

## JUSTICE WILLIAM JOHNSON: SOUTH CAROLINA UNIONIST, 1823-1830

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WILLIAM JOHNSON was an associate justice of the United States Supreme Court for thirty years, from 1804 until his death in 1834. He was the first member of the Supreme Court appointed by President Jefferson and the first Jeffersonian Republican to sit on the Court. It was Johnson's purpose to bring Republicanism to the Federalist-controlled Court. As it turned out, Johnson was unable to persuade the other members of John Marshall's Court to take up his Jeffersonian beliefs. It was only through his use of seriatim opinions that Johnson was able to express his views. Whenever he disagreed with one of the Court's decisions, he expressed his views in a separate opinion. In each session that he sat on the Court, Johnson delivered more seriatim opinions than any of the other justices with the exception of the Chief Justice. The writer of the only complete biography of Johnson gives him the epithet "the first dissenter."<sup>1</sup>

Johnson eventually took up many of John Marshall's principles, such as avid nationalism and economic conservatism; indeed, his advocacy of a protective tariff was to give him friends and connections in Pennsylvania, and a visit to this state was, by chance, to have an unhappy influence upon his career. But he broke with the Chief Justice over the role of the judiciary in the governmental system and here persisted in the Jeffersonian line. He adhered to judicial self-restraint. He believed that the powers of the judiciary are liable to abuse and should be limited. His Jeffersonianism is also apparent in his exaltation of the rights of the individual citizen.<sup>2</sup>

Johnson was born in Charleston, South Carolina, in 1771. He left Charleston in 1786 to study law at Princeton. He graduated

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<sup>1</sup> Donald G. Morgan, *Justice William Johnson: The First Dissenter* (Columbia, S. C., 1954).

<sup>2</sup> *Ibid.*, 288-292.

in 1790 and returned to Charleston, where he would reside the rest of his life. He was admitted to the state bar in 1792, but practiced law for only two years. In 1794 he was elected to the state legislature. He was re-elected in 1796 and 1798, and during his third term served as Speaker of the House. His legislative career ended in 1800, when he accepted an appointment to the South Carolina appellate court. He remained on the state bench until 1804, when Jefferson summoned him to the Supreme Court.

Johnson has received great praise for the opinions which he delivered while on the Supreme Court;<sup>3</sup> and he has also been lauded for his personal characteristic of independence. One of his contemporaries described this trait as an "inflexible, almost haughty independence of political authority on the one hand, and popular opinion on the other."<sup>4</sup> Johnson demonstrated this independence of political authority with his seriatim opinions. Unlike the other justices, he refused to acquiesce to the dominance of John Marshall. He also displayed this same independence in an 1808 Charleston circuit court decision.<sup>5</sup> In that case, he struck down as unconstitutional an executive order issued by Jefferson, the man who had appointed him to his position. By doing this, Johnson seriously strained his personal relationship with Jefferson and also injured the prestige of the Republican party. His action has been called "one of the most striking illustrations of judicial independence in American history."<sup>6</sup>

Independence is apparent also in Johnson's actions in South Carolina between 1823 and 1830; there he demonstrated his independence of popular opinion. Two such actions—an 1823 Charleston circuit court decision and a letter which he wrote in 1830—mark Johnson's involvement in the South Carolina unionist movement. Between 1823 and 1830, when sectional feelings were steadily increasing in the state, William Johnson waged a de-

<sup>3</sup> See the remarks of A. H. Kelly and W. A. Harbison, *The American Constitution* (3rd edition; New York, 1963), 273: "his [Johnson's] dissenting opinions served as an incisive critique and potential check on the rulings of the majority," and Fred Rodell, *Nine Men* (New York, 1955), 106, who calls Johnson "the voice of the nation's democratic conscience."

<sup>4</sup> John Belton O'Neill, *Biographical Sketches of the Bench and Bar of South Carolina* (Charleston, 1859), I, 74.

<sup>5</sup> *Gilchrist vs. Collector*, 10 Fed. Cas. 355 (1808). For a detailed discussion of this incident, see Morgan, *Johnson*, 55-74.

<sup>6</sup> Charles Warren, *The Supreme Court in United States History* (Boston, 1922), I, 324.

terminated battle to preserve the Union. When he realized that he could no longer repel disunionist sentiments by judicial means, he turned to extrajudicial means. His activities in South Carolina during these years are the subject of this discussion.

A Charleston circuit court decision of 1823 marks the beginning of Johnson's identification with South Carolina unionism.<sup>7</sup> This decision, *Elkison v. Delhesseline*,<sup>8</sup> delivered in the face of popular opposition and at the risk of his own personal safety, was a notable demonstration of independence and courage. It stemmed from an incident in the late spring of 1822.

If there was one thing that Southerners feared more than anything else, it was a slave insurrection. The possibility of slaves' turning on their masters and ravaging the countryside was a sobering thought to all white men. In May of 1822 this fear became a real one for the city of Charleston. Word had gotten out that a free Negro named Denmark Vesey was planning a slave rebellion; one of the slaves who had been taken into Vesey's confidence told his master of the conspiracy. This revelation triggered a clandestine investigation to track down the leaders. In mid-June Vesey was captured and the uprising was prevented. It is questionable how well organized the plot was;<sup>9</sup> but whether or not the intended insurrection warranted the hysteria of the Charlestonians is immaterial, for one thing was certain—fear had taken over their minds.

Denmark Vesey was a free Negro, who had used his position as a freeman to plan the conspiracy. This fact led the South Carolina legislature to pass a law placing greater restrictions on free Negroes. In the fall of 1822 a law was passed entitled "An Act for the better regulation of free negroes and persons of color,

<sup>7</sup> This does not mean that Johnson was not a nationalist before 1823; for before 1820 most South Carolinians were nationalists. When I speak of "unionists" or "unionism," I am referring to those men who made a concerted effort to oppose states' rights extremism in the state, which had steadily increased since the Missouri Crisis. During the 1820's, this division between the unionists and states' rightists (disunionists and later nullifiers) grew increasingly sharper, culminating in the formation of the Union and Nullification parties in 1830.

<sup>8</sup> 8 Fed. Cas. 493.

<sup>9</sup> For the opinions of most of the city, see James Hamilton, *Negro Plot* (2nd ed.; Boston: 1822). For a more recent and objective account of the Vesey affair, see John Lofton, *Insurrection in South Carolina* (Yellow Springs, Ohio, 1964).

and for other purposes." This act strengthened the 1820 law which restricted the immigration of free Negroes into the state. The law contained also a separate section dealing with Negro seamen who entered the state's ports from vessels of other states or foreign nations:

That if any vessel shall come into any port or harbor of this State, from any other State or foreign port, having on board any free negroes or persons of color, . . . [they] should be seized and confined in gaol until such vessel shall clear out and depart from this State.<sup>10</sup>

It was further stipulated that when the ship left port the captain must take the Negro from jail and pay the expenses of his keep; if the expenses were not paid, the Negro would be sold into slavery, the money being used to pay for his stay in jail.

In January, 1823 a seizure under the act was made on a British ship by the Charleston sheriff. An appeal was made to Johnson's circuit court for relief, but Johnson refused to hear the case; he told the British consul to bring it before the state court. Johnson believed that "it was obviously best that relief should come from the quarter from which proceeded the act complained of."<sup>11</sup> The state court granted relief, but on no permanent grounds; the act still remained in effect.

