JEREMIAH S. BLACK

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Black had succeeded Cass; Stanton had succeeded Black; Thomas, of Maryland, had succeeded Howell Cobb. On the twenty-sixth of December, the South Carolina Commissioners had arrived in Washington. The city was full of southern sympathizers. While we know little of what was said in the Cabinet, we know chiefly from Black himself through his son, his biographer, that the Cabinet was divided as to the question of reinforcing Anderson but that the President, Judge Black, and Stanton stood firmly for adequate protection of federal property and federal offices. The Cabinet sessions, in so far as any procedure was agreed upon, acted on the principles which Black, as Attorney-General, had laid down for the President's direction.[23]

Late in the evening of Saturday, the twenty-ninth of December, 1860, the President laid before the Cabinet the result of his own reflections in the form of an answer to the South Carolina Commissioners. It was such a paper as none of them expected to see. Secretaries Black, Holt (Secretary of War in the reorganized Cabinet) and Stanton objected that the paper conceded too much to South Carolina; Thomas and Thompson (Secretary of the Interior, from Mississippi), thought that the tone of the paper was hostile to South Carolina's claim and would make the immediate outbreak of civil war inevitable. Isaac Toucey, of Connecticut, Secretary of the Navy, alone of the

[23] For details see "Essays, &c.," pages 9–24.

Cabinet sustained the President. It was this paper concerning which Black next morning in communication with his colleagues announced that as it expressed the opinion of the President, and the President's mind was fixed beyond hope of change, disapproving the paper, he had determined to resign. When Toucey informed Buchanan of Black's decision, the President immediately sent for Judge Black, handed him the paper in question with the request that he strike out all objectionable matter. Immediately Black took the paper to Stanton's office and there himself wrote that famous "Memorandum" which Stanton copied as Black filled his sheets which transformed an executive document from what later critics have been pleased to call "a disloyal paper" into a vigorous declaration of a national character. Judge Black repudiated the powers of the Commissioners or of the President to make any treaty or to enter into diplomatic relations. Any negotiation by the President with the Commissioners must be considered as impossible. The paper recognized a right in the Federal Government to "coerce" a State, a doctrine which Judge Black denied. He also denied that the President, Acting for the United States, was under any "compact" with South Carolina or any other State. The intimation in the President's paper that Major Anderson's behavior in removing from Fort Moultrie to Fort Sumter, or in doing any act in defense of the property and the offices of the United States, Judge Black now wrote "should be carefully avoided." "It is a strange assumption of right," wrote Judge Black, "on the part of that State (South Carolina) to say that our United States troops must remain in the weakest position they can find in the harbor. It is not a menace to South Carolina, of (to) Charleston, or any menace at all. It is simple self-defense." The Secretary, in conclusion, entreated the President to order reinforce-

ments and supplies at once for the federal soldiers in Charleston harbor, letting Major Anderson know "that his Government will not desert him." And he concluded—"If not, I can see nothing before us but disaster and ruin to the country."[24]

Stanton agreed with Black, an agreement as to ideas which led two years later to Lincoln's appointment of Stanton as Secretary of War. On January 11, 1861, Thomas resigned as Secretary of the Treasury. General John A. Dix of New York was appointed and thus a loyal Cabinet was completed.

It was a week later when Secretary Black wrote the letter which, if no other communication existed from his pen, would mark him as statesman and patriot. Stripping the letter of its mere partisanship, it discloses undoubtedly not only Judge Black's opinion at the time, but also that of President Buchanan. Writing from the State Department he says—"It undoubtedly would be a great party move as between Democrats and Black Republicans to let the latter have a civil war of their own making. It would be poetical as well as political justice to let them reap the whirlwind which must grow out of the storm they sowed. But can we avoid something? Is not the business altogether beyond party considerations? For South Carolina compels us to choose between the destruction of the Government and some kind of defense. They have smitten us on one cheek, shall we turn the other also? They have taken our coat, shall we give them our cloak also? The Gospel commands this in private affairs, but the rule is not understood, I think, as applying to public property held by a government in trust for its people. I am not in favor of war, but I cannot resist the conviction that when war is made against us a moderate self-defense is righteous and proper. Coercion—

