Lincoln's Crackdown: Suspects jailed. No charges filed. Sound familiar?

By David Greenberg Nov. 30, 2001

Abraham Lincoln as a federal phoenix

Civil libertarians are crying foul over the indefinite detention of hundreds of Sept. 11 suspects and plans to try accused terrorists in military tribunals. In defense, some Bush administration loyalists cite another wartime leader who locked up civilians and resorted to army courts, Abraham Lincoln—even though Lincoln faced a radically different situation, and, more important, his civil liberties record stands as a rare blot on his reputation.

In his authoritative *Fate of Liberty: Abraham Lincoln and Civil Liberties* (1991), Mark Neely has argued that during the Civil War these two policies—summary arrests and military justice—were of a piece. Both stemmed from the emergency of having an armed rebellion in the nation's midst, and they were viewed as two parts of a single policy. Yet today we think of the policies as separate, if related. So this week I'll consider Lincoln's more famous action, his suspension of the privilege of the writ of habeas corpus. Next week, I'll tackle what at the time was considered the more egregious violation, the use of military tribunals to prosecute civilians.

First a definition: The Latin phrase habeas corpus means "you have the body." The privilege of the writ of habeas corpus refers to a common-law tradition that establishes a person's right to appear before a judge before being imprisoned. When a judge issues the writ, he commands a government official to bring a prisoner before the court so he can assess the legality of the prisoner's detention. When the privilege of the writ is suspended, the prisoner is denied the right to secure such a writ and therefore can be held without trial indefinitely. Habeas corpus is the only common-law tradition enshrined in the Constitution, which also explicitly defines when it can be overridden. Article I, Section 9 of the Constitution says, "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

Several times during the war, Lincoln or his Cabinet officers issued orders suspending the writ. The first came early in his presidency. Lincoln had been in office for barely a month when Confederate troops attacked the federal garrison at Fort Sumter in April 1861, starting the Civil War. One of his immediate concerns was how to keep an unobstructed route between Washington, D.C., and the North. He worried that if Maryland joined Virginia and seceded from the Union, the nation's capital would be stranded amid hostile states. On April 19, 20,000 Confederate sympathizers in Baltimore tried to stop Union troops from traveling from one train station to another en route to Washington, causing a riot. So on April 27 Lincoln suspended the habeas corpus privilege on points along the Philadelphia-Washington route. That meant Union generals could arrest and detain without trial anyone in the area who threatened "public safety."

Controversy followed. The most explosive incident centered on John Merryman, a Marylander arrested for insurrectionary activities. Summarily jailed, Merryman petitioned for a habeas corpus writ, which Chief Justice Roger Taney granted. But the commanding officer at Fort McHenry, where Merryman was held, refused to release the prisoner, citing Lincoln's edict. With the army loyal to Lincoln, Taney couldn't enforce his order and railed against the president while Merryman stewed in jail for seven more weeks. After being freed, he was never tried.

The Merryman case and others like it ignited a debate over Lincoln's actions. Democrats argued they were unconstitutional. Taney noted that Article 1 of the Constitution, where habeas corpus is discussed, deals exclusively with *congressional* powers, meaning that Congress alone can authorize the privilege's suspension. Although correct, Taney's argument framed the debate around a legalistic and secondary issue, that of congressional versus presidential power. It skirted the question of whether the situation warranted a suspension of habeas corpus at all. Thus when in March 1863 Congress passed the Habeas Corpus Act, effectively endorsing Lincoln's actions, civil libertarians were stripped of their main argument. (Taney also criticized Merryman's detention, noting that civilians aren't subject to military justice—an issue I'll get to next week.)

Where Democrats marshaled constitutional arguments against Lincoln's order, Republicans replied that in an emergency, only the president could act fast enough to protect the public safety. Lincoln himself took this line in a famous July 4, 1861, speech to Congress. He also, more memorably, used a pragmatic argument. "Are all the laws but one to go unexecuted," he chided his critics, "and the government itself go to pieces, lest that one be violated?" The phrase has been quoted ever since and even provided the title of a recent apologia by Chief Justice William Rehnquist for wartime suppression of freedoms.

