

## Revoking Civil Liberties: Lincoln's Constitutional Dilemma

His suspension of habeas corpus is part of what some consider the "dark side" of his presidency.

By Justin Ewers, Staff Writer

President Abraham Lincoln (CORBIS)

Few presidents have interpreted their wartime powers as broadly as Abraham Lincoln, whose presidency—for all of its many successes—did have what some consider a "dark side." Most famously, Lincoln suspended the writ of habeas corpus in the first year of the Civil War, responding to riots and local militia actions in the border states by allowing the indefinite detention of "disloyal persons" without trial. Habeas corpus, which literally means "you have the body," is a constitutional mandate requiring the government to give prisoners access to the courts.

Lincoln ignored a Supreme Court justice's decision overturning his order, and over the next few years, the Great Emancipator, in one of the war's starkest ironies, allowed these new restrictions, which also imposed martial law in some volatile border areas and curbed freedom of speech and the press, to expand throughout the Northern states.

As the war drew to a close, though, some historians believe Lincoln may have begun to recognize the dangers of his own unprecedented expansion of presidential war powers. More than 13,000 civilians were arrested under martial law during the war throughout the Union. But it was in Missouri, in particular, nearly a thousand miles from the nation's capital and far beyond the federal government's day-to-day reach, that Lincoln was confronted with the most dramatic example of his internal security measures' unintended consequences.

In the months before he was assassinated, Lincoln found, to his surprise, that he was unable to convince Missouri's Republican leaders—who had grown accustomed to their newfound powers—to put an end to martial law in the state. The lesson he learned, historians say, may have been a simple one: "It is much easier," says Eric Foner, a professor of history at Columbia University, "to put these restrictions in place than it is to stop them."

When the war started, there was little doubt in Lincoln's mind that his suspension of civil liberties was both necessary and constitutional. His political opponents may have disagreed, but facing a full-fledged insurrection in the South and with the loyalty of Maryland, the state between Washington, D.C., and the rest of the Union, wavering, Lincoln had grounds to worry that the nation's capital was in real danger.

His worst fears were realized in the first month of the war, when a group of Massachusetts soldiers he had ordered south to protect the capital was attacked by an angry mob as the troops passed through Baltimore. The soldiers, panicking, fired into the crowd, killing 12 civilians. Four soldiers were killed, too. Ironically, they were the first casualties of the Civil War.

With Southern sympathizers beginning to cut telegraph wires and burn bridges behind Union lines in Maryland, Lincoln gave the order in April 1861 to suspend the writ of habeas corpus, allowing the Army

to arrest and detain without trial those considered "disloyal." His order was limited, at first, to the rail lines between D.C. and Philadelphia, but it soon spread to the rest of the Union.

Legally, Lincoln felt he was on firm ground. The Constitution, after all, explicitly grants the government the power to suspend habeas corpus "in cases of rebellion or invasion," though it is not clear on whether this power resides with Congress or the president. In either case, before the war was over, the Union would face both rebellion and invasion, and in 1863, Congress passed a law, the Habeas Corpus Indemnity Act, in support of Lincoln.

Though he worried privately that these new powers might be misused, Lincoln publicly scoffed at the notion that his administration's suspension of civil liberties would have any long-term consequences. In a letter published before the 1864 election, Lincoln compared the wartime measures to the bitter medicine a patient takes when sick. He could not believe, he wrote, "that the American people will, by means of military arrests during the rebellion, lose the right of public discussion, the liberty of speech and the press, the law of evidence trial by jury, and Habeas corpus, throughout the indefinite peaceful future . . . any more than I am able to believe that a man could contract so strong an appetite for emetics [medicines] during temporary illness, as to persist in feeding upon them through the remainder of his healthy life."

When Lincoln wrote these words, though, some historians argue, he may not have realized just how far things had gone in Missouri. Martial law was declared early in the war in the frontier state, which sent thousands of men to fight for both sides of the Civil War. With the population sharply divided on the issue of slavery, the state was riddled throughout the war by hundreds of small skirmishes, many of them involving neighbors fighting neighbors and guerrilla bands torching farms and crops.

The military government, meanwhile, struggled to maintain order. Nearly half of the military trials conducted in the Union during the war took place in Missouri—nine times as many as in Kentucky or Maryland, two other volatile border states. In 1863, after one particularly brutal massacre in which rebel guerrillas slaughtered more than a hundred pro-Union civilians in Lawrence, Kan., the local Army commander evicted 20,000 civilians from border counties in Missouri, some of whom, he believed, may have been sheltering the rebels. It was, writes Mark Neely, a professor of history at Penn State University, in *Our Lincoln: New Perspectives on Lincoln and His World*, "the most drastic displacement of population of its kind in the whole Civil War."