This seizure of a British seaman brought an angry protest from the British minister to the United States, Stratford Canning. John Quincy Adams, the American Secretary of State, after receiving a pledge from South Carolina Congressman Joel R. Poinsett that the state would stay enforcement of the act, answered Canning's note. In his reply, dated June 17, Adams assured Canning that there would be no repetition of the January episode.<sup>12</sup>

This pledge was broken when, in early August, another seizure was made. As soon as a British cargo ship, the *Homer*, had entered the port of Charleston, one of its Negro seamen, Henry Elkison, a Jamaica-born British citizen, was taken from his ship by the sheriff and placed in jail. Again an appeal was made to Johnson, the consul asking for a writ of habeas corpus, or if Johnson could

<sup>10</sup> 8 Fed. Cas. 493.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

not grant that, a writ de homine replegiando.<sup>13</sup> The consul relied on Adams's letter of June 17 as the legal grounds for the prisoner's release; he considered the pledge as binding on the actions of the state.

This time Johnson did not turn the case over to the state courts. Their previous decision had not solved the problems which the enforcement of the act had created. Could a state prohibit citizens of another nation from entering its port? Could a state regulate commerce with a foreign nation? And what were the state's concurrent powers over commerce? Johnson was determined to answer these questions.

Johnson agreed with the prosecution that Adams's pledge had no legal bearing on the case. "It is not legally sufficient to regulate my conduct, or vest in me any judicial powers."<sup>14</sup> The government of South Carolina, Johnson said, should not be held responsible for the violation of Adams's pledge, for the state government was not enforcing the act. The act was being enforced by "a voluntary Association of gentlemen who have organized themselves into a society to see the laws carried into effect. . . . Pressing the execution of this law at this time is rather a private than a State act."<sup>15</sup> Johnson expressed this same conviction in a letter which he wrote to John Quincy Adams immediately after he had decided the case.<sup>16</sup> The association, consisting of about eighty or ninety members, had, Johnson said, "managed to carry with them the populace, and to muzzle the papers." Johnson was alarmed because most of the public officials were members of the association. "I stand alone almost in the little opposition that I am able to make to it, flagrant as the violations of law and constitution are under this act."

Adams's pledge to Canning, which was the only ground that the

<sup>13</sup> This is an obsolete writ that has been superseded, in most cases, by the writ of *habeas corpus*. While the writ of *habeas corpus* is to have the prisoner discharged, the writ *de homine replegiando* is to have him released on bail.

<sup>14</sup> 8 Fed. Cas. 494.

<sup>15</sup> *Ibid.*

<sup>16</sup> Johnson to [John Quincy Adams], Charleston, August 11, 1823; Gratz Autograph Collection, MSS, HSP. Adams mentions receiving the letter on August 19: *Memoirs* (Philadelphia, 1874-1877), VI, 175. This is the letter that Professor Morgan, *Johnson*, 197, note 28, states he was unable to locate. The letter has no addressee, but by its content, I believe the addressee to have been Adams; Professor Morgan, in reply to a letter which I sent him, agrees with my surmise.

consul used for seeking issuance of the writ, was not binding. Johnson then, on his own, raised the question of the commerce power.<sup>17</sup> Could the South Carolina act be enforced without conflict with the commerce powers of Congress? The South Carolina Negro Seaman Act, Johnson declared, was incompatible "with the power delegated to congress to regulate commerce with foreign nations and our sister states."<sup>18</sup> This power rested exclusively with Congress, and the states had no concurrent powers.

But the right of the general government to regulate commerce with the sister states and foreign nations is a paramount and exclusive right.

It is true, that it [the Constitution] contains no prohibition on the states to regulate foreign commerce. Nor was such a prohibition necessary; for the words of the grant sweep away the whole subject, and leave nothing for the states to act upon.<sup>19</sup>

The South Carolina Negro Seaman Act was, in effect, a regulation of interstate and foreign commerce; since that regulation was an exclusive power of Congress, Johnson declared, the act was unconstitutional and void.<sup>20</sup>

These remarks on the commerce power take on greater significance when it is realized that Johnson's decision in the *Elkison Case* preceded by eight months John Marshall's opinion in *Gibbons v. Ogden*. In that case Marshall is credited with having expanded the scope of the Constitution's "commerce clause," thus broadening the powers of Congress. Yet all he really did was expand the definition of the "commerce clause" to include navigation. On the questions of the concurrent powers of the states and the exclusiveness of Congressional control, the great exponent of "judicial nationalism" was extremely vague.

In *Gibbons v. Ogden* Johnson was to deliver a separate opinion which was one of the strongest pronouncements of national power

<sup>17</sup> All further references to "commerce" and the "commerce power" which are made during this discussion will mean interstate commerce only.

<sup>18</sup> 8 Fed. Cas. 494.

<sup>19</sup> *Ibid.*, 495.

<sup>20</sup> Johnson also ruled that the Seaman Act conflicted with the treaty-making powers of the federal government. See Donald G. Morgan, "Justice William Johnson on the Treaty-making Power," *George Washington Law Review*, XXII (1953), 187-215.

ever heard in the Supreme Court. He expounded his views on the exclusiveness of Congressional regulation. Marshall based his decision on the fact that the defendant (Gibbons) had been granted a coasting license by Congress to operate a steamship between the same two points where the plaintiff (Ogden) had been granted a monopoly to operate his steamship by the New York legislature. This monopoly conflicted with the commerce powers of Congress. Thus, Marshall ruled, it was unconstitutional. Johnson was to disagree with Marshall on the effect of the coasting license. Since he believed that Congress had exclusive control over commerce, the monopoly was void even if the defendant had no license. "I do not regard it [the coasting license] as the foundation of the right set up in behalf of the appellant. . . . If the licensing act was repealed to-morrow, the right of the appellant to a reversal . . . would be as strong as it is under the license."<sup>21</sup> The states, Johnson was to declare, had no concurrent powers over commerce. When they ratified the Constitution, they relinquished this power to Congress.<sup>22</sup>

Commerce itself was very important to Johnson. He believed that commerce was an essential factor in advancing knowledge and bringing the world closer together.<sup>23</sup> He once described commerce as "that honourable calling which connects the remotest nations of the earth into one society, diffuses to all, the enjoyments of each, . . . and sheds the lights of science and religion into the remotest corners of the world."<sup>24</sup> This "honourable calling" must never be retarded by conflicting state regulations, and the Seaman Act was doing just that.<sup>25</sup>

Johnson had declared the South Carolina act unconstitutional, but what relief could he give the imprisoned seaman? The Judiciary Act of 1789 provided for the federal judiciary's granting the writ of habeas corpus only in cases where the prisoner

<sup>21</sup> *Gibbons vs. Ogden*, 9 Wheat. 1 (1824), 231-232.

<sup>22</sup> *Ibid.*, 224.

<sup>23</sup> Expansion of the intellect was also important to Johnson. He was an avid supporter of free public education and had been active in the establishment of the South Carolina College. He was also a member of various intellectual and literary societies, such as the American Philosophical Society and the Charleston Literary Society. See his essay *Nugae Georgicae* (Charleston, 1815).

<sup>24</sup> *Eulogy on Thomas Jefferson* (Charleston, 1826), 31.

<sup>25</sup> Johnson's personal commercial interests may have been another reason for his concern with the commerce power. See Morgan, *Johnson*, 105-106.

was being held under United States authority. Since Elkison was being held by the state, Johnson could not issue that writ. As for the writ de homine replegiando, he granted it because "I have no right to refuse it."<sup>26</sup> But he admitted that he had no power to compel the sheriff to abide by it.

