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LINCOLN AND THE CONSTITUTION: AN OVERVIEW (continued)

This is not to say that Lincoln's constitutional thinking was nakedly opportunistic or embarrassingly shallow, only that he certainly changed his mind from time to time, especially during the Civil War. This is not to say, either, that an instrumental responsiveness to political events alone characterized Lincoln's political thought in general. It tended more to characterize his constitutional thinking because thinking in constitutional ways did not come naturally to Lincoln. It seemed always somehow secondary with him, of less importance than other approaches to ordinary political questions.

As for Frederickson's general conclusion, it is difficult to find tough threads of legalistic, procedural, or constitutional conservatism woven in Lincoln's political thought in the 1850s, even before the *Dred Scott* decision. In fact, Lincoln quickly embraced a moralistic antislavery ideology which stressed the Declaration of Independence and the political libertarianism of Thomas Jefferson and which relegated the Constitution and the laws to a rather pale secondary role. Immediately after passage of the Kansas-Nebraska Act in 1854, Lincoln told a Springfield audience that "The theory of our government is Universal Freedom. 'All men are created free and equal,' says the Declaration of Independence. The word 'Slavery' is not found in the Constitution." This was a succinct statement of Lincoln's antislavery reading of early American historical documents, and his political message on that subject varied little from 1854 to 1861.

Lincoln began to invoke Jefferson's name frequently, and now to more profound ends than mere embarrassment of those Democrats who claimed Jefferson as the founder of their party. On October 16, 1854, in a speech in Peoria, Lincoln spoke of "Mr. Jefferson, the author of the Declaration of Independence," as "the most distinguished politician of our history." He pointed to Jefferson's prohibition of slavery in the Northwest Ordinance of 1787 as the historic origin of modern Republican policy:

Thus, with the author of the declaration of Independence,

the policy of prohibiting slavery in a new territory originated. Thus, away back of the constitution, in the pure, free breath of the revolution, the State of Virginia, and the National congress put that policy in practice.

Lincoln did not entirely ignore or abandon the Constitution to the Democrats. Antislavery Republicans, rather, embraced an antislavery interpretation of the document. Lincoln put it this way:

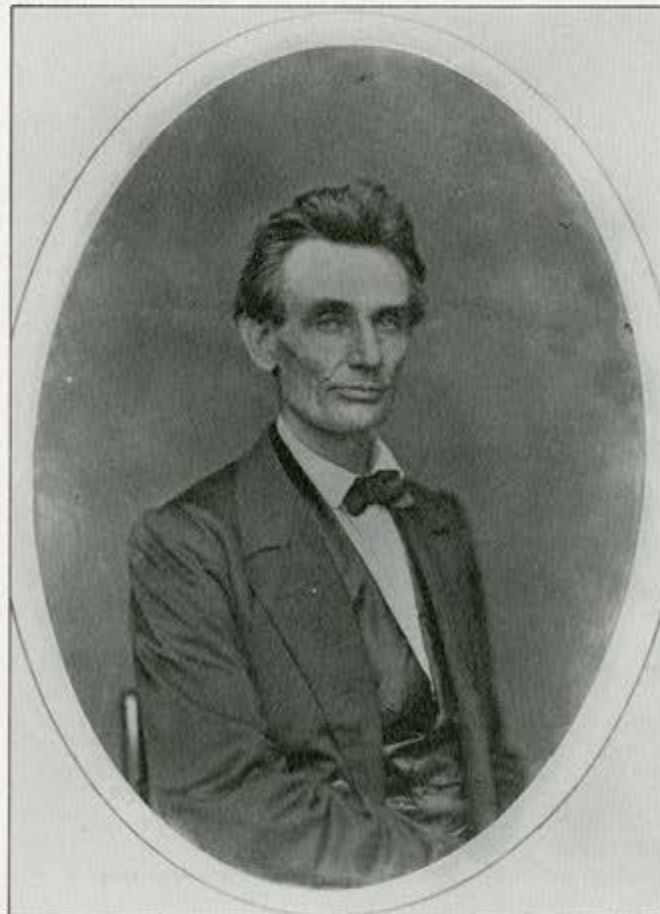
This same generation of men, and mostly the same individuals of the generation, who declared this principle [self-government] — who declared independence — who fought the war of the revolution through — who afterwards

made the constitution under which we still live — these same men passed the ordinance of '87, declaring that slavery should never go to the north-west territory.

