

but for military commanders in theirs. The slaves' insurrection loomed over it all. As officers routinely complained, the problem of loyalty and allegiance slaves posed was acutely pressing but impossible to resolve at the level of an individual command. Charles Manigault could casually acknowledge his slaves' sedition; planters all over the South could rail about their slaves' lack of fidelity and intention to desert to the enemy; North Carolina authorities could arrest white men for treasonable conduct in exciting a slave to insurrection; individual citizens could bluntly identify slaves as the enemy; and groups of citizens, like the one Colonel Colcock Jones was part of in Liberty County, Georgia, could flat out call them "traitors." "They are traitors who may pilot an enemy into your *bedchamber*," he wrote his son. "They know every road and swamp and creek and plantation in the country, and are the worst of spies." Radical Union commanders might reverse the equation, putting the stigma of treason on the masters. "Fugitive rebels," David Hunter famously called them, men who "everywhere fly before the appearance of the National Flag." What was needed instead was a "fugitive master law," he wrote sarcastically. But from the Southern point of view, it was slaves who were the traitors, slaves whose "absence of the political ties of allegiance" posed a threat to the very existence of the Confederate republic. Confederate citizens from all walks of life looked to the government and the military to establish slaves' accountability. "Can we find protection under Military Law?" the Liberty County planters asked. "This is the question we submit to the General in Command."<sup>76</sup>

But it was one thing for private citizens to call slaves traitors and quite another for the government or military to formally acknowledge them as such, given the Pandora's box it would open about their standing in the slaveholders' republic. And yet that is precisely the position to which the Davis administration was driven by the actions of a military officer in Pensacola, Florida, when, in responding to conditions much like those in Liberty County, he initiated a court-martial of six slave men in March 1862. The charges? "Attempt to violate the 57th Article of War," "holding correspondence with, or giving intelligence to, the enemy." "Who ever heard of a negro slave being arregned before a court martial for a violation of the Articles of War?" their incredulous master railed. Who indeed? In charging slaves with treason, the officer posed a profound question about

The mix of compromised state sovereignty and slaves' political agency proved lethal in the C.S.A. Conditions on the ground sounded a constant drumbeat of trouble not just for planters in their daily operations

their political status and membership in the body politic. A “traitor,” after all, was one who would “overthrow the government or impair the well-being of a state to which one owed allegiance.” Did slaves owe allegiance to the state? Could slaves be traitors? Were they subject to military law?<sup>77</sup> The settlement of those questions went all the way up the chain of command to the secretary of war, raising fundamental questions about slaves’ changing relation to the state.

The officer in command, Colonel Thomas Jones, had his views, although he knew he was on shaky ground. Jones and his troops, the 27th Mississippi, were in a highly exposed condition, holding Pensacola Harbor while positioned directly across the bay from Fort Pickens, which was in Union hands and to which slaves were constantly escaping. “Colonel Jones was left at Pensacola under very trying circumstances,” his superior officer, Major General Samuel Jones, reported to a War Department official after all hell broke loose, “and strong measures were needed to prevent spys whether white or black conveying information of his true condition to the enemy.” Planters from that area of the Florida panhandle, and even the governor, John Milton, were simultaneously pleading with President Davis for troops to stem the tide of slaves “defect[ing] to Pensacola, where they are constantly giving information to the enemy.” In fact, Colonel Jones identified runaway and insurgent slaves as the greatest threat to his “little army.” Convinced of their “treasonous designs,” he had already issued a proclamation making known his intention to apprehend slaves detected in escape to Santa Rosa Island. Jones did not seek to revolutionize the condition of slaves, only to contain the military threat they posed. On March 26, when his men picked up six slaves, five belonging to Jackson Morton and another belonging to a Mr. R. L. Campbell, he subjected them to a court-martial under the 57th Article of War. All six were convicted on all counts, three sentenced to death and three others to multiple rounds of whipping, all to be carried out by April 14.<sup>78</sup>

And there it might have ended, in the invisible torture and death of six slave men, six more added to the innumerable count piled up by Confederate troops and guerillas during the American Civil War. But Colonel Jones was a proper military man. He initiated a legal procedure, allowed the slaves a defense lawyer, and produced a record of the court-martials that Jackson Morton then used to challenge the legitimacy of the pro-

ceedings. As well he might. Could the court-martials of slaves under the Articles of War stand up to official scrutiny? Could the War Department really sanction it? Morton had his views, and he played them out in full with the War Department. Denouncing the court’s proceedings as “irregular and improper,” and the officer as the “autocrat of Pensacola,” he insisted that his slaves were just slaves, subject as such to punishment only by him. “The negroes should have been delivered to me when apprehended, I should have had them properly punished and removed to a place of safety,” he railed. To him this was simply a matter of slave fidelity concerning only their loyalty to him. But if the master Morton still regarded slaves as subjects of the household state and the masters’ law—just runaways—Colonel Jones thought them by necessity subjects like other citizens of the Confederate state and military law. To him and the court that convicted them, they were five “intelligent beings, possessing the faculties of conveying information which prove useful to the enemy and detrimental to the Confederate states.” Traitors, that is, not runaways. Testimony produced at trial confirmed the Morton slaves’ knowledge of the local waterways, troop strength, recent reductions in numbers, and lack of arms.<sup>79</sup>