Since the prisoner was being held by the state, Johnson in fact had no jurisdiction in the case; yet he wrote his lengthy opinion declaring the Seaman Act unconstitutional. He was using the weapon that John Marshall had mastered—*obiter dictum*. The correct procedure for hearing a case was to decide first of all whether the court had jurisdiction; if it did not, the case should have ended there. Even if he did have jurisdiction in the case, Johnson knew that his orders would not be obeyed.<sup>27</sup> Since he wanted to speak out on the constitutional principles that were involved in the case, he decided the question of jurisdiction last. Thus his opinion was delivered extra-judicially and was considered *obiter dictum*.

Johnson used this decision as a weapon to combat the ever increasing menace of states' rights extremism. South Carolina claimed that it had the right to regulate Negro seamen who entered its ports, that this was a power necessary for the safety of its citizens. Johnson disagreed; one state did not have the right to throw off the Constitution whenever it desired. "If it can be done as to any particular article it may done as to all; and, like the old confederation, the Union becomes a mere rope of sand."<sup>28</sup> The South Carolinians said that they would continue to enforce the Seaman Act, even if it meant disunion. It was this notion of disunion, "that greatest of evils," that Johnson wanted to refute and destroy.<sup>29</sup>

To refute Johnson's decision in the Elkison Case, a series of articles under the signature "*Carolinienensis*" were begun in the *Charleston Mercury*.<sup>30</sup> They attacked Johnson's decision as being

<sup>26</sup> 8 Fed. Cas. 497.

<sup>27</sup> See Johnson's letter to John Quincy Adams, August 11, 1823, *loc. cit.*

<sup>28</sup> 8 Fed. Cas. 496.

<sup>29</sup> Johnson to Jefferson, Charleston, August 11, 1823; *South Carolina Historical and Genealogical Magazine*, I (1900), 211.

<sup>30</sup> They appeared from August 15 to September 11. The authorship of these articles has been attributed to Robert J. Turnbull, an early advocate of nullification, and Isaac Holmes, the solicitor for the association defending the Seaman Act.



worthless extra-judicial utterances, defended the Seaman Act as a necessity, and spouted the principles of militant states' rights extremism.<sup>31</sup> Johnson responded to these attacks in his own series of articles, also published in the *Mercury*, but under the pseudonym of "*Philonimus*."<sup>32</sup>

South Carolina refused to abide by Johnson's ruling. Enforcement of the Seaman Act continued, and Johnson was unable to do anything about it. "I am wholly destitute of the power of arresting those measures."<sup>33</sup> Other Southern states began to enact similar laws, but no attempt was ever made to bring them before the Supreme Court. Enforcement of these laws was sporadic, but the Negro Seaman Acts continued in existence up to the Civil War.<sup>34</sup>

It is significant to notice the strong declaration of state sovereignty that the governor of South Carolina made concerning the enforcement of the Seaman Act. In July, 1824 Secretary of State Adams, in the interests of United States diplomatic relations, asked Governor John Wilson to stay enforcement of the act. The governor answered Adams in a speech which he made to the state legislature, overflowing with sentiments of states' rights militancy that anticipated the nullification controversy:

A firm determination to resist, at the threshold, every invasion of our domestic tranquility and to preserve our sovereignty and independence as a state, is earnestly

<sup>31</sup> In the *Charleston Courier* (hereafter cited as *Courier*), there were six articles signed "*Zeno*" which also attacked Johnson's decision, but in a dignified and legalistic manner. There also were many other attacks on the decision, but those of "*Caroliniensis*" and "*Zeno*" were the longest.

<sup>32</sup> They appeared from August 26 to September 19. Under this same pen name, Johnson also answered the attacks of "*Zeno*" and most of the others; but the longer and more significant correspondence was that with "*Caroliniensis*."

Professor Morgan, *Johnson*, 199-200, note 45, has ample evidence to prove Johnson's authorship of the "*Philonimus*" numbers. This evidence consists, basically, of Johnson's having been in Charleston at the time these letters were written, the ideas presented in these numbers, and the insinuations by others that Johnson was the author, which charges were never denied by Johnson.

<sup>33</sup> Johnson to John Quincy Adams, Charleston, July 3, 1824; in *Free Colored Seamen*, House Committee on Commerce, 27 Congress, 3 Session (1843), House Report 80, 15.

<sup>34</sup> See Philip M. Hamer, "Great Britain, the United States, and the Negro Seaman Acts of 1822-1860," *Journal of Southern History*, I (February and May, 1935), 3-28, 138-168.

recommended. And if an appeal to the first principles of the right of self government be disregarded, . . . there would be more glory in forming a compact with our bodies, on the confines of our own territory, than to be the victims of successful rebellion, or the slaves of a great consolidated government.<sup>35</sup>

Johnson's fears were beginning to be realized; the spirit of disunion was taking over in South Carolina.

The older historical works on the nullification controversy in South Carolina have emphasized as the prime factor the injury to the state's economy by the tariff and have ignored the importance of the slavery issue.<sup>36</sup> But a more recent study on the subject does take into account the slavery issue, and places greater emphasis on it as the cause of the controversy.<sup>37</sup> There were stirrings of discontent in the state over the tariff before 1823,<sup>38</sup> but Johnson's action of striking down the Seaman Act was instrumental in bringing slavery to the forefront of sectional antagonisms, thus further straining relations between the federal government and South Carolina.<sup>39</sup>

The tariff policy of Congress, which was detested by South Carolina, caused the state to realize that there were disadvantages which it suffered from a strong central government; but before 1823 there was no connection between the "great consolidated government" and a threat to slavery. It was Johnson's decision in the *Elkison Case* that made the connection discernible; the distant threats to slavery that had arisen after the Missouri Crisis now seemed closer. The federal government might soon be able to expand its powers to the point where it would assume control

<sup>35</sup> Hampden (pseudonym), *The Genuine Book of Nullification* (Charleston: 1831), 39.

<sup>36</sup> David F. Houston, *A Critical Study of Nullification in South Carolina* (Cambridge, 1896); Chauncey S. Boucher, *The Nullification Controversy in South Carolina* (Chicago, 1916); John G. Van Deusen, *Economic Bases of Disunion in South Carolina* (New York, 1928).

<sup>37</sup> William W. Freehling, *Prelude to Civil War* (New York, 1966).

<sup>38</sup> See Theodore D. Jervay, *Robert Y. Hayne and His Times* (New York, 1909), 106-114, for an account of the Charleston Memorial against the tariff of 1820.

<sup>39</sup> Freehling places greater emphasis on the intended Vesey insurrection than Johnson's decision. See his remark, p. 53: "the man most responsible for bringing South Carolina to the boiling point was . . . a low Charleston mulatto named Denmark Vesey." But he does say that the entire episode, the insurrection and the controversy over the Seaman Act, made slavery the foremost factor.

over slavery. South Carolina's reaction to the Elkison Case marks its turning point toward more militant sectionalism.

Johnson's decision in the Elkison Case thus helped to weaken the unity of the nation. Important political questions on the concurrent powers of the states were involved in the case, and intertwined with these questions was the subject of slavery. Since he had no jurisdiction in the case, Johnson could have refused to hear it, or else, as he did before, could have turned it over to the state court. Through his decision, Johnson had hoped to settle the political questions which existed between the federal government and the state, and at the same time refute the idea of disunion. As it turned out, he did neither; relations between the two governments grew worse and disunionist sentiment increased.