In such passages as these, Lincoln made of the founders basically a single cohort of heroes who drafted the Declaration of Independence, won the Revolution, and wrote the Constitution. Yet in the passage quoted just above this one, Lincoln had spoken of the revolutionary era as "away back of the constitution," as though the years from 1776 to 1787 spanned generations and made time-tested and ripened traditions.

The fact of the matter is that the Constitution was something of an embarrassment to antislavery men. The Constitution protected slavery in the states, and all politicians, Republican and Democrat alike, knew it. The best antislavery politicians could do was to find antislavery tendencies in the Constitution, to deduce from its language a reluctance on the part of the nation's founders to embrace slavery warmly as an essential part of the national fabric. The word "slavery," as Lincoln often said, was not in the document

and "Thus, the thing is hid away, in the Constitution, just as an afflicted man hides away a wen or a cancer, which he dares not cut out at once, lest he bleed to death; with the promise, nevertheless, that the cutting may begin at the end of a given time." Lincoln was never prepared to denounce the Constitution as a whole. No legitimate politician can, for that document



defines legitimacy. Lincoln was not prepared even to dwell on certain defective parts of the Constitution. But he found it easier to wax enthusiastic over the Declaration of Independence. The following passage from a speech in Chicago on July 10, 1858, shows the typical range of tone in speaking of the two documents:

It may be argued that there are certain conditions that make necessities and impose them upon us, and to the extent that a necessity is imposed upon a man he must submit to it. I think that was the condition in which we found ourselves when we established this government. We had slavery among us, we could not get our constitution unless we permitted them to remain in slavery, we could not secure the good we did secure if we grasped for more, and having by necessity submitted to that much, it does not destroy the principle that is the charter of our liberties. Let that charter stand as our standard.

The spirit of the Constitution, properly and carefully looked at, was antagonistic to the Kansas-Nebraska Bill, Lincoln could say, but it was easier and far more stirring to say that the "spirit of seventy-six" and "the spirit of Nebraska" were utter antagonisms.

In the years following the *Dred Scott* decision and preceding the Civil War, Lincoln's constitutional views changed little from their 1854 antislavery adumbration. He was, perhaps, forced to speak more about the Constitution than had been his custom early in his political life, but he did not change his manner of interpreting it. Nor did *Dred Scott* cause him acute embarrassment over the apparent conflict between Republican doctrine and Supreme Court dictum. He merely pointed out the juristic weaknesses of the *Dred Scott* decision, characteristically avoiding long comment on Latinate distinctions:

Perhaps you will say the Supreme Court has decided the disputed Constitutional question in your favor. Not quite so. But waiving the lawyer's distinction between dictum and decision, the Court have decided the question for you in a sort of way. The Court have substantially said, it is your constitutional right to take slaves into the federal territories, and to hold them there as property. When I saw the decision was made in a sort of way, I mean it was made in a divided Court, by a bare majority of the Judges, and they not quite agreeing with one another in the reasons for making it; that it is so made as that its avowed supporters disagree with one another about its meaning, and that it was mainly based upon a mistaken statement of fact — the statement in the opinion that "the right of property in a slave is distinctly and expressly affirmed in the Constitution."

