



Lincoln Lore

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STABBING THE CONSTITUTION

On October 3, 1861, Secretary of State William H. Seward, then in charge of arrests of suspected and disloyal persons, sent a letter to General John A. Dix at Fort McHenry in Baltimore about a judge named Richard Bennett Carmichael. A complaint sent from Maryland to the Secretary of War had been referred, in turn, to Seward, and it must have been impressive, for Seward told Dix that "that functionary should be arrested even in his court if need be and sent to Fort Lafayette." He sent along to the general a printed memorial addressed to the Maryland legislature and signed by Carmichael. Dix said that the memorial expressed "the most disloyal sentiments."

But General Dix did nothing — at first. A moderate and learned man, John Adams Dix, sixty-three years old and a veteran of the War of 1812, was deemed too old for battlefield service. But he was too valuable, particularly as an antislavery Democrat who stood fiercely by the Union in its worst hour, to be overlooked. He had served briefly as Democratic President James Buchanan's Secretary of the Treasury, being credited with helping to stiffen the spine of that administration as it faced secession. While in that office, he ordered a department official on January 29, 1861, to seize a revenue cutter in New Orleans and included words which made him an early war hero without firing a shot: "If anyone attempts to haul down the American flag, shoot him on the spot."

Dix was as well suited as any man in the Union for command in the difficult Department of Maryland. He could be trusted never to turn a blind eye to the development of a disunion movement in that volatile slave state, and yet he was not a Republican. True to form, when given the letter about Judge Carmichael, Dix, rather than have him arrested immediately, sought more information. Carmichael was a circuit judge in Kent, Queen Anne, Caroline, and Talbot Counties, on the Eastern Shore of Maryland, across Chesapeake Bay from Annapolis and the more populous and accessible part of the state.

For a time Dix did nothing about Carmichael. Then, on February 10, 1862, he wrote Maryland Governor Augustus W. Bradford the following letter:

Hon. R. B. Carmichael has for many months been one of the prime movers of disaffection and disloyalty on the Eastern Shore of Maryland. He was the author of a treasonable memorial to the legislature, published and circulated under his own signature while holding a place on the bench. His charges to the grand juries in his district have been inflammatory and insulting to the Federal Government. He has caused military officers to be indicted and has charged grand juries that it was their duty to find bills against all persons who had given information on which

arrests had been made by order of the Government. Under his instructions Brigadier-General Lockwood — whose conduct has been marked by the most prudent and discreet forbearance in the execution of my orders which have been by many regarded as too lenient — was subjected to the indignity of an indictment. This man is a dishonor to the bench. He is a dishonor to the loyal State of Maryland. I have forbore to take any measures in regard to him by the advice of gentlemen on the Eastern Shore; but I believe the feeling is now nearly unanimous that his disloyal and vindictive conduct has been endured too long. It was proposed months ago to arrest him and send him to Fort Lafayette. Though he deserves it I prefer to have him sent into the Confederate States to be turned over to the insurgents with whom he sympathizes and whose cause he is doing all in his power to promote. He is unworthy of the protection of a Government which he is laboring to subvert and he ought not to enjoy its privileges. I think he should go where he will find congenial associations. In this matter I should be glad to know Your Excellency's views.

Bradford was a staunchly Unionist governor, but he was always wary of Federal military interference in Maryland's



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FIGURE 1. John A. Dix.

political life. Apparently, he wanted neither to endorse nor oppose this move in the Carmichael case and failed to respond. Dix still did nothing.

Carmichael remained a problem in the eyes of military authorities, however. When he held the spring term of his circuit courts in 1862, he continued the practice alluded to in Dix's letter of charging his grand juries with responsibility to bring presentments against military authorities who illegally arrested Maryland citizens and against the Maryland citizens who aided the allegedly illegal arrests by informing the military authorities of disloyal acts. The aggressive nature of the judge's charges should be recognized, for a presentment is a grand jury statement of an offense based on their own knowledge and not on what is laid before them in a bill of indictment.