John Marshall had the political sagacity to avoid deciding a case which involved slavery. He knew that any case which touched on that subject was a poor one on which to decide constitutional issues; the popular feelings which accompanied the subject would overshadow any principles which he laid down. In 1820 a case came before Marshall's circuit court under a Virginia law that was very similar to the South Carolina Seaman Act, but he avoided deciding on the law's constitutionality by dismissing the case on technical grounds.<sup>40</sup> After Johnson's decision in the Elkison Case, Marshall related to Joseph Story how he had purposely avoided making a decision by using a narrow interpretation of the law. "A case had been brought before me in which I might have considered its [the Virginia law's] constitutionality, had I chosen to do so; but it was not absolutely necessary, and as I am not fond of butting against a wall in sport, I escaped on the construction of the act."<sup>41</sup>

The importance of determining the commerce powers of the states was realized by Marshall; the thought of one state's interfering with the commerce of the others must have been appalling to the Chief Justice. Marshall knew that the Supreme Court would eventually have to place limits on the commerce power of the states; but finding the right case would be difficult. Most of the Court's decisions which had expanded national power at the ex-

<sup>40</sup> The Brig *Wilson*, 1 Brook 423, cited in Warren, *Supreme Court*, II, 84.

<sup>41</sup> Marshall to Story, September 26, 1823, quoted *ibid.*, 86.

pense of the states were unpopular;<sup>42</sup> to broaden the commerce power of Congress, Marshall would have to find a case where the immediate effects of the decision would be so popular that they would take attention away from this expansion of power. Marshall delivered such a decision in *Gibbons v. Ogden*. The Supreme Court destroyed a monopoly, other steamship lines were now able to operate, a blow was struck for the American ideal of equal opportunity, and thus *Gibbons v. Ogden* was Marshall's most popular decision.

Johnson's opinions on the commerce power—such as delivered in the *Elkison Case* and *Gibbons v. Ogden*—are his greatest contributions to American constitutional history. But in the *Elkison Case* he showed he lacked the “judicial statesmanship” of John Marshall.

When states' rights extremists in South Carolina began to advance the idea of nullification, Judge William Johnson was one of their most zealous opponents. Observing that his decision in the *Elkison Case* was being disregarded, Johnson realized that he could no longer combat disunion by judicial means. In his battle against nullification, Johnson tossed aside his judicial robes and donned those of the politician.

Johnson was no stranger to politics. He had been a member of the state legislature before he became a judge, and while on the Supreme Court he had actively engaged in the Presidential campaigns of 1816 and 1824 on behalf of William H. Crawford. Before 1820 Johnson had shown a strong desire to leave his seat on the Court for a more politically active position in the federal government. John Quincy Adams called Johnson “a man of considerable talents and law knowledge, but a restless, turbulent, hot-headed, politician caballing-Judge.”<sup>43</sup>

In 1814 Johnson had asked President Madison for an appointment as United States minister to France in place of Crawford, who was then serving in that post; as his successor on the Supreme

<sup>42</sup> At this time, the Supreme Court was under heavy attack from members of Congress, and bills were being introduced to limit the Court's powers. See Charles G. Haines, *The Role of the Supreme Court in American Government and Politics* (Los Angeles, 1944), 463-514.

<sup>43</sup> Entry for March 27, 1820, *Memoirs*, V, 43.

Court, Johnson recommended Crawford.<sup>44</sup> Whether there was a political motive behind this attempt to exchange positions is not known, for Madison did not appoint Johnson. He remained on the Court while Crawford became Monroe's Secretary of the Treasury in 1817. When the Monroe administration took office, Johnson was again office-seeking; through Crawford's influence he was trying to become Secretary of War. But John C. Calhoun was selected instead.<sup>45</sup> In 1819 Johnson was appointed, through Crawford's influence, collector of the port of Charleston; but he decided to refuse the position.<sup>46</sup>

These three incidents: his willingness to switch positions with Crawford, his attempt to become Secretary of War, and his appointment as collector indicate close relations between Johnson and Crawford. They also illustrate Johnson's restlessness, his desire to be more actively involved in political affairs.<sup>47</sup> He wanted to play a more active role in the shaping of the nation's future. Before 1819 his duties on the Supreme Court did not satisfy this ambition; but by 1819, as his letter declining the appointment as collector indicates, Johnson was beginning to find the business of the Supreme Court interesting enough to satisfy him. "The interesting aspect also that the business of the Supreme Court has lately exhibited, its acknowledged importance and weight in the union," Johnson said, caused him to stay on.<sup>48</sup>

Three cases which held great importance for the future of the

<sup>44</sup> Johnson to Madison, Charleston, June 16, 1814, Madison Papers, Library of Congress; quoted in Morgan, *Johnson*, 93.

<sup>45</sup> Crawford to Albert Gallatin, Washington, October 17, 1817, Henry Adams, ed., *Writings of Albert Gallatin* (New York, 1960), II, 54-55.

<sup>46</sup> Morgan, *Johnson*, 108.

<sup>47</sup> In 1811 Johnson had been accused of being involved in some sort of activities which had caused rumors to circulate. Justice Story, in 1830, related to Richard Peters the reason for the Supreme Court's not holding session in 1811. He said that there were not enough justices present to constitute a quorum. Four were needed; only three, Marshall, Washington, and Livingston, were there; Cushing had died in 1810, Chase was home sick, Todd did not attend for an unknown reason, "and Judge Johnson stayed at home for a reason which I have heard, but do not know if it is well-founded and therefore [illegible] to repeat it." Story to Peters, Cambridge, July 26, 1830, Cadwalader Collection, *Peters Correspondence*, HSP. Hereafter cited as Peters Correspondence.

I have been unable to find out what this activity might have been. It may have involved land speculation, for around this time Johnson was involved in many transfers of land. Morgan, *Johnson*, 99, note 22.

<sup>48</sup> Johnson to Crawford, March 31, 1819, *Washington Gazette*, April 24, 1819, from *Raleigh Star*, April 9, 1819.

nation were before the Supreme Court in 1819. Two cases involving the interpretation of the "contract clause" were awaiting the Court's decision;<sup>49</sup> and one of the most important decisions ever delivered by the Court was also on its docket for 1819, the case of *McCulloch v. Maryland*.<sup>50</sup> This case dealt with the limits of the implied powers of Congress. The decision in this case, delivered by Marshall, with which Johnson concurred without opinion, gave a broad scope to the powers of Congress.

Johnson, although a Jeffersonian in many aspects, adhered to the Marshallian view of the implied powers of Congress. He knew the great importance which these powers held. Just as he would not limit the commerce power by a rigid definition, neither would he set limits on the implied powers. He believed that there were many benefits for the nation which could come only from the federal government; and it was only through the use of the implied powers that these beneficial acts could be realized.

Johnson's views on the implied powers clashed sharply with those of most South Carolinians, for it was through these powers that Congress was able to enact the despised protective tariff. By usurping this power, opponents warned, another step towards "consolidation" was being taken. "Consolidation" meant that the central government would continue to expand its powers to the point where it would reach a monstrous size; then this monster would devour the state governments. What defense did the states have? South Carolina turned to the weapon of nullification.

