

Lawyer Lincoln (Book Review)

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interest of one who may read the pages in which the story of the *Dred Scott* case⁸ is told, by indicating the course the author takes or the conclusions that he reaches.

As the author says, "Taney's attempts as Chief Justice to protect human rights, or 'community rights' as against property rights, and to deviate from *laissez faire* doctrines to the extent of justifying state laws needed by local communities but opposed by conservative interests have gone largely unrecorded" by historians. In this book they are recorded by one who has pondered fruitfully on problems of government.

The book is a valuable contribution toward breaking down the barriers which have prevented understanding and appreciation of Taney.

FRANK H. SOMMER.*

LAWYER LINCOLN. By Albert A. Woldman. Boston: Houghton Mifflin Co., 1936, pp. viii, 347.

We will probably never be able to supply a real picture of "Lawyer" Lincoln unless we study the record, subpoena Lincoln and let him speak for himself.¹ We feel that he needs no interpreter; that his utterances need no

⁸ *Ibid.*

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¹ How successful we have been up to the present time in having an adequate and genuine appraisal of Lincoln's ability as a lawyer may be gathered from a footnote to an address by John M. Zane on "Lincoln as a Lawyer."

"I notice but five authors, although there are many more who have attempted to describe his legal abilities. Mr. Richards' book is valuable, founded upon adequate investigation, but it does not picture Lincoln in his legalistic totality, especially as a constitutional lawyer. Mr. Hill's book is interesting, if nothing more. Nicolay and Hay did not write as lawyers, though they give some legal information. Works such as those of Ida Tarbell or Rose Strunsky have no actual value, and state no new facts. Judge Wanamaker has no comprehension of Lincoln as a lawyer. Ludwig is absurd. Masters, in 'Lincoln, the Man,' is too much given to hurling the contumelious stone. His ignorance on matters of ordinary historical knowledge is astonishing. As an instance, he says that Jackson called the alliance of Clay and John Quincy Adams 'a combination of the Puritan and the black-leg.' Imagine Jackson quoting Fielding, from whom the words come. Every tyro knows that John Randolph applied the quotation and Clay and Randolph fought a duel over the aspersion. Yet Masters is not without value as showing the attitude of the Douglas Democrats in Illinois during the years from 1854 to 1860. He does not seem to be very well read in the historical courses for that period. Lord Charnwood in his book is wholly without understanding as to our constitutional law and seems to have no juristic conceptions whatever. No one of the authors examines Lincoln's constructive constitutional policy * * * and many seem to think that he as President was constantly violating the Constitution, which is a wholly untenable position * * *. A late book is 'Lincoln and His Cabinet' by an author named Macartney. It has no value for the legal aspect of the President. Another late book by Emanuel Hertz, shows very great insight as to some aspects of Lincoln as a lawyer * * *. Mr. Beveridge in his unfinished

gloss nor commentary. It was one of his God-given qualities that when he spoke all who heard him understood—and understanding what he said, followed him and acted on his advice. Many people consulted him and each of his numerous clients had a peculiar case of his own, so that his practice took him practically into every phase of the great domain of the law. Each case, especially when a novel question was involved, was examined by Lincoln himself. And it was he who drew not only the pleadings, but also the legal memoranda showing the study of the authorities. He was the trial lawyer, the appellate lawyer, the brief lawyer, the pleader and the lawyer most consulted. And if the facts of the case justified it, Lincoln was generally successful.

These documents and cases which are now appearing show his acquaintance with every phase of life as manifested in each new case. They show that Lincoln was not a specialist, but rather the ideal "all-around" lawyer. Hardly any legal problem was foreign to him. No human ailment or misfortune which was aired in court, was rejected by him. The variety of legal subjects which came into his office, both in Springfield and to his temporary offices in the different county seats of the Eighth Circuit, was indeed remarkable—as remarkable as the desire of lawyers and litigants alike to retain him as counsel or lawyer.

