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MARK E. NEELY, JR.

LINCOLN AND THE CONSTITUTION: FROM THE CIVIL WAR TO THE WAR ON TERROR

On December 6, 2001, less than three months after the 9/11 terrorist attacks, Attorney General John Ashcroft, testifying before the Senate Committee on the Judiciary, gave a warning: “To those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists—for they erode our national unity and diminish our resolve. They give ammunition to America’s enemies.”¹

Such tough talk was not unprecedented in American history by any means. In fact, one can draw a straight line from President Abraham Lincoln to John Ashcroft on that score. Lincoln offered his sternest warning to the people of the North in a public letter sent to the press on June 12, 1863. He was responding to a letter of protest sent from a mass rally held in Albany, New York, and in his reply the president warned that public “clamor” over “arresting innocent persons” by accident, in the course of protecting national security, was “part of the enemies’ programme.” “Under cover of ‘Liberty of Speech’ ‘Liberty of the press’ and ‘*Habeas corpus*,’” Lincoln insisted, the enemy “hoped to keep on foot among us a most efficient corps of spies, informers, supplyers, and aiders and abettors of their cause.”² In short, to protest military arrests of civilians in the name of the First Amendment to the Constitution of the United States, was to give aid to the Confederacy.

Of course, the circumstances surrounding Lincoln’s warning were different from those that provoked Ashcroft’s statement, and the immediate context of the remarks is important. A cynic might well also say that words are one thing and actions quite another, and stern admonitions were certain to come from a president facing the gigantic rebellion Lincoln did. But even if we look deeper, at government

¹ Geoffrey R. Stone, *War and Liberty: An American Dilemma 1790 to the Present* (W.W. Norton, 2007), 129.

² Roy P. Basler, ed., *The Collected Works of Abraham Lincoln*, 9 vols. (New Brunswick, New Jersey: Rutgers University Press, 1953-55), 6: 263-64.

action and behavior, it is not impossible to draw parallels between the Civil War and the War on Terror.

Take the issue of torture, for example. Allegations of government torture to this very moment figure in prosecutions of enemy combatants for participation in terrorist actions against the United States. There were protests against government torture raised during the Civil War too. They came not from American lawyers and journalists disturbed over sensational allegations of torture, but from the authorities representing the British government in the United States during the Civil War. Again, the circumstances and practices were different, but torture was an issue.

The practice would not have come to light had it not been the case that some of the victims in the North during the Civil War were British subjects. They were young men, part of the very great number arrested in the North on suspicion of being deserters from the Union Army. Some turned out to be innocent civilians, and thus were numbered not among those answerable to military justice, but among the 15,000 or more civilians arrested by military authority under the Lincoln administration during the Civil War. Some suspected deserters were subjected by 1864, when the army had become exasperated by the great number of desertions, to a form of water torture applied to extract confessions.

The British subjects in Civil War military prisons were mostly young Irishmen resident in the United States. Great Britain took a dim view of the abuse of its subjects by foreign governments, and its official representatives in foreign lands were there in part to protect them. Sometimes abused prisoners contacted the representatives, and sometimes the British officials were proactive and toured the Northern military prisons looking for British subjects who might have been wrongly detained. When an official encountered a plausible complaint from some prisoner he demanded an explanation from the State Department. The United States officials felt compelled to answer because the one thing they did not want to do was to irritate Great Britain to the point where that country might intervene in the war.

Here are some of the cases whose records have survived in the archives. Mathew Murphy was an Irishman who was in jail in Alexandria, Virginia, in October

1864. He had been arrested on suspicion of desertion because he was wearing some government-issue clothing and because he was, according to the arresting authorities, a “hard-looking” man. Murphy complained that he had been handcuffed and suspended from the ceiling by the wrists. Federal authorities in Alexandria could not categorically deny that he had suffered such treatment.