One of the earliest pronouncements of nullification came in a series of essays under the title "The Crisis" or "Essays on the Usurpations of the Federal Government by Brutus."<sup>51</sup> "*Brutus*" was the pseudonym of Robert J. Turnbull, one of the writers of the "*Caroliniensis*" articles of 1823. He claimed to be a devout Jeffersonian and said that he received the doctrine of nullification from Jefferson. These essays were published in 1827, first in the *Mercury* and then in pamphlet form. "*Brutus*" denounced the policy of the federal government toward "consolidation." The North controlled Congress, he said, and this power would be

<sup>49</sup> *Dartmouth College vs. Woodward*, 4 Wheat. 518; *Sturgis vs. Crowninshield*, 4 Wheat. 122.

<sup>50</sup> 4 Wheat. 316.

<sup>51</sup> The term nullification is not used by "*Brutus*," but the basic tenets of the doctrine are fully laid down in this work.

used to harm the interests of the South; the tariff policy was definite proof that "an insidious attack was meditated against the tranquillity of the South."<sup>52</sup> Outright resistance and defiance of the federal government's laws was the remedy advanced by "*Brutus*."

To refute the assertions of "*Brutus*" a series of essays were printed in the *Courier*;<sup>53</sup> in 1828 they were printed in pamphlet form under the title *Review of a Late Pamphlet under the Signature "Brutus."* These reviews were written by Supreme Court Justice William Johnson; to conceal his identity he used the pen name of "*Hamilton*."<sup>54</sup> As he had done in 1823 with his "*Philonimus*" numbers, Johnson was again defending the Union against the attacks of states' rights extremists. He was convinced that the ideas which were being advanced by "*Brutus*" were a threat to the Union. "That I have neither mistaken, nor exaggerated the tendency and spirit of the 'Crisis,' I am well assured. It has already . . . made familiar to our ears, the term, disunion; a term, which ought never to have found its way into our vocabulary."<sup>55</sup>

To dispel the fear of what "*Brutus*" termed "consolidation," Johnson argued that it was the intent of the Constitutional Convention to establish a central government with strong powers. The reliance on the implied powers, he said, was "as old as the Government"; they were resorted to whenever "chapter and verse could not be found to warrant, in express terms, any particular measure deemed advisable."<sup>56</sup> These powers were used to assume

<sup>52</sup> Houston, *Nullification in South Carolina*, 49-51.

<sup>53</sup> They appeared from November 14, 1827, until February 12, 1828.

<sup>54</sup> The pamphlet was published in Charleston by James B. Burges. Further references to this work will be cited as "*Hamilton*," followed by the number of the essay.

"*Hamilton*" was a frequent pseudonym of Johnson's friend Mathew Carey, who was a Philadelphia publisher and an avid tariff supporter. Morgan, *Johnson*, p. 269, note 21, has surmised that Johnson was the author of these essays. He believes that the arguments and the ideas as well as the literary style of the work are definitely Johnson's. Also, during the time these articles appeared in the *Courier* Johnson was in Charleston instead of in his circuit court at Savannah, which he was otherwise regular in attending. The copy of this pamphlet which I used, from the College of William and Mary, has the name Martin L. Hurlbut, Esq., written in as the author; but after reading the work, I agree with Professor Morgan that it was written by Johnson.

<sup>55</sup> "*Hamilton*," 29, 103-104.

<sup>56</sup> *Ibid.*, 4, 14.

the debts of the states,<sup>57</sup> establish the United States Bank,<sup>58</sup> and purchase Louisiana.<sup>59</sup> "There is no peculiar reason, at this particular time, for the excitement that exists, with regard to the measures of the Government. So far, at least, as principles are concerned, the alarm comes too late. They have been fixed and settled long since."<sup>60</sup>

The tariff issue, Johnson was convinced, was being used to cover another issue—slavery. He realized that it was slavery, not the tariff, that presented "difficulties far greater, and dangers far more formidable to the permanence of the union."<sup>61</sup> Johnson was himself a slaveholder, and at no time did he ever advocate abolition. He regarded slavery as a necessary evil created by the climate and economy of the South.<sup>62</sup> He had seen the extreme emotional feelings that had been aroused by this subject in 1823, and he knew that these same feelings could be used as a means of wrecking the Union. "It is this [the slavery issue] that threatens to sow the whole soil of the republic with dragon's teeth, to spring up in due time, in the embodied forms of mutual hatred, and armed for mutual slaughter."<sup>63</sup>

By 1823 Johnson had already seen a real threat to the Union, and he knew that the slavery issue was causing it. He wrote Jefferson of his concern for "the destiny of our beloved country."<sup>64</sup> In his "*Philonimus*" numbers he charged that the excitement over the Elkison decision was created by a cabal of a few men whose goal it was to wreck the Union, using the slavery issue as their means. "On my conscience, do I believe, that there are men among us, who are aiming at the severance of the Union, on the most dangerous and fatal of all principles—The very Missouri question."<sup>65</sup> He saw the danger, but what could he do to help hold the nation together in the face of these attacks from states' rights extremists? Johnson decided to turn to politics.

The idea of a member of the federal judiciary's engaging him-

<sup>57</sup> *Ibid.*, 6.

<sup>58</sup> *Ibid.*, 8.

<sup>59</sup> *Ibid.*, 10.

<sup>60</sup> *Ibid.*, 7, 21.

<sup>61</sup> *Ibid.*, 18, 55.

<sup>62</sup> Morgan, *Johnson*, 135-136.

<sup>63</sup> "Hamilton," 18, 56-57.

<sup>64</sup> Johnson to Jefferson, August 11, 1823, *loc. cit.*, 211.

<sup>65</sup> "Philonimus" to "Zeno," *Courier*, October 8, 1823.



self in politics, although considered improper by some, seems to have been accepted by the majority. Most of the judges had a strong interest in politics, and many brought their partisan feelings with them to the bench; witness the actions of Justice Samuel Chase which led to his impeachment, the performances of the other Federalist judges during trials under the Alien and Sedition Acts, and the action John Marshall in the Aaron Burr trial. But Johnson went further than any of these other judges; while a member of the Supreme Court he was elected to a public office. From 1826 until his death in 1834, being re-elected every two years, Johnson held the position of commissioner of the poor in Charleston Neck.<sup>66</sup>

The parishes of St. Michael's and St. Philip's comprised the city of Charleston. When the city was incorporated in 1783, a portion of St. Philip's was left outside the city limits; this area was known as Charleston Neck. It was made up of several boroughs, one being Canonsborough, the home of William Johnson. Most of the residents considered themselves Charlestonians; in fact, Johnston dated all his letters from Charleston. The Neck was not governed by the city officials of Charleston, nor did it have its own municipal government; its only elected officials were five commissioners of the crossroads and five commissioners of the poor.

Under the church parish system of colonial days the commissioners of the poor directed public money for the relief of the poor, bound out their children, and prevented paupers of other parishes from moving in.<sup>67</sup> The state constitution of 1790 made the church parishes civil divisions. An act of 1791 made the office of commissioner of the poor part of the state's civil law; each district was permitted five commissioners. Their duties

<sup>66</sup> *Miller's Planters and Merchants Almanac* for each of these years lists the commissioners of the poor for Charleston Neck. I am grateful to Miss Sara Ann Lofton of the Charleston Library Society for furnishing me with this information. The election notices in the *Courier* and *Mercury* also confirm Johnson's election for each of these years.

Evidently Professor Morgan, *Johnson*, 273, note 64, thought that Johnson was elected to this position in 1832 only for the purpose of bolstering the Union ticket. He did not realize that Johnson had been elected to this post three times before.