Lincoln had said time and time again that the Constitution said nothing distinct or express about "slavery," for it eschewed the very word. Moreover, he kept on saying that the Constitution showed the reluctance of the founders to contemplate the permanence of slavery in the United States. Indeed, he dwelled on that subject, in considerable historical detail, in one of his most famous speeches, the Cooper Institute address of February 27, 1860. And he had reminded Stephen Douglas of it repeatedly in their famous debates in 1858:

It is not true that our fathers, as Judge Douglas assumes, made this government part slave and part free. Understand the sense in which he puts it. He assumes that slavery is a rightful thing within itself, — was introduced by the framers of the Constitution. The exact truth is, that they found the institution existing among us, and they left it as they found it. But in making the government they left this institution with many clear marks of disapprobation upon it.

When Lincoln became president and faced the issues of civil war, he focused on other constitutional questions, many of which he had surely never thought of as an Illinois lawyer and politician. But his manner of approach to constitutional issues was rather well established: the constitutional side of political questions would not usually come first to his mind, he would rely on arguments provided by his party heritage when forced to examine constitutional questions, and his constitutional views would be decidedly shaped by antislavery feeling.

THE CASE OF JOHN N. EITEL An Unpublished Lincoln Endorsement

On February 18, 1865, military authorities in New York City

arrested civilian John N. Eitel, a prosperous clothing merchant and partner in John N. Eitel & Company. They did not tell his family or his business associates what the cause of arrest was, and they quickly whisked him out of town to place him in Washington's Old Capitol Prison. Complaints and pleas for his release soon came into the War Department.

Though Eitel had indeed been summarily treated, it must be said that he was involved in a rather unattractive, if not downright sordid, business which was closely watched by War Department officials. As a sideline to his regular clothing business, Eitel was a recruitment broker. During the Civil War, many of the activities which today it would be unthinkable to turn over to private hands were matters of private enterprise, and recruitment for the armed services was no exception. This system was at first encouraged — a little — by the government itself, by paying a two dollar premium to any person who brought in a recruit who was accepted for service. Gradually, as Eugene C. Murdock explains in his valuable study of the Civil War draft and bounty system entitled *Patriotism Limited, 1862-1865*, this led to private brokers' all but taking over the supply side of the recruiting system. And nowhere were they more important than in New York City, where New York County Board of Supervisors authorized a \$300 bounty for volunteers and permitted another committee to rely entirely on brokers for distribution of the bounties. When a man volunteered in New York, the broker who brought him in paid the soldier whatever part of the bounty price they had agreed upon beforehand. Then the soldier would assign the whole bounty to the broker, who in turn would collect \$300 from the New York County committee.

Eitel may have gone into this business as a natural outgrowth of his clothing business. In an affidavit written on Eitel's behalf, a clerk in the naval rendezvous at 173 South Street, one of several where recruits were mustered in in New York City, testified that Eitel was in the business of selling clothing to naval recruits. They sold the goods for an eight or nine dollar profit on each recruit and paid about half the profit to runners who brought the recruits in. This was almost perfectly analogous to the way the bounty brokerage system worked, so it is little wonder that Eitel moved into that as well. It was made a good deal easier when Eitel's business partner, George Goin, was appointed acting master of the naval rendezvous.

It would be fair to characterize this as big business by the standards of Civil War America. Three hundred dollars constituted quite a substantial sum of money in those days, and there were thousands of recruits for this, the bloodiest war in all of American history. Recruiting in New York City was especially important for the United States Navy. In February 1865, for example, Secretary of the Navy Gideon Welles noted disapprovingly in his diary some attempts to regulate naval recruitment in the city:

The local municipal authorities of New York City are taking high-handed ground in regard to naval enlistments in that city. Such as cannot be permitted. They forbid the recruiting of any in the city unless they are accredited to that locality. The fact of the matter was that the Navy needed recruits and did not really want to see any decrease in competition among recruiters to ferret out every available man.

