





Life of
Reverdy Johnson

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BALTIMORE

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PUBLISHED SEPTEMBER, 1914



COMPOSED AND PRINTED AT THE
WAVERLY PRESS
BY THE WILLIAMS & WILKINS COMPANY
BALTIMORE, U. S. A

PREFACE

After the argument of his first case in the Supreme Court in 1806, another Maryland lawyer (Luther Martin was the first), William Pinkney, stepped to the front, where he remained until his death in 1822—the undisputed head of the American Bar (Warren, *History of American Bar*, p. 259).

William Pinkney remained the undisputed head of the Bar, until his death in 1822. Thereafter Daniel Webster overshadowed all others in the importance of cases argued and in the mastery of the great principles of constitutional law (op. cit., p. 368).

William Wirt of Maryland continued in constant and vigorous practise until his death in 1834, and his place at the Bar was taken by Reverdy Johnson, who, for many years after Webster's death, was regarded as the leading American lawyer (op. cit., p. 411).

The paragraphs which have just been quoted show the esteem in which the subject of this biography is held as a lawyer. His eminence is by no means confined to practice at the bar. Entering politics, he was elected to the United States Senate as a Whig, and, though he supported the loose construction and protective principles of his party, he broke from it as to the Mexican War. In Taylor's cabinet he served as attorney general. At the break up of the Whig party, he became a follower of Douglas. A Border State Union man, his efforts were notable in 1861 to prevent the secession of his state. While serving a second term in the United States Senate, his mediating position was an important one. He was thoroughly loyal, yet sympathized with the Southern people and, in the difficult period of reconstruction, he did much towards ameliorating conditions. But for him

Andrew Johnson would have been convicted, when impeached. Sent to England as United States minister, he negotiated the Johnson-Clarendon treaty, which, though rejected, was the basis of the arrangement under which the difficulties with Great Britain were finally adjusted. The life of a man whose career was so important is worthy of being written. The author's especial attention was drawn thereto, when he was asked to prepare a sketch of Johnson for the series of Great American Lawyers, edited by Professor William Draper Lewis. So much interesting material was then collected that it has now been worked up into this extended biography. Great assistance has been found in the valuable collections of the Maryland Historical Society: The frontispiece is a reproduction of the photograph of Johnson best liked by his family. Especial thanks are due to Clayton C. Hall, Esq., who married Mr. Johnson's granddaughter, for his interest and criticism.

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CHAPTER I

EARLY LIFE AND LEGAL PRACTICE (1796-1845)

The influence of the lawyer has been great in all parts of the United States, and in no state has it been greater than in Maryland. Men of eminent ability have shed lustre on the bar in Maryland for two centuries, from the time that Andrew Hamilton, who became the first American with a continental legal reputation, prepared a revision of the Provincial statutes, while he was a member of the General Assembly in 1715.¹ From that time onward, the roll of legal worthies is a long and honored one, bearing such names as those of the Dulanys, of Chase, of Paca, of Martin, of Pinkney, and of Taney. With the very first of these in ability and reputation, stands the name of Reverdy Johnson, who was esteemed by other members of his profession so highly that for a number of years before his death he was considered the leader of the bar of the Supreme Court of the United States.² He was not alone a lawyer, but also was interested in governmental affairs, as so many attorneys-at-law have been, and became an important figure in National politics during the latter portion of his life. At the time of the Civil War, he took the side of the Union and like another eminent member of the Baltimore bar, Henry Winter Davis, rendered noteworthy public service to the country.³

¹ See Vol. 20, Penn. Mag. of Hist., October, 1896, and Report of American Hist. Ass. for 1899, p. 229.

² See N. Sergeant's Public Men and Events.

³ This biography is elaborated from a sketch, written for W. D. Lewis's Great American Lawyers and appearing in Vol. IV of that work at page 409.

Reverdy Johnson was the son of John Johnson and of Deborah, the daughter of Reverdy Ghieselen. The maternal grandfather was of Huguenot ancestry, had been commissioner of the Land Office of Maryland and was associated with the Rev. Thomas Bacon in the preparation of that remarkable compilation of the laws of Maryland, which was the finest production of the press of the English colonies in America. John Johnson was a lawyer,⁴ who served the State as member of both houses of the legislature, as attorney general, as judge of the Court of Appeals, and as chancellor. In this last office, he was followed by an older son, John Johnson, Jr. With such relatives, Reverdy Johnson naturally thought of law as his life work.

He was born at Annapolis⁵ on May 21, 1796, and grew up at the Capital of Maryland, being educated at St. John's College there, until he was sixteen. He then began reading law with his father and, completing his studies in the office of Judge —— Stephen, was admitted to the bar in 1816, at the age of twenty. While a student, during the British alarms of 1814, he served for a time as a private in the 22nd regiment of Maryland militia.⁶

After being admitted to the practice of law, Johnson

⁴ See the Bowies and their Kin, p. 162.

⁵ Other accounts of his life are found in Richardson and Bennett's Baltimore, 86 Eclectic Magazine 502 (with steel engraving) by W. H. Bidwell, 3 Green Bag 317 (with portrait) by E. L. Didier, and 20 Harper's Weekly 165 (with picture) 1 Forum (Bench and Bar Review), 367 (1874) with engraving, 10 Cent. L. J. 106 (1876). An engraving of his portrait, at the time he was attorney-general, is found in 5 Am. Rev. 549, (June 1849). Alexander Randall, Esq., in the remarks he made at the memorial meeting of the Md. Court of Appeals on February 11, 1876, said of Johnson: "He was the friend of my childhood and lived under my father's roof." 43 Md. Repts.

⁶ A pay warrant is extant dated August 13, 1814, signed by Nicholas Brewer, to pay Johnson for his services \$2.78, at the rate of \$0.26 a day.

settled at Upper Marlborough, the county seat of Prince George's County, where the little brick building, in which was his office, is still standing. It is said that he was so discouraged by his first speech in the court there that he would have abandoned the law, but for the encouragement of Judge Edmund Key of the Prince George's Court.⁷ Persevering in the profession, he soon displayed such ability that he was appointed by the Attorney-General of Maryland his deputy for the judicial district. In a little more than a year from beginning practice, Johnson removed to Baltimore, so as to have a wider field,⁸ and continued in active practice at the bar of that city until his death, nearly sixty years later. Two years after removing to Baltimore, on November 16, 1819, he married Mary Mackall Bowie, who bore him fifteen children and with whom he lived happily for over forty years, until her death. She was the daughter of Thomas Contee and Mary Mackall Bowie and the grand-daughter of Governor Robert Bowie.

Johnson's legal career soon proved one of great brilliancy and success, because of the vigor of his intellect

⁷ Bowies and their Kin.

⁸ He told Mr. Edward Higgins that, when he established himself in Baltimore, he had not the means to furnish his residence in the manner he wished and arranged with the leading cabinet maker in the City to furnish it and receive payment from time to time, as would be convenient for Johnson, who would pay interest on the indebtedness in the meantime. From Mr. Higgins also comes the following anecdote: When a young man he was engaged in the trial of a case in *nisi prius* and was associated with Luther Martin. On the other side in the array of counsel appeared a man of unusual force in the trial of a cause, Walter Dorsey. The case consumed a number of days, during which there were a number of "animated" tilts between counsel. Mr. Martin brought into court every morning and carried away in the afternoon, a quire or more of cap paper. So far as Mr. Johnson observed, Mr. Martin made but one entry on the paper and it seemed to be very brief, and he had the curiosity to see what it was. A little while before Mr. Martin addressed the jury the opportunity came, and he read as follows: "Scold Wat Dorsey."

and the determination of his character. His quickness of mind, his remarkable memory, his unbroken cheerfulness, his power of repartee, his uniform courtesy and urbanity, his cogent and resistless arguments, his deep and impressive voice,⁹ his tact and skill in the management of causes, his lucidly and logically arranged discourse, delivered to court or jury; all these united to make him a powerful advocate and give him a great reputation as a *nisi prius* lawyer. His skill in the cross examination of witnesses was so great that "his contemporaries agreed that, in this line, he stood absolutely without an equal." With such mental equipment, Johnson soon made his way among the able men at the Baltimore bar and Robert Goodloe Harper, then one of its leaders, is reported to have said: "There is that young man, Reverdy Johnson, sir, he is very clever. He may lead them all yet." He was soon appointed chief commissioner of insolvent debtors and his experience in this post proved valuable to him in later years, when he had a part in the framing of the national bankruptcy law. Edwin Higgins, Esq., of the Baltimore Bar, who was associated with Johnson during the later years of his life, furnished some interesting memoranda concerning him as a lawyer:

Mr. Johnson while nearly an octogenarian, retained to the last his remarkable vigor of intellect. His power of analysis and his reasoning faculties, supported by robustness of expression, commanded attention and carried conviction. . . . If I were asked to name the foundation of his fame as the Nestor of the American Bar, I would declare it to be his untiring, persistent preparation for the trial of causes committed to his professional care.

⁹ When he twitted Henry Winter Davis for taking notes, Davis retorted "Yes, Mr. Johnson, but you will please remember that unlike the lion in the play, I have something more to do than to roar."

Over and over again, he required me to read the authorities, while he would bid me, from time to time, to pause, listen to his running criticism of assent or dissent. He studied the case in hand thoroughly and when the contest came he was prepared. . . . He was fair to the witness who he believed was truthful—but unrelenting in the interest of his client, in the cross examination of one, who he thought had not told the whole truth, and arraigned the latter by a sifting analysis of his testimony before the jury.

Mr. Johnson's favorite position in addressing a jury was immediately in front; often with the left hand in his trousers' pocket. When he became aroused in argument he would withdraw it and then, uplifting his right arm, would use it vigorously with partially open hand to emphasize his argument. I always felt when he had argued his case, not that he had exhausted his resources, but had taken a few dippersful from an inexhaustible well. No young man, if he was attentive in the consultation, could be associated with Mr. Johnson, in the preparation of a cause for trial without becoming ready for it. . . . I recall a mass meeting of the Bar held in the old Superior Court Room for the purpose of bringing about some reforms, over which meeting Mr. Johnson presided. After several addresses, Mr. Johnson called Mr. John H. B. Latrobe to the chair, came down to the trial table and made one of the most pleasing and profitable discourses it has been my good fortune to hear. It showed his appreciation of the importance of the study of the principles of law. He knew that the success in trying of a cause depends upon the mastering of the principles; and the application of them in the practice of the profession is essential in the making of a great lawyer. Mr. Johnson said: "You may ask me who was the greatest lawyer with whom I have been brought in contact, I answer, William Pinkney, by all odds. It is true he had but few cases every year, but they were cases. He made himself master of them in every possible way."

In the trial of a case in which I was associated with Mr. Johnson, the counsel for the opposite side, had, as Mr. Johnson

believed, stepped aside from the discussion of the evidence to arraign his client, and incidentally, to reflect, as it were, upon Mr. Johnson. When his turn came, Mr. Johnson said: "Sometimes when a lawyer has a poor case he resorts to traducing the witnesses on the opposite side and if he has a very bad case he will go further, he will blackguard his brother on the other side."

Mr. Johnson was retained by the B. & O. R. R. Co. in a very important matter with the understanding that, if suit was brought, he should receive \$5,000 for services. Instead of one, two suits were brought. Mr. Johnson appeared in both for the company and was successful in each. Mr. Johnson claimed \$5000 in each case, the Company refused to pay the \$10,000 and Mr. Johnson brought suit; the case was removed to Ellicott City. Mr. S. Teackle Wallis appeared for Mr. Johnson. At the trial, after Mr. Wallis had made a masterly argument before the jury, and counsel for the Company was addressing it, it dawned upon Mr. Wallis that it would be the courteous thing to ask Mr. Johnson, if he would not prefer to make the closing argument himself. It so happened, that just about this time something was said by the counsel for the Railroad to stir the old warrior's blood and he replied with some animation—"By the by, Teackle, I believe I will." He did not spare the other side and the jury gave him a verdict for the full amount of claim.

Great lawyers are proverbially poor penmen. Mr. Johnson was not an exception to the rule. Mr. Johnson was asked for an opinion in writing, relative to the title of a parcel of land which a land improvement association wished to buy. He gave it in his own hand-writing, covering several pages of letter paper, advising the corporation not to accept the title—and at the same time sent a bill for \$500. The committee in charge of the matter were unable to read the opinion and also thought the fee was too much, and appointed one of their number to go up to see Mr. Johnson and get him to read the opinion and also to ask him to make a deduction in his bill. The gentleman returned and reported that he had to explain

the case to Mr. Johnson again when the latter readily deciphered the hieroglyphics—and declined to reduce his fee, saying that it was not too much, that he had just charged the Union Bank a fee of \$3,000 for an opinion which had not required much more of his time. My informant added the \$500 paid for the opinion turned out an excellent investment, for the corporation followed it, and the sequel showed it was saved from very much trouble and loss.

Judge J. Upshur Dennis, of Baltimore, considered that Johnson's strength was as a "nisi prius" lawyer and that he was best suited for the work of the trial table.¹⁰

It was a treat to see him fence with a bright but hostile witness—how he would joke with him and provoke repartee, out of which Mr. Johnson was pretty sure to get something on his own side of the case before he got through, either from the witness himself, or by his own replies intended for the jury; for of the jury he never lost sight, from the time the case was called, until the verdict was announced. No answer of the witness, no matter how unexpected, ever seemed to disconcert him; he acted as if it was the very thing he was looking for and would make some suggestion or give some interpretation, which would make it seem that the answer was really in his favor.

Judge Dennis also spoke of

his imposing appearance, his manners and a certain original way of saying and doing things, which from others would have fallen flat, but from him always counted. He spoke slowly, in a full strong voice, deliberately, and even at the climax of his argument, was seldom ever loud, or at all passionate—only more grave and dignified and with more pronounced emphasis. He was the very embodiment of good nature, as I knew him

¹⁰ These extracts are taken from a paper read by Judge Dennis before the Maryland State Bar Association in 1905 and published in the Association's Proceedings for that year.

at the trial table and elsewhere—full of humor, full of fun, even jocose when the occasion permitted. While he was not witty in the strict sense of the word, yet he was fond of repartee and seldom came off second best. The sharp shafts of his opponent's wit or sarcasm evoked his laughter and apparent enjoyment of the thrust, even at his own expense, as heartily as that of any of the audience, while he was sure to come back with some blunt, broadly humorous retort that rarely failed to turn the laugh upon his adversary.¹¹

Johnson entered the field of politics, when he accepted an election to the membership of the Senate of Maryland to fill a vacancy caused by General John Stricker's declining an election. The Senate was then composed

¹¹ Hon. Charles E. Phelps in 1906 gave me the following interesting anecdote of Johnson: "Many years ago, I happened to be present in the Court Room during the trial of an important will case, in which Mr. Johnson was the leading counsel on one side and Mr. Wm. Norris on the other. The contest had been in progress many days and some friction had developed. On this occasion, Mr. Norris took the floor, immediately after the noon recess, and deemed it his duty, solemnly, to call the attention of the Court to what he complained of as irregular conduct (I am not quite sure he did not use the word unprofessional) of his learned brother, in approaching familiarly gentlemen of the jury during recess and cultivating them individually. I was one of those who, having seen this going on, from day to day, felt that the protest of Mr. Norris was called for and that the conduct of Mr. Johnson was a very bad example to the younger members of the profession."

"At this distance of time, some half century, I shall not undertake to reproduce the few but telling words of Mr. Johnson's triumphant reply, sarcastic, withering in fact, but perfectly good-humored. He expressed innocent surprise, he was not indignant but hurt, that the zeal of advocacy could go so far as to impute unworthy motives to the open conduct of a professional brother, who might ask a personal friend on the jury as to the health of his sick wife, or even go so far as to borrow his newspaper, or who should have so poor an opinion of the integrity of those high-toned gentlemen who composed this jury, as to imagine, for a moment, that any one of them was capable of being corrupted by these commonplace, ordinary courtesies of civilized life."

"It was Mr. Johnson's easy and assured manner, even more than his matter that closed the incident, and left him master of the situation. I do not remember what notice, if any, was taken of it by the Court, but my recollection is that, after that episode, Mr. Johnson was rather less communicative with jurors."

of fifteen members, who were chosen for a term of five years by an electoral college elected by the voters of the State. Vacancies occurring in the Senate were filled for the remainder of the term by the vote of the remaining members. The Republican party, with which Johnson was affiliated in his early life, had secured a majority in the electoral college of 1821 and had elected a Senate entirely composed of the members of that party. He served throughout the term, from his election on December 10, 1821, and was reëlected in 1826, but resigned on March 8, 1828, owing to the pressure of his professional engagements.

His desire to improve the administration of the law led him to introduce and, unsuccessfully, to urge the passage of a bill to enable parties to a law suit to testify therein and he aided in the accomplishment of certain measures of internal improvement, delaying his resignation, in order to aid in the accomplishment of several such measures. The vacancy caused by his resignation was filled on January 2, 1829.

His complaisance is shown in two letters, both signed by Isaac McKim and Johnson and dated February 13, 1822, recommending to the Governor's attention two different men, who were candidates for appointment as attorney general of Maryland.¹² It should be stated, however, that one man is recommended for appointment, and testimony is given merely to the legal abilities of the other.

Through his advocacy of a broad construction of the Federal Constitution, he became a member of the Whig party at its organization, but he remained out of political life for seventeen years from the time of his resignation of his position in the State Senate.

¹² Md. Hist. Mag., vol. 6, p. 42.

In 1821, he became associated with Thomas Harris, Clerk of the Maryland Court of Appeals, in the compilation of a series of reports of the cases decided in that Court, which series is known, from the names of the compilers, as Harris and Johnson's reports. Seven volumes were issued, the last one appearing in 1827, and they covered the Court's decisions for the years from 1800 to 1826.

During the early years of Johnson's practice, he grew to know with some intimacy and greatly to admire Roger B. Taney, then practicing law in Frederick. They met in 1815, when Johnson was admitted to practice in the Court of Appeals and, in the years before Taney entered Jackson's Cabinet, they often conversed about the Bank of the United States, on which occasions Taney assured Johnson that if he were in the Cabinet, he should feel it to be his duty to remove the public money from the bank. After Taney's death, at a meeting of the Bar of the United States Supreme Court, on December 6, 1864, Johnson gave this Chief Justice this praise:

It was my good fortune to have his confidence and friendship, almost from the first, and greatly did I profit by it. Often his associate, and often his opponent, I had constant opportunities of judging of his legal learning, of his ability in its use, and the fair and elevated ground upon which he ever acted. In neither relation is it possible to exaggerate his excellence.

At this period, Johnson's practice was growing rapidly.¹³ In 1827, he pleaded his first case in the United

¹³ On August 1, 1868, on the eve of departing for England, Johnson wrote Rev. Thomas McCormick, thanking him for an engraving of Luther Martin and stating: "It was my good fortune to know him personally and to have argued several cases with him, and to have had in him a constant and valued friend." Johnson's opinion of the elder lawyer, expressed in this letter, is worthy of being remembered: "Whether Mr. Martin's character be estimated

States Supreme Court, the important one of *Brown v. Maryland*¹⁴ in which he was one of the lawyers for the State, and in which the important doctrines of the "original package" and the "police power" first appeared. About the same time, he became one of the first counsel for the newly chartered Baltimore and Ohio Railroad, of which corporation he was one of the legal advisers for nearly half a century.¹⁵ His success was so great that, in 1831, fifteen years after he had been admitted to the bar and when he was thirty-five years of age, he had an income of nearly \$11,000 and, for each of several years thereafter, he received about the same amount. He had friendly relations with such other lawyers as J. V. L. McMahon, the historian and author of the charter of the Baltimore and Ohio Railroad.

Among his associates was Evan Poultney, who was prominent in local financial circles, and who induced him, in September, 1831, to become a director of the Bank of Maryland, of which Poultney was president. Later, Johnson became one of the organizers of an insur-

by his steady patriotism during the Revolution, or by his services in the Councils of the State, or in the Convention which framed the Constitution, or as a lawyer, it stands as high as that of any man who lived during the same period."

¹⁴ Taney was with him. Wm. Meredith and Wirt were the opposing attorneys. 12 Wheaton 419. His first case in the Maryland Court of Appeals was *Biays v. Marine Bank* 4 Harris & Johnson 338.

¹⁵ Among the papers showing Johnson's usefulness to the railroad is his opinion on the dividend, sent from Washington on January 23, 1847, to Louis McLane, the President, which opinion was printed on March 6, as Document S of the Maryland House of Delegates at the December Session of 1846. Johnson approved the conduct of the railroad, in using the net earnings for improvements and giving bonds and one per cent in cash to holders of fifty shares and upwards of stock, but cash alone to those holding less than fifty shares. He was one of the counsel for the road in the early great case of *Chesapeake & Ohio Canal v. Baltimore & Ohio Railroad* reported in 4 Gill v. Johnson. Daniel Webster was with him and A. C. Magruder and Walter Jones opposed them.

ance company, in which the same persons were interested as in the bank. Engrossed in legal affairs, Johnson paid little attention to the affairs of the bank and cannot be acquitted of the charge of serving as a dummy director. In 1834, the bank failed and its funds were shown to have been used for speculative purposes. Three trustees were appointed, and McMahan and Johnson were named as their counsel. The trustees fell out, two of them disagreeing with the third. Ugly charges of fraud were made on both sides, and a war of pamphlets followed between the former president of the bank and the majority of the trustees. Considerable delay occurred, and a great deal of litigation hindered the depositors from receiving any part of their claims. A suit brought by the bank's trustees against a person associated with the former president was removed from Baltimore to Bel Air and tried there in May and June, 1835. An array of able counsel was engaged on either side and considerable latitude was allowed in the reception of evidence, with the result that Johnson was conclusively cleared from any wrong-doing in connection with the bank. Johnson's own argument in summing up was said by a fellow attorney to have scourged the defendant "naked, for three days, until even his adversaries were moved to compassionate him."

In Baltimore, however, many were led to believe that Johnson and the trustees were responsible for the failure to settle the bank's affairs promptly and, on the evening of August 7, while Johnson was with his family at Annapolis, whither he had gone on professional business, a mob gathered and broke some of the windows of his house. The mayor, who had been a director of the broken bank, was inefficient. On Friday, the 8th, more damage was done, after a meeting of the bank's credi-

tors had demanded that the trustees turn over the institution's books to them. On Saturday, anonymous inflammatory placards were scattered throughout the city and, on that night, a number of the citizens, called together by the mayor, some armed with round sticks and so called the "rolling pin guards" and others with muskets, met the mob, but the weakness of the city authorities finally left the lawless elements of the population in control of the situation and on Saturday night and Sunday, the houses of Johnson and the trustees were plundered and destroyed by fire. On Monday, the veteran, General Samuel Smith, was induced to place himself at the head of those citizens who wished order restored, the mayor resigned, and the mob was dispersed without calling upon Federal troops. Johnson went from Annapolis to Bel Air, whence he and his associates were soon invited to return to Baltimore and were promised the protection of the First Company of Independent Volunteers. He came back, rebuilt his house on Monument Square, bought William Wirt's law library of four or five thousand volumes to take the place of the one he had lost,¹⁶ and, on petition to the General Assembly, was allowed in 1839, nearly \$41,000 indemnity, on the ground that this loss had occurred through failure of the civil authorities to protect his property. Just after the riots on August 17 Johnson wrote from Baltimore to a friend, L. P. W. Balch, Esq., who was then practicing law in Frederick City, in reply to a note of sympathy¹⁷ and said:

In the midst of all my troubles, tears have never come from me, until reading your most kind letter. There is something

¹⁶ Many of the books in this library were burned in the Baltimore fire of 1904.

¹⁷ Balch endorsed the reply, "Reverdy Johnson's letter when his house was in ruins."

so touching in a heartfelt sympathy, that I was overwhelmed by it. What I have lost in property is to me, comparatively, of no value. I would at any moment cheerfully sacrifice all to stand unimpeached before my fellow citizens, and I must hope that, so far, I do retain, with a large portion of them, my reputation for integrity unimpaired. I am entirely unable to say how deeply sensible I feel for your kindness. My heart is too full to suffer me to describe my feelings. Any effort to do so would be more than useless. There is only one thing more that you can do to make me, if possible, still more warmly grateful to you than I am already. My professional character is better known to my brethren than to any other class of the community. And an expression of opinion from your hand would be most highly gratifying to me.

I suggest it with diffidence and feel that you duly appreciate my motive.¹⁸

In answer to a similar letter, McMahan wrote Johnson that:

I have always found you a man in whose abilities and integrity I could repose full confidence; that I have never had occasion to falter in that admiration of your talents and character which

¹⁸ This letter was printed by Mr. T. W. Balch in his *Balch Genealogica* at p. 213. As Johnson destroyed his papers, according to the recollections of his son, the late Reverdy Johnson, Jr., very few manuscripts remain which give information as to the life of our subject. The account of Johnson's connection with the bank and the riots is based upon the study of the following authorities: 3 Scharf, *History of Maryland*, 176; Scharf, *Baltimore City and County* 778; Scharf, *Chron. of Baltimore*, 474; The Memorial of Reverdy Johnson of the City of Baltimore to the Legislature of Maryland with appendix 1840, pp. 46; Memorial of Reverdy Johnson praying indemnity for the destruction of his property in the City of Baltimore by a mob in August, 1835, to the Legislature of Maryland, Annapolis 1836, pp. 18; Evan Poultney, *Brief Exposition of the Matters Relating to the Bank of Maryland*, p. 86; Poultney, *An Appeal to the Creditors of the Bank of Maryland and the Public Generally*, 1835; Memorial to the Legislature of Maryland by John B. Morris, 1836, pp. 21; Extracts from the Correspondence and Minutes of the Trustees of the Bank of Maryland published by J. B. Morris and R. W. Gill, two of the Trustees,

has grown up from a long and intimate acquaintance; and that, whatever others may say, I claim, what I hope I shall long enjoy, the privilege of calling you my friend.

Johnson's busy professional career was seriously affected by an accident which occurred in 1842.¹⁹ One of his friends had challenged a man, who had struck him, to fight a duel, and the challenger had come to Johnson's house to elude the officer who had a warrant of arrest against him. Whilst his friend was his guest, Johnson practiced with a duelling pistol. A bullet from the pistol rebounded from a hickory sapling at which he aimed and struck his left eye, so injuring it that he lost the sight of that eye. This was probably the cause of his later portraits being always in profile. In the course of time, the other eye failed through sympathetic action and he became nearly blind. Judge Dennis says:

"He could not walk the streets, or even a room with furniture in it, without the guiding assistance of some one, and was not able to recognize features at all;" but he "gained a remarkable skill in distinguishing voices and delighted to show friends to the last that he could find on the shelves of his library any book

having relation, principally, to their intercourse with Poultney, Ellicott & Co. and Evan Poultney, 1835, pp. 64; Anonymous, To the creditors of the Bank of Maryland, pp. 7; Anonymous, Final Reply to the Libels of Evan Poultney, late President of the Bank of Maryland and a further examination of the Causes of the Failure of that Institution, 1835, pp. 146; The Report and Testimony taken before the Joint Committee of the Senate and House of Delegates of Maryland to which was referred the Memorials of John B. Morris, Reverdy Johnson and others, praying indemnity for losses sustained by reason of the riots in Baltimore in the month of August, 1835, pp. 77; Reply to a Pamphlet, entitled a brief exposition of matters relating to the Bank of Maryland, pp. 59; State of Md. v. Bank of Md. 6 G. & J. 205; Union Bank of Tenn. v. Ellicott, 6 G. & J. 364; Campbell v. Poultney. 6 G. & J. 94; Bank of Md. v. Ruff. 7 G. & J. 418.

¹⁹ 2 N. Sergeant's Public Men and Events. In 1832, Samuel Houston sent Johnson with a challenge to Stansberry on account of language used by the latter on the floor of the House of Representatives. 16 S. W. Hist Quar. 124.

he wished, from the lettering on the back. Great as was his calamity, he was undaunted by it, had the newspapers read to him for important events and, as he had been always courteous to others, found a return of that courtesy in the eagerness with which his juniors at the trial table gladly found his references in the books.²⁰

His blindness was the less of a misfortune to him, in that he was not in the habit of citing many authorities. Never a bookish lawyer, he devoted himself chiefly to evolving rules applicable to the particular case from the fundamental principles of the law. His limitations of sight prevented him from being a profound student of reports of textbooks in general, but he knew the *Federalist*, and the *Commentaries of Kent and Story on the Constitution*, as well as the reports of the United States Supreme Court, so thoroughly that he had a wonderful fluency of reference to them, and his remembrance of events in American History was so great that his power as a constitutional lawyer was scarcely affected. Judge Charles E. Phelps tells an anecdote showing that Johnson could even jest as to his blindness:

There had been a temperance meeting in Baltimore a few evenings before Johnson met Judge Hugh Lennox Bond, and Judge Bond, referring to it, remarked: "Mr. Johnson, I was very glad to see you on the platform at our temperance meeting the other night."

"Yes," said Mr. Johnson, "and I had you in my eye, Judge."

"Which eye, Mr. Johnson?"

"Why, which one do you suppose? The only one that can see."

"He was a thorough master of the underlying principles," says Judge Dennis, "and his powerful intellect

²⁰ Vide Forney's remarks in Proceedings of Bench and Bar after Johnson's death.

and extraordinary gift of common sense built upon these foundation stones a structure that was difficult for any attack to shatter." For example, the case of *Bayne v. the National Banks*, tried in the United States Circuit Court in Baltimore, before Chief Justice Chase and District Judge Giles, involved a very large amount of money and the correct interpretation of the national banking law.²¹ Against Johnson was Judge Benjamin R. Curtis of Boston, Johnson's great rival at the bar, yet in the speech he made then, which still seemed to Judge Dennis many years afterwards, "the greatest law argument" he ever heard, he referred to only one authority, "and few that heard him, after he had argued out his case on principle, thought that he needed the support of even that one citation." Not only did he cite very few authorities, but he was equally sparing of quotations and allusions to persons and events in history outside of the national history of the United States. In all his speeches, I have come across hardly half a dozen quotations and these, singularly enough, are all of verses of poetry of very little merit. Unfriendly critics commented on this lack of display of literary attainments and said they would not go to court to hear him speak, as they "had no desire to hear a man whose vocabulary consisted of six hundred words;" but the men, who went to hear him, listened to a forceful and well chosen vocabulary, powerfully used and adequate to carry conviction of the cause argued. He had a little trick of repeating a noun with each of several adjectives by which he wished to modify it and certain words of Latin origin were favorites with him; as for example, he said *termination* instead of *end*. But there were few mannerisms in his straightforward and direct discourse.

²¹ This case is not reported.

He never bore malice, and when an altercation in the Criminal Court, in which he often practiced, led in June, 1843, to a challenge to a duel between him and George R. Richardson, another attorney, a prompt arrest of Johnson by warrant and a day or two's reflection brought him to shake hands with his antagonist in open court and to a complete reconciliation which lasted until death.²²

The most complete description, which I have found of Johnson's personal appearance in his prime is given by Judge Dennis:

He was of medium height, round bodied, solidly, almost sturdily, built, just such a physical mould as indicated perfect health, capacity for work and endurance, without the risk of a breakdown, of all the toils and strains of the most active life at the trial table. He was cursed with neither nerves nor liver, but was the robust embodiment of *mens sana in corpore sano*. His features were strong; his forehead of great height, fulness, and breadth; while the back of his head was shaped like a barrel and seemed to bulge out all around, as if indicating holding capacity. But the dome of his head was its most striking feature, so lofty, so symmetrically rounded, that it seemed to tower above all others, as the dome of St. Peter's minimizes all other designs.

Shortly after 1840, Johnson visited Europe and spent some time in London, during which he attended the House of Commons for a week, in order to hear the debates.²³ He served as a delegate to the national Whig Convention in Baltimore in December, 1839 and, at a critical moment, read a letter from John M. Clayton of Delaware, declining to allow his name to be used as a candidate for the Vice-Presidency, which declination

²² Scharf, Baltimore City and County. 713.

²³ Speech in Senate of March 4, 1847.

led to the nomination of Tyler.²⁴ After Harrison's inauguration, on March 21, 1841 he wrote to Francis Granger, the Postmaster General, recommending Richard Swann, who had long been a zealous Whig, for the postmastership of Annapolis.²⁵ Johnson would rather keep the incumbent in office, but knew that his conduct in the presidential campaign brought him under the general rule for removals, which rule is right in general. The Maryland Senators had recommended another man, but one of the Senators lived on the Eastern Shore and the other on the lower extremity of the Western Shore, and neither knew anything about Annapolis, where two-thirds of the people wished Swann's appointment. Johnson himself knew the people of that city well, "being one of them for years and always in constant association with them." In the presidential campaign of 1844, he took an active part, serving as delegate to the Whig nominating convention in Baltimore, and presenting the report of the committee on the platform. He also addressed, together with Webster and other leaders, a vast concourse at a popular ratification meeting²⁶ at Canton, in the suburbs of Baltimore.²⁷ A few months thereafter, the Maryland

²⁴ Thurlow Weed, *Autobiography*, Vol. I, p. 482, and Vol. II, p. 77.

²⁵ After Tyler became President, Johnson wrote J. J. Crittenden on August 30, 1841 (1 Colemans Crittenden 160) that Alexander Hamilton of New York, an intimate friend of Tyler, had visited Baltimore to see Judge Upshur and Mr. Maher, and that the impression was that Hamilton had been sent to sound them as to a new cabinet, in which Maher should succeed Crittenden. If Johnson's suspicion be correct, he cannot speak of the attempt, "without using terms of the President that should not be applied to him except in the last emergency."

²⁶ See Granger Papers in Library of Congress. Scharf, *Chron. of Balto.*, 511. An interesting letter to Van Buren written September 29, 1840 is printed in the *Md. Hist. Mag.* for September, 1914.

²⁷ Mr. Higgins relates that Johnson, in the course of his speech, having drawn the contrast in public service between Clay and Polk, exclaimed: "My fellow citizens, who is James K. Polk?" After it was "definitely settled that Mr. Polk was elected President," one evening, a crowd gathered in front of

legislature elected him to the United States Senate, where Hon. James Alfred Pearce, his colleague presented his credentials on February 4, and where he was sworn in as a member on March 4, 1845.²⁸

Johnson's residence and began to cry, "My fellow citizens, who is James K. Polk?" Finally, Mr. Johnson appeared on his portico, with hat in hand and bowed to his audience. When all were silent, he said: "My fellow citizens, James K. Polk is the President-elect of the United States. Good night." He then retired and the assemblage dispersed in good humor.

²⁸ Through the courtesy of Mr. Louis H. Dielman, executive secretary of the Peabody Institute, we are able to quote from the autobiography of John P. Kennedy (II, 127, 1845), a passage which throws some light on this election:

"Merrick's term of service in the Senate being limited to the 4th of March, 1845, it became the duty of the Legislature last winter to make an election of his successor. The most *active* candidate for this appointment was Reverdy Johnson, who has been working for it for the last six years. He and his friends have been personally excessively industrious in attempting to obtain it. And as soon as the Legislature met they were on the spot using all the customary means to promote his success. His extreme unpopularity in the State was in a great degree counteracted by the assiduity of those who took his case in hand. There were other candidates spoken of—Cost Johnson, Wm. Price, Genl. Chapman and others—besides myself.

Holding it to be a matter which deeply concerns my own character and my desire to preserve the utmost personal independence as well as self respect, I not only refused to take any steps directly in my own behalf, but also indirectly to engage the services of friends. I was content that the question, so far as I was concerned, should rest upon the uninfluenced suffrage of the Legislature. Early in the session it was found that Reverdy Johnson had not a sufficient force to secure his nomination in a caucus. By management therefore a caucus was postponed. The Whigs had a large majority in the Legislature, and continued efforts were made to bring a sufficient number into Mr. R. J.'s interest. Cost Johnson, who was a member of the Legislature, told me after the session was over, that finally it was ascertained that Reverdy's party had grown strong enough to secure the nomination. Before this was done Cost made a proposition to withdraw his name and recommended that all his friends should unite upon me. It became apparent at that period that I would have got the nomination. This induced a concentrated and vigorous effort against me, which by means of such appliances as are unhappily too common in Legislative bodies, had its effect to secure a majority of two in favour of R. Johnson in the caucus. This being discovered to be the condition of things, the caucus was held and upon the first ballot Johnson obtained 38 votes,—37 being sufficient for the vote. If the nomination had not suc-

ceeded on this first ballot, Cost Johnson tells me I would have received a large majority on the second. Reverdy Johnson thus obtained the nomination and was elected. He is a man of talents, a very earnest Whig and will make an efficient Senator—though I have no reason to suppose he will ever become eminent in that body. He is a pretty good lawyer, with some very striking defects even in that character; but he is very far from being a good speaker, or an effective debater, and he is singularly deficient in all accomplishments which might render him either a conspicuous or a useful statesman. What redeems him however from many deficiencies, is a pleasant and attractive good fellowship, which I think will make him popular with his party in the Senate. We have made in his appointment a most profitable exchange from Merrick.”

CHAPTER II

SENATOR, ATTORNEY-GENERAL, LAWYER (1845-1860)

Johnson began his national career, when he was nearly fifty years old and at the beginning of the Mexican War. His first activity¹ in the Senate occurred in the session which began in December, 1845, and he quickly showed himself the peer of such great men as Clay and Calhoun. Johnson resided in the same house with the latter for two sessions, and receiving much of Calhoun's confidence, frequently heard him in private argument, with "wonderful acuteness," defend nullification on constitutional grounds. Johnson never told him that he did not take that view, "but could see no more constitutional warrant" for nullification than for secession, which Calhoun carefully distinguished and which he "repudiated, as wholly indefensible as a constitutional remedy." Both men agreed that secession could be placed "on no other ground than that of revolution."²

The first important speech made by Johnson on March 11, 1846, was upon the Oregon question.³ In it, his eloquence and sarcasm were directed to an attack upon the administration. He defended a compromise on the line of 49°, moved that England be notified of an abro-

¹ He presented petitions on December 29, and introduced, on the 30th, a resolution, adopted on the next day, asking the Committee on Military Affairs to inquire whether for purposes of defence the United States ought not to subscribe to the Baltimore and Ohio Railroad.

² S. S. Cox, *Three Decades of Federal Legislation* 101, extract from letter of Johnson to Edward Everett, June 24, 1861.

³ He had spoken on preemption of public lands on January 13, and on a bill giving recompense for a ship confiscated during the war of 1812, on February 4, and had made inquiry as to the policy of the administration in reference to Oregon on February 26.

gation of the previous joint occupation of the Oregon country, and favored peace, as the Christian attitude.⁴ Two months later, however,⁵ he broke from his party, declared that he believed that a state of war existed between Mexico and the United States, and that the territory of the United States had been invaded. He would have voted against the annexation of Texas, but did not think that his country was the aggressor in the war. He uttered these views, not only on the floor of the Senate, but also in a public meeting in Monument Square in Baltimore on May 23.⁶ He showed his loose construction views, by advocating action in emergencies when the constitution was silent.⁷ In the latter part of June, a resolution, introduced by Johnson, passed the Senate, calling on the Secretary of War to report whether any individual had been authorized to raise volunteers. President Polk sent for Johnson and had a frank conference with him on the evening of July 6, reading him copies of the papers showing the plans of a campaign into California. Polk said that the publication of these papers "would probably defeat our objects and be most prejudicial to public interest," as exciting the "jealousy of England and France." Johnson agreed with Polk as to this and said he "regretted that he had not known more on the subject, before he moved the resolution." He further advised that the call be not answered and said that, "if any thing was said about it in the Senate, he would take pleasure in stating that he had seen the papers and deemed it improper that the call should be

⁴ Vide speech also of April 16.

⁵ On May 5 and May 12, he had spoken on preemption claims, and on June 29 he spoke in opposition to selling public lands at too low a price.

⁶ Scharf, Chron. of Baltimore 516.

⁷ Vide speech of June 5, Webster denied the right to take such action as that of Gen. Grimes, whom Johnson defended for calling for troops in May.

answered.”⁸ Johnson was not called on to make this statement, however. His only other speech on the Mexican question at that session was one of some length, delivered on August 5, in which he “ably advocated” Benton’s motion on an indemnity.⁹

During July, he was active in the discussion of the tariff bill.¹⁰ He opposed the lowering of protective duties and on the 18th, in a speech of three hours length, maintained that the bill would not bring in enough revenue. He denied that the citizen paid the tax, pointed to the prosperity which had followed the tariff of 1842, and maintained that Polk had carried Pennsylvania through a promise to support it. If the Federal Government has no power to lay protective duties, the States are industrially yet colonies, nor had there been a protest against the rightfulness of such duties from 1789 to 1822. Johnson served on the Finance Committee and, both in the committee and on the floor of the house, protested against a hasty consideration of the bill.¹¹

At the next session of Congress, on January 7, 1847, he advocated successfully the printing of memorials from Louisiana, criticising its representatives as unfaithful to the State’s interests because of their votes on the tariff bill. On March 4, speaking on reporting by con-

⁸ 2 Polk’s Diary 13.

⁹ The speech is not extant.

¹⁰ The only other subjects on which he spoke in the latter part of the session were the issue of treasury notes which he advocated on July 16, to avoid transportation of specie, the purchase of the toll bridges over the East Branch of the Potomac by the United States, which he successfully advocated on August 3, and the act disaffirming the laws of the territories of Iowa and Wisconsin granting banking privileges, which act he opposed in an elaborate argument on August 6.

¹¹ Vide speech of July 6, and motion of July 28, to commit the bill to a select committee on raw materials, on which motion there was a tie vote, whereupon the vice president cast a negative vote. On July 27, Johnson also spoke on frauds on the revenue of the United States in the tariff bill.

tract, he contrasted the reports of the debates in the Senate with those in the House of Commons, to the disadvantage of the former. He opposed, on January 19, a limitation on sale or devise for seven years of bounty lands, speaking in behalf of Maryland soldiers who might not wish to emigrate, and urging that it was better to run the risk that speculators should secure the land than that it should be eaten up by several years' taxes. In carrying on the war, he urged active measures, and, on January 22,¹² decried the use of militia, who choose their own officers, as the "least efficient, the most dangerous and expensive course," only suitable for a "sudden crisis." So that the Mexicans, who had invaded our soil, might speedily be brought to terms, he favored large increase of the army, and the levying of additional taxes on tea, coffee, etc.¹³ On February 6, he spoke again on the Mexican situation. Polk asked an appropriation of two million dollars, to enable him to conclude a treaty of peace and Cass, as chairman of the Committee on Foreign Relations, recommended that the amount be increased to three millions, and proposed a preamble to the measure setting forth the character of the war. Johnson felt that the war was just, but as a pacifier, he objected to a statement, to which "many high minded men in the Senate" could not agree, and which would drive these "brother Senators" to vote against the bill, or to vote that a war was just, which they believed "illegally brought" on the country. He also felt that, as the reasons for going into a war have nothing to do with a declaration of peace, Cass's preamble needlessly increased the impedi-

¹² Johnson's speeches of January 22, sent to Annapolis, and February 9, were revised by him and appear in the appendix to the *Globe*, as did that of July 19, 1846.

¹³ As a good Whig, he wished the repeal of the subtreasury act.

ments to peace, by insulting the public opinion of Mexico, declaring her a causeless aggressor. The bill also showed the "white feather," by proposing to buy a peace, while "a nation engaged in a war—just or unjust—is in a condition in which every consideration demands that it should be brought to a successful and honorable termination." He was emphatic in his attack on the administration for inefficiency in its military policy and for its permitting Santa Anna to return to Mexico, as well as for its "project of terminating the war by dismembering a sister republic, which plan is so revolting to my moral sense, to all my notions of propriety, honor and justice, that I would see my arms sink palsied to my side rather than to agree to it." The president brought on the war and if he refused to treat, or to conduct the war, as Congress wished, that body might give an opinion, which, if Polk rejects, will make him "liable to impeachment." The Democrats say that if the war goes on we may annex all Mexico and already it is proposed to acquire a territory equal to the original thirteen states. War would never have been approved by Congress had the object been stated "to get territory, not to vindicate the natural rights, not to drive off supposed or alleged invaders of our soil, not to protect our sister State of Texas, . . . but in order to pay our own citizens the debts due them by Mexico, . . . and in order to obtain New Mexico and California." His astute mind foresaw that the questions likely to "arise on the admission of any new territory" might "cause the Union to totter to its very foundations." We have enough land and the South is in no danger, with the country's existing limits, but the "only way to keep back the northern conscience as to slavery" is to refuse to admit new territory. Already

the legislature of New York had adopted resolves that the North West Ordinance as to slavery should be extended into any annexed territory and an Alabama Senator had said that such extension was in "derogation of the United States Constitution" and "at war with the rights of slave States." Johnson, cheerfully, would vote for the prosecution of the war, but would "blush for my country, if she persisted in exactions upon a feeble and impoverished foe, which the world would justly anathematize as rapine and plunder." He felt that annexation of the proposed territory would be followed by "one of two things: civil war with all its inconceivable horrors, or disruption of the Union and a violated Constitution." The strong and prescient words of this speech were followed by another address, delivered on March 1, upon the Wilmot Proviso, against the establishment of slavery in the territory proposed to be annexed.¹⁴ Johnson opposed the measure on constitutional grounds, since, by the "Spirit of the Constitution," the States are to be equal in all respects, and, consequently, the citizens of slave States should not be prohibited by Congress from settling with their slaves in acquired territory. If slavery could be prohibited, in a manner binding on the States formed from new territory, so it could be established there permanently. "I can vote for neither," said Johnson, for he was not a proslavery man, adding: "I believe and have ever believed since I was capable of thought, that slavery is a great affliction to any country where it prevails and, so believing, I can never vote for any measure calculated to enlarge its area, or to render more

¹⁴ In April 1873, Johnson, whom Henry Wilson describes as "an eminent lawyer, and statesman of recognized ability and large experience," wrote him that he would have voted against the Wilmot Proviso, had opportunity been given. "Rise and Fall of Slave Power" Vol. II p. 17. Vol. III p. 440.

permanent its duration. In some latitudes and for some agricultural staples, slave labor may be, for the master, the most valuable species of labor, though this I greatly doubt. In others, and particularly in my own State, I am convinced that it is the very dearest species of labor and, in all, as far as natural wealth and power and happiness are concerned, I am persuaded, it admits of no comparison with the labor of freemen and above all, disguise it as we may, if the laws of population shall not be changed by Providence, or man's nature shall not be changed, it is an institution, sooner or later, pregnant with fearful peril." So believing, he had early emancipated the slaves, whom he had inherited from his father, and did not agree with the South Carolinians in claiming that there was a "conservative influence of slavery on our free political institutions." Yet he showed the nervous sensitiveness on the negro question always displayed in the South, attributed much of the strength of the proslavery sentiment, especially in Maryland, to the efforts of political abolitionists and insisted that the North must leave the question to be settled by southern men exclusively.

When Congress met in December, 1847, Johnson's position was established as one of the leading members of the Senate. In his first speech on December 30, he asked for the number of those who died of disease and who were killed in Mexico, maintaining that the great mortality which had prevailed was due to the lack of the same degree of discipline among volunteers as among regular troops and, therefore, urging that the regular army be increased, rather than that more volunteers be raised. On January 10, 1848, he began an important speech on the ten regiment bill, which he concluded with an eloquent peroration on the following day. Johnson

had come into the Senate, "differing with the administration on almost every subject of our public civil policy" and his experience in that body had "more and more strengthened and confirmed" the differences between him and the Democratic party, on all questions but the war. "I believe," he said, "they misapprehend the true policy of the country and fundamentally err upon great and vital points of constitutional power." It is interesting to observe that he spoke of the conditions in the civil service as bad, because "bred in the corruption of the motto of the political freebooter that the spoils belong to the victor." He discussed the Texan question¹⁵ from 1834 and defended our claim to the Rio Grande as a boundary, maintaining that the war was just and honorable and that the United States had a just cause for war. They were right in striking the first blow in self-defense, because of the hostile acts of Mexico in mustering an army and marching "with the avowed purpose of taking forcible possession" of the disputed territory. After a vigorous description of the horrors of war and our wickedness in waging war, if it be not a just one, he said that, though the nation had given Polk all the power he wanted and there have been great victories, yet there is no peace. Deluded with the idea "that peace was to be obtained without the effusion of blood," Polk's "ostentatious" vigor had given Taylor and Scott such small forces that they could not properly follow up their victories.¹⁶ War should be carried on in the heart of Mexico, till that country agreed to terms of peace, by which we may obtain "vindication of our

¹⁵ On June 30, he said we should adopt a treaty instead of resolves of annexation.