We may search far and wide for a man in the whole Eighth Circuit as it was then constituted, or for that matter in the entire state of Illinois, which contains the city of Chicago with its thousands of lawyers, and we may throw in the twenty thousand lawyers in the city of New York and we will not find one who undertakes to cope with problems as divergent and as far flung as were those which Lincoln cheerfully undertook to solve—and solved.

That it has taken seventy-one years to produce a book like Mr. Woldman's "Lawyer Lincoln" is a strange commentary upon the lack of interest in one of the important phases of Lincoln's activities. It is to be hoped that the Centennial anniversary of Lincoln's admission to the bar will result in a complete resurgence of all that Lincoln accomplished as a lawyer.

We are grateful to Mr. Woldman for having set himself to the task of destroying the mythical anecdotes which depict Lincoln "as a Don Quixote of the judicial circuit searching for cause of injustice to combat. They encircle his head with a halo as they strip him of all practicality, acumen, and shrewdness, and portray him as an oafish country lawyer, perversely honest, who eschewed the technicalities of the law, who refused cases where there was the least doubt as to his prospective client's innocence, and who was naïve almost to the point of simplicity when it came to charging fees for his services."

One of the chapters which is absolutely novel in Woldman's book is the chapter on "Judge" Lincoln. Other biographers either did not know or did not think it worth while to discuss this phase of Lincoln's career in the courts. And here we have the cases actually tried by Lincoln acting in the capacity of

work has gotten together with incredible industry what has been said by others upon Lincoln as a practitioner, but he relies upon misleading material. Of Beveridge's ambitious work it may be said what was said of another book: 'Much of it is so bad that it ought not to live, and some of it is so good that it ought not to die.'

the Judge, as a substitute for Judge Davis and by consent of the parties concerned, and the usual record made in the files of the court.

Lincoln's career as a railroad and big-business lawyer has never before been so clearly set forth—and it has taken one hundred years after his admission to the bar to acquaint the Lincoln students with the fact that he tried some of the most important cases of his day and generation. He did all that without leaving any scars; for the author more than demonstrates the fact that those who procured his nomination for the presidency were Lincoln's fellow lawyers headed by the noblest Roman of them all, Judge David Davis, before whom he practiced and with whom he crossed and travelled to every corner of the Eighth Circuit—and whom he finally rewarded by promotion to the Supreme Court of the United States. It is only logical that Lincoln's legal and constitutional problems during his presidency were coped with and solved in the same fashion as he coped with and solved ordinary legal problems of the day.

Lincoln's conflict with Chief Justice Taney is set forth fairly and completely and shows that he was the better lawyer of the two. And as Taney is considered one of the really great judges of the Supreme Court, this is no mean achievement on the part of the modest prairie lawyer. And it brought about the greatest war of all time up to that day—the Civil War—in order to reverse Judge Taney in that same case, the only case in our history thus appealed and reversed. And so it came to pass that Lincoln was true to his promise that he would see to it that the *Dred Scott*² decision would be reversed. It was his last great legal victory—for he lived but a few days after the final reversal was consummated at Appomattox.

Despite the great amount of material which is available on "Lincoln the Lawyer", I am constrained to agree with John M. Zane,³ distinguished son of one of the young clerks in Lincoln's office, that very little of any importance has appeared in the books on Lincoln the lawyer, and even less in any of the biographies of the man. That phase is yet to be written. And on the one hundredth anniversary of his admission to the bar we are first on the threshold of being able to write a definitive story of Lincoln the lawyer.

It is the accepted version of practically all biographers that Lincoln concluded the practice of law on the evening when he last visited his Springfield office in order to wind up (as far as he was concerned) a number of cases which were pending at the conclusion of the sixteen years of his partnership with Herndon. In truth his practice was just beginning, and he was yet to make use of all he had learned and experienced since he was first admitted to the bar in 1837. The fruition of that training is manifested in his coping with the great constitutional problems which he was called upon to solve from the very moment of his inauguration. The problems of Lincoln's presidency were for the most part legal problems and it is short of amazing that historians and biographers overlooked his wide assumption of power; his willingness to compensate slave holders; his interpretation of the Constitution as to the President's war powers. The legal features of the Civil War; the law of treason; the treatment of Confederate leaders; the power to suspend the writ of *habeas*

² *Scott v. Sanford*, 19 How. 393 (U. S. 1856).