The court-martials of the slaves put Colonel Jones and, as it turned out, the Confederate War Department on uncharted—and very precarious—ground. It was, as Morton charged, a clear departure from the army’s customary policy, which stipulated the holding of recaptured slaves in depots in each state to be reclaimed by, or delivered to, their owners. That policy, although a drain on military resources, was entirely in keeping with the constitutional obligation to treat slaves as the private property of their owners.<sup>80</sup>

There was simply no precedent for charging slaves with treason under civil or military law. The treason law the United States had adapted from English law retained the essential principle that acts of treason aimed at the overthrow of the government. The new federal and state laws, like the colonial statutes, encompassed “domestic insurrection” or “domestic disturbance” within the offense of treason, but the threat posed by alliance with, or adherence to, an external enemy was clearly the main concern. More important, in every case when writing treason acts or clauses, the new government entities—the Continental Congress, Congress, and

the individual states—explicitly tied allegiance to the laws of the United Colonies or States to the “protection” derived from those laws.<sup>81</sup> One had to be under the protection of the laws to owe allegiance to the state. Because of the obligation to personal obedience incurred by those in subjection, even free married women were questionable cases with respect to charges of treason. Legal citizens, clearly under the protection of the law, they were shackled by coverture and the competing legal obligation of submission to their husbands. States that had rendered explicit women’s obligation to refrain from treason during the Revolutionary War beat a fast retreat in its aftermath, remanding married women to the legal jurisdiction of coverture.<sup>82</sup>

Slaves were a far more clear-cut case. Understood by almost any standard as being outside the protection of the law, they were bound instead by ties of subjection to a particular master, owing obedience and allegiance exclusively to him. The nineteenth-century record leaves very little evidence of treason charges ever being brought against slaves. There were a few cases reflecting an older view, probably still held in the war years, that slave insurrections threatened the social order and thus constituted a crime not just against the master but against the people and the state. But the majority of those charged specifically with treason in relation to slave insurrections were white men, and slaveowners were careful not to treat slaves as guilty of high treason, “thereby avoiding . . . any problem about *allegiance* due to society.” Instead slaveowners believed that the allegiance slaves owed had a private object (their owners) and that slaves were capable only of petit treason—willful murder committed by one who is in subjection to and owes duty and obedience to the party murdered—not high treason. To apply the treason act to slaves in the event of rebellion was to treat them as citizens of the state in some fashion or another. The idea of slave treason was legally incoherent.<sup>83</sup>

The year of war that preceded Colonel Jones’s court-martials offered manifold evidence of slaves’ revolt against their masters, intent to levy war and adhere to their enemies, but little by way of precedent for treason charges against the perpetrators. The climate of vigilantism and summary justice that prevailed in 1861 and continued throughout the war explains that. Ad hoc committees of safety, or the kind of “examination committees” to which the Second Creek slaves were subjected, did the work of

trial and punishment that would otherwise have reached the courts. “I saw a Negro hung in Jackson for being hired to the Yankees to go in our breast works and see how many big guns we had,” a soldier in a Jackson regiment reported. “He undertook the task for the promise of 40 Dollars and was hung for it rite before our Regt.” Slaves constituted only about 5 percent of the 4,100 or so political prisoners held in Castle Thunder in Richmond in 1862–63 (the only prisoner census available); most at risk of indictment were presumably spared that formality and dealt with out on the roads and waterways by extralegal means, as was the Jackson slave. The military mostly operated the same way. Of the few slaves accorded the privilege of imprisonment, the majority were simply listed as runaways and held for return to their owners. The handful captured on their way to or from the enemy were held on specific charges, including informing to the enemy, but only one for “disloyalty.”<sup>84</sup> None were charged with treason, which explains the furor that arose around Colonel Jones’s decision to court-martial Morton’s slaves under the 57th Article of War.

Colonel Jones did not purport to try Peter, William, George, Robert, and Stephen in state court. He exercised his authority as a commander under military law. But even that elastic domain was unpromising to Jones’s case, his decision a departure from usual practice and, in an official sense, untested. The legitimate reach of military law was hotly disputed during the Civil War, North and South, and in the C.S.A. the issue of whether a civilian could be tried by court-martial was fiercely contested, with civilian lawyers, politicians, at least one state supreme court justice (North Carolina) and even the Confederate vice president, Alexander Stephens, denying that they could. “The Constitution is made for war as well as peace,” he famously said. The Articles of War under which Jones issued the indictments applied most explicitly to members of the armed forces, governed the conduct of soldiers in the field, although some of its provisions did extend to allied civilian hires of the army. In fact, when the War Department was forced to rule on one such case in November 1862—at the exact moment when Colonel Jones’s case hit the War Department—Adjutant General Samuel Cooper sided with the civilian lawyer in the case, agreeing that the military could not try his client.<sup>85</sup> But the civil liberties of slaves were nowhere at issue in the Confederacy during the war. None of the previous legal wrangling settled the question of

whether the military could try slaves, men who were not citizens of the C.S.A. Colonel Jones was on his own.

In attempting to administer slaves as traitors, Colonel Jones's court-martial bore far more directly on the matter of slaves' political standing than their legal standing. It is true that in recent years historians have moved past the brittle picture of the master-slave relation in statutory law and appellate decisions to a view of the legal personhood of slaves in the Southern law of slavery: the double character of slaves as property and persons. One recent reading of the way the law operated at the local level even makes the case that slaves were part of the legal order, that they were understood to be under the protection of the law and thus had status, if not rights. Statutes holding masters criminally liable for the murder of their slaves and the introduction of information by slaves at civil trials or magistrate hearings all speak to the nuances of the legal order that evolved in the antebellum South. But homicide statutes proved impossible to enforce, and far more slaves went to law as pieces of property itemized in bills of sale, turned into cash, and divided up in estate settlements, or sold under the sheriff's hammer—than ever did as participants in hearings. Whatever the evolution of the law over time in the antebellum period, it is still hard to avoid the conclusion that little interfered with the treatment of slaves at law as property. It was "the property element in the slave that was 'juridically' significant," one legal historian has insisted.<sup>86</sup> This was certainly the view Morton took and the one he pressed on the secretary of war in demanding review of the legality of Colonel Jones's action.