Despite the rhetorical power of Lincoln's speech, there's no evidence the government would have gone to pieces. By the time he issued his April 27 order, Union troops had made their way through Baltimore, and it should have been clear that Washington wasn't going to be fatally isolated. As for dissuading Maryland from seceding, contemporaneous accounts suggest that whatever the administration's fears, no such move was imminent.

If Lincoln's Maryland actions were dubious, a wave of arrests the following summer under another habeas corpus suspension was downright indefensible. The wave began after Congress instituted the first-ever military draft in July 1862. Because the draft proved highly unpopular and hard to enforce, Secretary of War Edwin Stanton, at Lincoln's behest, issued sweeping orders on Aug. 8 suspending habeas corpus nationwide—the first time the writ was suspended beyond a narrowly defined emergency area. Stanton decreed that anyone "engaged, by act, speech, or writing, in discouraging volunteer enlistments, or in any way giving aid and comfort to the enemy, or in any other disloyal practice against the United States" was subject to arrest and trial "before a military commission."

The exceedingly broad mandate precipitated a civil liberties disaster. It allowed local sheriffs and constables to decide arbitrarily who was loyal or disloyal, without even considering the administration's main goal of enforcing the draft. At least 350 people were arrested in the following month, an all-time high. Some of the accused had done nothing worse than bad-mouth the president. (That was also true before Aug. 8. On Aug. 6, for example, Union Gen. Henry Halleck arrested one Missourian for saying, "[I] wouldn't wipe my ass with the stars and stripes.")

On Sept. 8, the federal official overseeing these arrests decreed that law enforcement agents were enforcing the Aug. 8 orders too stringently. It was evident that people were being arrested who posed no threat to the public safety. Thereafter, the arrests subsided. Still, Lincoln himself reiterated the suspension on Sept. 24, and arrests without trial continued. Overall between 10,000

and 15,000 people were incarcerated without a prompt trial. On balance, their detention almost certainly did not enhance American security nor hasten the Union victory.

In the last 140 years, America has not faced a crisis anything like the Civil War, and the power to suspend habeas corpus has mostly gone unused. Although (as I'll explain next week) the Supreme Court never definitively ruled Lincoln's suspensions unconstitutional, his actions did come to be seen as a blemish on an otherwise heroic record of wartime leadership. That disrepute into which his behavior fell just may have helped deter his successors from using such measures themselves.

In the days after Sept. 11, George W. Bush was seen conspicuously toting around a new best-seller about the Civil War, as if to suggest he were reading up on the historical lessons of wartime leadership. It would be good if he brushed up not just on our greatest president's heroics but also on his sad mistakes.

Print Sources

The best book on Lincoln and civil liberties during the Civil War is, as mentioned, Mark Neely's *The Fate of Liberty: Lincoln and Civil Liberties* (1991). James McPherson's *Battle Cry of Freedom: The Civil War Era* (1988) is reliable for anything Civil War-related. Dean Sprague's *Freedom Under Lincoln* (1965) is dated but helpful. Overviews of wartime suppressions of civil liberties include Michael Linfield's *Freedom Under Fire: U.S. Civil Liberties in Times of War* (1990), which is generally critical toward such suppressions, and William Rehnquist's *All the Laws but One: Civil Liberties in Wartime* (1998), in which the chief justice generally defends them.

Uncivil Courts: America's military tribunals through the ages.

By David Greenberg Dec. 5, 2001

With U.S. forces seemingly closing in on Osama Bin Laden, the Bush administration may soon have to decide whether to execute its plan to try suspected terrorists— including American residents —before military tribunals. Just as the Bushies have invoked Abraham Lincoln's suspensions of the privilege of habeas corpus to justify their summary detentions, so they have hearkened back to the use of military tribunals in the Civil War to justify their new proposal. The big difference between the Bush plan (click here for the president's executive order) and Lincoln's plan, of course, is that while Bush intends to try mainly what the Supreme Court has called "enemy belligerents" in his military courts, Lincoln prosecuted American civilians. Still, now as then, using Army courts to try anyone but U.S. soldiers is to court the reproach of posterity.