<sup>67</sup> B. James Ramage, "Local Government and Free Schools in South Carolina," *Johns Hopkins University Studies in Historical and Political Science*, Series 1, Number 12 (October, 1883), 10-13.

were almost the same as in the church parish; but, in addition, they were given the power to demand fines, forfeitures, and other monies to meet the needs of the poor. They were also permitted to tax the election district for additional money if necessary.<sup>68</sup> A law passed in 1824 gave the commissioners the power to appoint superintendents for their district; the duties, tenure, and salary of these appointees were decided by the commissioners.<sup>69</sup> Two years later another law further increased the powers of the commissioners; it gave them all the civil power and authority which was previously held by the other officers of the church parish, providing there were no previous laws giving these powers to another civil official.<sup>70</sup>

By 1826, when Johnson first ran for the office, the commissioners of the poor had political importance. Along with the commissioners of the crossroads, they were the only elected officials of the Neck. They received public money and controlled its expenditure. To care for the poor the commissioners had to purchase clothing, food, and other essentials; and they decided where to buy these items. In addition, they had the power to appoint superintendents for their districts; this put some patronage power in their hands. Thus, by 1826 the office had at its disposal the political weapons of money to spend and jobs to hand out.

By the late 1820's Johnson was mounting an all-out offensive against the ever-increasing menace of disunion. With a pen as his weapon he had met the challenge of "*Brutus*." Clear logic and sound reasoning were the means of his attack, but they had failed; disunionist sentiment continued to flourish. His next line of attack would not be in the realm of abstract political theory. It would be a personal attack on one of the leading promoters of disunion. The man upon whom Johnson chose to launch his attack was Dr. Thomas Cooper, the president of the South Carolina College.

Cooper was an Englishman who had emigrated to America in 1794. Before leaving England he had been denounced in Parliament by Edmund Burke for praising the actions of the French Jacobins. He came to the South Carolina College in 1820. His extreme devotion to Jeffersonianism and his strong support of

<sup>68</sup> *The Statutes at Large of South Carolina* (edited under the authority of the Legislature by Thomas Cooper, M.D., LL.D., 1835-1839), IV, 175-176.

<sup>69</sup> *Ibid.*, IV, 241.

<sup>70</sup> *Ibid.*, IV, 284.

free trade made him well suited for South Carolina politics. His lasting fame in the hearts of the states' rightists was his 1827 remark that it was time to "calculate the value of the Union." He and Robert J. Turnbull were the earliest advocates of nullification; both have been called the "high priests of disunion."<sup>71</sup>

Aside from Cooper's position as an apostle of disunion, Johnson had a personal vendetta to settle with him. In the spring of 1823 the two men had been involved in a well publicized exchange of insults. They ended only when Johnson threatened to sue Cooper for libel, a threat which he never carried out; but the personal animosity between the two men continued.<sup>72</sup> By 1827 Johnson was convinced that Cooper was one of the leading conspirators who were trying to wreck the Union. To save the Union, as well as to satisfy his personal vengeance, Johnson started to organize a propaganda campaign with the purpose of destroying Dr. Cooper and his doctrines. In 1828 Johnson wrote to Richard Peters asking for "some particulars of the origin and progress of my friend Dr. Cooper—our apostle of disunion—the unbelieving Thomas. Our people's eyes are beginning to open upon him and I know that we should serve God and man in doing anything to put down his influence."<sup>73</sup> At this time there were many attacks on Cooper printed in the newspapers,<sup>74</sup> but none can definitely be attributed to Johnson.

It may have been Cooper's views on disunion, or on religion, or their mutual hatred for each other, or perhaps all three, but whatever the reason, it is apparent that Johnson had become obsessed with the idea of destroying the Englishman. In September of 1830 Johnson again wrote to Richard Peters; he wanted still more information on Dr. Cooper. "I am about publishing a collection of Cooperiana, for we are beginning here to think very generally that the interests of God and man require that we should undertake to get rid of a pest to both."<sup>75</sup>

No publication of what Johnson referred to as "Cooperiana"

<sup>71</sup> Dumas Malone, *The Public Life of Thomas Cooper* (Republication; Columbia, S. C., 1961), 309.

<sup>72</sup> For a full discussion of this skirmish between Johnson and Cooper, see *ibid.*, 268-272, and Morgan, *Johnson*, 141-146.

<sup>73</sup> Johnson to Peters, n.p., July 7, 1828, Peters Correspondence.

<sup>74</sup> Malone, *Cooper*, 311-323.

<sup>75</sup> Johnson to Peters, Charleston, September 20, 1830, Peters Correspondence.

has turned up; it probably never appeared. By 1830 Cooper was no longer a significant figure in the nullification movement,<sup>76</sup> and he was under heavy attack for his religious beliefs.<sup>77</sup> Cooper's writings, especially on religion, were exceptionally open to attack; it was probably these that Johnson had collected and was planning to publish. But the publication of a letter which Johnson himself wrote caused him to be the target of many violent attacks and forced him to take a back-seat in the anti-nullification movement.

Elections for members of the state legislature were held in September of 1830. The main tangible issue of the campaign was the calling of a state convention, but nullification was the underlying issue. Two opposing groups had been formed—the conventionists and the anti-conventionists. The purpose of a convention, opponents warned, was to nullify the Tariff Act, and nullification, they said, meant disunion. A two-thirds majority of the state legislature was needed to call a convention. The anti-conventionists were attempting to prevent the conventionists from attaining this goal.

Johnson was one of the leading figures in the anti-convention movement. Most of the other potential unionist leaders in the state were either out of the state at the time or undecided on the convention issue. Joel R. Poinsett, who would be the leader of the Union party in 1832, was in Mexico; and William Drayton, another leader of the Unionists in 1832, was running for Congress with the support of the conventionists. Johnson's letters to Richard Peters about Dr. Cooper show that he was attempting to create some sort of propaganda network; his position as commissioner of the poor provided him with some necessary political weapons, and his family connections put him in close contact with other leading anti-conventionists. His brother-in-law, Thomas Bennett, a former governor of the state, was the organizer of the anti-conventionist ticket in Charleston; in fact, the slate of candidates was known as the "Bennett Ticket." His brother, Colonel John Johnson, was running for the legislature on the ticket. A nephew, Edward

<sup>76</sup> Malone, *Cooper*, 335.

<sup>77</sup> Cooper had had a run-in with the state's clergyman over his religious beliefs. In his editing of Joseph Priestley's *Memoirs*, Cooper denied the existence of a human soul, freedom of will, and the trinity. These views eventually caused him to resign from the college. See *ibid.*, 270, 333-367.

McCready, was also an anti-conventionist leader. The adopted son of Thomas Bennett, C. G. Meminger, later an avid secessionist and treasurer of the Confederacy, was an anti-conventionist candidate for the legislature.

In late August Johnson received an invitation to attend a dinner to be held at Columbia in mid-September. The purpose of the dinner was to discuss the tariff and nullification; it was sponsored by the conventionists, but men of opposing sentiments were invited to express their views. The invitation was sent by a committee of five men headed by a former Princeton classmate of Johnson's, ex-governor John Taylor. In his letter to Taylor declining the invitation, which he gave permission to publish, Johnson set down eight points which he said represented his views on the tariff and nullification:

1. That the protection of domestic manufacturing was an avowed leading and necessary object of the Constitution.

2. That it was never lost sight of, but always relied upon as the capacity of the country to produce developed itself.

3. That the late attempts on a large scale grow out of a succession of such developments, and a state of things resulting from changes in the application of labor, which imperatively required of every wise government to adopt such a course of policy.