³ See note 1, *supra*.

corpus; military rule and arbitrary arrests; martial law and military commissions; the Indemnity Act of 1863 covering the question of liability of federal officers for wrong done in their official capacity during the Civil War; the régime of conquest in occupied districts of the South; legal and constitutional problems of conscription; the right of a confiscation; restoration of confiscated property; emancipation; state and federal relations during the Civil War; the partition of Virginia and the creation of West Virginia—these were some of the major problems which Lincoln the lawyer was called upon to define, interpret and pass upon. No other administration, not even Woodrow Wilson's, was troubled with the solution of such novel constitutional problems as was Lincoln's, for Lincoln had paved the way. Driven by circumstances to the use of more arbitrary power than perhaps any other president has ever seized, and carrying the power of presidential proclamation and executive order further than any other president, it is nevertheless the fact that his actions were generally confirmed not only by Congress, but also by the Supreme Court. True, he exerted his executive authority to the extent of freeing the slaves by proclamation and to the extent of setting up a whole scheme for reconstruction. True, he suspended the writ of *habeas corpus*, proclaimed martial law, enlarged the Army and Navy beyond the limits fixed by existing law and spent public money without congressional appropriation. And while some of these measures belonged within the domain of Congress, that body, as events turned out, was simply permitted to ratify these measures—which they did willingly.

Lincoln's view of the war power is significant. He believed that the rights of war were vested in the President and he promulgated the laws of war to regulate the conduct of the armies. Lincoln's view, under the pressure of severe circumstances, has been referred to as his dictatorship. In the *Prize Cases*⁴ the validity of Lincoln's action was sustained by a majority of the Supreme Court of the United States. While there were four dissenting judges in the decision on the *Prize Cases*, the whole of Lincoln's conduct illustrates his ability to retain popular confidence while doing "irregular" things. Neither Congress nor the Supreme Court exercised any restraint upon him. Congress specifically approved of his course between April and July, 1861. As to the *habeas corpus* question, while Congress passed a law which at the same time was differently interpreted as approving and as disapproving the doctrine that the president has the suspension power, its general effect, however, was in support of Lincoln. In the *Prize Cases*, the Court approved Lincoln's action in the early months of the War. Such an extreme measure as confiscation was upheld by the Supreme Court, though its validity was seriously questioned. And it was not the Supreme Court but Chief Justice Taney, hearing the Merriman petition in his Baltimore chambers, who denounced the President's suspension of the great writ of *habeas corpus*. It is true that the Court in the *Milligan*⁵ case, after the war, declared a military régime illegal in regions remote from the theatre of war; but while the war was in progress, the Supreme Court declined to interfere with the action of a military commission in a similar case, that of *Vallandigham*.⁶ The greatest factor in all these

⁴ *Prize Cases*, 2 Black 635 (U. S. 1862).

⁵ *Ex parte Milligan*, 4 Wall. 2 (U. S. 1866).

⁶ *Ex parte Vallandigham*, 1 Wall. 243 (U. S. 1863).

monumental decisions was Lincoln himself. His human sympathy, his humor, his lawyer-like caution, his common sense, his fairness to opponents, his dislike of arbitrary rule, his willingness to take the people into his confidence and to set forth the reasons for unusual measures—all these elements of character operated to mollify and soften the actions of over-zealous subordinates and to lessen the effect of harsh measures upon individuals. Though there were arbitrary arrests under Lincoln, there was no arbitrary government. Freedom of speech was preserved to the point of permitting the most disloyal utterances in the press. While much could be written on the suppression of certain newspapers, the military control of the telegraph, the seizure of particular editions, the withholding of papers from mails, and the arrest of editors—yet in a broad view of the whole situation, such measures appear so far from typical that they sink into comparative insignificance. There was no real censorship, and in the broad sense the press was unhampered. Be it remembered that Lincoln advised no interference with the freedom of the press, and he applied this policy in the case of the *Chicago Times*. To charge that Lincoln's suspension of the writ of *habeas corpus* amounted to setting aside all law would be unfair. The suspension was indeed a serious matter; but while men were arrested on suspicion, they were simply detained for a while and then released. As to military trial of civilians, it should be noticed that the typical use of military commissions was legitimate. For these commissions were commonly used to try citizens in military areas for military crimes where citizens in proximity to the Union Army were engaged in sniping or bushwacking, in bridge-burning or in destroying railroad or telegraph lines. Such suspected offenders were tried as they should have been—by military commissions. The prominence of the cases of *Vallandigham*⁷ and *Milligan*⁸ should not obscure the larger fact that these cases were exceptional. It was thus a rare use of the military commission that was declared illegal in the *Milligan* case years after the war was over.