What made opportunities for fraud abundant in this system was not only the vast sums of money and the large numbers of men involved but also — an overlooked factor — the rather primitive record-keeping and accounting practices of the day. Records were all handwritten, of course, by scores of clerks with handwriting of varying legibility and with different levels of understanding of the operation. Although the principle of alphabetization was known, apparently the idea of putting alphabetized names on cards was not, with the result that most Civil War lists appear on long sheets of paper, the names are alphabetized by initial letter only, and there is usually an addendum of names at the end for persons processed after the list was already complete.

One of the clerks in the naval rendezvous witnessed the wild confusion that made record-keeping difficult and fraud simple. For example, more men were mustered-in in the office some days than could be taken aboard the receiving ship on the same day. Overnight, the reluctant recruits might run away, never to appear on the receiving ship, but leaving a name as recruited

on the office books. Also, for reasons the clerk could never fathom, duplicate records of mustering-in and duplicate receipts given by the recruit for his bounty payments were produced on the receiving ship "with nothing thereon to indicate which was the original." Thus "a large field for fraud was opened."

Whether Eitel entered that fair field for fraud is unknown, but War Department detective Colonel Lafayette C. Baker thought he did and claimed to have evidence to prove it. Baker drew a rather different picture of the naval rendezvous in New York than that of Eitel's partisans, who described confusion and disorder rather than corruption.

In pursuance of the above order [of January 16, 1865], I went to New York City, which place was alleged to be the centre or rendezvous of the principal operators in fraudulent enlistment papers. It would be impossible to give a correct idea or understanding of the condition in which I found the recruiting business. A large number of persons, of the most desperate and disreputable character, were engaged at the different rendezvous in filling the quotas. The great and urgent demands of the Government to fill up the ranks of our depleted army, were seized upon by these individuals, known as bounty brokers or receiving agents, as a fit time to perpetrate those forgeries and frauds upon the Government and soldiers, the extent and enormity of which, I believe are unparalleled in the history of the world. These frauds, which robbed the soldier and his family, were but mild offenses compared with the crime of actually aiding the enemies of the Government, by representing on paper enlisted men who never existed. . . . What was true of the frauds peculiar at the army rendezvous in New York and vicinity, was more than true of the naval rendezvous. Out of seven of these naval recruiting rendezvous, but three could be entered without first passing through a public drinking saloon of the lowest and vilest character, and a substitute or bounty broker's office. In fact, the last two named institutions seemed to be necessary appendages to a recruiting depot. . . . The high social and official positions of many of the suspected parties, the large pecuniary interests involved in the business, tended to weaken my confidence in my success. . . .

The points of potential fraud brought up in the affidavit of the rendezvous clerk were more than corroborated by Colonel Baker:

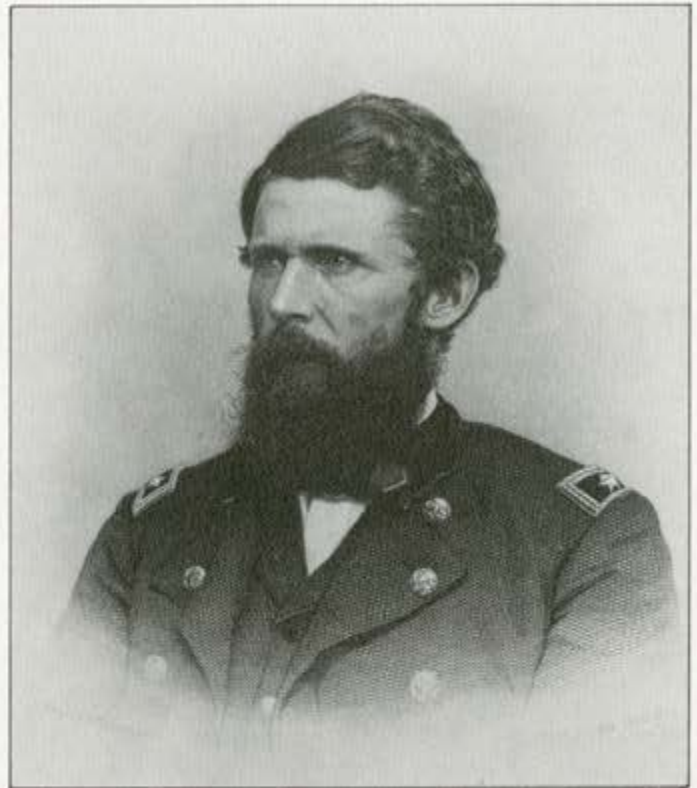
Another manner of desertion, and by far more generally practised, was by permitting recruits to desert in transit from the rendezvous in New York to the Island, or receiving ships. For instance, I will refer to the Cedar Street rendezvous. Between the 20th of May, 1864, and the 9th of October, 1864, there were enlisted at this rendezvous, one thousand two hundred and eighty-four men. The books on Governor's and Hart's Islands show but eight hundred and thirteen received from said Cedar Street rendezvous. About a similar deficiency between the actual enlisted and number received, is shown by the examination of the books of the other rendezvous.