In the slave South, enslaved peoples' absolute and permanent exclusion from the body politic—their lack of political standing—was not in doubt. Whatever the limited concessions made in law to accommodate the necessity of administering justice in cases involving human property, no such concessions had been necessary in political life. Alexander Stephens might have been right when he said that the Confederate Constitution was made for war as well as peace. But war created precisely those circumstances in which the political alienation of slaves became a liability. This was the point made by the Liberty County planters and many others in similarly exposed circumstances, and it was Colonel Jones's point in insisting on the court-martial of Morton's slaves as a "high military necessity."<sup>87</sup>

Recognizing slaves as traitors was part of "the stern logic of events" in war. But it was also profoundly at odds with the political project of the Confederate republic. In attempting to deal with slaves as traitors, Confederate military authorities were tripped up, as impressment officers had been, by the limited sovereignty of the state over slave subjects, by the way the master stood between the state and the slave. This was precisely what Colonel Jones said when he learned of Morton's attempt to thwart the proceedings by appeal to the secretary of war. "Strong influences had been interposed to protect and shield those who had been detected and apprehended," he complained to the adjutant and inspector general from his post in Pensacola. "Since this citizen is unwilling to make a sacrifice of his personal interests to the public welfare, and has had the power to interfere with the interior of my command and what I conceive to be the proper execution of my duties, I beg that I may not be held responsible for the difficulties & escapes which will most certainly follow."<sup>88</sup>

It was those two fundamental issues—the masters' paramount claim and, most explosively, slaves' status as property or persons—that Jones's court-martial raised. "Two questions are presented in these cases," Samuel Cooper noted by way of *précis*, in forwarding the record to the secretary of war for review. The first was practical: Can men be convicted for an "attempt" to correspond with or give intelligence to the enemy, the issue raised by the defense. The second was profound: "The parties are *slaves*. Can they be guilty of a violation of the military code, even when extended to the civil community by the proclamation of martial law?" Colonel Jones knew he was on new ground. Convinced that the exigencies of the service demanded his action, he also expressed relief when the matter was taken out of his hands, "as it was a case about the strict legality of which I had some doubt."<sup>89</sup> But Colonel Jones's relief became the secretary of war's dilemma, as he tried to figure out a way to exert state control over treasonous slaves while not recognizing them as part of the body politic.

When seven months later the Confederate secretary of war was forced to adjudicate the question of whether slaves can be guilty of treason under military law, the new politics and political subjects the war had called into being were perfectly in evidence. No ultimate legal ruling, only the confusion of Confederate states' attorneys, can be found in the record. Indeed what ruling was possible? Clearly as Major General Jones said

Confederate commanders needed to recognize slaves as traitors. But how could that be adopted as an official position without profound damage to slaves' status as property and masters' rights to it in the C.S.A.? Developments in Pensacola show the profound dilemma war—and, in this case, six Pensacola slaves—had launched them into. If slaves were traitors, they were no longer just slaves.

The Confederate state's willingness to concede slave men's membership in the body politic proceeded from the need to establish accountability, to counter slaves' treasonous activity with state violence. Such efforts, as in Pensacola, drew the Confederate state and military into increasingly intractable conflicts with slaveholders over the rights that attached to private property and contributed a great deal to the radically shifting terrain of Confederate politics. It is hard to overstate the distance covered in the C.S.A. in a few short years of war. Having first been seen as an element of strength, slaves had become the enemy within; having begun with an instrumental view of slaves, Confederates had come to recognize their political agency; and having at first insisted on slaves' political exclusion, they had come instead to insist on the necessity of their incorporation. These were hardly minor concessions. Although entirely pragmatic in origin, they were a direct repudiation of foundational Confederate principles. It was not simply that white Southerners had found nothing to complain about in Taney's view of slavery as the natural status of people of African descent in the United States and his insistence on the complete exclusion of slaves from the body politic; they had gone to war—and expended hundreds of thousands of citizens' lives—to extend those principles into perpetuity.

But the logic of change did not remain entirely negative and disciplinary. Some civilians and military men, particularly in the western theater, calculated the price of slave disloyalty differently and began to engage issues of volition and consent that went to the very heart of the Confederate republic. In September 1863, a Jackson, Mississippi, editor summed it up when he said, "We must either employ the negroes ourselves, or the enemy will employ them against us . . . They are no longer negative characters, but subjects of volition as other people." A plainer statement of

the problem and its imperatives could not be found. They must be taught that the C.S.A. was their country, and "he [the negro] must further be taught that it is his duty, as well as that of the white man's, to defend his home with arms, if need be." To this man the trajectory of Confederate politics was clear. "It is the duty of this Government to forestall Lincoln and proceed at once to . . . the emancipation or liberation of the negroes itself. Let them be declared free, placed in the ranks, and told to fight for their homes and country."<sup>90</sup>

By making their political and military value clear, enslaved men and women had presented the Confederate republic with an impossible problem of allegiance. That much was clear by the beginning of 1863. But the consequences were only beginning to play out. In time the pressure slaves exerted on the proslavery C.S.A. would move beyond delimited groups of citizens, editors, and military men in embattled corners of the republic to the office of the president himself. When it did, it would force Davis and his cabinet to do the unthinkable: to move to undermine the owners' paramount claim to their slaves, to claim state access to privately held property in slaves, and to contemplate the enlistment of some slave men to save the slaveholders' republic.

