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Letter from Hon. W. A. Graham.

From the Raleigh Sentinel.

THE TEST OATH,

As a Qualification for a Seat in Congress, or to hold Office under the Government of the United States.

It has now become a question of practical interest, what is to be the operation and effect of an Act of Congress of July 2d, 1862, which declares that a new oath, one heretofore unknown in our history, shall be exacted of every person *elected* or *appointed* to any office of honor or profit under the government of the United States (excepting the President) in the civil, military and naval departments, before entering upon the duties or receiving the emoluments of such office.

The oath, so far as regards its new features, is in the following words:

"I, —— ——, do solemnly swear, that I have never voluntarily borne arms against the United States, since I have been a citizen thereof, that I have voluntarily given no aid, countenance, counsel or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted nor attempted to exercise the functions of any office whatever under any authority, or pretended authority in hostility to the United States; that I have yielded a voluntary support to any pretended Government, authority, power or Constitution within the United States hostile or inimical thereto," &c.

I assume, what I think cannot be denied, that North Carolina was the least hostile to the government of the United States of all the States engaged in the late war. Yet if the provisions of this act be literally interpreted and enforced, it will operate a disfranchisement of four-fifths of her voting population to the extent of excluding them from seats in Congress, or holding any, the least Federal office. She contributed to the Confederate armies one hundred and twenty thousand men. Of these ninety odd thousand were volunteers. No casuistry, it is presumed, could justify any of these in taking this oath; and of the remainder there are doubtless not a few, who, though subjects of involuntary conscription, having done their duty like men, would not feel safe in making the denials embraced in its provisions.

To the survivors among these men, the very flower of her chivalry, whose suffrages must control the destinies of the State for at least one generation, may be added hundreds, if not thousands, of others, members of her Convention in 1861, of the Legislatures of 1860, '62, '64, of three successive Southern Congresses and other employees and private citizens, included in the same condemnation. It may reasonably be supposed that a no less extensive proscription will attend the enforcement of this act upon the people of other States.

When consequences so highly penal and derogatory are thus to be visited on whole communities, when obviously the remnant excepted may not in many localities afford persons fitted for representatives in Congress or to perform usefully official functions, when thousands of individuals who never thought of canvassing for office or preferment will feel themselves aggrieved in being made subjects of exclusion, it becomes a matter of serious concern whether the policy of this act should not be abandoned by a repeal, and if not, whether it can bear the test of constitutional scrutiny. Mr. Botts and Gov. Pierpont of Virginia, have in published letters each expressed the belief that Congress will adhere to this law, and that no Senator or Representative will be admitted unless he can take the oath, but that all others will be excluded. What sources of information are in the possession of these distinguished gentlemen, in reference to the probable action of a public body whose members have never yet convened, or whether they speak merely from conjecture, we are not advised. The President of the United States in response to an inquiry on the same topic replies, through his Attorney General, that he has no more means of knowing what Congress may do in regard to that oath than any other citizen, but it is his earnest wish that loyal and true men, to whom no objection can be made, may be elected to Congress. Uniting most cordially in this desire of the President, and adopting his appropriate mode of dealing with this grave question which has been as yet but little discussed, I pretend not to predict with confidence what action Congress may take in regard to it. I can only judge of what they will do from what I believe in reason and justice they ought to do. I cannot suppose that after the surrender of the Southern armies, the frank and manly acknowledgement of defeat and of the failure of the revolution, and after the steps that have been taken to restore not only constitutional but kind relations between the States lately in rebellion and the Federal government, that any feeling of vindictiveness or revenge will sway the determinations of either branch of Congress.