¹⁶ The administration had relied too much on volunteers, forgetting that "the expense of a regular force is much less and their efficiency infinitely greater, above all that the sacrifice of human life is less."

violated honor and indemnity for our heretofore violated rights," but not a dollar should be spent to "annihilate the nationality of Mexico, or forcibly to dismember her territory." He proposed confiscation of Mexican revenues to pay the United States army and advocated a treaty, placing the Rio Grande as a boundary. "If there be any national crime more crying and enormous in the opinion of all Christendom," said Johnson, "it is the forcible dismemberment of the territory of a weaker nation." Annexation was also sure to lead to the discussion of slavery, a "subject which no Southern man on this floor, when he can avoid it, desires to discuss." "The Southern States owe it to themselves, one and all of them, to stand on their own rights, to vindicate their own equality and, exclusively at their own time and without the interference of others, to meddle in their own way with this peculiar institution," interference with which may lead to "deadly conflict or amicable separation."¹⁷

Although he attacked the administration, he opposed on April 28 a bill appointing a board to investigate Californian claims, because it named the members of the board and did not leave the appointment to the President. Johnson felt no alarm from the "tendency of the times to curtail the legislative and enlarge the executive power." Both power of appointment and of veto must be placed in the hands of the President. The United States could not have existed but for the veto power. "What more than anything else prevents the successful

¹⁷ On May 8, Johnson spoke, urging delay in the question of Yucatan and on June 30, he defended a bill for the relief of men who had contracted with Texas to build war vessels. The United States were bound by honor and justice to pay them. On July 7, he spoke on extra allowance to paymasters and on the claims of citizens, many of whom were Marylanders, against Mexico. On August 11, he spoke on Mexican claims.

assaults of popular passion upon the guarantees of the constitution, except the knowledge that there exists in the government one man who can stop it until the question is submitted to the sober good sense, better thought, and matured consideration of the people?" Yet Johnson, on May 12, bitterly opposed the quasi-usurpation of Tyler, in vetoing the bank bill, and of Polk, who could not be reëlected, in vetoing the river and harbor bill and the French spoliation bill. Would the Democratic senators, to whom the executive lash had been applied, have selected Polk for the presidency as the convention, that "political excrescence" did? Why had not he sent in the nominations for positions in the army?¹⁸ The fact that Jackson had induced the Senate to expunge its resolution censuring him showed the "overshadowing influence and power of a President."¹⁹

He eulogized Taney for his diligence, character, and industry, on April 18, when urging legislation to prevent delay in hearing cases by the United States Supreme Court. The judges of this court are old and should be so, for young men are rash, but their age makes them feebler. He praised them for the Herculean labor they perform and had heard them praised in England. Johnson opposed the election of Judges by the people. It was a "system productive of nothing but unmixed mischief" to have candidates nominees of a political convention. Judges will then strive for reëlection, while a man once upon the bench should never again go into politics. In this speech, Johnson showed his love for the nation, by saying: "Loss of freedom is alone to be compared to the loss of the Union, nor, indeed, can freedom be lost, if the Union is in good faith preserved."

¹⁸ Vide speech of May 9.

¹⁹ Vide speech of May 10.

The bill for the organization of the territory of Oregon brought Johnson several times to the floor of the Senate. On June 23, he objected to the prohibition of slavery therein, whether the settlers wish it or not. On July 10, he felt the overshadowing importance of the presidential election,²⁰ and regretted that the slavery question could not have been postponed. Events showed the growth of moral degeneracy through the Southern section." The annexation of Texas and the bungling of the Mexican war caused "our present mournful condition," and, although he hoped that good sense would avert disaster, he felt that "the array of State against State and citizen against citizen was a spectacle which he regarded as ominous of fatal results to the Union." "If these signs continue to increase, the separation of the States is inevitable." "When the day shall come, when the whole northern territory of the United States shall be admitted as States and be represented" in the Senate, Johnson "was aware that slavery would no longer be permitted to exist in the South." He attacked Van Buren and his policy of slave restriction and found in the Constitution no power of prohibiting slavery in the territories. He wished, from his heart, "that no African had ever been brought to this country, but that our land was exclusively peopled by freemen." Though "slavery was a great evil," it was a "domestic institution, in some respects mutually advantageous" both to slave and to master. Maryland had found that, through the instigation of Northern men evils came from manumitting slaves and had restricted the right to emancipate. Northern men had also supplied the South with

²⁰ On July 3, speaking on the adjournment of Congress, he attacked the sketches of General Cass sent out by the Democrats, one for the north and the other for the south.

slaves, and part of the responsibility for the evils of slavery rested on them. Compromise now should settle this "agitating question, at once and forever," or it would be "settled by blood or separation." Yet there was a "greater evil than disunion and that was self degradation." The Northern men must not "cast on the South a conviction" that they regarded Southern men as inferior to themselves. In a third speech, on July 26, upon the Oregon bill, Johnson suggested a reference of the slavery question to the Supreme Court, as the only amicable way of adjusting a question which "threatened the honor and interests of the South." With considerable heat, he claimed that northern men had insulted Southerners in this debate and the men of the South would rather yield their lives, than "do the bidding of the North," but would bow to the Supreme Court, whose decision would be acquiesced in by all. The South was willing to abide by the law and there would "not be found, in the whole Southern bar, a lawyer who would not give, gratuitously, his services to a black man to free him from slavery, while there was a reasonable ground for the application." The Northern States had only recently abolished slavery and Connecticut had scarcely become a free State, while neither that State, New York, nor New Jersey allowed negroes to vote. The Free State men should have offered to extend the Missouri Compromise line.²¹

Johnson's only other action of note at this session was the presentation of a memorial, on April 11, for an appropriation for the establishment of institutions for instruction in science, engineering, agriculture and mechanics. He urged the favorable consideration of this request and maintained its constitutionality.

²¹ On August 10, he spoke for a fourth time on the bill, to the same purpose.

At the session of 1848 and 1849, Johnson's activity was less important²² and, on March 9, he sent in his resignation of his senatorship, as he had been appointed Attorney-General by President Taylor.

When Zachary Taylor was elected president in 1848, a bill was pending for the establishment of the Department of the Interior, and certain senators were induced to vote for it and thus secure its passage upon representations made them that, if a new secretaryship were created, Taylor would be able to find a place among his heads of departments for Reverdy Johnson,²³ for whom they had a deep admiration.²⁴ Johnson held the position of attorney-general until Taylor's death, in the summer of 1850. His opinions are of little interest.²⁵

In general he believed in following the doctrine of

²² On December 18, he opposed allowing the Secretary of the Navy and the Postmaster General to have full power to contract with the Panama railroad, because of the danger of exorbitant rates. On January 18 and 24, he attacked a bill to make Captain Percival pay the expense of a naturalist, who was employed without authority on an exploring expedition, since the naturalist had brought home minerals, which the United States holds, and rare seeds which had been distributed throughout the country by members of Congress. On January 26, he again spoke favoring the payment of Texan debts for building men of war. Texas can not now lay import duties, and her lands may not be worth anything for years, while the United States took over the vessels. On March 4, he opposed a bill extending the privileges of the writ of habeas corpus to the territory of California on the ground that the bill was not necessary, since the extension of the laws of the United States to the territory will cover the ground.

²³ See remarks of H. S. Foote in Proceedings of Bench and Bar after Johnson's death.

²⁴ Wm. H. Seward (2 Seward's Seward 103) wrote to Thurlow Weed on March 4, that Johnson for Attorney-General "is very well." On February 28, 1847, Seward had written Weed from Washington (2 Seward's Seward 38) that Johnson sought to know whether New York would be content to let Mangum, a slave holder, be Vice President. Johnson seemed to Seward to favor McLean.

²⁵ Opinions of the Attorney-General, pp. 1993-2092. 7 Exec. Docs., 31st Cong. 2nd Sess.

stare decisis with reference to the opinions of his predecessors, though he decided differently from them, when he saw good cause to do so. His most interesting decision, especially in view of his later diplomatic career, is one against allowing the purchase and fitting out in New York of a steamer by the German government, as an act contrary to the neutrality law, inasmuch as the ulterior purpose of Germany was to use the vessel in the war against Denmark. In many respects, Johnson was admirably adapted to be attorney general and it may be regretted that he had not greater opportunity to distinguish himself in that office. Judge Dennis rightly says his highest fame will always rest "upon his achievements as a constitutional lawyer." He early constructed for himself a system of constitutional interpretation, to which he held with marvellous consistency throughout the shifting scenes of his life, and so wide was the extent of his exposition of the Federal Constitution that it would be possible to construct almost a complete commentary on that great document from his published speeches and addresses.

Crawford, the Secretary of War, had been attorney for the Galphin claim against the Federal government and received half of the award, and, as Johnson said the law of 1848 allowed interest, Crawford received \$94,000. This produced a scandal. Crawford said that he never told Meredith, the Secretary of the Treasury, nor Johnson, of his connection with the case, but merely urged a prompt decision, and Johnson said that he had no knowledge of Crawford's interest. The papers in the case showed the interest, so Johnson confessed to a cursory examination of the matter. A resolution was introduced into the House of Representatives, disapproving of Johnson's action, and Taylor discussed with

Thurlow Weed replacing all three cabinet officers by others, but the President's death put an end to the difficulty.²⁶

After retiring from the attorney generalship, Johnson returned to the active practice of the law and, for a decade, but fleeting glimpses are caught of him. In 1850, he opposed Edwin M. Stanton as attorney in the well-known Wheeling Bridge Case.²⁷ He had previously argued with John B. Henderson against Henry D. Gilpin, the case in which the Woodsworth planing machine patent of 1828 was involved,²⁸ and the case of *Waring v. Clarke*, in which he found J. J. Crittenden against him and which foreshadowed the later decisions as to admiralty jurisdiction.²⁹ In 1854, he was associated with Thaddeus Stevens in securing a decision in favor of the validity of the McCormick reaper patent,³⁰ and two years later, he took part in a second suit between the same parties, having Abraham Lincoln and E. M. Dickerson as his associates and Edwin M. Stanton as one of his opponents.³¹ The case was first tried in the Circuit Court in Ohio before Judge McLean, and, being appealed to the Supreme Court, was heard there in 1857.³²

²⁶ See 1 Rhodes U. S. 202-204, 1 Weed Autobiography 589 (on p. 587 Weed wrote that he went to Washington when Taylor was inaugurated and "called upon the Attorney-General, Reverdy Johnson, with whom I had long been intimate who received me so coldly that I did not even sit down." This is an unusual statement, for Johnson was usually very genial).

²⁷ *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 9 Howard 649. On May 28 and 29, 1851, he argued in the United States Circuit Court in New York in a case concerning the property of the Methodist Church.

²⁸ 4 How. 646.

²⁹ (1847) 5 How. 341.

³⁰ *Seymour v. McCormick* 16. How. 480.

³¹ George Harding was with Stanton in the Circuit Court and Henry R. Selden and P. H. Watson were also against Johnson in the Supreme Court. *Seymour v. McCormick* 19 How. 96, appeal from 6 McLean 529.

³² Dickerson, in the Proceedings of the Bench and Bar after Johnson's death, referred to this case argued, by Johnson, when he "was in the maturity of his

In 1855, he was engaged with J. M. Campbell in the important cases of *Williams v. Gibbs* and *Gooding v. Oliver*.³³ In 1854, he was employed, together with Lord Cairns, as counsel in London to argue a claim before the Joint English and American commission established under the treaty of 1854,³⁴ and while there he received much attention from public men and from members of the English bar. Shortly after his return from England, he became one of the counsel for the defense in the great *Dred Scott* case before the Federal Supreme Court.³⁵ Johnson illustrated a conspicuous characteristic of his character, by entering this case without any fees. The other counsel upon both sides also served without fees in this case. This was not an isolated instance of Johnson's serving without remuneration. Although he was said to receive larger fees than any other member of the American bar, when either his sense of justice or the presence of some nice constitutional or legal point was noticed in the case, he frequently volunteered his services and kept up this generous practice until the last days of his life. The *Dred Scott* case was heard twice, and Senator Geyer of Missouri, a native of Maryland, was with Johnson at both hearings. Against them was Montgomery Blair, with whom George Ticknor Curtis was joined at the second hearing, on December 18, 1856. Years afterwards, when Johnson was dead, Curtis said:³⁶

strength and with a reputation secured and safe," and said that Andrew Johnson was concerned in the case also.

³³ 17 Howard 239 & 274. He was for appellees and secured a reversal of the Court below. The case arose out of a claim for fitting out of an expedition about 1816 to attempt to secure Mexican independence.

³⁴ 86 Eclectic 502.

³⁵ Vide 2 Nicholay & Hay's Lincoln 64.

³⁶ In remarks published in Proceedings of Bench and Bar after Johnson's death.

"It was the forcible presentation of the southern view of our Constitution, in respect to the relation to slavery to the territories and of the territories to the nation, that contributed more than anything else to bring about the decision that was made in this case. I believe that he held those opinions with entire sincerity; at any rate, he enforced them with great power. Those who were opposed to him (and I happened to be one of them) felt the force of his arguments and foresaw what their effect would be on a majority of the Court."

In his defense of the Court, and particularly of Chief Justice Taney,³⁷ for this decision, Johnson was always most emphatic,³⁸ and the only time in his senatorial service during the Civil War Period, when he lost control of himself and made a bitter personal attack upon his antagonists was in defence of his friend, the Chief Justice, of whom after his death it was proposed to provide a bust by federal appropriation.³⁹

³⁷ For example in a letter to a public meeting at Baltimore on March 6, 1858, Tyler's Taney, p 385. In this letter, which is also printed in B. R. Curtis's Life 237, Johnson pleaded that, if McLean and Curtis gave separate opinions, so should all other judges.

³⁸ 3 Scharf Md. 309. On October 13, 1864, Johnson spoke at a meeting of the Bench and Bar of Baltimore upon the occasion of Taney's death and defended him as historically right in saying a negro had no rights, etc. We saw in Taney, Johnson said, "everything that characterized a good and humane citizen. . . . We knew him to be humane, to be charitable, to be a Christian gentleman." See also Tyler's Taney, pp. 492, 496.

³⁹ 2 Rhodes U. S. 255 & 269. Ex-Senator Bradbury told Rhodes that northern Democrats in 1857 said that Johnson induced Taney to give the "political" decision. Pike wrote to the Tribune of Johnson that "no man is so intimate with and no man possesses so much influence over the Chief Justice as he," and Rhodes says that Johnson's social relations with Taney were such that his views could be enforced in private conversation, but gives *no* proof that this was done. Judge Brewer (98 Atlantic Monthly 590) relates a story of Johnson showing another side of his character, to the effect that once, when "employed to defend parties in South Carolina, charged with cruelty to negroes," he "was so shocked by the revelations of the character of his clients that, in the midst of the trial, he abandoned the case and left it to the care of junior counsel."

He possessed a marvellous power of making and keeping friends in both political camps, and, when Brooks assaulted Charles Sumner, sent promptly a message of "kindest remembrance" to the latter, asking concerning his condition and expressing the "highest regard for him as a friend, though differing with him on the exciting question of the day."⁴⁰ When Mr. Justice B. R. Curtis, one of the minority in the Dred Scott decision, resigned from the bench of the Supreme Court in 1857, Johnson wrote him twice, expressing his regret⁴¹ and adding that: "It would much increase the true concern of losing you to the bench, if I thought that I was not often to meet you. It is in all sincerity that I assure you that much of the gratification I have had in attending the Supreme Court, was that you were of it."⁴² At the break-up of the Whig party, in 1854, Johnson affiliated himself with the Democrats,⁴³ and, in 1856, he is said to have made an eloquent address in favor of the election of Buchanan to the Presidency.⁴⁴

Although absent from a dinner at the Maryland Institute, on September 18, 1855, given in celebration of the anniversary of the adoption of the constitution of the United States, Johnson sent a letter to be read on that occasion, eulogizing the constitution thus:

"The good and great men, who framed it, saw that without that, or some equivalent government, the useful union of the

⁴⁰ 3 Pierce's Sumner 496.

⁴¹ From Saratoga N. Y. on September 11 and from Baltimore on September 22.

⁴² 1 B. R. Curtis's Life pp. 260 & 261. The social side of Johnson's nature is also shown from the fact that, on February 17, 1859, he acted as one of the managers from the citizens of Washington at a ball to celebrate the peace of 1815 with Great Britain. 2 Seward's Seward 358.

⁴³ Without fully identifying himself with them.

⁴⁴ See Forney's remarks in Proceedings of Bench and Bar after Johnson's death.

United States could not be preserved, or the prosperity and power inseparable from such a Union attained. The result of their deliberations, conducted as these were, with a pure patriotism and an enlightened spirit, has made us what we are, a happy, a free, and a great nation."

He opposed the Know Nothing party, then growing in strength, and, arguing in behalf of religious freedom, said that Taney was a proof that the Roman Catholic Church is not dangerous to American freedom. The rules of naturalization may be too lax, but to exclude naturalized citizens from office is a clear violation of the constitution and carries with it national dishonor.⁴⁵ In the Democratic party, he was never fully at home, and, after the close of the Civil War, he said: "I never really was a Democrat," but, while he was in the ranks of that party, he followed Douglas and was an advocate of popular or squatter sovereignty.⁴⁶ We have seen him expressing views of that character in the Senatorial debates at the close of the Mexican War and he developed the same views in a pamphlet, which he wrote in 1859.⁴⁷ This pamphlet was issued in anticipation of the Democratic presidential convention at Charleston to urge the readoption of the platform of 1856. If the party abandon popular sovereignty, it will be a stain on its good name, will cause the people to cease to trust it, and even may lead to "calamity . . . beyond remedy, perpetual and fatal." John Brown and Seward had shown the need of democratic harmony to prevent

⁴⁵ James Raymond "Political" p. 326.

⁴⁶ Howell Cobb wrote Buchanan on August 4, 1856, that it was expected that Johnson would "be out" in a letter, supporting the Democratic ticket. Correspondence of Toombs, Stephens & Cobb 2 Am. Hist. Ass. Rept. 1911, p. 379.

⁴⁷ "Remarks on Popular Sovereignty, as maintained and denied respectively by Judge Douglas and Attorney General Black by a Southern Citizen." Vide 2 Am. Hist. Ass. Rept. 1911, 448.

the extinction of slavery. Johnson denied that the Supreme Court had touched upon the matter at all in the Dred Scott decision, which he vigorously defends, and, with great adroitness and acumen, pressed the point that the decision had merely denied the right of Congress to restrict slavery in the territories of the United States. The question as to the right of territorial inhabitants to regulate, or restrict it, had not been touched, and, as laws concerning slavery were different in the several slave States, there must be some authority to frame local regulations, or hopeless confusion would result. Slavery is a creature of "positive law" and was not named in the Constitution, because the "owners of such property were not then so sensitive as they are now," when the "assaults" hurled at them by a "body of frenzied or knavish citizens" of the Northern States, had determined them to maintain and vindicate the institution upon social, moral, religious, and political grounds." Unless there was power in the territorial legislature, however, to exclude slavery, it might be made perpetual against the wishes of the people.

In the turbulent local politics of Baltimore, Johnson took his part. He joined a committee of citizens to urge the governor not to call out the military forces on election day in 1857.⁴⁸ In 1860, the new law, providing that the police force of the City should be taken from under the control of the municipal authorities and placed under commissioners appointed by the State government, came before the Court of Appeals for decision as to its constitutionality. Johnson, with other eminent lawyers,⁴⁹ defended the law. In their argument and in

⁴⁸ 3 Scharf, Md. 260, p. 276. In November 1859 he sat on one occasion in the City Reform Committee.

⁴⁹ Scharf, Chron. of Balto. 575. S. Teackle Wallis, J. M. Campbell and W. H. Norris.

the opinion of the Court, the whole relation of municipalities to the State was elaborately set forth.⁵⁰ Of other important cases before the Courts we catch glimpses, and find him defending a Naval Officer before a court of inquiry,⁵¹ winning an important case in reference to Arkansas swamp lands, and gaining great familiarity with government land grants in the northwest and in California.

Though he became a communicant church member late in life, Johnson was a deeply religious man, and, in a trip to San Francisco in 1860, he was induced to deliver an address on October 18, at the dedication of the Church of the Advent, upon the "Influence of Christianity on the Individual and Social Condition of Man." The address was printed in pamphlet form,⁵² and shows a profound confidence in the authenticity and truth of the Scriptures, the power of Christ's life, and the complete triumph of Christianity in the future. The power of the United States to assist in the progress of religion is "manifestly dependent . . . on our remaining a united people."

⁵⁰ A. H. Garland in *His Experiences in the Supreme Court of the U. S.*, p. 5, states that, on December 26, 1860, Johnson proposed his name for admission to the bar of that Court. After the admission, Garland four times rose to visit the Senate, but Johnson asked him to stay and hear the speeches. Finally, Johnson took him to the Senate and procured him a good seat. Garland also tells a story of Johnson's berating a man who had recently published one of Johnson's letters showing that he had been inconsistent. "Make him produce the original letter," said — Badger, who was present. "Why?" asked Johnson. Badger replied: "No one on earth can read it but yourself and you can read it to suit yourself."

⁵¹ In 1857, Captain W. K. Latimer.

⁵² San Francisco 1860, pp. 18. He went there by way of Panama. See *Md. Hist. Mag.* for September, 1914.

CHAPTER III

THE STRUGGLE IN MARYLAND TO PRESERVE THE UNION

In the presidential campaign of 1860, Johnson naturally supported Douglas. From Washington on May 19, he wrote to the Chairman of a Douglas Meeting to be held in New York three days later, approving of the action of the New York delegates at Charleston and urging the defeat of Lincoln, who is "reeking with the grossest heresies of political abolitionism," and the support of popular sovereignty. Johnson had argued the Dred Scott case twice, as the friend of the South, and firmly asserted that squatter sovereignty was not only not decided by the court, but was neither argued, nor in any way presented for decision. He "never supposed that there existed in any part of the civilized world a government where slavery existed, in which there was not somewhere authority to abolish it." A few days later, Johnson delivered a stirring address at a Douglas meeting in Faneuil Hall, Boston, in which he said that the Democratic party was now the only national one, since the Whig party no longer existed.¹ Speaking in that place sacred to liberty and to union, he said that slavery was the "sole cause of peril . . . disturbing the fraternal feeling which our fathers entertained." He held slavery to be a local institution, with which Congress should not interfere,

¹ Speech of the Hon. Reverdy Johnson of Maryland delivered before the political friends of Hon. Stephen A. Douglas at a meeting in Faneuil Hall, Boston, on Thursday, June 7, 1860, to which is added the letter of the Hon. Reverdy Johnson to the Chairman of the Douglas Meeting in New York on the 22nd of May, 1860. Baltimore 1860, pp. 16.

and considered that the Kansas Nebraska bill is praiseworthy and constitutional, while secession is traitorous.²

After Lincoln's election and the secession of South Carolina, Johnson, without a moment's hesitation, took his place among the foremost advocates of union and opponents of secession. This position he never left. At the close of the war, he stated that he never had referred to the Confederates but as "traitors, rebels or insurrectionists." No man could have been fiercer than he in his denunciation of that "mischievous heresy of secession." In December, 1860, in concluding his argument in an important case in the Supreme Court, he said:³ "This may be the last time this court will sit in peaceful judgment on the Constitution, as acknowledged and obeyed by all." He hoped heaven would avert this calamity, but, if it should come, he felt that the record of the court was secure. On January 10, 1861, a meeting of the friends of the Union was held in the large hall of the Maryland Institute, on which occasion, Johnson delivered the principal address, a long and eloquent oration, breathing the spirit of fervent loyalty to the Union.⁴ The argument made here was expressed by him on other occasions in different forms, but the substance ever remained the same. In his characteristically long sentences, he discussed the history of our union of States, which carried on the revolutionary war and which the fathers intended to be perpetual.

² John A. Cobb, a son of Howell Cobb, wrote from the Gilmor House, Baltimore on June 20, 1860 (2 Am. Hist. Ass. Rept., 1911, p. 483), that the Breckenridge "speakers speak from the balcony of that hotel, the Douglasites from Reverdy Johnson's house which is just above, where George Saunders is keeping open house and Douglas men can stay gratis."

³ 2 Moore's Rebellion Record Document 274.

⁴ Proceedings and Speeches, Baltimore 1861, pp. 20. Johnson's speech is also reported in 2 Moore's Rebellion Record 133. J. C. Legrand published a reply. Important letters of this period from Johnson to Van Buren are published in Md. Hist. Mag. for September, 1914.

Under the Confederation, a league of States existed, lacking means to enforce what powers were committed to it, even more than it lacked adequacy in the grant of powers. In the Constitution there was made a grant of sufficient powers and of means to enforce them. Under the power to repress insurrection, the President may prevent secession. South Carolina, "that gallant state of vast pretensions but little power, though, apparently in her own conceit, able to meet the world in arms," is venturing to act upon the same fancy as in 1830 when Webster defeated Hayne in the constitutional debate, and is perpetrating treason. "The offending citizen cannot rely, as a defence, on State power. His responsibility is to the United States alone. His allegiance, his paramount allegiance, out of which the responsibility springs as to all these powers, is to that government alone. His State cannot legally protect him, or stand in his place. Her prior sovereignty as to this was extinguished by the act of the people, in adopting the Constitution, never again to be resumed under that instrument." The Constitution is not "fatally impotent," through lack of coercive power. "It is true, it contains no power to declare war against a State, but it has every power for the execution of the laws and the enforcement of their penalties. It goes against the individual offender. It makes no appeal to the State power to protect it. For that end, it is self-sustaining, it is its own protector. If the State places herself between the United States and the offending citizen and attempts to shield him by force of arms, it is she who declares war upon the United States, not the United States upon her. In such a contingency, the force used by the latter and which they have a clear right to use is not in attack but in defense, not war but the rightful vindication of

rights against unjustifiable and illegal assault." The Federal government does not coerce the State, but the State's citizens and whether one or all of these must be punished, makes no difference in the legal position of the national authorities. Lincoln is impotent for harm and so there was no present excuse for secession. South Carolina gets more from the Union than she gives to it and would be weak out of it. The Border States should get together and induce the adoption of amendments to the Constitution, safeguarding the South against the danger of attack from Northern abolitionists. In his glowing peroration, he urged the reënforcement and defense of Fort Sumter at all hazards.

Shortly after this meeting, Governor Hicks appointed Johnson one of five delegates from Maryland to the Peace Congress at Washington.⁵ In that Congress, he was "conspicuous by his earnest and eloquent efforts to avert the threatening calamities of civil war by measures of conciliation"⁶ and served on a committee of one from each State to report what they "deem right, necessary and proper to restore harmony and preserve the Union," in which committee he advocated earnestly the proposed compromise amendments to the Constitution, in the hope that they would be satisfactory to the South.⁷

When the Committee reported favoring an establishment of slavery in all territory south of $36^{\circ} 30'$, and Curtis expressed the fear that all future acquired lands would be south of that parallel, Johnson, on February 16,

⁵ The others were A. W. Bradford, Wm. T. Goldsborough, J. W. Crisfield and J. D. Roman. 3 Scharf's Md. 380. On February 21, Johnson, being ill, sent a proxy to Bradford.

⁶ 86 Eclectic 502.

⁷ Henry Watterson, in *Cosmopolitan* for March 1909 at p. 364, wrote that Johnson and Bell, at the time of Lincoln's inauguration, believed that there would be no war and that the troubles would be tided over.

moved to insert the word "present" before the word territory, and added that he thought that "no territory will be acquired hereafter without great unanimity." As he was physically unable to speak, he asked that the discussion be deferred.⁸

On the next day⁹ Johnson said, "There ought to be no ambiguity in a Constitutional provision," and so his amendment was wise, although the doctrine of the Dred Scott case would probably confine the application of the unamended proposition to existing territory. Johnson held that the Supreme Court said that "territories" meant those existing when the Constitution was formed, and, while he thought the decision was wrong, he admitted that it was binding. He objected to inserting the word "future," as it would be odious to put words into the Constitution "which should go forth to the world as an indication that this government proposes to acquire new territory." If the Constitution had said "any," Taney would have been obliged to decide differently. The South had been beaten in the election and "we ought to acquiesce in the decision of the majority of the Convention and limit the amendment to "present territory." The question should be settled, "fairly recognizing and acknowledging the rights of all," so that the Slave States "may remain brethren forever with the free States." We have now a "territory extensive enough to sustain two hundred millions of people, embracing almost every climate, fruitful in almost every species of production, rich in all the elements of national wealth, and governed by a Constitution that has raised

⁸ L. E. Chittenden's Report of the Debates and Proceedings of the Conference Convention for Proposing Amendments to the Constitution of the United States, p. 72.

⁹ Chittenden's report 82.

us to an elevation of grandeur that the world has never before witnessed." We should not separate on account of territory which we have not and do not want. If the amendment passes, it will be difficult to annex territory, since annexation can only come by treaty approved by four-fifths of the Senate.¹⁰

When Roger S. Baldwin of Connecticut objected to the method advocated for proposing amendments, Johnson and Collamer replied that Congress may and should propose amendments, when asked by any State or considerable section of the Union. Johnson stated that the delegates "came on Virginia's invitation, who saw that the country was going to ruin." "The circumstances affecting the condition of the South which aroused her to that frenzy which falls on every patriotic mind when it witnesses a country going to destruction," led her to invite all the "States to join in obtaining a suitable adjustment. Something must be done. Our credit is gone." Steps must be taken "quickly or the new President will have only States north of Mason and Dixon's line to govern, if he is to govern in peace." "I think there is no right of secession," but there is a "higher right," that of revolution, used when nine States adopted the Constitution. Seddon retorted: "they used the right of secession," and Johnson, disturbed from his usual serenity, answered: "I won't dispute about terms. In all such discussions, Heaven save me from a Virginia politician." Madison, in the *Federalist*, had said, however, that if one section of the Union refused to recognize and protect the rights of another part, the latter had the right to go out. Some of the Southern States had already gone out. Does the North wish "us" to go

¹⁰ Johnson would have preferred a two-thirds vote, in which a majority from both free and slave States should be included.

out? If not, he entreated the Northern delegates to grant us "what we are willing to stand upon." "At least, this will save the rest of the States to yourselves and to us" and settle the question of slave extension by dividing the territory. By this proposal, the South gives up rights under the Dred Scott decision and it is not certain that all territories south of the Missouri Compromise line will become Slave States. If nothing is done in the Convention, war must come.

After an absence of several days on account of illness, Johnson voted on February 23, in the minority of the Maryland delegation with Mr. Crisfield, against Seddon's proposition that appointments to office south of $36^{\circ} 30'$ be made on the recommendation of a majority of the Senators from the Slave States, those north of that parallel on the recommendation of the Senators from the free States.¹¹ On the same day, he spoke again on the acquisition of territory, which he thought the Dred Scott decision held was only possible as a preliminary to Statehood. He succeeded in inducing the Convention to add to the amendment that territory could only be acquired by treaty, a provision that it might also be acquired without treaty by discovery and for naval and commercial depots and transit routes.¹²

On February 27, just before the final adjournment of the Convention, Johnson offered a resolution that the passage of secession ordinances is an "event deeply to be deplored" and expressing the "earnest hope" that the seceding States may "soon see cause to resume their honored places in this confederacy of States. Yet to the end that such return may be facilitated and from the conviction that the Union, being formed by the assent

¹¹ Chittenden, p. 334.

¹² Chittenden, p. 340.

of the people of the respective States and being compatible only with freedom and the republican institutions guaranteed to each, cannot and ought not to be maintained by force, we deprecate any effort by the Federal Government to coerce, in any form, the said States to reunion or submission, as tending to irreparable breach and leading to incalculable ills, and we earnestly invoke the abstinence from all counsels or measures of compulsion towards them."¹³ It was far too late for such an attempt at irenic settlement of the difficulties: in a week, Abraham Lincoln would be inaugurated as President, in a few weeks more both parties would invoke the fierce arbitrament of war. Yet the Peace Conference was not wholly fruitless, for it showed the country that peace was an impossible goal to reach except through war.

Johnson had always favored moderate measures¹⁴ and had opposed the hanging of John Brown. The day for compromise, however, was past. Fort Sumter fell and the Sixth Massachusetts Regiment fought the mob in the Baltimore Streets. With a delegation of prominent Baltimoreans,¹⁵ Johnson came to Lincoln to learn if he meditated invasion of the South, and though the contents of Lincoln's confidential answer of April 24, that he intended merely to protect the capital,¹⁶ were speedily transmitted to the Confederate authorities, through Johnson's incautiousness, yet relations of cordial sup-

¹³ Chittenden, p. 449.

¹⁴ On July 29, 1861, S. S. Cox proposed that a peace commission of seven citizens be appointed, nominating on it Johnson with Edward Everett, Franklin B. Pierce, Martin Van Buren, Millard Fillmore, Thomas Ewing and James Guthrie. Cox, *Three Decades of Federal Legislation*, 314.

¹⁵ Johnson, "a lawyer and statesman of fame and influence both at home and abroad." 4 Nicolay and Hay's Lincoln, 164.

¹⁶ Johnson replied to Lincoln's letter: "In a word, all that your note suggests would be my purpose, were I intrusted with your high office."

port of Lincoln by Johnson were established for the time. This led Lincoln to request Johnson to answer Taney's opinion in *Ex parte Merryman*, as to the right of the President to suspend the writ of *habeas corpus*. Johnson, for once, differed with Taney and wrote a reply to him, in which, with great perspicacity, the constitutionality of Lincoln's act is defended.¹⁷ The duty of the President to suppress revolt and to cause the laws to be executed required him to use every legitimate means. Of the character and extent of the means needed to enforce the laws, Lincoln is to decide for himself, subject to his responsibility to the people and to Congress. The power to suspend the writ of *habeas corpus* is not a legislative one, and if the Constitution had intended to have left the power to Congress, it would have done so expressly. A state of quasi-war exists, the power in question is essentially a military one and, "under the Constitution of the United States, it is clear that, although the power to declare war is vested solely in Congress, the conduct of the war is solely with the President." Johnson always laid emphasis upon the fact that, though the Congressional powers are enumerated in the Constitution, the Executive power, which is vested in the President, is nowhere limited, and so, by fair implication, may be considered to cover the means necessary, faithfully, to carry out the laws. If the President may not suspend the writ, he is made subordinate, not only "to the Supreme Court and to every one of its justices, but also to every civil functionary of Federal, or State government, who has the right to issue the writ of *habeas corpus*, and the power of the President to suppress insurrection would be rendered ineffective. "In Maryland, for instance, where

¹⁷ Reprinted in 2 Moore's Rebellion Record, Docs. p. 185.

it is believed disaffection to the Government, to a certain extent, prevails, and sympathy for the rebels is entertained," the writ of *habeas corpus* may be "exercised so as seriously to disconcert the successful progress of our army," unless the fact be recognized that, in time of war, these civil guarantees have no place. Lincoln was serving the people faithfully, "with all the ability he possesses in the crisis of the government," and Johnson hoped that, when he retires from the Presidency, he may leave the people in the "peaceful and happy enjoyment of an unbroken Union."

On May 7, Johnson addressed the Brengle Home Guard, a Union Military Company of Frederick, on the occasion of the presentation to them in the court house yard of a flag by a number of ladies of that town.¹⁸ On May 8, he wrote S. P. Chase from Frederick, using a Union envelope, as the only one he could find in the town, and telling him that "the Union sentiment gets stronger and stronger,"¹⁹ and on June 24 he wrote Everett, answering a letter of the 18th and authorizing Everett to say that his speech in Frederick was conclusive as to the position of Calhoun against secession.²⁰ In that speech, he hailed with joy in "this existing crisis" "every indication of a national patriotic spirit." He spoke as to Maryland's duty and interest. The State has ever been loyal and, "if we continue true to patriotic duty, no ordinance of secession, direct or indirect, open or covered, will ever be adopted by those in authority, or, if madly adopted, be tolerated by the people. To this steadfast attachment to the Union, we are not only

¹⁸ 1 Moore's Rebellion Record, Int. 60, Docs. 199.

¹⁹ 3 Rhodes U. S. 388 & 389. He believed that troops could now pass through Baltimore without resistance and that it would be "mischievous" to have more than one company of "U. S. soldiers in the city". Hicks agreed with him. 2 Am. Hist. Ass. Rept., 1902, 497 (Chase Papers).

²⁰ 1 Moore's Rebellion Rec. Int. 44.

bound by gratitude to the noble ancestry, by whose patriotic wisdom it was bequeathed to us and by the unappreciable blessings the bequest has conferred upon us, but by the assurance, which the most solid interest can hardly fail to feel, that its destruction would not only and at once deprive us of all these, but precipitate us into irretrievable ruin. In this ruin all would more or less participate, but our geographical position would make it to us immediate and total." He apologized for the recent tumults in Baltimore and asserted that, in "every true Maryland bosom, there is a devoted attachment to the national emblem. The man who is dead to its influence is in mind a fool, or in heart a traitor." The Federal government had given no "cause for resistance to its rightful authority," and, since peaceful disseverance of the States is impossible, the powers which the executive exercised, when "rebellion began to muster its armies of pestilence," were clearly constitutional. If Lincoln had meditated any illegal acts, the "friends of constitutional rights were numerous enough in Congress" to have thwarted them; but the Southern Congressmen, "madly desecrating" the name of Calhoun, "rudely shot from their spheres and, under the utterly ridiculous claim of constitutional right," advised State secession. If Maryland should join these "mad and wicked men," who must fail in their attempt, our State would be the battle-field. Interest and patriotic duty join to retain the State in the Union. When the first gun was fired, "without cause," on the "noble garrison" of Fort Sumter, the secessionists caused "every man able to bear arms to rush to the support of the government." Where in the past the South could count its friends by thousands and hundreds of thousands, not one is now to be found. The cry is "The Government must be sustained, the flag must be vindicated." With

such strong stirring sentences, in the town in which the legislature was convened in special session, Johnson cheered the Unionists and summoned the wavering to the side of the Nation.

Though Johnson insisted on the guilt of the secessionists and asserted that a conspiracy of designing leaders had deceived the people of the South, when it came to a question of the cases of individuals, he ceaselessly exerted himself to free from imprisonment persons suspected of disloyalty, especially those living in Maryland, making his efforts sometimes with and sometimes without pay.²¹ Benjamin F. Butler, who commanded in Maryland during a part of 1861, never forgave him for this action,²² and, indeed, it affords a curious glimpse of contemporary standards of public morals, when we find in the following years that Johnson publicly justified, on the floor of the United States Senate, his practice of taking fees, after he became senator, to induce the federal government to free his clients suspected of disloyalty.²³

²¹ Series 2 War of Rebellion Record 1 p. 628. Johnson and John P. Kennedy, on July 4, 1861, called on Lincoln and recommended that Howard be released. Tuckerman's Kennedy, p. 318. From Cumberland on October 12, Johnson wrote urging the release of Henry May, *op. cit.* vol. 2, p. 800. On September 17, Cameron wrote Seward that in order to gratify Johnson he is willing to permit Winans to go free (vol. 1, p. 682). On September 27, he wrote the Department of State that C. J. M. Gwinn, his son-in-law, was perfectly loyal (vol. 2, p. 304). On November 12, Johnson recommended the release of Maryland prisoners except the Mayor and police commissioners (vol. 1, p. 704), on November 25, we are told that Johnson has the case of A. A. Lynch on hand (vol. 1, pp. 710, 714), and, on November 27, General Dix wrote that he thought Johnson's list of those to be released was not discriminating (vol. 1, p. 712). In December, he was interested in the case of W. H. Winder (vol. 2, p. 736), and on January 24, 1862, he recommended the release of T. J. Claggett (vol. 1, p. 731).

²² Butler's Book, p. 234, calls Johnson "the rank and bitter secessionist and worse than others, because he concealed it."

²³ See also manuscript letters of Lawrence Sangster in 1861, in Library of Congress, attacking "Reverence" Johnson for securing releases for "rabid secessionists," who had the necessary fee.

Johnson's mediation is also shown by his proposing, on August 22,²⁴ that the boats between Baltimore and Southern Maryland be permitted to renew their trips to carry freight and not passengers, so as to enable loyal people to send their produce to the Baltimore markets.²⁵

Johnson's kindness of heart was shown in a letter he wrote Judah P. Benjamin on September 26, 1861, in which he asked him to send a full brief in a case in which both great lawyers were engaged in the Supreme Court, on receipt of which brief Johnson, though differing from Benjamin, "totally, on the questions growing out of the deplorable crisis," wrote that he would try to get Benjamin his fee.²⁶

During the war, Johnson also appeared as counsel for army²⁷ officers who were tried by court martial, General Fitz John Porter being his best known client.²⁸ Johnson had known Porter before being made his counsel and maintained that the charges against him were malicious and his defense was unanswerable. The association of lawyer and client had added to Johnson's previous esteem for Porter, "the closer and ever stronger ties of personal friendship," and had caused him to regard the

²⁴ Series 1. War of Rebellion Record vol. 5, p. 598.

²⁵ In March 1862, *op. cit.*, vol. 5, p. 759.

²⁶ Series 2, War of Rebellion Record vol. 2, pp. 476-477, Benjamin in his reply stated that Mrs. Johnson had seemed, "with a woman's true instinct," to feel the approach of the war.

²⁷ Col. Miles 6 Moore's Rebellion Rec. p. 21, January 1, 1862. Col. Kerri-gan 3 Moore's Rebellion Rec. p. 109, December 10, 1861.

²⁸ A Reply to the Review of Judge Advocate General Holt of the Proceedings, Findings and Sentence of the General Court Martial in the Case of Major-General Fitz John Porter and a Vindication of that Officer by Reverdy Johnson, 1863, in a New York edition, pp. 56, and three Baltimore editions, pp. 88. An anonymous "Reply to the Hon. Reverdy Johnson's Attack on the Administration" appeared 1863, Baltimore p. 19, vide 37th Cong. 3rd Sess. Ex. Doc. 71, the record of the trial, and Series 1 War of the Rebellion Record, vol. 17 and vol. 12, part 3, p. 824.

officer, as a "brave soldier, a true patriot, and a noble man."²⁹

On September 12, 1861, the Union men of Baltimore County nominated Johnson as a candidate for the House of Delegates and he was elected as one of the Union majority of the Legislature, after an exciting campaign in which, because of his professional duties, he made only one speech, but that a noteworthy one at Calverton, on November 4. In that speech, he vehemently attacked the secessionists, in Maryland and in the South, who were responsible for this "cruel, and unprovoked rebellion." He said of these conspirators to destroy the Union that before any aggression, "they threw aside the mask, cast aside allegiance, and avowed themselves rebels and traitors." / The notion that State sovereignty was paramount to the general Government was "not only obscure in principle and impracticable in practice," but was also in direct conflict with the Constitution. Johnson praised Governor Hicks and General McClellan and blamed the late legislature. Of course, there can be no coercion of a State, but the powers of the National government are ample under the Constitution to coerce individuals. With great forcefulness, he insisted that the war was waged, not to subjugate the South, but to "vindicate the Constitution and laws and maintain the existence of the government," to "suppress the insur-

²⁹ In an eloquent peroration, Johnson wrote that the object of the rebellion, "even ostentatiously and shamelessly avowed, is not to vindicate and maintain freedom, nor even to rescue human slavery, as it at present exists in some of the States, from the hazard of a possible early overthrow, but to extend and perpetuate it through all time." Gettysburg had been fought and Johnson felt sure that the fate of the rebellion was already sealed and that "the very leader of the conspiring band, for years the plotter of the treason," is losing heart. "In the beginning of his wicked career," Jefferson Davis "ridiculed the power of the loyal States. Now he stands conscience stricken and appalled."

rection, force the citizen to return to his duty, and restore him to the unequalled benefits of the Union." "We must remain faithful to duty and to honor" and must "avoid, as we would pestilence or famine, all communion with treason," and victory will be the final result. The House of Delegates, in which Johnson served, was one of marked ability, containing such men as John A. J. Creswell, Thomas S. Alexander, Thomas King Carroll, R. Stockett Matthews, J. V. L. Findlay, and John S. Berry. In it Johnson introduced his favorite bill, allowing parties to testify in cases before the courts. He submitted vigorous resolves on February 26, "on the subject of the course the State will pursue in the present rebellion," in which resolves an indignant denial is made of the statement, as an "unfounded and gross calumny," that Maryland is, at heart, really with the South, and an ardent loyalty is expressed to the federal government.³⁰ On March 5, 1862, the legislature elected Johnson to the United States Senate, by a vote of 56 to 28. In the caucus the contest had been a spirited and very close one, between Johnson and William Price of Western Maryland, who represented the moderate men and Henry Winter Davis, who represented the more radical element.³¹ When Thomas S. Alexander, the great chancery lawyer, heard of the nomination, he said: "Slavery has received the worst blow that it has ever yet met." Johnson's senatorial service, the greatest and most essential one which he rendered his country, did not begin until December, 1863, though his colleague, Governor Hicks, presented his credentials on February 3.

³⁰ 4 Moore's Rebellion Rec. 140

³¹ Johnson was nominated in the caucus by one vote and after it, J. V. L. Findlay attempted to carry on the fight, by having Thomas S. Alexander run as an independent candidate in the open house. Letter of J. L. V. Findlay of May 2, 1906.

In June, 1862, Johnson was sent to New Orleans by Lincoln, as a special agent of the State Department, "to investigate and report upon the complaints made by foreign consuls against the late military proceedings."³² General Butler had seized certain property of the consuls and of other foreign subjects and there was considerable complaint concerning the legality of these seizures.³³ Johnson arrived in New Orleans early in July³⁴ and, after a careful investigation of the matter, ordered a great part of the seized property to be restored.³⁵ On September 19, Butler wrote Seward: "Another such commissioner as Mr. Johnson sent to New Orleans would render the city untenable. The town got itself into such a state, while Mr. Johnson was here, that he confessed to me he could hardly sleep for nervousness, from fear of a rising, and hurried away, hardly completing his work, as soon as he heard Bull Run was to be attacked. The result of his mission here has caused it to be understood that I am not supported by the government and that I am soon to be relieved."

Johnson's friendliness for Southerners is shown by the facts that, on June 23, in New York, he was given a permit to visit Soulé at Fort Lafayette,³⁶ and that on

³² Seward to Johnson, June 10, Series 3 Off. Recs. of War of Rebellion, vol. 2 p. 239., 5 Rhodes U. S. 277 gives an account of the mission. Johnson's report is in 37th Cong. 3rd Sess., Exec. Doc. 16.; vide Series 1 War of Rebellion Record, vol. 15, p. 474. Stanton to Butler, June 10, 1862.

³³ The Annual Cyclopaedia for 1862, page 650, discusses Johnson's dealings with the Dutch consul, vide Butler's Book pp. 522 and 525 for his account. Parton's "Butler in New Orleans," p. 356, said that Johnson was sent to comply with the demands of foreign powers, if it could be done without concessions too humiliating, and that he associated almost exclusively with secessionists in Louisiana, vide also pp. 364 to 377, 380, 385, 387, 389, 391, 470, 472.

³⁴ Series 1 Off. Recs. of War of Rebellion, vol. 15, p. 493. On June 23, he was in New York and (Series 3, vol. 2, p. 213) on July 10, he was in New Orleans.

³⁵ Series 3 Off. Recs. of War of Rebellion, vol. 2, p. 572.

³⁶ Series 2 Off. Recs. of War of Rebellion, vol. 4, p. 55 and 86.

September 13, A. Walker, a prisoner on Ship Island, writing Jefferson Davis and attacking Butler, said that Johnson at New Orleans manifested "some sympathy for our wronged people and some disgust for the excesses and villainies" of Butler.

Butler also conferred with Johnson with reference to the shipment of cotton and sugar. But was disgusted with the position of the commissioner in this matter also.³⁸ Butler was anxious to have the commerce of the port of New Orleans reestablished and Johnson wished to coöperate in this object, but they seem not to have accomplished anything.³⁹ As soon as he arrived at New Orleans Johnson showed his distaste for military rule, and, after consultation with Butler, Gov. Shepley of Louisiana was sent to Washington by Butler, while Johnson wrote Lincoln expressing the fear that General Phelps was crushing union feeling in the State.⁴⁰ Lincoln replied, disagreeing with Johnson's fears, and continued: "You remember telling me, the day after the Baltimore mob in April, 1861, that it would crush all union feeling in Maryland for me to attempt bringing troops over Maryland soil to Washington. I brought the troops, notwithstanding, and yet there was union feeling enough left to elect a legislature the next autumn, which in turn elected a very excellent Union United States Senator.⁴¹ I am a patient man, always willing to forgive on the Christian terms of repentance and also to give ample time for repentance, still I must save this government, if possible. What I cannot do, of course I will not do,

³⁷ Series 2 Off. Recs. of War of Rebellion., Vol. 4, p. 880.

³⁸ Vide Series 3, Off Recs. of War of Rebellion, Vol. 2, pp. 239 and 284.

³⁹ Series 3, Off. Recs. of War of Rebellion, Vol. 2, p. 264.

⁴⁰ Series 1, Off. Recs. of War of Rebellion, Vol. 15, p. 521 and series 3, Vol. 1, pp. 53, 528.

⁴¹ Johnson himself.

but it may as well be understood, once for all, that I shall not surrender this game, leaving any available card unplayed."⁴²

⁴²In an elaborate letter to the National Intelligencer of December 2, 1862, Johnson refuted the charges made by a New Orleans Journal, reflecting on his conduct in that city, 6 Moore's Rebellion Record 21. An interesting proof of Johnson's reputation is found in a remark by Gen. Wm. T. Sherman, in a letter to Gen. H. W. H. Peck, in which the former consents to the publication of a letter he has written, if Johnson or some other fit person mould it in such shape as not to compromise him. Off. Recs. of War of Rebellion, series 1, vol. 30, part 1, p. 235.

CHAPTER IV

SERVICE IN THE SENATE DURING THE WAR (1863-65)

On Johnson's return to Congress, he took a position, at once, at the head of the Conservative Union men and advocated the prosecution of the war and the restoration theory of reconstruction. He was easily the equal of any man on the floor of the Senate, and the superior of most of them in the discussion of constitutional questions, and constitutional questions were destined to occupy the time of the body during most of Johnson's term. In repartee, he was quick, his memory was so sure that he could easily refute careless statements; his acuteness was so great that he saw the real point at issue and aimed directly at it, or, if he thought that he might throw his antagonists off the true scent, he "wandered" into discussion of themes more or less closely related. His relations to all the members were friendly and in debate he was most courteous. However emphatic his words might be in characterizing the policy of his opponents on the hustings, in the Senate his urbanity was almost unperturbed. How much the country owes to his conciliatory disposition during those eventful years can scarcely be measured. He was no extremist and was ever willing to sink his own views as to the expediency, or even as to the constitutionality, of measures, if thereby, he could lead the majority to some greatly desired end. His conduct was that of a statesman, not of a politician and, at times, though he opposed a bill, he would suggest amendments to it, so as to render it less objectionable. With Sumner, his conflicts were almost of daily occurrence and, on

constitutional points, he invariably worsted him, while he was constantly parrying Sumner's thrusts and driving counter ones home. With Fessenden, he sparred on terms of full equality, and that too much forgotten great man, Lyman Trumbull of Illinois, was the only senator, who, in my judgment, ever came out victor in a conflict with Johnson.