When Henry H. Goldsborough, then president of the Maryland Senate and later the head of the state constitutional convention which would vote to abolish slavery in Maryland, was so indicted with a trial set for May, serious trouble loomed. Several officers of the Second Delaware Regiment, previously charged by a Carmichael grand jury but never arrested because they left the county in question, were subpoenaed as witnesses and were, therefore, threatened with arrest if they appeared in the county for the May trial.

The inevitable arrest could hardly have proved messier. Dix, for some unaccountable reason, now decided to honor the dictates of Seward's letter of the previous autumn, though the Secretary of State had not been in charge of internal security for over three months, and make the arrest "in Court in order that the proceeding might be the more marked." Marked, it was. When Baltimore's Deputy Provost Marshal and four policemen came to the court in Easton, Carmichael refused to recognize their authority and a scuffle ensued in which Carmichael received what Dix characterized as "a superficial wound on the head." The judge's partisans said that he was "beaten and hacked, until he was brought senseless to the floor and drenched in his blood."

The arrest of such a man as Judge Carmichael was not likely to go unnoticed, though it is perhaps significant that it caused no demonstrations, riots, or social disturbances beyond the courtroom brawl at the moment of arrest. His cause was soon championed by Congressman John W. Crisfield and Senator James A. Pearce, both of Maryland. These influential politicians gained Lincoln's ear, and, in a meeting with the president, Pearce brought to his attention a printed copy of Judge Carmichael's charge to the grand jury, a document allegedly printed months ago in order to refute newspaper distortions of what Carmichael had been doing in his court. Here is the bulk of that document:

Having now, gentlemen, charged you generally of the duties of your high office, here I would dismiss you to your chamber, if my duty did not require me to invite your notice to acts of outrage and violence unusual in this quarter.

Through the public papers and otherwise, it has come to my knowledge, that violations of law have been committed by persons holding themselves above the law, which, by tacit accord, for some reason have as yet escaped the cognizance of the authorities. Violent and dangerous injuries have been committed, upon your citizens, whilst the process of law has been forbidden to reach the offender. Arrests have been made, utterly groundless as it turned out; but whether with cause or not, by persons having no legal competency to make arrests, and without "warrant of law," or process from legal authority. A squad of soldiers, with no pretense of authority but their arms, it is said, have invaded the homes of your fellow citizens, and dragged them to their camp. There they have been detained as long as it suited the pleasure of their captors.

These are the cases to which your attention is directed — now a word about the law. And but for the very peculiar state of affairs, I should be content to leave you to the counsels of the State. But it belongs to every department to bear its

share of duty in the administration of the law. Yours is imperative, mine is not less so.

Is there one in your panel here, where the law has been held supreme; where, twice in every year, from time immemorial, its ministrations have been conducted, who does not know that the facts stated, constitute offence against the law?

I have told you that your duties extended to every case of public wrong. The mandate of your solemn obligation requires that you make "true presentment of all such matters as shall come to your knowledge," and if all, then there is no exception, and your cognizance must be exercised over the cases mentioned, unless you find some dispensing power, of which I have found no mention in the law.

Offences are the acts of persons. Every person, public or private, high or low, is subject to the visitation of the law whether invested with the robes of power, or covered with humble rags, all are alike amenable to its sanctions. That "the law only is supreme in this land," you have heard proclaimed by my honored predecessors, from this place, at every term. Heretofore I have so pronounced — my duty now still bids me to repeat the same to you, gentlemen, the Grand Inquest, its chosen ministers.

Violent and dangerous breaches of the public peace have occurred here aforesaid. With such offences you are not unfamiliar. They have received the prompt cognizance of your department, and have met the speedy and certain punishment which the law denounces upon all, without distinction. They are now not less obnoxious. In regard to these, I need not add another word.

