war. “Guilty of piracy, the President might have pardoned them for reasons of state,” wrote Woodward, “but he did not—he treated them as public enemies, and thus, in this instance, recognised the belligerent rights of the power that sent them forth, and the validity of the commission under which they sailed.” No action, in Woodward’s mind, “could be more emphatic that they were not pirates.”¹⁶³ Thus, Woodward concluded that *in this instance* the Confederate government must be considered an actual entity.

¹⁶² Ibid., 172-173.

¹⁶³ Ibid., 173.

Woodward was “careful to make no *general* application” from this executive act. “I would not infer from it alone, that the President meant to recognise the Southern Confederacy even as a government *de facto*, nor that he considered secession a revolution that placed the states outside of the Union, and I have no doubt that as a measure of policy it was dictated by motives of prudence and humanity; but in its bearing upon this particular case I cannot doubt that it was a recognition of the authority under which the Jeff Davis sailed.” Thus, the capture of the merchant ship was “a capture *juri belli* and not piratical,” and the Court sided with the insurance company.¹⁶⁴

It seems quite clear that, aside from fulfilling his obligations to adjudicate the case, Woodward hoped to accomplish several things with this opinion. First, he proved his loyalty by arguing that secession accomplished by violence was a constitutional nullity. Second, Woodward demonstrated that there were no clear and easy answers to the nation’s ills, and that reasonable parties could disagree about important issues related to the war. Third, and most significantly, Woodward may have intended this opinion to embarrass the Republican party. By citing Thaddeus Stevens and President Lincoln, Woodward showed that in many ways it was the Republicans who were playing fast and loose with the constitutional issues raised by the war.¹⁶⁵ Woodward’s opinion was so

¹⁶⁴ Ibid. The Court’s ruling was unanimous; however, the Republicans’ concurring opinions rejected much of Woodward’s reasoning.

¹⁶⁵ Woodward did not cite Stevens by name, but the quote is his. S. S. Cox used the same quote in congressional debate to claim that Stevens was a disunionist. See Samuel Sullivan Cox, *Eight Years in Congress, from 1857 to 1865: Memoir and Speeches* (New York: D. Appleton and Co., 1865), 91-92. Some Republicans distanced themselves from Stevens’ position. See, for example, James A. Garfield, *Speech of Hon. James A. Garfield, of Ohio, on the Confiscation of Property of Rebels. Delivered in the House of Representatives, January 28, 1864* (Washington, D.C.: Lemuel Towers, for the Union Congressional Committee, 1864), 1.

well argued, and written with such a subtle sense of irony, that one historian has wrongly concluded from it that, “So far as the Republicans were concerned, the best sort of state judge was exemplified by Pennsylvania’s Chief Justice George W. Woodward.”¹⁶⁶

In the final analysis, George W. Woodward was a state-centered nationalist at a time when such views were unpopular, and, in fact, associated with treason. Thus, the questions of treason and nationalism were closely linked in the gubernatorial election of 1863. Still, Democrats like Woodward were no less Unionist than the Republicans; but their Unionism and nationalism took a different form.¹⁶⁷ Their nationalism differed in one very important respect: they made a different estimate of the role of the states within the federal system, in many ways believing that the states ought to touch the daily lives of Americans more than the national government should. State-centered nationalists believed that the state and the central governments existed for different purposes, and that they ought to stick to their own respective spheres, both in wartime and in peace. Thus, if the central government disregarded its constitutional limitations and entered into a political sphere that was constitutionally reserved to the states, the states ought to protect their citizens against such encroachments.

The Democrats believed that Lincoln’s government had overstepped its bounds, and they sought a governor in Woodward who would interpose the state’s authority to protect the rights of Pennsylvanians, consistent with their understanding of the U.S.

¹⁶⁶ Harold M. Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* (Boston: Houghton Mifflin Co., 1975), 275.

¹⁶⁷ Phillip S. Paludan argues that “states’ rights devotion was not incompatible with firm nationalism.” See Paludan, *A Covenant with Death: The Constitution, Law, and Equality in the Civil War Era* (Urbana: University of Illinois Press, 1975), 14.

Constitution. This theory of state interposition was distinct from secession, but with the nation embroiled in an a civil war that was rooted in political controversy over theories of secession and nullification, the assertion of state-centered nationalist theories of interposition made northern Democrats vulnerable to charges of disloyalty. Indeed, such opposition to the national government seemed to Republicans like unlawful resistance by a state, similar to the Northampton Insurrection of 1798 or the nullification crisis of the 1830s.

In truth, the northern Democratic version of nationalism was a distant kin to the southern view of secession in the sense that both were state-centered and looked to the states for protection of individual rights. Both could claim lineage to the Virginia and Kentucky resolutions of 1798. Thus, it became easy for Republicans to accuse their Democratic opponents of southern sympathies and treason. Certainly, many northern Democrats were sympathetic to the “southern way of life,” but they were not guilty of treason, in a constitutional sense, as the southerners were. Their conception of nationalism differed from the Republican version, which emphasized an expanded role for the central government in Washington. In many ways, history has proved the Republicans right: the government had to work under a more centralized head in order to win the war (hence Jefferson Davis later opined that the Confederacy “died of a theory”). But it bears repeating that the Democrats’ constitutional understanding of the nature of the Union—their state-centered nationalism—was not treasonable, and in fact, was deeply rooted in the origins of American constitutionalism.

Chapter 6

“Division is Weakness”: How Republican Unity Won the Presidency and the War

The election of 1864 was far and away the most consequential presidential election in U.S. history. Lincoln’s reelection that November essentially sealed both the fate of the rebellion and the doom of slavery in America. Thus, the election might be seen as responsible for both the defeat of treason and the eradication of the cause of that treason. Accordingly, the campaign was a tumultuous one. Divisions plagued both parties in the North, and until late in the campaign Lincoln doubted that he would be reelected. Ultimately, it was the unity among members of the National Union party—the Republicans—that enabled Lincoln to triumph over the Democrats. They unified, in large measure, because they believed that Democratic victory meant success for the rebellion and treason.

Since early in the war Republicans had referred to their Democrats opponents as “Copperheads.” The term was meant to imply that Democrats, like the poisonous snake, were dangerous to the Union war effort. Indeed, most Republicans believed that most, if not all, Democrats were traitors to the Union cause. “I am ready to fight the traitors on the Battlefield and at the B[allot] Box,” wrote one Pennsylvania soldier. Others noted “that all the powers of darkness will combine under the generic name of *democracy* to defeat” Lincoln at the upcoming election. A Connecticut Republican lamented “the worst and most malignant set of traitors” in his state who were “working with the desperation of devils” to defeat Lincoln’s reelection.¹ Such language signified the moral

¹ Francis H. Reichard to James Lind, September 25, 1864, RG-19 (Records of the Department of the Military), Subgroup: Office of the Adjutant General, Series 19.29

dimension of Republican accusations of treason: Democrats were not only disloyal, they were also despicably evil.

In the past some historians have argued that the treason issue obscures the larger, more important issues at stake in the presidential canvass. “In the election of 1864,” writes William Zornow, “the issue of treason was the one used most frequently and effectively by the Republicans.” Real issues—such as reconstruction and emancipation—“should have occupied considerable attention during the election,” but “these issues of real national importance received scant attention.” Instead, Republicans were able to carry the election by focusing on empty and often contrived charges of treason.²

To the contrary, the treason issue illuminates how nineteenth-century Americans in wartime reverted to the anti-party heritage of the early republic. Republicans in the 1860s, like the Federalists of the 1790s, believed that party competition was illegitimate and harmful to the Union. As historian Adam I. P. Smith writes, “antipartyism took the form of an assertion by both parties, but especially the Republicans, that they were the embodiment of the nation, that they transcended party in their selfless devotion to the Union.”³ If the Republicans represented the nation, then opposition to them was

(General Correspondence), PHMC; John A. Clark to Elihu B. Washburne, October 19, 1864, Elihu B. Washburne Papers, LC; William Faxon to Welles, November 7, 1864, Gideon Welles Papers, LC.

² William Frank Zornow, “Treason as a Campaign Issue in the Re-election of Lincoln,” *Abraham Lincoln Quarterly* 5 (June 1949), 348-363.

³ Adam I. P. Smith, “Beyond Politics: Patriotism and Partisanship on the Northern Home Front,” in Paul A. Cimballa and Randall M. Miller, eds., *An Uncommon Times: The Civil War and the Northern Home Front* (New York: Fordham University Press, 2002), 165. See also Adam I. P. Smith, *No Party Now: Politics in the Civil War North* (New

traitorous. Wartime party competition, in this view, was also treason, for it sought to undermine the party that stood for the Union. As emancipation, conscription, and suspension of habeas corpus became more closely tied to the success of the war, the party that opposed those measures became even more susceptible to charges of treason.

In many ways, the election of 1864 was a fight for the soul of the nation. Would the United States be restored? And if so, would they continue half slave or become all free? In an equally important way, it was also a fight for the souls of the two contending parties. The Republicans—terming themselves the National Union party in 1864—were a broad coalition radicals and abolitionists, moderate or conservative Republicans (like the president), and War Democrats. Most Republicans-Unionists shared a desire to win the war and abolish slavery.

The Democrats had much less around which to unify. In fact, divisions within the Democratic ranks would prove to be their downfall in the ensuing election. Moderate Democrats, who probably made up the majority of the party, hoped to see the Union restored—and they knew that the war had to be fought and won to do so. These moderates, however, were dissatisfied with the Lincoln administration’s handling of the war. They opposed his suspension of the writ of habeas corpus, the draft, and, most especially, emancipation. One Pennsylvania congressman lamented the abolition of slavery because it “cheat[ed] every soldier who went in to this war believing it was not to interfere with the rights of the states, but to preserve the unity of this Republic.”⁴

York: Oxford University Press, 2006), and Joseph J. Ellis, *Founding Brothers: The Revolutionary Generation* (New York: Random House, Inc., 2000).

⁴ John Dodson Stiles to Lewis S. Coryell, February 15, 1864, Lewis S. Coryell Papers, HSP.

As dissatisfied as moderates were with Republicans, they were equally troubled by the Peace men of their party. After concluding that his party would surely lose the election, one San Francisco Democrat blamed “a small number of Peace Philosophers, who have succeeded in remaining somehow within the Democratic party to its ruin.” He wished the party had thrown the “Crazy sett [sic] of peace men” “overboard from the Start.” Another concluded that their party’s defeat would be “brought about by the treasonable attitude of the managers of the democratic party—by their miserable suicidal policy.”⁵

Some Republicans wondered whether the Democratic party would be able to hold together during the election campaign. “Can the two wings of that party, the Peace Democrats and the War Democrats, work together at all?” asked George Templeton Strong. “Is not schism inevitable?” Once the campaign began, however, Republicans paid very little attention to the divisions within the Democratic party. Partisan points could be won not by pointing out their differences but by treating all Democrats as if they were part of the “disloyal” Peace wing. “We have been denounced as all the traitors and double dyed villains that ever were,” complained one California Democrat to Samuel L. M. Barlow of New York.⁶

⁵ John Thomas Doyle to Barlow, May 17 and October 31, 1864, and T. J. Barnett to Barlow, October 8, 1864, all in Samuel L. M. Barlow Papers, The Huntington.

⁶ George Templeton Strong, diary entry for August 19, 1864, in Allan Nevins and Milton Halsey Thomas, eds., *The Diary of George Templeton Strong, 1835-1875*, 4 vols. (New York: The Macmillan Co., 1952), 3:475; John Thomas Doyle to Barlow, October 31, 1864, Barlow Papers.

The tactic of rhetorically lumping all Democrats into the Peace camp proved successful. Most Republicans believed that most Democrats were secession-sympathizing traitors. One soldier concluded that any northerner who voted the Democratic ticket “is a traitor to his God and his country and deserves no longer to be called a citizen of the U.S.”⁷ Rather than be so considered, many War Democrats moved solidly into the Republican base (at least for this election cycle). One War Democrat expressed utter dismay at the antiwar stance his party had taken: “they have become mad—utter idiots—they have made a most unpopular man very popular—to wit, the President—even I shall vote for him.” More than just vote for him, this soon-to-be-*former*-Democrat also campaigned for Lincoln in New York City in 1864.⁸

I.

It is remarkable how little the Democratic party in 1864 had learned from their experience during the election of 1860. In 1860 the party had divided into northern and southern wings, thus allowing Lincoln to capture the presidency with less than 40 percent of the popular vote. Although in 1864 they only put forward one candidate and platform, their candidate stood in opposition to the platform’s key plank. Thus, although all Democrats were opposed to Lincoln’s way of waging war, they could not unify on the best way to mobilize to remove him from power.

⁷ James S. Graham to Aunt Ellen, October 24, 1864, in William H. Bartlett, ed., *Aunt and the Soldier Boys* (Santa Cruz, Cal.: privately printed, 1973), 151.

⁸ Edwards Pierrepont to William L. Dayton, October 6, 1864, William L. Dayton Papers, Princeton University.; Christopher Dell, *Lincoln and the War Democrats: The Grand Erosion of the Conservative Tradition* (Rutherford, N.J.: Farleigh Dickinson University Press, 1975), 302-303.

In late 1863 and early 1864 many northerners of all political stripes were dissatisfied with President Lincoln's handling of the war. Within Republican ranks, radicals and abolitionists were dissatisfied with Lincoln's sluggish move towards emancipation and black citizenship, as well as his lenient reconstruction policy for the South. Frederick Douglass, speaking for many abolitionists, believed that Lincoln's emancipation policy was "timid and short-sighted."⁹ Secretary of the Treasury Salmon P. Chase fervently desired the presidency, and his name was frequently put forth for the Republican nomination, but in March 1864 he formally withdrew from the race.

A movement for General John C. Fremont, the radical who had headed the Republican ticket in 1856, also gained momentum, and on May 31 a convention convened in Cleveland that nominated him on a platform pledged to restoration of the Union, a constitutional amendment to abolish slavery, and confiscation of rebel lands. Accepting the nomination, Fremont pledged to withdraw from the race if the Republican national convention would nominate someone other than Lincoln. Union General Henry Wager Halleck believed that this "Ragtail" convention was "a mass of corruption and humbugs" whose "only object . . . was to be 'bought off.' No doubt they will sell out cheap, if either of the other parties wish to purchase. A sure opportunity for those who wish to own elephants!" Adam Badeau, a staff officer serving under U.S. Grant, noted the "abuse" that Radicals heaped on Lincoln: "They repeat all that the Democrats said last year and were disloyal for saying."¹⁰

⁹ Larry E. Nelson, "Black Leaders and the Presidential Election of 1864," *Journal of Negro History* 63 (January 1978), 47.

¹⁰ John Niven, *Salmon P. Chase: A Biography* (New York: Oxford University Press, 1995), 343-364; Nelson, "Black Leaders," 48; Halleck to Francis Lieber, June 2,

The Republican National Convention met at Baltimore on June 7, 1864. A platform pledging restoration of the Union and a constitutional amendment to abolish slavery were adopted, and by an almost unanimous vote (later made unanimous) Lincoln was re-nominated for president. Since early in the year it had been fairly certain that Lincoln would receive the nomination. Despite his failings, the country knew where he stood on the issues, which gave him a good deal of credibility among Republican voters. “Somehow the President has impressed the people at large with the conviction that they know where to find him,” noted Francis Lieber. The selection of the vice presidential nominee was a more contested affair, but the convention decided to dump Lincoln’s present vice president, Hannibal Hamlin of Maine, in favor of Andrew Johnson, the War Democrat from Tennessee. In doing so, Republicans hoped to appeal to voters outside of their party ranks, as well as in the border states. In many ways the Baltimore convention produced a moderate outcome: a candidate who had approached the slavery issue in a moderate way on a platform pledged to amend the Constitution, hardly a radical way to bring about permanent constitutional change.¹¹

Many Republicans and abolitionists hoped that they could unify in order to carry the election. Wrote one black abolitionist: “I cannot understand how sincere earnest men, who have worked together for years, cherishing among themselves every diversity

1864, Francis Lieber Papers, The Huntington; Adam Badeau to Harry, August 8, 1864, Adam Badeau Papers, Princeton University.

¹¹ Francis Lieber to Henry W. Halleck, January 16, 1864, Lieber Papers; William Frank Zornow, “The Union Party Convention at Baltimore in 1864,” *Maryland Historical Magazine* 45 (September 1950), 176-200; Don E. Fehrenbacher, “The Making of a Myth: Lincoln and the Vice-Presidential Nomination in 1864,” *Civil War History* 41 (December 1995), 273-290.

of opinion, should now, of all other times, when they have almost got the lead of things, when their policy is becoming more and more that of the nation, endanger their general success by forsaking one another.” Similarly, a doctor in Harrisburg, Pennsylvania, remarked that Fremont “knows that he cannot be elected, but because he and Mr. Lincoln are not the best of friends, he would accept the nomination to run against him (Mr. Lincoln) knowing that a member of the opposite party will support him (Fremont) just in order to defeat Mr. Lincoln.”¹²

Fortunately for Lincoln, the Republican party unified around him. On September 22 Fremont abandoned his campaign for the presidency. The following day, according to a pre-arranged deal, Montgomery Blair, a conservative in Lincoln’s cabinet who was one of Fremont’s bitterest political opponents and a supporter of reinstating McClellan to a high military post, was relieved of his duties as Postmaster General. The “few dissatisfied” radicals, according to one observer, “were swept into the growing current” for Lincoln. Even Frederick Douglass, who had supported the Pathfinder and had publicly criticized Lincoln, came out in support of Old Abe as the last best hope to free the slave. A Democratic victory, he said, “would be the heaviest calamity of all these years of war and blood.”¹³

¹² J. Sella Martin to William Lloyd Garrison, June 13, 1864, quoted in Nelson, “Black Leaders,” 49; John F. Woods to Sister, June 19, 1864, MG-188 Woods Family Collection, PHMC.

¹³ Tom Chaffin, *Pathfinder: John Charles Fremont and the Course of American Empire* (New York: Hill and Wang, 2002), 475; John Adam Kasson to Thomas Haines Dudley, October 2, 1864, Thomas Haines Dudley Papers, The Huntington; Montgomery Blair to Barlow, May 1, 11, and 27, 1864, Barlow Papers; Douglass quoted in Nelson, “Black Leaders,” 52.

Towards the middle of the political spectrum were Conservative Unionists—mainly former Whigs opposed to emancipation, presidential suspension of habeas corpus, and other Republican war measures. These politicians hoped to join with moderate Democrats to defeat Lincoln and “the Military-Abolition party.” Conservative Unionists had been organizing in various ways since 1862. On December 24, 1863, the national committee of the Conservative Union party met at Philadelphia, where it nominated General George B. McClellan for president, and a former Whig governor of Tennessee, William B. Campbell, for vice president. The Conservative Unionist platform criticized Lincoln for disregarding the Constitution and trampling on the rights of American citizens. It called on voters to displace him from office and replace him with a president who would be able to make peace and terms of reunion with the South, guaranteeing all constitutional rights to all Americans. Taking an early position, the Conservative Unionists hoped that Democrats would follow their lead and adopt their candidates and platform.¹⁴

If the Conservative Unionists hoped they would be able to unite with Democrats to form an anti-Lincoln, anti-abolition coalition, they would soon be disappointed. The resolutions adopted by the Conservative Unionists were read, amid much cheering and fanfare, at the Democratic National Convention, but that show of support was a mere facade. The Democratic party—still reeling from its defeats in the 1863 gubernatorial elections—had not yet found its footing, and was more divided than ever. Rather than

¹⁴ William C. Davis, “Conservative Unionists and the Presidential Election of 1864,” *Civil War History* 38 (December 1992), 298-318; quotation from p. 301; James H. Goodsell, ed., *Official Proceedings of the Democratic National Convention, Held in 1864 at Chicago* (Chicago: The Times Steam Book and Job Printing House, 1864), 20-21.

settle on the fairly moderate platform and nominations of the Conservative Unionists, the Democratic party embarked on yet another divisive, extreme, and self-destructive national convention.

The Democratic National Convention was scheduled to meet on July 4, but earlier that summer several movements sprung up to postpone the convention until late August or early September. With Grant stalled outside of Richmond, opponents of General McClellan's nomination believed a delay would help a Peace man gain the nomination. Most McClellan men, however, believed that the convention should be held at once. Indecision and reliance on future military failures, according to this view, would not give the party enough time to organize for success and rouse the voters against the present administration. "The errors and crimes of the Administration are such that they are easily defined, and if we place a candidate in the field well known and who embodies the principles of the Democratic Party, we can make all the combinations necessary to success, provided we have time to organize," wrote one moderate Democrat. Postponing the convention would not give the Democrats enough time to increase public "hostility to the administration, arriving at such a pitch that the people of the North will be compelled to take up arms against the administration." This Democrat was no Peace Man—he believed that if the Peace faction prevailed "all hopes for a Union are destroyed." Nevertheless, he believed that the party must have time to unify around a strong Democrat and platform. "To give us hope for success we must have this time to

organize; we must have a bold, decided Democratic platform—or else—or Lincoln, or anarchy.”¹⁵

There was enough pressure within the party to force a delay, and the convention did not convene until August 29. That McClellan would be nominated was an almost foregone conclusion. Some McClellan men feared that western Peace men would bolt if McClellan received the nod, but most Democrats, acutely aware that it was a rupture in their party that had brought Lincoln to the White House in the first place, would not allow such an occurrence to happen again.¹⁶ Most Peace men were willing to accept McClellan as a “necessity,” but they would fight tooth and nail to select his running mate and to control the tenor of the platform. Manton Marble, editor of the New York *World*, telegraphed Samuel L. M. Barlow several times from Chicago describing the “long hard fight” that was going on to shape the platform in committee.¹⁷

Benjamin Stark, the embattled former senator from Oregon, expected the convention to “speak frankly, explicitly, and without the slightest shadow of reserve or

¹⁵ David H. Williams to Barlow, June 23, 1864, Barlow Papers. See also James F. Noble to S. S. Cox, November 22, 1863, Barlow Papers. Some of the General’s friend’s believed that delaying the convention would also help him, but this was largely a movement on behalf of the Peace wing of the party. See John Van Schaick Lansing Pruyn to Barlow, June 18 and 25, 1864, August Belmont to Barlow, June 15, 1864, Fernando Wood to Barlow, June 15, 1864, George Washington Cass to Barlow, May 7, 1864, all in Barlow Papers; Sears, *McClellan*, 368-369; Mark E. Neely, Jr., *The Union Divided: Party Conflict in the Civil War North* (Cambridge, Mass.: Harvard University Press, 2002), 118-140.

¹⁶ Badeau to Harry, August 29, 1864, Badeau Papers; S.S. Cox to Barlow, November 21, 1863, A. Banning Norton to Barlow, June 22, 1864, Washington McLean to Barlow, August 29, 1864, Thomas Marshall Key to Barlow, August 24, 1864, David H. Williams to Barlow, August 22, 1864, all in Barlow Papers.

¹⁷ Manton Marble to Barlow, August 29 and 30, 1864, Barlow Papers; Jonah D. Hoover to Franklin Pierce, February 16, 1864, Franklin Pierce Papers, LC.

equivocation.” He did not wish to see his party attain “power in these sad and perilous times by indirection, much less by base concealment of their real purposes and intentions.” Rather, the party should be “harmonious and united”: “As a party, the democrats have everything to gain and nothing to lose by dealing fairly and frankly.”¹⁸

And deal frankly they did. Many Democrats had hoped their party would offer a platform with virtually no substance on the issues as a way to unify all wings of the party. But “the Vallandigham spirit” was “rampant” at the convention, and moderates feared that Val’s influence “will give trouble.” Indeed, Vallandigham’s influence made an indelible mark upon the platform. The first resolution pledged the fidelity of the party to the Constitution and Union. The second—one of the most notorious planks in all of U.S. history—declared “that after four years of failure to restore the Union by the experiment of war, during which . . . the Constitution itself has been disregarded in every part,” a cessation of hostilities and other means must be used to bring about a reunion of the states. The third plank denounced military interference in elections. The fourth and fifth planks again castigated the Lincoln administration for violating the constitutional rights of the people and the states. And finally the sixth plank pledged the sympathy, care, and protection of the Democratic party to the soldiers and sailors of the Union.¹⁹

Moderate Democrats were sorely disappointed with the platform. Congressman Samuel S. Cox “clasped his hands in his lap and dropped his head, a picture of despair” while August Belmont, the party’s national chairman, “also looked profoundly sad.” An

¹⁸ Benjamin Stark to Barlow, August 21, 1864, Barlow Papers.

¹⁹ James F. Noble to S.S. Cox, November 22, 1863, Belmont to Barlow, August 29, 1864, both in Barlow Papers; Goodsell, ed., *Official Proceedings*, 27.

Iowa Republican in Chicago was appalled by what he witnessed. “The speeches were bold & seditious,” he declared. “The Platform hostile to war, & therefore hostile to the Union.”²⁰

The Peace Democrats scored another huge victory in the selection of the Vice Presidential nominee, George H. Pendleton of Ohio. Pendleton had been a favorite for the position for some time, and as a westerner, it was believed that he would balance the ticket and placate the desires of many western Copperheads. He “will be a heavy load,” wrote one Cincinnati Democrat, “but McC can carry it out here.”²¹

In fact, Pendleton and the Peace platform proved to be too heavy of a load for McClellan. “I admire McClellan & should vote for him but I cannot swallow that Pendleton & that Chicago platform,” wrote one New Yorker. “I never could digest them.” Many others feared what would happen if McClellan died while in office and Pendleton assumed the presidency. “I think that Lincoln has made many and great mistakes—but I cannot for sake of these, act with men who have been traitors to the Union from the beginning of the *War* and who in my judg’t would in the event of his election kill Genl McClellan, and make Pendleton Pres’t within a month of his inauguration if he did not concede to their conspiracy against the Union, which I feel certain that he would not do,” wrote one man from Minnesota.²²

²⁰ Quoted in Sears, *McClellan*, 373; John Adam Kasson to Thomas Haines Dudley, October 2, 1864, Dudley Papers.

²¹ Thomas Marshall Key to Barlow, August 24, 1864, Barlow Papers.

²² J. F. Rathbone to Marble, November 4, 1864, Manton Marble Papers, LC; S. Miller to General, September 24, 1864, George B. McClellan, Sr., Papers, LC.

The platform and vice presidential nominee proved dissatisfying to many Democrats throughout the North. “The nomination of M’Clellan was the inspiration of popular feeling,” wrote the Sage of Wheatland. But “the platform is rather muddy. Peace would be a great blessing; but it would cost too dear at the expense of the Union.” Another Democrat noted that the platform was a “wet blanket” that dissatisfied “a large number of *our friends*, and disappoint[ed] thousands of wavering Republicans who were ready and anxious to come over to us.” Others believed that the peace platform had galvanized Republicans against the traitors in the rear. “The Republicans gather heart, resume the aggressive, & are confident enough to bet on the result,” wrote one dismayed Democrat. Indeed, many Republicans had been hoping for such results from the convention. Writing in late August, Francis Lieber noted that “Lincoln’s ice is melting away. Perhaps a very mean nomination at Chicago will give us a lift.” After the convention, Lieber exulted “that the disgraceful, servile, lickspittle platform makes the re-election of Mr L. possible, and his re-election I suppose is now necessary for the National Cause.”²³

Knowing that the platform would be unacceptable to many northerners, moderate Democrats argued that it ought to be construed as a call for negotiations to restore peace on the basis of reunion. They looked to the General to write a letter of acceptance that would so interpret the infamous Peace plank. Others, too, hoped that McClellan would issue an Andrew Jackson-like letter of acceptance—one that pledged that the Union must

²³ James Buchanan to Coryell, September 6, 1864, Coryell Papers; Daniel Devlin to Barlow, September 1, 1864, William Cassidy to Barlow, September 5, 1864, Theodore Romeyn to Barlow, August 31, 1864, all in Barlow Papers; Lieber to Halleck, August 21 and September 9, 1864, Lieber Papers.

be preserved. “The People are waiting for his letter they expect & wish something different from the platform,” wrote one anxious Democrat. “Thousand[s] want an excuse to vote for him, [but] under the platform they say they cannot.”²⁴

On September 8, McClellan issued his letter accepting the nomination. In it, he declared that “the Union must be preserved at all hazards” and that, while peace was desirable, it would not be lasting unless the Union was preserved first. Thus, McClellan firmly placed himself on a war footing, privately noting that “the peace men are the only ones who squirm” and that “all the good men are delighted” with the letter. Indeed, McClellan strongly wished to distance himself from the Peace wing of his party. He “wish[ed] they had kept Vallyandigham down south when they had him there!” and believed the Peace Democrats—“these fools”—would “ruin the country . . . ” but “I won’t help them.” During the ensuing campaign, some Republicans would charge McClellan with being “the leader of the Confederate forces” and rumors circulated throughout the North that he had offered his services to the Confederate government. But these rumors could not have been further from the truth. McClellan heartily wanted Union victories in the field and reunion of the states (although he did not consider abolition of slavery a prerequisite for reunion), he celebrated Sherman’s taking of Atlanta, and he noted that his letter of acceptance “will be acceptable to all true patriots, & will only drive off the real adherents of Jeff Davis this side of the line.”²⁵

²⁴ Amasa Junius Parker to Barlow, September 5, 1864, Daniel Devlin to Barlow, September 1, 1864, Andrew Morris to Barlow, September 2, 1864, James Robb to Barlow, September 3, 1864, all in Barlow Papers.

²⁵ George B. McClellan to Democratic National Committee, September 8, 1864, to Mary Ellen McClellan, September 9, 1864, to Samuel L. M. Barlow, June 17, 1864, to William C. Prime, August 10, 1864, to William H. Aspinwall, September 6, 1864, to

Moderate Democrats exulted in the letter. “McClellan’s prospects are brightening since his letter of acceptance,” wrote one relieved Democrat. “Without that letter, I doubt if he would have carried a state in the Union.” Meanwhile, August Belmont opined: “If we carry the election at all it will be owing entirely to the stand which the General has taken.”²⁶

Moderates exacted a pledge from Pendleton to remain silent during the campaign, but this, as well as McClellan’s letter of acceptance, infuriated the Peace wing of the party. Copperhead William B. Reed of Philadelphia, in particular, expressed his sense of dismay and betrayal. He castigated the moderates for turning against the platform as it was adopted by the Democratic convention. “Depend on it,” wrote Reed, “this will be a fatal mistake.” He insisted that only a peace message would carry the election, and he castigated the *World* for praising Sherman’s “supposed victory” in Atlanta. Reed acknowledged that McClellan would not campaign as a Peace Man, but he wished that, “for his own sake that he will utterly abstain from saying one word in favor of ulterior war.” Besides, Reed maintained, it was not fair that McClellan should single-handedly try to change the work of the convention and the meaning of the platform. “It will not

William T. Sherman, September 26, 1864, and to Charles A. Whittier, September 27, 1864, all in Stephen W. Sears, ed., *The Civil War Papers of George B. McClellan: Selected Correspondence, 1860-1865* (New York: Ticknor & Fields, 1989), 578, 586, 594-597, 604-605; Abram J. Dittenhoefer, *How We Elected Lincoln: Personal Recollections* (1916; reprint, Philadelphia: University of Pennsylvania Press, 2005), 93; Halleck to Lieber, September 12, 1864, Lieber Papers; Clement Hoffman to Mother, April 16, 1864, Clement Hoffman Letters, Harrisburg Civil War Round Table Collection, USAMHI; Stephen W. Sears, “McClellan and the Peace Plank of 1864: A Reappraisal,” *Civil War History* 36 (April 1990), 57-64; Sears, *McClellan*, 361-362.

²⁶ William H. Clement to Barlow, September 16, 1864, Barlow Papers; Belmont to Marble, September 13, 1864, Marble Papers.

look like fair play. It is hoisting one flag to get us under your guns—and then running up another.” But in election season “the main point” was expediency—winning the most votes and preventing the most defections. Reed believed this goal would be accomplished by a strong and unified Peace message. Despondently, he concluded, “I am so utterly hopeless of the future except on the basis of two recognized confederacies that my counsel may be of no value.”²⁷

Despite such divisions within the party, most Democrats (including Reed) hoped they could work together for a common victory. “Now that we are upon the same platform politically,” wrote one Peace Democrat to Manton Marble, “I hope we can strike hands upon McClellan and forget our own little differences.” Others warned Democratic papers not to “utter any revolutionary language. In New York & vicinity you want order & tranquility in order to get the vote in. The Republicans want disorder & confusion.”²⁸

Division over the war issue clearly hampered the Democrats’ chances for success. The party, being divided over whether prosecution of the war should be continued, also divided over how to respond to news reports from the field. Battlefield victories and losses had a significant impact on the electoral prospects of the competing candidates and parties. When Grant was stalled outside of Richmond and Sherman outside of Atlanta during the summer of 1864, Democratic prospects looked promising. It was during this

²⁷ William B. Reed to Barlow, September 4, 22 and 30, 1864, Barlow Papers. Joel H. Silbey has argued that Peace men, those he terms Purists, were more concerned with maintaining party principles than winning electoral victories. See Joel H. Silbey, *A Respectable Minority: The Democratic Party in the Civil War Era* (New York: W. W. Norton, 1977), 105-112. Letters like these from Reed, however, reveal that Peace men believed that their principles were the only ones that could carry the presidential election.

²⁸ Wilson Barston to Marble, September 20, 1864, William Cassidy to Marble, October 28, 1864, both in Marble Papers.

time that Lincoln penned his famous memorandum concerning his probable failure of reelection.²⁹ Sherman's taking of Atlanta, Sheridan's string of victories in the Shenandoah Valley, and Farrugut's capture of Mobile Bay, all in the late summer and early autumn of 1864, drastically changed Lincoln's fortunes. Few Republicans now doubted that he would easily carry the election.

Both parties were keenly aware that victories in the field aided the incumbent. "Old Lincoln is straining every nerve to have Grant accomplish something before [the] Election, and if necessary will sacrifice every soldier in the field to do so," wrote an ex-soldier and Democrat in October 1864.³⁰ Democrats were divided over whether to hope for battlefield victories or defeats in the months leading up to the election. They largely divided between the moderate and Peace wings of the party. Moderates praised the army for victories in the field; Peace Men, by contrast, hoped for defeat and did not believe Union victories should be praised by the Democratic press. The hope for defeat clearly delineated Peace Men as traitors. It also opened them up to the charge of putting their party's interests over that of their country's.

Sidney George Fisher, the astute Philadelphia observer of the war, noted in his diary: "These Democrats can see in this great war only a party contest. Every victory of

²⁹ Abraham Lincoln, "Memorandum Concerning His Probable Failure of Re-election," August 23, 1864, in Roy P. Basler, et al., ed., *The Collected Works of Abraham Lincoln*, 9 vols. (New Brunswick, N.J.: Rutgers University Press, 1953-1955), 7:514; Halleck to Lieber, September 2, 1864, Lieber Papers.

³⁰ Henry P. Hubbell to Brother, October 6, 1864, Hubbell Family Papers, Princeton University; Marsena Rudolph Patrick, diary entry for September 3, 1864, in David S. Sparks, ed., *Inside Lincoln's Army: The Diary of General Marsena Rudolph Patrick, Provost Marshal General, Army of the Potomac* (New York: Thomas Yoseloff, 1964), 419.

the government they lament as a defeat of their party; in every success of the rebels they see a party victory & hail it with triumph. In all possible ways they oppose the administration & thus encourage the enemy to persevere. Their treasonable speeches are republished in the South. They are evidence of a divided North. Division is weakness and our weakness is strength for the enemy.” Similarly, George Templeton Strong of New York believed that the Democrats “are answerable for the death of every national soldier who dies in his duty. For it is only their factious opposition that keeps the rebellion alive.”³¹ Fisher and Strong, like most Republicans, believed that party competition hurt the Union war effort. They deplored the tactics of the Democratic party and press, which were critical of the Lincoln administration and Republican war measures. If the North could be unified, they believed, the South would give up the fight much sooner.