If each of those men represented a \$300 bounty, this discrepancy alone accounted for a potential \$141,200 fraud — substantial money by today's standards and a fortune in the Civil War.

Baker caused Eitel's arrest, but soon there flowed to the War Department a stream of petitions and letters urging his release. His reputation, these pleas said, was too good to make it possible to believe Eitel guilty. Moreover, anxiety had all but driven his family to distraction. His wife was ill and his business affairs were suffering serious damage in his absence. He never made much off his recruiting sideline, anyhow.

After receipt of these, the case was referred for review to the Bureau of Military Justice, where Judge Advocate General Joseph Holt commented thus on March 15:

The crimes committed by the class of offenders to which the prisoner is alleged to belong are so atrocious & strike so directly at the life of the military service that it is believed as a general rule the parties should not be paroled. The spoils of these crimes are known to have been so enormous, that a monied deposit would afford but an imperfect guaranty for the appearance of the offenders. Exceptions to the rule suggested may be found in cases where the measure of proof



Lafayette C. Baker.

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so presented is not regarded as full & entirely satisfactory. In the present case, however, . . . Colonel Baker declares that the proofs of the prisoner's guilt are positive. This Bureau cannot therefore recommend that he be paroled.

As he had done many times before, President Lincoln overruled General Holt, endorsing the file on Eitel's case: "Let this man be bailed, Mr. Dana to fix the amount A. Lincoln March 17, 1865." Charles A. Dana was an Assistant Secretary of War and the person who referred the case to Holt for review. He set the bail at \$10,000, and Abram Wakeman of New York sent a check for that amount to parole John Eitel.

In his *Recollections of the Civil War*, written in the 1890s, Dana did not mention the Eitel case in particular, but he did comment generally on the problems of fraud and the president's willingness to go easy on persons suspected of defrauding the government.

At the time that I entered the War Department for regular duty, it was a very busy place. Mr. Stanton frequently worked late at night, keeping his carriage waiting for him. I never worked at night, as my eyes would not allow it. I got to my office about nine o'clock in the morning, and I stayed there nearly the whole day, for I made it a rule never to go away until my desk was cleared. When I arrived I usually found on my table a big pile of papers which were to be acted on, papers of every sort that had come to me from the different departments of the office.

The business of the War Department during the first winter that I spent in Washington was something enormous. Nearly \$285,000,000 was paid out that year (from June, 1863, to June, 1864) by the quartermaster's office, and \$221,000,000 stood in accounts at the end of the year awaiting examination before payment was made. We had to buy every conceivable thing that an army of men could need. We bought fuel, forage, furniture, coffins, medicine, horses, mules, telegraph wire, sugar, coffee, flour, cloth, caps, guns, powder, and thousands of other things. Sometimes our supplies came by contract; again by direct purchase; again by manufacture. Of course, by the fall of 1863 the army was pretty well supplied; still, that year we bought over 3,000,000 pairs of trousers, nearly 5,000,000 flannel shirts and drawers, some 7,000,000 pairs of stockings, 325,000 mess pans, 207,000 camp kettles, over 13,000 drums, and 14,830 fifes. It was my duty to make contracts for many of these supplies.