J.W. Nash, another British subject, represented a more typical case. Like many of these suspected deserters, he had been arrested while he was about to board a train at a railroad station. He was in the company of two deserters, dressed the same way they were, and he carried the same (apparently considerable) amount of money they did. He must have been suspected of being a “bounty jumper,” that is, a person who enlisted in order to receive the lucrative cash bounties extended for volunteers late in the war, and who pocketed the money and quickly deserted, sometimes to repeat the process. When the British minister to the United States, Lord Lyons, investigated Nash’s case, he learned that Nash had been the victim in prison of “violent cold water baths.” The captain commanding the Central Guard House in Washington, D.C., admitted that Nash had been “subjected to what is called a shower bath, which consists of a stream of water from a small rubber hose.” “It is not severe,” the captain explained lamely, “nor at this season of the year very unpleasant, as the prisoners there shower each other for their own comfort, daily.” The captain’s description did not sound convincing to Lord Lyons, who replied sternly, “This explanation does not show that the cold water was applied in Nash’s case, in conformity with any law or regulations as a punishment for a known and proved offense[;] on the contrary it tends to confirm the statement that it is used in the Central Guard House for the purpose of extorting, by the inflictions of bodily pain, confessions from persons suspected of being Deserters.”

Later in the summer of 1864 the British protested the treatment of a prisoner subjected to “a hose of water directed with full and powerful action against his naked person.” This inquiry led to an admission that the Judge Advocate General, the army’s highest-ranking lawyer, prescribed the water torture for certain kinds of prisoners. The army persisted in calling the practice “punishment by shower baths,”

but the prisoners writing to Lord Lyons told another story. James Buckley, for one, maintained that he had been subjected to showering for two hours until his skin broke.

Knowledge of the torture reached at least as high as the office of the Secretary of State, William H. Seward. Seward was forced by virtue of the sensitive diplomatic situation to examine the charges. He dutifully forwarded to Lord Lyons the explanations offered by prison-keepers of the behavior in question. Seward did not, as far as anyone knows, attempt to cover up the practice. On the other hand, he did not apparently forward the reports to the Secretary of War or protest on behalf of the aggrieved British citizens. He did not denounce torture or attempt to end its use. He merely responded.³

To be sure, these cases differed from the modern cases involving allegations of torture. The Irishmen were not enemy combatants but civilian residents of the North. Thus the torture was used to extract confessions and not to extract information about the enemy. The methods applied were not, apparently, as dangerous and cruel as the modern methods. Still, it has once again proved to be distressingly easy to draw a straight line from the Lincoln administration to the War on Terror not just in terms of tough words but also in controversial practices. And the victims of torture in the Civil War were not part of a plot to attack the United States or to terrorize its citizens; they were only suspected deserters from the army.

It is important to return to the language used by the Lincoln administration to “explain” its internal security system—the words about aiders and abettors of the enemy’s program quoted at the beginning of this article. They transcended as threats the commonly cited modern language used in the War on Terror and were much broader in their potential threat.

The statement quoted here appeared in what has come to be called the Corning letter. It was a broad defense of internal security policy written in answer to

³ This program of government torture was revealed in Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (New York: Oxford University Press, 1991), 109-112.

public protests over the arrest of an Ohio politician named Clement L. Vallandigham.⁴ The circumstances, ably and definitively described by the greatest historian of dissent in the American Civil War, Frank L. Klement, began with the reassignment of General Ambrose Burnside to a desk job after his catastrophic leadership of the Army of the Potomac resulted in the Battle of Fredericksburg in December 1862. Afterward the administration placed him in command of what was called the Department of the Ohio, with headquarters in Cincinnati. He oversaw military affairs in the states of the Old Northwest and Kentucky.

Unfortunately for the Lincoln administration, Burnside's approach to the home front resembled his approach to the battlefield: frontal assault. On April 13, 1863, he issued General Orders No. 38, warning that "The habit of declaring sympathies with the enemy will no longer be tolerated in this department." It is not at all clear that such expressions were habitual nor how, even if they were, Burnside, new to the scene in Ohio, had knowledge of them. Clement Vallandigham, who had failed to gain re-election in his recently gerrymandered district, was essentially looking for something to do. As Frank L. Klement interprets his actions, the ex-Congressman determined to court martyrdom by making a speech critical of the administration which Burnside would unfairly interpret as declaring sympathy with the enemy. Burnside would likely have Vallandigham arrested. Ohio was to have a gubernatorial election in 1863, and Vallandigham might be launched by the wrongful arrest to prominence as a possible candidate. The scheme worked so well that Vallandigham was almost elected governor.