Let us summarize his position on the many important questions which came before him, and then study it in more detail in this and the following chapters. He opposed the voluntary enlistment of Indians and favored that of negroes, while expressing the wish that enough white men might have been found as troops to have ended the war. Slaves, as persons, could be legally enlisted, but did not become free on enlistment. They should be freed, with compensation to loyal masters, because of enlistment. The families of slaves, however, should not be liberated by the slaves' enlistment; partly because this would be unjust to masters, partly because it interfered with State's rights, and partly because the demoralization caused by slavery had made it impossible to find the families in many cases.

He insisted on Maryland's loyalty and was quick to protest against any high-handed acts of the Federal government in that State. He insisted that the Rebellion was to be put down not under the war power, which referred to foreign relations, but under that to suppress insurrection. It was true that, from the great extent of insurrection, it had become necessary to concede privileges of belligerency to the Confederates and it was questionable as to whether this concession did not take away the right to punish them for high treason, to the penalties of which crime they would otherwise have been liable. When the insurrection is put down,

the power to suppress it is at an end. The States have never been out of the Union and, consequently, need not to be brought back. At the conclusion of a civil war, amnesty should be given, and the States should be encouraged to reestablish their governments as soon as possible, on the basis of present, not of past, loyalty to the United States. By these new governments representatives to Congress should be chosen, to be accepted or rejected, according to their individual qualifications, and not because they come from States whose citizens have lately been in rebellion. If the South is willing to return, the mass of the people must be pardoned; for, if all are punished, no inhabitants would be left but the former slaves. Though he thought the war should be ended, when the South was willing to submit, he was willing to destroy slavery by constitutional change. He voted for the Thirteenth Amendment, and said: "I thank God, as a compensation for the blood, the treasure and agony, which have been brought into our households," the war "has stricken, now and forever, this institution from its place among our States." Blaine wrote¹ that Johnson, who "had long been eminent at the bar of the Supreme Court" and who "had stood firmly by the Union . . . added largely to the ability and learning" of the Senate.

We find scattered references to Johnson during 1863. Thus, on July 4, he wrote Dr. W. H. Hammond about improving conditions at Fort Delaware, where a number of prisoners were confined,² and, on October 22, he went with Governor Bradford to confer with Lincoln on Maryland matters.³ The Federal administration interfered

¹ I Twenty years in Congress, 502.

² Series 2, Off. Recs., Vol. 6, p. 80.

³ Series 3, Off. Recs., Vol. 3, p. 967.

considerably in the Congressional elections held that year in Maryland and from Washington, on November 23, Johnson sent Bradford an opinion that he must proclaim those as Members of Congress, who were elected on the face of the returns, as the proclamation was a ministerial function and the Governor had no corrective power, although the election had been "not by the free choice, but under the duress of military violence and in the utter disregard of the rights and honor of a loyal State."⁴ This interference in Maryland elections may well have contributed to Johnson's breaking with Lincoln, soon after the session of Congress began. In the presidential campaign of 1864, Johnson supported McClellan with zeal and, in his behalf, delivered a stirring address in Brooklyn on October 21,⁵ in which speech, while professing as much abhorrence as ever for the claim of the right to secede, he eloquently stated that Lincoln's war policy had been a failure. The question was whether liberty was to survive and the nation to be restored with the preservation of our form of constitutional government. The "rebellion, in the beginning, was without justification or excuse and Lincoln's policy was right, until he issued the emancipation proclamation. "Military necessity" was a dangerous plea, which had led to "shameless interference" with elections in Maryland and Kentucky. "No one dislikes slavery more than I do," he continued, but although the war had given slavery a death blow, there was no rightfulness in Lincoln's demand that slavery be abolished as a condition of peace. The army and navy had failed, although McClellan, Porter, Sheridan, and Farragut had done nobly. Lincoln had shown his "utter

⁴ Md. Publ. Docs. 1864.

⁵ Speech before the Brooklyn McClellan Central Association, 1864, pp. 16.

unfitness for the presidency," and sought reëlection by "most unscrupulous and unexampled abuse of patronage and power." The Davis-Wade plan for reconstruction was commended and attention was drawn to the fact that the Confederate States had failed to receive recognition by foreign powers. The "rebel government," Johnson said, "still stands alone among the family of nations." "No single one, small or great, will admit it to fellowship. Cotton, the rebels find, is not king. Nor in this age of the world can mere material wealth ever be king."⁶

In 1864, a Constitutional Convention was held in Maryland and a constitution abolishing slavery was submitted for ratification to the people. The Convention prescribed an oath of loyalty to be taken by all voters and Johnson gave an opinion, on October 7, that this requirement was unconstitutional and that the Convention had usurped powers, but there was no remedy, and that the people who can do so may take the oath and vote upon the Constitution, which after the election was declared adopted by a small majority.⁷ In the Senate, on December 18, 1863, Johnson had objected to a similar oath, as prescribed for officers of the United States, and, in the debate upon that oath, he developed an elaborate argument in defense of the proposition that Members of Congress are not officers.

Johnson's first appearance on the floor of the Senate occurred on the day previous. John P. Hale had risen

⁶ It is interesting to see among the lesser activities of Johnson during this year, the receipt in April of a fee of \$1,000 to get Maddox, a blockade runner, clear. Series 1, Off. Recs., vol. 60, p. 33. On March 10, Series 1, Off. Recs. vol. 43, pp. 27, 122, Johnson showed his friendliness to Meade in writing to ask the latter, if Johnson was not right in denying certain allegations as to Meade's conduct at Gettysburg.

⁷ Opinion, etc., 1864, pp. 6.

to a question of privilege, having been attacked by a newspaper for receiving a fee for getting a client out of the old Capitol prison, and said that, before he kept the money, having an "exceeding jealousy" of his reputation as a Senator, he went for advice to Johnson, who held a "very high social position and a high professional position." Johnson had said there was "not the least objection in the world" and added that, "as to this matter you are asking me about, I am doing it every week." Johnson then rose to corroborate Hale's statement and said that there was no more reason for a member of either House of Congress to avoid appearing in military cases than in those before ordinary criminal courts.³

On the question of taking an oath, Johnson spoke thrice. Senator Bayard of Delaware had refused to take it and Johnson argued that it was unnecessary for him to do so. On January 2, Johnson said that he had taken the oath under protest, because he was unwilling to have it conjectured, on any ground, however feeble, "that I was not loyal as he must be who takes that oath." The oath was also bad since it was provided in an *ex post facto* law and since it disqualified a man from office without conviction of crime. In the debate, Johnson discussed the theories of war and of reconstruction. He held that Sumner's argument was "not only unconstitutional but most mischievous," in holding that the war, "which is now covering the land with blood in one section and carrying agony in another, has dissolved perpetually the ties which bound us of the loyal States to the States in rebellion," so that the latter are "out of the Union as States" and are "territory, subject to the unlimited

³ On February 10, 1864, he spoke again on this subject and stated, as he had previously, that he was willing to plead without fee.

will of Congress and to come back only at such time and upon such terms" as Congress may fix.⁹ The war was waged "to restore the authority of the Government" and "the end is the suppression of the rebellion." When this is accomplished, the war power is at an end and the submission of the people of a State brings her back into the Union. The powers of the government are "exerted not as against States, but as against citizens." "There is not one man in a thousand in the South, who has not fallen into the vortex of this rebellion. Some men of hardy character, stubborn virtue, inflexible firmness, a loyalty that quailed before nothing, have been able to drag out a miserable existence, cheered only by the consciousness that they were doing right under the oppression and outrages to which they have been subjected in the rebel States;" but, "for the most part, firmness has yielded, association has had its influence. You must not exile, exterminate, or enslave the men who submit."¹⁰ He had confidence in the speedy close of the war and that "there will arise, in all its original power, that love of the Union, that reverence for our forefathers, that pride in our common glory, that desire to share in the achievements, which we have won together in the past, to bring them back again to act with us as brethren, brethren in heart as well as in deed."

On January 25, in his third speech on the subject, Johnson¹¹ again maintained that a Senator was not a

⁹ He denied that the Prize Cases were authority against him. The Supreme Court there really said that the property was an enemy's and the fact that he was a traitor, "because he owed allegiance to the United States," was no defence.

¹⁰ Johnson added that "I have thought slavery wrong, since I was capable of thinking," and immoral, shocking "the heart of every freeman, which beats true to the inspiration of the goddess of liberty."

¹¹ At this time, he read Sumner a delicious lecture on the "very positive way" in which he expressed his opinions.

civil officer. He is "not an officer under the government, but above the government. He does not derive his authority from the government, but from the creators of the government. His commission comes from his State.¹² We should look at the matter from the point of view of the country, but should not let our patriotism run wild. The act of 1862, providing the oath of which Johnson complained, does not include State legislatures, and judges and no oath can be forced on them, yet without it, what security is there against another rebellion? This should not be a war of subjugation. Johnson was willing to go as far as was necessary to put down the rebellion, but only in a constitutional way. He favored restoration. "If the South is willing to return—I do not mean the leaders, if captured, they should be tried and convicted and execution should follow to a large extent, but you cannot try and convict four or five or six million people," and, if you could, you would have only the slaves left in the South.¹³

A resolution had been introduced for the expulsion of another Border State Senator, Garrett Davis of Kentucky, and Johnson came to his defense also.¹⁴ Davis had introduced resolutions on January 5, censuring the president. On January 26, Johnson denied that the resolutions were treasonable and said he wished neither to offend Kentucky, nor limit the right to criticise the conduct of the executive. He referred to famous past opponents of administration, both in England and in America, such as Burke, who rejoiced that the colonists resisted. In a remarkably strong speech, he defended

¹² He referred to the Blount Case on January 21, he referred also to the case of Smith in Burr's time.

¹³ On March 14, he spoke on the power to require an oath of loyalty from citizens who transferred property and said this was often done in Louisiana to avoid confiscation.

¹⁴ On January 11, he spoke in favor of prompt action in the matter.

Davis, who had been for years an opponent of the extension of slave territory and had gone with his nephews a hundred miles to beat back the rebel invaders of Kentucky. Johnson would not vote for the resolves, but held their criticism of the President not more censurable than that indulged in by such a New England senator as Hale.¹⁵ Johnson felt that the administration was justly censurable for making the Southern people desperate. "In my judgment, the ultra measures, which now seem to be the favorite measures of the government, that is to say the measures of destroying slavery in the States, of enforcing the confiscation laws, of distributing the lands among the loyal soldiers, or among blacks, do more to keep alive the rebellion, than any one cause or perhaps all causes combined." On January 28, he spoke again on the subject and claimed the liberty to denounce the executive in the strongest terms, if necessary. On that day, through the vigorous opposition of Davis's friends, the resolution of expulsion was withdrawn.¹⁶

The enrollment bill took much of Johnson's thought during January,¹⁷ and the enlistment of negroes was discussed by him in a speech delivered on the twelfth and fourteenth. Free negroes were already enrolled in Maryland and slaves, as "persons," might be enrolled,¹⁸ but as they were also "property" their masters should be

¹⁵ Johnson referred to his own support of Lincoln in 1861 and claimed that Luther v. Borden had shown that treason can be committed against a State and, therefore, that the President could even commit treason against Kentucky!

¹⁶ Davis attacked Wilson of Massachusetts on February 17 and Johnson poured oil on the troubled waters, calling to mind Wilson's previous attack on Davis.

¹⁷ On January 7, he suggested the requirement of a month or more of residence and spoke of the difficulty as to sailors plying between two States.

¹⁸ They could be tried for treason, if they had done "as the white men in the Southern States have done—I do not mean all the Southern States—thank God, I am not obliged to say so."

paid for their services. In Maryland, the enlisting officer tells all slaves they are free and enlists all he can of them. Johnson protests against such conduct, although, he adds, "that the State will be benefitted by the effect of it in the end, I have no doubt." If necessary¹⁹ he does not object to calling on slaves to assist in putting down the rebellion, which had become so much more formidable than at first was thought, and which "proper exertion, proper skill in the field, proper foresight on the part of the Executive, proper legislation on the part of Congress, would have quelled previous to this time." He wished the white men alone had done the work of conquest, and believed that the South had done its utmost and that we need no longer to raise more men. Johnson thought that he had better information than most persons at the North and that Louisiana and Mississippi were "utterly exhausted in everything but zeal and intrepidity of a portion of their population." The deluded masses of the Southerners will continue to fight, while nature survives, but Lincoln's recent proclamation, though far from such as would be proper, is already doing a great deal to restore union feeling. The speech ended with a panegyric on the Union and a hope that the Southerners may return to the Union and "restore their States, by means of free labor, to a State of prosperity and power that they never in the past attained."²⁰ Henry Wilson said in the debate, that the Maryland elections had been carried on the issue of the enlistment of slaves and that the people had preferred that the blacks should go rather than themselves. Johnson came at once to the defence

¹⁹ With his jealousy for Congress' power, he states that of the necessity "Congress must judge in the first instance and the Executive afterward."

²⁰ On the 15th Johnson spoke on certain of the details of the enrollment bill.

of the State and, on the sixteenth, said that, on the Eastern Shore, many thought that the national government had no right to enlist blacks and that they would be ineffective compared with white troops. Johnson agreed with the latter contention, though he believed negroes could become good soldiers after a year or two of training. He maintained that the result of the Eastern Shore election was due to the interference of the military, without proper authority, to prevent any one from voting, unless he took the oath prescribed by the military commander, and to arrest any one whom they thought to be disloyal. Some men were arrested miles from the polls. Men of "stern and rigid loyalty" were arrested, because they were obnoxious through their opposition to immediate emancipation without compensation to masters, and were thrown into the old slave prison in Baltimore. When discharged, they were returned to Chestertown by a steamer, which also bore a private letter directing the officer in command of the troops there, who had gone to repeat the outrage elsewhere, to release two of the men and detain the rest until after the election. As a result, Creswell, whom Johnson respected, was elected and owed his seat in the House to "as great an outrage as ever was perpetrated upon freemen." Harlan of Iowa defended the acts of the military and said that, within the last three years, the Federal Government had one hundred thousand men in arms to protect Maryland, since she was unable to protect the purity of her elections and the civil rights of her own people. Johnson denied the truth of this and asserted that the "ultra loyal" Maryland legislature was as devoted to the Union as that of Iowa and that the Iowa troops were not superior to Marylanders. In April, 1861, Baltimore was "crazy"

with "a sudden outbreak, not premeditated at all, confined to a very few. Every city has a combustible population and, whenever any particular cause of excitement is started, a few wicked men can get up a mob," but "there is not now within the limits of this great land, a State in which loyalty beats stronger or more universally than it beats within the hearts of the sons of Maryland,²¹ and, if the time shall come when it shall become necessary to call to the aid of the United States every man within her limits, to save the Republic, there is not one of them who will be permitted to remain in her borders who hesitates for a moment to come to the standard of the United States." Johnson opposed the raising of men for a hundred days, but was earnest in desiring to attain the "object which we all have so much at heart, the driving of the rebel authorities from Richmond."

On January 28, he voted in favor of freeing slaves when enrolled, but expressed himself as opposed to freeing the mother, wife, or children of soldiers without compensation, as to do so would interfere with State's rights, it having always been conceded until 1861 that slavery was a State institution. A sense of justice should require that these slaves be paid for, as had been done for slaves when freed in the District of Columbia. Otherwise, Maryland will suffer and, "whatever disaffection there may be among certain citizens of Maryland," the State has, "from the first of this rebellion, been true to her constitutional duty. Her laws have never been silent," nor has the conduct of her officers been "other than that of perfect loyalty." Her institu-

²¹ On April 4, Johnson stated that General Lew Wallace would probably not interfere in the elections in Maryland, having received satisfactory assurances from Governor Bradford.

tions should not be interfered with, more than those of other States. "We have thought, we are about to change our opinion as I think, that it was very material to the industry of Maryland that she should have the right to have compulsory labor." The United States may interfere with this institution, only on the ground of "military necessity," since "the armies of the rebels will continue to be supported," if "this labor is left undisturbed." So this compulsory labor has been declared to be at an end in the rebellious States. Johnson never apologized for slavery, though many yet believed the institution to be of divine origin, but said, "I doubt very much if any member of the Senate is more anxious to have the country composed entirely of free men and women than I am." "There is in every government," he continued, "what may be called a higher law and that exists . . . to go outside of the constitution and adopt measures that may be found to be absolutely necessary to preserve the life of the Nation. . . . If the life of the American people depends upon the transcending any of the particular powers of the government, I would transcend them," but that is not now the case.²² When Senator Grimes of Iowa said that he had heard that slaves would not enlist, because they feared to leave their families in slavery, Johnson at once retorted that it was necessary to go out of Maryland to learn about it and stated that a "man, who was able to bear arms and whom the military authority of the United States wished to bear arms, has, whether he willed or not, been compelled to bear arms." When Grimes gave the recruiting officer in Maryland

²² Later in the speech he said: "I would not suffer the heritage, which is ours, to be lost by insisting on a strict and literal enforcement of constitutional restriction."

as his authority, Johnson delivered a panegyric upon Massachusetts, but alleged that there was more difficulty in getting men there than in Maryland, for the former State asked leave to go out of its borders and get slaves to fill her quota. He even challenged Massachusetts to show as many enlistments of new soldiers in the past year, as the four thousand slaves enlisted in Maryland in that year.

It would often be difficult to prove slave relationships, and a slave enlisted in South Carolina might have a wife and children in Maryland, for

it is one of the vices and the horrible vices of the institution, one that has shocked me from infancy to the present hour, that the whole marital relation is disregarded. They are made to be, practically and by education, forgetful or ignorant of that relation. When I say they are educated, I mean to say they are kept in absolute ignorance and, out of that, immorality of every description arises, and among the other immoralities is that the connubial relation does not exist.

In some States, marriage was even prohibited to slaves and, in Maryland, it could occur only with the master's consent "They lived together, but were never man and wife, except in the sight of heaven. You must recognize as marriage what is not" and thus violate the Constitution, for marriage is a State controlled institution, or must pass an ineffective law.

Slavery "must expire" when the heart is "humanized," and in Maryland now no slave would bring ten dollars, except as his hire; but the destruction of the institution came not from the influence of those Northern men "who desired to do away with it," but from "retributive justice, which visited crime in God's providence." "The men who were here, preaching treason from their desks and telegraphing to their minions to seize government

property, and who tried to seduce military officers, they have done it." Turning to the Republican Senators, Johnson told them that the Southern leaders

did not believe you would resist. You are free, and you are brave because you are free, and, as I have told them over and over again, let the day come when, in their madness, they should throw down the gage of battle to the free States of the Union and the day of their domestic institution will have ended. . . . I thank God that, as a compensation for the blood, the treasure, and the agony, which have been brought into our households and into yours, it has stricken, now and forever, this institution from its place among our States.

Yet²³ Johnson was careful not to use harsh epithets concerning preceding generations of men and reminded the Senate that Washington held slaves until his death.

The question of the enlistment of slaves came up again on February 14, when Johnson complained, as together with Governor Bradford he had already done to Lincoln, that the recruiting officers in Maryland took slaves, without the consent of or compensation to the owners and without draft or conscription. He believed that the majority of Maryland slaveholders would have been willing to let their slaves be taken, provided a reasonable compensation were made and saw no difference between giving a bounty to a white volunteer or to a negro's owner. On the twenty-fifth, he spoke again on the same subject and took occasion to criticise the waste and fraud of public officials, though he was not afraid of lack of financial ability to win the combat, if resources were husbanded. The Maryland loyal slaveholders

²³ In speech on February 9.

are much more wedded to the Union than they are wedded to any of their local institutions and, especially, more than they are wedded to that particular institution, which, I now thank God, as they do, very many of them, is about to expire in Maryland.²⁴

When the passage of an act was urged by Andrew of Massachusetts to pay \$13, instead of \$10 a month to negro troops, on the ground that they were promised the larger amount, Johnson promptly responded that a public agent may not bind the government wrongfully, and that the true question is whether the soldiers are properly entitled to more. Certainly, the Maryland regiments had no such assurance and there is no obligation to give them extra pay. In this debate, Johnson's power of repartee was clearly shown, when he stated that he had confidence in Andrew's integrity, though "perhaps he is a little wild upon a particular subject." Sumner interrupted with: "Wise, the Senator meant," and Johnson instantly replied: "Wild, I said. He may be a little wise. I think he is certainly wild." Again it was said that Massachusetts had offered to pay the extra amount, but the soldiers insisted on taking it from the United States, Johnson said, "They are gentlemen of extraordinary sensibility." And when Grimes said their officers persuaded them, Johnson replied: "They are docile and easily persuaded, they believe almost anything."

On February 26, the bill allowing negroes to be employed in mail service and the testimony of colored men to be received in all cases in the Federal courts came up for discussion. Johnson said that he preferred "that

²⁴ On March 10, Johnson said that the enlisted slave "had, as against the United States, a right to freedom, which it would be dishonorable" to refuse, but that the proper compensation for them to the master was a judicial question, \$300 being not enough for some slaves and too much for others.

all questions, depending on human testimony, should rather be questions of credibility than questions of competency," and that he had urged this view upon the Maryland legislature in 1862, but that he objected to slaves testifying. "It is useless to deny that there has been in Maryland, and to a certain extent there exists now, a very strong sympathy with the South," and this law will make matters worse, while it will not hasten the end of the war. He felt that the North's prosperity was due chiefly to the absence of slavery there. The utmost the law should allow was that all free men might testify—the slaves lacked the needful moral and intellectual education.

When it was proposed to permit black men to vote in Montana, Johnson objected²⁵ that those "who have been slaves from infancy are not intelligent enough at once to exercise the right of suffrage," and yet enough of such men might go to Montana to control the territory. The debate led to a reference to the Dred Scott case and Sumner expressed the hope that Congress would proceed without "respect to a decision, which has already disgraced the country."²⁶ Johnson admitted that he had always doubted whether the part of the decision as to the unconstitutionality of the Missouri compromise were not extrajudicial, but took occasion to praise Chief Justice Taney and the Supreme Court and to attack Sumner for conceit. Johnson said that Clay had told him, that after Taney had been five years on the bench, he apologized to Taney for his opposition to his confirmation and continued:

It was my good fortune to be with the present Chief Justice and opposed to him while at the bar and almost every day for

²⁵ On March 30.

²⁶ On March 31.

years, and for consummate ability in his profession, for unsullied integrity in all the relations of life, while he graced and honored our bar, there was no man in the government and no man in any government, acquainted with his character, who would think himself at all disparaged by having Taney considered, in the judgment of the men who knew him, his equal.

On April 5, when the Thirteenth Amendment was under debate,²⁷ Johnson discussed whether it was right and whether the consequences would be "such as to render it inexpedient, because inhuman in other particulars, to do what is right." To manumit at once nearly four million slaves, who have been in bondage always and have been kept in almost absolute ignorance, is an event to which the world's history affords no parallel. The fathers of the Republic thought slavery sinful and evil and that it would, at sometime, come to an end, but that the union could not be formed without recognizing it.

I am satisfied and have always been that, sooner or later, the present condition was inevitable.

I never doubted that the day must come, when human slavery would be terminated by a conclusive effort on the part of the bondsmen, unless that other and better reason and influence which might bring it about should be successful—the mild, though powerful, influences of that higher and elevated morality which the Christian religion teaches.

He agreed with Jefferson, that, in a contest between slave and master, the God of justice could not help the

²⁷ White's *Life of Lyman Trumbull*, at page 227, states that "the most impressive speech made in either branch of Congress was that of Senator Reverdy Johnson of Maryland. The fact that he represented a slave holding State could not fail to add force to any argument he might make in support of the measure, but the argument itself, both in its moral and its legal aspects, was of surpassing merit. It deserves a high place in the annals of senatorial eloquence."

latter. "A prosperous and permanent peace can never be secured, if the institution is permitted to survive," yet it can only be destroyed by constitutional amendment. The doctrine of the Prize Cases did not terminate civil obligations and Lincoln can not free the slaves of the enemy, where he has not physical power to attain that result. The Southerners are "both rebels and enemies," though many Union men in the South only obey de facto governments. The proclamation of amnesty, requiring that those who accepted it should also accept the emancipation proclamation, only affected persons within the Union lines antecedently to the proclamation, and it would be futile to pass a law freeing slaves within the enemies' lines, even though Congress possessed the war power, under which J. Q. Adams in 1836 thought slavery might be abolished. Slaves coming to the Union lines may be made free by the emancipation proclamation, but the courts will not hold others to be free. The Constitution gives no authority for national intervention with slavery in a State at peace, so that slaves may continue to exist in Maryland. Yet the Nation ought to terminate "that institution which deals with humanity as property, which claims to shackle the mind, the soul, and the body, which brings to the level of the brute, a portion of the race of men. Slavery is not of divine origin and the negroes, who long for freedom, have been kept in ignorance, because, if they had knowledge, "they would be free men or die in the attempt." Johnson once believed that slavery and free government might go on for ages and abolition would be peaceful; but now, owing to "misjudging philanthropy in one section and to a traitorous purpose in another, that time, in my view, is passed, and we must terminate slavery. When that is done the wit of man will, as I

think, be unable to devise any other topic upon which we can be involved in a fraternal strife."

In this speech, he discussed the question of sovereignty and said that "there never was a greater political heresy" than Calhoun's, in saying "that the only sovereignty was that which belonged to the States."

The States, in the first place, were never disunited. As one they declared independence. As one, they fought and conquered the independence so declared. As one, in order to make that independence fruitful of all the blessings which they anticipated from it, they made the Constitution of the United States. . . . There was no absolute sovereignty, that is to say there was no sovereignty coextensive with the whole scope of political power, belonging to the government of either, but each was invested with a portion of the sovereignty, which the people might create, and each, therefore, within the extent of the portion allowed it, was to the extent of that portion supreme.

The Union is irrevocable, except when "that other and paramount right, never recognized by constitutions of government, comes into existence . . . the right of revolution."

Somewhat later, on April 19, he opposed the repeal of the fugitive slave act of 1793, whose rightfulness no one doubted at its passage and whose constitutionality the courts maintained. The act of 1850, though constitutional, was objectionable and may be repealed, but it must be remembered that the Constitution itself is a fugitive slave act and the practical effect of the repeal of the law of 1793 "may create unpleasant feeling in that part of the South which is sectionally loyal, and among many in that part of the South who, though sectionally disloyal, are themselves loyal." Sumner entered into an argument with him and said the deca-

logue abolished slavery. "Then leave the question to the courts," Johnson replied, and taunted Massachusetts with her position in 1812 and with suffering her "love of freedom to boil over." She thus "enabled these traitors to fan into treason the public mind of the South." Johnson desired the destruction of slavery by constitutional amendment, and urged united action to "put down this vile, wicked, and wholly unjustifiable rebellion."²⁸ On June 24, when discussing Sumner's bill to prohibit the coastwise interstate slave trade, Johnson urged the propriety of the act under the commercial power of Congress.²⁹ A day later he denied that the two races cannot live together, as the free blacks did with whites in the past, to satisfy demands for labor. Though social and political equality, as the history of the North shows is impossible, freedmen can and do live in peace with their former masters and the laws requiring emancipated slaves to leave some States are recent.

Although Johnson had come to be an opponent of Lincoln,³⁰ yet he was tenacious for the preservation of

²⁸ On June 22, Johnson and Sumner again came into conflict over this bill, when the former moved a postponement, to let Davis, who was ill, be heard upon it. Sumner urged going on to perfect the bill, which Johnson remarked, being merely a repealing act, was already perfect.

²⁹ Collamer, in this discussion, got the better of Johnson in a neat repartee. The former stated that the courts had said that a man could import and sell goods, in spite of any State law. When Johnson replied that the decision referred to goods in the original package, Collamer reported: "Well, I take it, that is the way negroes are generally sold." In the same discussion, Johnson and Sumner had another sparring match, in which the latter said that Johnson is always "willing to interpret the constitution for slavery. I interpret for freedom." Johnson shortly afterwards said that the word person included slaves, as is conceded by every lawyer, unless Sumner "claims to be one, after having been out of practice more years than I should dare to mention."

³⁰ For example on June 25, he said Lincoln had "seduced" Congress to appoint a commissioner of navigation.

the President's powers and, when the bill for the appointment of a lieutenant-general was under discussion, expressed doubts as to whether the bill did not go too far and deprive the President of his power to remove the officer and wished Grant's name, which had been recommended in the bill, stricken out, as it was a bad precedent. He praised Grant and thought Lincoln, though he had done his best, yet had been largely responsible for the errors of other officers through his interference. It was no disparagement of Grant to remove his name and the clause of recommendation, which had no legal operation, may put the President and the Senate at loggerheads. If Grant is so excellent, the President cannot help appointing him and the recommendation really disparages Grant, by suggesting that another might be appointed. In a later speech³¹ Johnson said the bill was also a reflection on General Halleck, whom Johnson knew intimately and in whose society he had spent months. After talking over with Halleck all the subjects connected with the war and visiting his office daily, he felt in agreement with General Scott that Halleck was "as fit, if not more fit, to discharge the duties of the place that he holds than any other man."³² On March 2, Johnson defended McClellan and Meade and the Army of the Potomac, which had twice saved Washington, and said that assaults on officers "are exceedingly inappropriate and impolitic," though, in the same speech, he censured Lincoln and criticised mildly Hooker and Burnside.³³

³¹ On February 24.

³² Johnson admitted that Halleck was no Chesterfieldian, but claimed that the failures of the Army of the Potomac, which body he praised, were due to others, more than to Halleck.

³³ On Union military matters, we find Johnson, on May 2, objecting to the payment of the hundred days Western volunteers, on the ground that the

Over a month later, in speaking on the Fort Pillow massacre,³⁴ Johnson asked why no reinforcements had been sent thither.

We feel indignant at this Vandalic outrage, which never could have been perpetrated, I think, in this age of the world, even by cannibals, with more ferocity than is stated to have attended this particular outrage. . . . There is now in part of this rebel soldiery . . . who have been frenzied into madness and become worse than savages, a disposition which has none of the restraints of civilized warfare and it is time, high time, since the United States in my judgment, in the exercise of a power with which they are clearly invested, have thought proper to enlist into their army Africans, that these rebellious foes of ours should learn that, upon the field of battle, in the eye of justice and in the opinion of the United States, the life of a soldier under our flag is as dear as the life of any rebel and that nothing will satisfy the honor of the one and satisfy the demands of the other, if the horrid alternative should be left to us, but life for life. It will never do that we should suffer our soldiers to be treated with the barbarity, the inhumanity, the savage barbarity with which it is said they have been treated upon this occasion.

On May 21, Johnson showed his tenderness of heart, by moving an executive session, so that a mortally

President had not bound Congress by calling them out and that, if the period counts from enlistment, not from muster, the government got but little good from them. On the next day, in reference to the same bill, he said a motion to reconsider it, made within two days of its passage, will keep it from being sent to the Executive. In reference to the cases of Generals Schenck and Blair, he said, on May 16, that the unbroken precedent of both army and navy was to cancel resignations and consider officers to be in the service again, if the officers and the President so desired. Johnson instanced the case of Captain Buchanan (then Admiral Buchanan in the Confederate navy) with whom Johnson "had been very intimate" and of whom "he had a very high opinion," who resigned the command of the Navy Yard at Washington and was later reinstated therein.

³⁴ On April 16.

wounded officer who had been promoted, might be confirmed before he died. On June 8, he objected to allowing commutation for men drafted into the army although he stated that he was willing to vote to enlarge the amount from \$300 to \$500 or \$600.

He felt³⁵ that it was perilous to keep men so long a time as three years in the service, as they get attached to it and unfit for all else and yet there was no authority by law, in Johnson's opinion, to call out troops for a less period. Raw men seemed to him practically as brave as veterans and, if the power is properly wielded by Grant, as is probable, and the rebellion is terminated at all, it will end in one or two years, so a draft for three years is too long.

Johnson also opposed³⁶ compelling Indians to enlist, as they had been granted "virtual independence" and it was "inconsistent with our policy to force them to come to our aid." It was shameful that we had to enlist Africans to aid us and would be a worse shame to "drag in the Indians." They may volunteer, as foreigners do, but the world's judgment would hold it hazardous to bring into the field men who fight with the tomahawk, though that weapon is "not a bit worse than the weapon the Confederates are using, the bowie knife." In drafting Indians, savages can not be distinguished from those civilized.

The question of punishing guerrillas came up on June 16, and Johnson said, that, in the legal and constitutional sense, if the war was at an end, the courts would not permit a commission from any branch of the Confederate government "issued by a co-conspirator and a co-traitor" to serve as a defense against homicide.

³⁵ On June 23.

³⁶ On June 20.

But as we must not have retaliation during the war, the Confederates must be recognized as having a government in fact, to be dealt with as legally established and entitled to the exchange of prisoners. The bill to punish guerrillas, as it does not define them, may lead to retaliation and wrongfully takes power from the civil authority of loyal States, by providing for the trial of the offenses anywhere.³⁷ When gunboat contractors claimed relief,³⁸ Johnson favored interference to prevent their ruin and urged that "a great government, when dealing with citizens, will never be influenced by those nice and strictly legal principles which govern contracts between man and man." On the same day, he pressed on the Senate the importance of proper remuneration to Ericsson for his Monitor, by which great boon we were placed in position to defy the navies of the world.³⁹

He was distinctly a Border State Union man and, when Saulsbury of Delaware offered an amendment to a "bill dealing with the rebel States" that all white persons in loyal States be protected, Johnson met this manifestation of "copperheadism," by opposing the resolution, as it merely affirmed the constitution which cannot be made more valid. If there is not such protection, it is the executive's fault and if he will not obey the constitution, he will not obey the act. The amendment further was not germane to the bill.

The Constitution of the United States, in the States in rebellion, is only so far in force as is consistent with the state of war which exists between the United States and the States in rebellion. The trial by jury and all personal guarantees

³⁷ On June 30, he again spoke on the danger of retaliation.

³⁸ On June 22.

³⁹ He referred to the great joy, because of the victory over the Merrimac, which he had seen while a member of the State legislature, at Annapolis.

that the Constitution provides for a state of peace are necessarily at an end, for the time, in a state of war between the United States and the people.

Reconstruction had already begun and men from Arkansas were knocking at the doors of the Senate for admission. An extended debate took place between Johnson and Sumner, on June 13, over a motion to refer the question of their admission to the judiciary committee. Sumner said the seceding States were out of the Union and, therefore, their citizens were alien enemies, and Johnson's quick rejoinder was that then Andrew Johnson of Tennessee was an alien enemy and could not be elected vice-president. The fact was, however, that Tennessee was a State, as much as ever. Sumner replied that the territory was in the Union and Johnson quickly said: "I did not suppose the land had gone out or seceded" and that Sumner, whose industry he praised, had voted for the confirmation and payment of federal officers in Arkansas. Johnson questioned Lincoln's reconstruction policy. The President had no right to say who shall be Senator, and his proclamation for the restoration of State government, when one-tenth of the voters have qualified as loyal, ought to be carefully considered. Referring to William Pinkney's great speech on the Missouri Compromise, Johnson said that a State can come into the Union only as an equal. Massachusetts could reestablish slavery, if she thought proper to do so, and, if Arkansas could not do so, she would not be equal.⁴⁰ "I trust in God, the Union is destined to last forever, but it cannot last, when once it is understood that each State in the Union is not the equal of every other." If the seceded States are in

⁴⁰ I regret that Johnson cited the baseless slander that Massachusetts sold her slaves to the South.

the Union, they have a right to choose presidential electors and if the election hinges on them and Lincoln wins through their votes, "I can almost hear, by anticipation, the mutterings of the thunder." Sumner said that Johnson agreed with him that the States were not entitled to vote and Johnson replied that he always tried to agree with Sumner, but seldom succeeded, for the difference between them was

as wide as the poles. I consider the war now being carried on against the citizens of those States, as being carried on against them individually, that each man is just as much a citizen of the United States in these States now, as is each man in the loyal States: but as those men, for the most part, are now in arms against the United States, trying to destroy the United States, they are not to be represented in the electoral college, because they are criminals, traitors, whom it is the duty of the United States to prosecute as such and to punish as such.

If they are pardoned, reorganize their State governments and come here, "they have the right to come, but, until they do that, they are the enemies of the United States." He was hopeful of success and added: "I think I see—but I am sanguine, I think I see that the time is comparatively near at hand, when" the rebellion "will be put down. I do not believe . . . it is in the providence of God, that this nation is to die. I believe it will survive and be the purer and greater for the trial through which it was passed."

Johnson was interested in the Military Academy,⁴¹ complained of reëxaminations given by the influence of Congressmen, and thought that the President should appoint cadets and midshipmen from the States in rebellion, where there are no congressmen, if such pupils

⁴¹ On March 11 and 14.

could be found. The Naval Academy had been removed in 1861 temporarily to Newport and, on April 12, he urged its return to Annapolis. At the time of its removal, the State of Maryland "was in a condition of great disquiet. It is unpleasant for me to recollect how deep the feeling of hostility towards the United States, on the part of a portion of the people of Maryland, at that time was and serious apprehensions were entertained that the Academy would be taken possession of by mob violence, by traitorous machinations, and held as against the Government." After the removal, General Butler seized the grounds and Secretary Stanton would not give them up, although most of the naval officers wished to return. The War Department could get along without the grounds and should not stand in the way of the school, for the hospitals now placed there can be located elsewhere and Maryland

has not only spoken, so as to satisfy the whole world that she is loyal to the Government and to the Union, but that she is loyal to the cause of human freedom, that she has made up her mind that the last badge of servitude, as far as her limits are concerned, shall be terminated; that her soil shall only be trod by the feet of freemen, without regard to complexion or to race. . . . She desires to be and to remain forever, a State of a Union, in which there shall be not other servitude than the servitude which belongs to an honest and patriotic obedience to the laws.⁴²

Financial matters received Johnson's attention. He objected⁴³ to raising the tax on whiskey already distilled,

⁴² Maryland's Constitutional Convention was just about drafting a constitution which abolished slavery. While Johnson seems not to have spoken again on the Naval Academy question, his letters of Dec. 5, 1865, and March 16, 1866, to Governors Bradford and Swann printed in 9 Md. Hist. Mag., pp. 68, 69, show that his interest in the subject continued.

⁴³ On February 4.

as unfair⁴⁴ and, when the deficiency bill came up for consideration, on February 12, he remarked that Congress could not accurately approximate the amount the government will need and that a standing committee would not help matters. When an appropriation is exhausted, a department must act on its responsibility, trusting that Congress will ratify the act. All that a committee could do, would be to see that moneys appropriated are not squandered. It could not say, for example, to officers, you pay too much for hay, or compel the Executive to carry on war where it wished. On the other hand, Congress is not obliged to appropriate what a department asks and may examine its estimates.

Johnson favored the disposal, for the purchase of supplies, of the gold in the treasury not needed for interest on the debt. The distrust in the power of the country to meet its engagements was the cause of the premium on gold. The debt increases fast and bears higher interest than that of England. It has a bad influence for the nation to buy its own notes at a depreciated value. Extravagance and the great profits of contractors should be diminished. He defended Chase's relations with Jay Cooke and advocated higher taxes, as a means for reviving credit.

Johnson refused to support the bill prohibiting speculation in gold, for he felt it could not be passed under the powers to regulate the coinage, to borrow money, or to regulate commerce. It is not depreciation of coin, but of paper, of which there is complaint and the United States has no jurisdiction over contracts, by which it may prevent gambling in gold or in any thing else, or

⁴⁴ On March 1, he opposed the policy of the Secretary of the Treasury to issue 5/20 bonds for excess subscriptions and on April 16, he showed watchfulness in the discussion of the appropriation bill.

over buying and selling for exchange. The bill allowed selling of gold *in praesente* which destroyed its efficiency. Currency problems rest on fundamental laws and the true causes of the bad state of the currency were inflation and a war of a "magnitude greater than ever before shocked humanity." The true remedy was "additional and adequate taxation." Victory will cause the debt to be "considered trivial," compared with the Nation's present and future resources.⁴⁵

He objected also, on April 28, to taxing goods in bond at a higher rate, as an act of bad faith. Prices had much increased, and the gold bill had had only a temporary effect, as he had prophesied. The present tariff brought in enough to pay the debt, principal and interest, in gold and the proposed temporary measure provided that a man, who now had gold in a bonded warehouse, should pay 50 per cent increase while he, who imported goods after the bill went into effect, paid only 30 per cent increase. Johnson held that there was a contract between the government and the importer that he may take out goods from bond, on paying the amount of duty levied at the time of warehousing.

When Johnson objected to exempting national bank stock from taxation,⁴⁶ as hard upon Maryland, and unnecessary, since national banks would probably supersede State banks and should be able to pay both National and State taxes, Chandler of New Hampshire said: "Some men have the Constitution on the brain." Johnson at once took fire:

We have sworn not to violate it. I too favor a liberal construction. If the Constitution leaves the State the right to tax and we take it away, we sin against the Constitution. The

⁴⁵ Vide. speech of April 16 also.

⁴⁶ On April 27.

States must not be bankrupted, but their cordial support must be given the National Government; for, only by perfect accord between the loyal States and Nation, can the expenses of the war be met.

On April 29, he spoke to the same point and distinguished the Maryland tax on a franchise of a bank, as in the McCulloch case,⁴⁷ from the right to tax the property of citizens invested in the stock of the bank and insisted that the case of *Brown v. Maryland*, in which he had been counsel, confirmed this view. Sumner⁴⁸ asked whether this would not permit the State to tax the stock indirectly, though it could not tax it directly, and Johnson replied that it could tax the bank's real estate.

He felt that the banks could not resume specie payments⁴⁸ until the United States should withdraw the legal tender notes. "So long as the rebellion lasts," there can be no return of specie paying currency. Johnson⁴⁹ was unable to see that Congress had power to fix the sum of the circulation, nor that to do so would be useful. He questioned the constitutionality of the legal tender notes, especially as to past debts; though he should have voted for the bill to issue them, feeling that there was a reasonable doubt in the matter. He hoped that the Judges would uphold their constitutionality.

Except for the tax on State banks, he approved the National Bank Act as a whole, and thought the want of a uniform currency throughout the country had been a crying evil, when there was no United States' Bank.⁵⁰

⁴⁷ Johnson had been present at the argument of this case.

⁴⁸ On May 2.

⁴⁹ Speech on May 9.

⁵⁰ On May 10, he opposed an enforcement of stockholder's liability, except when the assets have been ascertained to be too small. On June 4, he said the National Banks ought to make monthly returns, but may well pay the tax semi-annually.

As to the income tax, Johnson advocated exemption of small incomes and no increased percentage for the richer man.⁵¹ In the debate on the internal revenue bill⁵² he held that the federal government should not license a trade prohibited by the laws of a State and said that the States had exclusive control over lotteries.⁵³ He held⁵⁴ that the taxing power of the Nation was exclusively to raise revenue, except as to protecting manufacturers, and that in protecting them it may prohibit. It is true, however, that the motive of Congress in passing a law can not be inquired into in a judicial proceeding. He objected to a tax on State Bank circulation and held that such paper was not "bills of credit." He had no doubt that the United States could pay its debts and that the Nation's honor would be saved and felt that:

We are just as much bound to adhere to the Constitution as the Courts and we are just as much violating the Constitution of the United States, if we do in the execution of the particular power, what that power was not granted to accomplish, as the courts would be if they sanctioned it.⁵⁵

⁵¹ On May 27.

⁵² On May 25 and 27.

⁵³ On the liquor question, Fessenden advocated a liquor tax, as men will sell liquor any way and without a tax the government will lose revenue. Johnson (vide on June 2 and 4) said that a steam boat, passing through a canal, pays toll and should receive credit for these tolls on the gross receipt tax. It throws a favorable light on Johnson's conception of legal ethics to find him saying that he would not draw a deed for a man without a color of title.

⁵⁴ On June 1.

⁵⁵ On June 2, he spoke concerning the duty on quicksilver and the tax on express companies and opposed taxation of savings bank depositors. He referred to the taxation in Maryland of mortgages and of savings bank franchises. On June 6, he said that, when they had a stamp act in Maryland, they found that the stamp was rarely put on papers while they remained in the hands of the original parties, but only when there was a contest.

He feared that the internal revenue bill would not bring in as much revenue as was expected, and opposed taxing some articles 10 per cent and others 5 per cent. Especially⁵⁶ he objected to a specific tax on tobacco, as a discrimination in favor of Connecticut, as against Kentucky and Maryland, whose industry has been hurt terribly by the war, because the "Southern States, who, false to duty and false to honor, have left us," had taken away the chief market. He felt there was no want of patriotism in the Senate⁵⁷ but that the delays in the passage of the revenue bill were due to the House. The rise in the price of gold did not surprise him, as it was not an article of commerce nor was used as money, but he believed that the success of the Union arms and the determination to meet the country's demands by taxation will lead in the end to satisfactory results.⁵⁸ He opposed an ad valorem tax on tea,⁵⁹ because of the difficulty in appraising it, and an import tax on railroad iron, as manufacturers engaged to supply the government can not make it, and all the railroad iron is bought abroad by such a corporation as the Baltimore and Ohio railroad, which is "comparatively a rich company. Notwithstanding the inroads upon this road made by the rebels, it has been doing an immense business and has been able to pay 6 per cent, besides reconstructing the railway, because of the peculiar loyalty of the road and the condition of the country, in other respects, which has increased, in some measure, the business." He felt⁶⁰ that the object of the proposed tariff was more to raise a revenue than to give protection. A time when citizens suffered was a bad one to raise the duties, so as to

⁵⁶ On June 6.

⁵⁷ On June 3.

⁵⁸ On June 6, he spoke on warehousing, etc.

⁵⁹ On June 16.

⁶⁰ On June 17.

prohibit or raise the price of foreign articles. Manufacturers were probably never more prosperous than under the existing tariff and, if the people find it difficult to meet current expenses, they also will not be able conveniently to meet the government's calls.⁶¹

In the affairs of the District of Columbia he took a peculiar interest, differentiating it from the territories.⁶² When Saulsbury opposed allowing negroes to ride on the Washington street railway cars, Johnson said:

If a black man proposes to ride in a first class car upon any of the railroads, where there is no State statute preventing it, he has just as much right . . . to be transported upon that car as a white man. There is no more right to exclude a black man from a car designed for the transportation of white persons than there is a right to refuse to transport in a car designed for black persons, white men.

He thought too much time was spent in discussing the negro question. Public judgment opposed political and social equality. Negroes should have all the rights necessary to enable them to protect life and property; but, "when we come to the questions of political rights and social enjoyment, there are other considerations that enter into such inquiries." Prejudice must then be considered. Some negroes have as much intellect as white men, but it would not be wise to have them in the Senate.⁶³ "I should have no objection to ride

⁶¹ On June 10, he advocated payment for feeding the Winnebago Indians which had been done without warrant by the Interior Department and, on June 15, he supported an appropriation to pay Schoolcraft for copies of his Indian book.

⁶² On February 17, he advocated paying part of the expense of its jail and its penitentiary prisoners to Maryland instead of to Albany. On May 24 he opposed registration of voters in Washington on election day. Registration should be limited to an earlier date.

⁶³ He referred to Banneker, the negro mathematician and said that he did not eat with white men.

in a car with them, provided they were clean, and I have just as much objection to sitting along side of a dirty white man as to sitting along side of a dirty black man." He admitted, however, that ladies objected. Slaves, he added, were as a rule kindly treated, yet Johnson was glad that slavery is coming to an end, and, with Washington, he thought that it hurt the value of good land about the Chesapeake. Sumner well said of this address that Johnson, with "nimbleness of speech," had ranged "over a very extensive field."

Later in the Session, the question of running street cars on Sunday came up and Willey of West Virginia said it would be contrary to the laws of God. Johnson replied that "it is the duty of every man to go to church and worship God according to his own conscience, and, if in the particular locality in which he happens to be, he can not get to church without extraneous help, there ought to be some mode in which he would be able to get to church." He cited the case of a coachman and horses in the country, and referred to the local conditions of this "city of magnificent distances." It is often difficult to understand scriptural injunctions and "we may make our conduct conform to their general spirit, but a literal construction would be inconsistent with the purpose which the Maker of the world intended to effect." Johnson further did not believe in preventing a working man from going to the country on Sunday. He had been a very hard and "incessant laboring man" and had found that, when he had "the promise of a Sunday with the privilege of going out, unaffected by the cares of office and engagements of my profession, I was the better physically, as well as morally."