Lincoln's Army tribunals began operating just a few months after the Civil War began. Disorder was acute in border states such as Maryland and Missouri, which remained loyal to the republic but contained many citizens who sympathized with or aided the Confederate rebels. In Maryland, Lincoln sought to quell the chaos by suspending habeas corpus (as discussed in last week's "History Lesson"). But Missouri was more intractable. In June 1861, the state's governor declared war on the Union forces even as he swore his fidelity to the United States; a month later, all-out combat had consumed the state. Union Gen. John C. Frémont imposed martial law in August.

Martial law, which Army commanders impose on populations when regular governments cease to function, is not the same as *military law*. According to the Articles of War passed by Congress in 1806, only members of the armed forces can be tried under military law. Once, during the War of 1812, Gen. Andrew Jackson tried a civilian journalist before a military commission, but the journalist was acquitted on the grounds that as a civilian, he wasn't subject to military justice. (Jackson, on the other hand, was fined $1,000 for contempt.) During the Mexican War, Gen. Winfield Scott made extensive use of military courts, but he obeyed the Articles of War and tried only soldiers in his own ranks who had broken laws.

Yet Frémont and his successor, Henry W. Halleck, believed (incorrectly) that they could legitimately employ military courts in Missouri because they had imposed martial law there. This belief probably stemmed from innocent confusion since, despite a Lincoln administration white paper spelling out the differences between the two concepts, few people understood them.

The defendants who came before these tribunals weren't Confederate soldiers, who, when captured, typically became prisoners of war and weren't put on trial. Rather, the defendants in military court were mainly civilians suspected of aiding the rebels. Gen. Halleck explained the rationale: In Missouri, he said, those burning bridges or buildings weren't "armed and open enemies" but "pretended quiet citizens living on their farms." These civilian rebels couldn't be treated as prisoners of war, but neither could they be entrusted to the local courts, which Halleck deemed "very generally unreliable"—not least because so many locals were likely to sympathize with the South. (International war crimes tribunals, like those used to try the Nazis at Nuremberg after World War II, weren't yet common practice.) So starting in September 1861, Missourians were prosecuted under military tribunals that Union generals established. Lincoln did nothing to deter his generals from doing as they saw fit to subdue Missouri.

Eleven months later, such tribunals were given explicit sanction to operate nationwide. In August 1862, Secretary of War Edwin Stanton, on Lincoln's orders, suspended habeas corpus across the country and decreed that a range of civilian criminals and dissenters would face arrest and trial before military courts. Of the 4,000-plus military trials throughout the war, about 55 percent took place in the border states of Missouri, Maryland, and Kentucky (where the Union military maintained a strong presence and where generals wouldn't trust juries composed of locals). Roughly 32 percent occurred in the Confederate states. The rest occurred in Washington, D.C. (which was also under martial law for some of the war), and the North.

As noted, captured Confederates weren't the usual defendants since they were typically held as prisoners of war. To be sure, after the war, some Confederates were tried before military courts. One Confederate Army officer, Henry Wirz, who ran an inhumane POW camp at Andersonville, Ga., was so tried and was executed for war crimes. The men who conspired with John Wilkes Booth to assassinate Lincoln were also convicted in a military court. On the other hand, civilian courts were often deemed fit to try Confederates. Even Confederate President Jefferson Davis was tried in U.S. federal court, although after President Andrew Johnson pardoned all rebels in 1868, Davis' indictment was dismissed.

The military trials that became most controversial were those of civilians who lived in Union or border states. Their offenses—which were categorized, rather indiscriminately, as "treason," "conspiracy," "rebellion," or other similar crimes—included engaging in guerrilla warfare,

spying, avoiding the draft, and even voicing disloyal opinions. These defendants often received less than full justice.

The problem wasn't that the tribunals were kangaroo courts. Staffed by military officers, they did abide by set procedures and sometimes acquitted defendants. Sentences were subject to review by senior officers, death penalties by the president himself. Lincoln himself spared many lives.