Democrats deplored these Republican accusations of disloyalty. All Democrats—Peace Men and moderates—believed they were faithful unionists (even though many Peace Men were willing to give up the Union by 1864). “The Republicans are trying desperately to electioneer with battles,” opined the *New York World*, “as if . . . the battles were not the nation’s battles, the victories the nation’s victories.” Knowing that victories in the field were necessary to bring about peace, the editors of the *World* professed to welcome good news from the field because it would make their work of peace and reconstruction easier after they had taken back the White House. Such Republican

³¹ Sidney George Fisher, diary entry for May 8, 1863, in Jonathan W. White, ed., *A Philadelphia Perspective: The Civil War Diary of Sidney George Fisher* (New York: Fordham University Press, 2007), 190; George Templeton Strong, diary entry for September 13, 1864, in Nevins and Thomas, eds., *Diary*, 3:486.

“attempts to degrade the well-earned fame of our soldiers into a paltry electioneering instrument” was, according to the *World*, “shallow and belittling.”³²

These issues came to a head in New York City about one month before the election. In late September the New York City Common Council passed resolutions calling for an illumination of the public buildings, “in honor of the recent victories on land and sea” and also requesting the mayor to invite the citizens of New York City to illuminate their homes on the same night. The Council, which was controlled by Democrats, found their resolutions vetoed by New York’s Peace Democrat mayor, C. Godfrey Gunther. Gunther explained that citizens who opted not to illuminate their homes “would be denounced as disloyal.” These were not victories for the Union, he explained, but for emancipation, and as Lincoln’s emancipation policy was, in his view, only prolonging the war, he could not acquiesce in their celebration. “I yield to no man in my attachment to ‘the Union as it was, and the Constitution as it is,’” wrote Mayor Gunther, “but as the President demands of the Southern people to abandon the rights which the Constitution confers, I do not see how those, who have always held that the Federal Government has nothing to do with the domestic institutions of the States, can be expected to rejoice over victories which, whatever they may be, surely are not Union victories.” Gunther claimed that Republicans would only accept peace based on emancipation and “unconditional surrender,” whereas Democrats would accept peace on

³² New York *World*, September 30 and October 4, 1864. The editors of the *World* also understood that they had to praise the successes of the army in order to appeal to the soldier vote. See Geo. W. A. to Mr. Croly, September 22 and 25, 1864, Geo. W. A. to Marble, September 27, 1864, R. McClelland to Marble, September 10, 1864, all in Marble Papers; William Henry Aspinwall to Barlow, September 26, 1864, Barlow Papers.

the basis of reunion. Finally, he gave two practical reasons for opposing the measure. Republicans were claiming that their emancipation policy would lead to many future victories. If such were the case, the city would be called upon to illuminate “three times a week.” Moreover, the city ought to abstain from celebrating victories gained in civil war because such celebrations would treat the South as “aliens and enemies,” thus lessening the chances for a peaceful reunion. Gunther criticized the proposal “as one of a political nature” during a “most exciting” campaign. As the illumination seemed to be a celebration of emancipation at the expense of Union, the mayor could not give the resolutions his official endorsement.³³

Republican papers criticized Gunther’s veto message. Horace Greeley’s *Tribune* claimed that he lacked brains, logic, honesty, and loyalty. “The Rebel partisan has only tears to give to Union victories that must bring peace to a distracted land; joy only in the hope that the triumph of his party may be the triumph of a Rebellion over the grave of the Union.” The moderate Democratic New York *World* also criticized the mayor, saying that he did not represent the sentiments of the majority within their party and that it was “eminently proper” to honor the recent victories of “the gallant soldiers and sailors of the republic.” The *World* surmised that either Gunther’s sentiments were “on the wrong side of the Appomattox” or that his veto message had been written under the influence of

³³ *New York Times*, September 30, 1864. For a fine analysis of how Democrats like Mayor Gunther used the slavery and peace questions during the 1864 campaign, see Michael Vorenberg, “‘The Deformed Child’: Slavery and the Election of 1864,” *Civil War History* 47 (September 2001), 240-257.

Republican politicians “to supply the administration with an effective campaign document.”³⁴

Thomas G. Pratt, a former Maryland governor and U.S. senator suspected of harboring southern sympathies, by contrast, thought the mayor’s veto message “*admirably* drawn” and believed “it would be better to wait until the reality of the Victories was more certainly ascertained.” He criticized the *World*’s handling of the matter and it’s tendency “to magnify every success” of the Union armies in the field. “As I have said, the only chance for Mr. Lincoln is the army & victory, & I cannot see that it is your duty to place these winning cards in his hands when they do not honestly belong to him. Let it be shown that we cannot *conquer* [or] *subjugate the South*, and every honest man would go for Genl. McClellan, as the election of Mr. L. would mean perpetual war or a conquered North.”³⁵

Views such as these clearly opened the Democratic party up to accusations of treason. Because of their prevalence among vocal Democrats, even moderate Democrats, such as the editors of the *World*, could not convince the nation that their party was loyal. George Francis Train, in a scathing rebuke of the Democratic party, declared that “THE AGE OF TREASON has arrived.” In a letter to the editor of the leading Democratic journal in Philadelphia, he wrote:

The difference between us is, you have party on the brain—I have country. You cheer when gold goes up—I hiss. You despond when Sheridan beats Early—I cheer. You want to throw poor men out of employment by free trade—I want to give them higher wages by protection. You go for the

³⁴ *New-York Daily Tribune*, October 1, 1864; *New York World*, September 30, 1864.

³⁵ Thomas G. Pratt to Barlow, October 6, 1864, Barlow Papers.

English candidate—I for the American. You prefer the Jews—I the Gentiles. YOU RECOMMENDED THE SURRENDER OF YORK—I would have died first! Your party has no opinions—mine has. You say, “I was not a member of the Chicago Convention”—I say YOU are a LIAR, and say it offensively. But (as I am not a proud man) if I have offended you by my recent course, I am willing to accept your apology, for

While the Union lamp holds out to burn,
The vilest traitor may return.³⁶

Train, like Fisher, Strong, and many other Republicans, believed that the Democratic party as a whole depended on Union military defeats in order to prosper on election day. In a very real sense, they were right. The accusation of treason—and of putting party above country—was therefore, if slightly unfair, still a credible charge.

Ironically, the voices of moderate Democrats who wanted victory in the field were lost amidst the din of political rhetoric and campaign stump oratory. The Peace wing—both at the national convention and in the local arena, such as the debate over celebrations that engulfed New York City’s mayor—became the spokesmen of the entire party. Even though most Democrats favored Union victory on the battlefield, their moderate voices were lost amid the clamor of the Peace Democrats. Republicans, consequently, successfully branded the party as a peace-at-any-price party, reliant upon rebel victories to win back the White House. The one division among the Democrats—that of favoring Union victories—that might have helped the party win some votes went largely unnoticed, while the many other divisions within the party only worked to help secure their defeat.

³⁶ George Francis Train to the Editor of the *Philadelphia Age*, October 29, 1864, George Francis Train Broadside, Library Company of Philadelphia. The verse at the end is a play on a hymn by Isaac Watts that had emphasized the rolls of mercy and repentance, implying that the Democrats might still turn from their wicked ways and be forgiven.

II.

Border states and the Old Northwest were particularly contentious regions during the election of 1864. Winning elections in the border states had been a priority for the Lincoln administration throughout the Civil War because the border states were slave states, and Lincoln knew that Republican leadership in those states would help ease the Union from being a house divided into being all free.

Many Democrats sincerely believed that Lincoln was a tyrant. In 1862 and 1863 Republicans had used military power to “preserve order” in border regions—places where many civilians were suspected of harboring sympathies with secession. Democrats, of course, believed the military was present to intimidate voters and secure Republican victory, and they complained bitterly about tactics Republicans had used to secure electoral victories.

There was substantially no Republican party in Kentucky during the Civil War, but federal troops still played a role in elections there. The bulk of loyal voters in the Bluegrass State were divided between conservative Unionists and Unconditional Unionists. Although neither of these factions supported the administration in Washington, Republicans threw their support behind the latter group, and the military was employed to help support their candidates at the polls.

On August 3, 1863, state and congressional elections were held in the Bluegrass State. A few days before the election, on July 29, one military officer issued an order declaring that only loyal men could serve as election judges, run for office, or vote. The officer also issued a loyalty oath that would be required of all voters which, in substance,

declared that the voter had never “given aid, assistance, or comfort” to the rebels. On July 31, from his headquarters in Cincinnati, General Ambrose Burnside declared martial law in Kentucky, ostensibly to uphold the election laws of the state. Burnside insisted that the military was only charged with assisting the civil authorities in the exercise of their election-day duties. But irregularities, as might have been expected, were bound to occur.³⁷

Some military officers took it upon themselves to write their own loyalty oath, which was much more stringent than the one required by the state or the official military proclamations: “You do solemnly swear that you will support the Constitution of the United States, the present administration, and the enforcement of its laws, the constitution of Kentucky and the enforcement of its laws.” Requiring voters to support “the present administration, and the enforcement of its laws,” was, of course, much more than most Kentucky voters could assent to do. But the oath reveals how many Republicans had conflated loyalty to Lincoln and emancipation with loyalty to the Constitution and the Union. One Kentucky citizen who was denied the vote later testified that he was not permitted to vote because he would not “take an oath to give the last man and the last dollar in support of the administration.”³⁸

Federal soldiers who were stationed in Kentucky during the election took seriously their call to maintain order. “There was an order issued preventing any who

³⁷ Richard Franklin Bense, *The American Ballot Box in the Mid-Nineteenth Century* (New York: Cambridge University Press, 2004), 253-255; “Special Orders No. 159,” July 14, 1863, “General Orders No. 47,” July 29, 1863, and “General Orders No. 120,” July 31, 1863, all in *O.R.*, ser. 1, vol. 23, pt. 2, pp. 570-572.

³⁸ Bense, *American Ballot Box*, 256-257.

had ever expressed disloyal sentiments or were disloyal from voting at all,” wrote one soldier to his parents, “and we carried it out too.” He reported that they had killed seven men “who attempted to steel the ballot box” in one city. Democratic papers throughout the nation referred to “the farce of the Kentucky election” and implored their voters not to allow such usurpations to happen in their states.³⁹

Republicans and Unconditional Unionists believed that Democrats and conservative Unionists were disloyal sympathizers with secession. Believing that Kentucky was no more loyal than Mississippi or Louisiana, one Kentucky soldier approved of “the presence of the Federal soldiery,” which he believed had been instrumental in carrying the state for the Unionists in 1863. “I am glad they were so controlled,” he wrote his sister. “I dont want every body to vote, not till everybody is a different kind of chap than he is now.”⁴⁰

Repression of political opposition was even more complete in Missouri. In Kentucky most soldiers who guarded the polls were from other states; in Missouri most soldiers were from local state militias that tended to be strongly Republican in their composition. Thus, neighbors armed with guns and bayonets enforced rules of their own making at the polls. In antebellum elections neighbors could sway each other with logic, moral suasion, rhetoric, pamphlets, or a nice shot of whiskey; during the Civil War, some neighbors stood by the polls armed with a much more persuasive flask.

³⁹ Luke Lyman to Parents, August 5, 1863, (GLC3036.25), GLI; Gettysburg *Compiler*, August 31, 1863; *New York Daily News* quoted in Bellefonte *Democratic Watchman*, August 21, 1863.

⁴⁰ Robert Winn to Sister, August 8, 1863, Winn-Cook Family Papers, The Filson.

Enrolling officers in the Missouri militia made notes regarding the political affiliation of potential recruits. According to one observer, each name was carefully examined and “any man not a radical & Loyal (to Lincoln) or who was suspected to be anti administration, was rejected & stricken from the enrollment.” (Tally lists exist from militia leaders confirming this fact.) Once enrolled, these militias broke up Democratic meetings, tore up Democratic ballots, destroyed poll books in majority-Democratic polling places, blocked the polls with bayonets, and drove potentially disloyal voters from the polls. At an 1862 congressional election a dispute between a militiaman and Democratic voter resulted in the militiaman attempting “to stick a bayonet in him.” Another soldier at that election arrived at a polling place with “a large revolver in his hand.” As he swung it around the crowd, he swore that “if there was any secessionist there he intended to kill him if he showed himself, and said he was going to vote.” The fear this soldier instilled in the voters drove most of them from the poll. At a time when most Democrats were called traitors and secessionists by their Republican opponents, few were willing to risk their lives to vote in a congressional election.⁴¹

One other major irregularity occurred during the 1862 elections in Missouri. Upwards of 1,500 paroled Union soldiers were stationed near St. Louis. On election day they were driven to the polls in government wagons. Their mission was to vote for the Republican candidate, Frank Blair, Jr. Few, if any of these soldiers, were citizens of

⁴¹ James Harrison to Barlow, September 18, 1864, Barlow Papers; Bensel, *American Ballot Box*, 217-253. Some soldiers were punished for interfering with Democratic voters. During the 1863 elections in Missouri, several soldiers used abusive language toward voters and threatened to steal their horses. In several of these instances the soldiers were tried and punished by courts martial. See, for example, RG 153 (Records of the Judge Advocate General [Army]), Court Martial Case Files LL-1738, LL-1744, and NN-1482, NARA.

Missouri, and when one Democrat objected to any more of their votes being taken, the editor of a Republican newspaper drove the soldiers to another polling place.⁴²

Further east, border state Democrats faced similar situations as in Missouri and Kentucky. Maryland Democrats complained that they had not had a “free Ballot Box” since the war began.⁴³ Winning a pro-emancipation majority in the state legislature in 1863 had been of utmost importance to Lincoln, and he was willing to use the military to help secure it. If emancipationists controlled the legislature, they would call a convention to adopt a new state constitution abolishing slavery in the state. This is precisely what happened, but the result did not come without controversy.

On October 27, 1863, General Robert C. Schenck issued orders to keep “evil-disposed persons” from voting in Maryland. Any suspicious persons “hanging about” the polls were to be arrested by the military, and any voter who might be of questionable loyalty would be ordered to take a loyalty oath. If they refused, they were subject to arrest. Such military interference in the state election made Governor Augustus Bradford furious, and in a letter to President Lincoln he declared that General Schenck’s order was “justly obnoxious to the public sentiment of the State.” Lincoln replied that “in this struggle for the nation’s life” some of these measures might be necessary to ensure the election of loyal candidates. Furthermore, keeping the peace on election day and “prevent[ing] the persistently disloyal from voting” did not constitute “a just cause of

⁴² Bensel, *American Ballot Box*, 262-267; Bruce Tap, “‘Union Men to the Polls, and Rebels to Their Holes,’” *Civil War History* 46 (March 2000), 24-40.

⁴³ James C. Clarke to McClellan, September 20, 1864, McClellan Papers.

offence to Maryland.” And Lincoln reminded Bradford that General Dix had used troops in a similar way “when your Excellency was elected Governor” just a year before.⁴⁴

Lincoln revoked parts of Schenck’s order but insisted that the military must be present at the polls.⁴⁵ Nevertheless, Bradford issued a proclamation on November 2, 1863 decrying such military interference in a loyal state. The military’s presence was without justification, he said, because Maryland’s loyalty had never faltered. Moreover, the state had a right to protect its own ballot boxes. He called on the judges of elections, in pursuance of the laws of Maryland, to report to the state’s attorney any soldiers posted near the polls. Furthermore, the judges must uphold their own oaths as judges of election in determining who had a right to vote. Despite General Schenck’s order, the judges of election should not administer the military’s test oath for voters.⁴⁶

Schenck worked hard to suppress Bradford’s proclamation. He restrained Baltimore newspapers from publishing it, he forbade the sending of telegrams related to it, and he even stopped vessels heading from northern Maryland to the Eastern Shore. The following day Schenck issued a broadside defending his actions, saying his intention

⁴⁴ “General Orders No. 53,” October 27, 1863, in *O.R.*, ser. 1, vol. 29, pt. 2, pp. 394-395; Augustus W. Bradford to Abraham Lincoln, October 31, 1864, Lincoln Papers; Lincoln to Bradford, November 2, 1863, in Basler et al., eds., *Collected Works of Lincoln*, 5:555-558.

⁴⁵ *Ibid.*

⁴⁶ Scharf, *Maryland*, 3:566-567; see also, Robert C. Schenck to Lincoln, November 2, 1864, and Augustus W. Bradford to Lincoln, November 3, 1864, both in Lincoln Papers; Thomas G. Pratt et al., to Bradford, November 21, 1863, Governors Miscellaneous Papers (S1274), MSA.

was to prevent traitors from voting. He then lifted his ban on the dissemination of Bradford's proclamation.⁴⁷

At the election itself there were great injustices inflicted on Democratic candidates and voters. Soldiers were stationed near polling places on the Eastern Shore and they arrested the election judges at one polling place for abiding by state law and Governor Bradford's proclamation, rather than Schenck's military order. Another military officer declared that no "*damned Democrat vote*" would be accepted, while an army sergeant held up a Republican ballot and declared that it would be "the only ticket that shall be voted today." A military order was even distributed ordering "every truly loyal citizen to . . . [give] a full and ardent support to the whole Government ticket" because "none other is recognized by the Federal authority as loyal or worthy of the support" of true Unionists. Several influential Democrats were also arrested on or around election day.⁴⁸

Edward Bates of Missouri, a conservative member of Lincoln's cabinet, noted "the late military *abuses of election*" in Maryland. But the tactics were successful. Emancipationists won 57 seats in the state legislature; another 8 Unionists were pledged to voting for a convention, 10 had neither endorsed nor opposed a convention, and 21 were pro-slavery Democrats. In 1864 the majority of the legislature called a convention to write a new constitution for the state. The document produced by the convention abolished slavery in Maryland, authorized confiscation of disloyal citizens' property, and

⁴⁷ Charles L. Wagandt, "Election by Sword and Ballot: The Emancipationist Victory of 1863," *Maryland Historical Magazine* 59 (June 1964), 147-151.

⁴⁸ *Ibid.*, 151-161.

permitted soldiers to vote (both in the referendum on the new constitution, and, if passed, in subsequent elections). The referendum (to be discussed below) was scheduled for October 1864, just a month before the presidential election.⁴⁹

Elections in Delaware followed a similar pattern. During the congressional and gubernatorial elections of 1862, both Unionist candidates—U.S. Representative George P. Fisher and William Cannon, respectively—called upon Washington to send federal troops to ensure a free and fair election. Twelve hundred troops arrived to guard the polls, which the Democratic *Delaware Gazette* deemed “certainly unnecessary, unconstitutional, and as a precedent unwise.” Fisher lost his congressional seat, but Cannon won the governorship.⁵⁰

Following the election Democrats maintained strong control of the state house. They launched investigations into the presence of troops on election day and concluded that soldiers had caused violence, that they had unconstitutionally required a loyalty oath of many voters, and that many Democrats were intimidated out of voting. In November 1863 Cannon—now as governor—again called for federal troops to supervise a special congressional election. General Schenck issued an order requiring a loyalty oath of

⁴⁹ Edward Bates, diary entry for November 19, 1863, in Howard K. Beale, ed., *The Diary of Edward Bates, 1859-1866* (Washington, D.C.: GPO, 1933), 316; *Tribune Almanac and Political Register for 1864* (New York: Tribune Association, 1864), 63; Charles L. Wagandt, *The Mighty Revolution: Negro Emancipation in Maryland, 1862-1864* (Baltimore: Johns Hopkins Press, 1964), 219-220; *Tribune Almanac and Political Register for 1865* (New York: Tribune Association, 1865), 55; *Baltimore Sun* April 27, 1864.

⁵⁰ Harold Bell Hancock, *Delaware during the Civil War: A Political History* (Wilmington: Historical Society of Delaware, 1961), 117-127. It will be recalled from Chapter 2 that after losing this election, Fisher was appointed to the federal bench in Washington, D.C.

suspected disloyal voters. This time Democrats decided to protest. Most stayed home on election day—in fact, only 13 Democratic votes were counted! They allegedly hoped that the election would be considered void, but the House of Representatives accepted the result and the Republican candidate claimed his rightful seat in Washington.⁵¹

In 1864 the Democratic legislature decided to strike back. By a party vote they defeated a resolution of thanks for the troops, and within two weeks of the presidential election the legislature adopted two laws to ensure the liberty of voting to citizens of the First State. The first statute allowed voters who had been prevented from voting by soldiers to seek damages in the civil courts. The second law allowed voters to set up new polling places if their right to vote was interfered with by more than five soldiers. Without the power of a veto, Governor Cannon was helpless to prevent the passage of these acts.⁵²

Several politicians at the national level hoped to get similar legislation adopted. On January 5, 1864, Senator Lazarus Powell of Kentucky introduced a bill in the Senate to prevent officers in the army and navy from interfering in civil elections. Three months later Representative Samuel S. Cox of Ohio introduced a bill in the House. Democrats defended the measures as a protection of free elections, while Republican opponents claimed that a military presence was essential in some regions on election day to preserve

⁵¹ Ibid., 137-138.

⁵² Ibid., 139-142; *An Act, Further to Protect the Free Exercise of the Elective Franchise*, act of October 28, 1864, and *An Act Further to Secure the Free Exercise of the Right to Vote at Elections*, act of November 2, 1864, both in *Laws of the State of Delaware, Passed at an Adjourned Session of the General Assembly, Held at Dover on Tuesday the Twentieth Day of October A.D. 1864* (Wilmington: Henry Eckel, 1865), 510-517.

peace and good order. The House bill died in committee; the Senate bill passed in the Senate but was not approved by the House until January 1865. Lincoln signed it into law on February 25, 1865. The law prohibited bringing troops near a polling place except to repel rebel invaders or to keep the peace. It also forbade military officers from proscribing qualifications of suffrage. Unfortunately for the Democrats, this measure was adopted a few months too late.⁵³

As the presidential election approached, Republicans in the border states called upon Washington to send troops to guard the polls. Governor Cannon informed Secretary of War Edwin M. Stanton that a military force was needed “to guard our polls, to keep the peace and prevent riot and bloodshed.” In a separate letter sent the same day, Cannon also asked that Delaware soldiers be furloughed home to vote in the election. Without their votes the Republicans would lose the state, “and Emancipation in Delaware, depend[s] upon the result.” Senator Bayard resented Delaware’s “tool of a Governor” who allowed the federal government to override the sovereignty of a loyal state. The Republicans would do anything to control this small Democratic stronghold. “I believe we shall not be permitted to vote on the 8th Novr,” wrote Bayard, “but I cannot advise the people to resist a large force because the *duty* of resistance depends upon the power of successful resistance to lawless oppression.” But if the state “had a million, or

⁵³ S. 37, 38th Cong., 1st sess.; H. R. 334, 38th Cong., 1st sess.; *House Journal*, 38th Cong., 1st sess., p. 1077, 1087; *Senate Journal*, 38th Cong., 1st sess., p. 774; *Senate Journal*, 38th Cong., 2nd sess., p. 367; *House Journal*, 38th Cong., 2nd sess., p. 506; *An Act to Prevent Officers of the Army and Navy, and Other Persons Engaged in the Military and Naval Services of the United States, from Interfering in Elections in the States*, act of February 25, 1865, 13 Stat. 437.

even half a million of people, I would advise resistance to any [of] the slightest interference by the forces with the exercise of the elective franchise.”⁵⁴

As in previous elections during the war, and as Democrats feared, soldiers played an important role in the election of 1864. As far north as New York City, soldiers were stationed in boats off of Manhattan, ready to be deployed in case of an election-day disturbance.⁵⁵ In St. Louis soldiers broke up Democratic meetings, tore down McClellan and Pendleton banners, and for various reasons, even arrested Democratic women. Some Democrats claimed McClellan men in Missouri were being shot as rebel bushwhackers when they came out in favor of the general. Many Democrats in the border states believed the ballot would be controlled by the bayonet. Like Senator Bayard, they believed they might have to resist Republicans with force on election day, and possibly also afterwards if they won and Lincoln refused to relinquish power. “Let the Democracy stand firm. No flinching now,” wrote one Pennsylvania congressman. “We have gone through the furnace. What we want now is fearlessness. . . . Our candidate for the Presidency must avow his determination to take his seat if fairly elected.”⁵⁶

⁵⁴ William Cannon to Edwin M. Stanton, October 27, 1864, Edwin M. Stanton Papers, LC; Bayard to Barlow, October 29, 1864, Barlow Papers.

⁵⁵ Stanton to General Grant, October 23, 1864, Stanton Papers; Your Friend & of our distracted Country to Seward, October 27, 1864, William H. Seward Papers, LC; Edward G. Longacre, “The Union Army Occupation of New York City, November 1864,” *New York History* 65 (April 1984), 133-158.

⁵⁶ James Harrison to Barlow, September 16, 17, 18, 22, and October 20, 1864, Barlow Papers ; Thomas Marshall Key to Barlow, August 24, 1864, Thomas G. Pratt to Barlow, October 5, 1864, both in Barlow Papers; James G. Nelson, “‘My Dear Son’: Letters to a Civil War Soldier,” *Filson Club History Quarterly* 56 (April 1982), 152-159; John Dodson Stiles to Coryell, April 20, 1864, Coryell Papers.

Democrats and conservative Unionists in the border states believed McClellan would carry their states unless Lincoln “tomahawked” the election and used “the muster rolls” to furnish enough votes to carry the election. The “few men” in Kentucky who would vote for Lincoln, wrote one conservative Unionist congressman, “will earn life long infamy. The vast bulk of our people will ever regard them with abhorrence.”⁵⁷ Many in Kentucky were tired of the shackles of military despotism and appeared ready to resist military interference at the polls. Peace Democrat Charles A. Wickliffe warned August Belmont that an attempt to suppress the vote for McClellan in Kentucky might end in “blood shed.” “Freemen cannot bear to be deprived of the right of suffrage by force without a struggle.” Wickliffe hoped that the Republicans would wisely choose to allow the civil authorities to hold the election. But if this was refused, “the Democracy will know upon what they have to depend.”⁵⁸ A Kentucky soldier of Democratic proclivities echoed these sentiments: “If Lincoln puts himself into the presidential chair by bayonets, just as certain as the Redeemer lives he shall be put out by bayonets.” Lincoln, of course, had no plans to use military might to keep the presidency if he lost the election, but Democrats had no way to know his intentions.⁵⁹

Not all Republicans and military officers were keen on using soldiers in elections. Henry Wager Halleck, Lincoln’s chief of staff, in particular, lamented their use. The soldiers were most needed in the field, he said, and “the best way to get up a row at the

⁵⁷ William Henry Wadsworth to Barlow, October 24, 1864, Barlow Papers.

⁵⁸ Charles A. Wickliffe to Belmont, September 5, 1864, Marble Papers.

⁵⁹ Nelson, “My Dear Son,” 154; Herman Belz, *Abraham Lincoln, Constitutionalism, and Equal Rights in the Civil War Era* (New York: Fordham University Press, 1998), 33-35.

polls at elections would be to send soldiers to prevent it.” Local authorities, he believed, ought to control their own affairs.⁶⁰ But a majority of the Republicans in Washington believed soldiers were essential to preserving peace, order, and fairness in the border states.

Soldiers played perhaps their most important role Maryland’s October 1864 referendum on the new state constitution. The proposed constitution, which would abolish slavery in the state and also authorized the forfeiture of the estates of convicted traitors, also permitted soldiers to vote and disfranchised Marylanders who supported the Confederacy. Significantly, the document, which had not yet been ratified, permitted these changes in the qualifications for suffrage in the election that would determine whether or not the new constitution would become law. Maryland Republicans knew that this radical document would not receive the consent of the people unless southern sympathizers were kept from the polls and Union soldiers had the polls brought to them.

The new constitution disfranchised any person who had “at any time been in armed hostility” against the United States, or aided the rebels “in any manner,” or advised any person to join the Confederacy. It also required voters to take an oath of allegiance to the Union by which the voter swore “that I have never given any aid, countenance or support to those in armed hostility to the United States, that I have never expressed a desire for the triumph of” the Confederacy, and that “I will in all respects demean myself as a loyal citizen of the United States.” The oath did not guarantee the right of an

⁶⁰ Halleck to Lieber, September 30, 1864, Lieber Papers.

individual to vote, however. An election judge could charge a voter with perjury and deprive him the ballot if he believed the voter was swearing falsely.⁶¹

Democrats claimed that, prior to ratification, the provisions disfranchising some and enfranchising others were “inoperative and void,” and they called on the governor to stop this injustice from taking place. But Republican Governor Augustus Bradford—who himself had been elected with the help of Union troops stationed at the polls—claimed that, unlike General Schenck’s military interference in the state elections the year before, this referendum was an act of the sovereign people and they could authorize the referendum however they chose. If voters felt that they had been denied their rights by the convention, they could sue in the state courts.⁶²

On October 8, 1864, Governor Bradford issued a circular to the judges of election stating that the election returns should distinctly show that the loyalty oath had been administered, and “that no military or other armed force had appeared at the place of voting and interfered with said election, unless under the call of the civil authorities as therein provided.”⁶³ On October 12 and 13 the referendum was held for the new state constitution. In the final tally, 30,174 ballots were cast in favor of the new constitution and 29,799 against it. Sixty-one blank ballots and thirty-three cast against the constitution by voters who had refused to take the oath were rejected from the final count. Maryland soldiers cast 2,633 votes in favor of the constitution and 263 votes against it.

⁶¹ Maryland Constitution (1864), art. 1, sec. 4.

⁶² George Vickers to August W. Bradford, September 14, 1864 and Bradford to Vickers, September 19, 1864, both in *Debates*, 3:1904-1906 (emphasis is Bradford’s).

⁶³ August W. Bradford to the judges of the election, October 8, 1864, in *ibid.*, 3:1915.

Thus, soldiers' votes supplied the slim majority of 375 votes in favor of the constitution. After receiving the official returns from the election judges, Governor Bradford declared that the constitution would go into effect on November 1, 1864.⁶⁴

Samuel G. Miles, a Maryland slave owner, brought suit in the state courts to overturn the result of the election, claiming that he had been denied the right to vote when he refused to take the loyalty oath even though soldiers had not been required by election judges to take the oath. The new constitution was a "nullity," he argued, because the convention did not possess the authority to add new qualifications to the suffrage, nor had it the right to permit soldiers to vote beyond state lines (and even if it had, soldiers, too, should have been required to take the loyalty oath, which the election returns did not indicate had been required). Miles, "as a qualified voter of this State . . . and as the owner of slaves in this State," felt entitled to have the results of the referendum thrown out because he "will be deprived of his said slavery property without any compensation" under the new constitution. Miles' motivation in challenging the new qualifications of suffrage, thus, was grounded in the fact that he was losing his slave property, despite his claim that he had remained loyal to the Union.⁶⁵

The Superior Court of Baltimore city dismissed Miles' suit. His case, along with several others, were appealed to the Maryland Court of Appeals under the head of *Miles v. Bradford*. After arguments had commenced in the state's high court, Chief Justice

⁶⁴ Ibid. 3:1925-1926. A group of Democrats approached Governor Bradford and requested permission to inspect the ballots from the field. The governor acquiesced; following their inspection of the votes, Bradford discarded 290 soldier votes, 285 for the constitution and 5 against. See *ibid.*, 3:1919-1925.

⁶⁵ Miles v. Bradford, 22 *Maryland Reports* 172-178 (1864); *Debates*, 3:1916.

Richard Johns Bowie and Associate Justice Brice John Goldsborough both recused themselves from the case because, “being themselves slaveholders, they had the same interest in the decision of the cause before them which the parties complainant in the cause had.”⁶⁶ Thus, while suffrage technically was the legal issue on the table, the slavery issue remained at the fore.

The Court of Appeals unanimously upheld the lower court’s dismissal of Miles’ petition. Relying on the doctrines of political questions and separation of powers, the Court claimed that it did not possess the jurisdiction to interfere with the governor’s counting of the soldiers’ votes. Lincoln, of course, was pleased with the outcome of the referendum. He had longed for emancipation in Maryland for some time because he believed “it would aid much to end the rebellion. Hence, it is a matter of national consequence, in which every national man, may rightfully feel a deep interest.”⁶⁷

Less than a month after the referendum in Maryland, soldiers from nineteen northern states—including the border states of Maryland, Kentucky and Missouri—voted in the presidential election. By most accounts the election in the border states transpired peaceably.⁶⁸ Still, irregularities occurred. Prior to the presidential election a group of Confederates captured four Union soldiers. The Confederates took their prisoners’

⁶⁶ *Debates*, 3:1917.

⁶⁷ Miles v. Bradford, 22 *Maryland Reports* 182-186 (1864); Lincoln to John A. J. Creswell, March 7 and 17, 1864, and Lincoln to Henry W. Hoffman, October 10, 1864, all in Basler, et al., eds, *Collected Works of Lincoln*, 7:226, 251, and 8:41-42.

⁶⁸ Anna M. Ferris, diary entry for November 8, 1864, in Harold B. Hancock, ed., “The Civil War Diaries of Anna M. Ferris,” *Delaware History* 9 (April 1961), 256-257; Owen R. Ashton and Joan Hugman, “Letters from America: George Julian Harvey, Boston, U.S.A., and Newcastle upon Tyne, England, 1863-1888,” *Proceedings of the Massachusetts Historical Society* 107 (December 1995), 178.

uniforms, as well as their Republican ballots, and confidently marched to the polls.

Dressed in Union blue, they cast the ballots without being administered the loyalty oath or having their qualifications questioned, “for of course no one could object to us after voting for Lincoln.”⁶⁹

An even more raucous scene occurred in Indiana, where a group of Massachusetts soldiers appear to have voted at least 25 times each in the 1864 state elections. “Did you ever attend an election out West?” one soldier asked his brother. “It is a big thing! . . . people vote as many times as they please, and allow all their friends to do the same, provided they are ‘sound on the goose.’” This soldier estimated that the 60th Massachusetts Infantry had “cast about 6,000 votes for Governor Morton.” The authenticity of this letter is certainly open to doubt, for it was widely reprinted in Democratic newspapers to support charges of Republican fraud. Nevertheless, it reveals some of the potential consequences of opening up civil elections to influence and interference by the troops.⁷⁰

As the preceding letter reveals, the states of the Old Northwest were also scenes of major controversy during the election of 1864. Rumors circulated throughout the continent of secret societies with memberships numbering in the hundreds of thousands

⁶⁹ Harry Gilmore, *Four Years in the Saddle* (New York: Harper and Brothers, 1866), 272-275. There were other irregularities as well. Minors were known to vote, in some cases without any trouble because they had “fibbed” about their ages when they enlisted. James G. Knight, “Some Experiences of a Soldier and Engineer,” manuscript memoir dated 1890, James G. Knight Papers, Research Center, Wisconsin Veterans Museum, Madison, Wisc. Other documented cases of minors voting or receiving furloughs to go home to vote also exist. See Susan Hinckley Bradley, ed., *A Soldier-Boy’s Letters, 1862-1865* (Boston: Privately Printed, 1905), 48.

⁷⁰ Quoted in Oscar O. Winther, “The Soldier Vote in the Election of 1864,” *New York History* 25 (October 1944), 453.

devoted to aiding the South and severing the Northwest into a separate confederacy. The painstaking research of historian Frank L. Klement has shown that these secret societies—the Knights of the Golden Circle, the Order of American Knights, the Sons of Liberty, and others—were, in actuality, largely paper organizations. Their founders were dreamers and schemers who hoped to build large-scale auxiliaries of the Democratic party to protect against arbitrary arrests, resist enforcement of the draft, and stop interference at elections. But these groups never got off of the ground, and most of the information spread about them was the product of over-zealous Republican imaginations.