In making contracts for supplies of all kinds, we were obliged to take careful precautions against frauds. I had a

colleague in the department, the Hon. Peter H. Watson, the distinguished patent lawyer, who had a great knack at detecting army frauds. One which Watson had spent much time in trying to ferret out came to light soon after I went into office. This was an extensive fraud in forage furnished to the Army of the Potomac. The trick of the fraud consisted in a dishonest mixture of oats and Indian corn for the horses and mules of the army. By changing the proportions of the two sorts of grain, the contractors were able to make a considerable difference in the cost of the bushel, on account of the difference in the weight and price of the grain, and it was difficult to detect the cheat. However, Watson found it out, and at once arrested the men who were most directly involved.

Soon after the arrest Watson went to New York. While he was gone, certain parties from Philadelphia interested in the swindle came to me at the War Department. Among them was the president of the Corn Exchange. They paid me thirty-three thousand dollars to cover the sum which one of the men confessed he had appropriated; thirty-two thousand dollars was the amount restored by another individual. The morning after this transaction the Philadelphians returned to me, demanding both that the villains should be released, and that the papers and funds belonging to them, taken at the time of their arrest, should be restored. It was my judgment that, instead of being released, they should be remanded to solitary confinement until they could clear up all the forage frauds and make complete justice possible. Then I should have released them, but not before. So I telegraphed to Watson what had happened, and asked him to return to prevent any false step.

Now, it happened that the men arrested were of some political importance in Pennsylvania, and eminent politicians took a hand in getting them out of the scrape. Among others, the Hon. David Wilmot, then Senator of the United States and author of the famous Wilmot proviso, was very active. He went to Mr. Lincoln and made such representations and appeals that finally the President consented to go with him over to the War Department and see Watson in his office. Wilmot remained outside, and Mr. Lincoln went in to labor with the Assistant Secretary. Watson eloquently described the nature of the fraud, and the extent to which it had already been developed by his partial investigation. The President, in reply, dwelt upon the fact that a large amount of money had been refunded by the guilty men, and urged the greater question of the safety of the cause and the necessity of preserving united the powerful support which Pennsylvania was giving to the administration in suppressing the rebellion. Watson answered:

"Very well, Mr. President, if you wish to have these men released, all that is necessary is to give the order; but I shall ask to have it in writing. In such a case as this it would not be safe for me to obey a verbal order; and let me add that if you do release them the fact and the reason will necessarily become known to the people."

Finally Mr. Lincoln took up his hat and went out. Wilmot was waiting in the corridor, and came to meet him.

"Wilmot," he said, "I can't do anything with Watson; he won't release them."

The reply which the Senator made to this remark can not be printed here, but it did not affect the judgment of the action of the President.