Johnson knew many parts of the country⁶⁴ and was

⁶⁴E.g. Key West. April 11, 1864.

especially interested in western land questions.⁶⁶ He felt that the public lands should be saved to help pay the enormous public debts, which it would require a "patriotic effort to meet," and he feared to permit the Western States to absorb these lands, of which the Atlantic States had received no share.⁶⁶ As subsidies were given western railroads, Johnson asked⁶⁷ why none were given for ships and favored one for mail service to Brazil, since the South American trade was formerly great and he felt "that our country is somewhat in dishonor, from the fact that it has no ocean line of steamers."⁶⁸

When there was a debate as to what constituted a constitutional quorum of the Senate,⁶⁹ Johnson said that, in his opinion, it was a majority of the senators elected. The House of Representatives is composed of members chosen, not of members which the States have a right to chose. The right to compel absent members to come to the session shows that only chosen persons were counted. It was properly held that the requirement for two-thirds vote of the Senate on a constitutional amend-

⁶⁵ On March 7, he defended a land grant to Lake Superior and Mississippi Railroad, by whose projectors he had been consulted. On March 28, he spoke on California land titles, especially that of the famous quicksilver mine and said that all such cases should go to the courts. On April 15, he favored confirming the title to lands in Minnesota of one Ford, who was a bonafide purchaser of a fraudulent land warrant. On April 30, he spoke on the San Ramon land grant in California. On May 20, he spoke on the Pacific Railroad and its receiving the right of eminent domain, saying that it was fair to reduce the damages to private owners by the beneficial effect of the road, as was done in assessing benefits and damages, when streets are opened in Baltimore. On June 7, he spoke on a land grant in New Mexico and on June 11, on Juan Miranda's claim.

⁶⁶ See debate on Military Road in Wisconsin on June 15.

⁶⁷ On May 20.

⁶⁸ On June 18, he spoke, urging that the government keep its contract as to the Overland Mail.

⁶⁹ On May 4.

ment was fulfilled on March 2, 1861, when twenty-four voted aye and twelve voted no, although twenty-four was not two-thirds of the entire Senate. The Government must go on and the South is kept by itself alone from electing senators. The Union stands upon the strength of the loyal States, and if the South left the Union, would still stand, represented in her remaining States. The Constitution does not require every State entering the Union to remain there forever, that the Union may continue. Garrett Davis retorted that the courts may disagree with Johnson, who brightly replied: "That may be. They have often done so, very much to the disappointment of my clients."

On May 10, he spoke in favor of a bill, of which he had charge, concerning proceedings in criminal cases, in which the United States were allowed peremptory challenge in trials for treason and said that he had acted as prosecutor, and more often in the defense, and felt it a gross injustice that the government had not previously possessed such privileges. He favored permitting the accused person to waive a jury trial, a practice which had been found to work well in Maryland.⁷⁰

⁷⁰ Miscellaneous speeches of his are those: on March 8, defending General Curtis, whom he had known in the Peace Conference, from charges of cotton speculation; on March 15, objecting to the appointment of twenty-five consular pupils at a salary of \$1,000 each and favoring the appointment of a minister plenipotentiary instead of a minister resident at Brussels, since the King of Belgium had been very friendly and had sent a plenipotentiary; on April 8, urging that Illinois be required to cede jurisdiction over the site of the Rock Island arsenal and stating that eminent domain is in the United States as incidental to other powers; on June 7, advocating the printing in the Congressional Globe only what is said in Congress; and on June 18, moving adjournment, when Trumbull and Fessenden had engaged in a heated argument and saying: "We are all of us, more or less, at times, under the control of impulses and we have, all of us, at times, uttered, in a moment of excitement, what we afterwards, upon cooler reflection, much regret."

When Congress assembled in December, 1864, it was evident that the fall of the Confederacy was close at hand. Johnson's first speech of the session was delivered on December 18, upon the defense of the Northern frontier, where the St. Alban's raid had recently occurred. He believed that the governments of Canada and of Great Britain would try to observe neutrality and that, doubtless, under the law of nations, if such raids continue and the raiders cannot be arrested in the United States, they may be pursued into the adjoining foreign territory.⁷¹ The judge who released the St. Alban's raiders acted wrongly and it is proper that we should prevent the repetition of such acts, or vindicate ourselves against such "acts of piratical warfare, thieving and murder." It is interesting to notice that Johnson expressed himself as approving of the surrender of Mason and Slidell and as thinking that the act of July, 1861, and the prize cases showed that Great Britain did not act too speedily in recognizing the rebels as belligerents.⁷²

He was as eager as ever that the war should be ended successfully and favored immediate action,⁷³ without reference to a committee, on a resolution of thanks to General Sherman.

Not only was the campaign from Chattanooga to Atlanta most unrivalled for the gallantry and skill displayed and its successful termination, but the progress of the march from Atlanta through Georgia, a distance of three hundred miles, with an army of fifty or sixty thousand men, without losing a man hardly, and finally capturing the city of Savannah, without firing a gun, will, in the history of military affairs

⁷¹ "I believe that right is just as firmly settled as any other question can be settled by the law of nations."

⁷² On January 5, he protested against including a provision for brevet rank in a bill to naturalize foreigners in the army.

⁷³ On January 6, 1865.

the world over, be considered, not only as without example, but as an achievement that the imagination of man in advance hardly thought to be possible.

The brilliant and successful termination of the Georgia campaign seemed to "have brought about very strong grounds for believing that it will contribute very largely in putting an end to the rebellion."

He reiterated his position⁷⁴ against manumitting the families of slaves who enlisted in the army. He had been so anxious to abolish slavery that he voted against referring the Thirteenth Amendment to the Judiciary Committee and he did not wish the families to remain in slavery, but thought it not in the power of Congress to free them by act. He had never doubted the power to raise negro armies; for, "whether he was slave or free," the negro "held the relation of citizen, owing an allegiance to the United States" and so was subject to a call to arms. There had been no difficulty in obtaining black soldiers in Maryland, by voluntary or compulsory enlistment, and they had already shown themselves "gallant and efficient." Congress had no power to destroy slavery in loyal States. In reply to Wade's desire that the war be continued for thirty years, if necessary, till slavery was entirely abolished, Johnson said, "I dislike the institution just as much as he does or can. I think it is attended with the most dire of evils, that it is disadvantageous to the master and keeps the slave in a condition in which no man should be placed, demoralizes him, renders him incapable of knowing what moral duty is, debars him of the privilege of ascertaining what Christian duty is, closes the Bible to him and closes every variety of knowledge, from neces-

⁷⁴On January 9.

sity." Yet he would terminate the war at once, if he could, believing that "in the retributive justice of heaven, the institution is mortally wounded now," for the South, "must have seen what an element of weakness it is in war." Suggestions are already made there to abolish it and thus obtain foreign assistance. Johnson does not wish to see the "Union dissevered, the work of our fathers gone, our former glory never again to be repeated, and (as is certain to be the result) every ten or fifteen or twenty years, a war between the conterminous countries." He agreed with Lincoln in hoping for peace. There is a step beyond which "loyalty would become barbarity. The South, God knows, has suffered enough. They have invited it. The people now, as we have every reason to believe, see that they have been misled . . . through the arts, wickedness, and insincerity of the madmen by whom the rebellion was inaugurated." It is time to hold out the olive branch and make the Nation, "potentially, one of the greatest powers upon the face of the habitable globe." He believed that abolition of slavery, by constitutional enactment, would not be an impediment to a successful peace, but that such a step would "tend to strengthen the government and greatly increase the chances of an early restoration of the Union." He had no doubt of the result, if we are true to ourselves and wish the country "peopled by freemen alone." As to the leaders of the South, "if Toombs, Davis, and the others should come here, they ought to be indicted for treason instead of being admitted" to Congress.⁷⁵

Johnson's clear views as to the war powers of the President were shown⁷⁶ in the debate on naval forces

⁷⁵ Wade significantly said: "If they will throw down their arms, we will govern them, until they do right."

⁷⁶ On January 18.

on the Great Lakes. It was proposed by the committee, unanimously, that the treaty of 1817 with Great Britain, limiting such forces, be terminated and the question arose whether the President had authority to give such notice, antecedent to Congressional action. Johnson maintained that he had the authority, for foreign nations know only the Executive and "have a right to suppose that what he does in behalf of the United States he does under some proper authority." He cited Hamilton's *Pacificus* Letters and said that England, doubtless, thought that Lincoln had the right to issue his proclamation of the preceding 23rd of November and so replied that putting an end to the treaty was not considered an unfriendly act. Congress may confirm his act by subsequent ratification. Davis of Kentucky asked whether war would date from a President's proclamation, if he should declare it and Congress ratify his act three weeks later, and Johnson answered affirmatively, adding that war is an existing fact, a "prosecution of some supposed right by force," and the President's right to carry on war against invasion, without an antecedent act of Congress, is clear, although his act needs Congressional ratification. In the *Prize Cases*, the court admitted that every belligerent act existed after July 13, 1861, but the rebels had declared war before that day.

He opposed strongly retaliation on rebel prisoners for the ill treatment of the Union soldiers held prisoners,⁷⁷ except in future cases and then, without allowing cruelty, as it would deprive us of the "support of the God of justice." Success in such a contest would be infamy. Retaliation should be limited at the point of cruelty, as Lieber provided. To burn prisoners, even if the Confederates did so, would be inexcusable, though such

⁷⁷ On January 26, 27, 28.

conduct found a defender in the heat of debate. Exchange of prisoners had been brought about between nations by Christianity and Johnson thought we ought to negotiate for exchange, leaving "the rebel government, if they have resorted to the enormities stated in this resolution, as I have no doubt they have, to the judgment of the civilized world, which will pronounce a judgment of infamy against all who are concerned in them." If Lincoln had refused to exchange prisoners, on the "ground that the enemy would not deliver the Africans whom they have taken in battle, while they were willing to exchange" white soldiers, or because an exchange "would inure more to the benefit of the enemy, he has perpetrated a high crime against the soldiers." "The black is in no worse condition by rescuing the white," but is better off, for such rescue replenishes the Federal army. As a general rule Congress had the power over the exchange and treatment of prisoners; but the President, without legislation, might retaliate to the extent of the law of nations and even commanding officers had certain powers of retaliation, as Washington's and Jackson's acts showed. If the rebels refuse to exchange black soldiers, Johnson advocated keeping Confederate prisoners, man for man, so as not to abandon the negroes, but he would also keep the obligation to our white soldiers. He "would go as far as any Senator in protecting any black man, who might be enlisted into the service of the United States and shouldered his musket to protect the rights of the United States."⁷⁸

⁷⁸ On February 6, he opposed diminution of punishment for one who enlisted an insane person. On February 7, he opposed a graded tax on incomes, to pay bounties, as making a distinction between rich and poor and as being "class legislation, . . . always mischievous and . . . defective in principle." On February 18, he spoke in reference to paying the Illinois

Late in the session,⁷⁹ he spoke in opposition to the bill creating the Freedmen's Bureau, as it made no provision for white refugees⁸⁰ nor for trial by jury in certain cases and was unconstitutional in declaring that certain officers shall be deemed to be in the military service of the United States, so as to "be liable to trial by courts martial."

On the questions especially dealing with the Border States, he spoke several times at this session. He objected to the seizure, incarceration, and punishment of any citizen without a trial and protested against the misconduct of subordinates, who arrested the Lieutenant-Governor and a presidential elector in Kentucky, and of the military, who, seeming to think they are not bound to obey State or National laws, had disregarded in Maryland the statute providing that persons not liable to military control should be turned over to a civil tribunal.⁸¹ "It may be . . . that, upon the ground of military necessity, in the beginning of

Central Railroad for transporting troops. On February 24, he advocated fortification of ports, especially of San Francisco, as we might get into a foreign war and our experience with Forts Fisher and Sumter showed that iron clad vessels can not take all forts.

⁷⁹ On February 22.

⁸⁰ He showed resentment, when Sumner appealed to him to be just.

⁸¹ For example, at the election on the adoption of the new Constitution in Caroline County, a Union man took the oaths but was refused a vote and when he sued the election officers, he was thrown into jail in Baltimore. The election gave a majority to the Democrats in the legislature and one timid member from a county was threatened with arrest, if he did not resign and did so. In Somerset County, a Democrat, who received a majority of over three hundred votes, also received a polite letter from Major General Lew Wallace, asking him whether he thought it well to take his seat in the legislature, as he had raised a rebel flag on his premises in 1861. He denied this, was arrested, taken to Baltimore, thrown into an old slave prison without bed clothing to lie upon and was sent South on the next day. Appeal was made to Lincoln, who telegraphed that no action be taken against the man, but was answered that he had already been sent South. Johnson expressed confidence in Lincoln.

this dreadful war, aiming as it did at the very life of the nation, these arrests were unavoidable; but, thank God, it is not so now, thank God, it seems now to be approaching its end and the end will be the restoration of the Union." In suppressing the rebellion, the rights of the loyal citizen should be preserved.⁸²

In spite of his action in behalf of suspected persons, Johnson's vigor in supporting the Union led him,⁸³ in speaking to a motion asking Lincoln for information as to a peace mission to Richmond, to refer to "the rebel authorities, for speaking on the floor of the Senate, I have called them nothing but rebels and shall continue to call them so, until they prove themselves able to establish their independence." At times, he would even yield to the opinion of more radical Senators, as when he voted yea, following Sumner's lead, on a bill for an ironclad oath to be taken by lawyers, though he thought it unnecessary to prescribe the oath for them alone and not for men of other professions. So too, together with Lyman Trumbull, he supported Lincoln's reconstruction policy in Louisiana.⁸⁴ The Committee on the Judiciary thought that the new State government could not be recognized except by act of Congress, and that the Executive had no power to "bring the State back under the Constitution." They also objected to the institution of the constitutional proceedings by the military authorities. This, Johnson admitted to be a bad precedent; but, no "matter how the proceedings were instituted, if, in point of fact, the people of the State did act voluntarily and were competent to act under the

⁸² So on February 8, he said postmasters ought not be allowed to break seals and take anything whatever out of the mails.

⁸³ On January 31.

⁸⁴ Vide 5 Rhodes U. S. 56.

original constitution and were authorized to act by being loyal at the time they did act, it is the duty of the Government of the United States to receive them back." Only 14,000 voted of the 51,000 voting population, but no loyal man was excluded from voting. So many Louisianians had volunteered in the rebel army that those who voted might easily be a majority of the active voters. In a long and able speech, Johnson discussed the relation of the loyal citizens of Louisiana to the Nation, after the act of secession. They did not cease to be citizens of the United States, but were entitled to protection and had forfeited no rights. They were kept by force from expressing their opinion, but, when protected, should be allowed to vote. If the ordinance of secession did not carry the State out of the Union, the loyal people should exercise the sovereign authority belonging to the State. There is no other way for them to come back, the United States cannot interfere with the State suffrage laws, even in the Western States, which admitted to the polls inhabitants not yet citizens. "If coming together, the loyal men" did an act which they would have been authorized to do, provided they had come forward voluntarily, we ought to receive their act, though done under military authority. Maryland had adopted a constitution manumitting slaves, of which no man in Maryland seriously questions the obligation, but it was adopted by the exclusion of a good many entitled to vote. A State has several meanings, and one of them certainly is the people. Sumner said the States should be governed as Provinces. What then becomes of the loyal citizens?

It is the American doctrine that the people have a right, as against the government, to meet and establish a government for themselves. If it is not in accordance with the Consti-

tution, Congress need not accept it, but, when a State is admitted on an equality with other States, it has a right to change its constitution and a seceded State is not equal to Massachusetts, if the former may not come back without negro suffrage.

Sumner asked, if Ohio could repeal the Ordinance of 1787, and Johnson replied in the affirmative that Ohio could enslave her fellowmen as well as Massachusetts. Sumner hotly answered that "Massachusetts cannot do an act of injustice," and Johnson retorted that she had done so and instanced her giving the vote, which prevented the abolition of the foreign slave trade before 1808. Henderson remarked that the education clause of the Massachusetts constitution would prevent most of the negroes from voting in Louisiana and Johnson continued: "If Massachusetts had such negroes, lost in ignorance, divested more or less of moral sense, because of the horrid condition, in which they have been kept, knowing not what the laws of God require, because they have been kept in a state of ignorance," Massachusetts would exclude them from suffrage. Maryland had just emancipated one-third of its population. To give the freedmen the vote would place Maryland in the hands of an ignorant population. The traitorous rebels are organizing negro troops, shall these vote, or be treated as the disloyal whites? By the new constitution of Louisiana, slaves are legally emancipated. If the pending resolve does not pass, their freedom will depend on the presidential proclamation, whose operation beyond our lines is more than doubtful.

Sumner then inquired, whether Johnson questioned the affirmation by the Supreme Court of the validity of the proclamation over all the Slave States. Johnson crossed the aisle to answer and, with more than usual loudness of voice, said that he did doubt it, but that,

Southern man as he was, he wished slavery destroyed and then the authority of the Union would never be destroyed.⁸⁵ The great difference between the Confederation and the Constitution was the want of an authority under the former to make its powers efficient and to act on the individual citizen, instead of on the State. Reconstruction should be accomplished quickly and the negroes, suddenly emancipated, should not vote now. If they are given the suffrage, "the whole of that vote will for years be in the hands of a few white men."⁸⁶

On the last day of the Session, when a proposition was made to punish the Southern sympathizers known as copperheads, by military tribunal, Johnson asked whether this was not a violation of the Fifth Amendment to the Constitution. The treatment of a spy in a loyal State was an exception. The filling of the military prisons in Baltimore with prisoners not notified of their offense is wrong, while to say "that every citizen of the United States is to be dragged before a military tribunal is to say that our fathers fought during the Revolution in vain."

Though Johnson had opposed Lincoln's reelection, he gave him the benefit of the presumption that he would not keep in the service any one unnecessarily and felt that it would be indecorous to overrule his determination.⁸⁷ Upon the counting of the electoral votes, he said that⁸⁸ he thought Congress had power to legislate

⁸⁵ During this speech, he had a colloquy with Sumner on Washington's position and that of the members of the Convention of 1787 as to the "consolidation of the Union."

⁸⁶ The sovereignty of the State in subjects left to it, such as marriage, is still its own though limited, see *McCulloch v. Maryland* and *Marshall v. Lewis*.

⁸⁷ In the debate on dropping unemployed generals from the rolls on January 6.

⁸⁸ On February 2.

in prohibition of the counting of votes from States in rebellion. Congress had not provided a way of deciding contested elections, but has the power to do so. The Vice-President cannot exclude any votes. The "efforts of those rebellious citizens to take those several States out of the Union are legally imperfect," but have put the States "in a state of rebellion" and "at war with the United States." These States cannot vote, as those citizens of Maine could not who were under British power in 1812. Probably, if all the inhabitants of those States threw down their arms, and admitted their allegiance to the United States, the States would be entitled to seats in the Senate, but that is not the present question. Having "got rid of the disturbing element of slavery," the prospect was good for the "perpetuity of the Union." In a second speech⁸⁹ Johnson said that, though the act of 1861 did not name the rebel States, they are named in the presidential proclamation thereunder and, therefore, have no right to choose electors. By like proclamation, Lincoln can say the rebellion is terminated and the States, which have never been out of the Union in a constitutional sense, then cease to be in rebellion, without waiting for Congressional action. If, at election time, rebellion should have been terminated and the authority of the Constitution reinstated, the States are entitled to representation in Electoral College or Congress. "The moment the hostility ceases, then the commercial intercourse begins again and, that beginning, the State is back in the Union for all purposes." A war may terminate before a treaty of peace is made. "Congress has no constitutional right to carry on a war against States, but may suppress insurrection which amounts to war." If the South is

⁸⁹ On February 3.

willing to come back and abide by the decision of the majority as to slavery, it would be murder for the President to authorize another man to be shot. The "terrible, most pestilent, destructive heresy" of secession was most earnestly entertained by many Southerners, who thought they were right. Even Lincoln himself, when a Congressman, had seemed to entertain it. The Southerners had "been made to see that the resolution of the country is so perfect, the devotion to the Union is so absolute, that happen what will, we of the loyal States mean to prosecute the war to the end, until the insurrection is put down, which has no other foundation, in point of law, than the assumed right of secession." The President has the power to pardon and it is proper he should, when such men come to him saying they sinned: as A. H. Stephens, who denounced secession and predicted its evils; Hunter, who never was party to it; or Justice Campbell, who, in the Supreme Court, "thought it the vilest heresy that ever entered into the imagination of man, but was carried away by circumstances surrounding him."⁹⁰ However,⁹¹ when Lincoln signed a resolve as to representation in the electoral college, with a denial of the right to such legislative power in Congress, Johnson differed with him and said that Lincoln was wrong in point of law and⁹² that he had no right to read Congress a lecture. Keen to defend the right of Congress,⁹³ he said that it was also a mis-

⁹⁰ On February 4, he replied to Collamer of Rhode Island, showing that Madison in the Federal Convention was an authority against war being made upon a State. On February 6, the Senate voted to count the electoral votes, but the House would not, so the vote failed.

⁹¹ On February 9.

⁹² He reflected on Congress, as he did in his comment on the Davis-Wade bill.

⁹³ On February 7.

take for Lincoln to sign the Thirteenth Amendment, for the "object of the constitutional provision on the subject is simply to initiate a mode, by which the people shall decide whether there shall be an amendment to the Constitution or not." The two-third vote needed to pass the amendment is the same as that required to pass a bill over the presidential veto and it is "evident that what was intended to be submitted to the President was a question, which was to be passed upon by more votes than were necessary, before it was submitted." Previous practice and an opinion of the Supreme Court in 1794 confirmed his opinion.⁹⁴

Financial measures did not cause him to make a long speech at this Session,⁹⁵ but he spoke several times upon the internal revenue bill, opposing a tax on State bank notes⁹⁶ and a graded tax on incomes to pay bounties.⁹⁷ He opposed a tax on sales, as one which fell ultimately on the consumer and which was odious, because a government officer would have to go monthly into each business house.⁹⁸

He favored, however,⁹⁹ a tax on book publishing, as a tax not on knowledge, but on business. On law books,

⁹⁴ On March 3, he said that an answer of the Assistant Secretary of Navy to a Senatorial request was out of place, again showing his zeal for the privilege of the body.

⁹⁵ On December 21, Johnson said that the principle of the proposed internal revenue act was altogether wrong and that a man should be given time to straighten out the whiskey tax. On March 2, he remarked that fertilizers should not be taxed too heavily, for such tax falls on the agriculturists. On February 28, he said that the difference between the nominal and the market value of gold should be considered as income and as a proper profit, but that a man who kept the gold should not be taxed on the inflated value.

⁹⁶ On March 1.

⁹⁷ The poor man had no right to say to the rich, pay me for entering the army. On February 7.

⁹⁸ On March 1.

⁹⁹ On February 27.

“it comes first out of the lawyers; but, perhaps, it comes out of the client. If the client does not pay it in advance, the client who comes next pays it. I speak from some little experience.” So long as American consumers are taxed by an import tax on imported books, it is not unjust to make an American manufacturer pay for the privilege.¹⁰⁰

On January 19, Johnson delivered a long legal speech on a bill to regulate commerce among the States. Previously, it had been admitted that the State had exclusive control over internal commerce, but Johnson thought this bill limited it. The power to establish post roads meant only to designate existing roads, not to build new ones. When, in 1800, the Cumberland road was begun to be built from the proceeds of the sales of public lands, it was claimed that Congress could appropriate money for any purpose material to the common defense and the general welfare. Monroe, however, was right in his veto of a road bill in 1822, saying that it was not an independent power. The only guarantee against an abuse of the appropriating power was the appeal to the people, which also guarded against abuse of the taxing power.¹⁰¹ Judge McLean denied Congressional power to construct the Rock Island bridge over navigable water. The proposed bill alters franchises of railroads and denies the State the power to make roads as she pleases, since it permits the railroads to carry

¹⁰⁰ He doubted as to whether bonds and notes (on March 1) issued under the new loan bill would not inflate the currency and lower the standard of value still more. On advocating a bill for repayment of \$2,000 to H. A. Bingham, a paymaster, who had to pay the government that amount which had disappeared while in his custody, Johnson said, on January 19, “Very few men think of counting their money. I am one of the reckless ones and I never think of it, though I do not know that I have ever been taken in.”

¹⁰¹ He quoted a number of decisions.

troops, freight, etc. Maryland is a quasi-corporator of the Washington Branch of the Baltimore and Ohio Railroad, and this measure involves a "principle which is destructive of the sovereignty" of the States. If the courts support it, the authority of the States is submitted to the unlimited power of Congress.

We are sent here to take care, among others, of the rights of our States. Our oath to support the Constitution of the United States is not merely to execute all the powers which it confers, but to abstain from exerting any powers which it does not confer, . . . in order to protect the inherent, and original, and undelegated powers which belonged to the States before the Constitution was adopted.¹⁰²

When the Senators from Nevada appeared, Johnson advocated their admission and that of their State, although they had been elected in advance of the admission of the State into the Union, following the precedent of the first Senators of Missouri, Michigan and California.¹⁰³

In discussing the legislative appropriation bill, the question of the amendment of money bills came up and Johnson advocated the Senate's using its utmost power, referring to the precedent of 1856. Sumner replied that this precedent was of no value, for the men who made it were rebels. Johnson replied: "They were able men and one of them, Brodhead, was a friend of mine, who labored for the Union and, in professional

¹⁰² On District of Columbia matters, he spoke to advocate the grant of a wharf privilege to a ferry company (on January 17). The bed of the river is the property of individual owners, who hold riparian land; but, on navigable streams, no one has a right to go to the thread of the stream, without consent of the sovereign. Similar wharf privilege was given in Baltimore. He opposed, in vain, the visitation of the institution of the Sisters of Mercy by public officials (on February 11.).

¹⁰³ On February 1.

ability, was Sumner's equal. He was a Democrat always and a pure patriot." Sumner could only respond: "I shall not follow Reverdy Johnson."¹⁰⁴

Johnson's devotion to friends was also shown, on February 23, in his defence of Taney, when a bust of the Chief Justice was proposed to be placed in the Supreme Court. Reference to this defence of Taney's "great ability and moral worth" has been elsewhere made. Johnson lost his temper and became personal in his discussion of the Dred Scott decision, which came into the debate.¹⁰⁵ Blaine wrote¹⁰⁶ that Johnson's defence of Taney showed "that amplitude and readiness, which Mr. Johnson displayed in every discussion involving legal principles."

On February 15, Johnson announced that his colleague from Maryland had died on the 13th at 7 a.m. He had been paralyzed on the day before and lay speechless but conscious, nearly to the end. Governor Hicks, "a title by which he is best known and will be ever gratefully remembered, not only by Maryland but by the Nation," was eulogized by Johnson as a Christian, beloved by his friends, "ever courteous, kind, and attentive," possessing "the esteem and confidence of us all, endowed with a sound judgment and animated by a fervent patriotism."¹⁰⁷ As Governor, "his responsi-

¹⁰⁴ On February 10.

¹⁰⁵ Trumbull, McDougall, Carlile favored the motion and Sumner, Hale, Wilson, Wade opposed it. Five days later, Johnson in the debate on the cotton drawback was asked to speak louder and said that objection was sometimes made that he spoke too loud.

¹⁰⁶ Twenty years in Congress 135.

¹⁰⁷ Thomas Holliday Hicks was born in Dorchester County, September 2, 1798, one of a large family with limited means. After studying in the common schools, he helped his father on the farm. Entering public life as a constable in 1824, he next became sheriff and then opened a store at Vienna. He was a member of the Electoral College for the State Senate in 1836 and "evinced

bility was such as to task his firmness and his judgment and to test his patriotism. They proved equal to this emergency." The people of the State, for a time, forgot

the paramount duty, which they owed to the General Government In this interval of temporary forgetfulness, an excitement amounting to madness threatened the State with a fraternal war and with driving her into the rebellion, that would have made her soil the battleground of the strife which has deluged every seceding State in blood and would certainly have involved her in ruin. Against every effort that ignorance or ambition could essay to effect the insane and wicked purpose, Governor Hicks interposed the whole power of his office and succeeded in defeating it. Nor was this accomplished without personal peril. In April, 1861, when the blood of the loyal soldiers of Massachusetts was treasonably shed in the streets of our chief city and its power for some days was wielded by men who for the most part were resolved on rushing the State into rebellion, it was obvious, to those who witnessed the scenes of the day and moved among the parties who engaged in them, that Governor Hicks was an object of such intense animosity, that his safety was not assured. . . . In these trying moments, the Governor was true to his duty. Throughout his term of office, he devoted himself with untiring industry and an ever watchful patriotism, by every legal means, to crush out the spirit of secession and to retain the State in her allegiance to the Union and he succeeded. When he ceased to be her Governor, she was loyal in all the departments of her government and the people, by a voice approaching unanimity, proclaimed their fixed resolve to stand by the Union, not only as a matter of almost holy duty, but as indispensable to their safety and prosperity and

an inherent love of law and order." He then served in the Governor's Council, as Member of the House of Delegates, as Register of Wills in his County, and as member of the Constitutional Convention in 1850. He was chosen Governor on the Know Nothing ticket in 1859 and, at the conclusion of his term, became United States Senator.

so she and they have been ever since. It is not going too far to declare that this result is in a great measure to be referred to the conduct of Governor Hicks.¹⁰⁸

When Lincoln was assassinated, Johnson served as one of the pallbearers¹⁰⁹ on the part of the Senate, but a month later, on May 13, he appeared without compensation as one of the counsel for Mrs. Surratt, who was tried by military commission for complicity in the murder of the President. He had never seen Mrs. Surratt until the day before his appearance for her, but said he felt it was due to the legal profession that she should not go undefended.¹¹⁰ His appearance was objected to, on the ground that he did "not recognize the moral obligation of an oath that is designed as a test of loyalty." Johnson repudiated the charge, which was based on his letter with reference to the Maryland elections of 1864. Although allowed to appear, he was present only at rare intervals throughout the trial and sent in his final written argument to be read by his junior associate, denying the jurisdiction of the Court and asserting the illegality of military commissions in the United States. He did not seek immunity for any-

¹⁰⁸ Senator Hale added that Hicks was second to none on the proud roll of fame, "of those by whose clear sagacity, unshaken firmness, and patriotic devotion to duty in a great crisis of our country's history, her integrity was preserved and her ultimate triumph secured." Hale had served on the Naval Affairs Committee with Hicks and had "never met a more kind, genial and courteous gentleman." He preferred to have his own people abolish slavery and was an antislavery man. Willey of West Virginia voiced the gratitude of his State and said: "I never knew a man whose simplicity and singleness of purpose, whose evident sincerity, purity and unselfishness of aim to promote the honor and welfare of his country, commanded more of my confidence and respect. . . . He ever appeared to forget himself in the higher and holier purpose of securing the public good."

¹⁰⁹ War of Rebellion Off. Recs. Serial 97, Ser. 1, Vol. 46, pt. 3, p. 807.

¹¹⁰ Vide DeWitt Judicial Murder of Mrs. Surratt, pp. 41, 73, 85, and T. M. Harris's Assassination of Lincoln, pp. 107, 111, 327.

one guilty of the "horrid crimes," but claimed that the trial should proceed before the civil courts.¹¹¹

In his argument, Johnson declared that he believed the evidence against Mrs. Surratt was suspicious and that she was innocent of the assassination, which "in the black catalogue of offences . . . will forever be esteemed the darkest and deepest ever committed by sinful man." For such a commission to have jurisdiction, a military offence must be made to appear, the offender must be subject to military law, and the military law must provide for trial and punishment by a military tribunal. These circumstances were not found here and the commission could not be justified as an incident of the war power, for the creation of a court is a legislative function and the President cannot suspend courts, as he can the writ of habeas corpus. The case is not military treason, as the accused were not, in the belligerent sense, enemies. The "continuance of our government does not depend on the lives of any or all of its public servants" and the "folly of the madman and the fiend" in killing Lincoln will not destroy the nation. In England, persons who tried to assassinate the monarch have been tried by the civil tribunals.¹¹²

Following out a similar line of argument, Johnson appeared before the Supreme Court in *Ex parte* Milligan and there won his case. He also acted with Matthew Carpenter and A. H. Garland, at the request of the latter, in *Ex parte* Garland, in which case the ex post facto oath was declared unconstitutional.¹¹³ In July 1865, Garland, who had been admitted to the Supreme Court on Johnson's motion in 1860, came to Washington

¹¹¹ His argument was printed at Baltimore in pamphlet form in 1865, pp. 31.

¹¹² H. L. Bond and Peckham of N. Y. were against him.

¹¹³ Vide Garland's Experiences in the Supreme Court.

and procured a pardon, in which application he was seconded by the "efforts of my constant and steady friend" Johnson, the "big hearted, large brained and generous man and friend." During that visit to the national capital, Garland formed the idea of asking to be admitted to practice, notwithstanding the test oath, and Johnson gladly aided him without any fee,¹¹⁴ being interested in the case both from its constitutional aspect and from his friendship for the younger man. B. R. Curtis expressed himself as satisfied of the soundness of Johnson's argument against the test oath¹¹⁵ and added, "certainly, it is put with great clearness and force before the Court." About the same time, Johnson, with Montgomery Blair and David Dudley Field, was successful in the Supreme Court in defending a Roman Catholic priest, named Cummings, who had preached in Missouri, without taking the iron clad oath.¹¹⁶

¹¹⁴ Speed and Stansberry were the opposing lawyers.

¹¹⁵ 1 B. R. Curtis Life 370, July 8, 1866.

¹¹⁶ Vide Cox, Three Decades 251.

CHAPTER V

THE THIRTY-NINTH CONGRESS AND RECONSTRUCTION (1865-67)

In this great Congress, Johnson's career was most conspicuous. Sitting on the right of the Vice-President's Chair and in the row of seats nearest his desk, Johnson was one of the most prominent figures in the house.¹ He was "perhaps the most eminent lawyer in a body, where legal ability always commands much respect,² and he showed that his mind had lost none of its force and power, though he was now about seventy years of age. He was the oldest member of the body, in years, if not in service, and his conciliatory disposition and friendly relations with all the members did much to increase the efficiency of his leadership of the minority. Hon. George H. Williams of Oregon, one of the last survivors of the Senators who served with Johnson, wrote thus of him on May 9, 1906:

I was admitted to practise in the Supreme Court of the United States on the motion of Mr. Reverdy Johnson and was with him in the Senate. Mr. Johnson was an exceedingly amiable and accomplished gentleman, a lawyer observing the dignity of the Senate and the civilities of social intercourse. He was a great lawyer and had a remarkable and accurate knowledge of the decisions of the Courts at his command. He was a frequent speaker in the Senate and a ready debater

¹ W. H. Barnes, *History of the Thirty-Ninth Congress*, p. 24. An engraving of Johnson is opposite p. 203.

² W. G. Brown, *Thirty-ninth Congress*, 97 *Atlantic Monthly* 466. At p. 473, Brown writes "So long as the discussion concerned itself with theory," Johnson "could hold his own with Fessenden and Trumbull. He could more than hold his own with Sumner, who was never strong on legal questions."

upon almost all the questions that arose in that body. He was a Democrat and I was a Republican and, consequently, we did not agree upon most of the subjects growing out of the Reconstruction policy of Congress and other party questions, but there was nothing in these differences to disturb our personal relations. I had an impression of Mr. Johnson that he was not a man of very strong convictions and that he could speak with equal readiness and facility upon one side of a question, as upon the other, and that he was not very particular as to which side he espoused. I may have misjudged him in this respect, but such was my impression. He was particularly at home upon all constitutional and legal questions and always brought learning, ability, and skill to the discussion of such questions. He was quite blind, while he was in the Senate and had to depend largely upon his memory, which was evidently a storehouse full of the learning of the law.

On reconstruction, Johnson's policy consistently favored restoration of the Southern States with amnesty to their citizens. He cited the proceedings of all departments of the government during the war and of the judicial and executive departments later, as proving that States were not out of the Union. The citizens' disloyalty could not carry the States with them and, at the moment when resistance was abandoned, the authority of the United States was reinstated. When the Fourteenth Amendment was presented, Johnson opposed it, although he favored certain provisions in it, as he thought there ought to be a constitutional definition of citizenship in the United States and believed that negroes would be citizens, but for the decision in the Dred Scott case. He held that the phrase, "All men are created equal," included negroes, but that only a juristic equality was meant and that political and social equality should be excluded. He believed in the possibilities of the negro, but opposed granting him the suffrage, at

present, or the deprivation of representation from the Southern States, on the ground that negroes did not vote there. He believed negroes should be counted in for representative purposes, as women were. Suffrage, he thought, was not an inalienable right, but a privilege, which the government may grant or withhold. Leave the black man without suffrage, "until he can raise himself to the elevation of the white race, as I think he may, and then, if possible, change your organic law."

Johnson favored Andrew Johnson's³ presidential plan of reconstruction, but was not closely connected with the President, nor was a blind follower of him. He was the only representative of the minority in the Senate in the Committee of Fifteen on Reconstruction and, as the leader of that minority in the Senate, had to defend several of the President's vetoes. The power of removal by the President was vigorously upheld by Johnson and he especially emphasized the folly of requiring the President to keep in office, as heads of departments, men who no longer had his confidence.

On December 12, Johnson was appointed one of the six members of the joint committee on reconstruction on the part of the Senate. During the first week of the Session, Mr. Wilson of Massachusetts introduced a bill for the protection of freedmen⁴ and Johnson replied to him, asking that the bill be referred to a committee. The bill proposed to repeal laws by which any difference or inequality was created between races. Does this affect police laws? If the Southern States are in the

³ On April 24, 1865, Reverdy Johnson wrote Andrew Johnson: "It will be my pleasure, as I think it will be my duty, to afford your administration, as I anticipate it will be, all the support in my power (Century Magazine, January, 1913, Vol. 85, p. 423).

⁴ In a debate on pension laws on April 13 and May 18, he referred to the difficulty of ascertaining who was a negro's wife.

Union, they may pass such laws. Is there a more pressing need to prevent outrages on blacks in the South than in the loyal States? Crimes are committed even in Massachusetts. He was glad that the blacks were free and took the occasion to express his "very decided opinion," which he had always held, that the Southern States are in the Union "and that they never could have been placed out of the Union, without the consent of their sister States. The insurrection terminated, the authority of the government was thereby reinstated; *eo instanti* they were invested with all the rights belonging to them individually, I mean as States." The "sole authority" for the Congressional acts of the war period was the authority to "suppress insurrection." He praised Andrew Johnson's message, which took the same view. Having conversed with many of the rebel leaders, he found "they are now as anxious to return, as in their insanity they were anxious to leave us."

For the care of the freedmen, the Freedmen's Bureau had been established on March 3, 1865, and, as it was found that the original act did not go far enough, Trumbull introduced, from the judiciary committee, a supplementary act to enlarge the powers of the Bureau. Johnson at once suggested delay and, on January 23, expressed himself as anxious to provide for the freedmen, but as doubtful of the power of Congress, especially as to the proposal to authorize the Bureau to go into the States and buy lands for the freedmen. The United States can buy lands for the arsenals, etc., but not for this purpose. Slavery having been abolished, the negroes stand on the same footing as the whites and, if there be authority to provide for the black, it is because he is a citizen, and so we may clothe and educate all citizens, though the project of a national university had been set aside because of

supposed lack of power. The nation cannot buy lands for philanthropic purposes. He had no partisan objection and thanked God that the rebellion had been suppressed as he had desired, but he must keep within the Constitution. Suppose that part of the Eastern Shore were bought up for this purpose. "Do you believe that 'Maryland' would be satisfied to have that portion of our State, one of the fairest portions upon the face of the globe, capable of producing almost an unlimited amount, not only of the necessaries, but of the luxuries of life, put into the hands of the blacks exclusively?" Trouble would surely follow, though Johnson believed negroes were as safe in Maryland as in Massachusetts.

Heaven knows, I have no prejudice against the race. Brought up among them, associating with them in boyhood and since, giving to them and receiving from them acts of kindness, I have no possible prejudice against them, but still I know that nature has made them so distinct from our race that, with the mass of mankind, there will be and perhaps must be more or less of prejudice, more or less of unwillingness on the part of the whites to be associated with the blacks. . . . I believe that they are capable of as much a high civilization as the white race. I have seen as much native talent exhibited in the black race as I have seen exhibited in the white race and I believe . . . they will ere long become valuable citizens of the country.

He felt that "slave labor cannot . . . compete with free labor." Creswell, Johnson's radical colleague, spoke of outrages on the Eastern Shore for the purpose of driving refugees and freedmen from Maryland, alleging that juries were summoned by rebel sheriffs and were composed mostly of the very worst rebels. Johnson replied, in tone of apology, claiming that the outrages are exceptions and saying that he "once took

an active part in a movement to prevent the exiling of free blacks from Maryland'' and so had a right to speak. It was largely through Creswell's insistence that the bill originally drafted for the States in rebellion was amended to extend to the whole Union;⁵ but Johnson, insisting that there was no more need of applying the law in Maryland than in Massachusetts, read from Governor Swann's speech, refusing to endorse Creswell, and from letters written by members of the Maryland Senate, stating that a man was killed in a drunken broil in Worcester County who, Creswell said, had been ruthlessly murdered by a rebel soldier.

The cognate civil rights bill, also introduced by Trumbull, was opposed by Johnson, as beyond the power of Congress, although he patriotically tried to amend it to make it as free from objections as possible. The bill proposed to define citizenship. Johnson went out of his way to say that, since the Dred Scott decision, a person of African descent was not a citizen; for, on that point, the opinion dealt with an essential matter, even though what was said of the Missouri Compromise might be *obiter*. If it were not for the ruling of the Supreme Court, he should hold that the negroes were citizens, even when slavery existed. Johnson was anxious to get a good constitutional definition of citizenship and also to protect the colored race in all proper rights, but this bill proposed to sweep away the police power. An act made obnoxious to the whole community, like the fugitive slave law, is of no practical importance, because it is a dead letter. Some States forbade intermarriage of negroes and whites and this law would destroy all State power in the matter. What will be the standing of Indians, who are wards of the United States? Lane of

⁵ February 8.

Kansas said that Indians in his State had already taken allotments of lands. Johnson admitted that those who had separated themselves from their tribes ought to be citizens, but if their citizenship does not date from birth, it does not come from buying land, but will require Congressional legislation. Congress may admit to citizenship foreign subjects in annexed territories and has done so. It is "an anomaly that says there shall not be the rights of citizenship to any of the inhabitants of any State." Trumbull had used the word "inhabitant" in the bill,⁶ and Johnson pointed out that he had made it thus impossible for any State "to draw any distinction between citizens, who have been there from birth, or have been residents for a long time, and him who comes into the State now for the first time as a foreigner. He becomes at once an inhabitant. If he comes from England, or from any of the countries of the world, he becomes that moment an inhabitant; and if this bill is to pass in the shape it stands, he can buy, he can sell, he can hold, he can inherit and be inherited from, and possess all the rights of a native born citizen," without being naturalized. Johnson held that the phrase, "all men are created equal," covered negroes, for it was idle to deny that a negro is a person, in many respects the same as a white, though his intellectual capacity may be less.⁷ He moved to strike out, "without distinction of color," from the definition of citizenship in the bill, as he was anxious to do away with all questions involving rights which may be supposed to exist in one race and not in the other.

The bill was passed and vetoed by President Johnson. In the debate which preceded the passage of the bill over the veto, Johnson delivered an important speech on

⁶ Vide 2 Blaine 174.

⁷ On February 1.

April 5. He defended warmly the veto power, which was given to guard the executive department, the States, and the citizens against encroachments by the legislative department and against inexpedient and ill-considered legislation. The President has a right to veto a bill on the grounds of expediency, as well as of constitutionality, as Madison said in the *Federalist*, although the Whigs had held otherwise in Jackson's times. Andrew Johnson in 1860 had merely said that, when a bill was passed by a large majority, great caution was necessary in vetoing it. This was not a declaratory act, but one which changed the whole theory of government. The bill struck at all the reserved rights of the States. If Congress can so legislate as to blacks, the same may be done as to whites and the States are virtually abolished.

It is the business of the general government to protect the citizens of the United States, where that protection cannot be obtained through the instrumentality of the States, but where the rights of the citizens of the United States are given by State laws over subjects intrusted exclusively to State legislation, it is the exclusive business of the State to protect them.

This law, which invaded the jurisdiction of the States over their criminal code, is based on the "perilous delusion" that "the sooner everything is vested in the government of the United States, the better for the country." Under this theory, the government will not last half a century, for anarchy and then despotic power would result. The only constitutional authority for Congress to confer citizenship is found in the naturalization clause, which was designed to remove disabilities arising from the fact of alienage. The bill wrongfully attempts to make all persons born in the United States citizens thereof and of the State wherein they reside, but the true view

is that every free person born in a State, who is a citizen of that State, is also a citizen of the United States, that is to say, birth plus State citizenship equals federal citizenship. The States exclusively possess the power to say what persons shall be citizens. "A country as extensive as that of the United States cannot exist, except by means of divided sovereignties." "Removal of the disabilities under the naturalization laws did not create the party a citizen of any one State. Congress can only accomplish its purpose by constitutional amendment. The bill provided that any judge who shall hold this law unconstitutional and a State law to be in force, in spite of this law, shall be punished and thus "usurps a power, inconsistent with the independence and integrity of the State judiciary." The President is correct in saying that it is not right to change the whole domestic economy of eleven States, as this bill does, in the absence of their representatives. It is not their fault that they are not here. They have organized and await Congressional legislation. The executive and the judiciary departments recognize these States. "We alone stand in the way of a complete restoration." Irrespective of party considerations, what can harm us from their presence. The rights of black men are as safe in the South as in the North. Many disloyal men can be found in Illinois, if disloyalty is proven by want of confidence in Congress. Indeed Lincoln himself advocated secession in 1848. Andrew Johnson's career, as held by Trumbull, "a gentleman who stands at the head of the bar in America at this time," has been thoroughly loyal and not inconsistent.

On January 11, Johnson replied to Senator T. O. Howe of Wisconsin upon the subject of the Provisional

Governments of the Southern States.⁸ S. S. Cox⁹ was much impressed by this speech of the "sturdy and fervid Marylander," "with venerable English form" and "expressive mouth." The "cunning of fence and the courage of conviction of the Marylander were resistless" and "his elocution, albeit trained in the solemn hush and seclusiveness of the Supreme Court, was loud, orotund and defiant." Howe had maintained that the war had reduced the seceding States to the condition of territories and Johnson reiterated, in his reply, his old position that the nation can not war upon a State, but can suppress insurrection.

It was a police power, given to Congress as such, not a power, under which, by any possible mode in which it could be exercised, any conquest, in the proper sense of the term, was to be achieved, not a power by which there was to be extinguished any existing institution in any one of the States, and, above all, not a power to destroy a State or States.

The Federalist and the unanimous opinion of the Supreme Court in the Prize Cases were cited in confirmation of Johnson's view that the "power actually given was a power to preserve, not to destroy," to make the government perpetual. It seemed to him to follow that a continued use of the police power was "a simple absurdity," when an insurrection is suppressed and the condition which required resort to that power was at an end. If the ordinances of secession were void, they could not take States out of the Union. "If the citizens had not a right to be disloyal, their disloyalty could not put them out" and they always were in the Union.

⁸ On December 19, he spoke in favor of printing Carl Schurz's report on conditions in the South.

⁹ Three decades of Federal Legislation 354.

Lincoln's proclamations in 1861 spoke of "the insurrection." The United States now collect customs in the Southern ports under laws passed antecedent to the rebellion. The Sea Islands had been sold to pay for South Carolina's direct tax. District attorneys and marshals had been appointed in the South, yet, by the Supreme Court's decision,¹⁰ the judicial system would not extend to it, if the States had become territories. The Supreme Court, even during the war, allotted judges to the rebel States. The Federal authority conquered, "in the name of the Constitution and laws of the United States," and declared

to the insurgents this is your constitution and your laws and you are bound by them, as you were before you attempted to resist their authority. . . . We said that, notwithstanding their acts of secession and hostility, they were still States and their citizens were bound to obey the Constitution and laws of the United States. They denied this and we won, but have gained what may scarcely be called a victory, if we have put down an insurrection and have lost States in so doing.

If the secession ordinances had any validity, the "war upon our part has been a great crime." If the "Constitution confers no right of separation," the ordinances were void and separation can not be "effected by the conduct of the individual citizens." Every man in the insurrection was a traitor, whether he can now be presented for treason or not, and he is still a traitor, if he attempted to resist by arms one hour before hostilities terminated, since "he was then and is still a citizen of the United States." The result did not depend on the number of citizens in insurrection. "The offence of these citizens was a refusal to participate in the councils of the nation.

¹⁰ *Canter v. Am. Ins. Co.*

The proposition is that that refusal has put them in a condition, in which they "have no right to participate in such councils and cannot participate, unless we, hereafter, at any time when, in our judgment, we may think proper, give them the right." Yet at the beginning of the war, the statutes authorized the President to collect revenue on shipboard off the ports of the seceded States and to declare a state of insurrection there, whereupon commercial intercourse should cease, "so long as such condition of hostility continue." Castine and part of Maine were seized by the British during the war of 1812, but, "the moment the place was abandoned, the authority of the United States became reinstated *proprio vigore*¹¹ It revived just as animal life revives in certain cases, after temporary suspension." This remarkable speech closed with the expression of hope for harmony and prosperity.¹²

In January, Mr. Blaine proposed in the House a resolution which developed into the provision of the Fourteenth Amendment in reference to citizenship and the apportionment of representation. The amendment passed the House in the latter part of the month and in the debate upon it in the Senate on February 9, Johnson spoke at length in opposition to granting negroes suffrage. Under the old mode of ascertaining representation in Congress, the country had "prospered wonderfully," except only during "the four years through which we have so sadly but triumphantly passed." There are no longer slaves and "we all stand upon the same platform. As we came from Nature's God, we stand together upon

¹¹ U. S. v. Rice 4 Wheaton.