Republicans throughout the North published exposés that wildly distorted the nature of these Copperhead secret societies. They exponentially bloated the number of members involved and said they were armed and ready to serve the South. (Unfortunately for the rebels, many Confederate leaders acquired a false hope in the service that these Copperhead groups had to offer.) Just prior to the presidential election, mass arrests were made in several northern cities, and military commissions were set up to try the alleged traitors. In Indianapolis a military commission convicted four Democrats for organizing secret societies to conspire against the government of the United States, for plotting to raid federal arsenals and to free rebel prisoners in the North, for arming themselves to fight with the rebel armies in Kentucky, and for arousing “hostility to the Government of the United States” through public speeches and secret societies. Three were sentenced to death and one to imprisonment. At Chicago, two days before the presidential election, the military arrested upwards of one hundred-fifty civilians on charges of wanting to free rebel prisoners at Camp Douglas, in Illinois, attempting to form a Northwest Confederacy, and plotting to burn down the city of

Chicago. An exposé was hastily published cataloging their heinous plans, and preparations were made to try them before a military commission sometime after the presidential election. The exposés and rounding up of prisoners convinced many northerners that “we were almost on the brink of a revolution in Ohio & Indiana” and that the “leading copperheads” sought to plunge “the whole north into anarchy & thus secure the complete success of Jeff. Davis’ rebellion.”⁷¹

The timing of the exposés and trials could not have been better for the Republicans. As wavering voters were deciding how to cast their ballots, the newspapers headlined fantastic stories of treason, intrigue, and incendiary plots. Fear gripped many northern minds. “Unless the north wakes up to the impending dangers and repudiates peace and copperhead doctrines, we must succumb to northern & southern traitors,” wrote Henry Wager Halleck. “And then? I fear,—civil war at the north as well as at the south.” Halleck believed there was “evidence showing conclusively a direct understanding & agreement between the copperhead leaders and southern traitors.” Defeating the Democrats, therefore, was the only way to save the Union. But, unfortunately, northern voters “are so accustomed to political abuse and falsehoods about election time, that it is difficult to make them understand the importance of the crisis & the danger they are really in.”⁷²

Indeed, while some Republicans were concocting fantastic tales of Democratic treason in the Old Northwest, many Republican leaders were keen to the effect that these

⁷¹ Frank L. Klement, *Dark Lanterns: Secret Political Societies, Conspiracies, and Treason Trials in the Civil War* (Baton Rouge: Louisiana State University Press, 1984), 173-184, 202-204; Halleck to Lieber, October 16, 1864, Lieber Papers.

⁷² Halleck to Lieber, August 19 and October 18, 1864, Lieber Papers.

trials could have on the 1864 state and national elections.⁷³ Governor Oliver Morton of Indiana believed the arrest of these Democratic conspirators was “essential to the success of the National cause in the autumn election.” Similarly, a Republican military commander in Indiana called on voters to “rebuke this treason . . . at the ballot box while Grant and Sherman meet them in the field.” When all was said and done, Union officials claimed to have saved the Union (and the Republicans’ electoral chances) by the actions taken against the Democrats of Illinois and Indiana. General William S. Rosecrans believed the exposés published against the alleged northern Democratic secret societies “aided everywhere the triumph of the Union cause.” Democrats, meanwhile, referred to the exposés and reports as “the ante-election falsehoods of a dishonest party,” and the trials were evidence that the Republican party would use “the authority of the Government for its own purposes.”⁷⁴

The centrality of these exposés and trials to Republican electoral strategies reveals the importance of the treason issue to many Americans in late-1864. The rumors about secret orders may have been just rumors, based on little fact or evidence; but the trials, as reported in the press, were not a mere farce to most northern voters. Treason was a central issue in the election precisely because of its gravity. Many ordinary citizens

⁷³ To be sure, some Democrats were working to overthrow the national government, they just did not have the numbers or support that Republicans claimed. One Democratic paper conceded “that a few fools calling themselves ‘Sons of Liberty,’ or something of that sort, did not hold mysterious conclaves in mysterious places, and spout preposterous nonsense and utter direful threats which they were as likely to execute as they would a military assault on the moon.” But these treasonous scoundrels were not the base of the Democratic party, according to the editors. See Klement, *Dark Lanterns*, 204.

⁷⁴ Klement, *Dark Lanterns*, 90, 147, 161, 172, 177.

sincerely believed that the Democratic party sought to see the nation perish and that they were mobilizing themselves to bring about that end. That belief had a profound impact on their election day decision.

The view that the Democrats were traitors was most fully articulated in Unionist Tennessee. There, military governor and Republican vice presidential candidate Andrew Johnson required a test-oath of voters that essentially branded all opposition to his ticket as disloyal. After swearing to support and defend the Constitution, one had to swear that he was “an active friend of the Government of the United States, and the enemy of the so-called Confederate States,” that “I ardently desire” the defeat of the rebels, that “I sincerely rejoice” in Union victories, and that “I will heartily aid and assist the loyal people in whatever measures may be adopted for the attainment of these ends.” Striking directly at the heart of the Democratic platform, the oath taker further had to state “that I will cordially oppose all armistices or negotiations for peace with rebels in arms” until the U.S. government had reestablished its authority throughout the land. An oath like this—which was a *requirement* to vote in Tennessee—incontrovertibly branded any Democratic opposition to the Lincoln administration as treason.⁷⁵ This politicized oath was a tangible and logical outcome of the Republican rhetoric of loyalty that took hold in the North during the war. Opponents of the president would lose their political rights because political opposition was treason.

⁷⁵ *The American Annual Cyclopaedia and Register of Important Events of the Year 1864*, 14 vols. (New York: D. Appleton & Co., 1862-1875), 764-765.

III.

As Republicans in northern states passed legislation providing for soldier suffrage, President Lincoln ordered his commanders in the field: “Tell the soldiers.”⁷⁶ Lincoln, like most Republican politicians, wanted the soldiers to know that the Republicans were their true political allies at home. Regardless of their enfranchisement by Republicans, however, Democratic soldiers were critical of this brazen partisan jockeying. “Mr. Lincoln has telegraphed the news down himself! I suppose he thought to make himself popular by so doing, and perhaps he will,” wrote one Democratic soldier, “but for myself I think it would be more becoming the dignity of the President to telegraph his thanks after a victory than such small news.” Lincoln’s actions, according to this soldier, “will open a door for political discussion and influence which may be very damaging to discipline.” This soldier’s ideas paralleled those of the Democratic opposition in the various state legislatures, and even more fully articulated a version of the doctrine of separation of powers that should exist in the government: “A soldier’s business is to obey; he forms a part of the executive, not of the legislative force in the country.”⁷⁷ Like many Democratic politicians across the North, this soldier believed that allowing soldiers to vote would undermine the safety of the country.⁷⁸

⁷⁶ Lincoln to George G. Meade, March 9, 1864, in Basler et al., eds., *Collected Works of Lincoln*, 7:233.

⁷⁷ Allan Nevins, ed., *A Diary of Battle: The Personal Journals of Colonel Charles S. Wainwright* (New York: Harcourt, Brace & World, 1962), 328.

⁷⁸ See, for example, William A. Wallace, *Reasons of Hon. Wm. A. Wallace, of Clearfield, For His Vote on Amendments to the Constitution* (n.p., 1864), and Alexander H. Bailey, *Allowing Soldiers to Vote. Mr. Bailey’s Speech on the Bill to Extend the Elective Franchise to the Soldiers of this State in the Service of the United States. In Senate, April 1, 1863* (n.p., 1863).

Views like those of this soldier are rarely discussed in the historical literature. Most scholars who have looked at the soldiers' votes of 1864 have taken the outcome of the presidential election at face value, concluding that because soldiers voted so overwhelmingly Republican they had adopted the Republican war policies as their own, regardless of antebellum political affiliations. Seventy-eight percent of the soldiers' votes cast in the field were for Lincoln and Johnson. Jean H. Baker referred to Democratic soldiers as "switchers" during the election of 1864, and Harold Hyman concluded that "Union soldiers decided that the War should continue on the basis of the Republican platform, including permanent abolition of slavery and rejection of any contrived 'armistice' with the Confederacy that might allow rebel governments to outlast hostilities." More recently James M. McPherson has used the results of the soldier vote to suggest wide scale acceptance of the Republican policies of emancipation and black citizenship: "When Lincoln ran for reelection on a platform pledging a constitutional amendment to abolish slavery, he received almost 80 percent of the soldier vote—a pretty fair indication of army sentiment on slavery by that time." McPherson's student, Jennifer Weber, claims to trace "the politicization of Union soldiers . . . into lifelong Republicans."⁷⁹ While the soldier vote *was* cast overwhelmingly Republican, it is not an

⁷⁹ Jean H. Baker, *Affairs of Party: The Political Culture of Northern Democrats in the Mid-Nineteenth Century* (Ithaca, N.Y.: Cornell University Press, 1983; reprint, New York: Fordham University Press, 1998), 52; Harold M. Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* (New York: Knopf, 1973), 279; James M. McPherson, *For Cause and Comrades: Why Men Fought in the Civil War* (New York: Oxford University Press, 1997), 129; Jennifer L. Weber, *Copperheads: The Rise and Fall of Lincoln's Opponents in the North* (New York: Oxford University Press, 2006), 2. It should be noted that although she claims to trace Union soldiers into "lifelong Republicans," Weber's research and analysis do not extend beyond the war years. Coming from a different perspective, and not dealing directly with the

altogether reliable index of the army's ideological motivation or political sentiment.

These historians fail to account for the myriad reasons that may have caused a soldier to vote for Lincoln. They also have neglected the non-presidential elections of 1864, as well as voter turnout. Who did not vote may, in fact, be as important as who did.

As the presidential election of 1864 rapidly approached, the eyes of all northern politicians turned towards the armies of the Union. Over the previous few years, nineteen northern states had passed legislation permitting volunteers from their states to vote in the field, and many politicians believed that the soldiers' votes would determine whether or not Abraham Lincoln would be reelected in November 1864. Never before had absentee voting existed on such a grand scale in the United States, but with such a large portion of the electorate serving in the army, many politicians felt it incumbent upon themselves to extend to them the ballot. Consequently, the votes of the soldiers became central to winning the election. "Everything depends on Pa. and upon the army vote of that State," wrote a prominent New York banker to the Democratic candidate for president, General George McClellan.⁸⁰

George McClellan had been a popular officer in the Army of the Potomac in the early months of the war, but disputes over military strategy as well as his inaction as

soldier vote, Ira Berlin comes to a similar conclusion about the motivation of the soldiers. According to Berlin, the slaves "taught common soldiers" that they needed to emancipate southern slaves. This "lesson" eventually worked its way up the chain of command so that many northerners, from army privates up to the commander in chief, "learned" that they needed to abolish slavery. See Ira Berlin, "Who Freed the Slaves? Emancipation and Its Meaning" in *Union & Emancipation: Essays on Politics and Race in the Civil War Era*, eds. David W. Blight and Brooks D. Simpson (Kent, Ohio: Kent State University Press, 1997), 105-121.

⁸⁰ Samuel L. M. Barlow to George B. McClellan, September 23, 1864, McClellan Papers; William Cassidy to Barlow, September 21, 1864, Barlow Papers.

commander of the army had caused President Lincoln to remove him from command in 1862. At their national convention in the late summer of 1864, Democrats chose McClellan as their presidential candidate for several strategic reasons. First, Democrats hoped that a nominee with a strong war record like McClellan's would offset the Peace plank in their platform and the selection of George H. Pendleton, for vice president. In order to moderate the ticket and make it appealing to more hawkish members of their party, the delegates at the convention chose the ever-popular General McClellan to run for president. Despite their aversion to the war, Democrats sought to make their candidates appear supportive of both the war effort and the troops by "getting up a 'war' record for Pendleton for the army," as well as "good McClellan military documents."⁸¹

The second reason Democrats chose McClellan was that their party had generally opposed allowing soldiers to vote in the field. Some Democrats feared that their position on soldier suffrage would alienate Democratic soldiers and that the army would only vote for the party that had supported their right to vote. In choosing McClellan, northern Democrats found a presidential candidate who had been loved by soldiers from both parties, and they hoped that this affection would be enough to win some of their votes.⁸²

Historians who focus on the outcome of the 1864 presidential election must recognize that not all soldiers who voted for Lincoln's reelection did so because they had become Republicans. Many soldiers expressed disillusionment with the candidates and with politics in general in the weeks leading up to the election. Many doubted whether they would bother to vote at all. "I hardly think that Abraham Lincoln will be reelected

⁸¹ Geo. W. A. to Manton Marble, September 27, 1864, Marble Papers.

⁸² Barlow to Marble, August 21, 1864, Marble Papers.

the people are rather getting down on him,” wrote one Vermont soldier. “For my part I dont care who is elected President if this war can be settled soon as possible but I dont see possible chances of settling under Lincoln’s administration.” An Illinois soldier, who could not vote because his state did not enfranchise soldiers, wrote his mother on election day, “I would not vote for McClellan for I think him a traitor and I’ll be damed [sic] if I would vote for Lincoln.”⁸³

These sentiments seem to have been expressed most often by Democratic soldiers who supported the Republican ticket during the war. “If I vote at all I shall vote most of the Republican ticket,” wrote one soldier to his Democratic family on November 8, 1864. It is significant that even by election day he had not decided if or how he would vote. A surgeon from Pennsylvania informed his mother that “politics are commencing to run quite high, but as for myself, not proposing to vote, I interest myself very little. Moreover, I really don’t know whom I would vote for.” Other Union soldiers were so discouraged that they were “ready to *vote* for *any* man that will put an end (or try to) to this awful butchery.” In August this soldier cared for neither McClellan nor Lincoln, and did “not know who I shall vote for & I do not care whether I vote at all.” By November he had changed his mind, however, and settled on President Lincoln as the best man to bring the war to a close. Similarly, a New York artillerist wrote his wife on September 29, 1864, from Atlanta: “You wanted to no [sic] who I was going to vote for. Most any body! I can’t vote for old Abe. Tho, I think he will be elected. I can’t go Maclelland, no way. The platform is made of copper, and I am no copperhead. So, I wont [sic] vote at

⁸³ Napoleon Bonaparte Hudson to Nathaniel, August 28, 1864, Hudson Letters, and Frederic Henry Kellogg to Mother, November 8, 1864, Kellogg Letters, both in Civil War Miscellaneous Collection, USAMHI.

all.” In Atlanta this soldier observed that many southern women supported for McClellan for president, “and for that verry [sic] reason I think the army should go for old Abe.” So he decided to vote for Lincoln. “I can’t support any copperhead candidate. I can’t fite [sic] for the Union and vote against it. A house divided against it self can not stand. I go for the Union start [sic] through. This is no time for party spirit to show it self. I am a Democrat, but I say hoora for old Abe and down with cesion [sic].” This soldier concluded that “the quickest way to end the rebellion is to elect Abe.”⁸⁴

This soldier touched on a sentiment that got to the motivation of many soldiers on election day. They voted for the candidate they believed would end the war quickly and honorably. If McClellan was elected, one Massachusetts soldier told his wife, “I think the war will be over putey [sic] quick but if . . . Old Abe gets elected the war will last 4 [more] years.”⁸⁵ A New York soldier believed “Gen McClellan will end it sooner and without embittering the two parties so much that they could never live happily together

⁸⁴ Harvey Reid to Father, November 8, 1864, in Frank L. Byrne, ed., *Uncommon Soldiers: Harvey Reid and the 22nd Wisconsin March with Sherman* (Knoxville: University of Tennessee Press, 2001), 198; Daniel G. Brinton to Ma, September 12, 1864, Daniel G. Brinton Letters, Chester County Historical Society, West Chester, Pa.; John F. L. Hartwell to Wife, August 14, 1864, in Ann Hartwell Britton, and Thomas J. Reed, eds., *To My Beloved Wife and Boy at Home: The Letters and Diaries of Orderly Sergeant John F. L. Hartwell* (Madison, Wisc.: Fairleigh Dickinson University Press, 1997), 270, 308; Leaner E. Davis to Wife, September 29 and October 21, 1864, Davis Letters, Civil War Miscellaneous Collection, USAMHI.

⁸⁵ Samuel Brooks to Wife, November 4, 1864, Brooks Letters, Civil War Miscellaneous Collection, USAMHI. See also Carl Uterhard to Mother, September 5, 1864, Christopher Monn to Brother et al., December 9, 1863, Christian Bonsel to Parents et al., January 29, 1865, and G. W. Schwarting to Brother, August 15, 1864, all in Walter D. Kamphoefner and Wolfgang Helbich, eds., *Germans in the Civil War: The Letters They Wrote Home* (Chapel Hill: University of North Carolina Press, 2006), 172, 273, 330, 443; H. J. H. Thompson to wife, March 27 and November 27, 1864, quoted in John G. Barrett, *The Civil War in North Carolina* (Chapel Hill: University of North Carolina Press, 1963), 226.

again.” Similarly, a Pennsylvania soldier told his cousin that the General “is the only one that can settle the war. I hope you will not forget to put in a vote for little Mc and the union.”⁸⁶

Soldiers who voted for McClellan saw themselves as Unionists, but they rejected the abolitionism of the Republican party. One Wisconsin soldier, who knew he was voting against his father, brothers, and a majority of the army, voted for McClellan because Mac was “best fitted to bring about an honorable Peace, and the Union as it was before the war.”⁸⁷ A Michigan soldier, who told his mother shortly after the Emancipation Proclamation was issued that he was thinking about deserting, felt no better about fighting for emancipation by the autumn of 1864. “I am tired of seeing *White* men Slaughtered to Free the Negro,” he wrote her. His experiences in the South made him conclude “that the Negro is on the whole better off in the state of servitude than [in the] begarly [sic] freedom to which he will inevitably fall if freed . . . it appears to be their highest ambition to lie in the Sun and hunt . . . it takes the greatest patience to get along with them.” A Brooklyn soldier who supported McClellan noted the negative economic consequences of emancipation. “If the negroes are freed what are we to do with them. They will be the means of throwing the whites out of employment.” The

⁸⁶ John Berry to Samuel L. M. Barlow, September 3, 1864, Barlow Papers; Daniel Helker to George Miller, November 2, 1864, George Miller Collection, USAMHI; see also John Borry to Daniel Musser, September 12, 1864, Daniel Musser Papers (MG-95), PHMC.

⁸⁷ Martin G. Ellison to Parent and Sister, October 1, 1864, Martin G. Ellison Papers, Research Center, Wisconsin Veterans Museum, Madison, Wisc. See also George F. Morse to Father, November 6, 1864, Morse Letters, Civil War Miscellaneous Collection, USAMHI; Charles A. Coward to Father, January 25, 1863, Coward Letters, Civil War Miscellaneous Collection, USAMHI; John Berry to Barlow, August 27, 1864, Barlow Papers.

Irish, he predicted, would incite war in the North if they had to compete with blacks for jobs. Moreover, he believed that African Americans were lazy. “Whenever we want them to work we are compelled to send a guard after them,” he wrote his sister. “Mary Emma I do not like niggers no matter what you may say in their favor.” Another Pennsylvania cavalryman expressed his opposition to emancipation by criticizing those “Dam Degreaded Wreches” up North who called McClellan “a trator to his Country. . . . you can tell all them Dam Sap headed nigrow Hug[g]ers up thear that i am a full Blooded McClelon man And Sow is Every good union soldier that Belongs to the Arme[y] [sic] of the Potomac that is fighting for His Distracted Country.”⁸⁸

In like manner, not all soldiers that voted for Lincoln supported emancipation. “I’m no abolitionist and if I had a vote and McClellan stood on a good old democratic platform I would vote for him, but as things are at present, if I had that vote it should be cast for Lincoln,” wrote one Pennsylvanian stationed near Petersburg. “McClellan, standing alone or in connection with any good man, would gain the day, but as he stands in connection with the *traitor* Pendleton he must fail.” Another Pennsylvanian who considered himself a “full Bloom” Republican admitted that “there are some things I do not like about Lincoln, one of them is why he does not exchange all the White Prisoners and let the Colored ones go if the south will not exchange them. I do not believe in

⁸⁸ John Morton to Mother, January 13, 1863 and August 31, 1864, Morton Letters, and Morris W. Chalmers to Sister, September 26, 1864 and October 27, 1864, Chalmers Letters, both in Civil War Miscellaneous Collection, USAMHI; Charles Henry Morgan to Susannah Miller, September 23, 1864, Chester County Historical Society, West Chester, Pa.

having White Soldiers suffer to save a few Negroes.”⁸⁹ Similarly, a Minnesota artilleryist declared himself for Lincoln but against abolition. “And whether slavery be right or wrong I dont [sic] believe in carrying on a bloody war for years for the sole object of Abolishing slavery . . . whenever [the South] can be made or Per[s]uaded to lay down their Arms & Return to their Allegiance the war should end but not before.”⁹⁰ Following the election one soldier, who appears to have supported Lincoln, cursed abolitionists like Wendell Phillips for wanting “to make a nigger better than a white man.”⁹¹

Many soldiers saw themselves as choosing between the lesser of two evils. After mailing home his ballot for Lincoln, one New York soldier remarked that he had no respect for either presidential candidate. Old Abe needed “a new set of brains” while McClellan had too many private interests to be trusted. The only reason he voted for Lincoln was because the war had to be fought and won, and he believed Lincoln would do that. Charles Francis Adams received a telling letter from his son who was serving in the 5th Massachusetts Cavalry: “Soldiers don’t vote for individuals; they don’t vote for the war; they have but one desire and that is to vote against those who delay the progress of the war at home; they want to vote down the copperheads.” According to Adams, Jr., soldiers decided how to vote based not on what they were *for*, but what they were

⁸⁹ John S. McVey to Horace Subers, October 15, 1864, McVey Letters, and Thomas C. Bowman to Sister, October 20, 1864, Bowman Letters, both in Civil War Miscellaneous Collection, USAMHI.

⁹⁰ Brigham Foster to Wife, November 9, 1864, Foster Letters, Civil War Miscellaneous Collection, USAMHI. This soldier also believed that the southern people would never be willing to end the war while Lincoln was president and his emancipation policy was the law of the land.

⁹¹ Jacob B. Dannaker to Mother, December 28, 1864, Dannaker Letters, Civil War Miscellaneous Collection, USAMHI.

against. “Look at the soldiers vote and that will show you what we think of your peace men,” one Maine soldier told his wife, again implying that many voted against rather than for something. After commenting that he disliked both gubernatorial candidates in New York, but that he disliked the Republican “still more,” Marsena Rudolph Patrick, the provost marshal general of the Army of the Potomac, commented: “It is a choice of evils—I vote for McClellan because I cannot vote for Lincoln.”⁹² Similarly, a War Democrat from New York decided to split his ticket. He feared Peace Democrats, especially those that tried to portray themselves as supportive of the war. “I voted the Republican State ticket and if Gen McClellan had not been on the other should have voted for Lincoln as the less of *two evils*.”⁹³

This last soldier’s fear of Peace Democrats captured the essence of many Democrats in the army who could not vote for McClellan. “I am afraid of Pendleton,” he wrote. “I could respect him I think if he came out plain and plump a peace on any terms man but he is two faced[.] I think as much of McClellan as anyone can & would trust him with everything but many a night I have laid awake thinking if he should die, what would happen[;] still I voted for him.”⁹⁴

⁹² Edward King Wightman to Brother, October 26, 1864, in Edward G. Longacre, ed., *From Antietam to Fort Fisher: The Civil War Letters of Edward King Wightman, 1862-1865* (Madison, Wisc.: Fairleigh Dickinson University Press, 1985), 212-213; Charles Francis Adams, Jr., to Father, October 15, 1865, in Worthington Chauncey Ford, ed., *A Cycle of Adams Letters, 1861-1865*, 2 vols. (New York: Houghton Mifflin Co., 1920), 2:204; Charles H. Smith to wife, October 20, 1864, Charles H. Smith Letters, Civil War Miscellaneous Collection, USAMHI; Patrick, diary entry for October 25, 1864, in Sparks, ed., *Diary*, 433.

⁹³ John Berry to Samuel L. M. Barlow, November 4, 1864, Barlow Papers.

⁹⁴ *Ibid.*

But the thought of a Peace Democrat on the ticket was more than most soldiers could bear. “The peace plank in the [Democratic] platform renders it untenable,” observed one Republican soldier. “Army officers heretofore strong for McClellan say they cannot vote for an ‘immediate cessation of hostilities.’” Similarly, a Rhode Island soldier noted in September that “six months ago a grait many of the soldiers would have voted for [McClellan] but he wont get as many now old abe is the man to finish this thing up.” A New Yorker who had voted for the General noted that “McClellan would have got A greate many more votes in the army if he had not been in with pendleton[,] the soldiers dont like pendleton.” A soldier in the Regular Army summed up what must have been the sentiments of many Democratic soldiers in a letter to his sweetheart: “you think perhaps I am a McClellan man yes I would rather fol[l]ow him than any man on earth for I know him to pos[s]ess the true principle of the Soldier and a man, but I could not vote for him it is the wrong party that comes in to power with him if he is elected.”⁹⁵

Other Democratic soldiers were weary of the war and the Lincoln administration’s handling of the conflict. “I wish the Chicago convention or some other would have the effect of reducing the prices of Sutler’s goods,” wrote one New York soldier. He also remarked that his pay was seven months late and that a “new administration might do better by us.” Another soldier noted that the troops “do not like [Lincoln] at all. He gives us very little to eat three hard tack and a pint of Coffee for breakfast, Three Hard Tack and a piece of Salt Horse for dinner, Hard tack and Coffee for

⁹⁵ Adam Badeau to Harry, September 4, 1864, Badeau Papers; John Preston Campbell to Sister, September 11, 1864, Campbell Letters, Edward Cotter to Parents, November 15, 1864, Cotter Letters, and Samuel J. Marks to Carrie, October 1, 1864, Marks Letters, all in Civil War Miscellaneous Collection, USAMHI.

supper. It is very hard for any kind of men to live on that.” Others believed that McClellan would not treat the soldiers to “shoddy” equipment. Some Republicans feared the effects of these issues on the army vote. The soldiers “are much dissatisfied because they have received no pay, they fear that they will not be paid at the end of their term of service as it seem has been the case with several regiments of that class,” wrote one worried Republican to an Illinois congressman. “Unless something is done soon to counteract this evil, I fear that our candidate for President will lose many votes.”⁹⁶

Many Democrats in the field also complained that Republicans at home did not understand what they were calling for when they urged the Lincoln administration forward until a peace was won. “A vigorous prosecution of the war’ sounds well to talk, it reads well in newspapers, and makes a good platform for political campaigns. But my God! do people know what it means? I do. It means every week or two to take out a few thousand men and butt them against the mud walls that surround Richmond, then march back to camp with from five to fifteen hundred [fewer] men than we went out with! . . . I am not in favor of withdrawing our armies and giving up everything, but think every honorable means that can be used to put an end to the war should be, and soon, too.”⁹⁷

Because of the suffering they had endured, many soldiers resented those at home who denounced certain men serving on the battlefield as disloyal. A Kentucky soldier

⁹⁶ Hermon Clarke to Father, September 11, 1864 and October 3, 1864, in Harry F. Jackson and Thomas F. O’Donnell, eds., *Back Home in Oneida: Hermon Clarke and His Letters* (Syracuse: Syracuse University Press, 1965), 161, 166; Morris W. Chalmers to Sister, October 27, 1864, Chalmers Letters, and George W. Lewis to Henry S. Jay, August 29 and September 3, 1864, Henry S. Jay Papers, both in Civil War Miscellaneous Collection, USAMHI; A. Beeler to Washburne, October 6, 1864, Washburne Papers.

⁹⁷ Hermon Clarke to Father, November 13, 1864, in Jackson and O’Donnell, eds., *Back Home*, 176-177.

told his sister in August 1864: “All men opposed to Father Abraham’s way of doing buisness [sic] are not in favor of Jeff Davis’ way—nor Vallandigham’s. And all men that dislike the *service*, are not *cowards*, no, not even all that get out by dishonorable trickery.” In July this soldier had said he would not vote for Lincoln “or anybody else” without having a change of mind. By October he appeared to come out in favor of the incumbent, but he still would not allow his sister to call McClellan a traitor. “Loyal men are in favor of McClellan and Slavery—who are willing to prove their loyalty by facing the enemy upon the Battle field.” It was a truer loyalty to enlist in the cause of the Union and oppose emancipation than to stay at home campaigning for Lincoln and abolition, he cautioned. “So I will request you not to make any more charges like those contained in your last to the Genl. of ‘Ignorance, Treason, & Cowardice.’”⁹⁸

Most Democrats in the army probably opposed both the Peace men of their party and the abolitionists. An Indiana Democrat said he could neither indorse Vallandigham nor Lincoln: “I am a Douglas Democrat,” he wrote in mid-1864 (three years after Douglas’ death), “& will never vote for the mongrel, kinky headed abolitionists. I detest them.” Another Democratic soldier, who believed party politics had a corrosive effect on the war effort, wrote: “I think the Peace Democracy are a despicable set, equally as bad as the worst abolitionist.”⁹⁹

⁹⁸ Robert Winn to Sister, July 16, August 1, October 19, 21, and 26, 1864, Winn-Cook Family Papers, The Filson.

⁹⁹ William Allen Clark to Parents, June 5, 1864, in Margaret Black Tatum, ed., “Please Send Stamps’: The Civil War Letters of William Allen Clark Part IV,” *Indiana Magazine of History* 91 (December 1995), 420; Andrew Knox to Wife, February 22, 1863, Knox Letters, Civil War Miscellaneous Collection, USAMHI. See also George D. Williams to Henry S. Jay, March 24, June 20, and August 18, 1864, Henry S. Jay Papers, Civil War Miscellaneous Collection, USAMHI.

Because so many soldiers expressed feelings of disdain towards politics and the presidential election, or uncertainty over who to trust and vote for, the question of voter turnout must be examined. Most scholars of Civil War politics and the Union military have taken this point for granted and merely assumed that the voter turnout in the Union army mirrored the high voter turnout exhibited in the election as a whole. If the soldiers did not go to the polls in large numbers, however, then perhaps current understandings of soldier motivation and political affiliation need adjustment.

The analysis here is meant to be tentative and suggestive. There is an enormous amount of evidence that indicates a broad support for Lincoln among the troops. Still the historiographical question about the ideological motivation of Union soldiers may have been too hastily closed.

The sample of regiments in Table 6.1 represents all of the military units for which both election returns and complete morning reports for election day could be located. The sample reveals an estimated voter turnout of about 80 percent among the troops. This level of voter participation was typical for mid-nineteenth-century elections, but it is nevertheless telling that about 20 percent of the soldiers eligible to vote chose not to vote on election day. After all, voters at home might have to travel some distance to cast their ballots, but voters in the field had only to walk down their company street.¹⁰⁰ When the

¹⁰⁰ In at least one other case a scholar has noted the low voter turnout among the troops. “Only 3,121 of approximately 15,000 Union soldiers [from Maryland] took advantage of this opportunity [to vote],” writes Jean H. Baker, “although certainly some soldiers received convenient furloughs and returned home to vote. The voting procedures in the field, which permitted officers to collect ballots, probably intimidated some Democrats from voting.” See Jean H. Baker, *The Politics of Continuity: Maryland Political Parties from 1858 to 1870* (Baltimore: Johns Hopkins University Press, 1973), 131 note 59.

voter turnout from this sample is factored into the percentage of votes cast for President Lincoln, somewhere between 50 and 60 percent of the eligible soldier voters voted for Lincoln, substantially lower than the 80 percent figure generally stated.

The most obvious explanation for low voter turnout among the soldiers would be troop movements and skirmishes. One commissioner from Pennsylvania's October state election collected all of his returns except those of one battery "who moved last night or this morning." Some army officers were aware that this might be a problem, however, and planned accordingly. In order to see to a free and expedient election, the officers of the Fifth Corps, for example, prohibited drills on election day and requested all commanders "to take measures to enable their men to vote early and as promptly as possible." Evidence suggests that troop movements had a minimal effect on the soldier vote.¹⁰¹

Another reason for a low voter turnout might be that soldiers had not made themselves eligible to vote according to provisions in the laws that enfranchised them. The Pennsylvania statute permitting soldiers to vote, for example, required a ten cent tax to be assessed in order for soldiers to be eligible to vote. It appears that many soldiers did not have this tax assessed in time for the state election in October. "The election passed off quietly, a very small vote being polled in consequence of not having tax

¹⁰¹ McKelvy, "Diary," 404; *O.R.*, ser. 1, vol. 42, pt. 3, 549. See also William H. Newlin, *A History of the Seventy-Third Regiment of Illinois Infantry Volunteers* ([Ill.]: Published by the Authority of the Regimental Reunion Association of Survivors of the 73d Illinois Infantry Volunteers, 1890), 388; William C. Hacket to Wife, October 27, 1864, Hacket Letters, Civil War Miscellaneous Collection, USAMHI; E. P. Sturges to Folks, November 9, 1864, E. P. Sturges Correspondence, *Civil War Times Illustrated* Collection, USAMHI.

receipts,” wrote one Pennsylvania election commissioner to a Republican newspaper. This was “a matter that should not be again omitted by the friends of the soldier. With proper exertion a vote twice as large may be obtained [in November].” Similarly, a Pennsylvania soldier wrote home two weeks before the October election: “For me to vote here ‘twill be necessary for a receipt from the collector to be sent to me. It will be too late, I suppose, for the first election unless already done. But I should like to have things done for the Presidential.” Fortunately, this soldier learned a few days later that his “officers had made arrangements for having those entitled to vote, assessed, etc., according to some order issued by the War Department.”¹⁰²

Testimony about the army’s general attitude towards politics reveals that many soldiers may have been less concerned about voting than has generally been presumed. “I note all you say of politics, but in the army we take but little interest except earnestly to wish the election was over,” wrote General George Gordon Meade to his wife. “Until it is, nothing else will be thought of and no proper thought given to the war.” Similarly, a Democratic soldier from New York remarked that “politics don’t trouble us much.” Many Republican soldiers perceived that significant numbers of their comrades were not interested in politics and the election, and they took it upon themselves to canvass the army and convince as many of their fellow soldiers as they could to join them in voting for Lincoln. And one soldier who came from a Democratic family but supported the Republican ticket while in the army wrote home to his father that soldiers “have little

¹⁰² J. B. Wood, “Visit to the Army of Eastern Virginia and North Carolina,” *West Chester Village Record*, October 25 1864; Kermit Molyneux Bird, *Quill of the Wild Goose: the Civil War Letters and Diaries of Private Joel Molyneux, 141st P. V.* (Shippensburg, PA: Burd Street Press, 1996), 230, 235.

opportunity of studying politics, and also have so much else to think of as to have little inclination for it.”¹⁰³ Though many political issues were substantively relevant to the soldiers in the field, soldiers were often too busy to think on the issues, or simply did not have the information on hand with which to take educated positions.

Election commissioners visiting the troops also got the impression that politics was not important to many of the boys in blue. One commissioner was perceived as “rather disgusted with the result of his mission” because “very few of the soldiers had qualified themselves to vote and altogether appeared quite indifferent. He seemed to think the soldiers’ vote would be very insignificant.” Pennsylvania commissioner David McKelvy recorded a similar observation in the journal he kept while canvassing the troops: “The other officers were perfectly indifferent as to the election, and it was with some difficulty that they were urged in opening the polls yesterday and with more difficulty that they were to-day urged into the task of finishing out the forms. . . . They considered it just so much work put on them for nothing.” After the state election in October, McKelvy determined that “getting the vote was a thankless job,” and he did not wish to serve again as an election commissioner for the presidential election.¹⁰⁴

¹⁰³ Meade to wife, October 7, 1864, in George Gordon Meade, *The Life and Letters of George Gordon Meade*, 2 vols. (New York: Charles Scribner’s Sons, 1913), 2:232; Hermon Clarke to Brother, October 9, 1864, in Jackson and O’Donnell, eds., *Back Home*, 169; Jesse Brown to sister, October 23, 1864 (GLC3523.15.19), GLI; Edwin Weller to Nett, October 15, 1864, in William Walton, ed., *A Civil War Courtship: The Letters of Edwin Weller from Antietam to Atlanta* (New York: Doubleday & Co., Inc., 1980), 115-116; Harvey Reid to Pa, September 19, 1863, in Byrne, ed., *Uncommon Soldiers*, 91.