But arbitrary, illegal, and false imprisonments have been unknown to our modern history. In a practice of more than six-and-twenty years at the bar, throughout this circuit, and a service of a few years upon the bench, I have never known such a case — either by criminal presentment, or by civil action. Almost every crime and misdemeanor, with this exception, have found persons wicked enough to commit them. It will strike you, how sacred the right of personal freedom has been held within this jurisdiction, for more than a quarter of a century. And, you will be assured, there is ample redress for its invasion — that it has been preserved thus inviolate. It is the hereditary right of American freemen. It was the right of their ancestors, before American Independence.

Before that day, a British subject could not be arrested, but under process of law. An arrest and detention of his person was unlawful, unless made under "process from the Courts, or under process from a legal officer, having the power to commit under his hand and seal."

This process was required to be founded on oath, disclosing the cause of arrest. Indeed, so jealously was the liberty of the subject guarded, that it was held, at a very early date, by a high authority, such as Coke, that a FELON could not be arrested upon the warrant of a Justice, until "after indictment actually found." This strictness, it is true, was combatted. But from that day, to the date of American Independence, the arrest of a British subject could not lawfully be made, unless under the authority of judicial or justicial warrant. Made otherwise, it was "false imprisonment;" an offence, which an eminent English jurist denominates "a heinous public crime," for which, he says, "the law demands public vengeance." Every arrest without "due process," was regarded arbitrary, illegal, and despotic, and such as the ministers, at the date of American Independence, dare not claim for the British crown. The assertion at this day, of such a power for the crown, would shake the British throne to its very foundation.

Exemption from the exercise of such power, is the birthright of Americans. They trace it back in the musty scrolls of the mother country for ages long past. It is inscribed, in letters of light, in the Constitution of Maryland. This right may yet be found in the Constitution of the United

States — the Supreme law — before which every person, potentate, and power in the United States must give place. There followed a long section in which the judge explained the original need for and quoted from the Bill of Rights. He continued:

The 4th Article forbids the arbitrary arrest and false imprisonment of the citizen. It guarantees to him the right heretofore enjoyed under the British Constitution. It prohibits "unreasonable seizure;" prohibits a warrant for seizure except upon "probable cause;" and requires such cause to be shown under the sanction of "oath or affirmation."

Here is no room for misconstruction. The supreme law is express in its terms. It is set up, by its declared terms, as a barrier to the *powers to be* in the State. It remains to us as a barrier against "the powers *that be*."

It has never been repealed, nor can be lawfully repealed, except by the power which created the Government, and in the manner provided by the Constitution itself.

This freedom from imprisonment "without due process," is absolute in the citizen, with only two exceptions. One, in which he is found in the very act of committing a felony, which obtains alike in England and this country; the other, where he has exchanged the citizen for the soldier — "in cases arising in the land or naval forces, or in the militia when in actual service in the time of war or public danger."

Your inquiries will enable you to ascertain if the arrests reported have, in fact, been made, and, if you find they have been made, whether they come under the excepted cases just stated.

If they have been made, and are not within the rule of these exceptions, then they are public wrongs. It is my duty so to charge you, and so I do charge you.

The circumstances in which we are, instruct me to remind you that your inquiries into, and action upon, this subject are to be conducted — unmoved by prejudice, unswerved by favor, and unawed by fear.

I cannot doubt that you will not be warped by prejudice on the one side, nor by favor on the other. As you are freemen, you are required to swear that you will not be restrained by fear in the discharge of your duty. A freeman should have no fear but of his God. The law is ordained by him. That commands what is right, and forbids what is wrong. It would be mockery, and I would not permit you to take the oath to act without fear, if there was an earthly power to restrain your free will.

There may be others, besides the persons who committed the violations of law heretofore considered, who may be obnoxious to presentment. If any of your citizens have instigated these groundless arrests, they are more guilty than those upon whom they have imposed. And it is hardly to be supposed that strangers amongst you would wantonly, and without suggestions by mischievous persons, molest and harass your people. Such persons are liable for conspiracy. But your diligent and impartial inquiry will ascertain the truth.

I am admonished, gentlemen, by former misconstructions, to say to you that my instructions to you are not moved by political or partisan bias.