[24] "Essays, &c.," pages 14–17; the language of the *Memorandum* carefully followed.

well, I would not care about coercing South Carolina if she would agree not to coerce us. But she kicks, cuffs, abuses, spits upon us, commits all kinds of outrages against our rights, and then cries out that she is coerced if we propose to hide our diminished heads under a shelter which may protect us a little better for the future. I agree with you that we ought not to make a civil war. Do you agree with me in the opinion that we are bound to defend ourselves from an unjust and illegal attack?"[25]

Judge Black always denied the right of secession; the southern members of Buchanan's Cabinet asserted the right. The President also denied the right, but his convictions (from which he never swerved) were buried in a mass of communications as to slavery, State sovereignty, abolitionism, and transference of initiative to preserve the Union, to Congress. Public opinion as revealed in the election of Lincoln and by the later course of the civil war fixed upon Buchanan the seal of weakness, timidity, secret sympathy with "the lost cause," and that unforgivable stubbornness in his high office which prevented him from preventing the war. This harsh judgment is not the judgment of impartial history. While time has confirmed the opinion of the Supreme Court of the United States that "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national Government"; that "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States,"[26] a doctrine four-square with Judge Black's opinion, time has also confirmed the opinion of a respectable portion of posterity that

President Buchanan could not have prevented the civil war.

However, the question remains: did President Buchanan do all in his power to prevent that war? Was what he did, of a preventive nature, in the performance of his duties, in any degree due to the counsel, the services of Judge Black? The larger number of members of his Cabinet labored, and however secretly or openly, labored to disrupt the Union. Judge Black, as Attorney-General and as Secretary of State, labored ceaselessly and not in vain to protect, to defend and to preserve the Union. He and his colleagues of like mind sustained Buchanan in all his loyal efforts and undoubtedly contributed to keep him in a loyal path. It is true that Black, as Attorney-General, in direct reply to Buchanan's request, advised him "to go straight forward in the path he had trodden." Evidently Judge Black believed to his dying day that James Buchanan was a loyal, patriotic man. In this opinion history sustains Judge Black. It was shortly after the date of Black's letter to Parsons that the Secretary was nominated by the President as an Associate Justice of the Supreme Court of the United States, to fill the vacancy caused by the death of Mr. Justice Daniels of Virginia. The Senate adjourned, taking no action on the nomination. Secretary Black's decisions as Chief Justice of Pennsylvania[27] warrant the opinion that the Supreme Court of the United States would have been strengthened by the confirmation.

The Secretary of State of the United States is, to use the title of John Jay under the Confederation, Secretary of Foreign Affairs. During the short tenure of the office, Judge Black was concerned chiefly with domestic affairs. The burden of his work was to

[27] 4 Harris (16 Pa.) to 5 Casey (29 Pa.).

preserve the Union. His opinions as Attorney-General were of this nature. This lofty service also distinguishes the communications he sent out touching on our foreign relations. Thus to Lord Lyons he wrote early in 1861—"In reply to an inquiry made by the British minister on the thirty-first of December, 1860, as to what position the United States proposed to take with regard to the action of the authorities of South Carolina in assuming to regulate foreign commerce and exact duties on imports at Charleston, the Department of State said that the payment of duties to a person who was not an officer of the United States and authorized by its laws to receive them would be a mispayment, and that the clearance which might be obtained contrary to those laws could not be regarded as valid by the federal authorities, but that the question whether the state of things existing at Charleston would or would not be regarded as a sufficient reason for not exacting the penalties which might be incurred by British subjects was a question which must be reserved till it arose practically. Each case, said the Department, would no doubt have its own peculiarities, and no general assurance could be given concerning the intentions of the President. "Any uncertainty on such a subject is in itself," said the Department, "an evil which ought to be removed if it could be. But the reliance which your lordship cannot but feel on the justice of this Government will no doubt quiet all apprehension of ultimate wrong to British subjects, if such wrong can possibly be avoided."[28]

The case of the Confederate States was presented by Judge Black in a circular from the State Department sent out February 28, following—"You are of course aware that the election last November resulted in the choice of Mr. Abraham Lincoln; that he was the