¹⁰⁴ Meade, *Life and Letters*, 2:233-234; McKelvy, “Diary,” 404, 410.

These sentiments were also present in the writings of enlisted men. Many soldiers wished the election was over for the sake of the war effort, while others paid no attention to it whatsoever. One invalid in a Philadelphia hospital believed that the rebellion was crumbling very fast but that “the rebels will striek and hang” on until the election was over. This soldier’s opinion agreed with the estimation of General Meade, who desired the elections to be over so that “attention will be turned back to filling our ranks and raising more troops, so that we can have the means of bringing this war to a close, which will never be over without much more hard fighting.” Meanwhile, on election day, one cavalryman recorded in his diary: “Laying in camp today[;] nothing of importance.”¹⁰⁵

Some documentary evidence from the field also suggests some voters in the field may have had a real indifference or aversion to participating in the election. The 18th Indiana Light Artillery held a mock election to gauge the sense of the regiment on the upcoming election. According to one participant there were only five votes in the 8th Battery, four for Lincoln and one for McClellan. Of more interest are the ones who did not vote: “There were seven or eight of the eighth Battery who are regular butternuts in principle and refused to vote.”¹⁰⁶ A New York soldier noted that “several refused to

¹⁰⁵ G. D. McCormick to Margaret Williams, September 28, 1864, Evan Williams Civil War Letters, Historical Collections and Labor Archives, Paterno Library, Pennsylvania State University; Meade, *Life and Letters*, 2:239; John W. Rowell, *Yankee Cavalrymen: Through the Civil War with the Ninth Pennsylvania Cavalry* (Knoxville: University of Tennessee Press, 1971), 196.

¹⁰⁶ John H. Rippetoe to Mary J. Rippetoe, September 18, 1864, Rippetoe Letters, Civil War Miscellaneous Collection, USAMHI. This soldier was still proud of the vote in his unit, which must have gone overwhelmingly for Lincoln.

vote” in his regiment.¹⁰⁷ Another New Yorker said that few in his company supported McClellan: “only 3 out of about 50 so far and they are not decided and I think will not vote at all.” Finally, a Massachusetts Democrat serving in the army noted that his battery went for Lincoln “but a great many of the McClellan men did not vote. They are of the weak kneed kind.”¹⁰⁸

Partisan attachment may have, at times, also seemed less secure among Republican soldiers as well. One wounded cavalryman at a hospital in Philadelphia warned Pennsylvania’s Republican governor that if the soldiers were not allowed to go home to vote (rather than vote at the hospital) many would refuse to vote at all, and he warned the governor that “some of the less intelligent even threaten to ‘change their colors.’”¹⁰⁹

The range of sentiments exhibited by Union soldiers is both extensive and remarkable. There was no clear consensus among the Union army that Abraham Lincoln was the right man for the job. Even many soldiers who voted for Lincoln expressed serious doubts as to his qualifications (his needing a new set of brains, for example).

¹⁰⁷ William D. Butler to James and the folks, October 26, 1864, War Letters 1861-65, NYHS. Again, in his regiment the majority also went for Lincoln.

¹⁰⁸ Willie Root to Laura, October 16, 1864, Willie Root Diary and Letters, *Civil War Times Illustrated* Collection, 2nd series, USAMHI; John W. Chase to Brother, November 12, 1864, in John S. Collier and Bonnie B. Collier, eds., *Yours for the Union: The Civil War Letters of John W. Chase, First Massachusetts Light Artillery* (New York: Fordham University Press, 2004), 376. This soldier was unable to vote because Massachusetts never enfranchised her soldiers. Still, this soldier worried that “perhaps a *poor cuss* like me might get shot” for his political opinions, and he felt he had to “keep silent” on some of his opinions during the election. *Ibid.*, 345, 363.

¹⁰⁹ H. K. Smith to [Andrew G. Curtin], October 12, 1864, RG-19 (Records of the Department of the Military), Subgroup: Office of the Adjutant General, Series 19.29 (General Correspondence), PHMC.

Perhaps even more striking is that it seems that many of the men endangering their lives for the Union were not motivated enough to get out of their tents to cast a vote for president in an election that largely has been seen as ensuring the downfall of both slavery and the Confederacy.

The low turnout for McClellan among the troops may be indicative of a lack of faith of Democratic soldiers in the Democratic party and platform in 1864. While many soldiers loved George McClellan as a general, they frequently commented on their dislike of “the company he kept.” McClellan’s running mate, George H. Pendleton, was among the numerous northern politicians who had branded the war a failure. It is likely that many Democratic soldiers consciously abstained from voting, rather than endorse a platform that denounced their efforts on the battlefield. In doing so they renounced both the “peace” platform of the Democrats and the “abolitionist” platform of the Republicans. At least one soldier wished he could vote for McClellan for President and Andrew Johnson, Lincoln’s running mate, the War Democrat from Tennessee, for vice president.¹¹⁰

What seems most likely is that many scholars’ conclusions that the Union soldiers had adopted Republican war aims as their own overstates the case. Even if the voter turnout was not as low as this study suggests, and a higher proportion of the eligible voters in the field voted for Lincoln, it is more likely that soldiers voted overwhelmingly Republican out of disgust for the party that had deemed their work in the field a failure than out of support and admiration for Republican war aims. One way to “measure” the

¹¹⁰ Nevins, ed. *Diary of Battle*, 476. This soldier refused to vote for Horatio Seymour’s reelection in New York in 1864, but he did end up voting for George McClellan for president.

partisan attachment of Union soldiers to the Republican party is by considering how soldiers acted in other elections close to, but not on the same day as, the presidential election.

Tables 6.2 and 6.3 compare the results of several state and congressional elections with the votes of those states in the presidential election. These state and congressional elections were held in the weeks just prior to the presidential election. As can be seen, there were drastic increases in the voter turnout among the soldiers in the November presidential election, when compared with the September and October elections (with the exceptions of the Republican soldier votes in Maryland and Iowa). On average, the homes votes of both parties increased only 8 percent from the state to the presidential election, whereas the Republican army vote increased almost 50 percent, and the Democratic army vote increased by more than 120 percent.

While this analysis is admittedly impressionistic, one explanation for the increased turnout among the troops may be that the voters at home were more tied to particular party platforms than were the soldiers in the field. Perhaps the troops were more concerned with electing a commander-in-chief who would lead them to victory than they were with the two parties' positions on most of the political issues of the day. Electing the right president was the most important choice they would have to make—and for most soldiers, was the only one worth voting for. Despite General McClellan's letter of acceptance in which he pledged to prosecute of the war until victory was won, many soldiers had reason to believe that if McClellan was elected then all of their efforts in the field would come to naught. This belief was enough to convince more Republican soldiers to vote in November than in October, to get some Democrats to vote for

Abraham Lincoln, and to keep other Democrats from voting at all. It also helps explain why so few Democratic soldiers voted in the state and congressional elections. Most Democratic soldiers, by 1864, had come to doubt their party's loyalty and Unionism. They could not vote for Democratic congressmen and state leaders. But many could still vote for McClellan because they believed he would fight to restore the Union (as it was). As one soldier wrote, "I don't suppose for a moment that *any soldier* would go home and vote a *Copperhead ticket*, and on the other hand *I* wouldn't vote a *republican ticket* just merely because it *was* republican but I should most assuredly vote for the Union, and those that would maintain it, let the *principle* appear under any name whatsoever."¹¹¹

Scholars who have used the soldier vote to support various conclusions about the army have almost invariably ignored the soldiers' votes in the non-presidential elections of 1864. By 1864, it seems that Republicans had maintained the support of their partisan friends in blue (the Republican party did win a large majority of the soldier vote in October, too), whereas Democratic soldiers had lost confidence in both parties altogether. One New York soldier who cast his ballot for McClellan came to the sad conclusion that both parties were "equally corrupt, and equally far from my views in their extreme doctrines."¹¹² This soldier, like many of his comrades, believed he had to choose between the lesser of two evils. Some Democratic soldiers turned to Lincoln to finish out the war, some, like this one, voted for their party's candidate, and some opted to abstain from the franchise.

¹¹¹ George W. Tillotson to Wife, November 21, 1863 (GLC4558.124), George W. Tillotson Papers, Gilder Lehrman Institute.

¹¹² Nevins, ed., *Diary of Battle*, 473.

Many Democrats—both at home and in the field—complained that it was difficult to vote the Democratic ticket in the field. One soldier complained that his regiment only received Republican newspapers, and that “some other regiments had no opportunity to vote any but the Republican ticket.”¹¹³ A New York soldier grouched that “such mean, contemptible favoritism or partisanship” was “shown for Lincoln, by many officers in the army, representatives of the Sanitary and Christian Commissions, etc.” that “hundreds of soldiers have been literally proscribed from voting for McClellan by their officers, and they have been obliged to get McClellan ballots from other sources.” On at least a few occasions Democratic politicians and electioneers were threatened and driven from military camps. Ohio congressman “Sunset” Cox complained that “the camps [were] closed to us” and “the Barracks [were] used to keep us out & Republicans in.” “The soldiers were hungry for our tickets,” he exclaimed, “& the cry was for more, when the officers ordered us out! This in Columbus—a *free* state! Do you wonder how I am beaten. We left tickets there, when ordered out, but they were at once destroyed.”¹¹⁴

¹¹³ Hermon Clarke to Father, October 16 and 17, 1864, in Jackson and O’Donnell, eds., *Back Home*, 171, 173; Robert Emmet Doyle to Barlow, October 27, 1864, Barlow Papers; “From the Headquarters of the Army of the Potomac,” September 22, 1864, Geo. W. A. to Mr. Croly, September 22 and 25, 1864, Horatio Seymour to August Belmont, September 26, 1864, Geo. W. A. to Marble, September 27 and October 2, 1864, all in Marble Papers; Wilhelm Mobus to Parents et al., November 4, 1864, in David L. Anderson, ed., “The Letters of ‘Wilhelm Yank’: Letters from a German Soldier in the Civil War,” *Michigan Historical Review* 16 (Spring 1990), 81; Peter Curley to Andrew Curtin, October 11, 1864, Slifer-Dill Papers, Dickinson College. One Union officer was convicted of conduct prejudicial to good order and military discipline by a court martial for distributing copies of the Columbus, Ohio *Crisis*, and other Democratic newspapers and pamphlets in camp. He claimed the right of a citizen to discuss political issues but was dismissed from the army for the words he said and pro-Democratic actions he took. See RG 153, Court Martial File LL-1359, NARA.

¹¹⁴ George Breck to Ellen, October 23, 1864, in Blake McKelvey, ed., *Rochester in the Civil War* (Rochester, N.Y.: The Rochester Historical Society, 1944), 141; S. S.

Indeed, partisan soldiers took pride in this sort of behavior. One soldier wrote his aunt that “I am going to do all I can for Abe.” He described two Democrats who came into his camp “peddling McClellan tickets” but explained that they probably would not be back. “We all took tickets and when they had given the boys all [of the] tickets they were talking to us telling us what a good man McClellan is. We let them talk as long as we could stand it and then we burnt the tickets and told them iff [sic] they did not get out of ther[e] in less than 5 minutes we would ride them out on a rail.”¹¹⁵ Another soldier threatened to “shoot the shit” out of his “copperhead” lieutenant.¹¹⁶

Many Democratic soldiers claimed to be discriminated against because of their political convictions. Democrats in Philadelphia learned from their election commissioners “that Democrats were threatened to be sent to the front if they voted.” Testimony from soldiers corroborates this account. One soldier noted that his regiment was canvassed “to see how many would vote for Lincoln if they got a chance to go home.”¹¹⁷ An Ohio soldier believed “the majority of the Regt. will go for McClelland

Cox to Marble, October 12, 1864, Marble Papers; Cox to Barlow, October 11, 1864, Barlow Papers.

¹¹⁵ James S. Graham to Aunt Ellen, November 7, 1864, in William H. Bartlett, ed., *Aunt and the Soldier Boys* (Santa Cruz, Cal.: privately printed, 1973), 152. Democrats could also be guilty of such behavior. See Fitz-John Porter to Barlow, June 3, 1863, Barlow Papers. Republican soldiers from New York also believed they would be defrauded of their votes by unscrupulous state agents in Baltimore and Washington. See William P. Forman to Seward, October 28, 1864, Seward Papers; Jonathan W. White, “Canvassing the Troops: The Federal Government and the Soldiers’ Right to Vote,” *Civil War History* 50 (September 2004), 303-309.

¹¹⁶ RG 153, Court Martial File LL-2698, NARA.

¹¹⁷ William B. Reed to Barlow, October 18, 1864, Barlow Papers; Nelson G. Huson to George T. Huson, August 14, 1864, HM29119, The Huntington. This sort of electioneering had occurred in previous elections as well. See Jonathan W. White,

[sic] if they have a fair vote.” But many, of course, doubted there would be a fairness.¹¹⁸

In some cases Democrats faced court martial, lack of promotion, or dismissal from the army for being a Democrat, or for writing allegedly treasonable letters home to Democratic newspapers.¹¹⁹ McClellan and some of his supporters in the army believed they and their correspondence was being surveilled by Secretary of War Edwin M. Stanton and his Republican subordinates in the War Department.¹²⁰ Soldiers who attended a McClellan meeting near West Point were “ confined in the guard house on their return, & as a punishment for holding the opinions of white men are now digging a drain for the Supt’s water closet.” Soldiers who attended Lincoln meetings, however, received no such punishment.¹²¹ Evidence suggests that there was a great amount of pressure, and even coercion, for soldiers to toe the Republican party line.

Nevertheless, Democratic soldiers took great offence when demeaned for their party loyalties. “A captain the other day said if any person was not an abolitionist he was a copperhead,” wrote one Democratic soldier. “I denied it.” The captain then said he

“Citizens and Soldiers: Party Competition and the Debate in Pennsylvania over Permitting Soldiers to Vote, 1861-64,” *American Nineteenth Century History* 5 (Summer 2004), 57.

¹¹⁸ Gideon R. Viars to Mary Viars, September 21, 1864, Viars Family Papers, The Filson; “Kentucky Unionist” to August Belmont, September 27, 1864, Marble Papers.

¹¹⁹ W. W. H. Davis to Coryell, January 10, 1864, Coryell Papers; John McNab to Franklin Pierce, May 3, 1862, Pierce Papers; RG 153, Court Martial Case files LL-1359, MM-0448, MM-3652, and NN-0856; Court Martial Case of Newton B. Spencer, *Civil War Times Illustrated* Collection, USAMHI.

¹²⁰ James O. Miller to Nellie McClellan, September 1, 1864, McClellan Papers; Sears, *McClellan*, 363-364, 382-383.

¹²¹ Alanson Randol to Barlow, October 13, 1864, Barlow Papers.

would try to get his men to vote for Lincoln. “I then said I would try to get my Company to vote for little Mac ‘if this be treason, hang me.’” An Ohio soldier was peeved by how “fast” the Republicans called Democrats “copperheads[,] for I am a democrat & a soldier to[o.] I would shoot the first man that would call me a copperhead.” After declaring himself for McClellan, a Pennsylvania soldier criticized those that called the General a “trater”: “if A man tells me that I Wil nock him down or kill my self tring to.”¹²²

Democrats in the army, after all, bled and died the same as Republicans. Was it fair to treat them as traitors? Most Democrats rejected emancipation as a war aim.¹²³ Yet those who said so publicly—as newspaper correspondents—often found themselves in trouble. One New York soldier was astonished at the reaction his letters to a Democratic daily received at home:

Capt. Reynolds told me that my letters to the *Union* were considered ‘*treasonable*,’ by ‘my friends!’ Think of that, your brother George in the army, and has been for sixteen months or more, fighting for his country, an obedient soldier and officer in every respect, . . . ready now as ever to fight the battles of his country, and if need be, give his life for that country. Guilty of *Treason!* Whew, what an unenviable reputation I must be obtaining in Rochester. Perhaps, a committee will be sent to have me arrested and put into some bastille for the utterance of sedition and treasonable sentiments, because for[th]with I have very mildly taken exceptions to the emancipation proclamation. . . .

This soldier concluded by noting how “abolitionized” people were “disposed to call every one traitorous and disloyal because his ideas about slavery don’t happen to chime with

¹²² John Berry to Barlow, February 27, 1864, Barlow Papers; Jacob Weiker to Sister, April 29, 1863, Weiker Letters, Civil War Miscellaneous Collection, USAMHI; Francis M. Elliott to Sister, October 29, 1864, in “‘Dear Friends’: The Civil War Letters of Francis Marion Elliot, A Pennsylvania Country Boy,” *Pittsburgh History* 72 (Holiday 1989), 196.

¹²³ Bellefonte *Democratic Watchman*, June 19, 1863.

their exalted but fallacious notions on the subject.” After Lincoln’s reelection this soldier decided to resign his commission in the army: “About January [1865], if I am spared till then, look out for a Copperhead and a Traitor in the family, who has repeatedly been called such, by patriotic Republican officers in the field. It is surely dangerous, and ‘prejudicial to good military discipline,’ to have such a person of treasonable sentiments as I am in the army and confront the enemy.” He was tired of the war and believed that abolitionism had changed the nature of the conflict to something he was not willing to fight for. “Do you know of any good, loyal, and devoted Republican in Rochester who will come and fill my place for three years or during the war? . . . I don’t want a substitute. I want a *bona fide*, out and out Republican, who abominates a Copperhead, and is down on the Chicago Platform and George H. Pendleton, who is a true exponent of Mr. Lincoln and his policy.”¹²⁴

It took some mettle to be a Democrat in the army by 1864. One “Copperhead soldier” recalled in later years that many soldiers “believed McClellan to be the man for the place and voted for him. Lincoln, however, was elected and his history shows was for the best of our country. Yet we always admired General George B. McClellan. This was our first vote and the proudest of our life. It took some nerve at that time to be a Democrat.”¹²⁵ That many soldiers, like this one, realized later in life that Lincoln was the best man for the job, does not necessarily mean that most of the soldiers felt so

¹²⁴ George Breck to Ellen, February 8, 1863 and November 15, 1864, in Blake McKelvey, ed., *Rochester in the Civil War* (Rochester, N.Y.: The Rochester Historical Society, 1944), 122, 143-144.

¹²⁵ Lewis G. Schmidt, *A Civil War History of the 147th Pennsylvania Regiment* (Allentown, Pennsylvania: Lewis G. Schmidt, 2000), 1000.

confidently in 1864. Over time, the martyred president assumed a status of national deity. At the time of the election, however, the consensus was not as certain. Many Americans who never would have voted for Lincoln in 1860 or 1864 came to appreciate his greatness in the years after the war. If, in fact, veterans did vote overwhelmingly Republican after the war, then their post-war party allegiance may have been based on post-war issues and not on a conversion to the war aims of the Republican party in 1864. Party identification for many soldiers during the war may have been grounded more in the pre-war social and cultural variables of civilian life than in a changing of ideology during military experience.

Soldiers who supported McClellan for president did so because they believed he was the best candidate to reunite the nation and bring the war to a speedy close. These fighting men in blue are perhaps the most understudied political constituency of the Civil War era, yet their existence reveals a great deal about Civil War politics in general, and the treason and loyalty issues in particular. Northern voters who supported McClellan were castigated as traitors by the Republican majority. It was far more difficult to rationalize such accusations against those who were fighting and dying on the battlefield—yet the accusation of disloyalty was still sometimes made against these soldiers. That roughly twenty percent of the Union army did not vote for the “loyal” ticket, and another twenty percent voted against it, reveals that not all soldiers had adopted the Republicans’ broadened and politicized definitions of loyalty and treason. It also reveals that those Democrats in the army who voted did not consider their party’s goals as inconsistent with patriotism and unionism. That many likely supported McClellan but could not vote for his platform (thus abstaining from the franchise),

reveals that many Democrats in the army believed that their convention and platform did not represent their true feelings on the war. But neither of these groups would succumb to the pressure to vote Republican just to appear “loyal.”

It is also quite possible that many Democrats had left the army by November 1864. Accordingly, more scholarly attention also ought to be paid to reenlistments in the Union armies. Many soldiers resigned or opted not to reenlist after the Emancipation Proclamation was issued.¹²⁶ Others deserted.¹²⁷ At least one soldier even publicly threatened to desert and flee to Canada, the West Indies, or the South, if Lincoln was reelected.¹²⁸ Shortly before the presidential election, McClellan noted that he had received “many letters from privates & *ex*-soldiers—all right.”¹²⁹ His emphasis on “*ex*” soldiers suggests that many of his supporters may have left the service by late 1864. If the army lost many Democratic soldiers after their three-year terms of enlistment were

¹²⁶ See, for example, the letters of Henry P. Hubbell in the Hubbell Family Papers; James A. Bayard to Thomas F. Bayard, January 23, 1863, Thomas F. Bayard Papers, LC; Lewis Hanback to Hettie, October 8, 1864, Lewis Hanback Letters, The Filson; George D. Williams to Henry S. Jay, March 24, 1864, Henry S. Jay Papers, Civil War Miscellaneous Collection, USAMHI; Klement, *Dark Lanterns*, 157-158.

¹²⁷ See, for example, John Morton to Mother, January 13, 1863, Morton Letters, B. Theodore Parks to Col. Henry C. Eyer, January 31, 1863, Parks Letters, Benjamin F. Stalder to Parents, November 11, 1862, Benjamin F. Stalder Papers, and George G. Sinclair to Francis Sinclair, November 12, 1862 and January 6 and 27, 1863, George G. Sinclair Papers, all in Civil War Miscellaneous Collection, USAMHI; Benson Bobrick, *Testament: A Soldier's Story of the Civil War* (New York: Simon & Schuster, 2003), 226-227.

¹²⁸ RG 153 (Records of the Judge Advocate General [Army]), Court Martial Case file MM-2213, NARA.

¹²⁹ McClellan to Marble, September 17, 1864, Marble Papers.

up, it would make the case that the bulk of Democrats in the service switched to the Republican party during the Civil War even less tenable.

IV.

South of the Mason-Dixon Line, the rebels kept a watchful eye on northern politics. Confederate President Jefferson Davis viewed the election with a sense of ambiguous indifference. Fully committed to the idea of Confederate independence, it mattered little to him which candidate won, for both northern candidates were committed to reuniting the states. He therefore took few public stances on the election until just shortly before election day. Davis' lack of leadership on how southerners should view the contest, however, did not stop most southerners from developing their own opinions. Many southern leaders also criticized their president for not exacerbating northern political divisions by choosing sides in the contest.

Unlike the rebel chief, Confederate Vice President Alexander H. Stephens, believed the rebels should endorse the Peace wing of the Democratic party, and also the Democratic nominee for the presidency. To be sure, such an endorsement ran the risk of tainting the northern Peace men with treason, but it also would encourage the North to believe that peace was attainable through negotiation. The *Daily Reporter* in Selma, Alabama, explained the rationale behind such a strategy: "It should be our business and pride to hold aloft the olive branch to our implacable foe, and thus put ourselves in sympathy with the antiwar party at the North, thereby facilitating the overthrow of the

Black Republican party.” In Canada, Confederate agents met with northern Peace men, also working to convince them that peace could be gained through negotiation.¹³⁰

These efforts to boost the Peace wing of the Democratic party were undermined, however, by Jeff Davis, who made it quite plain that the question of peace would only be settled on the battlefield and with southern independence. Rebels like Davis believed that an armistice and convention of the states, which the Peace Democrats called for in their platform, would weaken chances for southern independence. With negotiated peace a real possibility, war-weary southerners might be willing to reenter the Union under certain conditions, and rebel soldiers might also become too discouraged to maintain the fight. “We cannot stop the fighting until their troops are withdrawn,” wrote one Confederate leader. “Cessation of hostilities would be fatal. Our armies would dissolve like frost before the rising sun.”¹³¹

Unlike their president, most rebels favored George McClellan’s election because they believed the leaders of his party would be less committed to the war than the Republicans. “Both parties profess to aim at the common object of preserving the Union in its original territorial limits,” wrote the editors of the Richmond *Examiner*, “but the Lincoln party insists on affecting this by abolition; subjugation; and confiscation; while their opponents propose to employ military coercion only after the failure of peaceful and

¹³⁰ Larry E. Nelson, *Bullets, Ballots, and Rhetoric: Confederate Policy for the United States Presidential Contest of 1864* (Tuscaloosa: University of Alabama Press, 1980), 32-56, 73-74, 86, 103-121; quotation from page 33; Jacob Thompson to Jefferson Davis, September 12, 1864, in Lynda Lasswell Crist, et al., eds., *The Papers of Jefferson Davis*, projected 15 vols. (Baton Rouge: Louisiana State University Press, 1971 —), 11:24-35.

¹³¹ Nelson, *Bullets*, 109-123; quotation from page 113.

conciliatory measures. One faction offers the sword alone; the other holds out the olive branch and the sword.” Others believed that if McClellan prosecuted the war without emancipation that the Republicans would settle “for peace on the basis of separation.” Most importantly, McClellan was tied to a platform and running mate very sympathetic to the South. If “God in his infinite goodness may send McClelland [sic] to the place he deserves,” wrote one hopeful rebel, then Pendleton, who “is true & reliable,” would ascend to the presidency and let the southern states go in peace.¹³²

Those who favored Lincoln’s reelection did so because they believed he would wear out sooner than a new president, or because McClellan might be able to rally the troops more easily than Lincoln could. Others hoped that Lincoln’s reelection would “bring about the great desideratum ‘a fire in the rear.’” Indeed, many Confederates believed that Copperheads in the Midwest would rise up and further divide the Union. During the Democratic convention some sixty rebel soldiers headed to Chicago to join with members of the Sons of Liberty to start an insurrection in the North, but when the Sons proved to be a generally inept and unorganized group, the rebel soldiers withdrew from the city.¹³³

Victory in the field was essential to the rebel cause, largely because Confederate victories would strengthen peace sentiment in the North and ruin Lincoln’s chances of reelection. Writing in early September, the Richmond *Sentinel* declared, “Let our

¹³² Nelson, *Bullets*, 148; Charles Slaughter Morehead to Simon Boliver Buckner, October 2, 1864, Simon Boliver Buckner Papers, The Filson; Charleston *Courier*, October 13, 1864, quoted in Crist et al., eds., *Papers of Davis*, 11:73.

¹³³ Nelson, *Bullets*, 9, 19-24, 86, 110; James Thomas to Father, September 23, 1864, James A. Thomas Papers, The Filson; Klement, *Dark Lanterns*, 201.

soldiers remember that a success at this time will be exceeded in its military, by its political importance, and will do more to expedite peace than half a dozen military achievements last year or next.” Similarly, the Charleston *Mercury* called on the troops, “for the next two months[, to . . .] *hold our own and prevent military success by our foes.*” The fall of Atlanta and Mobile Bay, Sheridan’s ravaging of the Shenandoah Valley, Early’s abortive raid into Maryland, and the failure of any Northwest Confederacy to materialize, however, devastated any chance for McClellan to carry the election.¹³⁴

On November 8, 1864, Lincoln and Johnson handily won the election. Lincoln won 2,330,552 votes to McClellan’s 1,835,985, giving Lincoln roughly 55 percent of the vote. In the electoral college, Lincoln garnered 212 votes to McClellan’s 21—the General only carried Delaware, Kentucky, and New Jersey (although it has been argued elsewhere that Lincoln only won New York with the help of the soldiers’ votes).¹³⁵

McClellan was gracious, indeed, relieved, in defeat. He concluded that the public was not yet ready to adopt Democratic policy—the only policy which “is yet destined to save the Republic.” In the meantime, the nation would continue to endure “much misery.” McClellan professed to be in fine spirits, saddened not for his own sake, but for

¹³⁴ Nelson, *Bullets*, 109, 113; Halleck to Lieber, September 2, 1864, Lieber Papers.

¹³⁵ *Tribune Almanac and Political Register for 1865* (New York: Tribune Association, 1865), 46-68; David E. Long, *The Jewel of Liberty: Abraham Lincoln’s Re-election and the End of Slavery* Mechanicsburg, Pa.: Stackpole Books, 1994), 233; Horatio Seymour to Sister, November 24, 1864, Helen Fairchild Collection of Horatio Seymour Papers, NYHS.

the country's. "The people," he wrote to his friend Samuel L. M. Barlow, "have decided with their eyes wide open and I feel that a great weight is removed from my mind."¹³⁶

Like McClellan, Senator James A. Bayard of Delaware believed McClellan "had a fortunate escape in not being elected Presdt." A Peace Democrat in San Francisco believed it was best that McClellan lost the election, for "he would have failed utterly to accomplish what you [Barlow] and others of his friends expected; the South will never consent to a reunion upon any terms conceivable, they are separated and will remain so, we can neither conquer nor cajole them." Most Democrats appear to have taken the result of the election in stride. Although sorely disappointed, many had expected the result since the fall of Atlanta. One Democratic soldier, however, used the election to call on Republicans to put their money where their mouths were and join him in the field: "Sand Lake gave old Abe a majority did it well seeing that they are so fond of having old Abe for President I wish that they would come down here & help him to keep his seat."¹³⁷

Republicans were elated with the result. Edwin M. Stanton believed that the election "exerted an important influence upon the war" and that Lincoln's reelection made "the rebel cause desperate." Lincoln himself drew a sigh of relief at the result. The

¹³⁶ McClellan to Christopher L. Ward, November 28, 1864, (GLC05041), GLI; McClellan to Barlow, November 10, 1864, McClellan to Mother, November 11, 1864, McClellan to Charles Lanman, November 16, 1864, McClellan to Robert C. Winthrop, November 16, 1864, McClellan to Arthur McClellan, November 20, 1864, McClellan to Charles G. Halpine, November 25, 1864, McClellan to Manton Marble, November 28, 1864, all in Sears, ed., *Papers*, 618-625.

¹³⁷ Bayard to Barlow, November 12, 1864, and Samuel F. Butterworth to Barlow, December 22, 1864, both in Barlow Papers; Alfred Carmon to sister, November 18, 1864, Alfred Carmon Papers, LC.

election, he publicly declared, “shows also how *sound*, and how *strong* we still are. It shows that, even among candidates of the same party, he who is most devoted to the Union, and most opposed to treason, can receive most of the people’s votes.”¹³⁸ By “we” and by “party,” Lincoln meant northerners who were faithful to the Union. In short, Lincoln believed his stand against treason had resounded with the loyal people of the North; they chose him to finish the work he had begun in his first term.

“Never in my recollection have there been so many votes changed to the very day of polling, as in the last Presidential election,” observed Francis Lieber, “and, probably, never before in the whole history of Civil Liberty.” The issues at stake in the election transcended usual party squabbles, and many Democrats who had been “staggered” by the Chicago Platform, voted against their party. It “took [them] some time to break loose,” Lieber declared, but on election day they did. Fremont men, too, realized they had to support the president, and many citizens who disliked Lincoln as a man also, on election day, voted for Lincoln as the only viable Union choice.¹³⁹ On November 8, 1864, a large mass of people who typically would never vote as a bloc did so for the sake of defeating the rebellion.

Indeed, Lincoln’s reelection seemed to bring about a unifying force over the entire North. “The papers are devoid of news,” wrote one War Department clerk. “Everyone is thankful for the perfect quiet which has reigned over the North since the election. The people seem to be more united than ever before, and intent on the one

¹³⁸ *O.R.*, ser. 3, vol. 5, pp. 534-535; Lincoln, “Response to a Serenade,” November 10, 1864, in Basler et al., eds., *Collected Works of Lincoln*, 8:100-101.

¹³⁹ Memorandum on the Election of 1864, by Francis Lieber, on the back of Erastus Cornelius Benedict to Lieber, November 21, 1864

object of prosecuting the war.” A San Franciscan noted that Lincoln’s decisive victory would squelch any further northern opposition to the war, and, lacking hope in such an enemy in the rear, the South would soon give up the struggle. Again, Lincoln called on his fellow countrymen, “now that the election is over,” and “having a common interest, [to] re-unite in a common effort, to save our common country.”¹⁴⁰ Defeating treason and rebellion were the work now to be accomplished.

In the field, many soldiers rejoiced at the news of Lincoln’s reelection. A cavalryman called the election result “overwhelmingly conclusive of the fact that this is the peoples [sic] war” and “the heaviest blow the rebels have received in a long time.” Similarly, an officer on General Grant’s staff declared that after having “whipped the Rebels in the rear,” the army must give its “undivided attention” towards whipping the rebels on the battlefield. “I now hope to hear no more of politics in the army till the end of the war,” he concluded. Indeed, one northern man cautioned: “The victory of yesterday will prove but an Antietam, if we permit ourselves to sleep too long on our arms.”¹⁴¹

Some observers of post-election America were astounded by the unanimity of feeling in the North.

¹⁴⁰ William W. Heed, diary entry for November 17, 1864, *Diary of William W. Heed*, CCHS; Henry Douglas Bacon to Celso Fhunken, November 12, 1864, *Henry Douglas Bacon Papers*, The Huntington; Lincoln, “Response to a Serenade,” November 10, 1864, in Basler et al., eds., *Collected Works of Lincoln*, 8:101.

¹⁴¹ Frank Wilberforce Dickerson to Father, November 11, 1864, *Dickerson Letters*, Civil War Miscellaneous Collection, USAMHI; Halleck to Lieber, November 12, 1864, *Lieber Papers*; Badeau to Harry, November 10, 1864, *Badeau Papers*; John K. Porter to Lieber, November 9, 1864, *Lieber Papers*.

The war overshadows the land. Many of our ablest and best have fallen. Taxes, Expenses of living, and other cares are pressing upon us, until we feel that the good old times are gone forever, and often sigh for relief. Yet there is a grandeur in the persistence and submissive spirit of our people. There is a youthful elasticity in our nature that refuses to be depressed, a respect for law, a conscious strength that is surprising. We have just passed through a fiercely contested election, and yet on the day the result was known there was quiet and order throughout the Northern States, such as hardly ever prevailed before. This happening in the midst of such a war must establish the strength of our form of government. We had a grand fight in the hustings, but when it was all over the result was acquiesced in about as quietly as you have seen perhaps men after a bitter quarrel setting all differences by an invitation to take a drink (Monmouth fashion!). It is conceded that the people by a large majority have voted that the war shall go on, and we are shaping all things to that direction.¹⁴²

Indeed, the North would persevere, and the rebellion would be brought to a close shortly after Lincoln's second inauguration. Lincoln's reelection unified the North in a way that neither party seemed able to do in the months leading up to November.

¹⁴² Edward W. Scudder to Dayton, December 14, 1864, Dayton Papers.