If I have declared to you the law as I understand it, you will remember it is under the same solemn sanction by which you are bound. If there be a class or party of persons who are banded together to oppose or violate the laws, it is my duty to animadvert upon their acts. If the facts to which I have alluded are true, their obvious tendency is not only to disturb the peace of society, but to subvert the very foundations of the Government whose laws both you and myself are sworn to administer.

With the condition of our unhappy country, the evils which exist, their causes, and those who are to be blamed, I have nothing to say here. I have my own — a very strong opinion. Others entertain another opinion. They are entitled to their

own, and I am equally entitled to mine. I would not trespass upon my own sense of propriety by alluding to these subjects here. But I should feel myself, and should be regarded by others, unworthy this place, if I should fail to charge you of offences against law, be the offenders who they may.

It is important to see exactly what Abraham Lincoln saw — hence the lengthy quotation from Judge Carmichael's document. It hardly seems inflammatory and in fact may appear innocuous and a bit dull to the modern reader.

That is why Lincoln's response seems so remarkable. On June 26, 1862, he wrote Congressman Crisfield this letter:

I have been considering the appeal made by yourself, and Senator Pearce in behalf of Judge Carmichael. His charge to the Grand-Jury, was left with me by the Senator, and, on reading it, I must confess I was not very favorably impressed towards the Judge. The object of the charge, I understand, was to procure prosecutions, and punishment of some men for arresting, or doing violence to some secessionists — that is, the Judge was trying to help a little, by giving the protection of law to those who were endeavoring the overthrow the Supreme law — trying if he could find a safe place for certain men to stand on the constitution, whilst they should stab it in another place.

But possibly I am mistaken.

The Secretary of War and I have agreed that if the Judge will take the oath of allegiance, usually taken in such cases, he may be discharged. Please ascertain, and inform me whether he will do it.

This letter required quite a preface but it seems worth it, for here one catches an especially revealing glimpse of Lincoln's mind at work. He did not find the grand jury charge innocuous; on the contrary it left the president "not very favorably impressed."

And why not? Apparently, there was nothing wrong with the law expressed in the grand jury charge. That was innocuous enough, and that is why Carmichael had it printed and Senator Pearce left it with Lincoln. What was wrong in Lincoln's view was the practical purpose to which the sound law was being put — protecting "secessionists," as Lincoln termed it. In part, then, this letter typified Lincoln's approach to the law and the Constitution, as an almost totally practical matter. He was rarely impressed with the abstract majesty of the law, at least not in wartime when violence threatened to undo law.

And he was not, it seems, much impressed with judges as a class of abstract arbiters of justice. Back in the great debates of 1858, Lincoln had always called his opponent "Judge" Douglas. This was done partly in order not to have to call him "Senator Douglas," for Lincoln was vying for the same senate seat and he had no desire to imbue Douglas with natural senatorial aura, as though the Little Giant were even appropriately named for the job. There was also bitter political irony in the use of the judicial title, for Douglas had gained it long ago by helping to legislate a Democratic majority onto the Illinois Supreme Court by augmenting the size of the court and then taking one of the new judgeships himself.

And the Dred Scott decision of 1857 was a bete noire for all antislavery Republicans. When Lincoln saw a judge frustrating important goals in the Civil War, he saw red and not the advocacy system at work or the procedural safeguards of the American republican experiment.

Even so, President Lincoln could summon enough feeling of clemency to allow the judge to be set free if he would take the oath of allegiance. What ensued thereafter is not clear from the record, but Carmichael remained a prisoner in Fort Lafayette. On August 8, 1862, Pearce, now too ill to see Lincoln in Washington, wrote him to ask for Carmichael's release on grounds of declining health (severe rheumatism and not an adverse effect from the head wound was said to be the judge's problem). Nothing happened. Crisfield wrote Secretary of War Edwin M. Stanton on August 17, asking again that Carmichael be paroled. Nothing happened, save that the judge was transferred to Fort Delaware.



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FIGURE 2. Edwin M. Stanton.