He gave the speech in Mount Vernon, Ohio, on May 1, 1863. Burnside had detectives in the audience taking notes and he had Vallandigham arrested. The scene was worthy of a twenty-first century civil liberties nightmare. The arrest came after midnight, when no courts would be open and when no judge would likely issue a writ of *habeas corpus*. A squad of armed soldiers wrenched Vallandigham from his family

⁴ This interpretation of the Vallandigham arrest relies on the groundbreaking and thorough work of Frank L. Klement, *The Limits of Dissent: Clement L. Vallandigham and the Civil War*, orig. pub. 1970 (New York: Fordham University Press, 1998); see esp. 138-72.

and carried him off to a train which rushed him out of his home town of Dayton, Ohio.⁵

Vallandigham was tried by military commission, a sort of court martial of civilians (also made familiar to us now in the War on Terror). He was found guilty and eventually banished to the Confederacy. From there he ran the blockade to Canada and, having been nominated by the Ohio Democratic party for governor, ran for office in absentia.

Lincoln's letter to Erastus Corning and others, the Albany protestors, was the first public defense of the administration's vigorous internal security system offered by the president in almost two years. In his famous and able letter Lincoln made several arguments, only one of which is much noticed today. For example, Doris Kearns Goodwin, in her widely read book, *Team of Rivals: The Political Genius of Abraham Lincoln*, the basis of the Steven Spielberg film on Lincoln released late in 2012, says that "Lincoln posed a question that was soon echoed by supporters everywhere: 'Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wily agitator who induces him to desert?'" Otherwise, she says, Lincoln's letter "put the complex matter of military arrests into perspective." He "reminded his critics that the Constitution specifically provided for the suspension of the writ of habeas corpus," and he insisted "that Vallandigham was not arrested for his criticism of the administration but 'because he was laboring, with some effect, to prevent the raising of troops, to encourage desertions from the army, and to leave the rebellion without an adequate military force to suppress it'."⁶

But that is not all that Lincoln did in the Corning letter. He also wove a conspiracy theory of the origins of the Civil War, claiming that secessionists had been "preparing for it more than thirty years." Part of those preparations included leaving behind, in the North, sympathizers, who could work internal mischief to the Union cause. Among other things, the secessionist conspirators knew that they could rely on

⁵ Ibid., 156-59.

⁶ Doris Kearns Goodwin, *Team of Rivals: The Political Genius of Abraham Lincoln* (New York: Simon & Schuster, 2005), 522-525.

these sympathizers to raise protests when the Northern government took effective measures for the internal security of the Union. “From this material,” the president argued, “under cover of ‘Liberty of speech,’ ‘Liberty of the press’ and ‘*Habeas corpus*’ they hoped to keep on foot amongst us a most efficient corps of spies, informers, suppliers, and aiders and abettors of their cause in a thousand ways.” Thus protests against government restriction of civil liberties became “part of the enemies’ programme.”

The first part of this article pointed these arguments out, but Lincoln went on to make two more chilling assertions about speech and internal security. First, he attempted to criminalize silence. “The man who stands by and says nothing, when the peril of his government is discussed, cannot be misunderstood. If not hindered, he is sure to help the enemy.” Next, he challenged the fundamental basis of a loyal opposition. The man was even less to be misunderstood, Lincoln said, “if he talks ambiguously—talks for his country with ‘buts’ and ‘ifs’ and ‘ands’.”⁷ Imagine yourself a Democrat, that is, a member of the loyal opposition party, who reads this letter. Who supports the war, “but” not if the war aims are changed a year-and-a-half into the war from Union to emancipation? Who supports the war only “if” the administration adheres to the Constitution in its prosecution of the war? The loyal opposition party, the Democratic party of the Civil War, took those positions, and no Democrat could read the Corning letter without feeling threatened.

Goodwin’s characterization of this letter by no means prepares us for what we read in it. Lincoln did not “remind” his critics; he threatened them. Lincoln did not “put the complex matter of military arrests into perspective”; he attacked the opposition. Goodwin says that even “Democrats were impressed” with the letter. Surely, they were more alarmed than impressed by it. Lincoln was not reaching out to the opposition in the Corning letter. He was agitating his base of Republicans who feared the opposition was disloyal.