Table 6.1

Estimated Voter Turnout in a Sample of Union Regiments

Regiment	Votes for Lincoln	Votes for McClellan	Total Votes	Total Present on November 8	Estimated Eligible Voters (78.2 percent of total present)	Estimated Voter Turnout (percent)	Percent of Eligible Soldiers Who Voted For Lincoln	Percent of Eligible Soldiers Who Voted For McClellan
57th PA	95	33	128	260	203	63.1	46.8	16.3
69th PA	6	119	125	179	140	89.3	4.3	85.0
84th PA	115	46	161	228	178	90.5	64.6	25.8
88th PA	135	62	197	351	275	71.6	49.1	22.6
91st PA	144	67	211	334	261	80.8	55.2	25.7
97th PA	108	112	220	291	228	96.5	47.4	49.1
99th PA	147	81	228	382	299	76.3	49.2	27.1
100th PA	212	41	253	366	286	88.5	74.1	14.3
107th PA	102	96	198	461	361	54.9	28.3	26.6
110th PA	91	72	163	323	253	64.4	36.0	28.5
116th PA	54	58	112	147	115	97.4	47.0	50.4
118th PA	130	64	194	297	232	83.6	56.0	27.6
140th PA	147	55	202	231	181	111.6	81.2	30.4
150th PA	111	27	138	218	171	80.7	65.0	15.8
190th PA	150	55	205	349	273	75.1	55.0	20.2
203rd PA	419	206	625	880	688	90.8	60.9	29.9
208th PA	401	279	680	811	634	107.3	63.2	44.0
209th PA	311	254	565	729	570	99.1	54.6	44.6
211th PA	430	141	571	655	512	111.5	84.0	27.5
16th ME	152	61	213	454	355	60.0	42.8	17.2
9th NH	85	18	103	291	228	45.2	37.3	8.0
11th NH	135	51	186	201	157	118.5	86.0	32.5
12th NH	86	39	125	214	167	74.9	51.5	23.4
6th WI	87	25	112	226	186	60.2	46.8	13.4
11th WI	217	38	255	474	371	68.7	58.5	10.2
17th WI	52	206	258	457	357	72.3	14.7	57.7
20th WI	386	48	434	506	396	109.6	97.5	12.1
23rd WI	224	20	244	383	300	81.3	74.7	6.7
30th WI	394	30	424	719	562	75.5	70.1	5.3
32nd WI	498	73	571	641	501	114.0	99.4	14.6
37th WI	115	21	136	224	178	78.2	64.6	11.8
42nd WI	331	35	366	750	587	62.4	56.4	6.0
43rd WI	440	96	536	817	639	83.9	68.9	15.0
Total	6,510	2,629	9,139	13,849	10,844	84.2	60.0	24.2
Total Excluding the six regiments with voter turnouts exceeding 100 percent:	4,513	1,982	6,495	10,804	8,463	76.8	53.3	23.4

Table 6.2

**Comparison of Soldiers' Votes in Presidential and Other 1864 Elections
with Percentage of Increase in Parentheses**

	R-Home	R-Army	R-Total	D-Home	D-Army	D-Total
Ohio Election for Secretary of State						
Oct. 1864	204,459	32,751	237,210	177,840	4,599	182,439
Nov. 1864 Pres. election	224,008 (9.6)	41,646 (27.2)	265,654 (12.0)	195,811 (10.1)	9,788 (112.8)	205,599 (12.7)
Ohio Congressional Elections						
Oct. 1864	210,708	28,878	239,586	171,855	6,981	178,836
Nov. 1864 Pres. election	224,008 (6.3)	41,646 (44.2)	265,654 (10.9)	195,811 (13.9)	9,788 (40.2)	205,599 (15.0)
Pennsylvania Congressional Elections						
Oct. 1864	247,423	7,635	255,058	244,919	2,500	247,419
Nov. 1864 Pres. election	269,679 (9.0)	26,712 (249.9)	296,391 (16.2)	263,967 (7.8)	12,349 (394.0)	276,316 (11.7)
Maine Gubernatorial Elections						
Sept. 1864	62,529	3,054	65,583	46,287	116	46,403
Nov. 1864 Pres. election	63,631 (1.8)	4,174 (36.7)	67,805 (3.4)	46,250 (-0.1)	738 (536.2)	46,988 (1.3)
Maine Congressional Elections						
Sept. 1864	62,212	3,099	65,311	46,417	72	46,489
Nov. 1864 Pres. election	63,631 (2.3)	4,174 (34.7)	67,805 (3.8)	46,250 (-0.4)	738 (925.0)	46,988 (1.1)
Maryland Constitutional Referendum (two days of voting)						
Oct. 1864	27,541	2,633	30,174	29,536	263	29,799
Nov. 1864 Pres. election	37,353 (35.6)	2,800 (6.3)	40,153 (33.1)	32,418 (9.8)	321 (22.1)	32,739 (9.9)
Iowa Congressional Election (one week before presidential election)						
Nov. 1864	72,263	16,410	88,673	47,883	1,463	49,346
Nov. 1864 Pres. election	71,765 (-0.7)	17,310 (5.5)	89,075 (0.5)	47,675 (-0.4)	1,921 (31.3)	49,596 (0.5)
Total of All State Elections in this Sample Compared to the Presidential Election						
State & Cong.	887,135	94,460	981,595	764,737	15,994	780,731
Sum of votes in pres. election from previous seven examples	954,075 (7.6)	138,462 (46.6)	1,092,537 (11.3)	828,182 (8.3)	35,643 (122.9)	863,825 (10.6)

Table 6.3
Maine Regiments in the Elections of 1864

Regiment	Gub. Election, Sept. 1864		Pres. Election, Nov. 1864	
	Republican	Democrat	Lincoln	McClellan
1st Infantry, Veterans	--	--	155	39
8th Infantry	133	3	179	15
9th Infantry	173	1	293	47
12th Infantry	122	6	108	26
13th Infantry	85	5	190	20
14th Infantry	26	0	44	13
15th Infantry	40	4	130	23
16th Infantry	114	1	152	61
17th Infantry	200	2	201	47
19th Infantry	107	0	129	31
20th Infantry	139	2	138	13
29th Infantry	138	3	175	40
30th Infantry	156	7	184	26
31st Infantry	56	6	108	20
32nd Infantry	54	0	68	31
1st Battery	--	--	32	31
2nd Battery	21	0	90	14
3rd Battery	73	4	77	5
4th Battery	46	11	59	34
5th Battery	33	0	36	8
6th Battery	59	0	58	3
7th Battery	60	0	78	90
1st Cavalry	243	7	289	46
2nd Cavalry	277	2	273	1
Detach at Cavalry Depot	54	8	59	8
1st Cavalry at Hospital	65	2	65	2
1st H.A.	132	5	149	23
2nd Battlion, H.A.	57	0	71	0
Base Hospital	36	3	44	0
Sickles Hospital	13	1	19	3
Camp Distribution	37	2	106	25
Campbell Hospital	14	1	24	5
Detach at New Orleans	51	1	52	1
2nd and 5th Corps Hosp.	73	3	78	3
Maine Agency in D.C.	64	5	93	7
Lincoln Hospital	11	0	35	9
City Point Hospital	29	6	33	7
Camp Stoneman	13	2	--	--
Ft. Washington	50	13	--	--
Soldiers at Annapolis	--	--	32	2
Co. A, Coast Guard	--	--	47	17
Detach at Pt. Lookout	--	--	21	2
Total	3,054	116	4,174	738

The purpose of this table is to show that, for the most part, the same soldiers were given the opportunity to vote in both the state and national elections. The increased voter turnout, therefore, is not explained by an increased opportunity of soldiers to vote in November.

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For Table 6.1: An estimation of the ages of the soldiers in November 1864 serves as the basis for approximating how many of the men present on election day were eligible voters. Interpolating the data found in U.S. Sanitary Commission Statistics with an exponential regression line shows that approximately 21.8 per cent of the Union soldiers were not of legal voting age for the November 1864 election. See Benjamin A. Gould, *Investigations in the Military and Anthropological Statistics of American Soldiers* (New York: Hurd and Houghton, 1869), ch. 2. I thank Evan Willett for assistance in making these calculations.

“The Martyr” by Herman Melville

Good Friday was the day
Of the prodigy and crime,
When they killed him in his pity,
When they killed him in his prime
Of clemency and calm—
When with yearning he was filled
To redeem the evil-willed,
And, though conqueror, be kind;
But they killed him in his kindness,
In their madness and their blindness,
And they killed him from behind.

There is sobbing of the strong,
And a pall upon the land;
But the People in their weeping
Bare the iron hand:
Beware the People weeping
When they bare the iron hand.

He lieth in his blood—
The father in his face;
They have killed him, the Forgiver—
The Avenger takes his place,
The Avenger wisely stern,
Who in righteousness shall do
What the heavens call him to,
And the parricides remand;
For they killed him in his kindness,
In their madness and their blindness,
And his blood is on their hand.

There is sobbing of the strong,
And a pall upon the land;
But the People in their weeping
Bare the iron hand:
Beware the People weeping
When they bare an iron hand.

Battle-Pieces and Aspects of the War (New York: Harper and Brothers, 1866), 141-142.

Chapter 7

“We Need No More Blood or Suffering”: The Aftermath of the Lincoln Assassination

Throughout the war Abraham Lincoln had hoped for a speedy and peaceful reconciliation between the two warring sections. In his December 8, 1863 amnesty proclamation, he required of rebels wishing pardon only a pledge of future loyalty and support for emancipation. Loyalty and black freedom, in Lincoln’s mind, were now inextricably linked. Radicals in Congress disliked Lincoln’s soft approach toward southern traitors. In the Wade-Davis bill of 1864, which would have disfranchised any southern voter who was unable to take the ironclad test oath of 1862 (which required a profession of both past and future loyalty), Congress attempted to supplant Lincoln’s lenient plan of reconstruction. But Lincoln pocket vetoed the Wade-Davis bill, thus leaving the battle over how reconstruction would be accomplished to his successor and the 39th Congress.¹

On March 4, 1865, Lincoln delivered his second inaugural address from the east steps of the Capitol. He called for “malice toward none” and “charity for all.” He wanted reconciliation—“to bind up the nation’s wounds” and to “achieve and cherish a just, and a lasting peace.” Recognizing that God was sovereign over the war and the nation—that it would be settled in His time and according to His plan—Lincoln offered hope to a weary people, hope that peace would be restored, that justice would reign in the land, and that sectional divisions would give way to national unity. A month later, on

¹ Abraham Lincoln, “Proclamation of Amnesty and Reconstruction, December 8, 1863, and “Proclamation Concerning Reconstruction,” July 8, 1864, both in Roy P. Basler, et al., ed., *The Collected Works of Abraham Lincoln*, 9 vols. (New Brunswick, N.J.: Rutgers University Press, 1953-1955), 7:53-56, 433-434.

April 9, General Robert E. Lee surrendered the Army of Northern Virginia to U.S. Grant at Appomattox Court House, Virginia. Prospects for peace and reunion ran high, and northerners openly celebrated the rise in Union fortunes. Lincoln, according to Frederick Seward, wanted “as few judicial proceedings as possible.” At Lincoln’s final cabinet meeting, “Kindly feelings toward the vanquished . . . pervaded the whole discussion.”²

Sadly, Lincoln’s vision would be short-lived. On the night of April 14, 1865, on Good Friday, no less, he was struck by an assassin’s bullet. He died the following morning, at 7:22 a.m. Shock waves reverberated throughout the nation. The people, recently united in triumph, now were unified in grief, anger, and vengeance. “Stern Justice to be Awarded to Traitors,” headlined the Washington *Sunday Morning Chronicle* on Easter morning. The editors noted that blood ought not be spilled in the streets, as had been done during the French Revolution. “But there should be, and will be, a feeling of indignation throughout the North which will result in a great change in the very lenient laws which now exist in regard to the insurgents. The tenderness which we have shown to the rebels, and of which Abraham Lincoln was the leading advocate, has been defeated of its purpose by the unparalleled crime committed by a miserable emissary of the Southern Confederacy.” Similarly, a Union soldier remarked: “What a gloom has fallen, like a pall over the whole army! And liberality toward our enemy changes to bitterness!”³

² Abraham Lincoln, “Second Inaugural Address,” March 4, 1865, in Basler, et al., eds., *Collected Works of Lincoln*, 8:332-333; James G. Randall, *Constitutional Problems under Lincoln*, revised ed. (Urbana: University of Illinois Press, 1964), 100.

³ Quoted in James L. Swanson and Daniel R. Weinberg, *Lincoln’s Assassins: Their Trial and Execution* (Santa Fe, N.M.: Arena Editions, 2001), 12-13; Russell M.

Following Lincoln's assassination, many northerners felt differently about reunion than they had beforehand. "Our papers don't say as much about conciliation as formerly," wrote the editors of the Republican *Daily Alta California*. Rather than conciliate all Americans, the paper suggested bringing together southern Unionists, poor whites, and the newly freed slaves. "We must break down utterly and forever the planting aristocracy; we must drive out of the country, or hang for treason, the leading politicians, whose wicked ambition has made a desert of the South." A Republican party must also be started in the South, and no congressional delegation or new state constitution ought to be accepted unless it had no taint of treason.⁴

While the people called for vengeance, and the military contributed to further suppression of disloyal northerners, the courts became a strong restraining force against the political passions that were brimming throughout the North. The aftermath of Lincoln's assassination, and the beginnings of the period of Reconstruction, saw northerners grappling with how to reunite a nation that had been torn apart by a long and bloody war. While the people, in the wake of their leader's cruel death, wanted blood, the courts helped bring about a sanity that helped foster reconciliation, across both sectional and party lines.

This chapter argues two broad points. First, the law of treason and the rule of military law in the North narrowed following the war (trials by military commission continued in the South during Reconstruction). Beginning with the secession crisis and

Tuttle, diary entry for April 17, 1865, in George H. Tappan, ed., *The Civil War Journal of Lt. Russell M. Tuttle* (New York: McFarland, 2006), 208.

⁴ *Daily Alta California*, June 2, 1865.

throughout the war, northern politicians, judges, and constitution makers broadened the law of treason, incorporating pre-1787 conceptions of treason into the American law. As the war came to a close, however, judges and courts became powerful restraining forces, reeling in this broadened view of treason, rejecting the argument that unconstitutional actions could be justified by necessity, and asserting themselves in types of cases they had abdicated during the war. At the same time that this narrowing of treason law was taking place, however, violent mobs carried forth the wartime definition of treason. Some lawmakers also pushed for legislation that continued to restrict the rights and civil liberties of northerners suspected of disloyalty. These two views of the law of treason competed in the period immediately following Lincoln's assassination, but eventually the judiciary reigned supreme. In peacetime, treason law moved away from constructive treason to the more narrow definition found in the Constitution.

Second, several prominent Confederate figures were punished as symbols of the rebel cause. The trial and execution of those behind the Lincoln assassination served as a catalyst for healing the nation's wounds. Now satisfied that some justice had been served, the people no longer needed to seek mass retribution, even though the North's initial reaction to Lincoln's assassination had been to decimate the South and northern Copperhead traitors. The people were weary of war and bloodshed. Thus, the few executions meted out by the military—the Lincoln conspirators and Henry Wirz, the commandant of Andersonville Prison—proved to assuage northern rage. The treason trial of Jeff Davis, which seemed to carry on for years (even though it never really ever began) signified the weariness of the northern public. By late-1868 they were willing to allow the arch-traitor to go free. President Johnson's pardon of Davis on Christmas Day

1868 reflected the feeling among many northerners who were willing to forgive the southern rebels of their sins.

I.

When word of Lincoln's death reached Philadelphia, the people were incredulous. Sidney George Fisher's little boy, who heard the news from a local farmer, went to his father's dressing room to relay the sad news. "Father," he said, "Lincoln is shot." "Nonsense, child," replied Fisher, "how did you hear that?" Soon Fisher's wife came to confirm the news. She read to him the account in the paper, "half crying & in a tremulous voice." The nation had felt such a surge of hope. Now, "the national exultation at the prospects of peace & union has been suddenly converted into alarm & grief." Fisher "felt as tho I had lost a personal friend" while his wife "was as much agitated as if she had lost a relation." Lincoln was, according to the diarist, "the great man of the period." His death was a culminating tragedy in the final act of a tragic civil war:

His death is a terrible loss to the country, perhaps even a greater loss to the South than to the North, for Mr. Lincoln's humanity & kindness of heart stood between them and the party of the North who urge measures of vengeance & severity. The southern people have murdered their best friend, as they are likely to find ere long. The feelings of good will & conciliation, which were spreading thro the North at the hopes of speedy peace, will now be checked & converted in the minds of many into resentment & rage.

This diary entry captures the transition that would sweep through the minds of many northern Republicans and military officers. Where there had been hope for peaceful

reunion, now was vengeance and hate.⁵ “We shall have no more speeches overflowing with the milk of human kindness & breathing ‘Charity to all,’” wrote a Quaker woman in Delaware, alluding to Lincoln’s second inaugural address. “We shall still ‘conquer a peace,’ but I am afraid we shall lose its crowning triumph, of mercy & forgiveness.”⁶

The streets of Philadelphia were shrouded in gloom, the homes draped in black, and “everybody in the streets look[ed] sad & depressed, in striking contrast with the hilarious cheerful expression of all faces a few days ago, or indeed yesterday.” The mayor ordered the police to protect the offices of a prominent Democratic newspaper from the anger of the mob.

The forbearance of the people has been wonderful. The Democrats in their speeches & their press have denounced the war & its motives & purposes, gloried in every rebel victory, mourned over their defeats, vilified the North, abused every officer of the government and above all Mr. Lincoln, on whom they have lavished every epithet of scorn & contempt; he was a usurper, a tyrant, a blackguard, a ruffian, a buffoon, a gorilla, a kangaroo, & his administration was worse than an eastern despotism. They have been permitted to do this without check or molestation, thus refuting their own charges. At length, Mr. Lincoln has been murdered by a Democrat in the execution of a plot made by Democrats.⁷

Black cloth hung from nearly every house in the city, closed shutters permitted little light into homes, and American flags, once fluttering proudly in the breeze, now drooped with black streamers. Portraits of the fallen president, “draped in crepe,” hung “in hundreds of

⁵ Sidney George Fisher, diary entry for April 15, 1865, in Jonathan W. White, ed., *A Philadelphia Perspective: The Civil War Diary of Sidney George Fisher* (New York: Fordham University Press, 2007), 251-252.

⁶ Anna M. Ferris, diary entry for April 16, 1865, in Harold B. Hancock, ed., “The Civil War Diaries of Anna M. Ferris,” *Delaware History* 9 (April 1961), 261.

⁷ Fisher, diary entry for April 15, 1865, in White, ed., *Philadelphia Perspective*, 251-252.

windows.” Even the homes of many prominent Democrats were “bowed,” something that “must have been a bitter pill” for many of them “to swallow.” This sign of grief had not exactly been done willingly by the Copperheads. Indeed, the mayor had informed them that “unless they gave this external mark of respect to the popular sentiment he would not be answerable for the consequences.”⁸

Quiet was not bound to remain in the City of Brotherly Love for long, however. In New York a prominent Philadelphia Copperhead, Edward Ingersoll, delivered a “violent speech” against the war. The Philadelphia *Evening Bulletin* headlined the speech, “The Ingersoll and Booth Doctrine” and asked whether “such a *traitor*” should be allowed to continue to reside in Philadelphia. Ingersoll’s brother-in-law, Sidney George Fisher, confided in his diary that Ingersoll’s speech was dangerous in wartime, but that arresting him might be the best thing for him, for “it might save his life.”⁹

Philadelphians took note of Ingersoll’s speech, and it riled them into a frenzied mob. On April 24 some 30,000 Philadelphians filed quietly past Lincoln’s coffin. Although peaceful on the outside, a venomous anger stirred just beneath the surface. Some “respectable men” determined to require Ingersoll to “disclaim his disloyal sentiments or quit the neighborhood.” But then the “catastrophe” that Edward’s family dreaded finally took place.¹⁰

When Ingersoll’s train from New York arrived in Philadelphia a group of Philadelphians were waiting at the depot, “for the purpose of giving Mr. Ingersoll a

⁸ Fisher, diary entry for April 17, 1865, in *ibid.*, 253.

⁹ Fisher, diary entry for April 21, 1865, in *ibid.*, 253-254.

¹⁰ Fisher, diary entries for April 22, 24, 27, 1865, in *ibid.*, 254-257.

parting salute of groans.” Seeing the assembled throng, Ingersoll slipped out of a back door of the station, but the crowd saw him and began to follow. An army captain called for “an apology to the country for your speech, and particularly to the soldiers,” to which Ingersoll told the captain to “go to hell.” The captain struck at Ingersoll with his cane, but the Copperhead blocked the swing and swung back with his own cane. During the scuffle, Ingersoll received a blow to the left side of his face, while he broke his cane over the arm of the soldier. Ingersoll eventually drew back and pulled a revolver from his pocket. He cocked the gun but was seized by a police officer before he could fire. Subdued but still defiant, Ingersoll was taken to the police station, with the frenzied crowd in tow.¹¹

The mob “surrounded” the police station all day. Edward’s friends considered him safe while in prison, but if he showed himself in public or returned to his home he “would surely be attacked by the mob.” Edward’s family decided that he ought to exile himself until the passions of the moment subsided. His brother, Charles Ingersoll—a Copperhead of note who had published several anti-administration pamphlets and been arrested by the military in 1862—went to the station to visit his brother. As he got out of his carriage the mob descended upon him and beat him violently. His appearance was “horrible,” according to his brother-in-law: “his face swollen out of all human shape; his shirt & waistcoat drenched in blood. The mob dragged him out of the carriage, beat him over the head & stamped upon him. The policemen allowed them to do it for a time & then, merely to save his life, interfered. They in truth sympathized with the mob.”

¹¹ *New York Times*, April 28, 1865; Fisher, diary entry for April 27, 1865, in White, ed., *Philadelphia Perspective*, 255-257.

Covered in his own blood, but somehow with his spirits still high, Charles was escorted home by three policemen.¹²

With Charles recuperating at home, Edward was released on bail and taken to an undisclosed “place of refuge.” The City Council debated a bill that would offer a reward to turn in those who had attacked Charles. The bill was voted down by a strict party vote, the Democratic minority supporting it, the Republicans opposing it. Sidney George Fisher, the beaten man’s relative by marriage, lamented “how completely party spirit rules over principle.” Republicans claimed that Charles had been a supporter of mob law for years, that he had “outraged the patriotic feelings of the community,” and that the government was not bound to protect disloyal citizens “from the consequences of their own folly.”¹³

Fisher confided in his diary that the Republican position was short-sighted and dangerous: “These people did not seem capable of rising above the particular case & of seeing that Charles was not of the slightest consequence compared to the general principles involved, & that the mob, when they struck at him, struck at the security of all rights.” The vote of the council on this bill would deny “the protection of the law from every man & invites the mob to further violence by impliedly sanctioning what they have

¹² *New York Times*, April 28, 1865; Fisher, diary entries for April 27, 28, 1865, in White, ed., *Philadelphia Perspective*, 255-258.

¹³ Fisher, diary entries for April 29, and May 5, 1865, in White, ed., *Philadelphia Perspective*, 258-259; Bellefonte *Democratic Watchman*, May 19, 1865.

already done.” Fisher, who had always been a critic of mass democracy, now feared that, in the wake of Lincoln’s assassination, America would be forced to live under mob rule.¹⁴

Pennsylvania newspapers reacted to the affair predictably. Republican papers called on their readers to “Rejoice, oh ye people! for treason—yea, sympathy with treason—is becoming unpopular.” After describing the scuffles that Edward and Charles Ingersoll endured, the paper rationalized the anger of the mob: “Much as these exhibitions of popular violence are to be deplored on ordinary occasions, we hold to the opinion that when Edward Ingersoll insulted a deputation of his fellow citizens, and then drew a pistol, he might have been hung on the nearest lamp post without offending the majesty of justice.” In endorsing secession, the Ingersolls “have preached submission to violence; now let them practice it.”¹⁵

Democrats, by contrast, reacted with outrage. Noting the “strange inconsistency” of the times, the Bellefonte *Democratic Watchman* editorialized: “Papers in Philadelphia and elsewhere, that went into deep mourning for the assassination of President Lincoln, rejoice over the late attempt to assassinate the two Ingersolls, and allow the culprits to go unpunished.”¹⁶ Most Republicans, of course, believed that the Ingersolls were receiving their just desserts, whereas Lincoln, the hero of the age, had been cruelly murdered without provocation. Mob violence against Lincoln’s enemies, was therefore justified. Sadly, some Republican lynch mobs did successfully murder their intended victims. In

¹⁴ Fisher, diary entry for May 5, 1865, in White, ed., *Philadelphia Perspective*, 259.

¹⁵ Wellsboro *Agitator*, May 3, 1865.

¹⁶ Bellefonte *Democratic Watchman*, June 2, 1865.

western Maryland, for example, a Democratic newspaper editor was hanged by a mob about a week after the assassination of Lincoln.¹⁷

Mob rule, however, was not the only non-republican form of government to take hold in the wake of Lincoln's assassination. Military arrests, courts martial, and declarations of martial law, which had been present in the North for the duration of the Civil War, continued in use in the period after Appomattox. The state of California, far from the seat of war, was also placed under martial law in the aftermath of Lincoln's assassination.

There had always been a strong pro-Confederate contingent in California. The state had been strongly Democratic in the 1850s; Copperheads continued to hold some sway during the war years.¹⁸ One San Francisco Democrat, when convinced that Lincoln would be reelected, despaired that the nation had declared its incapacity for self-government. "From the day of Lincoln's reelection," he wrote, "I am an advocate of constitutional monarchy—or despotism restricted by timely assassination."¹⁹ This was probably more a statement of despondency than a desire to see Lincoln actually murdered. Nevertheless, some in California did harbor sentiments hateful enough towards the president to see him dead, while others hoped that southern-sympathizers

¹⁷ Frederic Shriver Klein, ed., *Just South of Gettysburg: Carroll County, Maryland in the Civil War* (Westminster, Md.: Newman Press, 1963), 22. Other sources indicate uncertainty over whether the editor was hanged or shot and stabbed to death. See Charles W. Mitchell, ed., *Maryland Voices of the Civil War* (Baltimore: Johns Hopkins University Press, 2007), 460.

¹⁸ Ronald C. Woolsey, "Disunion or Dissent?: A New Look at an Old Problem in Southern California Attitudes toward the Civil War," *Southern California Quarterly* 66 (Fall 1984), 185-205.

¹⁹ Samuel F. Butterworth to Barlow, October 22, 1864, Barlow Papers.

might take over the state for the Confederacy. In January 1865, General Ulysses S. Grant wrote to Irvin McDowell, the Union general commanding the Department of the Pacific, warning him about potential rebel invasions from Mexico.²⁰ Though no real threat ever materialized, Union officers and Republican politicians were perpetually wary.

Throughout the war, Union military officers had muzzled the Copperhead press in California, as many Democratic presses had been suppressed throughout the country.²¹ These abridgements of the press were defended by the Lincoln administration as necessities in order to maintain the Union war effort. Democrats, by contrast, saw them as partisan efforts to silence the opposition.

In San Francisco, a bout of Republican mob violence led to increased suppression of Democrats by the military. On April 15—the day of Lincoln’s death—word of the tragedy reached the Pacific Coast. People flooded the streets, openly expressing their grief. The city, which had been euphoric at the news of Lee’s surrender, was now dazed and dismayed. Soon the mighty throng turned into an angry mob, anxious for revenge. The mob stormed and destroyed five or six Democratic presses. In typical fashion, it forced its way through the doors, threw the furnishings out into the street, started a bonfire, and melted the press’ type over the embers of the smoldering ruins. The police

²⁰ U.S. Grant to Irvin McDowell, January 8, 1865, in *California Historical Society Quarterly* 13 (1934), 38-42.

²¹ Robert J. Chandler, “Crushing Dissent: The Pacific Coast Tests Lincoln’s Policy of Suppression, 1862,” *Civil War History* 30 (September 1984), 235-254; Chandler, “Fighting Words: Censoring Civil War Journalism in California,” *California Territorial Quarterly* (1976), 4-17; John W. Robinson, “A California Copperhead: Henry Hamilton and the Los Angeles Star” *Arizona and the West* 23 (1981), 213-230; case files related to Henry Hamilton, in RG 109 (War Department Collection of Confederate Records), Entry 213 (List of Civilians Taking the Oath of Allegiance or Giving Bond, 1862-1864), box 14, NARA.

were called out to stop the violence, but each time they caught up with the mob it would disperse and reassemble at another Democratic paper, ever widening the swath of destruction.²²

In the midst of the riot, General McDowell addressed the angry crowd. He told them that he understood their excitement, and “felt as I know you feel.” Since being put in command of the Department of the Pacific, in July 1864, he had sought to exercise military power rarely to avoid inaugurating a “military despotism,” and he had striven to protect the civil liberties of the people. He had, “therefore, tolerated many wrong things done by the public press, in its attacks against the Government and the administration of its affairs, feeling, under the circumstances, it was better to endure the evil than to apply so harsh a remedy as military power.” But the “devilish act” at Ford’s Theater would make such tolerance a thing of the past. “While your course to-day was very wrong, it was very natural,” he told the crowd, “and in interfering with the affairs of the press, you have but anticipated me, and have perhaps saved me some trouble, though I should have managed the matter in a different way.”²³

McDowell’s speech was greeted with cheers and applause. Standing outside of the offices of a Democratic paper, he implored the crowd to disperse and leave matters of law and order to him. The crowd left, cheering his name, while the general ordered a band of troops to take over the building. The editor believed that the troops were

²² Zachariah Montgomery, *Letter Addressed to Maj. Gen. McDowell, Touching the Assassination of the President, the Riotous Destruction of Printing Offices in San Francisco, Trammelling [sic] of the Press, by Military Authority* (San Francisco, 1865), 3; *Daily Alta California*, April 16, 1865.

²³ *Daily Alta California*, April 16, 1865; Montgomery, *Letter*, 3.

stationed there to protect his office, but he soon learned that this was not the case. When he returned the next day a soldier pointed his gun at the editor and said, “God damn Frenchman! go away or I’ll shoot you.” According to testimony later given by the editor, the offices were “taken possession of by a force of United-States troops.” Soldiers occupied them for almost three weeks, until they vacated the premises on May 4. When the editor reentered his office he “found it in a state of complete ruin.” The soldiers “had abused and damaged it in every way,” destroying the furniture, “maliciously mix[ing]” up the type (which was in French and Spanish), urinating in water buckets, and defecating on the floor. “The soldiers had done what the mob had been prevented from doing,” observed one historian of the event. On May 4 the editor sent a letter complaining to McDowell, but the general never replied. The Frenchman spent the next twenty years trying to recover damages, of which he only received a very small sum.²⁴

About 5 p.m. on Saturday, April 15, at the same time McDowell was giving his speech, the city militia assembled, and with the help of state and federal troops, San Francisco was restored to order. The city rested that night in silence, sorrow, and grief. The following morning, Easter Sunday, sermons focused more on the martyred president than on the resurrection of Christ. American flags hung over pulpits, churches were

²⁴ *Daily Alta California*, April 16, 1865; Etienne Derbec to McDowell, April 18, 1865, quoted in *The Derbec Claim before the French and American Commission*, War Letters, 1861-1865, NYHS; Etienne Derbec to the Honorable Commissioners, June 25, 1880, War Letters, 1861-1865, NYHS; Herbert Marshall Goodwin, Jr., “Etienne Derbec: His Life and Letters” (Master’s Thesis, San Diego State College, 1962), ii-iii, 62-89.

festooned in black, and crosses were draped in crepe. A morning usually celebrated for the resurrection of the Savior was now a day to mourn.²⁵

Seeing the havoc that was taking place within his department, McDowell took extreme measures to silence the opposition, ostensibly hoping to restore peace and order to his military district. On Monday, April 17, just two days after the president's death and the San Francisco riot, McDowell issued General Orders No. 27. It had come to his attention, he wrote, that some persons on the West Coast were "so utterly infamous as to exult over the assassination of the President." These persons, according to the general, became "virtually accessories after the fact," and would be arrested, either by the military or by local police. "Any paper so offending or expressing any sympathy in any way whatever with the act," McDowell added, "will be at once seized and suppressed."²⁶

Democratic editors in California worried about the potential repercussions of this order. Zachariah Montgomery, the editor of one paper that had been destroyed during the riot, published an open letter to McDowell, asking for clear rules regarding what sort of publications would be permitted within the district. Montgomery denied that McDowell had the lawful authority to abridge freedom of the press, but knew that the general possessed the power necessary to enforce the order. Hoping to appear as a moderate (although he had throughout the war been accused of disloyalty), Montgomery condemned the lawless on both sides—those rebels who would assassinate a president,

²⁵ Kathe van Winden, "The Assassination of Abraham Lincoln: Its Effect in California," *Journal of the West* 4 (April 1965), 220-222; *Daily Alta California*, April 17, 1865.

²⁶ *McCall v. McDowell*, 1 Deady's Reports, 236; *O.R.*, ser. 1, vol. 50, pt. 2, p. 1198.

and those mobs that would destroy both property and constitutional rights. “The friends of law,” Montgomery wrote of himself, “besides submitting to any reasonable amount of personal inconvenience, will often endure the infliction of positive and crying injustice—for a time at least—rather than see the laws overturned, a city stirred to insurrection, or a State plunged into civil war.” Montgomery asked McDowell to side with the Constitution and to protect the rights of the press, even if what a newspaper said was unpopular. But if McDowell would not take such action, he asked for a specific explanation of what sort of editorial comments would be acceptable, and what would not. If Democratic papers were not allowed to speak their opinions without fear of reprisal, they “will simply remain silent for want of the power to speak.”²⁷

Although newspapers may have been stifled, some individuals refused to allow their views of the war and the martyred president to be silenced. A sixty-year-old man named John McCall, apparently under the influence of fine spirits, uttered several indiscreet statements regarding the president and the war. A native of Tennessee, McCall had lived in Potter Valley, California, about 130 miles north of San Francisco, for several years. On April 20 he publicly said that Lincoln had been shot “and that the damned old son of a bitch should have been shot long ago, and that some more of his kind would go the same way shortly.” Nine days later he denied that General Lee had surrendered and that Lincoln actually had been assassinated. “I am only afraid that it is not so,” he declared. “If three or four more of the leaders of the abolition party were killed, it would be a good thing, as it would be the downfall of that party.”²⁸

²⁷ Montgomery, *Letter*, 3-16.

²⁸ McCall v. McDowell, 238.

Word reached military authorities of John McCall's indiscretions and he was promptly arrested. Over the next several days he was forced to travel about 150 miles, from his home to San Francisco. He was compelled to march at least fifty miles, he rode on an uncomfortable pack saddle part of the way, and he spent two days in the cargo hold of a schooner. For several nights he was imprisoned in adobe houses and guard houses, "furnished with neither bed nor covering of any kind, but was compelled to lie upon the floor, with nothing to protect him but his usual clothing." When he finally reached San Francisco, he was clasped in irons and detained in "a filthy room, crowded with drunken soldiers." From this cell he was transported to Alcatraz Island, where he was forced to break stones for twelve hours per day. After a week of hard labor he was released, upon taking an oath of loyalty.²⁹

The summary action taken by McDowell in the aftermath of Lincoln's assassination showed that the military, in some cases, would endorse the actions of the mob in their outrage against Democrats and suspected southern sympathizers. McDowell had been a Democrat before the war, and following the war appears to have returned to the Democratic fold. In fact, during the war he was falsely and slanderously accused of being a member of the Knights of the Golden Circle.³⁰ But when the nation's life was on

²⁹ Henry P. Irving, *Argument of H. P. Irving in the Circuit Court of the United States, in and for the District of California. July Term, 1866. Before Hon. Judge Deady. John McCall, Plaintiff, vs. Charles D. Douglass, and Irvin McDowell, Defendants* (n.p., [1866]), 1-2.

³⁰ *Union County Star and Lewisburg Chronicle*, August 14, 1863.

the line, he was a staunch Unionist who would not trifle with anything less than utmost fidelity to the nation and support of his commander-in-chief.³¹

Instances like McCall's occurred in other parts of the Union as well. Throughout the Union there were those who rejoiced in Lincoln's assassination. Military units were sent to investigate rebel sympathizers in California who fired cannons in celebration of Lincoln's assassination. In Poughkeepsie, New York, a woman's house was mobbed after she "exulted in public over the assassination." A young man who defended her was "immediately throttled" by the mob, and both were subsequently arrested. In Baltimore, it was well-known that one store sold images of John Wilkes Booth. "The picture, however, was removed before the mob reached the place, or serious consequences might have resulted." In Los Angeles a citizen proclaimed that he "would walk a thousand miles, or to Washington City, to get to shit on Abe Lincoln's grave." Another Los Angelo wished "the President had been killed six months ago" and declared that "all the Union men were nothing but a sett of d—d niggers." In New Orleans four civilians were charged by a military commission with "using disloyal and treasonable language against the Government of the United States" when they publicly exulted in the assassination of the president. One of the four was also charged with "disloyal and treasonable acts and conduct" for allegedly burning a military-issued blanket marked "U.S." In Baltimore several tavern owners were prosecuted before a military commission for violating a military order that prohibited the selling of "spirituous, vinous, or malt liquors" until

³¹ *Speech Delivered by Major-General McDowell, Commander in Chief of the U.S. Military Forces on the Pacific Coast, at Platt's Hall, San Francisco, on the Evening of Friday, October 21st, 1864, at One of the Most Crowded and Enthusiastic Meetings Ever Held in this City* (n.p., [1864]); *Speech of General McDowell, at Sacramento, California, 3d November, 1864* (n.p., [1864]).

further notice was given by the military. Provost marshals and other military officers in various locations arrested many civilians who uttered “disloyal language” in praise of Lincoln’s assassination. In such a time of national sorrow, there was little toleration for celebration.³²

Surprisingly, some Union soldiers also exulted in the death of their commander-in-chief, an action which was explicitly prohibited by the Articles of War.³³ Most soldiers who hated Lincoln were probably wise enough to keep their rejoicings to themselves. “Our tyrannical President Abraham Lincoln was shot in a theatre by a man by the name of Wilkes Booth,” wrote one German soldier serving in a Pennsylvania regiment. “The whole country grieves at his death. Personally I am heartily pleased over it, yet for appearance sake I must make a long face over it.”³⁴ Not all soldiers were shrewd enough to conceal their true feelings, however.