One small tremor that started in northern Georgia augured a full-blown earthquake in Confederate military affairs. In December 1863 an Irish-born officer in the Army of Tennessee, hunkered down in winter quarters in Dalton and brooding on the string of devastating defeats suffered by his army, came to the conclusion that only one thing could save the slaveholders' republic. On January 2, 1864, standing before fellow officers, Major General Patrick Cleburne made his heterodox views known, recommending that the C.S.A. arm and emancipate its own slaves. It was an astonishing proposal from a senior military officer of the hemisphere's only independent slave republic. In that sense Cleburne's memorandum spoke to the stern logic of events in that slave regime at war. Although it

was never adopted and Cleburne did not live to see a slave enlistment policy, he staunchly predicted both the terms that required it and the terms under which it would work. Most stunning was the central role he attributed to slaves and their politics in the Confederate military dilemma. For Cleburne's core contention was that to get slaves' military service, the C.S.A. first had to win their political loyalty with the promise of freedom.<sup>38</sup>

The men Major General Cleburne addressed needed no primer in the "exigency in which our country is now placed." Every last one of them was a survivor of Missionary Ridge and Chattanooga. One of them, Thomas Hindman, a fellow officer and antebellum law partner of Cleburne's, had already made a similar proposal anonymously in a Georgia paper. But Cleburne put his name on his memorandum and shared it with other officers of the Army of Tennessee. Addressing the commanding general, the corps, division, brigade, and regimental commanders, he recounted the humiliating history of their army and country. "Every soldier in our army already knows and feels our numerical inferiority to the enemy," he said bluntly. "If this state continues much longer we must be subjugated." The stakes clear, Cleburne proceeded coolly to identify "the three great causes operating to destroy us." After the numerical inferiority of Southern armies, and the poverty of their supply sources, he came to the third: "the fact that slavery, from being one of our chief sources of strength at the commencement of the war has now become, in a military point of view, one of our chief sources of weakness."<sup>39</sup>

Cleburne's unflinching analysis of the military weakness of the slave state was so complete, it serves as an historian's index to the subject. It touched on every vulnerable point: the Union's superiority in numbers of white men and ability to augment their armies with Confederate slaves; the defection of slaveholders to save their property on the approach of the enemy; the scattering of Confederate forces to prevent Union raids and slave escape so that they were "not free to move and strike like the enemy"; the fact that slaves were useless to them but valuable to the enemy. Slavery is an "omnipresent spy system," he charged, with slaves "revealing our position, purposes and resources, and yet acting so safely and secretly that there is no means to guard against it." On every approach the enemy found recruits awaiting him with open arms, guides ready to

supply a complete history of the neighborhood, and men to resupply the enemy's already massive armies. Cleburne hardly underestimated slaves' effect on Confederate military operations. Slaves, he said, are the enemy within. Because of slavery the C.S.A. was forced to wage war with the Union army in front and "an insurrection in the rear."<sup>40</sup>

Cleburne's was a merciless critique of the liabilities of a slave regime at war and as blunt a description of the damage slaves were wreaking on the Confederate military effort as one will ever read. But Cleburne rehearsed that military history to show not just what the C.S.A. was up against but what it would take to change it. His most shocking contention was not that the Confederacy needed slave men to fill its armies, but that it could do so only by recognizing slaves' own objectives in the struggle under way. The logic was military, the goal more men in uniform, but the political vision was radical indeed. Cleburne looked slaves' anti-Confederate politics squarely in the face. "For many years, ever since the agitation of the subject of slavery commenced, the negro has been dreaming of freedom," he acknowledged. "It has become the paradise of his hopes. To attain it, he will attempt dangers and difficulties not exceeded by the bravest soldier in the field." It was "the chronic irritation of hope deferred" that alienated the "sympathies of his whole race" from the South, raised insurrection in the rear, and filled the ranks of Union armies. Only one thing could change that. "We must bind him to our cause by no doubtful bonds," he declared, and the only bond sufficient was the "hope of freedom." "It would be preposterous to expect him to fight against it with any degree of enthusiasm." Whatever anyone else thought, Cleburne recognized that the paramount challenge for the C.S.A. was to win slaves' loyalty, and he was prepared to do what it took. "When we make soldiers of them we must make free men of them beyond all question," he said, "and thus enlist their sympathies also." From that heretical truth of slaves' Civil War politics Cleburne shrank not a whit.<sup>41</sup>