¹² On January 26, he asked Howe whether a Senator, once admitted to the Senate, can be expelled on the ground that his State is not a member of the Union.

an equality, as far as related to human rights. The proposed disqualification is a safe one for New England, which had few blacks; but if Maryland makes a different qualification for her 171,000 blacks, all of them are deducted. Are you afraid of the power of the South? We had believed that Maryland possessed a republican government. The States will not admit the right of Federal government to regulate suffrage within their own limits." Sumner said that the civil rights bill had been passed, can not the same be done as to political rights? Johnson replied that he considered that the earlier bill was unconstitutional. "I had hoped that the time had passed when we were to esteem ourselves a different people. Our fathers esteemed us as one." Northern States have just voted against negro suffrage, yet the effect on them is nothing, compared to what it would be in Maryland and the South. The negro should be left without suffrage to educate himself, "until he can raise himself to the elevation of the white race, as I think he may, and then, if possible, change your organic law." Racial distinctions come from God. By the proposed amendments, Maryland's tax is increased, as the blacks are free, and yet representation is reduced. Kirkwood, who had been born in Maryland, asked why negroes should be counted, if they could not vote, and Johnson replied that he followed Madison, in saying that the right of suffrage and of representation were distinct. Negroes should be counted, for the same reason as women and children who are protected by the State. The educational qualification for suffrage in Massachusetts proves that there is no inalienable right to vote, but that the question is one of governmental discretion. We want amity now, as in 1774, when every Southern State rushed to the rescue of Massachusetts. The South

was not wholly to blame for the war. "Although the treason was culminated into actual perpetration by the South, it never could have occurred, but for the misjudged conduct of the North." Johnson labored to "defeat the parricidal effort to destroy the government," but now he longed for peace. Lincoln had once used words, as if he believed in the right to secede, and so had Jefferson in the Kentucky resolves, "a terrible document, a mischievous document." States once admitted are in the Union forever, as far as Congress is concerned. The Southern States have reorganized themselves and their representatives should be received. The Supreme Court in *Luther vs. Borden*, decided that the President had the right to determine when a State had a republican form of government.

Johnson spoke again on the status of the Southern States upon March 1. Having thought over the matter carefully, he felt more strongly than ever that he was right. The war is over and the "paramount obligation due" to the United States is recognized everywhere by the Southerners. They do not wish to resist and the government should give them the same privileges as residents in loyal States. Sumner discussed the character of the United States, as if we lived under one government, "paramount everywhere without limitation." Johnson recited the events leading up to the adoption of the Constitution, "which for the execution of its own powers looks to no State interference, to no State assistance, but to the direct responsibility of each individual citizen to the government within the limit of the powers conferred upon the government." The government is "partly national and partly federal." The States are absolutely necessary for the existence of the government. "He who seeks to blot out of existence a State, strikes a blow at the

very life of the government;" for the "continuing wholesome existence of the government depends upon the continuing existence of the States. The general government is infinitely more dependent upon the States than the States are upon the general government." The Constitution never contemplated that the government should "possess, under any state of circumstances, the power to put an end to a State." Sumner's suicide theory, now approved by a majority of the Senate, was not received in 1862. "If, *flagrante bello*, the Senate considered them as States, in the name of reason, why are they not to consider them as States, now that the war is ended." If they are States still, their relation is the same as before secession and they are entitled to representation in the Senate, if they can present persons who have the individual requirements to take seats there. There would be no danger to the public weal to permit this and party danger is not to be recognized. Anyone should be admitted, who can take the oath. In such belief, Johnson had presented a number of credentials for Southern Senators, who are now as loyal as Sumner himself.¹³

The government of the United States is not a government over the State at all. The government of the United States and the government of the State are equally, as far as the people of that State are concerned, the government of the people of that State. They owe allegiance to a much greater extent to the government of the State.

The judicial system of the nation and the Senate depend on the States. The Supreme Court is now receiving rec-

¹³ He claimed that Wade and Chase had supported secession resolves in 1859, but promptly apologized, when Wade denied this as to himself and Sherman as to Chase, vide March 2.

ords from decisions of courts in rebel States and hearing cases from these States. A government can not conquer itself. During the war, Wade himself had said: "Once a State of this Union always a State." As a member of the Judiciary Committee during the war, Johnson had agreed that it would be improper (not illegal) to admit the representatives from the rebel States without an act of Congress. "Now the war has been over for a year and you are trying to find out whether Southerners are kind to freedmen." Johnson had ever thought slavery was wrong, but did not quarrel with the other view. He believed that the results of emancipation "will be exceedingly advantageous," but thought that those vanquished in the greatest rebellion the world had ever witnessed should be taken back and granted peace, as Vattel advised should be done, when a rebellion was crushed.

It meant much to the country to have in the Senate, so fair-minded a man as Johnson, who could say¹⁴ that the Committee of Fifteen was perfectly impartial and gave subpoenas when asked. "I differed from the committee, but never saw the slightest reason to suspect that they designed anything that was not perfectly just and fair."¹⁵

An echo of a controversy which has not yet died down was heard on May 1, when Johnson read a letter from Wade Hampton, who had written him as South Carolina had no Senator, denying Sherman's charge that Hampton burnt Columbia, accusing Sherman's soldiers of burning the town, and asking for an investigation of the matter. Johnson vouched for Hampton's veracity, having known him long before the war and asked that

¹⁴ On March 15.

¹⁵ His eulogy on Solomon Foot of Vermont on April 12 is another proof of his friendly relations with northern Republicans.

the letter be referred to the Committee on Military Affairs. Fessenden objected to the reading of private letters and John Sherman defended his brother, whereupon Johnson rejoined that he considered the letter as a memorial and had shown it to John Sherman, who thought it might well be presented with Sherman's reply. He then withdrew his motion, remarking that he was far from justifying Hampton, who may have thought his conduct right, though "he sinned very materially against his duty," and that "nobody can think higher of the gallant general," Sherman, "to whom we are indebted so much for the termination of the rebellion, than I do."

He favored a constitutional definition of citizenship which¹⁶ was recognized, but not defined, by the original instrument. Without such definition he was not prepared to say that everyone born within the United States is a citizen. The Indian tribes are subject to our jurisdiction, but we recognize some sort of national existence of theirs, though under no constitutional obligation to do so. The grant of citizenship to them should be avoided and the term, "Indians not taxed," which had a fixed meaning, should be introduced in the definition as an exception. The proposed Fourteenth Amendment excluded too many from office.

All history shows, as I think, that, on the conclusion of a civil war, the more mild, consistently with the safety of the country, the measures which are adopted, the better for the restoration of entire peace and harmony.

The South will refuse to accept the amendment, which will disfranchise nine-tenths of the whites. Harmony is yet far off and the South is kept in thrall, wherefrom it is less prosperous and the whole country

¹⁶ On May 30.

suffers. If the amendment were divided the difficulty would be less. This war was not like many civil wars, for it grew "out of a difference of constitutional opinion," in which opinion the South was honest, although its view was "wrong, dangerous, unconstitutional, and inconsistent with the continuance of the Union." Treason had been committed, but the men who formerly held public offices are no more traitors than those who did not. He cited¹⁷ the case of *ex parte* Garland, which had not yet been decided, but which he had argued before the Supreme Court, and urged that the operation of the President's pardon was to clear the person pardoned from the obligation to take the iron clad oath. He was forced by Howe to admit that the power to pardon from the operation of a statute was greater than from the operation of a constitutional amendment. All his attempts failed to have the exclusion of the State officials removed from the resolution, or the length of time diminished during which the oath of allegiance had previously been taken. He even struggled to prevent¹⁸ the diminution of votes from applying to municipal elections.¹⁹ Up till the passage of the amendment, everyone thought the basis of representation depended on the entire number of the people represented; but "the effect of the exception is to deny to the black man the right of representation, unless the State shall secure him the right to the franchise." The right of the State to control the franchise is thus admitted. In Maryland, the exclusion of the blacks, who are a fourth of the population and who

¹⁷ On May 31, vide 2 Blaine Twenty Years 209.

¹⁸ On June 6

¹⁹ 2 Blaine 212 calls attention to the fact that the disqualification clause was made stronger in the Senate than in the House and Johnson was the only man who voted against the substitute, while even he afterward said that he did so under a misapprehension

are the only class of people excluded from the suffrage will cause the South to lose at least one Congressman.²⁰ The result will be ruinous to the South. In Maryland there is a contest for negro suffrage and this amendment is a provision to force such suffrage on the State. The free States have a majority of seventy-two now in the House of Representatives, which is surely enough to protect their interests. Johnson appealed to the Senators not to interfere with the "rights secured to the Southern States now by the Constitution, which our fathers gave us, upon the pretext, utterly without foundation, that the rights of your respective States will be subject to the slightest peril, by continuing the representation as it stands." In 1787, the fathers determined that a nation was to be created by means of their wisdom and a nation they did create, awful in war, happy and conservative in peace. It is an anti-republican doctrine that people within the limits of a State are not represented. Representation and franchise are different. The whole effect of the proposal is to strike a blow at States now in the Union, unless they will agree to a policy at war with the past and exclude some of the best and wisest of their men. All the States except Texas have organized and the executive and judiciary departments recognize them. Reference of the amendment to them for ratification recognizes them also. Let us wait until these States are represented in Congress and advise with us as to constitutional amendments. In 1865, Judge Nelson said South Carolina was entitled to the full enjoyment of her constitutional rights and privileges.²¹ We should terminate present conditions, readmit the Southerners to Congress, and make the Union prosperous and happy. His words

²⁰ On June 8.

²¹ Egan case. He was tried by a military commission.

fell on deaf ears and he voted with the minority against the amendment.²²

His anxiety to have the States restored was shown by his voting to recognize Tennessee, though he had no official knowledge of the truth of the statement made in the preamble of the resolve that that State had, in good faith, adopted the Fourteenth Amendment.²³ He was also urgent that Senator Patterson from that State be admitted²⁴ to take an oath, subject to the possibility of punishment for perjury.

He still insisted²⁵ that loyal slaveholders be paid with interest for slaves who enlisted in the Union army and who were properly declared free because of that fact.

If there are any men in the United States who should be treated with generosity, to say nothing of justice, it is the men who remained loyal to the Union and true to their duty and the flag of the Union in Maryland, who were slaveholders and who were willing to let the institution go, rather than see the government of the Union put at hazard.

When the Fourteenth Amendment shall have been adopted, no further payment can be made on this account, consequently this payment should be made quickly.²⁶

²² On July 7, he made a strenuous struggle to be permitted to present a report made by the minority of three in the Committee of Fifteen on Reconstruction. Johnson had been in Pennsylvania in the end of June and asked Hendricks to present it, but he had been refused permission so to do; because he was not a member of the committee, because it was not customary to receive such reports, and because it was not presented with the majority report. Johnson showed that such minority reports had been made in at least three previous years and won his fight to lay before the people views on the Constitutional Amendment different from those of the majority.

²³ On July 21.

²⁴ On July 26.

²⁵ On July 23. Creswell supported him.

²⁶ He was more successful in urging, on July 24, as an act of humanity and justice to the exceedingly impoverished South, the suspension of the direct tax, in accordance with the recommendation of the Committee of Fifteen.

During all this struggle, his relations to his Republican associates continued cordial. They recognized in him a Union man, who could say, in his eulogy²⁷ on Collamer, that he died just after the fratricidal blow, aimed "at the nation's life by wicked ambition, proving for a time able to mislead the honest masses of the South, was so utterly defeated and crushed that its renewal is impossible."

During the session he frequently spoke on the affairs of the District of Columbia. He held that a corporation,²⁸ chartered there by Congress, would have no power to transact business outside of the District; but, if no law of a State prevented, the corporation might go into a State and buy land there. He discussed the proposed alterations in the jurisdiction²⁹ of the courts of the District, the marriage laws,³⁰ the privilege of railroads there,³¹ and the enlargement of the capitol grounds.³² He felt there was no danger of annulling the provision of the Maryland Bill of Rights³³ and permitting people to give to churches what they think proper, free from restriction, because we have no state religion and the many sects are watchful of each other. Johnson had been a member of the Senate in 1846 and defended the recession of Alexandria to Virginia, which he thought clearly within the Federal power. The rest of the District might also be receded and the site of the capital changed. We had a government before we had a capital and the absence of it will not destroy the government. If Congress

²⁷ On December 14.

²⁸ On March 7 and 21.

²⁹ On April 2.

³⁰ On April 3.

³¹ On May 21.

³² On July 10.

³³ On July 20.

remove the capital, they are not compelled to remain rulers of the land, but may surrender it, as forts or dockyards are surrendered to the States, when the exigency demanding their use terminated.³⁴

If the act of secession was unconstitutional, it is void; if constitutional, Congress can not impair it. It is folly to say, as Howard did, that Alexandria was receded at the beginning of the rebellion. The fact that Alexandria voted in favor of returning to Virginia does not make the law void.³⁵ If Alexandria was not retroceded, how is West Virginia a State. To take back the territory would increase Federal expenses. The District needs no increase in territory, while some paramount consideration should be urged to justify the legislating for and taxing people without representation, contrary to the very spirit of our government.

Questions of interstate and foreign commerce brought Johnson often on the floor.³⁶ "Under the authority to regulate commerce," he held³⁷ that

Congress has no power to construct a bridge, unless it owns the land on either side, but that the authority to construct is vested in the States alone, where the States have jurisdiction on both sides of the river over which the bridge is to be thrown. Congress, however, have the authority, under the commercial power, to prescribe what draws are necessary, in order to avoid any impediment to navigation, or whether bridges are to be built without draws and with an elevation which will remove all danger of impediment to the river.

³⁴ July 10 and 11.

³⁵ In this speech, Johnson referred to his great contemporary, Henry Winter Davis, as "eminent as a lawyer, as well as a politician, and, in my judgment, more often wrong in the latter capacity than he was in the first."

³⁶ On January 15, he spoke on the Wheeling Bridge case.

³⁷ On July 18.

Neither the commercial nor the war power gives Congress the right to keep out the Asiatic cholera.³⁸ He believed that the commercial power was intended to be exclusive and, if Congress failed to regulate commerce entirely, it would have declared that it had placed matters in the condition in which they should remain. The commercial power does not conflict with the police power of the States to preserve the health or morals of their citizens and with their exclusive power to establish quarantines. If Congress can legislate as to the health, it can do so after a disease comes into the country, and if it has authority to prevent the spread of disease, it could prevent it through restrictions on interstate commerce also.

He objected to the bill for interstate intercourse.³⁹

A Constitution is worth nothing practically, if it is not to be considered as authoritatively decided after years of deliberation and frequent decisions by every department of the government.

It has been decided that commerce within the State is purely under the State's control. Individual judgment must not be used.

When we swear to support the Constitution of the United States, we are bound to construe it, in order to support it, as the framers of the Constitution are known to have construed it and the people by whom it was adopted are known to have construed it and to have adopted it because of that construction.

The States may prescribe the terms of railroad charters, and provide for their forfeiture, while Congress may not grant such railroads powers not in their charters, which franchises will be unforfeitable by the State. He

³⁸ On May 11 and 15.

³⁹ On April 26.

defended⁴⁰ the Baltimore and Ohio Railroad for its conduct during the war, when Lincoln and Stanton held it to be invaluable to the Union. It was planning a branch to Port of Rocks and was anxious to complete the Connellsville Railroad to Pittsburg. In the Circuit Court at Wilkesbarre in the preceding summer, Johnson had won a decision that the Pennsylvanian repeal of that charter was unconstitutional.⁴¹ He proposed that the rates be not greater than the State allows.⁴² Fessenden remarked that "a very selfish and odious condition" resulted in Maryland and New Jersey from monopoly given railroads. Johnson at once defended his State and the Baltimore and Ohio charter, which had been opposed by the Baltimore and Washington turnpike men. Instead of a bonus for the charter, a fifth of the fares on the Washington branch went to the State. Fessenden said that Maryland levied contributions on the citizens of other States. Johnson said that Maryland was not ashamed. Fessenden came from an inhospitable part of the country, surpassed by Maryland in climate and in such natural products as oysters, terrapins, crabs, and ducks.

If Maryland had been, as Maine has been from the first, a free State, she would have had a population now as numerous and as enterprising as is the population of the State of Maine.

As it is, Maryland will soon outnumber her.⁴³

John P. Stockton, the Democratic candidate from New Jersey for the Senatorship, had been returned as

⁴⁰ On May 3, Creswell spoke in defense of Maryland.

⁴¹ He explained why the Baltimore and Ohio and the Northern Central Railroads would not sell through tickets and checks from Washington to Harrisburg.

⁴² On May 29.

⁴³ In spite of his irenic disposition, Johnson had frequently such arguments, e.g., with Trumbull on February 23 and March 26.

elected by a plurality vote of the legislature, in accordance with a resolution passed by it, after it appeared that no candidate could command the votes of a majority of the members. His right to a seat was disputed partly on constitutional and partly on partisan grounds. Johnson took part in the debate and maintained⁴⁴ that the Constitution did not settle what constitutes a legislature. In 1787, Pennsylvania's legislature consisted of one House only. The joint convention of the legislature had the right to elect, when a majority of the whole number was present, although not one member of one of the Houses were present. The convention had also the right to provide that a plurality should elect a Senator. Stockton voted on his right to a seat and Senator Morrill broke a pair in order to vote against Stockton. The vote stood 22 to 21 in Stockton's favor. Stockton was ill advised in voting, for, in the case of a tie, he would have remained in the Senate, with a *prima facie* title. When the Senate met again, Sumner attacked Stockton, moved to correct the Journal, by striking out Stockton's vote, and said that Morrill had broken his pair, after obtaining the approval of Sumner, who in turn had consulted with Johnson. Johnson defended Stockton's act, as the case was one of the State of New Jersey, and Stockton's only interest was the insignificant one of his pay as Senator.⁴⁵ Though the Journal was not corrected, parliamentary steps were taken, which led to the rejection of Stockton from his seat, by a vote of 22 to 21, in the absence, through illness, of Stockton's colleague from New Jersey, who would have voted for him. Johnson

⁴⁴ On March 22.

⁴⁵ On March 26. White's Lyman Trumbull at page 264 speaks of this speech as "a pathetic appeal to the fraternal feeling and gentlemanly instincts of Senators."

properly reprobated the refusal of the majority to postpone the matter and claimed that "I speak in no party sense. Those, who know the political principles which I have entertained, from the time I came into public life up to the present time, are not warranted in calling me a Democrat. I never was."⁴⁶ The statement is paradoxical but true, for Johnson was, to the end of his life, a border State Union man and an old line Whig, though, for want of another party to advocate his principles, he found, at times, a more congenial refuge with the Democrats than with the Republicans.

He favored relieving Supreme Court Judges of Circuit Court work, but wished to continue appeals in many cases to the higher tribunal, feeling that the law would thus be more uniform and more respected by the State courts. He opposed allowing a judge who sat on a case below to sit *in banc* on an appeal, but⁴⁷ saw no objection to clerks being related to the judges.

Johnson defended a bill for the protection of federal officers.⁴⁸ In every well regulated government, he thought, the judicial department should be coextensive with the legislative. If the rightful authority of the government could not have been maintained by the courts, our institutions would have failed and the general government would have been comparatively futile. The provision of the judiciary act of 1789 that cases involving Federal questions might be carried, by writ of error, from State courts to the Supreme Court was very important. Whenever the validity of Federal law is questioned, the United States should have jurisdiction. If the State court tries to execute its judgment in spite of such re-

⁴⁶ On March 27.

⁴⁷ On April 2 and 4.

⁴⁸ On April 20.

moval, its officers should be punished, for it would not be a case of erroneous judgment, but of a violation of a Federal statute, which Congress has authority to pass. Many abuses of authority have been committed by those to whom the management of the suppression of the rebellion has been intrusted. "I believe the suppression would have been just as effectual, obeying the constitutional limits. I believed, in the beginning, that it was all important that the writ of *habeus corpus* should be suspended," and supported Lincoln against Taney in that position. "If I were wrong, every officer who refused to obey the proclamation would be responsible." Johnson thought military commissions merely covered the army, the executive thought differently and many were punished under them. Johnson tried in vain to persuade the Commission, who tried Lincoln's assassins, that they had no power, but, in *ex parte* Milligan, he won from the Supreme Court a decision that there was no authority for a court martial, or a military commission, to try a civilian, unless he happened to be a spy and so brought within the scope of military law.

Johnson upheld the power of the President to reappoint to an office a man whose appointment had been rejected by the Senate. The breach between Andrew Johnson and Congress was widening daily, and the conservatism which was characteristic of Reverdy Johnson, as a true Marylander, led him to support the President. The discussion over the post office appropriation bill led Johnson to express his views on April 23. The power to appoint to office can not be taken from the President and, as it is his duty to keep the offices filled, recess appointments continue until the end of the next session of Congress, in spite of rejection of the men appointed. The appointee has a right to the salary and,

if Congress can not prevent an appointment, they should not prevent the pay. If a man die during the session and the fact is not known, the President does not have to wait the Senate's convening to fill the vacancy. The President has also the power⁴⁹ to remove, a power not expressly put in the Constitution, but inferred. The Senate abandoned any attempt to attack Jackson for his removals. Congress may refuse to pay salaries, but has no moral right to do so. A President may be starved out as well as impeached, but such a precedent may return to plague the inventor. Arguing with Trumbull, Johnson continued that to grant the President power to remove and deny him that to appoint is to hinder the government. "It is not my good fortune to see President Johnson, except very seldom and that upon matters of business." He is a "man of firmness." Johnson, not being under the influence of party spirit, emphasized the danger of trouble between Congress and the President and of divided counsels, when there was danger of war with Austria and France over Mexico. We are not legislating for the hour and the President can not properly man the offices, if he has to find persons disposed to take place, on the contingency that the Senate will approve their nominations. He can see⁵⁰ to the faithful execution of the laws only through subordinates, and, although he may abuse the power of removal, all powers, even those of Congress, involve such possibilities of abuse. The proposal "strikes a vital blow at the executive department and is inconsistent with all the objects which it was the purpose of the Convention to have accomplished through the instrumentality of that department." "Nobody

⁴⁹ On April 30.

⁵⁰ On May 1.

has ever impeached the personal integrity of any President," though members of Congress have been expelled for improper conduct.⁵¹ Fillmore removed a territorial judge, who applied for a mandamus, but meantime the Senate had approved a nomination in his place. Did that remove from office the original incumbent? In any case, the proposed provision is not fittingly placed in an appropriation bill and, if the bill should be vetoed because of the provision, it might be necessary to close the post offices.

I will not discuss the differences between the President and Congress, but think those who differ from the President ought charitably to conclude that he, as they, believes he is right and that the differences are honest. Otherwise we will have a distracted country, in more peril than in the Civil War.

"Andrew Johnson is carrying out Lincoln's policy. It never occurred to the people in the past that the President could be compelled to retain, in his cabinet, officers in whom he had ceased to confide, no matter upon what grounds his confidence was lost." If he must report reasons for the removal to Congress, it must mean that, if the reasons are not satisfactory, the officers must be reinstated and a cabinet of officers, in whom he has no confidence, is forced on the President, or there is laid before the Senate some ground upon which the House of Representatives may impeach the President. The wise prescience of these words was to be proven in the coming months. Johnson discussed,⁵² with great incisiveness, the constitutional decisions on the right to remove officers and called to the attention of the Senate the fact

⁵¹ In *Marbury v. Madison* the Supreme Court "committed a very grave fault . . . by deciding a controversy in a case which was not before them."

⁵² On May 2 and 7.

that, as cabinet officers are not provided expressly by the Constitution, Congress might repeal the laws establishing them and leave no such officers. The good sense and patriotism of the men of 1789 showed how important it is to give the President advisers. You must vest powers somewhere and though the patronage of the government should not be used for political purposes, precedent shows that removal may be made without assigning cause.

When the consular and diplomatic bill was debated, Johnson opposed depriving of his salary, Mr. Harvey, the minister to Portugal, who wrote Seward a private letter reflecting on Congress. There was no complaint against Harvey's conduct of his office and it was unjust to force him to serve without pay, or to resign. Johnson was "not in the habit of writing private letters," but did not think they should count against a man.⁵³

He opposed the admission of Colorado on the ground⁵⁴ of want of population. Inequality between States is bad and would not have been ignored in 1787, had not the small States been perfectly independent and unwilling to come in on other terms. Colorado contains only 35,000 people, part of whom are Mexicans. Statehood is not needed to protect the people there, since we protect the District of Columbia, which contains 100,000 people. "My opinion is that the moment the State is admitted, it is wholly independent of any legislation that Congress may adopt, except such as falls within its delegated powers."

There is a danger in admitting too many States. Not wealth, but citizens, make a State. It was uncertain, whether the people of Colorado really wished statehood,

⁵³ On July 20.

⁵⁴ On April 25.

which they rejected in 1864 and now requested by a returned majority of only 155 in 6000 votes. A State constitution should not be forced on the people. The bill passed and was vetoed by the President,⁵⁶ and Reverdy Johnson defended his right to do so, though the act had no precedent. Congress did not repass the bill and Colorado waited for a decade, before she became a State.

He felt the condition of the country imperatively demanded a bankruptcy law,⁵⁶ and opposed a direct cotton tax.⁵⁷ He favored⁵⁸ permitting collectors of taxes to deposit funds in national banks, instead of compelling them to use the subtreasury, which would put on them the burden of converting their receipts into legal tender notes. So long as the national banks and the subtreasury are in existence, legislation must enable each to get on without unnecessarily embarrassing the public. He objected to a bill against smuggling, because it failed to provide a jury trial and placed the burden of proving innocence on the defendant, as the purchaser would have to prove ignorance of the wrongful importation.⁵⁹ He opposed a reduction of mileage of members of Congress to twenty cents,⁶⁰ as we "have got into the good practice of bringing our families" to Washington. Calhoun had rightly said that one of the bonds of the Union is the mileage, and the amount proposed is

⁵⁶ On May 21.

⁵⁶ On July 23.

⁵⁷ On July 6.

⁵⁸ On July 19.

⁵⁹ On May 14. On July 23, he advocated the act of 1864, which made passage money a lien on real estate and a personal obligation to be paid within twelve months by an immigrant, and provided that the Commissioner of Immigration see that means should be afforded him of being transported whither he might wish to go.

⁶⁰ On July 24.

not enough to bring the Congressmen's families on it. He defended the graduates of the military academy from the charge of treason.⁶¹ The fault of those, who left the government and were guilty of treason, was palliated by the fact that they received their early education in a part of the United States, where constitutional secession was taught.⁶²

Johnson opposed the purchase of the library of his old friend Pettigru of Charleston, whose last letter, regretting South Carolina's secession, had been written to Johnson.⁶³ Old editions of law books are not of much value. Pettigru was not buying books in recent years, relying, as most lawyers do, on bar libraries. Johnson himself bought Wirt's library of four or five thousand volumes for \$3000, when he had unfortunately lost his own through the mob's acts.⁶⁴

His charitable disposition was shown by his proposal to appropriate \$50,000 for the relief of sufferers from a fire in Portland, Maine.⁶⁵ He cited the precedents of appropriations for the sufferers from an explosion in the Washington arsenal, of \$20,000 to Alexandria in 1812, of lands to the sufferers from the New Madrid earthquake, of \$5000 to sufferers from a Venezuelan earthquake in 1812, and of the sending of a ship to Ireland in time of famine. Trumbull objected to the proposition and asked its reference to the Finance Committee. Johnson replied that Trumbull had recommended the Freedmen's Bureau, which was a charity. Here "is a loss by fire, such as never occurred anywhere else," and individ-

⁶¹ On May 17.

⁶² A member of the Peace Convention, who was a secessionist, had just told Johnson: You were right and I was wrong.

⁶³ Published in the *Intelligencer*.

⁶⁴ On May 14.

⁶⁵ On July 19.

ual aid is inadequate. Buckalew remarked that nothing had been given Chambersburg when the Confederates burned it, and Johnson replied that it was "impossible to indemnify against the consequences of war," after which speech he had the pleasure of seeing the bill pass the Senate by a vote of twenty-two to eighteen.⁶⁶

Near the close of the session, on July 28, he opposed permitting Fenians to hold their meetings in the buildings of a soldiers' orphans home. The Fenians' "avowed purpose is to make war upon England," which country would have good right to complain, if such permission be granted. Whether England did right during the rebellion is not now the question. Our recent steps to enforce neutrality laws do us great honor. We want the approval of mankind and Great Britain already shows such admiration of us that the time is near approaching, when she will wake up to her own default and pay us damages for it. Europe is in convulsion. We should abstain from doing anything to participate in the struggles. We have won in our own conflict and displayed our powers to an astonished world. Our duty now is to heal our own disorders. England, with all her faults, "is the only constitutional government now upon the face of the habitable globe, except our own, where personal liberty and personal rights are maintained."

He was so busy with legal practice in those days, that

⁶⁶ On miscellaneous topics we note that Johnson opposed, on December 13, a measure for improving the reports of the proceedings of Congress in the Associated Press, as he did not see how it would accomplish anything and considered that the newspapers did no harm in reporting speeches wrongly; spoke on April 20, on rescue of San Francisco passengers in 1853; prophesied, on May 24, that the official history of the rebellion would cost two or three million dollars; advocated, on May 17, raising the salary of clerks, particularly in the Treasury and State Departments; and suggested, on May 16, Round Bay on the Severn River as a freshwater basin for ironclads.

he was known to leave the Senate, argue a case in the Supreme Court, and then return to his desk. In the interval between sessions, he was occupied in the work of the law in the Maryland and Pennsylvania courts.

On August 14, 1866, a convention of conservative Unionists⁶⁷ was held in Philadelphia, in which gathering Johnson took part. An address to the President was there prepared and was presented to him by Johnson in a courtly speech⁶⁸ four days later. In the autumn, he took a prominent part in aiding the Democrats in State politics, joined other lawyers in an opinion that the registration law⁶⁹ did not apply to elections of municipal corporations, and published with J. H. B. Latrobe⁷⁰ an opinion, in opposition to that of Alexander Randall, that new registry lists could be used in Baltimore. On November 3, he delivered a speech at Towson "on the questions connected with the condition of the country,"⁷¹ in which he took strong ground for speedy readmission of the States, now that the "insane attempt to dissolve the Union" had failed, and for the repeal of the iron clad oath in Maryland. Yet so conservative was he, that he discouraged the calling of a constitutional convention in the State during 1867, after the Democrats had gained control of the State government, lest the Convention cause too much disturbance. In the Towson speech, after attacking the abolitionists and disunionists, he blamed the South for secession, because of the great inferiority of their power and because the

⁶⁷ The so called arm-in-arm convention. DeWitt's Impeachment of Andrew Johnson, 111.

⁶⁸ Gideon Welles (Diary II p. 582) wrote that Johnson read the address "with some earnestness and emphasis."

⁶⁹ 3 Scharf Md. 680.

⁷⁰ In the Sun for October 2, 1866.

⁷¹ Printed in pamphlet form. Baltimore, 1866, pp. 32.

ground, on which the legality of their act was placed was "without reasonable warrant and was, in its very nature, fatal to an effectual union of States, few or many." He justified, by historical argument, the right of the nation to suppress insurrection. The United States has a "government vested with every necessary power to enforce its jurisdiction against individuals, and to preserve and not subvert its own existence." It has "no power to destroy itself."

Its extended life depends upon the continuing existence of the States, as its own life is made up of the lives of the States and is totally, or partially, lost, as the latter shall cease to exist totally or partially. . . . Unfounded as the doctrine of State secession was, that of State expulsion by the general government, is, if possible, yet more unfounded.

This latter doctrine was first announced by Sumner, on February 11, 1862, but, in July, 1861, Congress had voted that the war was not waged for any purpose of conquest, or subjugation, and thus had pledged the faith of the nation to a contrary policy. Under that resolution, it mattered not how many States seceded, and Senators and Representatives of such States, like Andrew Johnson, continued in Congress. Under the new doctrine, there might be changes of boundary, or consolidation of the seceding States, and all congressional restrictions are destroyed as to them, while the laws to be applied to them satisfy an alleged public justice and the "low vulgar passion of avarice." The army makes no such suggestion, knowing that the South can not be properly governed as a conquered province without hundreds of thousands of soldiers. To prove that the States continue as such, Johnson referred to the reapportionment act, to the admission of West

Virginia, to the direct tax laws, to the appropriations for salaries of officers of the Federal courts, to the change of judicial circuits in the South, and to the requirement that the Southern States ratify the constitutional amendments. The Supreme Court entertains writs of error from the Southern States, which is conclusive proof that the tribunal regards them as States. The presidential plan of reconstruction, "had it prevailed, when first announced, would long since have restored the Union and, thereby, have brought peace, prosperity and happiness to our now distracted land. The Congressional plan has unwisely—and, I think, unconstitutionally—delayed these happy results and promises to delay them indefinitely." It is a most "inexpedient and mischievous proposition, endangering the South's great material interests," and hence endangering the whole nation, which must be kept united to "lead the world on to freedom." Southern men are to be trusted. The power to readmit their States is not legislative. He even feared a renewal of strife and suspected that the party in power wished to keep out the Southern States for party purposes, until after the next presidential election. The "enlightened sentiment of the world" was with Johnson, who was only carrying out Lincoln's policy, and the threatened impeachment and suspension of the President, for doing what half of the people approve, is alarming. In Maryland, a large majority of the citizens are excluded from the franchise, and the "best feelings of the heart are made grounds of expulsion of voters from the polls." Even George Peabody's utterances would exclude him from voting, if he resided in Maryland. "The blood of our patriotic ancestors cries out from the grave against" this state of affairs. Its continuance is inconsistent with the vital

spirit of our free institutions. It is absolute political despotism. Owing to "the wise and patriotic course" of Governor Swann, "the wrongs are being diminished." Johnson believed the provision of the Constitution of Maryland as to oaths was invalid, being an *ex post facto* law, but the Court of Appeals decided in favor of its validity, and the hope is now of relief from the new legislature, or from an appeal to the Supreme Court. If it decides against us, the majority of the people have the right, "with or without legislative sanction," to elect delegates to a convention, whose work should be submitted to the people to form a new, or modify the existing, Constitution. Maryland is "happily located, geographically, with a salubrious climate, a fertile soil, capable of almost every agricultural product, exhaustless supplies of coal and iron, unsurpassed water power." She needs "only a free and contented people to make our State one of the most prosperous of the Union. But all her natural advantages will avail little, without freedom of opinion, equality of rights, and kindness of feeling."

In the winter of 1866 and 1867, men saw Johnson taking a notable stand. On the one hand, he showed the Senate, by masterly argument, that the President's power to pardon was constitutional and could not be taken from him; he opposed "making a cipher of any department of government," and he insisted that the clause in the Constitution, guaranteeing a republican form of government to each State, had no possible reference to negro suffrage, but meant a government, "which corresponds with the governments in existence when the Constitution was adopted." On the other hand, without consulting his political friends, he introduced an amendment to the reconstruction act of 1867, providing that when the Southern States should have

adopted negro suffrage, they should be readmitted to the Union, inasmuch as nothing could be worse than the present condition. Some time should be set, at which the military dominion over these States should end and the country truly become one. When this amendment was adopted, Johnson voted for the bill and did so a second time, when Andrew Johnson vetoed it, as he believed that the States should be brought back, even with negro suffrage, and feared that if this bill failed, the temper of the North, steadily growing sterner, would demand even harder terms. In March, at the extra session, he voted for the supplementary reconstruction bill and supported it over the presidential veto. But here he stopped and returned to the ranks of the minority. He had always believed that the President would enforce the laws and, having received assurances to that effect from him, protested against the attempt to take from him the command of the army.

At the beginning of the session of Congress⁷² Johnson moved that the bill to repeal the pardon act be referred to the Judiciary Committee, as he took the position that, if the President could pardon under the Constitution by a general amnesty, or even if he must pardon men one by one, the bill was not needed. He maintained that the constitutional power of the President to pardon was as comprehensive as words can make it, and, as the Constitution says nothing as to how he shall perform the power, he may grant a pardon by a general or a special proclamation.⁷³

Washington's course after the whiskey insurrection and Hamilton's language in the *Federalist* confirmed

⁷² On December 4.

⁷³ On December 17.

this view. The power to pardon could not well be given to two departments of government and the only control⁷⁴ Congress can have over offenses created by statute is to repeal the statute. A pardon is matter *in pais* and must be proved to a court, but a proclamation must be noted by a court, as the blockade proclamation was noted in the prize case. The President, who had implied powers as well as Congress, may pardon conditionally. The clause authorizing Congress to pass laws "necessary and proper" has "no operation whatever," as the courts show. A power without authority to carry it out would be a gross absurdity. The Constitution was made for war, as well as for peace. If the President, or the Attorney-General, had listened to Johnson's advice, a general amnesty would have been declared long ago, except in one or two test cases, in which the courts might decide whether there was a right of secession and whether, after the close of an insurrection which was so great that it was necessary to treat those engaged in it as public enemies, they stood, as to a charge of treason, as subjects of another nation. As to the first question, Johnson thought the opinion would be unanimous; as to the second, he was in doubt. Some said that when belligerent rights were granted, the commission of treason became impossible. While the failure to give amnesty is the President's, the failure to try those accused is that of the grand jury and of the court. It is a reproach that Jefferson Davis had been incarcerated for nearly two years without a trial. If he is a prisoner of war, he should have been discharged at the end of the war. The civil authorities were not ready to take him from the President. Reverdy Johnson

⁷⁴ On January 4.

would have paroled, or bailed, Davis "long since" and thought that, if he should die in prison, our responsibility would be like Napoleon's, when he killed the Duc d'Enghien. The apparent purpose of the repeal act is that, "in the future, hard, inexorable justice is to be meted out to our Southern brethren, that generosity, forgiveness, mercy, pardon are no longer to be our policy." Our subdued enemies are loyal. Robert E. Lee's son recently refused to drink to the fallen flag, while our experience with Tories, in Shay's Rebellion, and in the whiskey insurrection, shows the value of clemency. Howe said that John Brown had been hung and Jefferson Davis should be hung. Johnson responded that he did not attack the "humanity, during the war of the government," which had no "more zealous supporter" than he. Johnson had disapproved of hanging Brown and thought that Virginia lost hold on the humanity of the other States through that act. He thought Davis could be tried in any State, in which there was an overt act of treason during the rebellion, but the attorney-general thought he could only be tried in Virginia. Johnson also thought that a district judge alone could try capital cases, but Taney had held that a circuit judge must be present in such trials and, as the Supreme Court judges had not yet reassigned themselves, the trial of Davis was further delayed. In spite of Johnson's efforts, the bill passed the Senate by a vote of twenty-seven to seven.⁷⁵

Johnson was no blind partisan of the executive. He thought that pension agents should be appointed with the consent of the Senate and that it would be "an

⁷⁵ The President probably agreed with Reverdy Johnson and neither signed nor vetoed the bill, vide 2 Blaine's Twenty Years, p. 282.

abuse of the power of the President" to reappoint a rejected man.⁷⁶ In another speech,⁷⁷ he said such reappointment would be "a decided outrage upon the Constitution," as it would enable the President to destroy the power of the Senate, by recess appointments. The President, however, had a precedent for that power, in an opinion of the attorney-general. Johnson never had the question to decide when he was attorney-general, but told President Taylor that, if it came before him as an original question, he would decide against the power. The matter was different as to the removal of officers. In the first session of Congress, this matter was decided in favor of the power of the President, by the casting vote of Vice-President Adams, and, in Jackson's administration, the Senate and the Bank of the United States both acquiesced in the President's removal of the Secretary of the Treasury, while the Senate rejected the view that, in the appointment of Taney⁷⁸ as Secretary, the President was guilty of usurpation and violation of the contract between the United States and the Bank. If a President reappointed a rejected man, he should send to the Senate a statement of reasons, such as newly discovered facts. It is a serious question whether continued reappointment is not ground for impeachment. We should not have a dual President. A man who always agrees with the President ought not to be in the cabinet. Johnson was not "for making a cipher of any department of government, yet he felt that it was all important that the executive should be a unit," in order that the President may see the laws faithfully executed. If he has a Secretary of State whom

⁷⁶ On January 8.

⁷⁷ On January 10.

⁷⁸ Johnson thought the Senate was right.

he does not trust, he should not leave him in office and, if he suspend him and because the Senate thinks the reason is insufficient, the Secretary of State should remain in office, "the organ with foreign nations will be a Secretary of State of the Senate. So of other portfolios—no man will take them temporarily."

On January 11, Johnson spoke upon the tenure of office act, which prevented the President from removing officials, without the consent of the Senate, and provided for the punishment of one taking office contrary to the act. Johnson secured the amendment of the act, by permitting the President to continue making recess appointments. Edmunds, who had charge of the measure, yielded, when Johnson showed the absurdity and expense of calling the Senate together, whenever there should be a death of a district judge or a minister who was carrying an important negotiation with a foreign court. The Constitution had not so intended. The Senate⁷⁹ is part of the appointing power and, if the possession of that power carries the possibility of abuse, it shares in that possibility. Commentators say that the legislature is more apt to usurp power than the President.

Few agreed with President Johnson, who followed Lincoln's policy as to the Southern States. In our government there will be parties, but the Senate was merely trying to secure a party end, when it provided that, if the President reappoints those rejected by the Senate, they shall have no salary. John Adams had said⁸⁰ that he thought that there would be danger from the Senate's wishing to use its influence for its political friends and against its enemies. After the election of 1828, Clay and the Whigs found fault with Jackson for his removals,

⁷⁹ On January 15.

⁸⁰ Vide 2 Story 394.

following Marcy's "mischievous doctrine" that "to the victor belong the spoils," but the people voted that the President was clothed with that power. Williams of Oregon had cited Hamilton as writing, in the *Federalist*, that the Senate must join in removals. As DeWitt remarks,⁸¹ "It was a dangerous experiment to cite authorities when Reverdy Johnson was to reply," for he proved that Hamilton changed his mind, after he became Secretary of the Treasury.⁸² After an examination of cases,⁸³ he warned the Senate that these acts may cause revolution, as the alien and sedition laws did.

A latitudinarian construction of the Constitution, the absorption of nearly all power into the legislative department of the government, an unwillingness to submit to the judgment, an interference with what may have heretofore been considered the legitimate powers of the President . . . these are the symptoms of the times.

He appealed to reason and to the ballots and believed that, when the excitement was over, the "Constitution will be restored in all its integrity and each department of the government be permitted to exercise every power which the Constitution, as construed in the past, vests in it."⁸⁴ On the eighteenth, he made another powerful address. He was "no party friend of the President of the United States, in the strict sense of the term." The President has erred, but he is honest and patriotic and has fallen in the estimation of the Representatives,

⁸¹ Impeachment of Andrew Johnson, p. 186.

⁸² See also speech of January 16.

⁸³ *Marbury v. Madison*; *Dred Scott Case*, which did not deny presidential power to remove; *U. S. v. Guthrie* 17 Howard; *Ex parte Hennen* 13 Peters 250. He also then and on January 14 defended Madison and Jefferson for their acts in 1798 and maintained that neither contemplated nullification.

⁸⁴ On January 17, Johnson's irenic disposition was shown in his smoothing down trouble between McDougall and Sumner.

“because a new state of things has arisen,” since his election, “in which he differs from the men by whom he was elevated to power.” Johnson believed that the President would rejoice to have peace and harmony. He had been “true to his duty to the country, according to his understanding” of it, had tried to make the United States the honor and admiration of the world, and had endeavored to secure to each individual his rights. The President had said many things he had better left unsaid and was by nature impetuous. “Sprung from the humblest walks of life and uneducated,” he made too many stump speeches, but he never quailed before difficulties. During the war he had been patriotic and, as President, he had tried to reorganize the States, as Lincoln had, and to have them brought into the Union at once. He submitted to the overriding of his veto. Sumner said he should be “kicked out” and then, in righteous indignation, Johnson rebuked him as having put himself out of the pale of Andrew Johnson’s judges, if the threats of the House of Representatives to impeach him were carried out. Sumner was a friend of Lincoln and never objected to his turning men out, and he should not now have attacked the President as he did, since he thus prejudged the case.⁸⁵

For the last time, Johnson spoke upon the tenure of office bill upon February 6. He referred again to the removals of cabinet officers by Jackson and asked whether we should allow precedent to rule, or always reopen questions. Cabinet officers are not appointed to thwart, but to aid the President of the United States. It is proposed to say to any President, “who may have been mistaken in relation to the character or the ability

⁸⁵ He showed Edmunds that his amendments would prevent men appointed during a session from holding office until its end.

of the men whom he had selected to advise him," that he shall not change them.

When Sumner attacked the Secretary of the Treasury in the debate on the legislative appropriation bill,⁸⁶ Johnson came to his defense and praised him for refusing to change employes for political reasons. It is a vice to appoint men, "who had nothing to recommend them but mere party services, in some ward controversy or some county controversy." These assaults on high officials, unless founded on well ascertained facts, serve no purpose whatever, but to injure the good name of the country.⁸⁷ He stated his regret, in another speech,⁸⁸ that Motley, our minister to Austria, should have spoken disrespectfully of the President and the Secretary of State and should have expressed an opinion hostile to the republican form of government and favorable to monarchy.

Johnson favored⁸⁹ a six years' term for the President without reelection and felt there was no danger for the liberties of the people in the change, for it was clear that the President was impotent to carry out a policy against Congress. The President is the constitutional commander of the army and a provision in a bill that the general of the army shall have headquarters in Washington and that no orders of a military⁹⁰ character shall be issued, except in accordance with this bill, is unconstitutional. Fessenden said that the people are

⁸⁶ On February 7.

⁸⁷ On December 20, Williams of Oregon objected to receiving anonymous letters, because the clerks' pay had not been raised, and Johnson, sympathizing with him, managed to include in his speech a defense of the Supreme Court from attacks in the Republican newspapers, because of the decision in *Ex parte Milligan*.

⁸⁸ On February 2.

⁸⁹ On February 11.

⁹⁰ On February 26.

sovereign, that they have retained sovereignty over the army and that the legislative department is the one in which the absolute sovereignty of the people is placed. Johnson quickly responded:

In one sense, the people is sovereign. They can, in constitutional mode, change their political institutions from time to time;⁹¹ but, in the exercise of their sovereignty, it is for them to decide how, in any particular constitution, that sovereignty shall be exercised and they have delegated such portion of it as they thought proper to delegate to each of the three departments of the government. To Congress are intrusted "the particular legislative powers," to the President the whole executive power and the commandership in chief of the army, even against the will of Congress. If Lincoln, or any other man who had the confidence of Congress, were alive, no such law would have been passed. If the President should order General Grant to leave Washington and he should refuse, the President could not go himself and issue orders, under the provisions of the bill. To depart from the Constitution, under any circumstances, is hazardous. I said during the existence of the rebellion, and I repeat it now, that, if I had been the President of the United States, I would have often done acts which the Constitution of the United States would not have authorized, if, in my judgment, I believed they were necessary to maintain the integrity of the government.

For this reason, he had voted for recent measures of reconstruction and, in spite of censure, would do so again, if necessary, to escape from a revolutionary condition. This bill was not necessary.⁹²

Johnson held that the bill for the payment of claims in insurrectionary States should include citizens in such territory as Louisiana, which was in possession of the

⁹¹ Johnson showed that Sumner was mistaken in quoting Kent.

⁹² The obnoxious clause was carried by vote of 28 to 8.

United States from the early part of 1862 and which contained many loyal men, or, indeed, in any territory which came into the possession of the Union forces during the war and so continued until its end.⁹³ He maintained that a pardon reinstated⁹⁴ a person to the condition he occupied prior to his offence and that it was wrong to refuse to pay disloyal pardoned men claims accruing before the rebellion. Loyal men are creditors of the South and rely on these claims to meet part of their debt. Whether the claims were assigned to loyal men before or after the rebellion mattered not, for the United States should not confiscate debts because the creditor had at one time been guilty of treason, when the confiscation would injure a loyal man.⁹⁵ A few days later, an interesting colloquy, showing Johnson's courtesy, took place between him and Trumbull. Johnson said it was our duty to pay assessors who acted in 1865, but could not take the oath. Trumbull remarked that this was demoralizing, as it was equivalent to saying that the man should be paid, whether he collected the money illegally or not. Johnson replied, with asperity, that, in reading him a lecture, Trumbull was lecturing three-fourths of the Senate, who "may have as nice a sense of morals and honor" as he. Trumbull retorted that Johnson, with "all his self-complacency," cannot have forgotten that he raised the point of morals, and Johnson closed the incident with a soft answer that he never knew Trumbull when he was not right on questions of morals or law, "and I sometimes doubt whether I am."⁹⁶

⁹³ On February 5.

⁹⁴ On February 23.

⁹⁵ Johnson, in vain, voted against the resolution which passed, 25 to 6.

⁹⁶ The amendment then passed, 33 to 13.

On the bill providing for the government of the Southern States,⁹⁷ Johnson offered the Blaine amendment to the effect that, when in any State, the Fourteenth Amendment had been adopted and the franchise given to all male citizens (except felons and traitors) and a new constitution adopted, the State shall be readmitted. He believed the Senate was independent and was bound to exercise its own discretion without regard to the fear that, with that proviso, the House might defeat, or the President veto, the bill. He acted "without consulting the political friends, with whom it is my pleasure generally to act." Differing from the majority of the Senate, he held that the Southern States are now in the Union and that the citizens of these States are entitled to all Constitutional guarantees of personal liberty." When the Civil War ceased, the power to suppress insurrection, under which the Federal government carried on the struggle, came to an end. The executive and judicial departments have recognized the Southern States. If Virginia has not been a State since secession, she could not consent to the division of her territory and so West Virginia is no State. Men have an instinctive repugnance to military rule. The reconstruction bill of 1866 was intended to "provide for restoring the States lately in insurrection to their political rights." Now there is no insurrection, nor do occasional acts of violence, nor the fact that the murderer of a black man can not be punished, constitute it. He believed there was less crime in the South than in Massachusetts or New York. In Oregon, the constitutional convention, of which Senator Williams had been a member, had provided that no negro should come into the State and yet Oregon received no military government. The war

⁹⁷ On February 15.

had convinced the Southern people that their peculiar notions of State sovereignty can not be maintained and they are now loyal. Military despotism for the South is now proposed, indefinite in length; but, with this amendment, the bill provides for the termination of that despotism. Is the Supreme Court to be told that they shall not issue a habeas corpus writ? Johnson applauded the statement of the chief justice that he would not hold court in a State where martial law prevailed. Johnson should vote against the bill, if amended, as he believed the Federal government had no right to control suffrage in the States; but, with the amendment, the bill would be less objectionable. He closed with a defense of the law-abiding character of Maryland.