One private under Irvin McDowell’s command in the Department of the Pacific was convicted of using “treasonable and mutinous language” when he declared that

³² G. Wright to R. C. Drum, April 18, 1865, in *O.R.*, ser 1., vol. 5, pt. 2, p. 1201; Swanson and Weinberg, *Lincoln’s Assassins*, 12; Affidavits of Robert Smith and L. Ulyard and trial transcript from the case against Charles Helms, all in RG 109 (War Department Collection of Confederate Records), Entry 213 (List of Civilians Taking the Oath of Allegiance or Giving Bond, 1862-1864), box 14, NARA; John Wilson, *Memories of a Labour Leader* (London: T. Fisher Unwin, 1910), 178-180; *Daily Alta California*, April 18, 1865; “General Orders No. 82,” April 15, 1865, in *O.R.*, ser. 1, vol. 46, pt. 3, p. 778; Court Martial Case files MM-2092 and OO-0934.

³³ The fifth Article of War prohibited any soldier from speaking contemptuously or disrespectfully of the president, vice president, Congress, or governor and legislature of any state. War Department, *Revised Regulations for the Army of the United States, 1861* (Philadelphia: J. G. L. Brown, 1861), 500.

³⁴ Franz Schwenzer to Father-in-Law, July 4, 1865, translation in Civil War Miscellaneous Collection, USAMHI.

“Abraham Lincoln, was a long sided son of a bitch, and ought to be killed long ago.”

When brought before a court martial, the soldier said he never used “profane or vulgar language” and that he “would not rejoice over the . . . assassination of a gentleman whom I highly respected.” He had been a soldier in the regular army for ten years, he declared, and once was wounded in the head by a musket ball. The result was that whenever he was drunk he had no recollection of what he did: “I am Non Compos Mentis, and act in a strange and unaccountable manner.” He claimed to have been intoxicated when the alleged incident occurred (this excuse was given by nearly every soldier court martialed for exulting in Lincoln’s death). He therefore asked for clemency, but instead he was convicted and sentenced to be shot. The commanding general, however, mitigated his sentence to hard labor for the duration of his term of service and the loss of all pay.³⁵

In cases where the evidence was not sufficient to prove that a soldier had uttered treasonable words regarding the president’s death, or where witnesses did not agree upon the facts, the prisoners were acquitted, or, if convicted, their sentences were overturned by the commanding general.³⁶ Many prisoners were sentenced to hard labor for exulting in Lincoln’s death, all were dishonorably discharged and lost any back and future pay due

³⁵ Court Martial Case file MM-2771. Other soldiers were also sentenced to death for celebratory language relating to the death of Lincoln. One veteran in Baltimore was charged with “conduct tending to excite and cause a mutiny” for “express[ing] pleasure at and approbation of the assassination and death of Abraham Lincoln” in the presence of many enlisted men. He was arrested and confined to the guard house, but escaped and was later picked up in town, where he was confined to the city jail. He plead not guilty, claimed to be “drunk” and “crazy” during these various occurrences, but was convicted and sentenced to death. The commanding general mitigated his sentence to three years at hard labor with loss of pay. See Court Martial Case file MM-2304.

³⁶ Court Martial Case files MM-2190, MM-2379, OO-1078, OO-1146, and OO-1267.

to them.³⁷ One Indiana soldier who proclaimed, “Abe Lincoln is dead. Hurrah for old Abe. Who cares a damn, let him go to hell,” was found guilty by a court martial and sentenced “to be paraded through the grounds” of the hospital where the offence had taken place, for two hours, with an escort of drums and fifes, and “with a placard on his back, with the following words written or printed plainly thereon: This man said ‘Abe Lincoln is dead; who cares a damn, let him go to hell.’”³⁸ One can only imagine the harsh response such a punishment elicited from his peers. These instances all reveal that “disloyal” and “treasonable” language regarding the death of the president would not be tolerated in the field.

Many northerners, still holding to views that had become widely accepted during the war—that civil liberties and freedom of speech ought to be narrowed in time of national emergency, and that treason could consist of words without acts—were content to see those who exulted in Lincoln’s death silenced by force, be it by mob violence, military suppression, or military justice. One German soldier, observing how the assassination “plunged the whole country into grief and commotion,” believed that freedom of expression was not absolute in times like this. “A cry of horror and anger swept through the whole country, and even the smallest incident could have led to all the rebel prisoners and rebel-sympathizers having to pay for this crime with their own blood.” He noted that some southern sympathizers had been attacked and even killed in the North. “Served them right,” he wrote matter-of-factly. “It is true that we have rights,

³⁷ See, for example, Court Martial Case files MM-1936, MM-2047, MM-2093, MM-2344, and MM-2531.

³⁸ Court Martial Case file MM-2547.

guaranteed by the *Constitution*, to free opinion and speech as well as a free press, but traitors who rejoice at the assassination of the first citizen of the republic, the best of the patriots, a man who was full of love for those entrusted to him—such traitors cannot be tolerated.”³⁹

Back in Washington, the conspirators behind Lincoln’s assassination were rounded up and imprisoned. While many citizens were filled with rage and called for vengeance, many newspapers surprisingly called for calm and lawful behavior to guide the actions of the day. The editors of the *Sunday Morning Chronicle* implored loyal northerners “not . . . to be carried away by passion” and not to replicate the “barbarous ferocity and the insane rage” which caused the rebels to murder the American president. “Let us be stern and just and dignified,” they concluded. “Let the law—not lynch law—take its proper course.”⁴⁰

Secretary of War Edwin M. Stanton determined that the conspirators would be tried before a military commission. He actually wanted them executed before Lincoln was buried, but such grandiose plans proved infeasible. Beyond that, other members of the cabinet doubted the legality, practicality, and political prudence of trying the conspirators before a military commission. Lincoln’s former attorney general, Edward Bates, also believed such a trial both “unlawful” and a “gross blunder in policy” because

³⁹ Victor Klausmeyer to [missing], April 15-28, 1865, in Walter D. Kamphoefner and Wolfgang Helbich, eds., *Germans in the Civil War: The Letters They Wrote Home* (Chapel Hill: University of North Carolina Press, 2006), 244.

⁴⁰ Quoted in Swanson and Weinberg, *Lincoln’s Assassins*, 18.

it would make martyrs of the condemned.⁴¹ Critics of trial by commission also pointed out that the conspirators were being tried by the executive branch (via a military commission) for a “political” crime that was defined by the executive branch, not for mere murder or conspiracy. Just after the trial, one Connecticut man wrote: “They were not tried for murder, pure and simple, nor for any other crime, simply as defined in the statute, or articles of war. The charge against them may have included murder, or the acts which amount to murder, but the charge itself, in its legal aspect, was for a great *political* offense, and not for a personal murder merely. It was not for *treason*, nor any other well defined crime known to law.”⁴²

Such considerations went unheeded, however, and on May 1, President Andrew Johnson ordered the commission to proceed. There were nine judges, all of whom were military officers and none of whom were lawyers. Unlike a trial by jury, only a simple majority was needed to convict, and a two-thirds majority could impose death. The trial went on for two months, with 361 witnesses and nearly 5,000 pages of transcribed testimony. On June 29 the commission went into secret session to deliberate; on July 5 the verdicts and sentences were presented to President Johnson. Four of the eight were sentenced to death, three received life imprisonment, and the unfortunate stage hand who had held John Wilkes Booth’s horse in the back alley while the dastardly deed was done received six years behind bars. Johnson promptly approved of the sentences. The next

⁴¹ Swanson and Weinberg, *Lincoln’s Assassins*, 18-20; Edgar Welles, ed., *Diary of Gideon Welles, Secretary of the Navy under Lincoln and Johnson*, 3 vols. (New York: Houghton Mifflin Co., 1911), 2:303; Edward Bates, diary entry for May 25, 1865, in Howard K. Beale, ed., *The Diary of Edward Bates, 1859-1866* (Washington, D.C.: GPO, 1933), 483.

⁴² William Davis Shipman to Barlow, July 12, 1865, Barlow Papers.

day, July 6, the prisoners were made aware of their fates. The following day, the four went to meet their maker.⁴³

The Washington *Evening Star* approved of the swift justice in this case: “Their deeds have been judged patiently and impartially. Seven weeks were devoted to their trial, witnesses have been summoned from remote locations, every point that in some manner suggested innocence was carefully weighed, and the sentence of death executed only because there was not one reasonable doubt of overwhelming guilt.” One Democratic observer was less sure. “I think the summary execution of the conspirators struck a deep chord in the public’s bosom,” he confidentially wrote a friend. “There were few words uttered, but the shock was almost universal, as it became known that the condemned were to die upon twenty four hours notice.” Most observers, however, seemed to approve of the proceedings. In a time when northern vengeance needed to be satisfied, one historian has suggested that Mary Surratt’s execution—notably the first woman to be executed by the federal government—served as “a symbol of all the other women of the Confederacy who throughout the war had engaged in treasonable behavior,” yet gone largely unpunished. Mary, in short, was hanged as “the supreme representative” of all traitor women.⁴⁴

The rage directed towards those behind Lincoln’s assassination justified the use of a military commission to try and sentence them. Only one other rebel, Captain Henry

⁴³ Swanson and Weinberg, *Lincoln’s Assassins*, 19-23.

⁴⁴ Quoted in Swanson and Weinberg, *Lincoln’s Assassins*, 26; William Davis Shipman to Barlow, July 12, 1865, Barlow Papers; Elizabeth D. Leonard, “Mary Surratt and the Plot to Assassinate Abraham Lincoln,” in *The War Was You and Me: Civilians in the American Civil War*, ed. Joan E. Cashin (Princeton, N.J.: Princeton University Press, 2002), 301-305.

Wirz, the commandant of Andersonville Prison, faced the gallows. He was convicted by a military commission of “maliciously, wilfully [sic] and traitorously” aiding the “armed rebellion” by conspiring with Confederate leaders “to injure the health and destroy the lives of soldiers in the military service of the United States . . . to the end that the armies of the United States might be weakened and impaired.”⁴⁵ Atrocities difficult to imagine had occurred under Wirz’s command. His summary trial and execution therefore seemed warranted. The thought of using commissions to try the masses of disloyal southerners, and their rebel leaders, proved a more difficult concept for northern minds to grasp. In the early months after the war, many Confederate leaders were arrested and imprisoned.⁴⁶ Determining what to do with them proved an almost intractable dilemma.

Union commanders had contended all along that even if the rebellion were treated, at times, as a civil war (for the humanitarian purposes of prisoner exchanges, or to justify a blockade of southern ports), rebel leaders could still be tried for treason. “Treating in the field the rebellious enemy according to the law and usages of war has never prevented the legitimate government from trying the leaders of the rebellion or chief rebels for high treason, and from treating them accordingly, unless they are included in a general amnesty,” declared the War Department in 1863.⁴⁷ Thus, unless pardoned, leaders like Jefferson Davis and Alexander H. Stephens, the president and vice

⁴⁵ *Congressional Serial Set*, House Ex. Doc. No. 23, 40th Cong., 2nd sess., p. 807.

⁴⁶ James G. Randall lists more than 1900 indictments for treason and aid and comfort in Tennessee in 1865, four cases of treason and 142 for conspiracy in Missouri, 25 cases in Maryland, and “many” others in Kentucky and Virginia. See Randall, *Constitutional Problems*, 97.

⁴⁷ General Orders No. 100, “Instructions for the Government of the Armies of the United States in the Field,” April 24, 1863, in *O.R.*, ser. 3, vol. 3, p. 163.

president of the Confederacy, respectively, could be tried in civil courts for the highest political crime known to the law.

Immediately following the assassination, many northerners believed that the idea to kill Lincoln had been hatched and promulgated at the highest levels of the Confederate government. Others believed it had been a plot of the fabled KGC.⁴⁸ Thus, many citizens and politicians thirsted for Jefferson Davis' blood to be spilled in retribution. Davis was captured in May 1865. At a cabinet meeting in July 1865, Andrew Johnson and his advisors decided to try Davis for treason, hoping that the federal courts "might officially and finally declare secession to be treason." Some northerners hoped to try Davis in a northern state on the basis that he was "constructively" present when rebel troops invaded the North. Such a venue presented the government with a more likely chance to attain a Unionist jury with a desire to convict the former rebel chief. But the government decided to try Davis at the federal circuit court in Richmond, where Chief Justice Salmon P. Chase would preside as the circuit judge. In the same way that Taney's opinion lent weight to the *Merryman* decision in 1861, so too, it was hoped that Chase's position as chief justice would add weight to a treason conviction for Jeff Davis.⁴⁹

⁴⁸ San Francisco *Daily Alta California*, April 17, 1865.

⁴⁹ *Congressional Serial Set*, 39th Cong., 1st sess., House Misc. Doc. No. 6 and House Report No. 104; Roy F. Nichols, "United States vs. Jefferson Davis, 1865-1869," *AHR* 31 (January 1926), 266-267; William Hanchett, "Reconstruction and the Rehabilitation of Jefferson Davis: Charles G. Halpine's *Prison Life*," *Journal of American History* 56 (September 1969), 280-289; James Speed, "Case of Jefferson Davis," January 6, 1866, in 11 *Attorneys General* 411-413. Davis was indicted for high treason in Washington, D.C., in 1865, but nothing ever came of that indictment once it was decided to move the trial to Richmond. See Dunbar Rowland, ed., *Jefferson Davis, Constitutionalist: His Letters, Papers and Speeches*, 10 vols. (Jackson: Mississippi Department of Archives and History, 1923), 7:142-143.

Many northern Republicans doubted that a treason trial against Davis was a wise idea. A single man could hang the jury (while all twelve were needed to hang Davis), and thus undo the legal question of secession that the war had seemed to settle. Johnson's attorney general noted: "The risks of such absurd and discreditable issue of a great state trial are assumed for the sake of a verdict which, if obtained, will settle nothing in law or national practice not now settled, and nothing in fact not now history, while no judgment rendered thereon do we think will be ever executed." For these reasons, Judge Advocate General Joseph Holt favored the use of military commissions because they were "unencumbered by the technicalities and inevitable embarrassments attending to the administration of justice before civil tribunals."⁵⁰ Still, the government decided to proceed.

On May 8, 1866, a grand jury in Richmond indicted Jefferson Davis for high treason. The indictment accused the former rebel chief of "not having the fear of God before his eyes," of forsaking his allegiance to the United States, and of "being moved and seduced by the instigation of the devil" to "wickedly" attempt to disturb "the peace and tranquility" of the nation, to "subvert" the national government, and "to stir, move, and incite insurrection, rebellion and war against the said United States of America." He, according to the indictment,

with force and arms, unlawfully, falsely, maliciously, and traitorously did compass, imagine, and intend to raise, levy, and carry on war, insurrection, and rebellion against the said United States of America, and

⁵⁰ Nichols, "Davis," 281; William Blair, *Why Didn't the North Hang Some Rebels?: The Postwar Debate over Punishment for Treason* (Milwaukee, Wisc.: Marquette University Press, 2004), 15. Notably, in 1867 the trial of John Surratt, a conspirator in the Lincoln assassination case who had fled the country in April 1865, resulted in a hung jury.

in order to fulfill and bring to effect the said traitorous compassings, imaginations, and intentions of him, the said Jefferson Davis, . . . with a great multitude of persons whose names to the jurors aforesaid are at present unknown, . . . armed and arrayed in a warlike manner, that is to say with cannon, muskets, pistols, swords, dirks, and other warlike weapons, as well offensive as defensive, being then and there unlawfully, maliciously, and traitorously assembled and gathered together, did falsely assemble and join themselves together against the United States of America, and then and there, with force and arms, did falsely and traitorously, and in a warlike and hostile manner, array and dispose themselves against the said United States of America. . . .

The charge of treason against Davis in this indictment relied Davis' role in Early's raid on Washington, D.C., in the summer of 1864. Perhaps most striking about this charge is its reliance on antiquated religious and old English notions of treason. Davis was morally guilty of siding with Satan in making war against the United States, and of compassing and imagining its destruction. These charges hearkened back to the 1350 treason law of Edward III. Significantly, the indictment did not state whether Davis was being charged under the 1790 treason law or the Second Confiscation Act. This omission left some ambiguity as to whether his punishment would be death or fine and imprisonment. Consequently, the lawyers involved interpreted the charge as rising under the 1862 treason law (the Second Confiscation Act), which permitted Davis to be punished by fine or imprisonment, rather than with death.⁵¹

⁵¹ Rowland, ed., *Jefferson Davis*, 150-152, 172; *New York Observer and Chronicle*, June 1, 1865. This sort of indictment for treason was typical in the United States at least through the Civil War. See Thomas P. Slaughter, "'The King of Crimes': Early American Treason Law, 1787-1860," in *Launching the "Extended Republic": The Federalist Era*, ed. Ronald Hoffman and Peter J. Albert (Charlottesville: University Press of Virginia, 1996), 97-98; and Charles F. Hobson, *The Aaron Burr Treason Trial* (Washington, D.C.: Federal Judicial Center, 2006), 46-48. Other examples of indictments for treason are available in the case files of the Baltimore Rioters of April 1861, in RG 21, Records of the U.S. District Court, District of Maryland, at the National Archives Mid-Atlantic branch in Philadelphia. Some of these case files are available online through the National Archives' ARC search engine.

The trial of Davis was postponed for many reasons over the ensuing months. First, Chief Justice Chase refused to hold a trial until “martial law was abrogated and the writ of habeas corpus fully restored in Virginia.” Later, Chase demurred because Congress had reorganized the judicial circuits without reassigning the Supreme Court justices to particular circuits. He therefore claimed that he lacked authority to hold sessions (this oversight was corrected by Congress in March 1867). For nearly two years Davis sat imprisoned at Fortress Monroe. Finally, in May of 1867 Davis’ counsel decided to press the issue and call for either a trial or release on bail. When the government was forced to admit that they were not yet prepared for a trial, bail was set at \$100,000, money which was supplied by several leading Republicans and abolitionists—Horace Greeley, Gerrit Smith, and Cornelius Vanderbilt, among others (these men hoped that amnesty would help usher the way for a peaceful reunion with black suffrage and political rights). On May 13, 1867, two years after his initial capture, Davis was released from captivity. The courtroom erupted in “deafening applause.” Davis’ lawyers became convinced that their client would never have to go to trial. Sentiment in the North “for amnesty and the restoration of good feeling,” according to historian Roy F. Nichols, was also growing.⁵²

Still, some leaders in the national government hoped to see Davis convicted and hanged. A trial date was set for November 1867, but again, the government, for various reasons, was not ready to prosecute the case, so it was postponed until March 1868. On March 26, nearly three years after the close of the war, a Richmond grand jury drew up a

⁵² Nichols, “Davis,” 267-274; Rowland, ed., *Jefferson Davis*, 7:144-145, 154-176.

new, sixteen-page indictment against Davis. Referring to Davis as the “commander-in-chief” of the rebel forces, the new indictment linked Davis to the Confederate military and its battles in more than a dozen states, from First Manassas to Petersburg. It quoted extensively from his military orders, described planning sessions with leading Confederate generals and cabinet members, and even linked him to specific battles in which he “did order, direct, and command said Robert E. Lee . . . to assault, wound, fight, capture, and kill the officers and soldiers in the military service of the United States.” This new indictment lacked the antiquated and moralistic language of the 1866 document (his being influenced by the devil, for example, or his compassing and imagining the death of the nation); it specifically linked Davis to many actual overt acts of war. Perhaps most importantly, unlike the 1866 indictment, the 1868 one specifically charged Davis with high treason under the treason law of 1790 (as well as the 1862 law), thus requiring his execution upon conviction.⁵³

The trial soon faced more delays. With Chief Justice Chase called to preside over the impeachment trial of President Johnson, the treason trial again had to be postponed. On June 3, Chase appeared in Richmond, finally prepared to hear the case—but no one else was ready. The lawyers on both sides had previously agreed to postpone the case, and the court had to concur in that decision.⁵⁴

In November 1868, Johnson’s attorney general again moved to postpone the case. This time Davis’ lawyer decided to act. Having heard that Chase believed that the disqualification clause of the Fourteenth amendment (the third section) prevented further

⁵³ Rowland, ed., *Jefferson Davis*, 176-195.

⁵⁴ Nichols, “Davis,” 275-281; Randall, *Constitutional Problems*, 107-111.

proceedings for treason (because a treason trial would then violate the double jeopardy clause of the Fifth amendment), the lawyer moved that the indictment against Davis be quashed. Sitting as circuit court judges, the chief justice and a federal district judge heard the arguments of Davis' lawyer and of the federal district attorney. Chase and his colleague could not reach an agreement, so the case was referred to the Supreme Court. But a trial date was never set. On Christmas Day, 1868, President Johnson granted complete amnesty to all rebels who had not yet received a pardon. What might have amounted to the greatest treason trial in United States history closed, after three years, before it ever really began.⁵⁵

II.

As the war came to a close, many Republicans at the state and national levels sought to pass legislation disfranchising former rebels and northerners suspected of southern sympathy. In doing so, these northerners continued to articulate the belief that those whose loyalty was doubtful did not deserve the political and constitutional rights of citizens. Moreover, by adopting legislation and loyalty oaths that disfranchised suspected traitors, Congress and the states were able to punish treason while bypassing the time, expense, and uncertainty involved in prosecuting treason trials. Americans suspected of disloyalty, in short, would be punished through the legislative process rather than in the courts.

Congress took the lead in punishing the disloyal classes of American society. On March 3, 1865 Congress stripped deserters from the Union army of the political rights of

⁵⁵ Nichols, "Davis," 281-284; Randall, *Constitutional Problems*, 111-115.

citizenship.⁵⁶ In January 1867, Congress disfranchised voters in the District of Columbia who had “voluntarily given aid and comfort to the rebels in the late rebellion.” A few weeks later, while embroiled in political struggles with President Johnson, and upset about the broad amnesty being done by Johnson, Congress repealed the power of the president to grant amnesty and pardon to traitors. Finally, aimed at southern citizens, the three Reconstruction Acts of 1867 perpetuated the use of military tribunals for civilians and disfranchised and barred from holding office all former rebels. “There can be no penalty too great,” argued Charles Sumner, “for the conspirators, who organized this great crime and let slip the dogs of war.”⁵⁷

Near the end of the war, and in the early postwar years, Congress also denied the rebellious states their representation in the national government. In February 1865, both houses adopted a joint resolution that excluded the rebellious southern states from the electoral college.⁵⁸ The House and Senate also excluded southern delegations from their

⁵⁶ *An Act to Amend the Several Acts Heretofore Passed to Provide for the Enrolling and Calling Out the National Forces, and for Other Purposes*, act of March 3, 1865, in 13 Stat. 490. This law was upheld in several state court decisions, although the state courts narrowed the scope of the act by requiring conviction in court in order for a deserter to be disfranchised. See *Huber v. Reily*, 53 *Pennsylvania State Reports* 112 (1866), *Severance v. Healey*, 50 *New Hampshire Reports* 448, and in *State v. Symonds*, 57 *Maine Reports*, 148 (1869).

⁵⁷ *An Act to Regulate the Elective Franchise in the District of Columbia*, act of January 8, 1867, in 14 Stat. 375; *An Act to Repeal Section Thirteen of “An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels, and for Other Purposes,” Approved July Seventeenth, Eighteen Hundred and Sixty-two*, act of January 21, 1867, in 14 Stat. 377; *An Act to Provide for the More Efficient Government of the Rebel States*, 13 Stat. 428-429, and the two supplementary acts at 14 Stat. 2-5, 14-16; *Congressional Globe*, 37th Cong., 2nd sess., p. 2196.

⁵⁸ *Joint Resolution Declaring Certain States Not Entitled to Representation in the Electoral College*, adopted February 8, 1865, in 13 Stat. 567-568.

right to sit in their respective houses of Congress until the state ratified the Fourteenth amendment and the congressmen-elect could swear to the 1862 ironclad test oath. In some cases, Congress also excluded elected representatives from loyal border states. These exclusions were a mix of partisan politics and of reasonable demands for loyalty in the national legislature. They also representative part of the struggle for control over Reconstruction between the executive and legislative branches of the government. Nevertheless, in excluding former rebels or those suspected of past disloyalty, Congress punished the rebellious states as corporate entities, as much as it punished the rebel citizens, for their acts of treason and disloyalty.⁵⁹

At the same time, Congress also took the lead in rewarding people for their personal acts of loyalty. On March 3, 1865—the same day that the law stripping deserters of the rights of citizenship went into effect—Congress adopted two joint resolutions to the benefit of loyal soldiers and their families. The first encouraged government and private employers to give preference when hiring to soldiers who had been honorably discharged from the military “by reason of disability resulting from wounds or sickness incurred in the line of duty.” The second offered freedom to the wives and children of former slaves who enlisted in the Union army. Congress also took measures to protect the graves of Union soldiers from desecration, and in July 1866,

⁵⁹ Hyman, *Era of the Oath*, 83-94, 127-134; Kentucky, *Memorial of Protest*, approved March 9, 1868, in *Laws of Kentucky (1868)*, 84-88. Many northern states approved of this decision. The legislature of California, for example, adopted a joint resolution endorsing exclusion of southern delegations to Congress. See *Concurrent Resolution No. 40*, adopted March 31, 1866, in 1866, in *The Statutes of California, Passed at the Sixteenth Session of the Legislature, 1865-6* (Sacramento: C. M. Clayes, 1866), 909-911.

Congress granted to loyal Tennesseans the right to submit claims to the federal government for wartime losses.⁶⁰

To further protect military officers who made arrests of suspected traitors, Congress passed a second indemnity act on May 11, 1866, and on March 2, 1867, adopted a law legitimizing all presidential actions pertaining to the arrest, detention, and trial of disloyal Americans, during the war covering the time period from March 4, 1861 through July 1, 1866. According to James G. Randall, this second indemnity act “was equipped with ‘teeth.’” It did not require a specific order from the president to justify a military officer’s actions, and it virtually forced state judges to stop proceedings in which former detainees were seeking damages from their captors.⁶¹

The states also moved to promote patriotic notions of loyalty and to deny their disloyal residents the rights of citizenship. Oregon, Nevada, and New York adopted new loyalty oaths for voters.⁶² After a set-back in the state courts, the West Virginia

⁶⁰ *A Resolution to Encourage the Employment of Disabled and Discharged Soldiers, and A Resolution to Encourage Enlistments and to Promote the Efficiency of the Military Forces of the United States*, both adopted March 3, 1865, in 13 Stat. 571; *A Resolution Respecting the Burial of Soldiers Who Died in the Military Service of the United States during the Rebellion*, adopted April 13, 1866, in 14 Stat. 353; *Joint Resolution to Extend the Provisions of the Act of July Fourth, Eighteen Hundred and Sixty-four, Limiting the Jurisdiction of the Court of Claims to the Loyal Citizens of Tennessee*, adopted July 28, 1866, in 14 Stat. 370-371.

⁶¹ *An Act to Amend an Act Entitled “An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases, Approved March Third, Eighteen Hundred and Sixty-three*, act of May 11, 1866, in 14 Stat. 46-47; *An Act to Declare Valid and Conclusive Certain Proclamations of the President, and Acts Done in Pursuance thereof, or of His Orders, in the Suppression of the Late Rebellion against the United States*, act of March 2, 1867, in 14 Stat. 432-433; Randall, *Constitutional Problems*, 193-206.

⁶² Oregon, *An Act to Prevent Fraudulent and Illegal Voting, and to Repeal Certain Laws in Conflict Therein*, act of December 19, 1865, in *The General Laws of*

legislature adopted a new test oath for attorneys.⁶³ Perhaps most far reaching, Radical Republicans in Missouri adopted a new oath requiring past and future loyalty of all voters, office holders, lawyers, teachers, preachers, doctors, those holding corporate offices, and jurymen. This oath listed eighty-six disloyal offences that oath takers had to swear not to have committed. These offences included crimes of the heart and mind, including one provision that the oath-taker had never “by act or word, manifested adherence to the cause of such enemies or his desire for their triumph over the arms of the United States, or his sympathy with those engaged in exciting or carrying on rebellion against the United States.”⁶⁴ California adopted a statute promoting the teaching of patriotism in public schools: “It shall be the duty of all teachers to endeavor to impress on the minds of their pupils the principles of morality, truth, justice, and patriotism . . .

Oregon Passed at the Special Session Begun and Held December 1865 (Salem: Henry L. Pittock, 1866), 24-25; Nevada, *An Act to Provide for the Registration of the Names of Electors, and for the Ascertainment by Proper Proofs of the Persons Who Shall be Entitled to the Right of Suffrage*, act of March 11, 1865, in *Statutes of the State of Nevada Passed at the First Session of the Legislature, 1864-5, Begun December 13th, 1864, and Ended March 11th, 1865* (Carson City: John Church, [1865]), 882; Robert M. Bastress, *The West Virginia State Constitution: A Reference Guide* (Westport, Conn.: Greenwood Press, 1995), 15; New York, *An Act to Provide for a Convention to Revise and Amend the Constitution*, act of March 29, 1867, in *Laws of the State of New York, Passed at the Ninetieth Session of the Legislature, Begun January First, and Ended April Twentieth, 1867, in the City of Albany* (Albany: Weare C. Little, 1867), 287. The New York only applied to New York voters in an election to elect delegates to a state constitutional convention.

⁶³ West Virginia, *An Act in Relation to the Oaths of Attorneys at Law*, act of February 14, 1866, in *Acts of the Legislature of West Virginia, at its Fourth Session, Commencing January 16th, 1866* (Wheeling: John Frew, 1866), 19; Hyman, *Era of the Oath*, 99-100.

⁶⁴ *Garesché v. Missouri*, case no. 285, in Supreme Court of the United States, *Transcripts of Records* (December Term 1866), 8: 5050-5058, Library of the Supreme Court of the United States, Washington, D.C.; RG 267 (Records of the Supreme Court of the United States), case no. 4680, box 577, NARA; Hyman, *Era of the Oath*, 97.

and to instruct them in the principles of a free government, and to train them up in a true comprehension of the rights, duties, and dignity of American citizenship.”⁶⁵ In all of these ways, the several northern states hoped to reward and promote loyalty while punishing disloyal citizens.

In the early years after the war, when West Virginia was still under Republican control, the state adopted many measures to punish and disfranchise former Confederates. The legislature indemnified loyal citizens who had retaliated against rebel guerrillas or marauders in the state. The state also adopted a constitutional amendment denying state citizenship and the right to vote to any person who, since June 1861, had given “voluntary aid or assistance to the rebellion,” unless that person had subsequently volunteered for the Union army and received an honorable discharge. Several new state registry laws were also used to keep disloyal voters from the polls. It has been estimated that these provisions disfranchised between 15,000 and 20,000 West Virginians. Moreover, the state adopted measures prohibiting Virginians from collecting debts from West Virginians, although West Virginians who had aided the rebellion were not given this protection. Finally, the state imposed its heaviest tax burdens on the counties with the most former Confederates, and, using a loyalty oath, barred them from suing to regain property they had lost during the war.⁶⁶

⁶⁵ California, *An Act to Provide for a System of Common Schools*, act of March 24, 1866, in *Statutes of California* (1866), 400.

⁶⁶ West Virginia, *An Act for the Relief of State and Home Guards*, act of February 27, 1866, in *Acts of the Legislature of West Virginia, at its Fourth Session, Commencing January 16th, 1866* (Wheeling, John Frew, 1866), 95; Joint Resolution No. 29, *Proposing an Amendment to the Constitution of the State*, adopted March 1, 1865, in *Acts of the Legislature of West Virginia at its Third Session, Commencing January 17th, 1865* (Wheeling: John F. McDermot, 1865), 94; Bastress, *West Virginia*, 16-17.

Seeking to put into effect the congressional statute that denied the rights of citizenship to deserters, New Hampshire, Pennsylvania and Wisconsin passed legislation disfranchising deserters (with Wisconsin requiring an oath of those accused of desertion and New Hampshire prohibiting them from holding office). Deserters from Wisconsin were also denied stays of proceedings in civil actions, a legal courtesy that previously had been granted to all soldiers. In Ohio, draft dodgers were imprisoned at hard labor for up to six months, and lost the right to vote, to be a juror or witness in court, and to serve in civil office.⁶⁷

⁶⁷ New Hampshire, *An Act Concerning Deserters from the Military and Naval Service of the United States, and Avoiding the Draft into the Same*, act of July 7, 1866, in *Laws of the State of New-Hampshire, Passed June Session, 1866* (Concord: George E. Jenks, 1866), 3238-3240; Pennsylvania, *A Further Supplement to the Election Laws of this Commonwealth*, act of June 4, 1866, in *Laws of the General Assembly of the State of Pennsylvania, Passed at the Session of 1866, in the Nineteenth Year of Independence* (Harrisburg: Singerly and Myers, 1866), 1107-1109; Wisconsin, *An Act to Amend Chapter 7 of the Revised Statutes, Entitled, "Of General and Special Elections; of the Manner of Conducting the Same, and of the Canvass,"* act of March 26, 1866, in *General Laws Passed by the Legislature of Wisconsin, in the Year 1866, Together with Joint Resolutions and Memorials* (Madison: William J. Park, 1866), 32-33; Wisconsin, *An Act to Authorize the Secretary of State to Procure and Furnish to Clerks of County Boards of Supervisors Authenticated Lists of Deserters from the Military and Naval Service of the United States, and to Provide for their Distribution*, act of March 29, 1867, in *General Laws Passed by the Legislature of Wisconsin, in the Year 1867, Together with Joint Resolutions and Memorials* (Atwood and Rublee, 1867), 64-65; Wisconsin, *An Act to Amend Chapter 32 of the General Laws of 1863, Entitled "An Act Relative to the Commencement and Prosecution of Civil Actions against Persons in the Military Service of the Country,"* act of April 7, 1865, in *General Laws Passed by the Legislature of Wisconsin, in the Year 1865, Together with Joint Resolutions and Memorials* (Madison: William J. Park, 1865), 481-482; Ohio, *To Punish Persons Who Leave Their Places of Residence for the Purpose of Avoiding Conscription*, act of March 29, 1865, in *General and Local Laws and Joint Resolutions Passed by the Fifty-Sixth General Assembly of the State of Ohio, at its Second Session, Begun and Held in the City of Columbus, January 3, 1865, and in the Sixty-Third Year of Said State* (Columbus: Richard Nevins, 1865), 68.

Many northerners supported this sort of action. “A man that will desert his country in this trying hour is not fit to be a citizen of the United States,” wrote one Pennsylvania soldier to his sweetheart during the war.⁶⁸ Others were a little more wary. Over time Wisconsin slackened the stringency of its statute. In 1868, accused deserters were given additional opportunities to prove their innocence, and the law was finally repealed on March 10, 1869.⁶⁹ Other states had similar reservations about restricting deserters from the franchise.