Lincoln was certainly aware of the measures being taken in his administration's name, but it was only after the 1864 elections that he felt he could do something about them. Lincoln had tried to persuade the military commander in the area to consider ending martial law earlier in the war, but he had been rebuffed. "The peace of the State rests on military power," the officer had replied. "To relinquish this power would be dangerous."

As the war began to wind down and the threat of Confederate invasion dwindled, Lincoln decided to try again. In the fall of 1864, after he had won re-election, Lincoln appealed to the general in control of the state to repeal martial law. "Please gather information," he wrote, "and consider whether an appeal to

the people there to go to their homes, and let one another alone . . . may not allow you to withdraw the troops."

What Lincoln didn't realize, scholars say, was just how much the fierce fighting in Missouri had hardened attitudes there—and how much the leaders of Lincoln's own party had grown accustomed to the status quo.

The first signs of trouble appeared in the state's election results. More than 165,000 Missourians had voted in the 1860 presidential election, with only 17,000 voters supporting Lincoln. But four years later, Lincoln had received 70 percent of just over 100,000 votes cast. The question, of course, was not just how Lincoln had grown so popular, but what had happened to the rest of the voters. "Essentially," writes Neely, "much of the Democratic Party in the electorate in Missouri, likely a majority, had disappeared."

Neely, for one, believes Lincoln probably understood what had happened: The state's Republicans had used their newfound war powers not just to shut down newspapers and arrest those they considered disloyal but to intimidate and disenfranchise the Democrats, many of whom supported slavery and some of whom were sympathetic to the Confederacy. The Republicans, in other words, reigned supreme in Missouri. They had the Army at their backs, and they liked it that way. "What Lincoln had attempted to guard against in his internal security policy had come to pass," writes Neely.

Lincoln's appeal to end martial law fell on deaf ears. "Allow me to assure you," replied Gen. Grenville Dodge, the newly appointed military commander in the area, when he received Lincoln's suggestion that martial law be repealed, "that the course you proposed would be protested against by the State authorities, the legislature, the [constitutional] convention and by nearly every undoubtedly loyal man in North Missouri."

Stymied, Lincoln turned, instead, to the state's new governor, Thomas Fletcher. "It seems that there is now no organized force of the enemy in Missouri and yet that destruction of property and life is rampant every where," Lincoln wrote. "Is not the cure for this within easy reach of the people themselves? It cannot but be that every man, not naturally a robber or cut-throat, would gladly put an end to this state of things." Lincoln asked Fletcher to call for neighborhood meetings so preparations could be made to end martial law. "At such meetings," Lincoln said, hopefully, "old friendships will cross the memory; and honor and Christian Charity will come in to help."

To Lincoln's surprise, the governor, too, refused him. "It would madden the true men of this State," Fletcher wrote, "to talk to them of reliance on the 'honor' and 'christian charity' of these fiends in human shape."

It was at this moment, historians believe, that Lincoln may have realized how far his civil liberties restrictions had been taken—and how difficult it might prove to restore those liberties. "Governments that assemble these powers tend to be rather reluctant to give them up," says Foner. Particularly, it seems, during a violent, highly personal civil war. "Lincoln had miscalculated. He could not at first

believe that liberty could be permanently diminished among the liberty-loving American people," writes Neely. "Missouri proved him wrong."

Lincoln's solution was straightforward: If neither the Army commander in Missouri nor its civilian leaders would agree to end martial law, Lincoln would send in the Army to do it for them.

Only a few months before he was killed, Lincoln decided to send a new general, John Pope, to the state to impose his will. Pope, to his surprise, found the rancor in Missouri went even deeper than Lincoln imagined. In March 1865, a newspaper correspondent in St. Louis reported that many Republicans in Missouri—not just the state's leaders—had come to admire the efficiency of martial law: "So far from being unpopular, it is believed that a large portion of our loyal people are willing to see a provision incorporated in the charter of the city, requiring six months of martial law to be imposed . . . every five years to clean up all the little cases of outraged justice, loose indictments, public corruption and private speculation, which the ordinary courts cannot reach."

Lincoln's envoy pushed back against what he and the president surely recognized as creeping tyranny. Pope reminded the state's leaders that he "fully believed in the capacity of the American people for self-government." In a letter to the governor, Pope said he already had seen "an alarming and fatal tendency among the people . . . to surrender to the military the execution of the laws, and thus to abandon all safeguards against tyranny and oppression." He worried about where this temptation might lead: "Once let the American people abandon themselves to this practice, which indulgence confirms into habit, and their liberties are gone from them forever."

There is little evidence, unfortunately, of what Lincoln thought of these final developments. He was killed only a few weeks later, before martial law was finally repealed in Missouri and before civil liberties could be restored elsewhere in the country. It seems likely, though, that in the waning months of the war, Lincoln learned an important lesson: Civil liberties are much more difficult to restore than to revoke.