Slave emancipation arose in Confederate history, as in so many other slave societies, as a military imperative. And like other such military emancipations this one figured slave women as marital recipients of a freedom earned by their men. Cleburne always spoke of the slave as a male. But like republican commissioners in Saint-Domingue and officials of Lincoln's government, Patrick Cleburne recognized the necessity of extend-

ing freedom to women as a condition of the political loyalty and military service of slave men. Like those officials, he turned to marriage to make that work. Recognizing how the Emancipation Proclamation had changed the terms of the competition for men, he said, the Confederacy had “to give the negro not only his freedom but that of his wife and child.” To that end, Cleburne proposed they make “his [the slave’s] marriage and parental relations sacred in the eyes of the law.” He proposed, that is, that they first create marriage and then free slave women into it as a gift to their soldier husbands. In his scheme, slave women would be delivered directly from the legal regime of property into that of coverture. For Cleburne, as later for General Lee, President Davis, and the War Department, the slave who dreamt of freedom was male, and it was the black man—husband, father—who would earn emancipation for his wife and children. As in so many cases of military emancipations before, Cleburne proposed that men take the military route to emancipation through the war and its devastation, and slave women, somehow, the marital route. Even in this most progressive Confederate proposal the usual terms of military emancipation were exposed, showing the pattern in official views across time and space.<sup>42</sup>

Cleburne’s assessment of the Confederacy’s military prospects showed the weight of history. He knew the relationship between war, slave enlistment, and emancipation, and he knew too that the C.S.A., overmatched, desperate for men, could not escape the pull of those historical tides. “Will the Slaves Fight,” he asked rhetorically. “The helots of Sparta stood their masters good stead in battle. In the great sea fight of Lepanto . . . the galley slaves . . . were promised freedom and called on to fight at a critical moment of the battle . . . The negro slaves of Saint Domingo, fighting for freedom, defeated their white masters and the French troops sent against them . . . and the experience of this war has been so far that half trained negroes have fought as bravely as many other half-trained Yankees.” With the “allurement of a higher reward,” Confederate slaves would fight for their masters, too, he concluded. Unlike President Davis, Patrick Cleburne extracted the salient message from the complicated history of war and emancipation: slaves will fight when they are fighting for their freedom.<sup>43</sup>

It was a discomfoting message to deliver to men fighting on a proslav-

ery platform. To think of slave men as soldiers was to think of them as freemen and members of the state. To Cleburne, emancipation was the only right and reasonable term on which to demand slave men’s military service, because they would not fight for less and because principle demanded it. “It is a first principle with mankind that he who offers his life in defense of the State should receive from her in return his freedom and his happiness and we believe in acknowledgment of this principle.”<sup>44</sup> Freedom from slavery, membership in the body politic, standing in the state, marriage, and the rights of husbands: by their resistance slave men and women were pressing nothing short of a revolution in Confederate political life.

It was a revolution for which most Confederates were not ready. Many would never be desperate enough to embrace its revision of Confederate society and politics. Was that the republic they had seceded to establish? One that emancipated its own slaves? Cleburne’s proposal—brilliant, impolitic—was immediately suppressed, almost to the point of being lost to history. Some of the men present when he first read it exploded in anger. Among them were a few who sought to punish Cleburne for his heresy. A year later others would get behind the idea of arming slaves, but virtually no one else, with the telling exception of General Robert E. Lee (who said little and wrote less), came as close as Cleburne to calling for a general emancipation of the nation’s whole slave population. A great many serious proposals to arm the slaves, including one from the president himself, contemplated emancipation only of those who served, and there were many people inside government and out who thought it entirely feasible to arm slaves *as slaves*.

The kind of radical thinking Cleburne offered would not be seen again. Davis immediately ordered the document suppressed, deeming it “injurious to the public service that such a subject should be mooted, or even known to be entertained by persons” in authority. The best policy was to “avoid all publicity.” No copy of it resurfaced until the 1880s. On orders from General Johnston, Cleburne destroyed all personal copies and endured the consequences of his apostasy until he was killed in the service of his country in the battle of Franklin ten months later.<sup>45</sup>

President Davis managed to suppress Cleburne’s proposal. But one can hardly help thinking about how its harsh truths and radical recom-



mendations played on the president's mind between January (when he received it) and November 1864 when, facing the utter failure of slave impressment policy and an even more desperate military situation, he made his own radical proposal to the Confederate Congress. President Davis never would take Cleburne's broad agnostic view of the matter of slave emancipation—constitutional issues alone assured that he would not—but like him, he could not avoid the problem of slaves' political loyalty and the necessity of securing it to the slaveholders' republic. In that respect Davis's proposal, although far more politic, shared historical ground with Cleburne's brilliant proposal. The Confederate political project was undergoing a powerful test and no little tempering in the crucible of war.

The suppression of Cleburne's proposal did not buy the Davis administration much of a reprieve. By 1864 the subject of arming slaves was irrepressible in the Confederacy, especially in Virginia and the western states, all the scene of harrowing campaigns. After Atlanta fell in September, calls from citizens in Georgia joined those from Mississippi, Alabama, and Louisiana urging Davis and his administration to act. Women fighting the recent call-up of detailed men urged President Davis to "send us protection in the shape of our sons & husbands and we will send you able bodied negroes." Others pressed to arm slaves and spare what remained of the nation's white men. "Is it not time now to enlist the negroes?" one Georgia citizen bluntly inquired of Davis shortly after the disaster at Atlanta. Do it now or "the cries of starving women & children will make of us all cowards."<sup>46</sup>

As the military situation deteriorated, eyes turned to the only untapped military population source remaining in the C.S.A. In mid-September President Davis acknowledged that two-thirds of the army was absent, most without leave. By that point, the South had only about a quarter as many soldiers present for duty as the North. The head of the Conscription Bureau reported that the recruitment of white men had reached its limit and that "the functions of this Bureau may cease with the termination of the year 1864." In November Seddon again did the dismal math, concluding that the Confederacy simply could not compete with the Union in the size of its armies. We have limited exemptions and details, impressed slave men, and pushed conscription to its limits, he admitted, "[and yet] it is not to be disguised that they must still leave those armies

relatively weak to encounter the hosts being summoned by the enemy for our subjugation . . . additional legislation is necessary."<sup>47</sup>