On February 20, he spoke again upon the bill. Holding that the South had the right to be represented, he had solicitude beyond words on account of its exclusion; but, since Congress took a different view, there seemed no hope of seeing it reinstated at an early day. The reputation and the material interests of the whole country suffer. Nothing could be worse than the condition in which the South was placed. The character of the Southerners, "as men, had been aspersed, in terms which have caused me nothing but the deepest regret In all particulars, moral and political, intellectual and Christian, they are our equals. The very battles they have waged, in seeking to destroy the government, exhibited deeds of valor, of which Rome in her proudest days might have boasted." Johnson had reconsidered his position of opposition to the bill. He must acquiesce in the decision of the majority, "believing it will end, in a comparatively short time, in restoring the Southern States. I am unwilling to have this Congress adjourn, without adopting some measure which holds out hope

that this will be the result of our deliberations." He would vote for the bill, in the hope that it would "rescue the country from the perilous predicament" in which it stood. "If there be a feeling which should animate the heart of every American, it should be one of generosity, magnanimity and charity for the men who, although they sought to break asunder the cords of the Union, are now looking with solicitude to their being reinstated." He longed to see the United States, "at the earliest period, a people one and indivisible."

The supporters of the President were enraged at this change of base and Gideon Welles wrote in his diary⁹⁸ that Johnson, "the Senatorial trimmer, gave his vote in the Senate for this infamous bill." Stanton quoted him as an example and authority. The President vetoed the bill and it passed over the veto, the vote in the Senate, on March 2, being 38 to 10. In explaining his vote against the veto, Johnson said that he regretted the conclusion and tone of the veto message, which contained unsound legal propositions and errors of reasoning, and feared that it may result in continued turmoil and peril. When Johnson announced that "I shall give the same vote as before," there was applause from the galleries, until checked by the President. Johnson, in an eloquent speech, said he was not governed by desire of applause.

My motions, if I know myself, were pure and patriotic. I see before me a distressed, a desolated country and, in the measure before you I think I see the means through which it may be rescued and restored ere long to prosperity and a healthful condition and the free institutions of our country preserved. . . . I have reached that period of life, when I can have no other ambition than that of serving my country.

⁹⁸ February 2, Diary III, p. 49.

He had always hoped for success and a firm establishment of the forms of government, securing their respective rights to the States and the Union. If the South "had succeeded, the cause of constitutional liberty would for years, if not forever, have terminated. The effort, thank God, failed. The power of the government, under the Providence of God, has proved able to arrest and defeat it and the South now, as I believe, is willing, in good faith, and anxious to abide by the result." How shall the government be restored "to its original integrity and the States, as vital to that integrity, be restored to their former constitutional condition." Johnson believed that, at the moment when the war ended, the States were in the Union and possessed the exclusive power to change their government, so that "no terms can be enacted, either by the President or by Congress, as conditions to be performed, before they are entitled to representation." He had never justified the position of Lincoln, nor of Johnson, who held that the executive, without the sanction of Congress, had authority to require conditions of readmission. The recent Congressional elections show that the people of the United States agree to the Congressional theory that that body could alone give the right of representation, so the States are only to be restored by submitting to the Congressional conditions. Johnson, differing both with Congress and the Executive, sought "complete restoration of the Union" and saw "no way of accomplishing it, but by the adoption of the measure." The country is now in a state of quasi-war, for ten States are held as conquered provinces. This condition is full of peril and, if not arrested, the government will be destroyed. The bill is no more unconstitutional than the civil rights and Freedman's Bureau bills, which the President enforced,

“as I think he was in duty bound to do.” The Supreme Court may well refuse to decide on the constitutionality of the bill, holding that the termination of the war is a political question. The bill is less objectionable than the previous ones, for it provides a way for ending the military rule. Reflecting and intelligent men of the South say they will organize States under this act. If the bill fail, one of harsher character will be adopted, founded on “the hypothesis that the people of the South were to be esteemed legally as conquered enemies and their land and other property on that account, as liable to confiscation and forfeiture.” The Supreme Court might declare such a law unconstitutional, but, in the meantime, the uncertainty would produce ruin and, if the law proved constitutional, the South would be surrendered to negroes and the whites driven out. Johnson wished to prevent calamity and must throw aside party for country, seeking the restoration of the Union, which he believed would be accomplished by this bill. Buckalew attacked Johnson’s position as inconsistent and Johnson replied:

Consistency in a public man can never properly be esteemed a virtue, when he becomes satisfied that it will operate to the prejudice of his country. The pride of opinion, which more or less belongs to us all, becomes, in my judgment, in a public man a crime, when it is indulged in at the sacrifice, or hazard, of the public safety.

The President and the minority party were powerless and the question confronting Johnson was: “What shall I do for the South in this present exigency and for the country?” He had no fear to submit his conduct to the judgment of posterity. He would have rejoiced at a Democratic victory in the past autumn, but there was

none. Since the Supreme Court said the insurrection was a war and one of the incidents of war is confiscation, that Court may also say it is a political question, if Congress holds the Southerners to be public enemies and thus the South may be destroyed.

In his disgust at Johnson's action, Welles bitterly wrote⁹⁹ that in the Senate "party dominated over country." If several hesitated, "the recent extraordinary course of Reverdy Johnson decided them to submit to the demands of party." Johnson violated his oath in voting for the bill, and "his apostasy" came, because his son-in-law was an "earnest candidate for the office of district-attorney of Maryland and he could not, under existing circumstances, expect to be confirmed by the Senate were the President to nominate him." Welles thought that Johnson fancied "that his position as Senator, and one of the judges of the President in case of impeachment," would secure the selection of his son-in-law. In his rage, Welles added:

I have no doubt this old political prostitute has been governed by these necessary personal considerations. He has a good deal of legal ability but is not overburdened with political principles. This conduct occasions less surprise on that account. Sad is the condition of the country, when such men influence its destiny.

On the next day, Welles wrote that the President told him¹⁰⁰ that Reverdy Johnson had just written, asking that his son-in-law, Ridgely, be nominated as district-attorney, which was "as cool a piece of assurance as he had ever witnessed." Welles added "It does not surprise me," and, on the next day, when Ridgely had

⁹⁹ Diary III 55.

¹⁰⁰ Diary III 58.

been nominated and confirmed, Welles wrote¹⁰¹ that he wondered who influenced the "forbearing" President, and added in his Diary, "so much for disregarding principle, conviction and duty."

When it was proposed to admit Nebraska as a State¹⁰² and to require negro suffrage there,¹⁰³ Johnson delivered an elaborate historical address, discussing the right to make such a requirement through the power to admit new States and guarantee a republican form of government. He discussed the history of the change of the predominant interest in the eastern States from commerce to manufactures, through the influence of the war of 1812 and the protective policy since that date. During the last five years, the United States had passed through "a trial, to which no country in the world was ever before subjected," during which "everything was supplied that human industry could furnish, every species of manufacture entering into the necessities of an army in the field was near at hand, fashioned by the skillful industry of the workmen of the United States." He admitted that the system "increases, in time of peace, the cost to the consumer of everything which he is obliged to get from the manufacturer" and that it is difficult to say how much of that tax the consumer paid, but the protective system was so useful to the country that he was very cautious about admitting new States in the West, which seemed to turn to free trade. Nebraska,

¹⁰¹ Diary III 59.

¹⁰² On January 29, he voted to sustain Johnson in his veto of the bill admitting Colorado as a State.

¹⁰³ On December 19. On the 17th the bill had come up and Johnson asked that a notice of the death of Wright of New Jersey might be made and questioned what would happen, if the ten days, during which the President might hold a bill, fell within a recess of Congress.

with not over 50,000 people, had too small a population for a State, in any case, and had better be kept a territory, unless it were necessary for the protection of her citizens to have her admitted as a State. The North cannot say this, for they propose to place ten States under a territorial government, and the only argument for admission remaining is the desire to protect a political party.

“Nullification is at an end, thank God for that, secession is equally dead” and the South will never leave the Union, but the great West should be looked to, for she will not long consent to have the East manage her affairs and, if a constitutional convention be ever called and the West have a majority in it, there is nothing to prevent her from insisting on a change of the equal representation in the Senate of the States. When Nebraska is admitted, she may disregard the restriction on the right to regulate the franchise, for that is a subject in the power of a State and Nebraska, being equal with the older States, will possess all their powers.¹⁰⁴ Before the adoption of the Constitution, the States were equal and that document changed nothing, except to delegate certain powers to the United States. It would lead to very perilous consequences to hold that a State constitution was unrepresentative, which denied to any citizen the right to vote. The Federal Convention had not for its object to change the forms of the State governments, but to preserve and protect life, liberty and happiness, which the declaration of independence said were inalienable rights of the people and which were thought to be in imminent jeopardy, because of the demonstrated inefficiency of the government of the Confeder-

¹⁰⁴ Brown interrupted with the statement that “we can take away the right to do wrong”, and Johnson asked him what that right was.

ation. Contemporary construction is controlling, to the effect that the Federal Constitution made it no duty of the United States to assail every State constitution. Even the Committee of Fifteen of the last session, by drafting the Fourteenth Amendment, showed they thought they had no power in the matter. Pushing the point further, he asked whether, if Oregon would be forced to permit the Chinese to vote under the guarantee clause, the Pacific Coast would not soon become disloyal and exercise "that inherent right which belongs to every State and every people to war against tyranny." The term "Government" does not mean the Constitution, but those exercising the power. The guarantee clause means that, "whenever the criminal ambition of those who are in the possession" of the government "induces them to pervert its powers and to assail the people, the people are to be protected against any change in the form of government that may be brought about by such causes." "Every government is republican in point of form, which corresponds with the governments in existence when the Constitution was adopted." Most of these governments, in 1789, excluded the black man from voting. No one then thought that the United States was given a right to interfere with the existing conditions and a different view of the Constitution would place the country in the power of Congress, which might destroy it. Otherwise,

I have no fear but that the political institutions of the United States will endure for ages, and I trust forever, extending as they do from ocean to ocean, distributing their blessings everywhere and enabling men, with perfect assurance, to feel no apprehension, and that they never will be called upon to feel any apprehension against any violence from within, or any invasion from abroad.

Some weeks later¹⁰⁵ he opposed Edmunds, who had said that Congress might keep Nebraska as a territory forever and might impose whatever condition the members pleased, at the time of admission. Johnson replied that the power of Congress was to admit a new State, that is one

partaking precisely of all the characteristics, and possessing all the powers, and having all the rights that characterize and are possessed by the States that were in the Union, when the Constitution was ratified. Otherwise there would be no harmonious whole. There is no provision in the Constitution which gave Congress the power to interfere with elections, as is shown by the provision that the electors of the House of Representatives should be the same as for the most numerous house of the State legislatures.

Johnson had just won in the Supreme Court, for holders of Arkansas swamp lands, a case, in which they claimed exemption from taxation. He held that a State might "enter into a contract," not alone in relation to the right of taxation, but also "in relation to any subject which did not impair her sovereignty and take away her ability to hold an equal place among her sister States." Nebraska had already elected her Senators and, if the bill for admission of Nebraska pass, Edmunds will not object to swearing in these men, which fact showed that, in a sense, Nebraska is already a State. Congress cannot create a State. "It must be the work of the citizens." The follower of Stephen A. Douglas had not recanted from the creed of popular sovereignty.

When Sumner asked for further guarantees before reconstruction be completed,¹⁰⁶ Johnson replied that there should be delay, to see if the South would accept

¹⁰⁵ On January 9.

¹⁰⁶ On March 11.

the previous exaction. He had assured Southern correspondents that nothing more would be required and hoped not to have to retract this statement. The Southerners had been punished and both the loyal men and the freedmen will be safe under the bill already passed. Sumner wished to see the South restored, but wished to see those States "come back" by the vote of the blacks just emancipated and that of some three or four thousand men, calling themselves loyal men, many of whom in the beginning were Secessionists, "while the intelligence, the virtue, the refinement of the South is to be neglected." From that course of action the horrors of Santo Domingo may come.¹⁰⁷ In the debate on the supplementary reconstruction bill, Johnson urged that we cannot subsist long with ten States out of the Union. "It is a government of States and it was the duty of Congress to bring back the rebel States as soon as possible. "There did not exist, in the States of the Union, any authority by which they could legally escape from the Union." "The attempt to escape, therefore, was of itself illegal and imposed upon us the duty of arresting and defeating it, not for the mere purpose of arresting and defeating an insurrection, but for the purpose of restoring the Union." The authority to add territory was only that the people of the territory might be fitted for Statehood and we are guardians for them. If there is a majority in one of the seceded States "inimical to a restoration of that particular State," that majority should be forced in. Howard of Michigan had said no government, founded on the will of a minority, can be republican, yet he voted to exclude a large portion of the people of these States from voting. To continue

¹⁰⁷ On March 9, he defended Alexandria for excluding the blacks from voting, on the advice of all the lawyers in that town.

military rule will be expensive and will sacrifice the principles of freedom and liberty upon which our institutions rest. The majority of those voting, and not of the electors, should be sufficient to adopt the new Southern State constitutions, lest¹⁰⁸ some whites may prefer to keep the States under military rule and may induce negroes to stay away from the polls by misrepresentations, as these negroes are in a "state of absolute ignorance, by the policy of the South for the past twenty years, lest the institution be in peril through the knowledge of what were the rights of man." A State government should not be forced on an intelligent people, but the negroes, whom Johnson was willing to permit to vote, were not intelligent.

I vote for the original bill, or the amended report by the Committee on the Judiciary,¹⁰⁹ from a sincere desire to have the States back, on almost any terms. I would not be in favor of negro suffrage, if I was permitted to vote upon that question alone, but I believe that the interest of the country requires that the States should be back, even requiring negro suffrage.

Persistent in his opposition to a requirement that a majority of the registry be cast for the proposed constitutions, he carried a narrow majority of the Senate with him.¹¹⁰

His patriotism was again shown when he voted to pass the completed supplementary reconstruction bill over the President's veto.¹¹¹ He had been so assiduous in devotion to the business of Congress that he objected to an adjournment over the holidays,¹¹² yet he

¹⁰⁸ On March 16.

¹¹¹ On March 23.

¹⁰⁹ On March 18.

¹¹² On December 14.

¹¹⁰ The vote was 24 to 21.

denied Sumner's¹¹³ assertion that, on the adjournment of the session at the end of March, eight million people were left unprotected and subject to a despot, as well as Chandler's claim that the President would not execute the reconstruction laws, on the ground that he thought them unconstitutional. Reverdy Johnson had talked with the President and had been told by him that it was an insult to suppose he would not execute a law passed in a constitutional way by Congress. Military governors had been appointed as soon as possible. There was no danger that the Supreme Court could decide the laws unconstitutional before Congress met in December, as that Court can only hear appeals. Nor was there need to watch the President, as he had been left no power except to execute the laws. The people desire Congress to adjourn, not because they are dissatisfied with what has been done, but rather for fear that it may do something rash, if it continues to sit.¹¹⁴

He urged¹¹⁵ that a corporation could not be disloyal and, therefore, the banks, who alleged that the money captured with Jefferson Davis had been seized from them, should have the right to sue for the money in the Court of Claims. He said¹¹⁶ it would be a hardship to deprive masters of enlisted slaves of the payment previously provided by law. Maryland had paid \$100 to each master *pari passu* with the national govern-

¹¹³ On March 23.

¹¹⁴ On March 28, he stated that he agreed with the proposition that Congress, by agreement of both houses, can adjourn from month to month, or to any specified time. He held that there was no ground for believing that the minority can adjourn from day to day, when the houses have voted to adjourn to July 1 and then, unless otherwise ordered by Congress, from July 2 to December.

¹¹⁵ On March 16.

¹¹⁶ On January 7.

ment.¹¹⁷ He voted against suspending the payment to the masters for slaves who had volunteered in the army, as it would violate the plighted faith of the nation, and on March 23 he protested against moneys for colored troops being paid General O. O. Howard unless he were bonded.

When the bill to regulate the suffrage in the District of Columbia was under discussion, Johnson spoke in opposition to woman suffrage, which did not then exist elsewhere in the United States.

Ladies have duties peculiar to themselves which can not be discharged by anybody else; the nurture and education of their children, the demands upon them consequent upon the preservation of their households.

If the question of voting were submitted to "the ladies, in the true acceptation of the term," it would be rejected. They would feel it dishonor to "undergo, what is often the degradation of seeking to vote, particularly in the cities, getting up to the polls, crowded out and crowded in." Men vote because they serve in the militia and perform similar duties, which women are not expected to do. Woman is protected by man and needs not to protect herself.

Nature has not made her for the rough and tumble, so to speak, of life. She is intended to be delicate. She is intended to soften the asperities and roughness of the male sex. She is intended to comfort him in the days of his trial, not to participate herself actively in the contest, either in the forum, in the council chamber, or on the battlefield.

The strong minded women are exceptional. The presence of ladies at the polls will not turn a blackguard into

¹¹⁷ On March 21.

a gentleman. In Baltimore elections are as orderly as elsewhere, but,

in times of high party excitement, it is impossible to preserve that order which would be sufficient to protect a delicate female from insult, and no lady would venture to run the hazard of being subject to the insults that she would be almost certain to receive.

The bill, as passed, gave no suffrage to women, but gave it to negroes. Andrew Johnson promptly vetoed the bill and Reverdy Johnson was one of the minority of ten who voted to sustain the veto,¹¹⁸ while twenty-nine voted to override it. He said that Congress had a right to pass the act, for the only limits to its powers over the District were found in the guarantees to individuals. For many years after the adoption of the Constitution, it was thought that, having accepted the territory from Maryland and Virginia, Congress should not interfere with slavery in the District. He had not accepted this view, though Calhoun and Clay had done so and even Adams had said it would be wrong to abolish slavery there without a popular vote. The people of the District who protest against this act, have a right to be respectfully heard and their views should be followed, if they are well founded. Congress had not yet given the freedmen in the States the suffrage under the Constitution. Morrill said that in 1789 negroes voted in every State but South Carolina and Johnson retorted "Well, the States regulated suffrage." The negro had not been given the right to vote in Ohio or Maryland, and should not be given it in the District, where many of them are living "in squalid misery, in a sense paupers." He referred to the Chinese and maintained that there would be distinction on account of color, so long as the

¹¹⁸ On January 7.

racess were not blended. He had no fear of the foundations of the country being shaken, by executive or by legislative usurpations. If these come, they will be redressed by the "patriotism and the power of the American people."¹¹⁹

Maryland matters demanded much of Johnson's attention at this Session. On January 3, Sumner complained of the sale of negroes' services for six months, for a year, and for two years, as had been done in punishment of crime at Annapolis during December and asked that the judiciary committee consider the case. Johnson replied that slavery may be a punishment for crime according to the constitution, and that it is better to wait, as the judge, who sentenced the negroes, had already been arrested and the case is in the United States courts.

Perhaps there is no State in the Union, in which there is a more fixed determination that Slavery, . . . on any account except for crime, shall not exist, than there is in Maryland.

Creswell, the radical colleague of Johnson, said that the Maryland law only referred to blacks and that the only service exacted from criminals should be that rendered the State, which change may be effected by the civil rights bill. Maryland's attachment to freedom was doubted by Creswell, who advised the Senate to watch the State legislature, in any repeal of the slave code.

¹¹⁹ As to minor matters concerning the District, on January 19, he advocated postponing action on the charter of the Baltimore and Potomac Railroad, until Maryland had acted, for that State, having a deep interest in the Baltimore and Ohio Railroad, may refuse to permit the new road to pass through its territory. On February 9, he objected to disturbing the dead, by removing bodies from the Foundry Methodist graveyard, but finally yielded; he spoke in favor of the newsboys' home, and opposed limiting the National Capitol Insurance Company by its charter to do business in the District alone, as it should be empowered to enter such States as may permit it.

Later in the session, the Maryland legislature elected as Creswell's successor, Philip Francis Thomas, who had been Commissioner of Patents and Secretary of the Treasury under Buchanan's administration. He had lived in retirement during the war and had made an intemperate speech against the acts of the majority of Congress, when notified of his election. On March 16, Johnson presented Thomas's credentials, opposed a reference to the Judiciary Committee, and defended Thomas's loyalty at the beginning of the war from a charge that he had transferred money to the sub-treasury at New Orleans.¹²⁰ Howard complained of Thomas's remarks made after his election and Johnson replied that, like himself, Thomas may have thought that the government of Maryland, as recently administered by the suffrages of not more than a fourth of the population, was not republican. Nye of Nevada took the position that the election, by which the legislature of Maryland was chosen, was fraudulent, in that the law prohibiting rebels from voting had been disregarded and charged that Thomas resigned from Buchanan's cabinet, because he did not believe in reënforcing Sumter. Investigation should be made before Thomas is sworn. Johnson remarked that, if rumors are taken, we may all be in trouble. Sumner and I differ, yet neither is disloyal. Investigation may follow Thomas's taking the oath. The Senate has no jurisdiction over the legislature of Maryland. Nye persisted. The Senate should decide for itself on the election of its members and good loyal men of Maryland wish to appear before the committee to show that Thomas was disloyal. If the Maryland legislature is fraudulent, we have the right to inquire

¹²⁰ He had already transferred money from Arkansas to New Orleans, which was all expended before the secession of Louisiana.

into it. Trumbull supported Johnson and said that, after the admission of Thomas, the Senate could investigate the legislature of Maryland. Not everyone disagreeing with us is an enemy of the country. The debate became general. Fessenden recalled that, in only two cases, had reference of credentials been made to a committee¹²¹ and, in both cases, there were affidavits against those bearing credentials, when they presented them.¹²² Here, however, there was only rumor and no remonstrance had been made. On such rumors, all Democrats might be kept out and this is a more extreme case than that of Stockton, for there the question was, had the legislature elected him rightfully and here the question is, was the Maryland Assembly rightfully elected. When Sherman said he favored reference of the case to the committee, since Thomas's resignation of the Treasury Department had been possibly on the same ground as Floyd's, Johnson at once replied:

If I had been in his situation, I would have concurred with the majority of that cabinet, because in the then condition of things, I would not have enquired whether there was a law or not. I would have enforced the collection of the duties.

As to the speech reported recently to have been made by Thomas, it was printed in the *American*, a "most violent partisan paper," which had often misrepresented Johnson, though he took no notice of it. Thomas had authorized him to say that "he has not the slightest recollection of saying a word, which would have justified such a statement" as made in the *American*. What he

¹²¹ Stark of Oregon during the war and since that time Patterson of Tennessee, who had taken an oath of office under the Confederacy.

¹²² In both cases the reference was made so as to avoid the need of two-thirds vote to expel.

said was what had been said in Congress.¹²³ The fact that Thomas had not volunteered during the war was no proof of disloyalty.

Stewart of Nevada thought reference should be made to a committee, since men will be coming from the States lately in rebellion and it will be a dangerous precedent not to refer credentials. When Johnson asked if there was not a difference between Maryland and the seceding States, Stewart replied that there was none between a disloyal individual in Maryland and one in South Carolina, except that the former was more guilty, as the whole people were not disloyal and there was Federal power to protect him. Johnson asserted that the presumption was that a man presenting himself as a Senator from Maryland was as loyal as one from Nevada. Stewart replied that this might be true as a presumption, but, "when there is a suggestion that there may be guilt, it is then incumbent on the body to investigate it." The only question was the order of procedure, for it was admitted that an investigation will be proper at some time. "If we refuse to examine this case at this stage, when the suggestion is made hereafter for a reference, it will be regarded as a condemnation." Conness remarked that he was surprised at Johnson's position, for Thomas's resignation of the Treasury in 1861, on the ground that he could not agree with the majority of the cabinet as to the policy to be pursued towards South Carolina, showed that there must be "a close investigation." He would never vote to admit to the Senate, a man, "either so weak or so vicious in

¹²³ Johnson cited Andrew Jackson's calling two Congressmen traitors, without any one proposing to impeach him for it; Webster's statement that he would not appropriate three mills to Andrew Jackson for war, if the enemy was thundering at the gates of the Capitol (which J. Q. Adams said was treason); and the bitter denunciation of Andrew Johnson in either house.

1861, as not to be able to find law enough to defend the honor and existence of this country" and who even left the cabinet for that cause. Sherman added that Thomas's singular letter of resignation stated that secession was a constitutional act and that South Carolina had so withdrawn from the Union that there was no authority to enforce the law of the United States in that State. Thomas had not aided in the suppression of the rebellion and should not be allowed in the Senate, if he had really said in his recent speech that in the Senate he "would face these men, who now and always were traitors to the Union."¹²⁴ Saulsbury of Delaware said that the Republicans call opponents names and the Gazette had a different report of the speech. "I know, living not far from Thomas, that he lived a quiet, peaceful life during the war" and, though a military force seized Judge Carmichael for disloyalty, no charge was made against Thomas. Johnson attempted to show that Sherman and Conness misunderstood Thomas's letter. Davis of Kentucky advocated immediate admission of Thomas and Howard closed the debate by urging reference of the credentials and stating his belief in Thomas's disloyalty.¹²⁵

On March 29, Johnson gave up the fight and moved, at Thomas's request, that the credentials be referred to the Judiciary Committee, which was promptly done.¹²⁶

Maryland's political condition was brought before the

¹²⁴ Morton agreed to this.

¹²⁵ On March 20, Johnson wrote to Governor Bradford that he would try to secure his confirmation in office, but was doubtful of success and very doubtful of Thomas's admission. On the 21st, he wrote Bradford again that, in spite of Creswell's telegram that Bradford's rejection was absolutely necessary, he secured confirmation by a vote of 22 to 16.

¹²⁶ On the same day, Johnson opposed the publication of the laws in the Southern papers.

Senate on March 28, by the receipt of resolves from the Maryland Republican Convention,¹²⁷ protesting against a scheme for a State Constitutional Convention and by Francis Thomas attacking the Democratic State Administration on the floor of the House of Representatives. Johnson moved reference of the protest to the Judiciary Committee and said that he felt that there should not now be such a convention, as it would be "fraught with more or less of peril to the peace and prosperity of the State" in the present condition of the country and the state of feeling in Maryland. When Sumner, on the following day, used as an argument for negro suffrage, the fact that returned rebels, but not negroes, could vote in Maryland, Johnson, prompt as ever in the defence of his State, said "there is no State in the Union, where private rights of person, and rights of property, are more amply protected. There is no judiciary in the land, whose duties are more honestly and impartially administered."¹²⁸

He favored the bankruptcy law, but opposed giving the chief justice power to make appointments under it, thinking this might tend to make him a party man and make people think him such.¹²⁹ The Supreme Court had never lent itself to partisanship and the duties of its head should be confined to high constitutional and legal ones.¹³⁰ He learnedly discussed¹³¹ the effect of

¹²⁷ Signed by Frederick Schley.

¹²⁸ On January 31, in the tariff debate, Johnson said that he lived in a State "which stands between the extremes" and quoted from the message to the Assembly of the first Maryland governor elected by the people: "We are not given to the rude boreas of northern fanaticism or the hot simoon of Southern impetuosity."

¹²⁹ On January 19. On March 22, he reiterated his views on this joint.

¹³⁰ Johnson preferred giving the appointive power to District, rather than to Circuit Judges.

¹³¹ On February 1.

Supreme Court decisions, which were pertinent to this law,¹³² and urged that while the law must be uniform, it ought not to appropriate to the payment of debts property which is not liable under existing State exemption laws. The civil troubles had swept away¹³³ many men's property, especially in the South, and the law should be liberal, so as to relieve men from the slavery of debt, whether or not they could show assets equal to half their debts and whether or not the insolvent was a trader, and the debt a mercantile one. Corporations should be allowed to partake of the benefits of the law, without forfeiture of their franchises, which are property to be sold for the benefit of creditors. He opposed¹³⁴ a provision that no discharge should be valid, except with the consent of three-fourths of the creditors, as it made the creditor the judge rather than a disinterested tribunal. A man who can not pay his debts is no repudiator.

No bankrupt law has ever been passed, except because of the large amount of existing debts which were depressing the industry of the country and ruining the debtor. When, therefore, a man contracts a debt, the creditor is supposed to know that there is in Congress power to discharge a debtor, on his delivering up the assets.

Consequently, the act is valid as well to prior debts as to subsequent ones. He objected to Sumner's proposition to give a test oath to petitioners in bankruptcy, who may have been protected by the grant of belligerent rights. They were once traitors, but are now citizens and may contract debts. The test oath has hitherto

¹³² E. g. *Sturgis v. Crowninshield* and *Ogden v. Saunders*.

¹³³ On February 4.

¹³⁴ On February 5.

been only used for officers and quasi-officers. It is absurd that a law should not apply to all. The question as to whether a rebel debtor is discharged or is allowed to do with his property as he will, should not depend on a loyal creditor applying for the benefit of the law.¹³⁵ Finally, on March 29, he voted with the majority against the bankruptcy bill.

When the tariff bill came up for discussion,¹³⁶ Johnson said:

I have, from the first, been in favor of protecting the domestic industry of the country by Congress, having no doubt either as to the power or as to the expediency of doing so.

Since 1828, Congress had several times passed such laws and the prosperous condition of the country, which enabled it to win in the war, was largely due to the existence of the protective system. Since States can not protect industries by laying duties, no one can do so, unless the United States lay them. Protection may be carried to a ruinous extent, of course, and may injudiciously reduce revenue from imports, so that the country will not have money to pay its debt. The tariff should protect the wool grower as well as the manufacturer,¹³⁷ and the Maryland coal from the Nova Scotia product, so as to give the former the Massachusetts market,¹³⁸ which the Canadian reciprocity treaty took

¹³⁵ On March 26, he objected to preference given to creditors and to the postponement of the effect of the law from June to January. On March 28, he advocated abolishing preferences in bankruptcy made after the law passed but before June 1.

¹³⁶ On January 23.

¹³⁷ Yet he was not in favor of protecting wool growing and leaving other interests unprotected. Speech of March 1.

¹³⁸ On January 25.

from it.¹³⁹ The tariff system¹⁴⁰ was forced on New England by Southern votes and though she protested, she availed herself of it and grew rich thereunder. He also was interested in having efficient merchant shipping and believed that shipbuilding should be fostered, since the "arm of the country in case of danger is strengthened . . . through the instrumentality of a commercial marine."¹⁴¹ When the internal revenue act was under discussion,¹⁴² he opposed a tax on cotton, as bad policy, liable to injure an industry much greater than the wool one.

He maintained that a "violation of a national agreement, under any circumstances, is full of peril, and it is especially mischievous when that violation relates to some financial operation of the government." Therefore,¹⁴³ he favored the taking up of the compound interest notes and the issue of three per cent notes in their place, for the government had made a contract with the holders of legal tender notes, not to issue over \$400,000,000 of them. The original issue of legal tender notes was open to great objection, but they can not be gotten out of the way at once.

On miscellaneous topics, we find Johnson asserting that a married woman should not be made a *feme sole* at law,¹⁴⁴ and advocating the preservation of the Choctaw

¹³⁹ Creswell also defended the tariff on coal, but Fessenden replied that the Baltimore and Ohio and the Chesapeake and Ohio freights were the enemies of Maryland coal.

¹⁴⁰ On January 29 and 30.

¹⁴¹ On March 23, he opposed the bill permitting the sale of ships to belligerents, saying that the proposed law might complicate matters with England and would repeal the excellent neutrality laws of 1798.

¹⁴² On March 1.

¹⁴³ On February 27.

¹⁴⁴ On February 9.

and Chickasaw funds that their schools be not closed.¹⁴⁵ He had "always voted¹⁴⁶ against intrusting the custody of the Indians to the army."¹⁴⁷ He advocated larger salaries for those very important officers, the judges of the Court of Claims.¹⁴⁸ Congressmen have other sources of income, but judges have not. Heads of bureaus are mere accounting officers, do not require the same kind of ability, and should receive less salary. Judges of the Supreme Court also receive too small salaries. Taney "lived in the most economical way possible" and could not entertain a single person at his table, yet "left the world with a family almost wholly dependent upon others." When it was proposed to vote indemnity to military officers,¹⁴⁹ Johnson expressed doubts as to whether an indemnity act would be sanctioned by the court and opposed prohibiting courts from entertaining jurisdiction in the case. He felt that we should go to the verge of the Constitution in protecting officers, in all acts they honestly believed necessary to protect the government from the effort to destroy it, but this bill went too far and prevented an injured citizen from suing, in a civil tribunal, any person who acted under presidential authority. Congress assumed to say that all the President's acts are legal and are legally performed and, even if Congress is without power to pass such a law constitutionally, that the Court shall not examine it.

Though he appreciated the importance of the Court

¹⁴⁵ On March 20.

¹⁴⁶ On March 9.

¹⁴⁷ In a speech on the printing of the Congressional Globe, on February 8, which he thought ought to be printed by the government were it not for the existing contract, Johnson said "the true mode of interpreting a law is to interpret it by itself without any reference to facts aliunde."

¹⁴⁸ On February 8.

¹⁴⁹ On March 2.

of Claims, yet he felt that the Senate was competent to pass on legal questions, such as grants of public lands, and opposed reference of such a claim¹⁵⁰ to the Court. He favored appropriations for such internal improvements as were in the river and harbor bill, believing¹⁵¹ that it was "important to the whole country that the navigation of the western waters should be as good as it can be made."¹⁵²

On May 8, 1867, he argued, unsuccessfully, for the defendant in the case of Virginia v. West Virginia in the Supreme Court.¹⁵³ He first considered whether the case entitled the complainant to relief. Berkeley and Jefferson Counties, in 1863, voted in favor of annexation to West Virginia and Virginia now denied the validity of the election. Johnson argued that the certificate of the loyal governor of Virginia in 1863 as to the election was conclusive, that the absence of voters in the Confederate army could not invalidate the election, that Congress approved West Virginia's constitution which provided that additional territory might be admitted into the State with the consent of the legislature, and that Congressional approval to the annexation was given in 1866, within a reasonable period of the election.

He then considered whether Virginia was a State competent to act. "The Union consists of States, equal in all respects in dignity, and possessing the same rights. The most important of these rights, the one upon which all its other rights and interests depend for protection and enjoyment, is the right of representation in Congress." If Virginia does not possess this, she is not a

¹⁵⁰ That of Milwaukee and Rock River Canal on January 3.

¹⁵¹ On February 25.

¹⁵² Vide remarks on Clinton Bridge on February 21.

¹⁵³ His argument was printed in pamphlet form p. 18. Stanton and Lee were with him. Curtis and Hunter opposed him.

State, within the meaning of the Constitution. "My own opinion has been" that the Civil War, "in the sense of the Constitution," was an "insurrection and not a war, that the power conferred upon Congress to declare war referred exclusively to an external conflict." The Constitution could not have "intended to authorize Congress, through the war, or any other power, to conquer a State, annihilate and govern it as a territory and its citizens as enemies. The framers of the Constitution looked to the happening of two events: one a war with a foreign nation, the other an insurrection among the people of one or more States. For the first, they invested Congress with the war power; for the second, with the power to call out the militia. The power to suppress insurrection was given to preserve and not to destroy the States." Congress, however, acted on the inference that, when started, the conflict is a war and the parties are enemies, though they must again become traitors and no longer enemies, at the end of the conflict. The Supreme Court's decision as to the Constitutional character of the struggle is not binding upon Congress, of which each House "has the exclusive power to decide that a State is entitled to representation, or to state it more correctly, whether a community is a State for that purpose, within the meaning of the Constitution." As Congress does not recognize Virginia, it is not a State and cannot bring suit.

In an eloquent peroration, Johnson said,

It is not for me . . . to censure or taunt Virginia's sons, now that the war is over, by unfriendly reference to their recent error. I know well how sincere and deep was the affection they bore their State. Their mistake has been that in indulging it they forgot what they owed to the government of the Union. In the blindness of their State love, they did

not see it was their duty also to love the Union.
 It is absolutely necessary that the powers delegated to the Government should be paramount to State powers. This necessity creates an allegiance, to which State allegiance must be subordinate. The South forgot or denied this. They acted upon a different theory. They maintained that the allegiance of the citizen was first due to his State and the late war was the consequence. The result of that war, I hope, has convinced them that their theory is unsound, or at least that it can never be successfully vindicated in practise. Secession, therefore, as a State right is at an end.¹⁵⁴

At the extra session of Congress, in July, Johnson was consistent with his previous position. He successfully moved that no person who gave aid and comfort to the rebellion after holding office should vote,¹⁵⁵ but that men who did not actually enter into the rebellion should not be excluded, being impelled by a letter from General Sickles who, wrote that there were many now loyal in the Carolinas, who saw the error of their ways and were anxious to help "reëstablish the Union." With earnest opposition he met the proposition that there be any increase in the number of persons to be disfranchised, or that persons who acted in any official capacity in the rebel States be excluded from voting. Without these men, there would have been anarchy and the judges, at least, stood in the situation in which Lord Hale stood, when appointed Judge by Cromwell. He defended the Attorney-General¹⁵⁶ for expounding the Reconstruction Act to the District of Columbia Commissioners, at the direction of the President. He did not believe that the Attorney-General wrote the veto message and

¹⁵⁴ On July 11, he referred in a speech on the floor of the Senate to the overruling of this demurrer.

¹⁵⁵ July 10.

¹⁵⁶ On July 11.

took the opportunity to say that the law has put the civil under the military authority, and that the Supreme Court, in cases such as those of Texas and Virginia, had entertained writs of error and even heard cases in original jurisdiction, concerning the seceding States.

In a later speech,¹⁵⁷ he states that he did not regret voting for the original reconstruction acts even after the President's veto, but that no additional law is necessary. He is willing, however, to vote for a new bill, lest a still worse one come later. "It is high time that the Union should be restored, as it was before the attempt at its disruption," and should be again, "what it was, when it was originally established, a union of hearts, as well as a union of men." It is a "reproach to the wisdom of the Government" that there are ten States still out of Congress.¹⁵⁸

Consistent to his theory, he¹⁵⁹ held the President wrong and his message unnecessarily harmful to our credit in saying that we are responsible for the debts of the Southern States. Johnson instanced our relation with Spain, when Napoleon controlled it. When we reconstruct the States, their debts revive. They never had right to leave the Union and so their rebel debts were void. If we conquer the States, we have the right to pay for their government while under federal control, by taxing them. The States are for a time out of the Union, but Johnson rejoiced to hear Sumner say that a State can never die, as that statement agreed with Johnson's theory.

¹⁵⁷ On July 13.

¹⁵⁸ He objected to voting money for reconstruction expenses without the recommendation of the President, or Secretary of War. On July 18, he stated that the Secretary of the Navy was censurable, for not examining a man for admission to the Naval Academy.

¹⁵⁹ On July 15.

In an eloquent speech, on July 12, he defended Maximilian's course in Mexico, in that he treated guerrillas as criminals as we did and in that he died rather than flee, "because he loved honor more than life." There is no civil liberty in Mexico and we must not vindicate his executioners. Six days later, he protested against the idea that the United States are unable to keep their faith pledged with the Indians. White men on the frontier had treated Indians wrongfully without the interference of the government, which can and should enforce obedience there, as in the South. A place must be found for the harmless Indians within the broad limits of the United States.¹⁶⁰

It was at this Session, that Sumner, who had experienced many a conflict with Johnson, paid him the high compliment of saying that "we all know" Johnson's "eminence at the bar of the Supreme Court. He has no superior."

In October, Johnson published a tract¹⁶¹ entitled "The Dangerous Condition of the Country, the causes which have led to it and the duty of the people, by a Marylander." He felt that the country was in peril, for its very existence depends upon the equality of States, yet that equality is at an end, for ten States are under military rule. The legislative department has brought the country into this predicament and has lost the potential wealth of these States to the Nation. The

¹⁶⁰ On July 19, he defended the court of claims and protested against taking cases from it. In April, 1867, John Bigelow was in Washington and called upon Seward, who was anxious over the ratification of the treaty for the annexation of Alaska. Seward told Bigelow that Sumner had said that consideration of the treaty might have to be deferred because Reverdy Johnson opposed it, but that Johnson, "who is very untruthful," charged Sumner with being the cause of the delay.

¹⁶¹ Pp. 24.

war, "which grew out of the insurrectionary attempts of the people of the South," had been over more than two years previously. Congress voted in July, 1861, that its sole object was to "defend and maintain the supremacy of the Constitution and to preserve the Union with all the dignity, equality and rights of the several States unimpaired." President Johnson tried to carry out this resolution. It is a glaring absurdity to construe the Congressional power to preserve the States into one to destroy them, yet the war is over and the Union continues suspended. The distinction between a domestic insurrection and a foreign war is dwelt upon. The insurrection became so formidable that, on grounds of humanity and to give the government the means to assist in its suppression, belligerent rights were given the insurgents. The Prize Cases did not mean that the South was a conquered province, but the perpetual relation of the States was only suspended by the war, although Congress says the Southern States are subject to its unlimited power. A Government can not make conquest of its own territory and Stevens is wrong in finding such power outside of the Constitution, as Congress possesses no power except those delegated thereby. Sumner's suffrage bill is not rightly under the guarantee clause, and suffrage should be as much a State matter as education, or the control of corporations. Congress already claims the right to charter companies to construct railroads in the States without their consent. There is no danger from the executive, but there is from Congress, whose radicalism tends to disorganize the country, make it less easy to pay the debt, and keep alive animosity. There is especial danger in the threat to suspend President Johnson, "which nothing but his

patriotic forbearance can prevent from terminating in another civil war."

A month later, he published a second pamphlet.¹⁶² In this publication, he deals more particularly with Maryland affairs. After discussing the meaning of the clause of guarantee, he turns to the charges that the State's government is not republican, because of the limitation of the suffrage and the unequal representation of the counties. A Congressional Committee, sitting in secret and permitting no representative of Maryland to be present, had inquired into the question and heard witnesses from the members of "that very small party in the State known as Radical." The Constitution of 1864, however, was "declared by competent authority to have been legally adopted" and excluded white men from the franchise "by restrictions, in their nature unjust and punitive," yet there was no protest at Washington. A large majority of all the males in Maryland, white and black, support the government and the Democratic candidate for governor had been elected by a majority twice as great as that given the Constitution of 1867.¹⁶³ Congress had no right to make a Constitution for such a State as Maryland. The Fourteenth Amendment, whose object was to define citizenship, gives no power to regulate the elective franchise. The President is threatened with impeachment, yet "any alleged violation of supposed duty, not made a crime by Statute, any alleged violation of party fealty, any use of his official patronage which politicians may find fault with, or which may have proved injurious to the public interest, are not causes of impeachment." One must remember that, during an impeachment trial,

¹⁶² Also anonymous "A Further Consideration, etc., pp. 23.

¹⁶³ 44, 742 votes for Bowie, 24, 124 for the Constitution.

the President holds office. The dominant party does not observe the Constitution. The address of the white citizens of South Carolina, protesting against reconstruction, causes "sympathy and pain. They should have peace and, throughout the land, the white men should determine to have the Constitution respected and to continue the governments, State and National, exclusively in the hands of men of their own race."

CHAPTER VI.

THE IMPEACHMENT SESSION (1867-68).

In this session and in the trial of President Johnson, Reverdy Johnson took a most important part. He was one of the committee on the rules of the Court. To him largely was it due that the President was acquitted. He opposed in vain Wade's sitting in the Court. He filed an opinion, stating that the President was not guilty, which opinion was forceful and conclusive. He influenced several senators, who had been uncertain what course to pursue, and induced them to rely on President Johnson's integrity for the enforcement of the reconstruction acts. During the early days of the Session, we find him¹ spending the evening with General Sherman, devising some adjustment of the complications in the War Department, as a result of which conference both he and Sherman urged the President to appoint General Jacob D. Cox as Secretary.² As the questions at issue were grave and the report of the Committee on Military Affairs was an able one, he wished it printed with the President's message.³

On February 24, the House of Representatives voted to impeach the President for "high crimes and misdemeanors" and, on March 5, eleven articles of impeachment were presented by the House to the Senate. That body was ready to receive them. Johnson had been appointed on February 25 as one of a committee of seven,⁴ to which were referred the resolutions of the

¹ On January 11. De Witt's Impeachment of Andrew Johnson, 322.

² Welles Diary III, 260-261.

³ On January 28.

⁴ Howard, Trumbull, Conkling, Edmunds, Morton, and Pomeroy were the others.

House, passed on the preceding day. In the discussion of the rules of the Court⁵ Johnson took active part. He thought the Southern States should be restored, but had bowed to the majority and, holding that the authority to try impeachment was the same as that to pass laws, maintained that a quorum of the Court was a "majority of those whom the Senate have decided to have been elected," pointing out that any other theory would invalidate all acts passed since April, 1865, although the Courts had sustained them. He suggested taking up the proposed rules *seriatim*, as was done, and insisted that as a Court, the Senate should adhere to precedents. He opposed, both in the committee and in the Senate, a rule to require the aid of any officer military or civil, to enforce the Court's decree, as the judgment could only be removal from office and inability to hold office and no process was needed to enforce such judgment. The mode of enforcing the judgment was a matter of legislation and the Senate alone had no legislative power. If the President were convicted and refused to leave the office, it would be for his successor to enforce the removal, but Johnson had confidence, although he had not conferred with the President, that he would obey the judgment of the Court. He also opposed any limitation of discussion of any preliminary points which might be made, such as a motion to quash the indictment because it contained no averment of criminal intent, as he was particularly anxious to preserve for the Senate "without suspicion, its honor, its justice, its impartiality."

On March 5, the first day of the trial, Johnson spoke in opposition to Senator Benjamin F. Wade's sitting in the case, as he was president *pro tempore* of the Senate

⁵ On February 29 and March 2

and would succeed to the Presidency, if the accusation should be successful. Johnson was careful to make his protest, which was overruled, on purely legal ground, having no personal objections. He cited the precedents brought forward by Sumner and others of the majority in the Stockton case,⁶ and insisted that it was improper to place any man in a position, where he would be a judge in his own case, no matter what was the character of his interest. In sitting on the impeachment, he was ever emphatic in reminding his fellow members that they acted as a court and the court must be a constitutional one. He also insisted⁷ that, in a case where the issues are so "fearful," order must be preserved in the galleries and, that there be no suggestion of mob violence, he suggested that admission be by ticket.⁸

At the close of the trial, he gave an opinion which Cox⁹ called "unanswerable to the unprejudiced reader" and which left the prosecution no constitutional ground to stand upon. In this opinion¹⁰ he took the position that impeachment lay only for acts for which one would be liable to a criminal prosecution and that it did not lie for speeches, which were protected under the amendment protecting freedom of speech. The tenure of office

⁶ 3 Impeachment of Johnson, 68.

⁷ In the Senate on March 10.

⁸ Col. W. H. Emory testified in the trial that he understood that other officers consulted Reverdy Johnson. On April 14, Johnson advocated printing the proceedings of the trial separately. On April 13, he brought up the question of Sherman's conversation with the President as to his purpose to remove Stanton on January 27, 1868. 1 Impeachment of Andrew Johnson, pp. 236, 517. On March 17, Col. W. G. Moore wrote (19 Am. Hist Rev., Oct., 1913, p. 126) "During a visit to the Capitol today, Senator Reverdy Johnson expressed anxiety" that the "President should do something to help himself" and appeared to entertain the opinion that a change should be made in the State and Treasury Departments.

⁹ Three Decades of the Federal Legislation, 361.

¹⁰ 3 Impeachment of Andrew Johnson, 50 & ff.

act did not take away the right to remove Stanton, as he came under the clause forbidding such removal for the term of the President by whom he was appointed and for one month thereafter, and so Stanton's term expired a month after Lincoln's death. It would be most unwise to force on a President a cabinet of men in whom he had no confidence and the tenure of office bill was framed with the intention of allowing him to change them. Precedent established the right to remove without the Senate's consent and the act of 1795, allowing the President to appoint a secretary of war *ad interim*, had never been repealed, expressly or by implication. In any case differences of opinion as to the construction or constitutionality of the tenure of office act may honestly be maintained and there is no criminality in holding either view. If there were a constitutional power to remove, the President is bound by his official oath to maintain that power.

The doctrine that the President is forced to execute any statute that Congress may pass according to the forms of law upon subjects, not only not within their delegated powers, but expressly denied to them, is to compel him to abandon his office and submit all its functions to the unlimited control of Congress and thus defeat the very object of its creation. Such a doctrine has no support in the Constitution and would in the end be its destruction.

He must execute the Constitution and obey only acts passed in pursuance thereof, or break his "sworn obligation to support the Constitution. Otherwise the effect of the Constitution would depend on Congress," which would have practically all powers of government, "a result clearly destructive of liberty." The fact that the President wished to have the case referred to the Supreme Court showed that his intent was good. The resolution

of February 6, by which the Senate declared Stanton's removal in the preceding August to have been contrary to the Constitution and law, was passed in the Senate's legislative capacity and without much deliberation and did not preclude any Senator from changing his mind in a judicial proceeding, where he must, under oath, decide as to the law and justice, nor may he consider what will be the political result of failure to convict, even if it be "civil commotion and bloodshed."