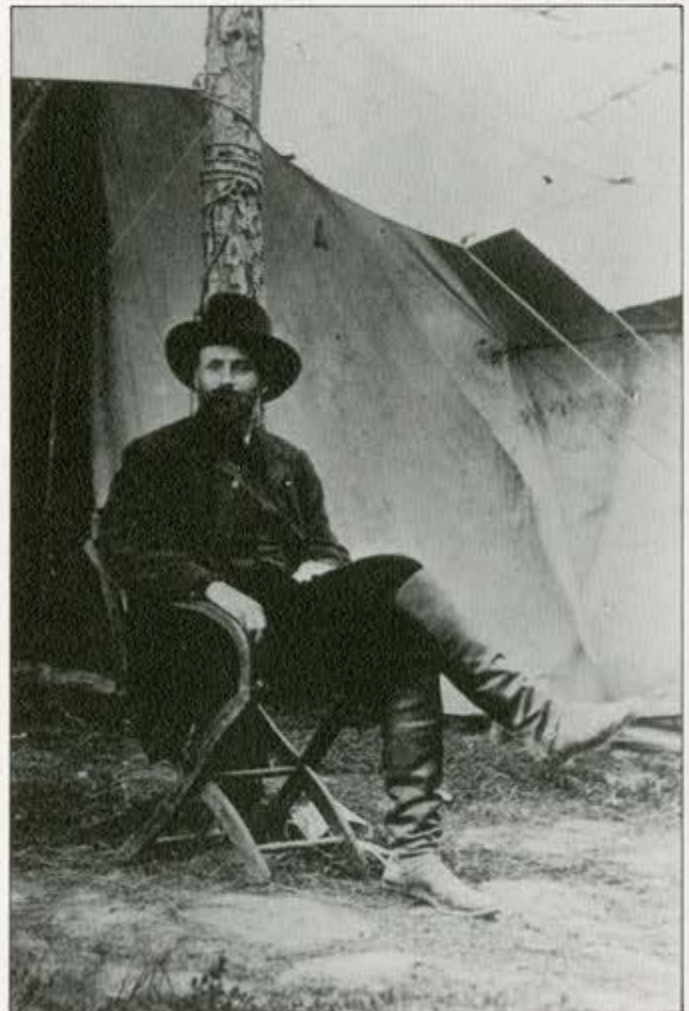
The men were retained for a long time afterward. The fraud was fully investigated, and future swindles of the kind were rendered impossible. If Watson could have had his way, the guilty parties — and there were some whose names never got to the public — would have been tried by military commission and sternly dealt with. But my own reflections upon the subject led me to the conclusion that the moderation of the President was wiser than the unrelenting justice of the Assistant Secretary would have been.

Regular readers of *Lincoln Lore* may recall a vaguely similar case of military arrest of prominent businessmen — the case of the Baltimore merchants, discussed in *Lincoln Lore* Number 1755 (May 1984). Examination of Charles Dana's *Recollections* for remarks on the Eitel case revealed his comments on the case of the Baltimore merchants. As he provides some insight not available elsewhere, his comments are repeated here:

Much of my time at this period was spent in investigating charges against defaulting contractors and dishonest agents, and in ordering arrests of persons suspected of disloyalty to the Government. I assisted, too, in supervising the spies who were going back and forth between the lines. Among these I remember one, a sort of peddler — whose name I will call Morse [it was really Pardon Worsley] — who traveled between Washington and Richmond. When he went down it was in the character of a man who had entirely hoodwinked the Washington authorities, and who, in spite of them, or by some corruption or other, always brought with him into the Confederate lines something that the people wanted — dresses for the ladies or some little luxury that they couldn't get otherwise. The things that he took with him were always supervised by our agents before he went away. When he came back he brought us in exchange a lot of valuable information. He was doubtless a spy on both sides; but as we got a great deal of information, which could be had in no other way, about the strength of the Confederate armies, and the preparations and the movements of the enemy, we allowed the thing to go on. The man really did good service for us that summer, and, as we were frequently able to verify by other means the important information he brought, we had a great deal of confidence in him.

Early in October, 1864, he came back from Richmond, and, as usual, went to Baltimore to get his outfit for the return trip. When he presented himself again in Washington, the chief detective of the War Department, Colonel Baker, examined his goods carefully, but this time he found that Morse had many things that we could not allow him to take. Among his stuff were uniforms and other military goods, and all this, of course, was altogether too contraband to be passed. We had all his bills, telling where he had bought these things in Baltimore. They amounted to perhaps twenty-five thousand dollars, or more. So we confiscated the contraband goods, and put Morse in prison.

(To be continued)



Charles A. Dana.

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