By the time Seddon offered his recommendations for more aggressive slave impressment, the public debate had moved far out ahead of the administration. Even as Davis and the Congress remained mum on the subject of arming slaves, citizens and the press noisily debated the merits of doing just that. During the fall of 1864 there was a clear sense of a public anticipating a decision. The discussion was single-handedly jump-started by the governor of Louisiana, Henry W. Allen, in September 1864 when a very pointed letter he wrote to the secretary of war was intercepted—and published—by the Union authorities. Governor Allen having been driven out of his state capital in Baton Rouge, his intercepted letter was datelined Shreveport, and his sense of urgency and readiness for radical change in military policy jumps off the page. Responding to a request from Richmond to send troops to Georgia and Virginia, Allen said he could spare none. "The time has come for us to put into the army every able-bodied negro man as a soldier," he told Seddon abruptly in the middle of the letter. "This should be done immediately" by Congress. "The negro . . . must play an important part in this war. He caused the fight & he will have his portion of the burden to bear . . . I would free all able to bear arms & put them into the field at once. They will make much better soldiers with us than against and swell the now depleted ranks of our armies." Picked up by Union forces, Allen's incriminating letter was forwarded to Generals Halleck and Grant. In October Allen conferred with other governors, who together recommended "a change of policy on our part" in the use of slaves for the public service; newspaper editors, private citizens, and Confederate politicians all staked out their position on the decision they were sure was coming. Union newspapers in the occupied South hooted about the arming of slaves as conclusive evidence that the rebellion was in its death throes.<sup>48</sup>

Like so much else in the Confederate war, the enlistment debate started out in the hinterlands and arrived late in Richmond. By the time it erupted in the capital—in October 1864—Governor Allen's position, that slave men should be enlisted and freed, was only one among many about how to make such a policy work. The *Richmond Enquirer* took a pro-enlistment position that was widely regarded as a trial balloon floated by the

Davis administration. Other papers endorsed the *Enquirer's* view, some talking in starkly racist terms about how Confederates had already sacrificed the flower of their population and about negroes as "good enough for yankee bullets." For these advocates of enlisting slaves no general emancipation of the sort Cleburne had envisioned was talked about at all, but at most a partial emancipation covering only those who served: the sacrifice of some slaves to save the rest.<sup>49</sup>

But while that position occupied the center of the political spectrum in the Confederate debate, it was not uncommonly the view that slaves should be enlisted as slaves, with no change in their social condition or standing in relation to the state.<sup>50</sup> Following Cleburne, most historians have cast the choice faced by the C.S.A. in stark ideological terms—as a choice *between* independence and slavery—and thus as a referendum on emancipation and a test of the strength of Confederate nationalism.<sup>51</sup> But many Confederates, including politicians, believed that they could have their cake and eat it too: that they could choose independence and slavery, arm slaves and retain slavery. Indeed, the parties most likely to acknowledge a necessary or inevitable connection between arming slaves and general emancipation were those most strongly opposed. "Those who fight for freedom are entitled to freedom, and we say so too," the *Lynchburg Republican* barked on its editorial page, before refusing the terms of the deal they believed they were being asked to make—slavery for independence. "If the white men of the South . . . claim rights in slaves which they are incapable of maintaining by force of arms, then we say we deserve no other fate than to be leveled to the equality of our negroes." "This is the monstrous proposition. The South went to war to defeat the designs of abolitionists and behold! In the midst of war, we turn abolitionists ourselves."<sup>52</sup> Most advocates of arming slave men seemed perfectly sanguine, by contrast, about the ability to enlist slave men and emancipate only those who served (and perhaps their families) while retaining slavery as a social institution governing the vast majority. Some diehard proslavery types even believed that slaves could be made to fight without any promise of freedom. Most Confederates were for independence and slavery until the bitter end.

That much became apparent in Richmond in the fall of 1864. As the public debate rose to a fever pitch, a Confederate senator from Virginia,

Allen Caperton, worked out his views in anticipation of a congressional debate. It was, he said, "the most serious social proposition that has been presented since at least the commencement of the eighteenth century to the people of Virginia: Whether to conscript the male slaves of the country between the ages of eighteen and fifty." Caperton was weighing a particular proposal, probably the one floated in the *Richmond Enquirer*: to conscript two hundred thousand slave men, to give them the pay of soldiers, and to enlist them on the promise that the conscripts "shall henceforth be free." General emancipation was not on the public agenda. The question, as Caperton put it, was whether it was "not better to part with a portion of our property than the whole of it and our liberty besides."<sup>53</sup>

It tells a great deal about the so-called "Confederate debate on emancipation" that even that proposition was too much for Senator Caperton. "This would be abolition with a vengeance," he protested, going immediately, as so many others would, to the specter of a black army nestled in the heart of a slave country. The Confederacy should hesitate to undertake such a dangerous experiment, Caperton protested, spinning out a postwar scenario of such horror it hung the peace and security of Confederate families forever in the balance. Caperton did not dispute the need to arm the slaves. In that he occupied the middle of the political spectrum in the C.S.A. Arm them, he said, but don't free them. "Is the proffer of freedom necessary or proper," he asked. "May not this step be taken without invoking the permanent interests of white man and the slave?" "I answer it may." Slaves will fight more gallantly for their masters *as slaves*, he assured himself, than as freemen.<sup>54</sup> The Virginia senator imagined that Confederate slaves could be made to fight as slaves for hearth, home, and slavery just as white men did.