[28] Secretary Black to Lord Lyons, January 10, 1861. Ms. Notes to Great Britain, VIII., 383. Moore, "International Law Digest," VI., 995.

choice of the Republican or Anti-slavery party; that the preceding discussion had been confined almost entirely to topics connected, directly or indirectly, with the subject of negro slavery; that every northern State cast its whole electoral vote (except three in New Jersey) for Mr. Lincoln, while in the whole South the popular sentiment against him was almost absolutely universal. Some of the southern States, immediately after the election, took measures for separating themselves from the Union, and others soon followed their example. Conventions have been called in South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana and Texas, and those Conventions, in all except the last-named State, have passed ordinances declaring their secession from the Federal Government. A Congress, composed of representatives from the six first-named States, has been assembled for some time at Montgomery, Ala. (bama). By this body, a provisional constitution has been framed for what it styles the "Confederated States of America."[29]

"It is not impossible that persons claiming to represent the States which have thus attempted to throw off their federal obligations will seek a recognition of their independence by the Emperor of Russia. In the event of such an effort being made, you are expected by the President to use such means as may in your judgment be proper and necessary.

The reasons set forth in the President's message at the opening of the present session of Congress in support of his opinion that the States have no constitutional power to secede from the Union are still unanswered and are believed to be unanswerable. The grounds upon which they have attempted to justify the revolutionary act of severing the bonds which connect them with their sister States are regarded as wholly insufficient. This Government has not relin-

quished its constitutional jurisdiction within the territory of those States, and does not desire to do so.

It must be very evident that it is the right of this Government to ask of all foreign powers that the latter shall take no steps which may tend to encourage the revolutionary movement of the seceding States, or increase the danger of disaffection in those which still remain loyal. The President feels assured that the Government of the Emperor will not do anything in these affairs inconsistent with the friendship which this Government has always heretofore experienced from him and his ancestors. If the independence of the 'Confederated States' should be acknowledged by the great powers of Europe, it would tend to disturb the friendly relations, diplomatic and commercial, now existing between those powers and the United States. All these are consequences which the court of the Emperor will not fail to see are adverse to the interests of Russia as well as to those of this country.''[30]

This notice to the powers was endorsed by Secretary Seward, a few days after the inauguration of Lincoln. ''My predecessor,'' so wrote Seward, ''in his dispatch, No. 10, addressed to you on the twenty-eighth of February last, instructed you to use all proper and necessary measures to prevent the success of efforts which may be made by persons claiming to represent those States of this Union, in whose name a provisional Government has been announced, to procure a recognition of their independence by the Government of Spain. I am now instructed by the President of the United States to inform you that, having assumed the administration of the Government in pursuance of an unquestioned election and of the directions of the Constitution, he renews the injunction which I have men-

[30] Secretary of State Black to all the ministers of the United States, Circular, February 28, 1861. Diplomatic Correspondence, 1861, 31; Moore, "International Law Digest," I., pp. 103, 104.

tioned, and relies upon the exercise of the greatest possible diligence and fidelity on your part to counteract and prevent the designs of those who would invoke foreign intervention to embarrass or overthrow the Republic.''[31]

So Seward, voicing the mind of Lincoln, gave notice to the nations of the integrity of the United States, endorsing, corroborating Judge Black's notice already given. Had Black's ''Circular'' lacked national character, would Lincoln have endorsed it? Unfortunately, and without historical foundation, there lingers an idea more or less popular that the Lincoln administration repudiated the Buchanan. This is as false as another idea held by many people that President Buchanan, after retiring from office, failed to support the Lincoln administration. An aged man, as was Buchanan, could not do much toward such support, but the evidence is overwhelming that his loyalty never wavered.[32]

It may be said that Lincoln appreciated Stanton, Buchanan's Attorney-General, and that Seward walked in the foot-steps of Black. Lincoln himself held the same legal views as to national sovereignty as Buchanan and Black; he differed in his political and ethical views. Possibly no unimportant element in the careers of the two Presidents is mentioned when history reminds us that Buchanan lost, but Lincoln gained and held public opinion.