In 1867 Michigan held a constitutional convention that debated disfranchising all future deserters. The proposition was rejected overwhelmingly by the convention for several reasons. First, many delegates doubted that this sort of crime and punishment should be included in the state’s organic law. Others did not believe a local board of elections should become the judge of whether a crime had occurred. “In such a case a man is condemned without the formalities and safeguards of a trial,” declared one member of the convention in opposition to the measure. The punishment for a crime without the benefit of a trial, according to another delegate, deprived alleged deserters of due process rights. Still others claimed that youthful, inexperienced soldiers sometimes

⁶⁸ William T. Shimp to Annie, September 1, 1863, William T. Shimp Papers, Civil War Miscellaneous Collection, USAMHI. On the constitutionality of the Pennsylvania law, see *Franklin Repository*, October 4, 1865.

⁶⁹ Wisconsin, *An Act to Amend Chapter Sixty-seven (67) of the General Laws of 1867, Entitled “An Act to Authorize the Secretary of State to Procure and Furnish to Clerks of County Boards of Supervisors Authenticated Lists of Deserters from the Military and Naval Service of the United States, and to Provide for their Distribution,” and for Other Purposes in Connection with Men Charged with Desertion*, act of March 6, 1868, in *General Laws Passed by the Legislature of Wisconsin, in the Year 1868, Together with Joint Resolutions and Memorials* (Atwood and Rublee, 1868), 171-173; repealed on March 10, 1869, in *Laws of Wisconsin (1869)*, 141.

deserted without understanding the full consequences of their actions. And not only cowards deserted, either. “Many times some of our best soldiers, under trying circumstances, have been guilty of desertion. Many such have afterwards nobly redeemed their characters, when they have again gone upon the field, after the offense had been pardoned or the punishment mitigated. They have in many cases redeemed their characters by the sacrifice of their lives.” Finally, because this provision would only deal with future desertions, such a punishment now might hamper future efforts at recruitment. There was no necessity, in the view of the convention, to adopt such a provision in these current times of peace.⁷⁰

Many border regions—areas that had traditionally been sympathetic to both southern interests and the Democratic party—moved quickly to repeal many of the stringent Republican war measures that had been adopted during the four years of conflict. Without military units present to threaten the opposition during elections, Democrats regained majorities in many border state legislatures and constitutional conventions.

Maryland had adopted several broad treason and disloyalty statutes, as well as the radical new state constitution, during the Civil War. In the years just following the war the state legislature moved quickly to repeal these laws. Because Governor Thomas Swann stopped enforcing the requirement of the ironclad test oath for voters, Democrats made a quick comeback. Consequently, they undid much of what had been accomplished

⁷⁰ William Blair Lord and David Wolfe Brown, eds., *The Debates and Proceedings of the Constitutional Convention of the State of Michigan, Convened at the City of Lansing, Wednesday, May 15th, 1867*, 2 vols. (Lansing: John A. Kerr & Co., 1867), 2:776-779.

by the Republicans during the war. In 1867, Maryland repealed the loyalty oath required of jurors and restored the full rights of citizenship to those who had been disenfranchised by the state constitution of 1864. In 1874, the General Assembly also repealed portions of the state's broad 1862 treason law.⁷¹

A large majority of Maryland voters also determined to write a new state constitution, one that would undo many of the radical provisions found in the wartime document. The 1867 constitution included a clause banning “retrospective oath[s] or restriction[s].” It also excluded the 1864 constitution’s requirement of loyalty oaths for office holders, teachers, attorneys, jurors, and employees in public education. It called for compensation for former slave owners for their loss of property. It omitted a clause allowing for forfeiture of the property of traitors. It prohibited the legislature from

⁷¹ Maryland, *An Act to Restore to Full Citizenship, and the Right to Vote and Hold Office, All Persons Who May be Deprived Thereof by the Provisions Contained in the Fourth Section of the First Article of the Constitution of this State*, act of January 24, 1867, and *An Act to Repeal the Act of the January Session, Eighteen Hundred and Sixty-four, Chapter Two Hundred and Eighty-two Entitled, An Act to Add the Following Section to the Fortieth Article of Public General Laws Requiring Jurors to Take the Oath of Allegiance*, act of March 23, 1867, both in *Laws of the State of Maryland, Made and Passed at a Session of the General Assembly, Begun and Held at the City of Annapolis, on the 2nd Day of January, 1867, and Ended on the 23rd Day of March, 1867* (Annapolis: Henry A. Lucas, 1867), 18-20, 346-347; Maryland, *An Act to Repeal Sub-section eight, Sub-section Eleven, Sub-section twelve, and Sub-section Thirteen of Article Thirty of the Code of Public General Laws, Title “Crimes and Punishments,” Sub-title “Treason,” Being Parts of an Act Passed at the January Session, March Sixth, in the Year Eighteen Hundred and Sixty-two, Chapter Two Hundred and Thirty-five, Entitled “An Act to Amend Section Two Hundred and Two of Article Thirty of the Code of Public General Laws, Relating to “Crimes and Punishments,” and Providing for the Punishment of Treason, and Other Kindred Offences*, act of April 11, 1874, in *Laws of the State of Maryland, Made and Passed at a Session of the General Assembly, Begun and Held at the City of Annapolis, on the Seventh Day of January, 1874, and Ended on the Sixth Day of April, 1874* (Annapolis: S. S. Mills and L. F. Colton, 1874), 574.

imposing test oaths for holding office in the state. It omitted any provisions for soldiers voting, and it did not disfranchise Confederates or supporters of the Confederacy.⁷²

The 1864 Maryland constitution had included a provision that closely tied loyalty to nationalism. Making allegiance to the nation paramount to allegiance to the state, the clause read: “The Constitution of the United States, and the laws made in pursuance thereof, being the supreme law of the land, every citizen of this State owes paramount allegiance to the Constitution and Government of the United States, and is not bound by any law or ordinance of this State in contravention or subversion thereof.” The 1867 delegates kept a supremacy clause but deleted the obligation of “paramount allegiance” that the wartime constitution makers had believed was owed to the national government.⁷³

In a direct attack on the Lincoln administration’s appeal to “necessity” for restrictions on liberty, the new constitution declared: “That the provisions of the Constitution of the United States, and of this State, apply, as well in time of war, as in time of peace; and any departure therefrom, or violation thereof, under the plea of necessity, or any other plea, is subversive of good Government, and tends to anarchy and despotism.”⁷⁴ This rebuking provision would soon become a model for other border state constitution makers.

⁷² Maryland Constitution, Declaration of Rights, articles 17, 24, 27, 37, and art. 1, sec. 7 (1867); Maryland Constitution, art. 3, sec. 47, art. 12, secs. 11-16, and art. 1, sec. 4 (1864).

⁷³ Maryland Constitution, Declaration of Rights, art. 5 (1864); Maryland Constitution, Declaration of Rights, art. 2 (1867). The 1867 constitution’s supremacy clause borrowed language directly from Article 6 of the U.S. Constitution.

⁷⁴ Maryland Constitution, Declaration of Rights, art. 44 (1867).

The Bluegrass State followed a pattern similar to Maryland. In 1865, the Kentucky legislature repealed its wartime anti-rebellion statutes and its law requiring a loyalty oath of jurors. In January 1866 the Kentucky legislature “pardoned and absolved from all the pains and penalties thereto attached” all persons charged with treason against the state. In February the state suspended the statute of limitations for any person who had been arrested while habeas corpus had been suspended so that they could seek damages in court for any wrongs that had been done to them while they had been incarcerated. The legislature also declared that any elections that suffered from military interference would be declared void, and a new election would be held.⁷⁵ In 1867, the legislature repealed most of the state’s 1862 penal code, replacing it with a single clause:

That any person who shall hereafter conspire or combine with others to levy war against this State, or give aid and comfort to the enemies of this State, whether foreign or domestic, within this State or elsewhere, and be convicted thereof, shall be confined in the penitentiary not less than one nor more than five years.

This brief clause, which had, almost word-for-word, been part of the 1862 statute, was all that remained of the broad anti-disloyalty wartime measure (discussed in Chapter 1). The

⁷⁵ Kentucky, *An Act to Repeal an Act, Entitled, “An Act to Prohibit and Prevent Rebellion by Citizens of Kentucky and Others in this State,” Approved October 1, 1861*, act of December 18, 1865, *An Act to Repeal an Act to Prohibit and Prevent Rebellion by Citizens of Kentucky and Others in this State, Approved 1st October, 1861*, act of December 19, 1865, *An Act to Repeal an Act, Entitled “An Act to Amend the Jury Laws of this Commonwealth,” Approved August 22, 1862*, act of December 20, 1865, *An Act to Pardon All Persons Who have Heretofore Committed the Crime of Treason against this Commonwealth*, act of January 13, 1866, *An Act to Amend the Law of Limitations in Certain Actions*, act of February 17, 1866, and *An Act to Amend Section 8, Article 7, Chapter 32, Title “Elections,” of the Revised Statutes*, act of February 17, 1866, all in *Acts of the General Assembly of the Commonwealth of Kentucky, Passed at the Session of the General Assembly which was Begun and Held in the City of Frankfort, on Monday, the Fourth Day of December, 1865* (Frankfort: George D. Prentice, 1866), 3-5, 8, 73.

new law repealed the old clauses which prohibited participating in secret societies, advocating joining the southern Confederacy, displaying rebel flags with the “intent to excite seditious feelings,” and enticing or seducing others to act disloyally. Finally, in February 1867 the legislature granted amnesty to all former Confederates, declaring that they shall not “be held responsible, criminally or civilly, in the courts of this State, for any act done during the late rebellion by compulsion of, and under color of, military authority.”⁷⁶

The Kentucky legislature also adopted a number of joint resolutions in the immediate postwar period that expressed disdain for the Lincoln administration’s handling of the border states in wartime. In 1865 the legislature appealed to the president to free Kentucky from martial law and to remove black Union soldiers from the state. In 1866 the state asked the president to revoke suspension of the writ of habeas corpus. In 1868, the legislature called on the president to grant “an universal amnesty, without distinctions, discriminations, or test oaths” so that “the Southern States” would regain “the free and equal enjoyment of their rights in the Federal Union.” Finally, in 1869 the legislature protested the military arrest and subsequent impeachment of Kentucky’s chief justice, the Peace Democrat Joshua F. Bullitt, for having allegedly been a member of a “treasonable association” (the Sons of Liberty). The legislature declared Bullitt’s

⁷⁶ Kentucky, *An Act to Amend an Act, Entitled “An Act to Amend the Penal Laws,” Approved August 28, 1862*, act of January 15, 1867, and *An Act to Quiet All Disturbances Growing out of the Late Rebellion*, act of February 28, 1867, both in *Acts of the Commonwealth of Kentucky, Passed by the General Assembly at the Adjourned Session (January 3, 1867) which was Begun and Held in the City of Frankfort, on Monday, the 4th Day of December, 1865* (Frankfort: John H. Harney, 1867), 2-3, 51-52.

punishment an “illegal arrest and imprisonment” at a time when Kentucky was “wholly under the domination of the military.”⁷⁷

In all of these ways Democrats in the state of Kentucky attempted to reassert their views of loyalty and justice in the postwar period. Now that the military no longer controlled the state, they expected constitutional rights to be protected, as they had been in the antebellum peacetime. Moreover, they rejected the charges of treason and disloyalty against Judge Bullitt, which they interpreted as an insult and imputation of disloyalty against the entire state. His arrest and impeachment was “a flagrant outrage upon his constitutional rights; a manifest violation of all rules of equality and justice, and an insult to the honor and dignity of the Commonwealth of Kentucky.”⁷⁸ Bullitt, to the postwar Democratic legislature, was a representative of the state’s best qualities. These best qualities seemed to include a certain amount of sympathy for southern rebels. In

⁷⁷ Kentucky, *Resolution Requesting the President of the United States to Relieve Kentucky from the Operation of Martial Law*, adopted June 3, 1865, *Resolution Requesting the President to Withdraw Negro Troops from the State of Kentucky*, adopted June 3, 1865, and *Resolutions Nos. 74, 76-79, and 89 regarding Judge Bullitt*, all in *Acts of the General Assembly of the Commonwealth of Kentucky, Passed at the Adjourned Session (January, 1865) which was Begun and Held in the City of Frankfort, on Monday, the Seventh Day of December, 1863* (Frankfort: George D. Prentice, 1865), 155-166; *Resolutions in Regard to the Restoration of the Writ of Habeas Corpus, &c., in this Commonwealth*, adopted February 17, 1866, in *Kentucky Laws of 1865*, 87-88; *Resolutions in Regard to General Amnesty*, adopted March 9, 1868, in *Acts of the General Assembly of the Commonwealth of Kentucky, Passed at the Regular Session of the General Assembly, which was Begun and Held in the City of Frankfort, on Monday, the Second Day of December, 1867* (Frankfort: George D. Prentice, 1868), 92-93; *Preamble and Resolution in Relation to the Hon. Joshua F. Bullitt*, adopted March 16, 1869, in *Acts of the General Assembly of the Commonwealth of Kentucky, Passed at the Adjourned (January, 1869) Session of the General Assembly, which was Begun and Held in the City of Frankfort, on Monday, the Second Day of December, 1867* (Frankfort: George D. Prentice, 1869), 116-117.

⁷⁸ Ibid.

fact, as one historian has noted, Bullitt's exoneration represents "the turning of the people more and more toward the Confederate tradition."⁷⁹

By 1870, the governor and legislature of West Virginia were willing to loosen the stringent disabilities they had imposed upon former Confederates. "It is not a just policy to continue in our midst a class deprived of the privileges of citizenship," declared the governor, referring to white former rebels. The legislature promptly repealed the loyalty oath for attorneys and teachers, and in 1871 the state adopted a constitutional amendment that enfranchised both former Confederates and black men. These developments, along with a federal court decision that ruled the state's voter registry law unconstitutional, opened the door to a Democratic takeover of the state. In the 1870 elections Democrats carried the state house, the governorship, and West Virginia's congressional districts. The new legislature almost immediately voted to call a constitutional convention to rewrite the states fundamental law.⁸⁰

The West Virginia constitution of 1872 was rid of many of the radical Republican features of the 1863 constitution. The *Wheeling Daily Intelligencer* bemoaned the fact that the convention was dominated by Democrats "of the old secession stripe," many of whom had been rebels during the war. One delegate—it is unclear whether he was serious or joking—proposed changing the names of Lincoln and Grant counties to Davis and Lee, and he also, according to one secondary account, "sarcastically proposed that committee chairmanships be limited to those who had held the rank of colonel or higher

⁷⁹ E. Merton Coulter, *The Civil War and Readjustment in Kentucky* (Chapel Hill: The University of North Carolina Press, 1926), 392.

⁸⁰ Bastress, *West Virginia*, 16-18; Richard O. Curry, "A Reappraisal of Statehood Politics in West Virginia," *Journal of Southern History* 28 (November 1962), 420-421.

in the Confederate Army and that nothing could pass unless upon the approval of at least fifteen former Confederate officers at rank of major or above.”⁸¹

The new constitution, which was adopted by West Virginia voters on August 22, 1872, was largely patterned after the 1863 document, but still made several substantive changes. Most of these changes underscored the delegates’ commitment to democratic government, personal liberty, and a limited national power. Like other border states, the changes were direct responses to West Virginia’s experiences during the war. “The provisions of the Constitution of the United States, and of this State, are operative alike in a period of war as in time of peace, and any departure therefrom, or violation thereof, under the plea of necessity, or any other plea, is subversive of good government, and tends to anarchy and despotism,” stated Article I, an echo of many Copperhead complaints from the war years. Lincoln, of course, had taken many actions based on “necessity,” and Democrats, in turn, had accused him of being a despot. The delegates hoped to rebuke wartime Republican leaders by saying that the state and federal constitutions would in future times function in war as they did in peace.⁸²

Other provisions of the constitution also assailed Republican war measures. Declaring that standing armies “should be avoided” and that the “military shall be subordinate to the civil power,” it explicitly forbade the use of military tribunals for citizens when the civil courts were in session. It also declared that “political test oath[s]” were “cruel and oppressive” and “repugnant to the principles of free government.” Additionally, the constitution forbade the legislature from establishing a board of registry

⁸¹ Ibid., 18-19.

⁸² West Virginia constitution, art. 1, sec. 3 (1872).

for voters. Finally, the delegates removed the provision allowing for suspension of the writ of habeas corpus “when in Cases of Rebellion or Invasion the Public Safety may require it.” Now the clause simply stated that the writ “shall not be suspended.” This change in the state’s constitutional law, which departed from the federal Constitution, was a conscious reaction to the military arrests of civilians that had transpired in West Virginia during the Civil War.⁸³

Although the most drastic narrowing of treason and disloyalty laws occurred in border states, they were not the only places to re-narrow the definition of treason. California also took strong steps to undo its wartime legislation against traitors. In 1866 California repealed its 1863 piracy and treason law. In 1868 the state repealed its wartime law that “exclude[d] traitors and alien enemies” from the state’s judicial system. The state legislature also passed an act indemnifying victims of the 1865 San Francisco riot.⁸⁴ Most other northern state legislatures did not take the steps that California and the border states did to move away from constructive definitions of treason, but where legislatures failed to act, the state and federal judiciaries stepped in to make their voices

⁸³ Bastress, *West Virginia*, 19-21, 52; West Virginia constitution, art. 3, sec. 11 and 12 (1872).

⁸⁴ California, *An Act to Repeal an Act Entitled an Act to Prevent the Arming and Equipping within the Jurisdiction of this State of Vessels for Piratical or Privateering Purposes, and Other Treasonable Conduct, Approved April Twenty-fifth, Eighteen Hundred and Sixty-three*, act of April 2, 1866, in *Statutes of California* (1866), 663; California, *An Act Supplemental to and Amendatory of an Act Entitled an Act to Exclude Traitors and Alien Enemies from the Courts of Justice in Civil Cases, Approved April Twenty-fifth, Eighteen Hundred and Sixty-three*, act of April 2, 1866, in *Statutes of California* (1866), 853; California, *An Act to Repeal an Act Entitled an Act to Exclude Traitors and Alien Enemies from the Courts of Justice in Civil Cases, Approved April Twenty-fifth, Eighteen Hundred and Sixty-three*, act of January 17, 1868, in *The Statutes of California, Passed at the Seventeenth Session of the Legislature, 1867-8* (Sacramento: D. W. Gelwicks, 1868), 8; Goodwin, “Derbec.”

heard. Indeed, as Chief Justice Salmon P. Chase declared in 1867, while sitting as a circuit judge, “the word ‘only’ was used [in the treason clause] to exclude from the criminal jurisprudence of the new republic the odious doctrines of constructive treason.”⁸⁵

III.

In the early postwar period the state and federal judiciaries made many decisions regarding loyalty laws that had been adopted during the Civil War. Although their decisions were not all uniform, they generally articulated the Democrats’ wartime views of justice. Military commissions and the military arrests of civilians fell out of fashion. When civil courts were in session, and civil war was no longer raging, liberty-loving Americans grew wary of the summary justice of the military. Now that the war was ended, the nation was reuniting and peace was restored, extreme measures that had been necessary to win the war were no longer seen as essential. The views of a federal judge, written in a private letter just five days after the execution of the four Lincoln assassination conspirators, reveals the thinking of an increasing majority in the North.

William Davis Shipman, an 1860 Buchanan appointee to the U.S. District Court in the District of Connecticut, penned a thoughtful letter to Samuel L. M. Barlow, the Democratic financier behind the New York *World* and a close friend of General George B. McClellan. Shipman conceded that the “apparent guilt” of the four conspirators “may

⁸⁵ Shortridge et al. v. Macon, 22 *Fed. Cases* 21 (1867). In this case, the court still held the rebellion to be treason, rejecting the argument that because the rebellion had reached such gigantic proportions it ceased to be treasonable. The argument that treason could not be committed in civil war was also rejected by the federal courts during the war. See U.S. v. Cathcart and U.S. v. Parmenter, 25 *Fed. Cases* 344 (1864).

have the effect to lead the people to acquiesce in the mode of trial.” Few would complain or protest their execution so shortly after such a dastardly act. Yet, the United States was in danger of incorporating “a terrible engine of despotism in the form of a military court for the trial of civil offenses” permanently into its system of government. Such a court would “defy law, justice and public sentiment” because it was responsible to no one but the president, who not only was the leader of the government, but also of a political party. Thus, a time might soon come when “a man’s purely political action and opinions will subject him to death.” Members of the political opposition would be accused of crimes that had been defined by the president, tried by members of the executive branch, and punished according to standards developed by the commander-in-chief. “The executive department of the government is thus in possession of *absolute* power over the lives of the citizen. . . . Thus the whole power over life and liberty is committed to the unchecked and arbitrary will of a single man, and those rights which it was sought to guard the most carefully in the constitution, are found to be without any protection whatever.”⁸⁶

Judge Shipman believed that the power to try men by military commissions “must be disavowed, and wholly abandoned.”⁸⁷ His views were soon to be echoed by state and federal judges throughout the North, though these times in official court decisions.

At the federal level, several cases signaled a shift in the jurisprudence of treason and disloyalty. The most well-know, and oft-cited, is *ex parte Milligan*, the case of a Democratic politician in Indiana, Lambdin P. Milligan, who was convicted by a military commission of “conspiracy against the Government of the United States,” giving “aid

⁸⁶ William Davis Shipman to Barlow, July 12, 1865, Barlow Papers.

⁸⁷ *Ibid.*

and comfort” to the rebels, “inciting insurrection,” “disloyal practices,” and violating the laws of war. As was the case with many military commissions, several of the charges were “crimes” that had never been defined by an act of Congress. The military commission was therefore left to define the crimes and charges as it saw fit.⁸⁸

Allegedly as members of some secret traitorous societies in the North, Milligan and other Democrats had hoped to free rebel prisoners, arrest Governor Morton of Indiana, resist the draft, and incite rebellion in the North. Milligan was arrested by the military on October 5, 1864; the commission sentenced him to death, and his execution date was scheduled for May 19, 1865. Along with him, two other men were also sentenced to die, and one was sentenced to imprisonment at hard labor for the duration of the war.⁸⁹

Prominent Democrats, including George H. Pendleton, the 1864 Democratic nominee for vice president, pleaded for their lives to be spared. “Why execute them?” asked Pendleton. They could cause no more mischief from prison, where they were held in safekeeping, could cause no harm, and could not escape. Beyond that, Pendleton argued, “We need no more blood or suffering.” Many others agreed. Lincoln appears to have favored commuting their sentences, but he was killed before he could make a final determination. Letters had flooded Lincoln’s desk, and they continued to reach Johnson. Some sought clemency, others favored execution. On February 3, 1865, Indiana

⁸⁸ *ex parte Milligan*, 71 *U.S. Reports* 2(1866); William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* (New York: Alfred A. Knopf, 1998), 83-88.

⁸⁹ Frank L. Klement, *Dark Lanterns: Secret Political Societies, Conspiracies, and Treason Trials in the Civil War* (Baton Rouge: Louisiana State University Press, 1984), 184.

congressmen Schuyler Colfax, Godlove Orth, and George W. Julian begged Lincoln not to commute the sentence. The Chief Justice of Indiana, by contrast, believed the execution should be stopped. “The people of this State, are not prepared for the Execution,” he reluctantly wrote to President Johnson. “The trial has not been in the form, they have always been taught to regard, as the proper one, through which the death penalty should be reached.” Johnson initially believed the prisoners should receive the punishments given by the military commission, but he eventually commuted their sentences to imprisonment at hard labor for life.⁹⁰

Milligan appealed his case to the U.S. circuit court for the District of Indiana, asking to be freed by a writ of habeas corpus. Under the Indemnity Act of March 3, 1863, which permitted the president to suspend the writ of habeas corpus, the War and State Departments were required to furnish the federal courts with lists of all prisoners arrested by the military. If a grand jury in each respective district did not issue an indictment against the detainee, then the prisoner had to be released. In Milligan’s case, no list had ever been sent to the federal court in Indianapolis, and the grand jury adjourned without finding an indictment against him. Milligan’s attorneys pointed out that the Indemnity Act had laid down procedures for how cases like his ought to be handled, but that the requirements of the law had been ignored. Moreover, he protested that the military commission did not have jurisdiction over his case because he was a citizen of a loyal state where the courts were in session.⁹¹

⁹⁰ George H. Pendleton to Barlow, May 11, 1865, Barlow Papers; Rehnquist, *All the Laws*, 102-104, 116-117; Klement, *Dark Lanterns*, 184-186, 224-227; Court Martial Case file 3409.

⁹¹ *ex parte Milligan*, 71 *U.S. Reports* 2.

The circuit court divided over the case, so Milligan's case was sent to the Supreme Court. Unlike the wartime *Vallandigham* case, in which the Supreme Court claimed not to have jurisdiction over the decision of a military tribunal, this time the Court took the case and unanimously decided that Milligan had been wrongfully tried and sentenced. The Court therefore ordered his release. The majority opinion declared that military commissions had no jurisdiction over civilians because the Bill of Rights guaranteed certain procedural rights—including jury trial in criminal cases. “By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people.” The Court continued:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

Moreover, the Court agreed with Milligan that military commissions could never be used against civilians in loyal states “where the courts are open and their process unobstructed.” If guilty, and so convicted by a “an established court and impartial jury,” Milligan “deserved severe punishment.” But such conviction must be ascertained by normal judicial procedures.⁹²

The majority opinion held that military commissions could never be used to prosecute civilians. In dissent, Chief Justice Chase, joined by three other justices, argued

⁹² Ibid.

that Congress could authorize the use of military commissions for civilians, but because Congress had not done so in Indiana, Milligan's trial had been unlawful.⁹³

Another case, back in General McDowell's military district on the Pacific, signaled a similar direction for civil liberties in postwar America.

John McCall, the old Californian who had been arrested under General Orders No. 27 for calling Lincoln a "damned old son of a bitch" who "should have been shot long ago," sued General McDowell for damages for wrongful arrest, abrogation of his constitutional rights, and mistreatment while he was incarcerated. Seeking substantial monetary damages, McCall's attorney pleaded for an absolutist notion of free speech. His lawyer recounted the "cruelty" that had been practiced against his client, and argued that military commanders had no authority to arrest civilians based only on the belief that they had committed certain "disloyal practices."

"Thus your Honor will see how our military officers have borrowed the language of despotism," declared McCall's attorney in court. "It seems that my unfortunate client was one of those charged with '*disloyal practices*.' I have read in vain the Constitution of the United States, as well as the laws of Congress, to find any statute either *defining or punishing disloyal practices*." Taking an unusually broad construction of the Bill of Rights for the nineteenth-century, McCall's lawyer continued: "[McDowell's] order attempts to restrain, and to punish, the free expression of opinions; it attempts to do that which the Congress of the United States are forbidden to do. . . . Entire freedom in the expression of all opinions, and freedom from responsibility for their expression, is one of the fundamental principles upon which our institutions rest. The National Legislature has

⁹³ Ibid.

no right to *abridge that liberty*, and yet in this Order we see an attempt on the part of a mere Military Commander, to do that which *the Congress* of the United States are prohibited from doing.”⁹⁴

Judge Matthew Paul Deady, an 1859 Buchanan appointee to the federal bench, heard McCall’s case in the U.S. Circuit Court for the District of California. After recounting the facts of the case, Deady concluded that McDowell had not issued General Orders No. 27 with any “malice or any intention to injure or oppress the plaintiff, but from good motives and considerations involving the public peace and safety.” Although the facts of the case did not justify McCall’s arrest, in the mind of the judge, they would be “considered in estimating the amount of damages which the plaintiff is entitled to recover.” Had McDowell’s motives been vindictive, McCall would be awarded a large sum; but Deady did not believe any such malevolent motives could be attributed to the general.⁹⁵

Judge Deady agreed that McCall’s treatment had been “oppressive and uncalled for,” although he recognized that McDowell had not intended for “political prisoners” to be put to hard labor at Alcatraz. Still, having issued General Orders No. 27, McDowell was ultimately responsible for the arrest and imprisonment.⁹⁶

Deady underscored that the speaking of “gross and incendiary language” was not “technically a crime,” and therefore could not be “a legal cause of arrest.” Yet, “when the words are calculated to provoke and do provoke the battery, they may be given in

⁹⁴ Irving, *Argument*, 14-15.

⁹⁵ McCall v. McDowell, 240.

⁹⁶ *Ibid.*, 241.

evidence to mitigate the damages.” McCall’s speech had been calculated to provoke U.S. citizens “at a moment of intense public feeling and anxiety.” Rather than act so rashly and disgracefully, McCall ought to have conducted himself in a reasonable manner, not seeking to exult in a national calamity or mock the people in their fear. “Talk and reason as we will about the liberty of speech,” observed the judge, “something is due to society from every reasonable being who enjoys its protections and privileges.”⁹⁷

As to the power of McDowell to arrest disloyal citizens, Deady reviewed the history of suspensions of habeas corpus during the late Civil War. Lincoln’s suspension proclamation of September 1862 had been very specific about what types of persons might be arrested—rebels and those who aided or abetted them in their rebellion. Lincoln’s proclamation of September 1863, however, superseded the 1862 proclamation and Deady did not believe that it authorized the arrest of those who aided and abetted the rebellion without further orders from the president.

The power of arbitrary arrest and imprisonment, though sometimes absolutely necessary to the public safety, is a dangerous and delicate one. In the hands of improper persons it would be liable to great abuse. If every officer in the United States, during the suspension of the habeas corpus, is authorized to arrest and imprison whom he will, as “aiders and abettors of the enemy,” without further orders from the President . . . the state of things that would follow can be better imagined than expressed.⁹⁸

Although sympathizing with McDowell’s motives in issuing General Orders No. 27, Deady feared the potential consequences of military officers making summary arrests of civilians whenever their actions appeared to be disloyal.

⁹⁷ Ibid., 242-243.

⁹⁸ Ibid., 258-263.

In his opinion, Deady stressed that Congress possessed the right to suspend the writ of habeas corpus and that Lincoln's proclamations had to be read in light of the Indemnity Act. Quoting Blackstone, Deady noted that "in cases of emergency . . . *the nation parts with its liberty for a while, in order to preserve it forever.*" Accordingly, the rights granted to citizens by the Bill of Rights "are qualified" by the suspension clause and indemnity acts. Deady concluded that McCall's arrest had been unlawful only because there was no explicit authorization from the president. "In the case at bar, no authority or order of the President is shown for the imprisonment of the plaintiff. It is the *order or authority of the President* which the [indemnity] act makes a defense to the action. Such order or authority cannot be presumed but must be proved."⁹⁹

Deady concluded by stating that McCall would have won a larger settlement had his statement not been so egregious, but he nevertheless ruled in McCall's favor because, he said, a military commander did not possess the authority to issue such an order stifling free speech in an area that was not in a state of rebellion. In short, McCall could not be considered an accessory to the assassination as McDowell had wanted him charged.

John McCall was one of many civilians who sought damages for wrongful imprisonment. "As military pressure was lifted at the close of the war, thousands of suits against Union officers were brought in State tribunals in defiance of the [indemnity] act," according to James G. Randall. Some Union officers were even convicted and imprisoned on criminal charges. Even after Congress adopted the second Indemnity Act in 1866, many state and lower federal courts, in cases like McCall's, continued to limit the scope of legislative indemnification of military officers. Ultimately, the Supreme

⁹⁹ Ibid., 251-260.

Court upheld Congress' indemnity legislation, but the many challenges to it limited its practical effect.¹⁰⁰ Martial law and military commissions were not the only issues to receive a rebuke from the judiciary. Loyalty oaths also faced tough challenges in the court systems.

Alexander J. P. Garesché, a St. Louis lawyer, challenged the stringent 1865 Missouri oath as it applied to attorneys. He argued that the oath punished crimes against the federal government (crimes over which the state had no jurisdiction), and also that it punished offences that had never been declared unlawful by any statute. Perhaps most importantly, Garesché claimed that the oath redefined the crime of treason. He noted that the oath had been written and adopted by men who "held that to be a Democrat was to be a traitor." Beyond that, he argued that Republicans had also changed the definition of loyalty to mean allegiance to Lincoln: "we remember that allegiance to the Administration was the test of fealty to the Government; that opposition to the war was held to be treason." The oath, according to Garesché, incorporated these broadened definitions of treason and loyalty. Moreover, by testing the *words* and *sympathies* of Missourians, the oath intruded upon the "secret heart of a man" who may have "sympathize[d] with the enemies of his country" but who never acted upon that intent. Thus, the oath held people morally guilty of treason even if they had committed no actual offence.¹⁰¹

¹⁰⁰ Randall, *Constitutional Problems*, 186-214.

¹⁰¹ Alexander J. P. Garesché, *In the Supreme Court of the United States of America, Alexander J. P. Garesché, Plaintiff in Error, vs. The State of Missouri, Defendant in Error, Argument of the Plaintiff, per se* (Washington, D.C.: Brophy and Burch, 1866), 1-8, in United States Supreme Court, *File Copies of Briefs* (December Term 1866), vol. 5, Library of the Supreme Court of the United States.

The Supreme Court of Missouri rejected Garesché's contention and upheld the test oath, claiming that it did not require of an attorney "anything more than he was legally and morally bound to have done by the obligation of the oath which he took when admitted to practice." The oath, in the court's view, was a reasonable protection against disloyalty in the courtroom. The acts referred to in the oath were "such only as, if done, might amount to treason, or to evidence (more or less direct and conclusive) either of treason, or of disloyalty and disaffection to the government. Can it be too much to say, that this party, by virtue of the oath he had taken, was under legal and moral obligations not to be guilty of either?" The court concluded that traitors could still be punished under normal judicial procedures: "The provisions of the Constitution concerning the oath of loyalty do not in any way modify these offences, nor change the punishment or the evidence required." Accordingly, Garesché was not being punished or declared guilty of any crime. The oath was simply a requirement for further evidence of the good moral character of attorneys in the state.¹⁰²

The court denied that imposition of the oath was a punishment for treason or lesser crimes of disloyalty. Still, it was understandable that a Missourian would interpret requirement of an oath precisely that way. As was seen in Chapter 4, loyalty oaths were often a punishment inflicted on border state men and women who were arrested for disloyalty.

Upon reading the court's opinion, Garesché was incredulous. The court, in his view, was allowing the abandonment of all judicial protections for suspected traitors and

¹⁰² State v. Garesché, 36 *Missouri Reports* 256 (1865).

was equating treason with political opposition to those in control of the government. Moreover, by implying that refusal to take the oath was “more or less” evidence of disloyalty, rather than the constitutionally mandated requirement of two witnesses to an overt act of treason, the court was requiring a much lower standard of proof than was required by Article III for treason cases.

How humiliating to see an American judge thus distort the definition of treason: “Might amount to treason, or to evidence (MORE OR LESS CONCLUSIVE) either of treason, or of *disloyalty* and disaffection to the Government.” What *legal* offence is designated by “disloyalty” or “disaffection to the Government?” And even of *these* the evidence is not to be *positive*, but “*more or less* conclusive.” One of the most valuable pearls in the casket of our liberties is, that the crime of treason is defined. .

..