If then it can be demonstrated that the act under consideration has served its purpose, is no longer necessary or just, and is withal in palpable conflict with the provisions of the Constitution, I assume that there will be no hesitation in its repeal or abandonment. There were doubtless many acts of Congress and other measures adopted by each of the belligerents while the war raged, to which the Latin adage may be applied, *Furor ministrat arma*—measures adopted in the heat of revolutionary phrensy as means of aggressive hostility, and supposed safety and necessity, for the time being, but having no view to a state of peace. Of this class was the act before us. It bears date in July, 1862, when there was no member sitting or expected to take a seat in either House from all the Southern States; immediately after the defeat of the expedition of General McClellan in a seven days battle in the vicinity of Richmond; at a period the most disastrous to the arms of the United States of the whole war; when the most stringent appliances may well have been deemed indispensable to guard against treachery in public officers both of the army and navy, and even in the civil service; and it cannot be reasonably inferred that it was designed to be applied after the conclusion of peace to persons who had returned to their loyalty and duty, and had sealed their fidelity with a new oath of allegiance or amnesty as a punishment for their offense for taking part in the war. This would be to convert a precautionary and preventive expedient of war into a new, unusual and severe punishment in time of peace; and that in a case where the condemnation is without trial, and the party is compelled to give evidence against himself. The act according to the exclusive operation proposed to be given to it, is nothing more or less than a decree of disability ever thereafter to hold office under the government of the United States, against any citizen, 1st, who ever voluntarily bore arms against the United States; 2d, who has voluntarily given aid, countenance, counsel or encouragement to persons in armed hostility thereto; 3rd, who ever sought, accepted or attempted to exercise the functions of any office whatever under any authority or pretended authority in hostility to the United States; 4th, who has yielded a voluntary support to any pretended government, authority, power or constitution within the United States hostile or inimical thereto; and the oath is tendered only as a means of compelling the party to discover his own guilt by a refusal—a guilt whose stain cannot be washed out by a Presidential pardon, which, according to the constitution and the law, cleanses the offender in all cases, except where he has been convicted by impeachment. An argument is hardly necessary to prove that exclusion from the right to hold office is a punishment under our system of government, since "removal from office and disqualification to hold and enjoy any office of honor, trust or profit," is the penalty prescribed in the great offences triable by impeachment. Now I cannot believe, when this act is viewed in its true light, and it is perceived that the policy which dictated it has passed away, that Congress or any other authority of the government will fail to yield its assent to so obvious a maxim as that when the reason of the law ceases, the law itself should cease to operate; or that there will be any serious attempt to give to a purely precautionary and temporary measure, a punitory and permanent effect. To this course of reasoning there will be a more ready assent when it is remembered how sweeping and indiscriminate will be the proscription entailed by the contrary decision, embracing nearly all of the talent, intelligence, energy, spirit and manhood in whole districts of country; and this among States and people, many of whom never denied the true theory of the constitution, that it creates a government not a mere compact, were opposed to secession in the outset, and are of undoubted loyalty now; but became involved in the support of the war by necessities which they believed themselves unable to control, but being in, bore themselves as brave soldiers and true men.

Nor can I assent to the recommendation of Messrs. Botts and Pierpont, endorsed by some of the papers of this State, that we should take it for granted that a majority of Congress will insist on a liberal enforcement of this act, and avoid the discussion of the question by the election of representatives who can take the oath without a violation of consience; no matter how contrary to the popular choice or unfit for representative duties. Representative government implies fit representation. The ship of State never sails under jury-masts. Every representative no matter from what State or district is in the halls of Congress the peer of every other; and to be useful and respectable—each should feel and know that he is there by no spurious or doubtful title, and in sympathy and accord with a real constituency according to the course of the Constitution. That remains unchanged by the war.

The war was made for its conservation; and its line and plummet should determine every step in our renewed union. A wise policy also suggests, that it is no time to weaken the public counsels when measures are to be grappled with as momentous as any in our history. Is it expected that in the next two or six years (these are the terms of Congressional service) and for an indefinite period beyond, that the whole legislation of Congress is to be shaped by the leading minds of one section, while those of the other are debarred from consultation, and the places which by the popular confidence they would fill, are occupied by members who are only present "to see proceedings?" or is it not desirable that every section should contribute to the common stock of wisdom and knowledge, for the interests and honor of a common country?