4. That Carolina has not only not been injured but really benefited to many thousands by the tariff.

5. That no state in the Union is more deeply interested in maintaining the principles of the tariff.

6. That nullification is folly, and the peaceable course projected under it, is all a silly and wicked delusion.

7. That it grows out of a deliberate conspiracy against the Union, which has been steadily working upon us for the last six years, though very few are in secret.

8. That a Convention is the grand end and aim and agent of the conspiracy.<sup>78</sup>

The publication of this letter marks the end, in an active political sense, of Johnson's connection with the South Carolina unionist movement.

<sup>78</sup> Johnson to Taylor, Charleston, August 31, 1830, *Mercury*, September 21, 1830.

These "eight points" were a godsend to the nullifiers, and were a millstone around the neck of the unionists. The nullifiers' organ of propaganda was the *Mercury*. It published Johnson's letter, along with Taylor's reply, on September 21. Taylor attacked Johnson for his remarks about the aims of a convention and demanded proof of the judge's accusation of conspiracy.<sup>79</sup> The *Mercury* made no other comments on Johnson's letter, except to say that it had not finished giving the tariff-loving judge all that he deserved. The "castigation which Colonel Taylor gives him [Johnson] is sufficient for present. It is the first installment of a debt which the community of South Carolina owes him, and which will be paid with punctuality."<sup>80</sup> For the next two days the *Mercury* reprinted the "eight points"; each time they were introduced by a letter charging that Johnson was the leader of the unionists and that his "eight points" represented the views of his party.<sup>81</sup>

Johnson's motive for this ill-advised outburst was the same one which had compelled him to speak out in 1823—preservation of the Union. He hoped to prove to the state that there was nothing to fear from the tariff, that their apprehensions were created by a few men whose aim it was to wreck the Union. He believed that the people of the state had to be shown the error of their ways. Again Johnson demonstrated independence and courage in the face of popular opposition; and, as in 1823, his attempt to ward off disunion backfired. His defense of the tariff weakened support for what was gradually becoming the Union party.

The expediency of the tariff should not have been brought up at all. The issues of the campaign were the calling of a convention and nullification. There were Union men like Johnson, especially East Bay merchants, who believed that the tariff was expedient, but they were in the minority. If Johnson had said nothing on the tariff, the party would have been more firmly united; for both pro- and anti-tariff men opposed nullification. But Johnson's remarks increased internal dissension.

In spite of Johnson, the conventionists were prevented from attaining the necessary two-thirds majority; a simple majority was

<sup>79</sup> Taylor to Johnson, Rice Creek, September 11, 1830, *ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*, September 23, 1830.

the best that they could salvage. The success of the anti-conventionists was due to the lack of a strong, well-organized party organization for the conventionists. It was not until after the election of 1830 that the well-organized Union and Nullification parties were formed. The leaders of the Union party then were Joel Poinsett and William Drayton.<sup>82</sup>

Johnson was hoping that the Union party would be pro-tariff as well as anti-nullification; to him the two were inseparable. But the new leaders would have nothing to do with the tariff, since opposition to nullification was their only *raison d'être*. After failing to persuade the Unionists to take up the cause of the tariff, Johnson faded, or was pushed, from the political scene. He showed his disgust with the anti-tariff policy of the Union party in a letter which he wrote to Mathew Carey, the patron saint of protected industry. "Men's minds there [South Carolina] are diseased, and you must have noticed that the Union party has not ventured to advocate the tariff or even vindicate it against the attacks of Mr. Calhoun's disciples."<sup>83</sup>

Poinsett and Drayton thought it best that Johnson say as little as possible in public; his knack for saying the wrong thing would not do the Union party any good. In fact, through Dr. Joseph Johnson, the judge's brother, they tried to persuade him to stay out of the state. In June of 1831 Joseph Johnson informed Poinsett, in an encouraging manner, that "my brother William talks strongly of a trip to France in a few days to see the culture of beets and grapes—I think he will go."<sup>84</sup> Johnson most likely decided against taking the trip; in July he was holding circuit court, and in August he was in Washington.<sup>85</sup>

John Belton O'Neill, a very early biographer of Johnson, gives this account of the judge:

When the unfortunate Nullification struggle rose to its height in the State, Judge Johnson, whose nature was earnest and whose opinions were always decided, found

<sup>82</sup> For a complete discussion of the election of 1830, see Freehling, *Prelude to Civil War*, 206-218.

<sup>83</sup> Johnson to Mathew Carey, Raleigh, December 10, 1831, Gratz Autograph Collection, Johnson Folder, HSP.

<sup>84</sup> Joseph Johnson to Joel Poinsett, Charleston, June 6, 1831, Poinsett Papers, HSP.

<sup>85</sup> Morgan, *Johnson*, 269.

himself in opposition to the sympathies of the majority of his fellow-citizens; and while his interest in the contest was the warmest, his judicial position . . . not only forbade interference, but imperatively commanded the most complete abstinence. He . . . absented himself from the State, and during the summer of 1833 he resided in the Western part of Pennsylvania. Here, unfortunately, he contracted a bilious remittant fever from which he was never entirely recovered.<sup>86</sup>

O'Neill admits that he did not know Johnson, and that he had to derive his data from another person.<sup>87</sup> That would explain why he was incorrect when he said that Johnson went to Pennsylvania in 1833. In 1833 Johnson was holding circuit court in June, and again in November;<sup>88</sup> an attack of fever would not have permitted him to travel from Pennsylvania to Georgia, where he was holding circuit in November. O'Neill also asserts that Johnson left the state when the "Nullification struggle rose to its height." The struggle had already passed its height by the summer of 1833; in the spring of 1833 a compromise was reached and the crisis had subsided.

Johnson himself proves the inaccuracy of O'Neill's statement. It was 1831 when the judge traveled to Pennsylvania and contracted the fever.<sup>89</sup> Writing to Richard Peters from Raleigh, where he spent the winter of 1831-1832, Johnson tells why he went to Pennsylvania:

I was on my way to Philadelphia when taken down at Lancaster with this fever which has been hanging on me ever since with but two intervals. I had been on an agricultural tour in the upper counties of Virginia, Maryland, and Pennsylvania and had lingered too long among your canals. I should have visited the best cultivated parts of New York and the eastern states but for this interruption.<sup>90</sup>

It was not his "judicial position," as O'Neill said, which pre-

<sup>86</sup> O'Neill, *Biographical Sketches*, I, 78.

<sup>87</sup> *Ibid.*, preface.

<sup>88</sup> Morgan, *Johnson*, 277-278.

<sup>89</sup> This fever also caused him to miss the 1832 session of the Supreme Court.

<sup>90</sup> Johnson to Peters, Raleigh, December 10, 1831, Peters Correspondence.



vented him from joining in the state's political struggle; it had not deterred him before. It was because the leaders of the Union party did not want him, and because of his own disgust with the party's tactics. His brother had not succeeded in coaxing him to go to France; but he was probably successful in persuading the judge to go on an agricultural tour, for next to law and politics, agriculture was his favorite pastime.<sup>91</sup>

In the fall of 1831 the Nullifiers attempted to have the validity of the tariff decided in a federal court. A test case was started when two of the Nullifiers put up a bond to guarantee payment of the tariff on a bale of English cloth. When payment was refused, the United States district attorney sought forfeiture of the bond.<sup>92</sup> The case was first heard in the federal district court of Judge Thomas Lee. The Nullifiers wanted the constitutionality of the tariff to be decided by the jury; but Judge Lee ruled that the jury could decide only whether or not the bond should be forfeited. The jury, limited only to the question of forfeiture, decided in favor of the federal government.