But the Missouri high court, according to Garesché, in order “to sustain this oath, would crush out this bulwark of freedom, and leave treason, the most odious of crimes, to be defined by the ruling passion of the populace.” Allowing political leaders to redefine treason meant that “there could be no public freedom.” And by upholding the oath on the basis of necessity, the courts had “abandon[ed] the constitutional definition of treason, and let in ‘all the ills’ of constructive treason.” The insidious old English doctrine of constructive treason was alive and well on American soil in the form of loyalty oaths.¹⁰³

The U.S. Supreme Court refused to take Garesché’s appeal, but the Court did hear several other cases regarding loyalty oaths. In 1865 and 1866, federal judges in Tennessee, Georgia, and Alabama all ruled unconstitutional the federal ironclad test oath as applied to lawyers. In January 1867 the Supreme Court agreed. Next the Court struck down the extensive Missouri oath as it applied to ministers (Garesché’s suit had only

¹⁰³ Garesché, *Argument*, 8-12.

challenged the oath as applied to attorneys). Justice Stephen J. Field criticized the Missouri oath “for its severity, without any precedent that we can discover.” He also criticized it for being retrospective, for punishing not only “overt and visible acts of hostility to the government” but also “words, desires, and sympathies,” and for not distinguishing between possible motives one might have given aid to a rebel (those “springing from malignant enmity” versus acts of “charity, or affection, or relationship”). Moreover, Field argued that the oath did not define or prescribe a punishment for any crimes, but that it “produce[d] the same result . . . as though the crimes were defined and the punishment was declared,” thereby denying suspected traitors of their day in court. Finally, the import of such a proscriptive oath was to make executive clemency meaningless because even though pardoned, a citizen still could not truthfully subscribe to the terms of the oath. Using the reasoning from this decision, the Court also voided West Virginia’s loyalty oath for litigants.¹⁰⁴

Following the Supreme Court’s lead, the high court in Missouri struck down its state’s oath as applied to teachers, Arkansas and Nevada held their respective oath for voters unconstitutional, and the New York Court of Appeals voided its state statute requiring an oath of loyalty for voters at the state’s constitutional convention. To be sure, not all states struck down their respective loyalty oaths, but the trend was moving against the use of oaths. In 1868 and 1871, Congress lessened the stringency of the oath required

¹⁰⁴ *Cummings v. Missouri*, 71 *U.S. Reports* 316-332; Hyman, *Era of the Oath*, 102-116.

of ex-Confederates who wished to hold public office. The final Civil War-era loyalty oath was repealed in 1884.¹⁰⁵

State courts also made many decisions regarding state-level war measures adopted to suppress the rebellion. The West Virginia Supreme Court of Appeals reversed the forfeiture of a rebel's property because he had not been convicted of treason in a court of law. In another case, the court also adopted a narrow view of treason—that treason against the United States was not necessarily treason against a state. In order for treason to be committed against a state, war must be waged directly against that state. A citizen guilty of treason under federal law was therefore not automatically to be viewed as guilty of treason under the state law. Using this logic to the opposite effect, however, the West Virginia court also reasoned that a presidential pardon did not free a citizen from obligations or penalties derived from the state law. In a case upholding the constitutionality of West Virginia's 1866 statute requiring a loyalty oath for lawyers, the court argued that "in no event could such a [presidential] pardon restore him to forfeited privileges which had been originally conferred by, or derived from the State Government, and which, if enjoyed or exercised at all, must be done under State laws." The state had a right to protect its judicial system from disloyal attorneys, argued the court. To have allowed traitors to practice law would have placed "the courts at the mercy of the foe, and given double aid and comfort to the enemy." Moreover, the court reasoned that oaths were not punitive but preventive. "It is certainly the duty of the State to guard its courts

¹⁰⁵ Hyman, *Era of the Oath*, 121-150; *Green v. Shumway and Coats*, 39 *New York Reports* 418 (1868).

against the dangerous influence of those inimical to its existence and disloyal to its government.” This duty was particularly essential in times of war or public danger.¹⁰⁶

Noting that the rebellion had come to an end, the Court of Appeals of Kentucky argued that the state should follow the “national government [in] pursuing a policy of enlightened liberality towards those lately in rebellion.” To that end, the court ruled that serving as a Confederate soldier did not disqualify Kentuckians from practicing law in the state. “A conviction of treason would have subjected the applicant to the statutory denunciation of forensic disfranchisement; but a confession of treason, without conviction, would not have that penal effect, and the amnesty oath, and the consequent executive pardon, relieved the applicant from all liability to conviction of treason, and *so far*, reinstated him in the *legal status* he previously occupied.” In another case, the court also ruled unconstitutional the state’s 1862 expatriation act, even though the state legislature had already repealed the act. “But while a citizen may with consent of his state, express or presumed, expatriate himself, no mere act of state legislation can *per se* denationalize him against his will or without his concurrence. . . . To decitizenize a freeman is a tremendous blow.” The legislature, in other words, could not punish citizens for treason, forfeit their rights, or deny them the franchise, without first gaining a conviction in court.¹⁰⁷

¹⁰⁶ Campbell v. The State, 1 *West Virginia Reports* 165-175 (1865); *ex parte* William A. Quarrier, 2 *West Virginia Reports* 569-573 (1866); *ex parte* Hunter, et al., 2 *West Virginia Reports* 122-186 (1867).

¹⁰⁷ *ex parte* O. S. Tenney, 63 *Kentucky Reports* 351-357 (1865); Burkett v. McCarty, 73 *Kentucky Reports* 758-762 (1866).

North of the border several other states also whittled away at legislation that curtailed the rights of traitors or those suspected of disloyalty. In 1868, the Supreme Court of Pennsylvania struck down that state's law disfranchising deserters, saying that rights conferred by the state constitution were "beyond the reach of legislative interference." Two cases before the Supreme Court of Illinois followed the reasoning of the *Milligan* decision, concluding that civilians in loyal states could not be tried and convicted by military commissions. The Supreme Court of Nevada struck down its state's new registry law that barred certain rebels from voting. During the war, the Minnesota high court also struck down that state's law barring traitors from the state courts.¹⁰⁸ To be sure, not all cases touching on these issues struck down the wartime legislation, but when the constitutionality of treason and loyalty laws was tested, several courts, at least, did not hesitate to rule them unconstitutional.

In the 1870s the Supreme Court of the United States also limited the scope of several pieces of wartime legislation. In 1878 the Court gave the Second Confiscation Act (the 1862 treason law) a more narrow construction than wartime military commanders had read it, by saying that it "applied only to the property of persons who thereafter might be guilty of acts of disloyalty and treason." The property of a rebel in New Orleans had been seized and sold in May 1862, several months prior to the passage of the act, but the Court held such confiscation unlawful. The Second Confiscation Act, according to Justice Field, excluded the property of those who committed treasonous acts

¹⁰⁸ McCafferty v. Guyer et al., 59 *Pennsylvania Reports* 109-128 (1868); Johnson v. Jones et al., 44 *Illinois Reports* 142 (1867); Carver v. Jones, 45 *Illinois Reports* 334 (1867); Davies v. McKeeby, 5 *Nevada Reports* 369 (1870); Walter N. Trenerry, "The Minnesota Rebellion Act of 1862: A Legal Dilemma of the Civil War," *Minnesota History* 35 (March 1956), 1-10.

prior to the passage of the act, leaving “the door open to them to return to their allegiance, without molestation for past offences.” In other words, the Second Confiscation Act was intended, in at least some small way, to serve as a vehicle of reunion. Daniel W. Hamilton’s study of postwar confiscation cases reveals the Supreme Court’s narrowing of the scope and reach of the Civil War confiscation acts (which included declaring the permanent confiscation of property unconstitutional). “The Court was able to accomplish what no other institutional actor could on confiscation. It stripped confiscation, through a thousand cuts, of both its menace and its appeal,” writes Hamilton. “The confiscation acts themselves were upheld as constitutional, even as their radical elements were gutted from within, leaving only an empty shell.”¹⁰⁹

Regarding the military arrest of civilians, the Court also limited the scope of the 1863 and 1867 Indemnity Acts. In November 1864 a citizen of Vermont had been arrested by the military for “disloyal practices in aid of the rebellion, and of affording aid and comfort to the rebels” by enticing soldiers to desert from the army. The military officers who arrested this man pointed to the authority of President Lincoln as their commander-in-chief and the two indemnity acts as a defense for their action. Justice Field rejected this reasoning, saying that the usual judicial processes were in operation in Vermont at that time of the arrest so that the detainee could have been arrested by the civil authorities, and that without proof of an order from the president for this military action that the arrest and imprisonment were unlawful. Like Judge Deady in the *McCall* case, Justice Field argued that the indemnity acts did not “cover all acts done by officers

¹⁰⁹ Conrad v. Waples, 96 *U.S. Reports* 283 (1878); Daniel W. Hamilton, *The Limits of Sovereignty: Property Confiscation in the Union and the Confederacy during the Civil War* (Chicago: University of Chicago Press, 2007), 140-167.

in the military service of the United States simply because they are acting under the general authority of the President as Commander-in-Chief of the Armies of the United States. They only cover acts done under orders or proclamations issued by him or under his authority; and there is no difficulty in the defendants setting forth such orders or proclamations, whether general or special, if any were made, which applied to their case.”¹¹⁰

In these cases, the Supreme Court upheld the rights of former rebels and Copperheads. They thus marked the direction in which the American courts had moved—that in peacetime they would protect the rights of individual citizens, even disloyal ones, when in wartime those rights had been restricted. During the war, military commanders had given broad constructions to legislation regarding disloyalty, thus giving themselves a wide latitude to punish rebels, North and South. In the postwar period the courts read the texts of the Constitution and wartime statutes much more narrowly, thus helping to lead the nation out of its wartime experience of “necessity” and away from its broadened definition of treason.

IV.

When the Civil War came to a close, and in the aftermath of Lincoln’s assassination, one might reasonably have expected many southern traitors to face the gallows. Gideon Welles doubted that many traitors would be hanged, but he thought they should be as an example “for present and for future good.” Imprisonment or exile would not make lasting impressions, and those punishments would only lead to efforts for the

¹¹⁰ *Bean v. Beckwith and Henry*, 18 *Wallace Reports* 510-516 (1874).

traitors' relief. "Death is the proper penalty and atonement," wrote Welles, "and will be enduringly beneficent in its influence."¹¹¹

Despite the foregoing sentiments, Welles understood the political realities of the postwar situation. "I apprehend there will be very gentle measures in closing up the Rebellion," he wrote despondently. "The authors of the enormous evils that have been inflicted will go unpunished, or will be but slightly punished."¹¹² Indeed, as the war faded into memory, many northern politicians and intellectuals began to doubt that there really had been treason in the Civil War.

Ironically, many antebellum abolitionists took stances similar to their former pro-slavery adversaries. Persons as diverse Orestes Brownson, Lysander Spooner, Gerrit Smith, and George W. Woodward all doubted that secession was treason and that the rebels ought to be treated as traitors.

Many who opposed stringent punishments for rebel traitors did so because they doubted that the southerners had actually committed treason. Writing as the war closed, the Boston Catholic intellectual Orestes Brownson argued that southern leaders had acted under prevailing notions of state rights. If the premise was accepted that each state was sovereign, then they could at anytime withdraw from the national government, just as the American colonies had done in 1776. The secessionists, "however much in error they have been," have not committed "the moral crime of treason. They held, with the majority of the American people, the doctrine of State sovereignty, and on that doctrine they had a right to secede, and have committed no treason, been guilty of no rebellion."

¹¹¹ Welles, ed., *Diary of Welles*, 2:43-44.

¹¹² *Ibid.*

Brownson conceded that the federal government could still use all of its force to preserve the nation, but he argued that the government could not punish the rebels for treason now that the firing had ceased and the rebels had submitted to the national authority. “None of the secessionists have been rebels or traitors, except in outward act, and there can, after the act has ceased, be no just punishment where there has been no criminal intent. Treason is the highest crime, and deserves exemplary punishment; but not where there has been no treasonable intent, where they who committed it did not believe it was treason, and on principles held by the majority of their countrymen, and by the party that had generally held the government, there really was no treason.”¹¹³

Abolitionist Gerrit Smith argued that because of the way the North had made war with the South—recognizing the rebels as belligerents under international law and the laws of war, negotiating for peace, blockading southern ports, and exchanging prisoners, among other things—that southern leaders could not be tried for treason. Waging the war by international law standards, according to Smith, “was our waiver of all right, our surrender of all claim, to punish the South for treason—was, indeed, our virtual agreement not to punish her for it. This is so from the simple fact, that, under the law of war, there is no treason.”¹¹⁴

According to Smith, it would be unjust to try and punish rebel leaders and not the rebel masses. “If we punish Davis and Stephens, consistency requires us to punish thousands; and, if we let thousands go unpunished, consistency requires us to let Davis

¹¹³ Orestes A. Brownson, *The American Republic: Its Constitution, Tendencies and Destiny* (1865, reprint; Wilmington, Del.: ISI Books, 2003), 214.

¹¹⁴ Gerrit Smith, *No Treason in Civil War: Speech of Gerrit Smith, at Cooper Institute, New-York, June 8, 1865* (New York: American News Company, 1865), 4.

and Stephens go unpunished.” Beyond that, as a practical measure, the Civil War had produced “belligerents on each side . . . too numerous to be treated as traitors, or as any thing else than enemies in war.” Echoing Brownson, Smith also argued that the “many millions, who seceded from the Union, not only fully believed in the doctrine of State Sovereignty, but they had really a large measure of right to believe in it,” not necessarily because the doctrine was sound, but because “many men, both wiser and better than I, believe it to be entirely sound.” The question of State Sovereignty, according to Smith, had been an open one until the Civil War finally settled it.¹¹⁵

Calling on northerners to demonstrate Christian charity, Smith implored the North to show mercy, pity, and forgiveness to the South. The North only ought to demand of the South that slavery be abolished, that blacks be given political and civil rights, that the “large landed estates” of the South be broken up for the benefit of the southern poor, that all rebel war debts be repudiated, and that disloyal southerners be prohibited from voting. These measures would help reconstruct the Union; beyond them, no punishment was necessary. Indeed, there would be “evil consequences” should the government decide to subject the rebels to “cruel treatment.” But

happy . . . would be the consequences of treating him mildly and humanely! Thereby would we gain the respect and gratitude and love of the whole South. Wide would she open her arms to receive the thousands of families which would, in that case, immediately begin to emigrate to her from the North. And, then, the North and the South would, in a very few years, become one in interest and one also in character. Moreover, a reasonable and humane Peace, following this horrid war, would not only honor us in the sight of the other nations, but it would contribute largely to advance the cause of civilization, and to elevate mankind, the earth over. Such a Peace would make Peace as more beautiful than ever, and War uglier than ever.

¹¹⁵ Blair, *Why Didn't the North*, 24-27; Smith, *No Treason*, 7, 13-15.

In short, Smith valued peace, reunion and civil rights for blacks over vengeance and punishment for treason. His argument, based on international law, Christian moral teaching, and ethical considerations, led to the conclusion that it would be better to forgive the traitors of their treason than indict them in a court. In doing so Smith believed the nation would be honoring the memory of their martyred president.¹¹⁶

Lysander Spooner, an antebellum abolitionist whose libertarian views verged on anarchistic, argued that nineteenth-century Americans owed no allegiance to the U.S. Constitution because none of them had been around to consent to its adoption, and none of them had signed it. Regarding the Civil War, then, he believed that southerners ought not to be charged with treason because they had not owed any allegiance to the nation in the first place.

The Civil War, according to Spooner, had not been about slavery or Union but had been fought merely to solidify the power of “blood-money loan-mongers.” Congress and the president were the “merest tools” of these people. “They dare not say nay to any demand made upon them. And to hide at once, if possible, both their servility and their crimes, they attempted to divert public attention, by crying out that they have ‘Abolished Slavery!’ That they have ‘Saved the Country!’ That they have ‘Preserved our Glorious Union!’ and that, in now paying the ‘National Debt,’ as they call it . . . they are simply ‘Maintaining the National Honor!’” Maintaining the national honor, to Spooner, meant

¹¹⁶ Smith, *No Treason*, 17-25.

that these “open robbers and murders” in power would continue to plunder and subjugate the masses.¹¹⁷

Based on this theory, the Union government’s reason for going to war had never been to abolish slavery or to preserve government by consent. How, then, could they be treated as having had honorable motives?

Their pretenses that they have “Saved the Country,” and “Preserved our Glorious Union,” are frauds like all the rest of their pretenses. By them they mean simply that they have subjugated, and maintained their power over, an unwilling people. This they call “Saving the Country”; as if an enslaved and subjugated people—or as if any people kept in subjection by the sword (as it is intended that all of us should be hereafter)—could be said to have any country.

According to Spooner’s theory, no Americans owed allegiance to the government, not the least of which did southerners. The people would be better off after they overthrew the constitutional government of the United States.¹¹⁸

If, as Spooner argued, the Constitution had no authority, then there could be no such crime as treason. Accordingly, the southerner rebels had not committed any treasonable acts in attempting to free themselves from the chains of constitutional despotism and bondage.

Chief Justice George W. Woodward of the Supreme Court of Pennsylvania took a position closer to Brownson’s in absolving southern rebels of treason. Woodward argued that the “*states* seceded”—meaning “the people in their corporate character as

¹¹⁷ Lysander Spooner, *No Treason: The Constitution of No Authority* (1870, reprint; Larkspur, Colo.: Pine Tree Press, 1966), 52; William M. Wiecek, *The Sources of Antislavery: Constitutionalism in America, 1760-1848* (Ithaca, N.Y.: Cornell University Press, 1977), 249-275.

¹¹⁸ Spooner, *No Treason*, 52-55.

distinguished from their individual personality.” If secession “was the offence of the corporate body,” then it would be “insensible” to indict individuals for treason, just “as it would be to indict the hand of Booth instead of Booth himself for the assassination. For the individual is only a member of the corporate body & must move by a volition which it cannot control.” The treason in the rebellion, according to Woodward, was done by the states, not by individuals. Accordingly, individual citizens ought not to be held responsible for the treason of their states, or for following their states into secession. “I see not how individuals could secede or commit treason in supporting secession,” wrote the judge privately.¹¹⁹

Ultimately, the question for Woodward was whether or not secession was treason. Defining secession, according to Woodward, had “been a toy of politicians & they have dodged every thing like a definition.” If secession was not treason, then war in support of it would not be treason either, for along with the right to withdraw from the Union would also be the right to self-defense. “But this is on the assumption that secession is something less than treason,” concluded Woodward, “which I neither aver nor deny.”¹²⁰

Indeed, confusion pervaded the North. One Michigan politician observed in 1867 that “Recently it was supposed that the crime of treason had been committed in this country, and that the penalty of a violated law would be executed upon those criminals. But indications, as they come to us at present, are calculated to lead the American mind

¹¹⁹ George W. Woodward to Jeremiah S. Black, May 28, 1865, in Jonathan W. White, ed., “A Pennsylvania Judge Views the Rebellion: The Civil War Letters of George Washington Woodward,” *Pennsylvania Magazine of History and Biography* 129 (April 2005), 224.

¹²⁰ *Ibid.*, 224-225.

to the conclusion that the crime of treason cannot be committed even against the Government of the United States.”¹²¹ Others, as we have seen, wished merely to avoid the entire subject and allow reunion to happen swiftly and in peace.

Certain questions naturally arise when considering these issues of the postwar period: Why were southerners after the war treated as less treasonous than northern Democrats were during the war? Or, why were there no mass executions or imprisonments of southerners after the war? Historian William A. Blair has concluded that the North did not execute former Confederates because “not enough northerners believed that treason had occurred or that it could be proved in a court of law. Reunion was a driving political force behind the war and Reconstruction—a desire that cannot be underestimated in this equation.”¹²² Blair is certainly correct. But there may be an even deeper constitutional rationale behind the desire to restore the disunited states peacefully and quickly.

Perhaps to some extent peaceful reunion was written into the lifeblood of the nation. Article IV of the Constitution, which guarantees to each state a republican form of government, meant that military rule in the South could not last forever. It was the federal government’s responsibility to restore civil government by consent in the South. The presidential pardoning power, too, served as a mechanism to reunite the divided nation, just as the Founding Fathers had intended. Forgiveness—or charity for all—was, in a very real sense (at least as it was exercised by Lincoln and Johnson), written into Article II of the Constitution. Broad use of the pardoning power was a way the

¹²¹ Lord and Brown, eds., *Michigan Debates*, 1:346.

¹²² *Ibid.*, 33.

presidents saw themselves as able to help restore republican government throughout the nation.

Forgiveness, as articulated in the presidential pardoning power, was a healing device the framers had written into the Constitution. Alexander Hamilton discussed both treason and pardons in *The Federalist* No. 74. “In seasons of insurrection or rebellion,” he wrote, “there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recal.” To be sure, Hamilton was envisioning smaller insurrections—like the Shays Rebellion in Massachusetts in 1786—in which the president could act more quickly than Congress to offer consequential pardons. But the principle still applied. Hamilton wrote, “Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed.”¹²³ Lincoln and Johnson could avoid legislative bickering that members of Congress could not. And when they felt that a large-scale offer of pardons could help bring peace and tranquility, they used their power to help restore the nation, just as Hamilton had envisioned they might. This was Lincoln’s motivation behind his pocket veto of the Wade-Davis bill as well.

The conservative Republican Senator Edgar Cowan of Pennsylvania argued that most southerners ought not to be disfranchised after the war because many, if not most, of them had been forced to follow the South into war by a web of unfortunate circumstances. “We know how readily they are led away by their leaders; we know how subject they are to have their passions excited, and we know how quickly the flame of

¹²³ *The Federalist* No. 74.

war may be kindled among them without the wicked, treasonable intent which is necessary to constitute the offence of treason.” Like Woodward, Cowan believed that individuals had been unable to resist their states’ decisions to secede. Forgiving them this transgression, according to Cowan, would only benefit the nation. “I like to believe it, because it enables me to think that we can restore the Union again; it enables me to think that we can have the greatest republic, and not only the greatest republic, but . . . the greatest empire, the world has ever seen.”¹²⁴

During and after the war northerners debated several theories of reconstruction. The Guarantee Clause of the Constitution was central to these debates. It reads, in part, that “The United States shall guarantee to every state in this union a republican form of government.” Determining the exact meaning of this clause was a complicated matter, but at the very least, it meant that all states in the Union were guaranteed the right to self-government. Many congressmen believed that Congress was constitutionally charged to uphold this guarantee.¹²⁵

The answer to the question, then, of why more rebel traitors were not executed after the war may have something to do with the concern for restoring republican government to all sections of the Union. What Lincoln called in his first inaugural, “the mystic chords of memory” that tied the nation together were the memories of the patriots of the Revolution and the republican institutions they had created. It was the hope of a national memory that gave northerners reason not to punish southerners after they had

¹²⁴ Quoted in Blair, *Why Didn't the North*, 29-30.

¹²⁵ U.S. Constitution, art. 4, sec. 4 (1787); Herman Belz, *Reconstructing the Union: Theory and Policy during the Civil War* (Ithaca, N.Y.: Cornell University Press, 1969), 4-5, 93-94, 99, 122-125, 134-135, 178-179, 203-208, 287-289.

surrendered, but to welcome them back into the Union. A movement towards national reconciliation, in short—Lincoln’s own vision from the beginning—was already weaved into America’s constitutional fabric.

Conclusion

When the Civil War began the Union government faced an internal security problem of unparalleled proportions. Prior to 1861 the nation had faced several small rebellions and insurrections—most notably the Whiskey Rebellion of 1794, the Northampton Insurrection (John Fries' rebellion) of 1798, the Burr conspiracy in 1806, the Dorr War in the early 1840s, the Christiana Riots in 1851, and John Brown's raid on Harpers Ferry in 1859. Each of these uprisings resulted in treason trials. The trials of Thomas Dorr and John Brown were at the state level; the remaining cases involved the federal law of treason. Thus, by the time of the Civil War a settled body of law had developed regarding treason against the United States.

In the Burr trial—the most important precedent for Civil War treason cases—Chief Justice John Marshall defined treason narrowly, arguing that counseling treason did not amount to treason, and that there must be some overt act of war in order for treason to have occurred. Once war was levied, Marshall continued, any act in support of it and linked to it through an actual conspiracy was treasonable. Marshall's understanding of treason fit the Framers' narrow definition—that treason must be an overt act of war or adherence to the enemies of the United States. His holding that counseling treason was not equivalent to treason itself would have a significantly limiting effect on federal authorities during the secession crisis.

In 1860 and 1861, as the southern states declared their independence from the Union, the federal government found itself wholly unprepared for the gathering storm. Southern leaders openly espoused secession, but since their speeches had not led to overt acts of war against the government, they had not yet violated any federal criminal statute,

nor had they transgressed the constitutional definition of treason. Thus, as Judge Peleg Sprague had declared in 1861, those who were “plotting and preparing treason . . . were not driven to cellars or caverns, the appropriate scenes for such dark and nefarious machinations. But they were carried on in open day, in public buildings and halls of legislation.”¹ Lincoln certainly recognized the difficulty of the situation. In his 1863 letter to Erastus Corning, he listed eight prominent Confederate military leaders who were known to be traitors before the war began. “Unquestionably if we had seized and held them, the insurgent cause would be much weaker,” he wrote. “But no one of them had committed any crime defined in the law. Every one of them if arrested would have been discharged on Habeas Corpus, were the writ allowed to operate.”² In short, when Lincoln assumed office on March 4, 1861, the government did not have at its disposal the weapons it needed to suppress the rebellion.

In April 1861 Lincoln suspended the privilege of the writ of habeas corpus for the first time, an action he would repeat several times during the war. By 1864 he had authorized its suspension throughout the entire nation. In September 1861 the military also began trying civilians, a practice that would continue in the North throughout the war, and in the South into the postwar period. Lincoln argued that suspension of habeas and the use of military tribunals were necessary to keep disloyalty on the home front from “damaging the army.”³ Dissent at home, after all, might inhibit the raising of

¹ Sprague, “Charge to Grand Jury—Treason,” 30 *Fed. Cases* 1042-1046 (1863).

² Lincoln to Erastus Corning and others, June 12, 1863, in Roy P. Basler, et al., eds., *The Collected Works of Abraham Lincoln*, 9 vols. (New Brunswick, N.J.: Rutgers University Press, 1953-1955), 6:265.

³ *Ibid.*, 266.

volunteers or encourage soldiers to desert. Lincoln struggled daily with the issue of desertion while trying to mobilize an army. There were an estimated 200,000 desertions in the Union army during the Civil War, or roughly one in every seven Union soldiers.⁴ Men were needed in the field, he concluded, for the war would be won only “by hard desperate fighting.”⁵ Thus, he used the strong arm of the military to make sure that dissenters on the home front did not impede the war effort.

“Long experience has shown that armies can not be maintained unless desertion shall be punished by the severe penalty of death,” wrote Lincoln just before the Battle of Gettysburg. Yet he believed it unjust to punish soldiers who deserted and not the civilians who persuaded them to desert. In one of his most effective defenses of his habeas and military tribunal policies, Lincoln asked, “Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wiley agitator who induces him to desert?” Of course, in most cases, Lincoln did not wish to shoot either. “I think that in such a case, to silence the agitator, and save the boy, is not only constitutional, but, withal, a great mercy.”⁶

Lincoln grounded his wartime policies in necessity. “I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation,” wrote Lincoln to

⁴ Ella Lonn, *Desertion during the Civil War* (Gloucester, Mass.: American Historical Association, 1928), 226.

⁵ Lincoln, “Memorandum on Furloughs,” November 1862, in Basler, et al., eds., *Collected Works*, 5:484.

⁶ Lincoln to Corning, June 12, 1863, in *ibid.*, 6:260-269.

Albert Hodges in April 1864. “Right or wrong, I assumed this ground, and now avow it. I could not feel that, to the best of my ability, I had even tried to preserve the constitution, if, to save slavery, or any minor matter, I should permit the wreck of government, country, and Constitution all together.”⁷ His policies of emancipation, conscription, suspension of habeas corpus, and use of military tribunals to try civilians, in short, had all become necessary to winning the war and preserving the Union. As such they became indispensable, for without them the Constitution would have been destroyed. Within this context, Democratic accusations that he violated the Constitution appeared nonsensical, for talk of constitutional liberty mattered little if the Constitution itself was destroyed by secession.

Republicans in Congress and the states also reacted to the secession crisis, enacting laws aimed at traitors North and South. Numerous loyalty oaths were adopted throughout the North. In some jurisdictions citizens could not practice their vocations or exercise their political rights without subscribing to one or more oaths. In reality, these oaths functioned as a punishment for suspected traitors, potentially imposing civil and political disabilities on them without attainment of a conviction in court. Other laws punished conspiracies against the government, the formation of secret societies, exulting in rebel victories, sending arms or intelligence to the enemy, discouraging enlistments, encouraging desertion, corresponding or trading with the South, or displaying Confederate symbols. These laws rarely used the word “treason” to describe the actions that they criminalized, but they drew from pre-1787 definitions of treason to the effect that they essentially redefined and broadened public understandings of what actions

⁷ Lincoln to Albert Hodges, April 4, 1864, in *ibid.*, 7:281.

amounted to treason. Newspapers and judges referred to many of these statutes as “treason” laws. Thus, legal and popular understandings of treason broadened beyond the narrow definition that the Framers had written into Article III of the Constitution.

The most notable instance of a legislature borrowing language from the definition of treason to define a new crime came in the Second Confiscation Act (1862). The second section of the confiscation law made it a crime to “incite, set on foot, or engage in any rebellion or insurrection against the authority of the United States,” or “to give aid and comfort” to those who did. In the process of writing this statute, many congressmen believed they were creating a new crime that was something less than treason. Thus, some government attorneys charged suspected traitors with the crime of inciting or engaging in rebellion, rather than with treason. (The attorneys likely believed that under this lesser charge they would not need to produce two witnesses to the same overt act in order to obtain a conviction.)

In the *Greathouse* case (1863), Justice Stephen J. Field and Judge Ogden Hoffman rejected Congress’ contention that it was creating a new crime. Sitting in the federal circuit court in San Francisco, these judges argued that an indictment did not need to use the word “treason” in order for a defendant to be charged with the king of crimes. In contrast, they held that the actions described in the second section of the Second Confiscation Act amounted to levying war against the United States, and thus were treasonable offences. They would not allow treason to be called by any other name. In *Greathouse*, therefore, a federal court rejected the Republican Congress’ attempt to borrow language from the constitutional definition of treason to create and define a new,

lesser crime. Many Democrats echoed the court's position. Political debates over the meanings of loyalty and treason, thus, became increasingly heated and contentious.

As wartime politics increased in vitriol, Republicans came to equate opposition to their war measures with treason. With southern armies arrayed in the field against the government, any opposition to measures adopted for the defense of the flag became seen as equivalent to the moral crime of treason. Political opposition to the Administration, too, was adherence to the enemy. Silence on the war question was also unacceptable. To restate the words of one of the Pennsylvania judges in Chapter 1: "In an emergency like this, treason consists not alone in the overt act. 'He that is not for us is against us.'—Moral aid and comfort is given to the rebel cause by any uttered sympathy with its nefarious purpose or any muttered dissuasions to halting patriots against a prompt enrolment of their names as volunteers." Treason thus broadened during the Civil War to encompass not only overt acts of war, as required by Article III, but also antiwar words and political positions in opposition to Republican-Unionist war measures. Consequently, politicians and ordinary citizens were punished for antiwar, anti-emancipation, or anti-draft speech. Judges also faced arrest for judicial opinions that seemed to interfere with the war effort.

The heated debates that arose in Congress and during the many election campaigns of the war revealed how both sides of the aisle understood treason and loyalty to be defined. Republicans argued that Democrats were disloyal to the government and the Union—that they were willing to allow the nation fall to pieces rather than see the institution of slavery harmed, and that they opposed all measures necessary to win the war because, in their hearts, they really wanted the South to succeed. The Democrats, by

contrast, claimed that Republicans were traitors to the Constitution, and that in the process of fighting the war the Republicans were destroying the federal republic in exchange for a centralized despotism in which citizens would lose their constitutional liberty. These debates—particularly when they occurred in Congress—became a sort of political theater that had major impacts on how northerners defined loyalty and treason. Many such congressional speeches were published as pamphlets and in newspapers, and they subsequently played an important role in the shaping of public opinion, convincing the bulk of the northern electorate that the Democratic Opposition was disloyal.

The Democrats certainly did not help their political futures when they opposed measures that many in the North believed were crucial to the war effort. In opposing confiscation and emancipation, Democrats bound themselves to slavery, defense of which had been the South's reason for rebelling in the first place. In their opposition to conscription Democrats appeared to oppose a vigorous prosecution of the war. In opposing legal tender and a national banking system Democrats seemed to favor fiscal instability and a hamstrung northern government that was limited in its ability to fund the war. And in opposing suspension of the privilege of the writ of habeas corpus and use of the military to arrest and try civilians, Democrats seemed not to take seriously the internal security threats facing the Union government. Indeed, opposition to these measures appeared to many northerners as overt attempts to encourage rebel victory.

In this wartime context, it was not a difficult mental leap for Republicans to conclude that the Democratic party was in league with the South. After the demise of the Whig party in the 1850s the Democrats could rightly claim to be the only truly national party in the United States. Republican candidates between 1854 and 1860, after all,

received few if any votes in the South. The national character of the Democratic party during the antebellum period proved to be a major liability for the party during the war itself. Democrats could now be easily linked to the southern traitors who had taken up arms against the Union. Thus, Republican congressman George W. Julian of Indiana branded the Democratic party “the great nursing mother that had fed and pampered” the rebellion.⁸ For their continued efforts that seemed in favor of southern secession, leading Republicans and Unionists called for harsh punishment, even execution, of northern traitors.⁹

Few northerners could actually be linked in direct conspiracy to the southern rebels. They therefore did not meet the standard set out by Marshall in the *Burr* case for their actions to constitute treason. Consequently, the Lincoln administration, Congress, the states, and the military adopted these other previously mentioned policies for dealing with disloyalty and dissent in the wartime North. In the process of adopting these new policies and laws, the Republican leadership essentially brought back to the United States the pre-1787 conceptions of treason of the heart and mind, treason by words, and the belief that political opposition, in some cases, could constitute treason. Many Democrats recognized the transformation that was taking place and complained bitterly. A man may be as patriotic as George Washington, proclaimed the editors of the *Brooklyn Daily*

⁸ Jean H. Baker, *Affairs of Party: The Political Culture of Northern Democrats in the Mid-Nineteenth Century* (1983; reprint, New York: Fordham University Press, 1998), ch. 8; Julian quoted in Melinda Lawson, *Patriot Fires: Forging a New American Nationalism in the Civil War North* (Lawrence: University Press of Kansas, 2002), 67.

⁹ See, for example, the arguments of Senator Daniel Clark of New Hampshire in *Congressional Globe*, 37th Cong., 2nd sess., p. 476, or of Senator Garrett Davis of Kentucky in *ibid.*, p. 447. See also the 1862 resolution of the Ohio legislature described in the Introduction.

Eagle, but if he doubted the wisdom of the president or condemned a bad policy of the Republicans he would be charged with giving aid and comfort to the enemy. “Under the modern construction of treason, the citizen is safe only in strengthening whatever delusion may take possession of our rulers.”¹⁰ But the die was cast. Neutrality on the war issue was treason. And treason, whether “expressed or implied,” or “in word or in arms,” became offences that were punishable, most often without trial or conviction in a civil court.¹¹ The military, in most cases, was given the discretion to determine whether a citizen’s words or actions amounted to treason.

In the postwar period the political branches of the state and federal governments abandoned many of the treason and disloyalty measures they had deemed necessary to winning the war. At the same time, the courts also asserted themselves in ways that they had avoided in wartime. Whereas the Supreme Court had declined to hear the *Vallandigham* case in 1863, in 1866 the Court ruled the use of military commissions to try civilians unconstitutional. The Court also struck at confiscation and the use of loyalty oaths. The states, too, repealed many of their wartime loyalty statutes and constitutional revisions. Suspected traitors would once again be subject to trial and punishment in civil courts and with the protections required by the Constitution and Bill of Rights. Lincoln thus proved somewhat prophetic when he argued that the constitutional protections

¹⁰ *Brooklyn Daily Eagle*, March 17, 1864.

¹¹ Lincoln had declared that border state neutrality was treason “in effect.” Burnside’s General Orders No. 38 had vowed to punish treason “expressed or implied,” and the Nevada legislature had resolved to oppose treason “whether in word or in arms.” See the Introduction and Chapter 1.

afforded to accused criminals and traitors “will stand . . . much longer after the rebellion closes.”¹²

¹² Lincoln to Corning, June 12, 1863, in Basler, et al., eds., *Collected Works*, 6:262.

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