Senator Caperton's views on arming slaves in the C.S.A. were not particularly extreme. They were shared by far more of his compatriots than ever considered a general emancipation as the necessary condition of enlistment. But the dismissal of the matter of slave men's will to fight as slaves—for slavery, presumably, and Confederate independence—was a whole lot easier for Caperton and newspaper editors than for their counterparts in the administration and the military who would be charged with making such a policy work.

President Davis, a rigid constitutionalist and no radical, proved an un-

likely protagonist in this regard and thus a perfect vehicle for the historian's assessment of the late-war fate of the Confederate political project. Throughout September and October 1864 the public debate raged. Congressman William Porcher Miles, chairman of the House Military Affairs Committee, quietly solicited the view of General Robert E. Lee, who in turn made it known that he supported the use of slaves in the armies of the C.S.A. Lee's view would not be publicly known for some time, but the solicitation of it shows how imminent Miles considered the decision to be. As citizens exchanged views, newspaper editors hammered out positions, senators prepared speeches, and important committee chairmen took the temperature of the military, the president of the C.S.A. likewise took the matter under consideration.<sup>55</sup> Sometime in October he solicited the advice of the secretary of war. On October 27, Seddon delivered to him "two rolls, which will be found to contain views . . . in reference to the employment of Slaves in our Armies. The roll bound with white string," Seddon said in the cover letter, "was prepared by myself as making the popular views on the subject and presenting my own convictions, and would probably be most politic at this time." "The other," he said more ominously, "presents a fuller and more exhaustive consideration of the subject, and comes from the pen" of Assistant Secretary Campbell, who gave "a good deal of reflection to the subject and prepared the paper for my use."<sup>56</sup>

If Seddon's report is anything to judge by, the politic position was for the administration to reject association with a project so radically transformative of the status of slaves and institution of slavery in the slaveholders' republic. Seddon did not gainsay the need. His report offered a dire account of military affairs and the state of the armies relative to the hosts summoned to destroy them. Under the circumstances, Seddon reasoned, the country was certainly justified in arming slaves in its own defense. But that was neither necessary or desirable. "For the present it seems best to leave the subordinate labors of society to the negro, and to impose the highest, as now existing, on the superior class," Seddon summed up.<sup>57</sup> By November 1864 the possibility of arming the slaves was on the table and in advising Davis Seddon spoke vigorously against it.

Davis moved toward a different conclusion. On November 7, in his annual address to the Congress, Davis made his views on the explosive

question of arming slaves publicly known for the first time.<sup>58</sup> His speech represented such a radical departure from any proslavery or administration orthodoxy—such a threat to the security of slave property—that it shook the very foundation of the slaveholders' republic. Davis's position was nothing short of a *volte-face*. Standing before the assembled members of the Confederate Congress conveying the dire military situation—the unlikelihood of foreign recognition, impossibility of a negotiated peace, and utter failure of slave impressment—he invited their "consideration . . . of a radical modification in the theory of the law" of slavery. Delivered in measured tones, Davis's proposal was nonetheless shocking. The slave, he declared flatly, can no longer be "viewed merely as property" but must be recognized instead in his other "relation to the State—that of a person." As property, Davis explained, slaves were useless to the state, because without the "loyalty" of the men nothing of value could be gained from their labor. "The duties required of them [in the army] demand loyalty and zeal," he insisted, describing a whole series of tasks slave men had been asked to undertake. "In this respect, the relation of person predominates so far as to render it doubtful whether the private right of property can consistently and beneficially be continued."

Thus Davis came face to face with slaves' politics in confronting the failure of impressment, and like Cleburne he did not flinch. The state, he said, had to bid for the loyalty of slave men. The government needed to purchase forty thousand male slaves for labor in the armies, and it was quite possible, he admitted, that the state might have to hold out "his emancipation . . . as a reward for faithful service." To make slaves an element of strength in the C.S.A., in other words, they would have to destroy the master-slave relation. As Davis acknowledged, it was slaves themselves who had brought a founding father and the sitting Confederate president to that juncture.

To many congressmen seated in the hall, the president's speech must have seemed incredible. Although the specific proposal was hybrid in nature, it was perfectly clear to everyone that he was laying ground for a more radical step. His own language and analysis—the salience of slaves' allegiance, the recognition of their standing in relation to the state, the necessity of emancipation—suggested as much, marking a radical modification in the theory of slavery such as would be needed to enlist slave

men as soldiers in the nation's armies. On that question Davis was publicly cautious. To use slaves as soldiers was a policy that should be regarded "solely in the light of policy and our social economy," he said evenly. There was no moral problem in doing so and they would be justified if they did so decide. Davis carefully kept his options open. But for that step he was not ready. "I must dissent from those who advise a general levy and arming of the slaves for the duty of soldiers," he announced. "But should the alternative ever be presented of subjugation or of the employment of the slave as a soldier, there seems no reason to doubt what should then be our decision." As of November 7, President Davis's radical modification stopped short of arming the slaves, for reasons that bore directly on the political nature of the Confederate republic.