Despite the publicity given to Johnson's "eight points," an appeal of the district court's decision was made to his circuit court. It seems strange that the Nullifiers, knowing Johnson's views on the subject, would even have bothered with an appeal. The more moderate members of the party probably felt that Johnson would at least give a fair hearing to their cause; and if he heard all the facts, he might change his mind.<sup>93</sup> The more radical of the Nullifiers most likely relented in the hope that Johnson would come out with another display of tactlessness equal to that of 1830, thus furthering their cause.

Being confined to Raleigh for the winter and early spring, Johnson did not hold circuit court until May of 1832. In early June

<sup>91</sup> He was an active member of the Charleston Horticultural Society, and had written many articles on agriculture. See his essay *Nugae Georgiae*; his communication to the *Courier*, April 27, 1831: "Rural Economy; On the Killing of Crows"; his article "Memoire on the Strawberry," *Southern Agriculturalist*, V (1832), 568-577; and his letters on the making of sugar from beets, *Southern Agriculturalist*, III (1830).

<sup>92</sup> *U. S. vs. Holmes and Mazych*, *Courier*, September 24, 1831.

<sup>93</sup> As an example see a letter signed "Cujos" in the *City Gazette*, October 1, 1831; quoted in Morgan, *Johnson*, 270, note 50. "It has . . . been stated in the papers that his [Johnson's] opinion . . . is in favor of the constitutionality of the Act; nevertheless, in a fair, full and solemn argument before him, he might change his opinion."

he handed down his decision. Handling the facts of the case in their narrowest possible manner, while relying on highly technical legal points, Johnson upheld the lower court's decision. He did not make the mistake that he had made in the Elkison Case; he kept his opinion strictly to law and avoided political questions.<sup>94</sup>

Johnson's decision was not appealed; for all efforts were being put into the fall election campaign. The Nullifiers held the upper hand in this election. They had failed to elect a two-thirds majority in 1830, but their gaining control of the legislature made victory easier in 1832. One of the Nullifiers, James Hamilton, Jr., was elected governor; thus they had the resources of both the executive and legislative branches at their disposal. The Nullification party itself was now a well-organized, smooth-running machine.<sup>95</sup>

Johnson ran for re-election as commissioner of the poor in 1832; and this year the election of the commissioners held considerable importance. A member of the Union party's organization committee wrote to Joel Poinsett expressing his deep concern about the situation in the Neck. He warned that the Nullifiers were bringing men into the Neck to claim residence in order to vote for the commissioners; and he feared that the Nullifiers would use a victory in the Neck for propaganda purposes. "The object of this must be to proclaim to the state that they have beaten us in our strong hold . . . and where they insinuate poison no antidote of ours can ever reach."<sup>96</sup> So concerned was Poinsett that he must have written to Johnson inquiring about residence requirements, for the judge's answer has been found. Johnson merely outlined the voting qualifications; he tendered no political advice.<sup>97</sup>

Running in his home district, a Unionist stronghold, Johnson was successful in his bid for re-election.<sup>98</sup> But that was his only political activity of 1832; his declining health may have been a reason for this abstention. His only public utterances were in a letter declining an invitation to a dinner being sponsored by the Union party. In this letter he again denounced nullification, but

<sup>94</sup> Holmes, *vs.* U. S. *Courier*, June 12, 1832.

<sup>95</sup> Freehling, *Prelude to Civil War*, 222-235.

<sup>96</sup> [Anonymous] to Poinsett, n.p., n.d.; the year 1832 is pencilled in, and the content of the letter indicates that it was written in 1832. Gilpin Collection, Poinsett Section, HSP.

<sup>97</sup> Johnson to Poinsett, n.p., September 22, 1832, *ibid.*

<sup>98</sup> *Courier*, October 13, 1832.

did not come out with any pro-tariff remarks; in fact, he even said that he, along with others, had tried to persuade Congress to lower the tariff duties.<sup>99</sup> The judge had finally learned discretion; he had finally realized too late that certain things are best left unsaid.

The newly elected legislature immediately called for a state convention. The convention met in December, and as its first order of business it declared the tariff null and void. A greater crisis was averted when, in the early spring of 1833, Congress reduced the tariff rates. Johnson went to Washington in 1833 for his last session of the Supreme Court; in 1834 poor health prevented him from attending, and in August of that year he died.

If there was one specific reason for Johnson's taking the actions which he did, one intention that stood above all others, it was his belief that he had a duty to mold the individual states of the nation into a firmer union. He expressed this belief best in the last of his essays reviewing "*Brutus*":

The great antagonistic principles of light and darkness, seem, even now, to be silently mustering their forces for the final struggle. . . . I deem it not improbable, that our duty, our honour, our safety even, may call us to a very different course; a course, for which, in the use of all sober means, we are bound to hold ourselves prepared. One of these means is, to strengthen and consolidate the union of the States; to harmonize the public feelings; to liberalize public opinion; to dispel local jealousies; to foster, with a beneficent impartiality, and with large and far-reaching views, the great interests of the country; and thus build, on a firm basis, a lofty national character, and a permanent national prosperity, that may abide, if need be, the shock of the sternest conflict.<sup>100</sup>

This was Johnson's dream; the creation of one indissoluble nation, with one "national character." The best means to reach this goal, Johnson believed, was commerce. Commerce was the great unifying force of the world; it was commerce "which con-

<sup>99</sup> Johnson to Thomas Lee, Jr., Charleston, October 3, 1832, *Courier*, October 11, 1832.

<sup>100</sup> "*Hamilton*," 29, 105.

nects the remotest nations of the earth into one society." It was this obsessive concern for commerce that motivated Johnson to make the decision in the Elkison Case and write the "eight-point" letter.

A "permanent national prosperity" was essential for a firmly united nation. In the advancement of manufacturing as well as commerce Johnson saw the future success of the country. "The protection afforded to manufacturers has not been greater than their importance demands."<sup>101</sup> Protection of manufacturing and preservation of the Union ran hand in hand; only through "national prosperity" could the nation remain together, and only through manufacturing could there be a "national prosperity." "That nation had never existed, which had grown to power and opulence by means of agriculture alone."<sup>102</sup>

Johnson's biographer says of his opinions: "The Jeffersonian concern for state autonomy had impelled him to resist at several points the policy pressed by the Marshallians";<sup>103</sup> but when the commerce power was involved, Johnson went far beyond the nationalistic limits of both Marshall and Story.

The best description of Johnson's character was made by one of his friends, who was at the time eulogizing the judge:

He was not perfect—he may have been at times too strenuous in the maintenance of the opinions he had adopted, and unwilling sufficiently to allow that others, who were investigating the same subject, and sought for truth equally with himself, could come to different conclusions without the imputation of weakness or obstinacy.<sup>104</sup>

This was William Johnson, a man of strong convictions, a man blinded by obsessions, and a man of determined independence.

<sup>101</sup> *Ibid.*, 28, 98.

<sup>102</sup> *Ibid.*, 27, 94.

<sup>103</sup> Morgan, *Johnson*, 253.

<sup>104</sup> Remarks of Rev. John Bachman in the tributes of the Charleston Literary and Philosophical Society, *Courier*, August 18, 1834.