Today, more than sixty years after the issues which confronted President Buchanan and his Secretary of State, those issues are seen in perspective. Tragical

[31] Secretary Seward, Circular to all the ministers of the United States, March 9, 1861. Diplomatic Correspondence, 1861, 32; Moore, "International Law Digest," I., 104.

[32] This brought out in Buchanan's own book, and by John Bassett Moore's "The Works of James Buchanan, Comprising his Speeches, State Papers, and Private Correspondence," Philadelphia, 1908–10. Both Curtis's "Life of Buchanan" (eulogistic), and Konkel's recent biography and edition of Buchanan's writings sustain and assertion.

as were the issues of that day, we can interpret them now quite without passion. Should the Stars and Stripes or a State flag wave over federal property? Should the United States or a State impose and collect duties, imposts and excises? Should the United States, by military force, if necessary, execute federal law? Are the States respectively sovereign? Can a President of the United States enter into diplomatic relations with a State in the Union? We know that the long struggle for sovereignty between the States and the United States at last culminated in civil war. A correct interpretation of American history warrants the conclusion that that war was, as Seward said in his great speech on the Compromise of 1850, an "irrepressible conflict."

The weakness of Buchanan, the fatal weakness from which even history cannot rescue him, lay in his conviction that the President of the United States, unless authorized by Congress, has no power to protect and defend the Constitution of the United States and all that it implies. With this notion Judge Black had no sympathy whatever. At various times, in various "opinions" he left no man in doubt as to his national ideas. While emancipation was involved in this idea, emancipation was not an issue during Buchanan's administration, which means during the years Judge Black was in Buchanan's Cabinet. The Thirteenth, Fourteenth and Fifteenth Amendments were not issued during those years. The names of Jackson and Webster are shouted to the skies, but neither of these men believed in the abolition of slavery.

The supreme question that confronted both Buchanan and Lincoln was the preservation of the Union. Jackson said it must be preserved; Buchanan said Congress alone could preserve it; radicals of the type of Wendell Phillips said it was not worth preserving; Lincoln said he would preserve it with slavery or with-

out slavery, by retaining some persons in slavery, by emancipating some persons from slavery; his single, supreme purpose was to preserve the Union.

Eliminate less important matter and this supreme purpose was the supereme purpose of Judge Black. His partisan politics here cut no figure. He was from first to last a Union man. He was a man intensely positive and ever nationalistic. If it be said that he took the strictly legalistic view of public issues, building his conclusions on the rights of property and persons, no one can deny that his foundation was secure. Every American statesman, every statesman who has lived since the protection of life and property has been recognized as the supreme care of every government, stands with Black. When Judge Black was counselling President Buchanan, the African slave in America was personal property. "The right of property is before and higher than any constitutional sanction" declared the Kentucky constitution of 1850. The Constitution of the United States, the Constitution of each State, and laws, State and federal, made like declarations. Judicial decisions, both Federal and State, sustained these laws. Public opinion at last changed all these constitutions, laws and judicial decisions, but not in the days when Judge Black was Attorney-General or Secretary of State of the United States. The preservation of the Union meant the abolition of slavery. It also meant the extension of the suffrage as today extended. History cannot criticise Judge Black or Daniel Webster for not advocating female suffrage or the Eighteenth Amendment. It must credit him for what he advocated and what he did.

At the age of fifty-one Judge Black left office with "clean hands and empty." As it were, he began life anew. Removing to the city of York in Pennsylvania, he resumed the practice of his profession. In 1861 he