In late September, the Commissioner to Superintendent Enrollment & Draft in Baltimore urged the release of the court clerk, arrested with Carmichael. This unfortunate bystander, the commissioner suggested, had done nothing except what Carmichael had ordered him to do and was not really disloyal — unlike Carmichael himself, whom he characterized as “the worst & most dangerous Rebel in Md.”

Early in October, Stanton arranged a parole of honor for Carmichael, which Stanton wrote out in his own hand. The judge’s signature below Stanton’s statement was preceded by these words: “By signing the above — no admission, by me, is to be implied — that there was just cause for my arrest. . . .” Apparently Carmichael remained in prison anyhow, for on November 3, 1862, his supporters tried a new tactic. The Comptroller of the Treasury for Maryland told Lincoln that the “revenues due to this State, from four of the Counties which comprise the Circuit of Judge Carmichael, have been largely withheld.” With the judge in prison, no courts were being held on that circuit and there was no way to reach delinquent taxpayers. This was a serious matter. Lincoln referred the letter to Attorney General Edward Bates, who, in turn, sent it to Stanton, as Bates had no authority over the prisoner.

Carmichael was released on December 4, 1862, before the January term of court began. When he wrote President Lincoln, asking for the cause of his arrest and by whom it had been ordered, he received no reply.

R. GERALD McMURTRY LECTURES AVAILABLE

Harold M. Hyman, *Lincoln’s Reconstruction: Neither Failure of Vision nor Vision of Failure*

Robert V. Bruce, *Lincoln and the Riddle of Death*

Herman Belz, *Lincoln and the Constitution: The Dictatorship Question Reconsidered*

James M. McPherson, *How Lincoln Won the War with Metaphors*

Frank E. Vandiver, *The Long Loom of Lincoln*

THE CASE OF JOHN N. EITEL (Conclusion)

But the merchants in Baltimore were partners in his guilt, and Secretary Stanton declared he would arrest every one of them and put them in prison until the affair could be straightened up. He turned the matter over to me then, as he was going to Fort Monroe for a few days. I immediately sent Assistant-Adjutant-General Lawrence to Baltimore with orders to see that all persons implicated were arrested. Lawrence telegraphed me, on October 16th, that the case would involve the arrest of two hundred citizens. I reported to the Secretary, but he was determined to go ahead. The next morning ninety-seven of the leading citizens of Baltimore were arrested, brought to Washington, and confined in Old Capitol Prison, principally in solitary cells. There was great satisfaction among the Union people of the town, but great indignation among Southern sympathizers. Presently a deputation from Baltimore came over to see President Lincoln. It was an outrage, they said; the gentlemen arrested were most respectable merchants and faultless citizens, and they demanded that they all be set instantly at liberty and damages paid them. Mr. Lincoln sent the deputation over to the War Department, and Mr. Stanton, who had returned by this time, sent for me. “All Baltimore is coming here,” he said. “Sit down and hear the discussion.”

They came in, the bank presidents and boss merchants of

Baltimore — there must have been at least fifty million dollars represented in the deputation — and sat down around the fire in the Secretary’s office. Presently they began to make their speeches, detailing the circumstances and the wickedness of this outrage. There was no ground for it, they said, no justification. After half a dozen of them had spoken, Mr. Stanton asked one after another if he had anything more to say, and they all said no. Then Stanton began, and delivered one of the most eloquent speeches that I ever heard. He described the beginning of the war, for which, he said, there was no justification; being beaten in an election was no reason for destroying the Government. Then he went on to the fact that half a million of our young men had been laid in untimely graves by this conspiracy of the slave interest. He outlined the whole conspiracy in the most solemn and impressive terms, and then he depicted the offense that this man Morse, aided by these several merchants, had committed. “Gentlemen,” he said, “if you would like to examine the bills of what he was taking to the enemy, here they are.”

When Stanton had finished, these gentlemen, without answering a word, got up and one by one went away. That was the only speech I ever listened to that cleared out the entire audience.