The Southern members all told, are but about one-fourth of the House of Representatives, and after the purgatorial process through which those States are now being passed as a consequence of the war, there is little danger of the return of even individual members hostile to the Constitution and the Union and a true reconstitement in feeling and intercourse. A wise government should never forget that magnanimity in victory is true policy; that there is no surer method of making men your enemies than to treat them as if you considered them such; and that when a quarrel is really settled, mutual confidence and kindness afford the only assurance of lasting harmony.

I pass over as not worthy of refutation the remark so netimes heard, that you are under the power of the North, and must submit to whatever appears to be demanded, or your noncompliance will be considered as contumacy. This is to suppose that other motives than reason, justice and kindness will sway the judgment of a majority of Congress, in which I do not agree.

But I further submit that either House of Congress will decline an enforcement of this law when they come to test it by the constitution. This requires as an oath of fidelity to the government "That Senators and Representatives and members of the several State Legislatures, and all other Executive and Judicial officers both of the United States and of the several States, shall be bound by oath or affirmation to support the constitution." And the question at once presents itself whether any other oath of fidelity can be required according to the maxim, *expressum facit cessare tacitum*. The oath being thus prescribed by the constitution, can Congress add to it or dispense with it or modify it? An eminent Judge in a judicial opinion declares that "sometimes affirmative words necessarily imply a negative of what is not affirmed as strongly as if expressed." The constitution of North Carolina directs the Judges of the Supreme Court to be elected by the Legislature. Upon the establishment of that court in 1818, the law provided that in every case where a Judge of the court had been concerned, as counsel in any cause previous to his election, the Governor should designate some Judge of the Superior Courts to sit in his stead in such cause. But after the lapse of one or two terms in which the law was allowed operation, the objection was taken and sustained, that the affirmative prescription of a mode of appointment in the constitution negatived any other mode of appointment.

Test oaths are a common resort in revolutions. The constitution of South Carolina in the days of her Pinkneys and Rutledges, had required that any person chosen or appointed to office before entering on its duties should take oath affirming that he would, "to the best of his abilities discharge the duties thereof, and preserve, protect and defend the constitution of this State and of the United States."

Her nullification Convention in 1833, adopted the theory "that the allegiance of the citizens of this State, while they continue such, is due to the said State, and obedience only and not allegiance is due by them to any other power or authority to whom a control over them has been delegated by the said State," and an ordinance empowered the legislature to provide for the administration of oaths to the citizens and officers of the State, "binding them to the observance of such allegiance, and abjuring all other allegiance." And the Legislature, to carry out the theory, enacted, "that every officer of militia hereafter elected, before he enters on the duties of his office shall, in addition to the oaths now required by law, take and subscribe the following oath: I —— —— do swear that I will be faithful, and true allegiance bear to the State of South Carolina." Mr. McCrady was elected a Lieutenant of militia, and being refused a commission unless he would take this oath, brought his writ of *mandamus* to compel its delivery, because the requirement of the oath was unconstitutional and void—being incompatible with the constitution of the State above recited, as well as with that of the United States. And Judges Johnson and O'Neal, (Union men, Harper, nullifier, dissenting,) held with the applicant on both points. The act of the Legislature was declared void upon the ground that it undertook to add to the oath of fidelity to the government of the State prescribed by the constitution.

This the Legislature could not do, because the prescription in the organic law of an oath of fidelity to government was equivalent to forbidding any other oath of that nature, or of adding to or varying it: though the Legislature might and usually did, in addition to this, require an oath for the faithful performance of the duties of office. They also decided that the ordinance of the Convention (it being a body of limited powers called only to act on the revenue laws of the United States,) gave no authority to the Legislature to exact the oath refused by the applicant. So that the commission was directed to be issued to McCrady without taking the oath imposed by the law. Can human ingenuity discover any difference between this case and that presented under the law of Congress? Can Congress add to or detract from the oath to support the constitution of the United States any more than a State Legislature in regard to that prescribed by the constitution of the State?

The Legislature of Virginia by act once required her public functionaries, extending to advocates at the bar, to take an oath that they had not engaged and would not engage in any duel. Her courts proceed-