The powers grasped by Lincoln may have caused him to be denounced as a "dictator". Yet civil liberties were not annihilated and no thorough-going dictatorship was ever established. A comparison with present-day European dictators shows that Lincoln's government lacked most of the qualities and especially most of the enormities of dictatorial rule: his administration did not, as in some dictatorships, employ criminal violence to destroy his opponents and perpetuate his power. He did not seek these much coveted powers. It is significant that Lincoln expected (and preserved a memorandum to that effect) to be defeated in 1864. The people were free to defeat him if they chose to do so at the polls. The Constitution, while temporarily stretched, was not subverted. The measures taken were recognized by the people as exceptional; but they had faith in him.

Referring to the issue of the Union, Lincoln said: "And this issue embraces more than the fate of these United States. It presents to the whole family of man the question whether a constitutional republic, or democracy—a government of the people, by the people—can or cannot maintain its territorial integ-

⁷ *Ibid.*

⁸ *Ex parte Milligan*, 4 Wall. 2 (U. S. 1866).

city against its own domestic foes * * *. It forces us to consider if there is in all republics this inherent and fatal weakness."

And so, in struggling with all these great constitutional questions and international problems, Lincoln surpassed all his great contemporaries (Chase, a future Chief Justice, Bates, Reverdy Johnson, Lyman Trumbull, Edwin M. Stanton, Montgomery Blair, who appeared for Dred Scott, and Judge Curtis, who wrote the great dissenting opinion, David Davis, a future Justice of the Supreme Court and Roger B. Taney) in the solution of such human legal problems as few other men, before or after him, had ever been called upon to solve.

What he said in 1858 was realized while in the White House. "Let us discard all this quibbling about this man and the other man, this race and that race and the other race being inferior, and therefore they must be placed in an inferior position. Let us discard all these things and unite as one people throughout this land, until we shall once more stand up declaring that all men are created equal. I leave you, hoping that the lamp of liberty will burn in your bosoms until there shall no longer be a doubt that all men are created free and equal."

The colossus in the White House won the greatest diplomatic victory in our history—"The Trent Affair"—at a time when the collapse of our Democracy was not only hoped for but was predicted by all the foreign leaders of the world from Palmerston to Napoleon the Third, and who were attempting to call into being another Holy Alliance to bring about the destruction of the last great experiment of a free government.

It was then only that John Bright in England, Victor Hugo in France, Bismarck in Germany and Gorchakof in Russia began to see the great silhouette of a statesman loom on the other side of the Atlantic—and for the first time they beheld the man who had determined that our nation was perpetual—"*esto perpetua*".

EMANUEL HERTZ.

BRANDEIS, *THE PERSONAL HISTORY OF AN AMERICAN IDEAL*. By Alfred Lief. New York: Stackpole Sons, 1936, pp. 508.

A liberal mind is a fascinating mind; it knows all things, sees all things, and believes all things to be true in part. It never gives intellectual offense, for it holds that no view is of permanent worth. Its functioning is bloodless, the personification of perfect manners, and it interprets public affairs with the nonchalance of a host in a drawing room. Such is the popular conception.

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America was in its teens in economic growth during the closing part of the nineteenth century, while England by that time had probably completed its full development under an expanding capitalism.