Not only did he so argue in public but, when some doubtful senators told Grimes of Iowa that they feared lest Andrew Johnson, if acquitted, would try high-handedly to stop Congressional reconstruction, Reverdy Johnson brought about a casual meeting at his house of the President and Grimes, without the foreknowledge of either, at which meeting the President was led to express sentiments, proving that there was no such danger. Grimes conveyed these sentiments to the waverers with the desired result.¹¹ On May 16, the vote was taken and the President was acquitted on the two leading articles by one vote, as the prosecution lacked one vote of obtaining the two-thirds of the Senate necessary to convict. Senator Grimes was ill at the time and it was uncertain that he would be present. At the most dramatic moment, just before the vote was taken, Reverdy Johnson rose and said of Grimes:

The Senator is here. I have sent for him. He is down stairs. He will be in the chamber in a moment. He is here.¹²

After the trial was over, Johnson was prompt as ever to defend his friends. A Committee of the House of Representatives summoned Senator Henderson to appear

¹¹ DeWitt Impeachment of Andrew Johnson 546, Cox, Three Decades, 592.

¹² DeWitt Impeachment of Andrew Johnson, 551.

before it, as he was accused of having been corruptly influenced in his vote, and Johnson defended him,¹³ taking the position also that no Senator should appear before the House. He added: "I am the oldest member of the body, I believe, if not in point of service, in point of age. Its honor is as dear to me as the government itself, and I believe there is no corrupt Senator." So too when a false newspaper report said that Henderson, Johnson, Sprague, and Chief Justice Chase had dined together during the trial and thus discussed the formation of a new party, Johnson came to the jurist's defence and declared that "such slanderers as the reporter who concocted the story should never be allowed to pollute this chamber by their presence."

As to the opinions of the Chief Justice¹⁴ they were not better known to me than they are to everybody else. What his opinions were with reference to the impeachment, if he had any decided opinions, and what were the reasons which led him to adopt such opinions are unknown to me. I had my own. I had no desire to consult with him.

Hereafter, "the public judgment will be pronounced, at least to the extent of saying" that those who voted to acquit the President,

did what they did from conscientious conviction, that what they did was the result of their calm and deliberate consideration of the law and the evidence, and that they were bold enough, defiant enough of all efforts to control them in the

¹³ On May 21.

¹⁴ On June 1, he explained, however, that he voted by mistake for a resolution thanking the Chief Justice for the manner in which he discharged the presiding office, as he thought the resolution was a vote of thanks to the Secretary of the Treasury. He thought that the resolution which had been passed was calculated to bring the judiciary into political contests.

discharge of a judicial duty, finally to decide as they did decide.¹⁵

John A. J. Creswell, a radical Union man, by gubernatorial appointment, had replaced Hicks as Johnson's colleague. To succeed Creswell, the Maryland legislature elected Philip Francis Thomas, a Democrat, in the spring of 1867, as we have seen. After long argument, in which Johnson took an active part, Thomas was not allowed to take the oath of office. On December 18, Johnson moved his admission. The motion was referred to the Judiciary Committee, which took testimony and reported on January 6. Johnson then addressed the Senate, urging that Thomas be admitted. He had been Secretary of the Treasury in the closing days of Buchanan's administration and had been accused of sympathy with secession then and with bad financial management. Johnson denied these charges and claimed that the New York bankers had asked Thomas's resignation, merely because he was a Southern man. The condition of affairs in Maryland, at the time of Thomas's election, was also alleged to be such that he should not be seated, but the most important accusation was one not brought forward previously, namely that his son had been in the Confederate service and that the father had given him one hundred dollars (\$100), when he left home to enlist at the age of eighteen in 1863. Johnson cited the instance of a son of Governor Bradford, who was also in the Confederate service and asserted that Thomas did not give the son money to aid the insurrection and never wrote him, after he left home. The boy would go, money or no. The father gave money to prevent

¹⁵ He assailed an officer of the Senate for editing a paper which bitterly attacked the minority.

calamity befalling the son afterwards. The unreflecting youth of Maryland were easily induced to go South and, through their erroneous belief in slavery, to resist what they believed to be the unconstitutional proceedings of the Union. Senator Edmunds said that he felt he must vote against Thomas, since, previous to his son's enlistment, he "was in full sympathy with the enemies of his country." Howard also opposed admitting him, but Howe, while admitting the force of the charge said that Maryland, as a State, had a right to be represented by Senators of her choice and that Thomas should be permitted to take the oath. After admission, the Senator might be expelled; but the Senate is judge of the constitutional qualifications only of those elected to its membership and may not add to these qualifications. Because men do not receive the penalties, which the law denounces against treason, "it does not become the Senate to sit and make faces at them." A judge would not exclude testimony, by refusing to allow a witness to swear, lest, if he take the oath, he commit perjury.

Conkling doubted the possibility of exclusion for past treason and Howe replied that, in any case, the penalty might follow present perjury, but that there were no limits to the power to expel. He did not think Thomas more dangerous than any other Democrat from Maryland and, although Howe did not like to trust the welfare of the country to any Democrat, the man represented the opinion of Maryland and the Senate may not disfranchise a State.

Trumbull next took part in the debate, opposing Howe's position. A man can not be both a citizen and an enemy and, as Thomas had shown himself to be the latter, his case is similar to a man convicted of bribery.

Howe controverted this, for the briber is disqualified, because of sentence of court; but the Senate had no jurisdiction to try crime and the statutes do not define disloyalty. Doolittle and Trumbull maintained that Congress might disqualify, by imposing punishment for crimes generally, and Edmunds added that Thomas should not be given a vote on the question of his own expulsion. At first, Trumbull had favored seating Thomas and then examining the case, but believed it competent for the Senate to examine into the case first, as it was a continuous body. The object of the oath is to protect the country against disloyal men holding office. Stewart opposed Thomas, in the last speech of the day, and said the Fourteenth Amendment covered the case and gave¹⁶ the Senate authority, as Thomas had taken the oath to support the government and later, by helping his son, was accessory before the fact to aiding rebels. The "trouble is that we are not in the habit of regarding rebellion as a crime."

The subject did not again receive discussion until January 20, when Hendricks favored Thomas, who was a "constitutional Union man, dissenting from the political policy of the administration at that time, but concurring in the necessity of the maintenance of the Union through the power of the general government." His assistance of his son had no criminal design, but might be compared to helping a wounded Confederate, or paying a debt to a man going South. Frelinghuysen spoke on the same side. The question is judicial, not political, and Thomas was "guilty of a grave mistake," but was not disloyal.

The debate continued on the next day. Howard impugned Thomas's conduct in 1861, and his mild dis-

¹⁶ Howe said he did not know whether the amendment had been adopted.

suasion of his son, merely saying Maryland had not gone out of the Union, when he should have had the youth arrested by the provost marshal. Morton of Indiana followed in a strong speech opposing Thomas.

Every deliberative body has the right to protect itself from the presence of disloyal men, or of great criminals. Thomas's disloyalty is shown by his speech, when notified of his senatorial election, and by the fact that his son testified that he was uncertain as to his father's position in 1861. Thomas's letter resigning the Treasury portfolio showed him to be "one of the original conspirators of this rebellion. . . . He expected his own State to go into it. It was known at that time that there was not a more disloyal city in the Union than the City of Baltimore. If it had not been for the subsequent course of events, by which Maryland was held for the time in the Union by the force of arms, I have no doubt Maryland would have passed an ordinance of secession. We, gentlemen, talk about the loyalty of Maryland. Allow me to say that it was a constrained loyalty.

Williams followed, speaking in behalf of Thomas and urging the Senate to accept any man with the constitutional qualifications, sent by a legislature. It is dangerous to make admission to the Senate a political question, and investigation and punishment for perjury, if necessary, may properly follow taking the oath. Rebellion is not a private crime and, although Thomas may have sympathized with the rebels, he did not give them aid and comfort. It was not likely that Maryland would elect a better Democrat and a loyal State should not be denied the right to representation. Morrill, opposing Thomas's admission, held it disloyal to resign the Treasury at the crisis and the gift to his son was misprision of treason. If Thomas is admitted, where shall the Senate stop? A. H. Stephens had already applied

for admission. Stewart closed the day's debate, summing up the objections of previous speakers, developing the Congressional plan of reconstruction, blaming Thomas for not keeping his son from going South, and claiming that there was no evidence that Thomas was willing to protect every Union man and enforce the civil rights bill in Maryland.

The debate continued on January 22, and several other Senators took part. Doolittle reminded the Senators that they acted in a judicial capacity and should not cite extreme cases, such as that of Jefferson Davis. The only question is as to a person doing acts "susceptible of a double construction." If a man would take the oath, he should have his seat. The fact that Thomas had a wrong opinion of the power of government in 1861 did not show disloyalty, for many loyal men, such as Greeley, had it. Drake asserted that the intent of the oath was to search the innermost recesses of a rebel conscience. The Senators must not be made accessories before the fact to perjury nor let Thomas take the oath, if they were satisfied that he would perjure himself in doing so. If a small rebel is admitted, a big one can not be kept out.

On the contrary, Tipton felt that none of these charges were sufficient to keep Thomas out and that he had a "right to retain his States' rights heresies at home." Buckalew felt that the charge of disloyalty in 1861 was absurd. Thomas had some degree of sympathy with the rebels, but settled down on his farm and did no wrong. The speech in 1867 is not important. If you concede everything in regard to the gift to his son, still the Senate is not competent to try questions of criminal law. If Thomas's intent was benevolent, there was no crime. In point of law, there was no power to turn

away a man with regular credentials, willing to take the oath, except in case of a traitor, excluded under the power of preserving public safety in time of public danger, which was not now the case. Fessenden announced that he should vote for Thomas, as there was no extreme need of exercising any extraconstitutional power. A refusal to permit Thomas to take the oath is a mere arbitrary decision, making a precedent which is apt to degenerate into a party question. The speech of 1867 and the resignation in 1861 were not important. Thomas was following the existing law, when, as Secretary of the Treasury, he refused to permit tariff duties to be collected on shipboard. He doubtless loved his son better than his country, and was willing to let him go, but did not give aid and comfort to the South. The Senate must not exclude all Democrats. Johnson closed the debate, on January 23, urging haste in settling the matter. He took advantage of the opportunity to defend the judges of the Supreme Court and to say that he did not believe that five of them had said they believed the reconstruction measures to be unconstitutional.¹⁷

On February 7, Johnson announced that he proposed soon to call up the case of his colleague, inasmuch as the legislature of Maryland was in session and, if Thomas were ousted, could at once elect another Senator. Six days later, the debate was resumed, upon a motion of Sumner that Thomas was guilty of misprision of treason for his conduct in reference to his minor son. Loyalty was a qualification for admission to the Senate under the Fourteenth Amendment. Trumbull responded that, if Thomas is now loyal, he should be admitted. He

¹⁷ "I am so situated," he added, "that I read the papers very seldom and indeed I am hardly able to read them at all."

defended Thomas's administration of the Treasury, though it had not the confidence of moneyed men and was unpatriotic, and he called attention to the facts that Thomas advised his son and other young men not to enter the rebel army and that the money given the son was all expended before the rebel lines were reached. As a juror, he would not find Thomas guilty. Letters expressing rebellious sentiments in 1861 had been written by men, like Colonel Stokes of Tennessee, who had continued loyal throughout the war and was now a Congressman. Fessenden followed in Thomas's behalf and remarked that Sumner and Trumbull had sat in the Senate and heard men say they were going home to secede, but had not informed on them, while Breckenridge even sat there, when the battle of Bull Run was fought. Thomas's duty should have led him to do more than he did, but his act did not make him a traitor. Edmunds spoke in opposition to Thomas and insisted that the war began before January 11, 1861, when Thomas resigned. In a long and eloquent speech, he claimed that Thomas had associated with rebels and had stopped speaking to Union men, while he had merely dissuaded his son from making war on Maryland, because it had not gone out of the Union. Yates and Sherman also spoke against Thomas, the latter speaker laying stress on Thomas's resignation of the Treasury Secretaryship two days after the "Star of the West had been fired upon, because he did not agree with Buchanan as to measures to be taken in reference to conditions in South Carolina." The resignation was an act of assistance to the rebels and Thomas had never expressed regret for it. He had applied to vote in Maryland, but had refused to take the prescribed oath,

both before and after the adoption of the Constitution of 1864, and would have been glad to go out of his State. Corbett closed the day's debate, with a declaration that Thomas was one of the original conspirators against the government and with a comparison of him to Johnson, a loyal Senator, who "stood forth like a giant in 1861 to maintain the rights of the Union." On the fourteenth Thomas was defended by Tipton and Buckalew, the latter of whom called attention to the fact that, when Thomas found his son tarried in Washington for two months, he induced his wife to write urging the youth to come home. Speeches in opposition to Thomas were made by Yates, Morton, Stewart, Fowler, Drake and Howard, the last of whom said that, when the Subtreasury funds were seized at Charleston on January 8, 1861, Thomas uttered no rebuke and made no attempt to defend the treasury. The debate then went over to the eighteenth, when it was taken up by Trumbull, who thought that the Judiciary Committee should have expressed an opinion in the matter, instead of merely reporting the evidence and saying that there was nothing to keep out Thomas except his conduct in reference to his son. Thomas was too loyal to agree with Buchanan and the distrust of Thomas felt by the New York capitalists was the real cause of his resignation. We fed rebel prisoners and Thomas did no more for his son. Ferry made a speech in opposition. Johnson then spoke in Thomas's behalf, and endeavored to prove Maryland's loyalty.¹⁸ On the question of ad-

¹⁸ On January 31, he wrote Governor Bradford, asking for facts for a speech to prove Maryland's loyalty and saying that the failure to reelect Johnson to the Senate, had, in the estimation of Congressmen of both parties, done the legislature of Maryland harm.

mitting Thomas, the Constitution made each Senator a judge. The legislative branch of the government depends for its existence on the States, whose legislatures have right of choice of Senators, subject to the constitutional restrictions. If Thomas is excluded, it is on ground of implied power to add qualifications for admission. The authority to impose an oath is questionable, the right to go back of that oath is also questionable, and there is no need to do so here, for Thomas is a man of honor and a gentleman, so that he may be trusted to take the oath. If Thomas is guilty of misprision of treason, the son was guilty of treason, but an intent to join those who levy war against us is not treason. Thomas had been commissioner of patents, until he was called to the Treasury on December 12, 1860, and he found that Buchanan, "by a policy which I forbear to characterize as I think it should be characterized, because he is an old man and has rendered service to the country, by a policy of imbecility and inactivity, had permitted the authorities of the State of South Carolina to encircle Sumter with a range of forts." If Thomas had been a secessionist, he would have remained in office to embarrass the administration. Thomas showed loyalty, by removal of the revenue cutter officer who had turned over his vessel to the South Carolinians. Many men still hoped for peace at that time and the Peace Convention of the early months of 1861 was, for the most part, animated with the purpose to obviate war, without seriously affecting the character of the government. Even Lincoln underestimated the Confederate strength and called for 75,000 instead of for 400,000 men. Many Marylanders, "greatly and lamentably in error," went into the rebel army from a conviction that the South had a just cause.

In the struggle of arms, the men of Maryland were true to their lineage in either army, their daring and impetuous courage was strikingly exhibited. Hundreds and thousands of them now sleep upon the fields which were the scenes of their valor. In this, I feel, as I hope, an honest and blameless pride. I can point to them, as demonstrating that the sons of Maryland have not degenerated, that they are the worthy descendants of ancestors, who, in the war of the Revolution, when under the command of Williams, Smallwood, or Howard, never turned their back to the foe and rarely ever met him but to conquer and who, in 1781, at the battle of Cowpens, led on by Howard, by a brilliant charge, threw the enemy into confusion and, snatching victory from defeat, changed the fortunes of the day and achieved historic and deathless fame for the Maryland line and its gallant leader.

On the nineteenth, the debate closed. Howard showed that Thomas was intimate with such secessionists as Floyd, Cobb and Thompson, and engaged in discussion with Trumbull over a statement that the order to reënforce Sumter caused Thomas to resign. Buckalew spoke in behalf of Maryland and then Johnson accused Howard of vituperation in saying that Thomas would perjure himself and suborn his son in order to take his seat. Thomas is a "frank and an able man, an honest and an intelligent man and, notwithstanding all that has been said of him, a patriot, in the true sense of that term, as pure and perfect as the honorable Senator for Michigan." Thomas was an honest man who left the Treasury as poor as when he entered the office, while his loyalty was shown, by refusing to pay a claim which Floyd advocated, and by transferring \$350,000 from St. Louis to New York, while he transferred not a dollar to the South. War was not flagrant in January, 1861. As late as the end of February, loyal men thought compromise was possible. The result was not certain.

We trembled, lest England or France should interfere and the Union be dissolved. Queen Victoria probably prevented British interference. "I believed and was thought oversanguine that, in the end, all would come right, but when and after what loss, I knew not." Even Stephen A. Douglas, Union man as he was, on March 15, 1861, offered a resolution in the Senate to have the Secretary of War inquire, if it were better to retain the Southern forts.

Conkling now moved that Thomas be refused admission, as he can not with truth take the oath of office, and Drake moved that Thomas, having voluntarily given aid to persons in armed hostility, is not entitled to be a Senator. Howe disliked Thomas, but felt that the parties to the controversy were Maryland and the United States and that Maryland had the right to elect and send here any man who had the constitutional qualifications. The Constitution does not insist that a man have been loyal in the past, but that he swear to be loyal in the future. The power to expel is to be distinguished from that to admit and gives Congress the needed safeguard. Davis agreed to this position; but Conness, though a Democrat, thought slavery and war rose above all other questions and that the Senate should be preserved from "living rebels." "At the beginning of the war, the Devil had a mortgage on nearly all Maryland which, during the war, he could not foreclose, but has now done so." In a final speech, Johnson cited the acceptances of the resignations of Robert E. Lee and Franklin Buchanan by the Secretaries of War and Navy in 1861, which acceptances were mistaken, as Johnson thought, who "was here at the time and sensibly alive to the dangers." He asked in vain, that by-

goned be permitted to be bygoned. Thomas was refused admission by the vote of 21 to 28.¹⁹

The Maryland legislature soon elected Harrison W. Vickers of Kent County to fill the vacant senatorial seat and Johnson presented his credentials on March 9. Sumner moved to refer them to the Judiciary Committee, to see if Maryland had a republican form of government, since fourteen counties, with one-fourth of the white population, elect fourteen of the twenty-four Senators; but he withdrew the resolution and Vickers was sworn in.²⁰

Together with the impeachment proceedings and the defence of Thomas, the questions arising out of the reconstruction of the Southern States occupied Johnson's attention. On December 5, he opposed the equal rights bill for the District of Columbia. He was willing to give the negroes every privilege necessary to their

¹⁹ In the discussion with Cameron, the latter misunderstood Johnson to speak of Joseph E. Johnston's resignation and said Johnson told him that he would not act against the government. Cameron also said that he had arrested the legislature of Maryland to prevent them from taking the State out. Johnson responded that the Maryland legislature could not have done any harm, but that Lee did. Cameron then told a hearsay tale of Lee's deserting the army under false pretences, which Johnson doubted, as not in keeping with Lee's honorable character, and reiterated his old position that Buchanan's capital error was in confounding war against a State with the duty of enforcing, as against citizens, obedience to the Constitution. On February 21, when Harvey, the Minister to Portugal, was blamed for his alleged statement that in 1861 Lincoln had authorized him to say that Sumter would not be reënforced, Johnson defended him and said that Harvey acted, at the time, at the request of Seward, who was then, in some particulars, conducting the War and Navy Departments. Cameron said that this was a reflection upon him and Johnson responded that he doubted not that Cameron did his duty, but insisted that Seward did things which were properly in the sphere of the War Department.

²⁰ Conness opposed Sumner and Nye supported him, saying that Swann's appointment of registers of voters was a fraud on the Constitution of 1864, and that R. B. Carmichael's letter to Governor Bowie proved that Swann's act was the result of a corrupt bargain.

protection, but he did not feel that allowance of suffrage to them was politic or demanded by any ground of principle.

That right, according to my understanding of it, is the creature of positive law, not one of the inalienable rights with which we are endowed, and may or may not exist in any particular community, as that community may think is advantageous or not advantageous to the interests of the whole.

He objected, seriously, to permitting black men to serve as jurors, especially in criminal cases, since for the most part they had just emerged from slavery. The number of negroes in Washington may even lead to the election of judges of that race, which would be detrimental to the rest of the people.²¹ Yet, when the bill was passed and was not returned within ten days by the President, Johnson held it became law, though Congress was not in session at the time, as there had been no close of the session, but only a recess for the Christmas holidays.²² Drake had been much offended at the President's message and offered a resolution of censure. He had also printed in the newspapers an open letter to Reverdy Johnson, saying that the supreme authority over the people everywhere, in relation to all things, is in the government of the United States and, especially, in its legislative departments, and that there are no rights which can be called, in any proper sense, sovereign in any of the States of the Union. Johnson defended the President's message and answered Drake's "constitutional heresies" in an able historical

²¹ Recent elections showed that Sumner's policy was not altogether palatable to the people.

²² Vide speech on January 7 and 24. On March 24, he said, if the body be not in actual session, the bill may be returned to one of its officers.

speech.²³ When the Confederation, creating a league, had been adopted by free and independent States, they soon found the need of a "government vested with powers adequate to its own preservation, a government, therefore, authorized to enforce those powers, not through the instrumentality of other governments, but, directly, upon the citizens individually, and above all having the authority absolutely necessary to maintain the interests of all against the nations elsewhere and to prevent conflicts among the States themselves," but not to extinguish the States. Only such powers were transferred to the United States as were "necessary and adequate to maintain our independence against the world and preserve peace among ourselves." Curiously enough, Virginia is "now, in the estimation of some, supposed to be out of the Union by means of a war waged for the purpose of preserving the Union unbroken." The Supreme Court, for example in the McCulloch case, had held the view of State sovereignty and Drake himself, sitting in the Convention which framed the Missouri Constitution, though he oposed exacting an oath of loyalty from the clergy, did not object to it on the ground that Missouri had no sovereign power. The executive power is not detailed in the Constitution and the President also has veto, treaty making, and nominating powers, his sole responsibility being by impeachment. He was not bound to approve bills for reconstruction, and was right to state his opinion of those laws, but he had enforced them faithfully. Drake would have done better to answer the message. Despite their difference in views, "the relations between the honorable member and myself are such and, I am glad to say, they are equally friendly with every member of the body, that

²³ On December 12.

he will never receive at my hands anything but what will be most cheerfully rendered, the greatest courtesy."

The President is not subordinate to the legislature. Jackson, who wrote the nullification message, also wrote the bank messages, which Johnson analyzed at length. President Johnson's position is stronger, for no court has said that the reconstruction laws are constitutional, those laws whose only warrant is that the Southern States have no existence and their citizens possess no individual rights, but "are bound to submit to the absolute and uncontrolled will of the legislative department." Clay had once carried a resolution of censure against Jackson and, although "I can never mention him, but with reverence and admiration. He was impulsive and strong willed, of masculine understanding and of the purest patriotism," yet he "could bear no brother near the throne. Let the Senate beware of a popular uprising against its policy and, instead of warring with the President, let it restore peace, revise taxation, maintain unbroken plighted faith and preserve unsullied the honor of the nation."

When the supplementary reconstruction bill was under discussion, on January 27, Johnson delivered a long and able address, attempting to show that the doctrines advanced in the bill were "unwarranted by the Constitution, unsound and mischievous." He defended, with great erudition, the power of the Supreme Court to declare laws void and maintained that, without this power, the government would not have had its great success, nor its prosperity. The object of the Convention, which formed the Constitution, was to preserve republican liberty by preserving a republican form of government, not to guard against the abuses of those who might be called upon to administer a government

of that form." Morton was wrong in saying that the word "loyal" may be interpolated in the guarantee of republican government of the States. When the Constitution was adopted, in most of the States there was slavery and in none was there universal suffrage. None then supposed that, in that guarantee, lurked a provision which might be used by Congress, for the purpose of taking away from the States authority to regulate suffrage. The Federalist shows that the clause gave Congress no power to create a government for a State, "but merely to defend the States." What is disloyalty? Is it to "entertain abstract opinions upon the meaning of the Constitution, to have believed in the doctrine of secession in the past, or to believe in it now," to disagree with Congress? "No, it may be an error of opinion, no more," and Reverdy Johnson had differed with each department of government.

In the exercise of my own honest judgment and having at heart the prosperity and safety of my country, I did, from the commencement of the rebellion and before, denounce it, as resting upon a doctrine finding no support in the Constitution of our country, but, on the contrary, at war with many of its express provisions. I had, however, the charity to believe, and I believe now, that the opposite doctrine to my own was maintained with equal sincerity by hundreds and thousands of citizens to be found in every State in the Union

When Jefferson wrote the Kentucky resolves of 1799, he was wrong, but not disloyal. The men, who govern Maryland now, do so rightfully, as far as the laws are concerned. "That they erred in the past in sympathizing with the South, nobody is more satisfied than I am," and they know now that secession would have ruined Maryland, which would have been the battleground of the war. This war was insane, as well as

unconstitutional in its origin, and, as Johnson predicted from the beginning, it was fatal to slavery, "the very institution which its authors thought to preserve by it." The fact that slavery is gone is "compensation almost entire for all that has occurred, terrible though the losses were." The doctrine of secession is also dead and prosperity may now be looked for. We must remember the clauses as to *ex post facto* laws, treason and jury trials, as well as the guarantee clause. The bill proposed to place ten States under the dominion of the military forces and make the general-in-chief a despot. "I would not entrust George Washington himself with such power." From the first, Johnson believed that the Southern States never ceased to exist as States, and repudiated, as absurd, the doctrine that the United States, exercising its power of self-preservation, could work the destruction of a State. He appealed to the decision of Chief Justice Chase in proof of the continued existence of the States.²⁴ The war ended in April, 1865,²⁵ since which time no man can be tried, except in the manner prescribed by the Constitution, which knows no doctrine of necessity, but was made to meet every emergency. Johnson had favored a general amnesty at the end of the war and now pleaded that the South be brought back in peace.

On January 31, he favored permitting Ohio to withdraw her assent to the Fourteenth Amendment, as he believed that, before the full number of States had assented, a State's vote is a mere promise to assent, when others are ready. Three days later, Ferry referred to Johnson's vote on March 2, 1867 for the reconstruction bill and said:

²⁴ On deciding on the invalidity of the sequestration act of North Carolina.

²⁵ Vide decision in *Ex parte Milligan*.

I thanked God in my heart that there had come down to us, from the palmy days of the Republic, one Senator, who would place country above party and give his vote accordingly.

Johnson explained:

I did it from a conviction that the measure for which I voted was calculated, sooner than any other that I thought was likely to be introduced, to heal the troubles of the country and bring peace to the South. It is equally true, that never, for one moment from the time I gave that vote to the present hour, have I regretted it and, under the same circumstances, I should vote as I did then.

He had thought the bill inconsistent with the Constitution, but

I yielded my opinion, in order to heal the troubles in which the country was placed, and I did it, under a belief that that measure would be a final one upon the part of Congress. . . . A Senator of the United States, who really believes that his country is in danger, unless its condition is changed for the better, has no right to stand upon his own convictions of constitutional duty, in time of admitted peril to the country, when he finds that he differs with many gentlemen of acknowledged ability and whose sincerity he had no right to question.

But the desired result had not come. "The country is not at peace. The measure for which I voted has not proved a finality." Johnson had received commendation for this vote from many men in the South, even those who "perilled their lives in the effort to establish for her a separate independence." "If I could be morally convinced that the South would in a short time," if the supplementary bill be "adopted, be restored to the condition in which she was before the war commenced," he would vote for it, but he did not feel that

this would be the case. He defended the attorney-general, for giving the President an opinion as to the constitutionality of a bill before it passed Congress, as it would be improper for one to defend in the Supreme Court a law he thought unconstitutional.²⁶ He also opposed²⁷ strongly the passage of the Supreme Court jurisdiction bill, to take the McCardle case from that tribunal.²⁸

It was a defect in the Constitution that it did not provide what courts are to exercise judicial power. But for the jurisdiction of the Supreme Court to examine all cases arising under the Constitution, the government would have ended long since. It is a great and peaceful tribunal, "having no power except that which reason gives, having no voice except that which speaks the law." Stewart had attacked the court and, sneering at his "peculiar style of oratory," Johnson denied that

it was for the political department of the government to determine whether a citizen of the United States is a public enemy. If he has forfeited the protection of the law, it is a case for the courts. If the court, in a case brought before it legitimately between parties, finds that the law was one which Congress had no authority under the powers

²⁶ On February 5.

²⁷ On March 26.

²⁸ McCardle had been arrested for disturbing the public peace, exciting to insurrection, libeling General Ord, and preventing contracts from being carried out. The act of February 5, 1867 had been passed to protect colored people, to prevent officers from being harassed by suits for damages and to ascertain what were the powers of the government during the war. Under the act, if the State courts caused an officer's arrest, application might be made to the Federal Courts for a writ of Habeas corpus. The government claimed that the Circuit Court had no jurisdiction and the Supreme Court stated that it would decide the case, when the case came for trial on its merits. McCardle was not arrested until November, 1867, and so could not have been engaged in rebellion.

vested in them by the Constitution, to pass, they have no discretion, they must so hold, or violate their duty and their oath.

The fact that the act repealing that which allowed an appeal was passed in two days is criticised. It is "a dangerous thing to deal with courts of justice in this suspicious spirit." "There are but two modes by which controversies can be settled, as we all know, force and law. Force necessarily leads to destruction. Law, if observed, leads to peace."

When the Washington city charter was debated, Johnson stated that, though he had the kindest feeling for negroes, he would not appoint them to offices of any consequence. Most of them are wholly uneducated and came to Washington during the war, so they have no interest in the city. Even Sumner did not give them tickets to the impeachment trial.

It is one thing to give to them all the rights of citizenship, to place them upon an equality, political, with all the white race and another thing to enable them to be placed in a situation, through some political contrivance, some party measure, to get possession of the offices of the government.

If their safety depended on it, he would even give them office, but they can enjoy their rights without it and the prejudice against their holding office of itself, looking to the peace and quiet of the community, is a reason against granting the privilege.

When Arkansas asked for readmission, his calmness and wisdom were shown²⁹ by advocacy of a reference of the new State constitution to the Judiciary Committee. There will be no harm in delay and admission

²⁹ On May 13.

might lead to the charge that new Senators had been added as judges in the impeachment trial. Such addition would be improper and no suspicion of the possibility of it should be allowed. The question of admitting Arkansas came up again on June 1, and Johnson said that the States had the right to control the franchise, just as if there were no Federal Constitution, and that Congress had no power to limit it. If the general government can not take the regulation of the franchise directly from a State, it cannot do so indirectly, nor can it impose on Arkansas as a condition of readmission, that she shall not regulate the franchise. There are no express terms in the Constitution, assuring the equality of the States, but, without absolute equality, the government could not exist and the intendment of the Constitution was clear, from the equality of senatorial representation. If New York and Maryland can regulate the suffrage and Arkansas can not, they are not equal. A State differs greatly from a territory, which Congress may govern as it thinks best for the interest of the people, as the territory is held by Congress in trust for the benefit of the people of the United States and of the territory.

If we can insist that negroes vote, we may insist that women and aliens vote.³⁰ Congress may not restrict a new State from its necessary attributes as an independent sovereign government. "I want the union to be what it was, in every respect, except slavery." He wished reintroduction of the seceded States, not from recollection of their past renown, but from hope of future renown. Government by military rule through the central government, is unsuited for the States.

³⁰ On February 25, he said that, in Maryland, naturalized citizens must produce their naturalization papers in order to vote.

Not that I have any prejudice against the army as such, against the officers who have led it during the last war to victory upon so many battlefields and have won for themselves such imperishable renown, frustrating, as they did, the greatest rebellion ever known among men; but because, from the very nature of military power, it is dangerous to individual freedom.³¹

Although he urged the admission of the Southern States speedily, and opposed "the imposition of any fundamental condition" thereto, he objected to the admission of Georgia with a constitution containing a clause impairing the obligation of contracts, which was unconstitutional.³²

Questions of taxation interested Johnson and he moved³³ to exempt the crop of 1867 from the cotton tax,³⁴ which he thought unconstitutional, as he could not distinguish it from a direct export tax. Taxation ought to fall as lightly as possible on the people, while the cotton tax is not only oppressive but ruinous. It might have been borne when slavery existed, but "that labor we have now, and I am glad to know, terminated forever." As it is desirable to have cotton growing, we should give a bounty, rather than discourage the cultivation. It was not a question of rebellion or of loyalty,

³¹ On June 23, when the credentials of the Senators from Arkansas were referred to the judiciary committee, Johnson said that if Congress did not recognize the Arkansas legislature, neither had it that of California, when the first Senators came therefrom, and remarked that he had once given an opinion in Maryland that, if the Governor refused to sign a certificate of election, credentials signed by two presiding officers of the General Assembly would be sufficiently authenticated.

³² On June 23. On June 30, he advocated the admission of Florida's Senators, although that State said it *adopted* instead of *ratified*, the amendments to the Federal Constitution.

³³ On December 16.

³⁴ On January 7. The cotton tax was 10 per cent.

but of financial policy. We desire to have the South reinstated in all the resources of wealth formerly hers except slaves.³⁵

He advocated a drawback on materials for the building of vessels, as he believed that³⁶ "there are some industries of the country that are more exclusively national than others and, if any one can be said to be more national than another, it is the marine, the shipbuilding industry of the country," which was virtually extinct in the United States. It was an art requiring high skill and the Maine shipyards were deserted, while the glories of the privateers of 1812, of the Baltimore clippers, and the New England boats had passed away.

I have, for years, felt regret at the fact that we were about to leave the ocean, the scene of so many of our noble exploits, the scene upon which we won such imperishable renown in the past, to the hands exclusively of other nations, who may become enemies. . . . A name upon the ocean, one that will not only be respected but feared, is of great value to a nation.

He was a protectionist, but favored³⁷ a tax on the manufacture of sugar, arguing that the manufacturers had made great fortunes during the war and had better reduce expenses.

Whether free trade, in the absolute sense of that term, would, at this time, be the proper policy of the government is a ques-

³⁵ Negroes already were growing the cotton crop on shares and so lose twenty-five per cent of the compensation. On March 12, he defended the permission given exporters of distilled spirits to export, within thirty days, alcohol and rum made before January. On March 28, he opposed granting internal revenue collectors the power to compromise, in cases of fraud in paying the whiskey tax. On April 6, he said that the departments have probably used unexpended appropriations for the ensuing year and have sent in estimates on that basis.

³⁶ On March 17.

³⁷ On March 19.

tion which I do not propose to argue. I do not think it would, but very many reasons might be given in support of the doctrine. One thing is certain, that we do not mean to adopt it. We mean to continue what we have done in the past to protect our domestic industries. Then the question in relation to every article of domestic industry is, what protection does it need, if it be an industry of interest to the country.

During the session, he spoke several times on District of Columbia matters.³⁸ He denied the right of Congress³⁹ to charter a corporation in the District, with right to have an office and hold meetings in a State without its consent. On another local matter, his last senatorial speech was made, advocating⁴⁰ an appropriation of \$7000 for the Mt. Vernon Association, as the government during the war had seized the steamer which plied to Mt. Vernon and so the Association lost revenue. It was important to prevent the catastrophe of Washington's house going to ruin. Johnson felt the place was properly in the hands of women, through their sympathies.

All sorts of miscellaneous subjects were dealt with in his speeches. The stationery room needed investigation.⁴¹ It was better to run the risk of abuse and permit the President to send secret agents abroad unofficially, than to require their nomination to the Senate.⁴² The "great measure" passed in 1862 for the building of the Union Pacific Railroad was passed in pursuance of a

³⁸ On December 20, he advocated paying certain claims in reference to the District jail. On February 12, when the case of negroes ejected from a Washington street car came up, he said he travelled often on the Baltimore and Ohio Railroad and had been counsel of the company ever since its organization, but never heard of such wrongs being done on it. On April 7, he objected to assessments for public improvements in Washington.

³⁹ On January 31.

⁴⁰ On July 6; the bill passed on the ninth.

⁴¹ On December 19.

⁴² On January 30.

“wise and enlarged policy” and constituted a “national undertaking, pregnant with national benefit,” which private wealth could not accomplish. The Central Branch of the railroad should be completed⁴³ and will help St. Louis, Baltimore, and other cities, while it will also gain for us the India and China trade, which made England and will make us.⁴⁴ The naval pension trust fund of 1800 should be preserved.⁴⁵ Marine hospitals are constitutional under the commerce clause⁴⁶ and should be established on inland waters. An appropriation should be made for a copyright library in the Department of the Interior.⁴⁷ Officers of the army may be allowed to bet, if they stake their own money, and it is sufficient⁴⁸ to prohibit betting by those who are intrusted with public funds. Congress alone may prescribe rules and regulations for the army⁴⁹ and cannot delegate this power to the President. The newspapers cause all men to form impressions on criminal cases, but a man should be allowed to serve as a juror⁵⁰ who has formed an impression, but who swears, to the satisfaction of the court, that he will be able to render a fair verdict. There is no greater disposition to appoint to office on party grounds, than there was for twenty years past.

The system commenced as a dangerous one, a mischievous one, in the days of General Jackson, and will be continued until healthier sentiment

⁴³ On March 16.

⁴⁴ The time in which railroads (on May 18) in Wisconsin and Michigan were to be constructed should be extended, so that they may not lose the land grant.

⁴⁵ On March 7.

⁴⁶ On June 29.

⁴⁷ On July 1.

⁴⁸ On June 29.

⁴⁹ On June 29.

⁵⁰ On April 8.

governs the country.⁵¹ The Senate should not consider nominations to petty offices, such as those in the navy yards, for to do so would take up its whole time and unfit the body for its "constitutional functions."

Johnson spoke on diplomatic affairs, advocating that a minister be sent to Ecuador, to the intent that we may prevent South American commerce falling into the hands of England and France,⁵² and insisting upon the need of a second assistant secretary of state.⁵³ Early in the session⁵⁴ speaking in opposition to recognition as belligerents of the Abyssinians who were at war with England, he declared that the only result of the resolves would be to induce some of our people to take the Abyssinian flag and prey on English commerce, which might lead to war between us and Great Britain, thus enormously increasing the debt. He could imagine no greater calamity to human liberty and to the two countries than war between them. Without calling into question the right of the British government to recognize the Confederates as belligerents, the act had been a "gross error," unkind to America, and it would have been almost suicidal to Great Britain, if she had accomplished the division of the United States. England had violated her neutrality in permitting the cruisers, especially the *Alabama*, to go out. Russell was especially unfriendly and even yet delays a settlement. "England owes it, not only to us, but to her own honor, to pay every dollar of the losses which American citizens sus-

⁵¹ On March 27.

⁵² On March 10.

⁵³ On June 22, he also defended Hunter, the veteran holder of the office of Assistant Secretary of State, and urged the appointment of an examiner of claims for that department. On March 13, he had advocated the payment of the claim of the heirs of Asbury Dickins, who had acted as Secretary of Treasury and of State, while chief clerk.

⁵⁴ On December 19.

tained, in consequence of the cruise" of the Alabama. Our claims should be arbitrated, but the question of belligerency is not necessarily connected with them. If we recognize the Abyssinians as belligerents, our act may jeopardize our Alabama claims. Our relations with Great Britain are now friendly and we should not retaliate upon her, when she apparently regrets her past conduct. "Peace between the two is the interest of humanity. Peace between the two is in the interest of constitutional freedom." Such strong and wise words on so important a subject naturally made men feel that Johnson could be trusted with our interests in London, especially after it became evident that he would not be reëlected to the Senate, on account of his votes in March, 1867, for the reconstruction programme.⁵⁵ In speaking upon the rights of naturalized citizens,⁵⁶ Johnson said

This government never can permit her naturalized citizens to be punished by England, or Germany, or any other nation, for acts which, as citizens of the United States, they had a right to perform.

If England would not admit the doctrine of alienable allegiance, "it would form just cause for war," which he hoped might not happen.

In the summer of 1868, Charles Francis Adams returned from England to the United States and the President offered Reverdy Johnson⁵⁷ the vacant post of

⁵⁵ Vide letter of James Touchstone to A. W. Bradford, who had urged reelection, January 8, 1868. The Bradford papers were used through the courtesy of Gov. Bradford's son, Mr. Samuel W. Bradford, of Bel Air.

⁵⁶ On December 19.

⁵⁷ George B. McClellan was first named and was rejected. Vide 12 Harper's Weekly 42 (July 4, 1868) for picture and sketch of Johnson with reference to the English appointment. The nomination is there called "judicious."

minister to Great Britain. The offer was accepted, a unanimous confirmation by the Senate followed on June 12, and, on July 9, Johnson rose in the chamber and, overpowered by his feelings, asked Vickers, his colleague, to read his farewell address. He retired, with the "deepest regret and with a grateful remembrance of the kindnesses received from his fellow members." He went to London, "influenced by a sincere wish to secure to both governments, an adjustment, honorable to both," of the difficulties existing between them. The Congressional Globe contains a remarkable note, stating that, at the close of the valedictory, the Senators rose, simultaneously, and grasped Johnson's hand in turn, to wish him success.⁵³ He had not overstated the facts in saying that he had "contracted friendships, which have been a constant source of pleasure and which I shall ever value. I cannot retire without the deepest regret." In the important period in which he had served, "although differing widely in regard to most" subjects "with a majority of the Senate and supporting my opinions with earnestness, it will always be a great gratification to me to remember that, at all times, by every member, I was treated with uniform courtesy and, I need hardly say, Mr. President, that such courtesy I never failed most gladly to reciprocate." He was going to Great Britain looking "with hope to the approval of my associates. They will do me the justice to believe that I have been governed throughout by an earnest desire to maintain all the rights and promote the interests of our beloved country." He should "never cease gratefully to remember the kindnesses evinced for me in this

⁵³ At Johnson's suggestion, the Governor of Maryland named William Pinkney White as his successor. The formal resignation to the Governor of Maryland was filed with the Senate on July 10.

chamber" and, gazing into the future, felt that, with unity of government, "imagination itself will be at a loss adequately to conceive the future greatness of our land."

In Mr. Blaine's words, Johnson "carried with him the respect and confidence of his fellow citizens. Appointed directly after the impeachment trial of President Johnson, he was among the few statesmen of the Democratic party who could have secured the ready confirmation of the Senate, for a mission which demanded in its incumbent a talent for diplomacy and a thorough knowledge of international law."⁵⁹

⁵⁹ 2 Blaine's Twenty Years, 489.

CHAPTER VII

MINISTER TO ENGLAND (1868-69)

Johnson's selection as Minister to England was well received. Harper's Weekly¹ said:

He fully agrees with the views of the government on the intricate questions with England and will probably pursue, under the same policy and general instructions, the work so well conducted heretofore by Mr. Adams.

The President might have nominated "an agent more acceptable," as to political principles, "to the Senate and country, but hardly one of greater ability, or higher character" than Johnson. Once A Week² thought the appointment to be of the "happiest augury for the friendship of the two countries. When speaking in the Senate—as he often did—on foreign relations of the United States, his tone was ever one of moderation and of conciliation."³

¹ Vol. 12, p. 42, July 4, 1868, with picture of Johnson and sketch.

² October 31, 1868, vol. 2, p. 351.

³ The article bears witness to the fact that his "public and private character is without a blemish" and his "abilities have been sincerely used in aid of honest convictions." His later years had been "spent in unceasing efforts to benefit his country and to soften the bitterness which had gradually grown up between the two sections. . . . The lucidity and penetrating quality of his mind, his great experience, his intimate knowledge, no less of the lore and general spirit, than of the details of the law, the clear and forcible manner in which he seized and urged his points, the intellectual strength which he always displayed in grasping the whole scope of his case, gave him advantages possessed by very few, if any, of his professional competitors." In the Senate, "he shone forth, as one of the most powerful orators of that body, nobly sustaining the cause of the Union, heartily voting the war supplies, advocating the extinction of treason, and lending all the strength of his marked abilities to the best interests of the land."

Johnson made a speech at the North Western Saengerbund festival at Schuetzen Park in Baltimore⁴ on July 14 and, on the next day, a complimentary banquet was tendered him at the Eutaw House.⁵ Five days afterward, Secretary Seward gave Johnson his instructions, which emphasized the importance of friendly relations between the United States and England and stated that the most important question requiring attention was the recognition of the alienability of allegiance, so that our naturalized Irishmen might visit England and be treated as Americans. We had been neutral during the Fenian troubles, with much difficulty and inconvenience, and felt that we had the right to insist on this concession. The location of the boundary line in Puget Sound was also to be considered and, if Great Britain makes satisfactory agreement as to these points, Johnson should advert to the "subject of mutual claims of citizens and subjects of the two countries against the government of each other, respectively." In other words, he was to sound Stanley, the English foreign secretary, as to his willingness to have the Alabama claims referred to a joint commission like that of 1853, although the United States should not be distinctly committed to such a proposition.⁶

Sumner, who was chairman of the Senate Committee on Foreign Affairs, wrote the Duchess of Argyll on July 28:

Reverdy Johnson came to see me last evening.⁷ He will begin on the naturalization question and has every reason to

⁴ Scharf, *Chronicles of Baltimore*, p. 676.

⁵ A. W. Bradford papers.

⁶ The dispatches, etc., passing between Seward and Johnson are found in *Diplomatic Correspondence*, 40th Congress, 3rd Session, pp. 328, 347 to 441. An incredible story as to Johnson's ignorance of English history may be found in *10 Cent. L. J.* 106.

⁷ *4 Pierce's Sumner*, 359.

believe that it will be settled harmoniously. He is more truly a lawyer, than any person sent by the United States, except perhaps Pinkney. He is essentially pacific and detests the idea of war or wrangle with England. On this account, I am sorry to lose him from my Committee in the Senate.

Sumner's biography states that Sumner had thought "our interests in England were too important to be hazarded on a compromise and preferred to have the post vacant;" but, when he found the majority of the Senate were not inclined to this view, he thought that the next best thing was to avoid a contest, so that Johnson might feel an obligation to the Republican majority.⁸

He was thought to be a better person for the post than any other the President was likely to name, he had shown himself, on the foreign relations committee, uniformly conservative and wise; he had risen above his surroundings in his support of the Fourteenth Constitutional Amendment, he was very amiable with his associates of both parties in the Senate, and there was a general disposition to give him the compliment of the brief term of service which remained under the present administration.

This statement shows where Sumner stood in reference to Johnson. From the same authority, we learn that Johnson had not waited to call on Sumner, until he was on the eve of sailing, but had gone there the day after the confirmation of his appointment and had thanked Sumner warmly for the unanimous action of the Senate.

In their conversations, naturalization and the question of San Juan Island in Puget Sound were discussed. No reference was made to the Alabama claims, which

⁸ 4 Pierce's Sumner, 383.

Sumner supposed would not be considered by Johnson, but would go over to the next administration. In spite of his outward friendliness, Sumner gave Johnson no letters of introduction in England.

Johnson arrived in England in August, charged by Seward with the commission to negotiate three treaties, viz.: recognizing our right to naturalize those who had been born British subjects, defining the boundary between Vancouver's Island and the United States with special reference to San Juan Island; and arranging for an adjustment of the claims arising out of Great Britain's alleged failure to assume a proper neutral position during the Civil War, the so-called Alabama claims.

From his first arrival, Johnson received the warmest possible welcome. An English magazine said that his appointment was "of the happiest augury for the friendship of the countries" and quoted with approval his statement that he came, "hoping to be the envoy of peace and good will, and more, of friendship and cordial coöperation, in the progress of the race." It was said that his reception was "worthy of the distinguished statesman, high-souled gentleman and accomplished scholar that he is." On August 18, Johnson was in London and sent a copy of his credentials and a note to Lord Stanley asking for an audience. The reply was made that Stanley was on the Continent with the Queen and would not return until the middle of September. While waiting for this, Johnson visited Disraeli, the Prime Minister, at Hughenden Manor, his country seat in Buckinghamshire, and met the Lord Chancellor and others of the House of Lords. He wrote Seward, on August 29, that nothing of a political character was discussed, but the friendly feeling shown had made him hopeful. Lord Stanley returned to England and John-

son met him on the tenth of September. They talked together, very satisfactorily, for more than half an hour, speaking of the subjects in dispute, in general and frank terms. On September 12, Johnson wrote Seward of this conversation and stated that he would endeavor to show Lord Stanley that Parliamentary action would not be necessary on the matter of naturalization, so as to avoid the delay incident to the passage of an act. As to the other matters, Johnson was "convinced there will be no serious difficulty," and asked that he might go on with the other questions, without waiting for the conclusion of the naturalization treaty, if there was delay therein.⁹ Johnson had an audience with Queen Victoria, September 14, when she spoke in "very friendly terms." On the twenty-fifth he saw Stanley, with such satisfactory results, that he was hopeful of agreeing, in a week or two, to a protocol of a treaty of naturalization, which will settle matters, as far as possible, previous to legislation which cannot be expected before spring. On October 7, he wrote Seward that he and Stanley¹⁰ had nearly agreed on the protocol and that he continued to "receive the strongest evidence from the other members of the government, as well as Lord Stanley and from the English public generally, of the friendly feeling entertained by them all for the government and citizens of the United States and I, therefore, entertain no doubt that all matters now in controversy will soon be satisfactorily arranged." Two days later, he cabled news of the signing of the protocol and wrote that the document "shows that the government does not hold,

⁹ He was also trying to secure the release of two Fenians, Warren and Costello, and was hopeful of success.