⁷ Roy P. Basler, ed., *The Collected Works of Abraham Lincoln*, 6: 263-65.

How can we explain such a letter, one that to this day should raise the little hairs on the backs of our necks and that was certainly intended to have precisely that effect at the time? The context is critical. Just as John Ashcroft made his remarks in the shadow of the recent 9/11 attacks, so Lincoln issued the Corning letter when the enemy was virtually at the gate. When reading any public statement of President Lincoln during the war, one should always ask, where was Robert E. Lee's army at the time? In the case of the Corning letter, Lee's Army of Northern Virginia was following up a crushing defeat of the Union army at Chancellorsville, fought May 1-3, 1863. Invasion of the North was now likely, and indeed General Lee did invade the North, crossing the Potomac on June 16.

In other words, there was threatening military context for the Corning letter. To complicate matters for the historian, there was also startling political context. The Ohio Democratic Convention nominated Vallandigham for governor on June 11, the day before the Corning letter was released to the press.

Which mattered the most to Lincoln? Which seeming threat was uppermost in his mind? Was he more worried about the Confederate army or political opposition? History will never know, and yet it would be useful to have a system for evaluating the internal security measures of wartime presidential administrations. I have been writing about Lincoln and civil liberties for over a quarter of a century, and over the years I have devised a system for evaluating internal security records that is based more on behavior than on words, for the latter always seem hair-raising and threatening in wartime.

The system asks four questions. First, and perhaps most important, did the president win the war? The question would be pertinent for appraising the record of James Madison, who, though he did not suspend the writ of *habeas corpus* during the War of 1812, did not, in many historians' eyes, definitely win the war either.

Second, were the measures taken for internal security proportionate to the threat—or out of proportion to it? This question would be damaging for John Adams's record during the Quasi-War with France, for the minimal threat on

American soil posed by this conflict waged mostly on the open seas, hardly seemed to justify the draconian Alien and Sedition Acts of 1798.

The third and fourth questions are considerations that the law professor and writer on civil liberties Geoffrey Stone has raised with special clarity. Was the internal security system confined in its uses to the original and designated targets of sedition or was the system in fact used for other purposes? In the nineteenth century, the feared “other purpose” of any internal security system was elimination of the opposition political party. This third question would endanger Adams again, for the Sedition Act threatened and was applied to the opposition Republican press, and newspapers were essential to any loyal opposition’s continuing role of criticism of the administration. In modern times, we worry about marginalized peoples who might be victimized even though they have nothing to do with the enemy’s program.

The fourth question (also suggested by Stone’s analysis) is whether the internal security system ceased when the threat ceased? The Red Scare that followed on the heels of World War I and the internal arrests made by the administration of Woodrow Wilson, aimed at radical labor organizations and socialists, might qualify as damaging instances of this phenomenon.⁸

If we were to give grades to presidential administrations for their civil liberties records, happily no one in American history has failed the tests altogether, employing the internal security apparatus devised for wartime to eliminate the loyal opposition party and to establish a dictatorship. I would not give any president an “F,” therefore, but the full range of grades is available for the test otherwise.

In the case of Abraham Lincoln, the fourth question is unanswerable. John Wilkes Booth assassinated President Lincoln before the threat of rebellion had entirely ended. The other three questions are difficult to answer, perhaps, but they do offer historians an approach to the question of civil liberties in war. And it is an

⁸ See Geoffrey R. Stone, *War and Liberty*, esp. 166-84. Stone offers a full and fair treatment of the issues involved in the administrations other than Lincoln’s

approach that allows comparison, even across centuries of time, with other presidents, other wars and other approaches to civil liberties and internal security.

When I spoke on this subject at Eastern Kentucky University's Chautauqua Lecture Series,⁹ I asked the audience to answer the four questions and come to an appraisal for themselves of Lincoln's record on civil liberties. And I believe I should end this article with the same task for readers. What grade would you give Lincoln?

⁹ August 23, 2012.