But as is typical of military justice, those procedures afforded fewer protections than those of civilian courts. Basic constitutional requirements were ignored. The Army courts had no juries, as the Constitution mandates. Nor did they require a unanimous vote to convict. A majority vote sufficed, except in capital cases, which required a two-thirds vote.

Another injustice was that Army courts were used to prosecute common thieves or liquor traffickers—purposes far from those the Lincoln administration intended. Worse, defendants were charged with crimes incommensurate with their behavior. Some who had simply shown sympathy to the Confederacy were accused of treason, a clearly inapplicable charge according to Article III, Section 3 of the Constitution, which defines treason as an "overt act" of "levying war" against the United States or of "adhering to their enemies, giving them aid and comfort." Some were sentenced to hard labor or death, though none was ultimately executed.

The most egregious violations of civilians' rights occurred in the North, where unreliable or ill-functioning civil courts could not be used as an excuse for resorting to military justice. One famous case involved Clement Vallandigham, an Ohio Democrat, former congressman, and leading "Copperhead," or Northern opponent of the war. A double victim, Vallandigham suffered from both the suspension of habeas corpus and the rough justice of military courts.

On May 1, 1863, Vallandigham delivered a fiery anti-war speech in Mount Vernon, Ohio, in which he attacked, among others, Gen. Ambrose Burnside, the military officer in charge of the region. A short-fused Burnside ordered Vallandigham's arrest. A few nights later, troops burst into Vallandigham's house in the wee hours and carried him away. Within days, an Army court sentenced him to jail for the rest of the war. Vallandigham petitioned a federal judge for a habeas corpus writ, but the judge noted that Lincoln had suspended the privilege. Vallandigham had in fact been trying to provoke just such a result, and he knew full well that Burnside was likely to come after him. He thus achieved his purposes: attaining martyrdom for himself and throwing Lincoln on the defensive.

The controversy deepened with the case of Lambdin Milligan, whom a military court in Indiana had sentenced to death for joining a pro-Confederate secret society called the Sons of Liberty. The Supreme Court, which in 1864 had declined to rule on Vallandigham's case, agreed in 1866 to hear Milligan's. In *Ex Parte Milligan*, Justice David Davis, delivering a majority opinion in Milligan's favor—which four justices joined and with which four others concurred in a separate opinion—strongly rebuked the government. Davis, who had been Lincoln's friend and campaign manager, held that military tribunals had no jurisdiction over civilians. Article III of the Constitution, he noted, mandates that courts be set up by Congress, and the Sixth Amendment guarantees the right to a jury trial.

Technically, the court didn't question Lincoln's suspension of habeas corpus since the Habeas Corpus Act passed by Congress in 1863 had removed the pressing constitutional questions surrounding that action. But it did order the lower court to give Milligan a writ for his freedom. More important, Davis' opinion included a passage about wartime encroachments on freedoms that became a touchstone for civil libertarians ever since:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchism or despotism.

Milligan didn't prevent presidents from sending civilians to Army courts. During Reconstruction, military justice was used to suppress insurrections and punish criminals. During World War II, too, the Roosevelt administration prosecuted eight Nazi spies under military law and executed six, with Attorney General Francis Biddle deriding *Milligan* as a "bad case." (The administration could have held the potential saboteurs as POWs and tried them later at the war crimes tribunals.) The Supreme Court upheld FDR's action, ruling in *Ex Parte Quirin* that Milligan's example wasn't relevant because Milligan was not an "enemy belligerent." In essence, *Quirin* tried to broaden the class of those subject to military justice beyond U.S. soldiers to include hostile combatants as well—the key point on which the Bush administration today rests its case.

Nonetheless, for decades now it has been *Milligan*, not *Quirin*, thathas been considered a landmark, an eloquent articulation of the paramount need for protecting civil liberties in wartime. To be sure, presidents and attorneys general have had little use for *Milligan* and legally speaking, *Quirin* overturned, or at least modified, it. But students of history and constitutional law have consistently considered *Milligan* the better decision. And if *Milligan* hasn't deterred wartime politicians from using military justice against enemy soldiers—just as it doesn't seem apt to disturb the Bush administration's military tribunal plans today—it has seared in the record the idea that future generations will not look kindly on such actions.