¹⁰ Johnson steadily felt (Despatch of February 17 to Seward) that Stanley was as "anxious" for the settlement of all difficulties, "as I was."

but, on the contrary expressly renounces, the principle of alienable allegiance and admits the right of expatriation." He was assured, both by the present government and also by the Liberals, "who may possibly succeed them," that Parliament would pass the desired act.

Meanwhile Seward, sanguine of success, had written him¹¹ on September 23.

In event that you become convinced that an arrangement of the naturalization question, which would be satisfactory to the United States, can be made, you may open concurrent negotiations upon the two questions but that these negotiations shall not be completed, nor your proceedings deemed obligatory, until after the naturalization question shall have been satisfactorily settled, by treaty or by law of Parliament, since the United States must negotiate with proper deference and respect to the state of opinion which prevails in the Senate, in Congress, and among the people. Without a satisfactory naturalization treaty, the Senate might "reject even the very arrangement, which otherwise might have proved satisfactory, in regards to the San Juan and claims questions. It was desirable that the new administrations of the United States and of Great Britain should find themselves relieved of all the international questions, which, although they are not intrinsically difficult, have, nevertheless, so long and so painfully embarrassed both nations.

So wrote Seward to Johnson and the latter replied on October 9, that he would next proceed on the San Juan question and expected to discuss it with Lord Stanley on the sixteenth. So speedily did they agree on this point that, on the seventeenth, Johnson wrote that he had just signed a protocol for settling the San

¹¹ On September 22, Sumner wrote Bemis: "Seward is sanguine and Johnson writes that he shall settle everything. Nothing just yet, but everything very soon. The naturalization treaty comes first. Seward then expects a commission to hear and determine everything" (4 Pierce's Sumner, 371).

Juan boundary controversy by arbitration, the convention not to go into effect until the naturalization question be settled.

On the question of the Alabama claims, Johnson set to work at once and, on October 20, cabled Seward, in cipher, a request to be allowed to sign a convention, on the basis of the treaty of February, 1853, leaving the questions to the King of Prussia as arbiter. Seward was out of Washington, but Hunter, the Assistant Secretary of State, submitted the dispatch to a cabinet meeting, on the day on which it was sent.¹² Four days later, Seward replied by cable that Johnson should insist on a convention like that of 1853, without naming an arbiter. Seward cabled again, on the next day, that the naturalization protocol was approved: "Can you hasten the claims convention?" A day later, he transmitted by cable the President's commendation for Johnson's diligence in the naturalization matter. Johnson's interview with Lord Stanley, on October 29, was so satisfactory that he sent Seward word that he expected to sign a convention as instructed, within a week, and that he hoped that the President's message to Congress in December may communicate a satisfactory adjustment of all matters which "weaken the friendly relations" of the two countries. Meanwhile, the presidential election occurred, with its great majority for Grant, and Seward feared the "claims protocol will meet opposition."¹³ Johnson had pushed forward so vigorously that he was able to notify Seward, on November 10, that he had signed a convention "for settlement of all

¹² 3 Welles' Diary, 459.

¹³ He called, on November 7, to have the President of Switzerland named as arbitrator. On November 7, Johnson sent a hopeful message as to the Claims Convention and, on the 10th, reported an amendment of the San Juan protocol.

the claims that the citizens of either country may have against" the other. "What are known as the Alabama claims are, of course, embraced by it." The question of the recognition of belligerency was included and the convention was to sit in London, as most of the evidence was in Liverpool. Seward did not like this arrangement as to location and insisted, by a cable dispatch, that the convention sit in Washington. Johnson replied, on November 12, that he would try to obtain the change, though it would cause delay to hold the sessions in Washington, as the proof was in England. He had not understood that the place of the convention's session was important, as a dispatch sent to Adams, while he was minister, had stated that this was a matter not to be insisted on. Seward cabled an immediate reply that, in view of the "highly disturbed national sensibilities," the naming of Washington was "indispensable." As Lord Stanley was absent from London for a few days, Johnson could not act immediately, but, on the sixteenth, he replied that he was hopeful of success and, on the twenty-third, sent Seward word that the British ministry had agreed to Washington and the "people of all classes, especially the opposition leaders, wish a satisfactory solution" of the difficulties. On the next day, Johnson cabled a request to make the San Juan protocol a convention and was surprised to receive an instant reply that that question may rest for the moment and that the claims agreement, "unless amended, is useless." The protocol provided that all claims should be submitted to an arbitration of four commissioners, two from each party and, if they could not agree, the points of dispute should be submitted to some sovereign as umpire. Seward took the dispatch to the cabinet meeting and told Secretary Welles, of the Navy,

that he was sick, for he "had got the damndest strange thing from Reverdy Johnson for a protocol." He submitted it to the cabinet, with a "lugubrious look," and said that the whole thing was contrary to his instructions and must be sent back. The members present were surprised, but did not inquire into the points of difference and Welles recorded, in his Diary, that he did not believe in a speedy settlement of the difficulties with England.¹⁴ Seward sent Johnson his views, in a long cablegram on November 27, stating that he was willing to accept a convention like that of 1853, pure and simple, but that the one which Johnson had submitted was unacceptable, as it did not put the Alabama claims on the same basis as the others, though they constituted the largest and most material part of the American claims. If Lord Stanley be offended, Johnson should explain matters to him. If he accepts Seward's amendments, Johnson may sign a protocol as to the claims and convert the San Juan protocol into a convention. Johnson replied to Seward that he could not understand the validity of the objections and that Lord Stanley would not¹⁵ yield to Seward's requirement that a foreign arbitrator be appointed; but that he hoped that the new liberal government, which was about to assume office would be more satisfactory. Lord Clarendon would hold the foreign office and Johnson, who thought he entertained sincere friendship for the United States, intended to renew negotiations with him, as soon as possible.¹⁶ Johnson was as good as his word and, on December 16, apprised Seward that he had met

¹⁴ 3 Welles Diary, 468.

¹⁵ Cables of November 28 and December 5.

¹⁶ On December 14, Seward wrote that the views previously given are entirely in accordance with the expectations of the country.

Clarendon and hoped to conclude a satisfactory arrangement. Two days later, Johnson spoke of a new arrangement in which, if the commissioners can not agree and think there should be a friendly government as arbitrator, they shall report to Great Britain and the United States, which nations shall select one within three months. Just before Christmas, Johnson informed Seward that Clarendon refused to make the agreement in the form of a protocol and insisted on signing the convention in London.¹⁷ Seward suggested minor amendments to Johnson, on January 11, and said that, if these were made, the residue was satisfactory and signature could be made, either in Washington or London, so that the convention might go to the Senate at once. The same directions were given as to the San Juan convention.¹⁸ Clarendon agreed to Seward's requests and, on January 14, Johnson was able to cable that the conventions were signed as directed. In a letter which followed the dispatch, Johnson wrote that he takes it for granted that the treaty will meet the approval of the President and the Senate. Great Britain had yielded two grounds asserted previously, for they now agree to refer to arbitration our demand and also the right of Great Britain to recognize the Confederate States as belligerents, "I have reason to believe," Johnson added, "that the abandonment of the grounds originally taken, to which I have referred, has been due, in a great measure, to the growing friendly feeling for the United States, which has been so strongly exhibited since my arrival in this country. Anticipating that that would be its effect, I determined to lose no time in cultivating such a feeling, whilst never forgetting scrupulously, to regard the rights and honor

¹⁷ Vide dispatches of December 23 and 24.

¹⁸ Vide also dispatches of January 12 and 13.

of my country. This has been my sole motive in the speeches, which I have delivered since reaching England." The Alabama claims were especially named in the treaty, which provided for the appointment of two commissioners by each government, who should meet at Washington and name an arbitrator. If they cannot agree on one, he is to be selected by lot. If two or more of the commissioners prefer a friendly sovereign, they must report to their governments, who shall choose one within six months.

Johnson had done much to establish an *entente cordial*. In a speech at Leeds, for example, Johnson assured the English that the Americans looked on them as brothers and that a war between countries so united would be as bad as the Civil War. He stated that he was struck with the similarity of the political institutions and had come with full power and with every disposition to settle all outstanding disputes. Even the hostile Saturday Review admitted,¹⁹ in commenting upon this speech, that the English had done wrong and that Johnson had an opportunity to accomplish definite results, but his courtesy, his pacific disposition, and his dislike to quarrel with men had, undoubtedly, led him too far.²⁰ On September 24, at the Cutlers' banquet at Sheffield, Johnson was a guest and spoke of "ties, stronger than links of iron, which bound the two nations." He was followed by Mr. Roebuck, a member of Parliament, who had sympathized with the Confederates and who spoke of the "monopoly of the government of the United States by the buccaneering element," and the exclusion of edu-

¹⁹ Vol. 26, p. 414.

²⁰ Rhodes (6 History of United States, 334) remarks that, in after dinner speeches, Johnson "spoke, in effusive terms, of the friendly sentiments that should obtain between peoples of the same race, speaking the same language and reading the same literature."

cated men from public life.²¹ The Nation,²² which was friendly neither to Johnson nor the administration, praised him for saying nothing in reply at the time and for correcting Roebuck's "absurdities in perfectly calm and temperate language,"²³ when replying to an address on the following day. He said in his reply:

If either country wrongs²⁴ the other, or suffers the other to be wronged, when it could have prevented it, it should not hesitate, when convinced of the error, to redress the consequences which may have resulted from it and I have so much confidence in the enlightened judgment of your government and its love of justice and I have like confidence in my own, that I feel convinced, if either commits a wrong, it will, when satisfied of it, confess it and do whatever may be necessary to redress it.²⁵

The Times severely criticised Roebuck for his discourtesy²⁶ and Johnson came out of the encounter with probably increased popularity in England. In America also, he had not lost much ground. Harper's Weekly, it is true, commented on "Mr. Reverdy Johnson's Indiscretions," but the Nation,²⁷ while feeling that "decency does require that he should hold aloof from persons opposed to the United States," added that he should

²¹ Rhodes censures Johnson rather harshly for going to the dinner, after he knew Roebuck was to be present.

²² Vol. 7, p. 242.

²³ Rhodes, not realizing the habitual use of the courteous phrase "my friend" by Johnson, objects to his using it in reference to Roebuck in the reply.

²⁴ Vide dispatch of February 17 to Seward.

²⁵ The answer was published, Johnson wrote, "with approbation, by almost the entire press."

²⁶ Rhodes casts it up against Johnson that Roebuck wrote the Times that Johnson "has given me every assurance that he felt greatly pleased by all that had happened since his arrival here and to myself, personally, he used expressions of kindness and friendship, which touched me very nearly."

²⁷ October 1, vol. 7, p. 266.

not be condemned too strongly, till it were known whether, "behind his fair words, there is any real concession on the subject of the rights of the country." A month later, a banquet was given to him in Liverpool, at which Lord Stanley and Gladstone both spoke and at which Johnson made a more serious mistake, by shaking hands with Mr. Laird, the builder of the Alabama. It is true that Laird was the representative in Parliament of Birkenhead and part of Liverpool, but his act led the Nation to say that Johnson's "performances make the judicious of all parties grieve deeply." To the American people, he appeared to talk too much and to fraternize with "notorious enemies and revilers of the United States."²⁸ The feeling was strong that he had "disgraced his government"²⁹ by persisting in his "foolish courses." Welles wrote in his Diary on December 21,³⁰ that Johnson "is doing neither himself, nor the country, credit in England. By last accounts, he was corresponding and dining with Laird. There is in much of his conduct, and especially in this, a degree of servility that is disgusting." Undoubtedly Rhodes is correct in thinking that, in the United States, Johnson's actions "injured his standing and impaired his authority," but he does not attribute sufficient importance to the influence and popularity in England that Johnson gained by his course. It was much to have the Saturday Review, which had been hostile to our nation, say that the Liverpool banquet was a great success and that "Mr. Johnson is an excellent example³¹ of what "experienced and conciliatory men of business" can "do in a

²⁸ Vol. 7, p. 342, October 28.

²⁹ Nation, vol. 7, p. 383.

³⁰ Vol. III, p. 488.

³¹ Vol. 26, p. 544.

very short time, when they set about their task in the right way. He has not only made himself popular in England, although he has only been a few weeks here, but he has done much to make his countrymen popular here. He does this by being, at once, cordial and straightforward." The same feeling marked a cartoon published in the number of *Punch* for December 26 and representing Johnson, Uncle Sam, and John Bull, "Under the Mistletoe."

Seward had been optimistic as to Johnson's success, for sometime before the treaties were concluded. As early as December 4, he relieved Welles from anxiety by saying that he had "great confidence in the success" of Johnson's plan. "Does it," said Welles, "embrace claims of England for cotton and other property, captured or destroyed during the war?" Seward replied emphatically, "No, it does not." In reply to further queries, Seward asserted that the plan shut off all claims for prizes condemned in American courts and considered nothing "which could come within our admiralty or local jurisdiction."³² On January 15, immediately after receiving the cablegrams announcing the conclusion of the treaties, Seward told Welles that he had all three treaties. Welles asked if they permitted England to present claims for loss of property by their people during the Civil War and, when Seward said yes to this question,³³ continued:

Such a treaty, including prize captures and cotton, is, in every point of view, adverse to us. The balance of account will be against us; but why should we consent to submit to arbitrament at all the destruction of British property sent to assist the rebels or which was destroyed within rebel lines.

³² 3 Diary, 474.

³³ 3 Diary, 506.

When Seward protested that: "We could not have a treaty, unless it included all claims on both sides," Welles replied: "But why permit, or admit, that such property, captured on rebel vessels, or in rebel territory, can be recognized as a claim, a matter of controversy?" Seward asked a counter question, instead of replying directly: "Did not we claim for the Alabama captures?" but Welles rejoined:

That was a very different question. They had improperly interfered, against our government, with which they had treaties and were at peace, without cause and to our injury. We had done no such wrong towards them. While, therefore, we had a just and equitable claim, they had none. If they have consented to arbitrament on the question of British municipal law, in permitting the Alabama to be built, fitted out, and manned in England, they have done it to get an advantage of us in the matter of sovereignty and other particulars also.

Later in the cabinet meeting, McCulloh, the Secretary of the Treasury, agreed with Welles that England would "make a balance against us," and expressed doubts "if these matters would be adjusted in our day—they would pass down to another generation." Seward showed annoyance at this speech, but said nothing, while Browning remarked that he was gratified that the Alabama claims were specifically named. No other member of the cabinet expressed an opinion, but President Johnson, who appeared to Welles to have previously consulted with Seward, said: "Right or wrong, I shall try it."

The treaties were submitted to the Senate at once and Sumner seemed at first rather favorably inclined towards them. He wrote John Bright, on January 17, that "they would have been ratified, at any time last

year, almost unanimously.³⁴ I fear that time will be needed to smooth the way now. Our minister has advertised the questions by his numerous speeches, so that he has provoked the public attention, if not opposition. . . . You are aware, of course, that the feeling towards Mr. Seward will not help the treaties." Two days later, Sumner wrote Bright again and, in speaking of a conversation on the preceding evening with General Grant, the President-elect, stated that:

He did not seem to object to the naturalization and San Juan negotiations but, I think, he had a different feeling in regard to the claims convention. He asked why this could not be allowed to go over to the next administration.³⁵

A favorable opinion of the treaties at first impression was also expressed in the *Nation*³⁶ on January 21, that Johnson, "after all, seems likely to come home from England with credit, his fraternizations with unworthy persons, his post-prandial oratory, and his difficulties of all kinds about dinners, to the contrary notwithstanding." Of the claims treaty, it was also said that "he has obtained not only the concession of all he had asked for, but of all Mr. Seward chose to ask for in addition." Two weeks later,³⁷ the wind had veered and it was announced that the treaty would be rejected, on the ground that England had prolonged the war for a year by her actions. The opposition grew and, on February 11, the *Nation* stated that "Mr. Johnson cuts a pitiable figure," that the public was in favor of keeping the question open, and that even the private claimants of damages from the *Alabama* supported this course. As

³⁴ 4 *Pierce's Sumner*, 368.

³⁵ 4 *Pierce's Sumner*, 368.

³⁶ Vol. 8, p. 42.

³⁷ *Nation*, vol. 8, p. 82.

a proof of this fact one of the heaviest sufferers had signed a petition against ratification of the treaty.³⁸ The objections arose from many causes.³⁹ Some declared that Johnson had "trucked to the British aristocracy and ought to have snubbed them, instead of making friendly treaties and after dinner speeches. Some thought the treaties must be wrong, because the English had agreed to them. Others wanted no treaty, but rather a standing grievance, as a basis for future war with England," and still others considered that "the fact that they were made by President Johnson's Secretary of State and minister was reason enough for refusing to accept them." Justin McCarthy, whose attitude was one of friendliness, thus sums up the situation.⁴⁰ Johnson, "with a kindly and good-natured purpose to put an end to an internal quarrel," seemed not

to have considered the difference between skinning over a wound and healing it. The defect of his convention was that it made the whole question a mere matter of individual claims. It professed to have to deal with a number of personal and private claims of various kinds, pending since a former settlement in 1853, claims made on the one side by British subjects against the American government and on the other by American citizens against the English government, and it proposed to throw in the Alabama claims with the others and have a convention for the general clearance of the whole account. Now it must be evident to any one, English or American, who considers what the complaints made by the American government were, that this way of dealing with questions could not possibly satisfy the American people. . . . The claim set up by the United States on account of the cruise of the Alabama was first of all a national claim.

³⁸ Vol. 8, p. 102.

³⁹ 3 Seward's Seward, 395.

⁴⁰ History of Our Own Times, vol. IV, p. 158.

Johnson sent Seward two long dispatches defending his course.⁴¹ He had deemed it important to ascertain what was the public sentiment of Great Britain and to "cultivate, on every proper occasion which offered itself, the friendly feelings" of the English, and so had made after dinner speeches. The fixing of the date of claims at 1853 should cause no offense. No provision was made for the submission of the losses which our government, as such, may have sustained, for "a nation's honor can have no compensation in money, and the depredations of the Alabama were on property in which our nation had no direct pecuniary interest. If it is urged that England was at fault in recognizing too soon the belligerency of the Confederate States, why is not complaint made also against France? The time allowed in the treaty was not too long and the admission of English, as well as American claims was necessary, for it was 'as absurd as it would be insulting' to 'suppose that a government, alive to its own honor' as the English had ever been, would consent to negotiate upon the hypothesis that they had forfeited it." This "able and elaborate" exposition of Johnson's views was not given the Senate by Seward, as it reached him at the close of the session of Congress.

The Senate Committee on Foreign Relations voted unanimously, in February, to report the claims treaty unfavorably, but did not report it until March 16, after Grant had been inaugurated. The treaty undoubtedly gave almost "personal offense to the mass of people" in the Northern States and seemed to them to admit

⁴¹ On February 17 and 20. On February 6, he had written that the Fenian prisoner Costello had been released and, on February 15, he stated that Queen Victoria, on the tenth, had answered favorably the request which he had made on January 27 that he might appear in plain citizen's evening dress at court ceremonials, without cocked hat or sword and knee breeches.

that the "claims of the United States against the conduct of Great Britain as a government were mere rant."⁴² Sumner spoke ably against the treaty, on April 13, and Lowell wrote Leslie Stephen⁴³ that Sumner had "expressed the national feeling of the moment pretty faithfully" and that "the country was blushing at the maudlin blarney of Reverdy Johnson and that made the old red spot, where we felt that our cheek had been slapped, sting again." The treaty received but one favorable vote and Welles wrote this⁴⁴ epitaph:

Thus end the labors of Seward and Reverdy Johnson on that important subject. I never thought that this was the time, or that they rightly appreciated the question, or that they were the proper men to adjust or to attempt the settlement of it.

After Johnson's death, however, the Nation summed up the matter more accurately in saying:

Even his Alabama negotiations, now that the passions of the time are no longer active,⁴⁵ must be acknowledged to have been creditable to him and it requires a good deal of discrimination to make out, wherein the settlement obtained by him fell short of what was afterwards obtained by General Grant. The real objection to his treaty was that it was negotiated by a Johnsonian Democrat, who was too polite to the British aristocracy, at a time when we hated the British aristocracy.

Meanwhile Johnson was closing his English ministry.⁴⁶ He continued to attend dinners and spoke at the inaugu-

⁴² Vide 2 Blaine, *Twenty Years in Congress*, 489.

⁴³ On April 24, 1869, 2 Lowell's Letters, 26.

⁴⁴ 3 Diary 578, April 16.

⁴⁵ Vol. 22, p. 106.

⁴⁶ On Seward's leaving office in March, Johnson wrote him, 3 Seward's Seward, 398, a personal and grateful note, congratulating him on the administration of the department of state.

ral banquet of the Colonial Society on March 10.⁴⁷ The *Times* extolled him, but the *Spectator* said,⁴⁸ "there is an end of Mr. Reverdy Johnson at last and we cannot affect to be sorry. Never was a man so bespattered with senseless praise. He wanted to forgive and forget all around" and "put forth enormous demands," while he "professed enormous friendship."

Arriving in New York early in June,⁴⁹ he spoke of the hospitality he had received, alluded to Sumner's speech as a preposterous performance and looked for a reaction in his favor.

The completest defense of his treaty, which I have found, is contained in a letter which Johnson wrote on November 28, 1870,⁵⁰ to John A. Parker, president of the Great Western Insurance Company, in answer to an inquiry for information. "Under this convention," Johnson wrote,

I have not the shadow of a doubt that all the losses to our citizens inflicted by the Alabama and other vessels, fitted out as she was, would long since have been fully discharged. The public sentiment of the people of Great Britain exhibited to me on visits by invitation to all the large towns in England and Scotland obviously favored such payment

⁴⁷ 2 *Morleys' Gladstone*, 401. Johnson made some facetious remarks about the colonies being transferred from the Union Jack to the Stars and Stripes, and Lord Granville replied that England was not prepared to open negotiations for the cession of Canada. An eulogistic article on Johnson at the time of his return to the United States may be found in 2 *Balto. Law. Trans.* 460, May 18, 1869.

⁴⁸ April 10, vol. 42, p. 442.

⁴⁹ 8 *Nation* 446, June 10, from interview in *New York Times*. He spoke of the hospitality he had received, alluded to Sumner's speech as a preposterous performance and looked for a reaction in his favor. (He also made a depreciatory allusion to Smalley, who had attacked him in the *Tribune*.) John Bigelow's *Memoirs*, vol. 4, pp. 230, 244, 245, 269, 278, 287, show the popular feeling in 1869 with reference to the Johnson-Clarendon Treaty.

⁵⁰ John Bigelow's *Memoirs*, vol. 5, p. 423.

Under this convention the question of the recognition of Southern belligerency, as well as any other question which either government might think proper to raise before the Commission, could have been presented.

He maintained that during the interval between the transmission of the treaty to the Senate and its rejection, he was "not advised by any member of the body, or by the State Department, what were the objections to the convention, or that there were any." The newspapers led him to believe that objection was made, because the treaty contained no provision for "the settlement of claims which our government then supposed it had in its own right upon Great Britain. Up to this time, I had never heard that the United States contemplated such a demand. My instructions, as did those of Mr. Adams, looked exclusively to the adjustment of individual claims." When Johnson learned that some Senators thought that the United States had a "claim of its own for alleged pecuniary losses, caused directly or indirectly by the conduct of the British government, I proposed to Lord Clarendon, first in a personal interview and afterwards in an official note dated the 25th of March, 1869, the signing of a supplementary convention, which should only so far modify that of the fourteenth of January as to provide for the settlement of any claims that either government might have upon the other." Clarendon's answer, on April 8, led Johnson to believe that, "if I was expressly instructed to make such an offer, it would be acceded to," whereupon Johnson telegraphed Fish, the new Secretary of State, that he thought he could obtain "such a modification, if instructed to propose it." Fish telegraphed back that the convention was before the Senate and the President, therefore, "did not think it advisable to change

it." Johnson could not see the force of this reason, "if the administration really desired an amicable settlement of the controversy," and told Parker that he believed that individuals had the right to apply directly to Great Britain for redress, without violating any federal law and that underwriters who have paid insurance had also a right by the doctrine of subrogation to apply to Great Britain. He was surprised to hear that the administration thought otherwise.

There were important postscripts to Johnson's English ministry in two pamphlets which he printed in 1871 and 1872, in response to a speech of Sir Roundell Palmer,⁵¹ afterwards Earl of Selborne, and to a resolution introduced into the House of Representatives by Hon. J. A. Peters.⁵² Grant had taken up the matter of settling disputes with England and the treaty of Washington had been concluded, referring the question to arbitrators at Geneva. Johnson felt that our claims were well founded and that it was proper to leave to arbitration the decision as to the rightfulness of the British proclamation of May 13, 1861, recognizing the Confederates as belligerents, especially as Lord Russell had used extraordinary haste in issuing it. It was "more than probable that, if they had not been recognized as belligerents, the war would have terminated much sooner than it did." Our government had refused to arbitrate, unless the English had included the consideration of the bel-

⁵¹ The Reply is dated September 8, 1871, and contains 50 printed pages. In his Personal and Political Memorials, Part II, vol. I, p. 209 and 224, the Earl, with whom Johnson claimed a slight acquaintance, said that the Reply confirmed, rather than displaced, his reasons for preferring the settlement made by the treaty of Washington.

⁵² Letter from Hon. Reverdy Johnson to Hon. John A. Peters, on the subject of the Washington Treaty and its construction in relation to the claim of the United States for Consequential Damages. Baltimore, 1872, pp. 19.

ligerency in the treaty. The Johnson-Clarendon treaty had been hailed with delight in England and had been rejected in the United States, through causes wholly irrespective of its merits. The value of arbitration is shown in the disastrous results of the recent Franco-Prussian war and the decision of the case will not impeach England's honor. Our position was that the losses for which damages are claimed were incurred through England's violation of neutrality, as defined by international law, or through intentionally failing to enact municipal laws coextensive with her neutral duty, or through her failure to enforce such of her laws as fulfilled her neutral obligations at international law.

It had been the uniform doctrine of the United States that neutrality is a part of international law and that the "Law of nations is as much a part of the law of every civilized government, as is its own municipal legislation." The manner of fulfilling the international obligations of a neutral rests on municipal law and, if such law was inefficient, the neutral power may not defend itself, by saying that it executed the law in good faith. The Jay treaty is a precedent, as it provided for the consideration of English claims by reason of captures "taken by vessels originally armed in the ports" of the United States. The duty of vigilance is involved in the duty of neutrality. "It is for a neutral nation herself to guard against its violation. She has no right to call upon the belligerent to assist her" and he is unable to ascertain what goes on in her ports. England failed to exercise due diligence as to the Florida and the Alabama. The Florida was allowed to depart from Liverpool and from Nassau and the crew of the Alabama, who burned captured ships, as the Confederacy had no ports which they might be taken, committed treason

against the United States. The fact that the vessels were not fully armed when they left England does not relieve her of responsibility, for she used no "diligence at all, in the legal sense of the term." He examined the evidence in detail and said that Laird's rams were seized later on no greater evidence, when England feared demands for indemnity and could see that the South's cause was lost. Johnson praised Adams, his predecessor, and Sumner, whose support of the recent treaty did him honor. Although the people of Liverpool had winked at the slavery in a foreign land through which they had acquired riches, yet, when Johnson visited that place as a guest of the city, he

was truly glad to find that whatever of hostile feeling towards the United States had been entertained by the people, pending the insurrection, no longer existed. The attentions paid me, as the official representative of my country, by every class and the manner in which they received the expression of my hope and belief that the friendly relations of the two countries would soon be perfectly secured, satisfied me that they as sincerely desired such a result as I did.

In the pamphlet addressed to Mr. Peters, who had introduced a resolution in the House of Representatives to the effect that the claim for consequential damages be withdrawn and with whose views Johnson agreed, the latter set himself to consider what was the true construction of the treaty of Washington, irrespective of extrinsic circumstances, what was the effect of such circumstances in showing the purpose of the two governments, and what course our government should adopt, if Great Britain should refuse to submit the claim for consequential damages to arbitration. England expressed regret for the depredations, but her expressions

do not cover indirect or consequential damages. Such immense losses would surely have been made the subject of arbitration in clear terms, if the government intended to include them. The claim for consequential damages rests on the assumption that the cruisers collectively produced such damages, through the cost of pursuing the vessels, the transference of vessels in the commercial marine from the American to the British flag, the increased premium of insurance, and the prolongation of the war. Johnson held that the arbitrators had no right to decide on the result produced by the cruisers in the aggregate, but to find what is due on account of each cruiser and so no indirect damages should be allowed. The precedent treaties, viz., that of Jay, that of 1853, the Johnson-Stanley protocol of November 9, 1868, which had not been satisfactory to President Johnson, and the Johnson-Clarendon convention, had not included consequential damages. Sumner's speech of April 13, 1869, was the first suggestion that this omission was a fault. The war was far from an end at the battle of Gettysburg and it continued through the "indomitable courage and consummate skill of the armies of the Confederates and of their resolve to continue the struggle, until all hopes of success were lost." The chief causes of the rejection of the Johnson-Clarendon treaty were the circumstances attending its negotiation, which circumstances, as Hamilton Fish, Grant's Secretary of State, wrote Motley on May 15, 1869, "were very unfavorable to its acceptance, either by the people or by the Senate."

The nation had just emerged from its periodical choice of chief magistrate and, having changed the depository of its confidence and its power, looked with no favor on an attempt at the settlement of the great and grave questions depending,

by those on the eve of retiring from power, without consulting, or considering, the views of the ruler recently intrusted with their confidence and without communication with the Senate, to whose approval the treaty would be constitutionally submitted, or with any of its members.

Our government should withdraw its claims for consequential damages, since "the leading object of the treaty, and that which has challenged for it the approval of mankind, is that it substituted a peaceful and honorable termination of national controversies by arbitration, for the uncertain, inhuman, unchristian arbitrament of the sword." Should the administration persist in the claim, Congress should express an opinion on the subject, having a right to do so, from being invested with the war power, inasmuch as the conduct of the executive would be likely to lead us into controversies with foreign power. The public spirit shown in these pamphlets and the cogency of their arguments are noteworthy and the fact that Johnson prepared and published them showed his continued interest in national affairs.

CHAPTER VIII

LAST YEARS AND DEATH (1869-76)

Johnson returned from England early in June, 1869, and took up the practice of the law with such zest that his seventy-three years seemed to have brought no old age to him. Judge Dennis writes of him that, in these latter days, "he seemed to me, half the time to be trying a case for the fun of it;" but that, "in the general conduct of the case, his skill, his resourcefulness, his pertinacity, and a courage, which no difficulties, or unforeseen adverse happenings, could ever daunt, made him an antagonist to be dreaded to the end." He was said to be "most dangerous," because "you never could be sure when you had him beaten." Governor John Lee Carroll¹ said:

I always considered him a great leader, in the days when there were giants at the head of the Maryland bar and his manly courage was as great as his ability.

Sergeant wrote in 1873,² that Johnson's name was

¹ Letter of May 2, 1906.

² N. Sergeant, Men and Events. Another interesting testimonial is found in Scharf's Baltimore City and County at p. 715. "A man of wonderful power, both physical and mental, combative yet subtle, acute, yet never wasting time on hairsplitting. Mr. Johnson's scope and range were remarkable. He could talk to a jury of plain farmers in a simple diction of which they understood every word, or thought they did, and so make them have perfect faith in a new medical theory of 'moral insanity,' invented by him for the nonce and reënfined by precept and example. He knew, none better than he knew, how to address the venerable justices of the Supreme Court, so as to win their approbation, while securing their attention and giving them the pleasing sense of relief from the deluge of verbiage perpetually rising round and threatening to overwhelm them. He was the readiest of debaters in the Senate, where his

"familiar to every man of intelligence in the United States and designated one not less universally respected than known." As a lawyer, he was a "colossal and familiar figure" and was held, by "his legal associates," as the "head of the bar of the Supreme Court." He "combined the *suaviter in modo* with the *fortiter in re* and denunciation, or harsh charges, were foreign to him." He possessed "ready and most felicitous oratorical powers"³ and a "happy tact in after dinner speeches."

He continued to appear in important cases, such as the one concerning the fraudulent stock of the Parkersburg Branch Railroad,⁴ the one concerning the capitation tax on the Washington Branch Railroad⁵ and the one

profound grasp of constitutional subjects kept him ready armed in any emergency. He was skillful, astute, and *au fait* in all the language and terms of diplomacy, never losing sight of the main issue of his case, while affecting, with the *politesse* of Talleyrand, the indifferent attachment of a Walpole to the middle way of a compromise, and, as an after dinner speaker, he was as clear, as genial, as sparkling, and as delightful as a draught of old South side Madeira, sunny and golden as the rays in which it had ripened. His capacity for work and business was almost miraculous. It despised the weight of years and the loss of sight."

³ Mr. J. V. L. Findlay writes that Judge Hugh L. Bond told him that when Johnson was counsel for the members of the Ku Klux Klan, indicted in the United States Court in South Carolina, he showed his gift for repartee. A member of the Klan had turned State's evidence and was an over smart witness. He had given a description of the meeting of the Klan, of the oaths taken, and the ritual, in his examination in chief, and Mr. Johnson, at the close of it, asked him, whether he had told every thing he knew about the Klan and he then, with apparently timid reluctance and with a cunning sort of reserve, said, "No;" whereupon Mr. Johnson said: "Out with it, we want to hear it all." The witness then said there was one thing he had failed to mention and that was that, at the close of the meeting to which he had referred, a hat was passed around to take up a collection for Mr. Johnson's fee, whereupon Mr. Johnson, as quick as a flash, said "I hope the meeting did not appoint you to carry the hat."

⁴ In 1870, Scharf's Chronicles of Baltimore, p. 681.

⁵ Johnson gave an opinion against the constitutionality of that tax which was published in pamphlet form in 1870, pp. 10

concerning the North Carolina special tax bonds.⁶ His very last case was an ordinary damage suit for false arrest and imprisonment, which, like other *nisi prius* cases, he took, in Judge Dennis's opinion, "largely for the fun he got out of it."

In the beginning of the Presidential campaign of 1872, on April 26, Johnson wrote Governor Bradford, that it was important for the latter to go to the Cincinnati Convention. Johnson believed that Judge Davis would be named and believed his nomination for the Presidency to be the strongest one that could be made.

His high character, great talents, great firmness, and liberality can not fail, if he is nominated, to obtain for him the votes of thousands of Republicans in all the States, as well as to obtain the general support of the Democratic party.

When the Convention, however, named Greeley for the Presidency, Johnson decided to support him against Grant and in July published an opinion of Greeley, as possessing "extraordinary ability, perfect patriotism, and incorruptible integrity."⁷ The faults of Grant's administration were set forth in detail and Greeley's protectionist ideas were not considered sufficient reason to reject him. He had been a friend to peace and to the South from the end of the war. As a "constant and ardent friend of general amnesty and of universal suffrage, he cannot but have commended himself to the good opinion of the white and colored citizens of that region."

Johnson spoke in public for the last time on January

⁶ His opinion in favor of the legality of these bonds was printed in 1873, p. 9.

⁷ A correspondence between the Hon. James Brooks of New York and the Hon. Reverdy Johnson of Baltimore on the State of the Country and the way to avert the peril which threatened it, 1872, p. 15.

15, 1875,⁸ at a meeting held in Baltimore, when he attacked the Federal administration for its policy in Louisiana. He put the responsibility for the action of the United States troops in that State entirely on Grant and said he would have voted to convict Andrew Johnson, at the time of the impeachment trial, if like accusation had been made against him. On September 15, he presided at a mass meeting in Baltimore, held in favor of the Democratic State ticket, which contained the name of his son-in-law, C. J. M. Gwinn, as candidate for attorney-general. He wrote a speech for that occasion, which was read for him, and which defended the nominees and the party organization, "Party triumphs," he said, "depend as much upon discipline as triumphs on the battlefield." He denied that corruption had characterized the city or State governments and claimed that a Republican victory in the State would show confidence in the "national administration, whose continuance is pregnant with danger, both to our material interests and to the very forms of governments."⁹ At that last meeting, he showed his interest in younger men, by reminding John V. L. Findlay, one of the other speakers, as he rose on the platform, to use an anecdote which he had recently told Johnson and which the latter had enjoyed. The same kindness of heart was shown in his habit of having his little granddaughter read to him every night after dinner the jokes she would cut from the daily papers, whereupon he would place the clipping in his pocketbook for preservation to show his appreciation of them. His kind heart¹⁰ was also shown in that, whenever Johnson went to Annapolis, he bought from an old colored woman,

⁸ The Louisiana Matter, Address of Reverdy Johnson at the Meeting of the Citizens of Baltimore held in Masonic Temple, 1875, p. 20.

⁹ Speech delivered by Hon. Reverdy Johnson, 1875, p. 16.

¹⁰ Told by Edwin Higgins, Esq.

whom he had known all his life, several packages, each containing a pound of taffy for one of his grandchildren.¹¹

On November 6, 1875, Johnson, with a son-in-law, Mr. Charles G. Kerr, went to England on legal business concerning lands in Florida, from which trip he returned on January 19, 1876. Shortly after his return, on February 1, he wrote Senator Bayard that he had no doubt of the constitutionality of a Congressional appropriation for the Centennial Exhibition. Although he had taken the side of the Democratic party in Maryland in 1875, when libel suits were brought by public officials against the American, the Republican newspaper, shortly after the close of the campaign, Johnson volunteered his services as attorney for the defense, thinking the liberty of the press was in peril, and conferred with the senior editor of that paper on the very day before his death.¹²

In the Spring of 1875, he argued his last cases in the Supreme Court, but he continued to appear in the State Courts and, on February 10, 1876, went to Annapolis to be the guest of Governor Carroll, expecting to argue a case before the Court of Appeals on the next day.¹³

¹¹ 1 B. R. Curtis's Life, 44.

¹² When the editor of the New York Tribune was arrested at the suit of Governor Shepherd of the District of Columbia, Johnson left Baltimore for Washington and sent his son at once to see if there was imminent danger, acting on the double ground of sympathy and personal friendship for the defendant. Before going to Europe in December, he took pains to see that the case could not come up in his absence and, on his return, he wrote, advising the editor of that fact and asking that he be notified to appear at the trial.

¹³ The case was *Metcalf v. Brooklyn Life Insurance Company*, in which Johnson was associated with Edwin Higgins, Esq. Mr. Higgins writes that "in this case he gave his time and abilities . . . without compensation, because our client was the son of one of his old friends, at one time clerk of the Criminal Court of Baltimore." Mr. Higgins was invited to Governor Carroll's to dinner that evening and, as he had opposed Carroll at the election the previous autumn, asked Johnson's advice as to accepting the invitation and was told: "Never mind the politics, accept by all means."

A number of gentlemen were invited to meet him for dinner. After dinner, Johnson asked permission to lie on a sofa in the library for a few minutes. When he was sought there, the room was found empty and his dead body was discovered lying on the ground on the north side of the Executive Mansion. Some thought he had mistaken an open window for a door and had stepped out and fallen into the paved area below, but it was more probable that he had left the house for a short stroll, turned close to the wall, stumbled on a lump of coal and fell against a projecting corner of the building, thus fracturing his skull.

On the next day, his death from an "unaccountable and unwitnessed accident" was announced by the Governor to the General Assembly, which was in session, and the flag on the State House was placed at half mast. Both Houses met, in the Hall of the House of Delegates, in the early afternoon and proceeded in a body to the Governor's Mansion, to join there the students of St. John's College, and the members of the Court of Appeals, in acting as an escort for the body to the depot. A joint committee of the General Assembly prepared resolutions of regret, which speak of Johnson as having "the consummate ability and commanding intellect, which exalted him as the foremost jurist of America and which bear testimony to his patriotic impulses, unsullied private character, and ennobling virtues. On the sixteenth, the resolutions were considered in the Senate, the gallery being filled with ladies, and several speeches were made, among them one by Dr. Lewis H. Steiner of Frederick, who stated that "there was something indescribably grand in the resolute firmness with

¹⁴ Dr. Lewis H. Steiner, who was one of the physicians called in, wrote "I saw the body about 9.30. There were two cuts on the left side of his head,

which the veteran lawyer continued to tread the laborious paths of an exacting profession, after the eye had ceased to furnish the aid to research and study that would seem almost indispensable."¹⁵

The family declined a public funeral, but seventy carriages followed the hearse from his residence¹⁶ to Greenmount Cemetery, where the burial took place on Sunday, February 13. On Friday, tributes had been paid him by lawyers in the Court of Appeals at Annapolis and in the United States Court in Baltimore,¹⁷ while, on Saturday, a Bar Meeting had been held in his honor in Baltimore, at which Governor A. W. Bradford bore witness to Johnson's "lucid and logical arrangement, his cogent and resistless argument, and his matchless cross examination of a reluctant witness." At the same occasion, Thomas Donaldson spoke of his kindness of heart, courtesy, quickness of mind, and cheerfulness; and George William Brown remarked upon the way in which his "powerful mind fastened itself, with intense concentration, on the case which he had in mind."

A meeting of Marylanders resident in Washington was held in his memory, presided over by Dr. C. C. Cox. The Department of Justice was closed, and, after

the skull was crushed, the *ossa nasi* broken, one finger on the left hand dislocated and bruises on various parts of the body. It is surmised that he fell and struck his head against the wall."

¹⁵ The writer of a sketch of Johnson's life in Richardson and Bennett's Baltimore, p. 329, said of Johnson: "Simple in his taste, kind and generous in his impulses, a warm and confiding friend and a most forgiving enemy, he is not only entitled to the place we have given him among lawyers and statesmen, but he commands an equally exalted position as a man."

¹⁶ 118 Park Street.

¹⁷ R. Stockett Matthews spoke of him in Baltimore "as a most accessible man and as not a case lawyer, but a reasoner." The Proceedings in the Court of Appeals may be found in 43 Md. Reports XIII. Johnson's death was announced by Edwin Higgins, Esq., and S. T. Wallis. Alexander Randall and Judge J. L. Bartol spoke.

the funeral, on February 18, a meeting of the Bench and Bar of the Supreme Court was held in the Court Room.¹⁸ Matthew H. Carpenter presided over the meeting and said: "I loved the old man." He "gave me fatherly recognition, became my adviser and ever after remained my friend." "His compact, firm knit frame, his heavy shoulders, his round head, his striking face, bearing the furrows of many sharp professional and political conflicts, but from which there still shone his gentle kindly nature—all indicated a man of genial nature, yet resolute of purpose—a man easy to court, but dangerous in conflicts."

Considering the extent and variety of his practice, his natural resources and professional attainments, his thorough self-possession and steadiness of nerve, when the skill of an opponent unexpectedly brought on the crisis of a great trial—an opportunity for feeble men to lose first themselves and then their cause—his fidelity to the oath, which was anciently administered to all the lawyers of England, to present nothing false, but to make war for their clients, the audacity of his valor, when the fate of his client was in the balance, he believing his client to be right, while every one else believed him to be wrong, remembering all these traits, we must rank him with the greatest lawyers and advocates of this or any other country.

A committee of fifteen illustrious lawyers was appointed to prepare resolves. Senator George F. Edmunds of Vermont was chairman of the committee and spoke of the "extensive and varied contributions that he has made to jurisprudence and to its application to the affairs of men." "His great mind has been brought to the consideration of every variety of question that can

¹⁸ Proceedings, etc., Washington, 1876, p. 23. The Proceedings in the United States Supreme Court may be found in 92 U. S. Reports.

arise in the affairs of men, from the lowest and simplest to the highest and most complex." Thirty years later, Mr. Edmunds wrote,¹⁹ "He was a great lawyer, a powerful debater and a highbred gentleman, for whom I had much admiration." Philip Phillips followed Edmunds, bearing testimony to the fact that Johnson and B. R. Curtis were the "acknowledged leaders of the American bar and their experience, learning, and intellectual power, justified fully the high position which, by common consent, was awarded to them." Johnson uniformly displayed "ability" in "the argument of his causes in the Supreme Court" and, "amiability" in his "intercourse with his professional brethren." Theodore F. Frelinghuysen came next, saying that, "as a statesman he had large views and compassed the interests of his whole country. Eminently familiar with and learned in international law, in constitutional law, in the history of his times and of his country, at any moment and on any emergency, he was ready to come to the front and there, courageously and ably, contend for what he believed the best interests of his country." Johnson was "eminently a ready man" and a "patriot, with whom the love and the duty he owed his country was paramount to any allegiance he owed to a party." Courage and generosity were his marked characteristics and "he delighted in words and acts of kindness. He withheld his sympathy from no one in trouble." George Ticknor Curtis bore testimony to his ability in the Dred Scott Case and E. N. Dickerson to his "reputation as a profound jurist, a wise legislator, and a noble, generous hearted friend," whose fame "fills the whole country and is cherished, wherever men rely on law for safety

¹⁹ Letter of May 1, 1906.

and protection." John Randolph Tucker spoke of his generosity of disposition and Henry S. Foote paid a tribute to

his learning, his high powers as a reasoner, his acknowledged skill as an advocate, his remarkable moral courage, . . . his freedom from all party or sectional bias, his noble fidelity in friendship, his kindness in social intercourse . . . The disappearance from the public arena of one so gifted, so pure, so magnanimous, so free from petty jealousies of every kind, from low and over selfish schemes for the acquisition of illicit gain, or for the attainment of official station, may well be looked upon . . . as one of the severest national calamities which have so lately fallen upon the American people.

Last, Garfield spoke, who saw in Johnson "united the eminent citizen, the public servant, and the great lawyer," and who added that:

More than any man we have known, Mr. Johnson has illustrated the truth that the highest human symbol of omnipotence is found in the power of unremitting hard work. His monument was builded by his own hands. He made his fortune and his fame by powerful, continuous, earnest, honest work. During the fourteen years of my acquaintance with Mr. Johnson, I never looked upon his face, without feeling that he was a Roman of the elder days, the very embodiment of rugged force and of that high culture which comes from continuous persistent work.

This remarkable meeting, where such notable testimonies were given by such eminent lawyers was followed by the announcement of Johnson's death to the Supreme Court, on February 23, when the Attorney-General spoke of him as "one of the most eminent lawyers of this country and one of the very foremost counsellors of this court" and Chief Justice Waite replied

that "extensively employed, with scarcely an interruption, in the most important causes," Johnson "was always welcome as an advocate, for he was always instructive. His friendship for the Court was open, cordial, sincere. We mourn his loss, both as counsellor and friend."

Of the numerous tributes from all sources, which appeared at the time of his death, two more may be cited. The Nation,²⁰ which had sometimes opposed him, said that his death

can hardly be said to be a loss to public life, as that career had been practically closed, but the bar loses in him one of its oldest and most respected members. He belonged to a past generation of lawyers, who made their entrance into life, when the practice of the law was a better school for sound thinking, good breeding, and good morals than it is now and he used his opportunities to such good advantage that he rose to prominent position, which he held easily to the day of his death.

John W. Forney, who was Secretary of the Senate, and had often enjoyed his hospitality, wrote:

I knew well his unrivalled abilities as a lawyer and as an advocate, and I had many occasions to prove the sincerity of his friendship, the dignity of his bearing, his genuine toleration, and his large and unexampled benevolence. But it was in his public relation to great questions that I fully appreciated his intense and devoted patriotism. A Southern man with Southern sympathies, he loved his country with unchanging affection. He was never an extremist and his natural and innate moderation always made him an invaluable medium between the ultras of both sides. Never shall I forget how often in the dark hour he pleaded for reconciliation. More than once he helped to decide questions in aid of the government and,

²⁰ Vol. 22, p. 106.

although often brought into conflict with the radical leaders, I think I can say that he never once lost his temper. Others differed to the verge of personal hostility. Many old friends in public life were separated forever and died enemies, but Reverdy Johnson was so consistently a gentleman, belonged so entirely to the statesmen of the better days of the Republic, that, when he finally retired from the Senate, he did so with the respect and the confidence of both parties. Few men have lived a life of such comparatively unbroken happiness, of such wholly unbroken integrity.²¹

So simple a character as Johnson's needs little further summing up. He had the virtues of the school of legal ethics to which he belonged and his faults were also those of that school. At times, he was so carried away by his duty to his client as to permit a slight obscuration of his duty to the state and his kindness and love of mercy caused him sometimes not to be insistent enough upon a just punishment for wrong doers, but in his faithful fulfillment of the duty of good citizenship we find few other defects. His political position was marvellously consistent and changed but little from year to year, because he had carefully thought it out and had based it upon fundamental principles.

There have been three men and only three, to whom by common consent there has been given the proud title, leader of the bar of the Supreme Court of the United States. It is not likely that any man in the future will attain the unquestioned preëminence which these three gained in the past. The proud boast of the Maryland bar is that two of these three came from her numbers, that William Pinkney was the first of them

²¹ Johnson's will, written by the late Hon. David Fowler, at his dictation, was interpreted by the Court of Appeals in *Johnson v. Safe Deposit and Trust Company*, 79 Md. 23.

in time, and that, after the death of the great orator, Daniel Webster, the first place came back to a Marylander lawyer and was held by Reverdy Johnson. Yet this great title is only part of his right to remembrance. His urbanity, his courtesy, his irenical disposition, his hopefulness, his consistency of purpose were such that, in a time of great national crisis, he deserved well of the Republic. The same qualities enabled him to inaugurate the era of good feeling toward England, which has ever endured and which bids fair to endure far into the future. He was skillful as a lawyer, he was wise and able as a statesman, but best of all it can be said of Reverdy Johnson, as of the Roman of old time, that, in spite of all threatening storms and in the darkest hour of peril to the nation, he never despaired of the Republic.

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