was appointed Reporter of the decisions of the Court to which as an Associate-Justice President Buchanan had nominated him, the Senate declining to confirm the nomination. Two volumes, bearing his name, record his work as Reporter. But his practice began to grow by leaps and bounds and he resigned the reportorial office. His work as Attorney-General of the United States had brought him into touch with vast interests. Doubtless during his tenure of that office his greatest work in court was in the well-known California cases, involving many millions of dollars; fraudulent claims which Black exposed. Had he inclined to be mercenary, he might easily have gathered a fortune, but having little or no taste for money, he was satisfied with securing a competency and refused to store away the golden shower. He was of counsel in important cases, of which those involving "high politics" were the impeachment of President Johnson, in which he appeared for the President, and the Tilden-Hayes case as it came before the Electoral Commission of 1877, he appearing for Tilden. In 1872 he was a member of the Pennsylvania Constitutional Convention, no delegate surpassing him in examination of the issues involved. In his later years he was identified with great cases involving "common carriers," his last forensic arguments coming just before that immense body of cases of a more or less corporate nature, which distinguish our judicial annals for the last forty years. Many were his occasional addresses investigating the principles of government, the rights of persons and property, political discussions, as his celebrated address on "Political Preaching." His controversial communications were numerous, as witness his "Letters" to Henry Wilson, to Garfield, and particularly on "The Third Term (of Grant): Reasons Against It." His arguments in several of the cases in which he was of counsel before the Su-

preme Court of the United States remain models of their kind.[33]

Judge Black died at his home, known as "Brockie" near York, August 19, 1883, in his 73d year. Fearing nothing in life, he feared nothing in dying. He had his life long "walked humbly with his God." A Christian to the end, he said, shortly before his death: "My business on the other side is well settled, on this side it is still somewhat at loose ends. The last book in his hands was the second volume of "Curtis's "Life" of his old friend, President Buchanan, and the pages were open at the account of Buchanan's death. He never read the later pages which concerned himself. Shortly before his death he rose from his bed and with difficulty walking out upon his broad veranda, he gazed silently upon the noble vista before him. Jefferson Davis in the Philadelphia *Times* had made a bitter assault on Black, rearguing for secession. It was a venomous attack. Calling for pencil and paper the dying man made answer; an answer which was an echo of his loyal past. "My original sin against him (Davis)," so his pencil wrote, "consisted in utterly rejecting the doctrine that a State had the right to secede and dismember the Union whenever its political leaders chose to take a huff at the result of a presidential election, or lose their temper by falsely anticipating some maladministration of federal powers. The States have rights carefully reserved and as sacred as the life, liberty, and property of a private citizen, but to say that among these rights is that of expelling from its territory the officers of the General Government,

[33] His miscellaneous addresses, eulogies on his character, some of his political essays and letters, and his forensic utterances in ten of the important cases in which he appeared are given in full in "Essays and Speeches" already cited. This collection by his distinguished son is not well edited. Its "Biographical Sketch" is scanty. The book aims, however, to be merely a book of "selections." It remains, even though incomplete, the source-book as to Judge Black.

resisting the execution of its laws, and abolishing its Constitution, is to utter an absurdity too absolutely gross to be entertained by any man who has bestowed one rational look upon the subject. This is a conclusion too simple to allow of argumentation either *pro* or *con*. It is not with me a matter of mere belief. I know it as every man knows how many fingers he has to his hand as soon as he counts them. If my opinions, carefully formed and faithfully adhered to, were in conflict with his (Davis's) interests, wishes, or feeling, I cannot help it. Nobody desired more ardently than I did that he should look for peace, safety, and justice where alone he could find them, inside of the Union and under the shelter of the Constitution. But in spite of all entreaties, arguments, and demonstrations of the truth, he (Davis) would go out and drag his people out with him into secession. He proudly put himself at the head of the movement to dismember the nation; he wrecked his cause, brought hideous ruin upon his followers, and left himself without an object in life except to throw the blame of his disasters upon somebody else."

"Ill-weaved ambition, how much art thou shrunk!"[34] Had Judge Black lived seven years longer, reaching the year when Jefferson Davis died, he could have read, in the new constitution of Mississippi, Davis's native State, in the Bill of Rights of that Constitution, this clause—"The right to withdraw from the Federal Union on account of any real or supposed grievance shall never be assumed by this State, nor shall any law be passed in derogation of the paramount allegiance of the citizens of this State to the Government of the United States."[35]

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[34] "Essays, &c.," pp. 31, 32 and 33.

[35] Constitution of Mississippi, 1890; Bill of Rights, Section 7. Thorpe "Charters and Constitutions," Volume IV, p. 2091.