The direct infringement on the master's paramount claim that Davis proposed was, even with compensation, too much for the majority of congressmen. That body refused, to the bitter end, to enact the radical modification Davis urged. But from Davis's point of view, arming slaves violated principles more fundamental even than that of "pecuniary interest." For him, it was the "social and political question" that was preeminent. To arm slaves, he explained, had far-reaching implications embracing "the stability of our republican institutions—resting on the actual political equality of all its citizens."<sup>59</sup> To do so required either the admission of black soldiers as equal citizens in the republic or the abandonment of the principle of the equality of republican citizens admitted to membership in the body politic. In a republic it would be impossible, he seemed to say, to extract military service—the highest duty of the citizen—without extending the rights and privileges that were usually exchanged for it. The nexus of manhood, military service, and citizenship was so tight in the nineteenth century, even in a proslavery republic, that Davis balked at violating it.<sup>60</sup>

The political implications of arming slaves were abhorrently clear to Davis. They involved a repudiation of foundational political precepts going back to the vision of the slave republic that Chief Justice Taney had articulated in *Dred Scott* and Southern men had offered as grounds for secession. Slaves, U.S. Senator Davis had said four unimaginably long years ago, were never part of the political community. To admit them as such, as Northerners proposed, was to threaten both the right of non-

erty in slaves and the principles of republican government itself. To enlist slaves as soldiers in the C.S.A. was thus to overthrow the very republic the South had seceded to perfect. On November 7 Davis teetered on the brink, recognizing the stern logic of war but loath to admit to the world the failure of the Confederates' ambitious political project at the hands of their own slaves.

Judging by the public reaction, no one was reassured by the president's disavowal of the idea of arming slaves. Although his immediate recommendation concerned slave impressment, few doubted that this was exactly where the Confederacy was headed. Davis's message opened the floodgates. In the ensuing weeks, the wisdom of arming the slaves was furiously contested in army and civilian life.

The press reaction mirrored the divisions that would become legislatively critical. The *Charleston Mercury* went straight to the million dollar issue of what, if emancipation was in order, secession had been for. The paper was already on record with its view of the move as apostasy: "Assert the right in the Confederate Government to emancipate slaves, and it is stone dead," it editorialized days before Davis's speech, charging administration advocates with "treachery to our cause itself." In the aftermath the paper amplified its role as keeper of the flame, handily measuring the distance between what the government "was created to protect and perpetuate" and what it now claimed the "power to destroy." By that Robert Barnwell Rhett and the *Mercury* did not just mean slavery but, like Davis, the republic they had set out to build on that foundation. Nobody would have voted for a Constitution that gave the government "the power to emancipate our slaves," Rhett raged in an open letter. "The true view of the Constitution seems clearly to be, that it establishes a Confederacy of *freemen*. Freemen constitute the militia of the States. Freemen made—freemen own—and freemen who made and own the Confederate Government, alone can be called on by the Government to defend it." To the Rhetts, nothing had changed in war. Slaves, he insisted, "are a part of the domesticity of the States exclusively under their jurisdiction and their control."<sup>61</sup> Slaves, Rhett said, as Chief Justice Taney and Senator Davis had in 1860, were not counted among the men of the political community called on to defend the state and never could be.

On March 8, 1865, kicking and screaming the whole way, the Confederate Congress finally passed "An Act to Increase the Military Forces of the Confederate States." In the Senate the bill passed by a margin of exactly one coerced Virginia senator's vote. On March 13, in the capital of the slaveholders' republic, President Davis did the unthinkable and signed into law an act making soldiers of slaves. That act cut the narrowest path possible to the desired end. It permitted him "to accept from the owners of slaves the services of such number of able-bodied negro men as he may deem expedient . . . to perform military service in whatever capacity he may direct." It preserved the sovereignty of the master, which had done so much to compromise the state in the war. And it made no provision whatsoever for emancipation. Indeed, the text of the law expressly stated that it did "nothing . . . to authorize a change in the relation which the said slaves shall bear toward their owners" except by the consent of the owners and the states in which they reside.<sup>88</sup> The Confederate Congress, in other words, proposed to enlist still-enslaved men as soldiers in the nation's armies. Far from choosing independence over slavery, as so many historians continue to insist, the Confederate Congress refused, even at the eleventh hour, to write an emancipation clause.<sup>89</sup>

But General Lee would have none of that and neither would President Davis. In the end they prevailed, and Confederate slaves proved themselves the architects of a new political era. On March 23 Jefferson Davis signed and released General Order No. 14, a piece of enabling legislation

that contained the revolutionary clause that "No slave will be accepted as a recruit unless with his own consent and with the approbation of his master by a written instrument conferring, as far as he may, the rights of a freedman." The Confederate army would enroll no slaves, only freemen, by their own consent.<sup>90</sup> It was a momentous development in Southern and Confederate political life. The opposition was ferocious and telling. But key political and military figures in the Confederate States of America had been forced to recognize the relationship between political allegiance, military service, and emancipation. Enslaved men and women had managed to make their foundational political exclusion unsustainable, to make their political consent count, and to force the Confederate government to contend for their loyalty with emancipation. General Order No. 14 inscribed the new political realities the South had arrived at through the devastation of war, including and especially the necessity of the political inclusion of slaves. In that crude but very real sense, those male slaves they wanted as soldiers were now recognized as part of the political community, part of the nation, necessarily part of the Confederate people. If the damages inflicted by the slaves' war against the slaveholders' state was to be contained, if slave treason was to be curbed, if slave men were to be soldiers, they would have to be free and the men among them perhaps eventually recognized as citizens. This was what independence and war had wrought in the slaveholders' republic.