

# Lincoln's First Amendment Record

by Eve Errickson

Visitors to the Cottage this summer may be surprised by the presence of a resident of the Armed Forces Retirement Home on the grounds, distributing flyers that voice his protest of practices at the Home. While President Lincoln's Cottage is a historic site of the National Trust for Historic Preservation and has separate management from the Armed Forces Retirement Home, we recognize his First Amendment rights to present his views peacefully on the grounds of the Cottage. As the First Amendment declares: "Congress shall make no law . . . abridging the freedom of speech, or of the press or of the right to peaceably assemble, and to petition the Government for a redress of grievances." The resident's exercise of his rights inspired our staff to take a fresh look at the legal debate over President Lincoln's actions to suppress the free speech of journalists and other private citizens who objected to the Civil War. His actions brought to light a complex intersection of laws which include the First Amendment and due process issues.

In 1861, mob violence throughout the Union forced the closure of newspapers that published editorials opposing war between the states and targeted the writers themselves for public humiliations. In response, Lincoln focused exclusively on quick, regional stabilization — "without ruinous waste of time."<sup>1</sup> The Union Army confiscated, monitored and censored communications sent via the mail and wire, including newspapers. Journalists and newspaper owners who persisted after government suppression were arrested and held without warrants or due process of law.

The suspension of the writ of habeas corpus in April 1861 was initially directed at quelling unrest in Maryland. In February 1862, Lincoln ordered the release of political and state prisoners once "The line between loyalty and disloyalty [was] plainly defined," only to suspend the writ again and extended throughout the Union in 1862. Congress confirmed the suspension, after the fact, through passage of the Habeas Corpus Act in 1863.<sup>2</sup> Prison records reflect that as many as 4,000 civilians were imprisoned as part of efforts to suppress anti-war sentiment—including politicians, foreign nationals, and diplomats. According to historian Mark Neely, Jr.:

The government thus unleashed every dogberry across the nation to make loosely defined arrests whose victims had no remedy to appeal to judges for writs of habeas corpus and might be essentially tried by court martial.

The intersection of the war and the suppression of free speech have invoked a wide variety of interpretations. As historian Akhil Reed Amar has observed, Lincoln focused on the preservation of the Union. For Lincoln, the Constitution was an expression of statehood, rather than an expression of individual rights, and saw no contradiction in trying to preserve a democratic union by force: "Continue to execute all the express provisions of our national Constitution, and the Union will endure forever" he said in his first inaugural address.<sup>4</sup> Others cite the absence of legal precedent and the importance of public safety—in essence, Lincoln believed that his actions were necessary to minimize the rebellion, even at the cost of essential

American civil liberties and innocent lives.<sup>5</sup> Whether or not his understanding of Constitutional issues was grounded in good faith or indifference to civil rights is a continuing and robust debate among lawyers and historians alike.

Lincoln's legal training and understanding of American Constitutional Law may clarify both sides of this debate. While the Constitution itself does not provide authority to act in the way Lincoln did, traditional legal practice in the 19th century did not confine itself to American precedents. English common law influenced American law makers from the time of the early Republic, and provided rationalizations for the suppression of public speech against the government through a number of conflicting interpretations. These different interpretations influenced American lawmakers well into the twentieth century.

William Blackstone's *Commentaries on the Laws of England*, although written for a pre-Revolutionary English audience, was often used by American lawyers during the 19th century. The work is an explanation of English common law by Blackstone in a series of lectures that took place between 1765 and 1769.<sup>6</sup> The *Commentaries* remained in the American legal canon for more than a century after the Colonies declared independence, even after the passage of state statutes designed to supplant it.<sup>7</sup>

Blackstone provided background on a wide variety of issues, including both the practical dynamics of freedom of speech and the criminal prosecution of

speech if shown to influence another to break the law. According to English common law, if a speaker provokes someone else to commit an illegal act, such as desertion from the army, the speaker could be prosecuted for the crime as well. However, where the act was not brought about by the speech, prosecuting the speaker was less clearly legitimate. Common law describes the criminal speaker as one who “advises”, “counsels” or “commands” another to commit illegal act. Therefore, common law broadly held that a criminal act could not be prosecuted without proof of the commission of a crime.<sup>8</sup> On the issue of free speech, Blackstone held plainly that it is a legitimate goal of a country to punish “any dangerous or offensive writings, which, when published . . . be adjudged of a pernicious tendency . . . to preserve the ‘peace and good order.’”<sup>9</sup>

Drawing on structural and political analysis from the *Commentaries*, Presidents John Adams and Woodrow Wilson enacted the Alien and Sedition Acts and the Espionage Act, respectively, that suppressed and criminalized open debate during wartime. Drafters of the 1798 Alien and Sedition Act explicitly cited Blackstone for the proposition that the speech of a “pernicious tendency” could be prosecuted on an arbitrary basis to protect public safety.<sup>10</sup>

Like many antebellum barristers and rising law students, Lincoln relied on Blackstone’s *Commentaries* to inform his understanding of the law. Lincoln used the *Commentaries* to prepare for

his license to practice law and it was also one of five basic sources he recommended to aspiring lawyers in 1858 and 1860.<sup>11</sup> Although early American lawyers made many attempts to “Americanize” English common law, the *Commentaries* remained a primary text for students seeking admission



In this 1864 cartoon, Lincoln is mockingly portrayed as a “Federal Phoenix” rising up from the ashes of burnt logs “United States Constitution,” “Commerce,” “Free Press,” “States Rights,” “Credit” and “Habeas Corpus.”

to the bar well into the 19th century, sometimes to the displeasure of others. According to Thomas Jefferson, the persistence of Blackstone was to blame for a rising trend of “toryism” among American lawyers. English jurist and philosopher Jeremy Bentham, writing in the 1830s, decried Blackstone’s exclusive focus on preserving power to the monarchy on the grounds of ‘natural law’ and argued for a central, absolute authority that assured “the greatest happiness for the greatest

number.”<sup>12</sup> Nevertheless, Blackstone’s comprehensive treatment of criminal and civil matters served as a foundation of the legal education of Lincoln and his peers.

English common law was a strong influence on 19th century lawyers and politicians as they interpreted the U.S Constitution and drafted legislation. Southern states pushed legislation during the 1830s at the state and federal levels that suppressed publications of abolitionist societies in order to avoid slave uprisings. Anti-slavery speech was seen as a danger to the institution of slavery, which then-President Andrew Jackson supported. At the state level, all publications “as may have a tendency to make our slaves discontented” were suppressed by the North Carolina legislature in December 1835. The same year, Jackson called on the free states to prevent the circulation of abolitionist publications from reaching the Southern States. The House of Representatives prohibited petitions on the subject of slavery thus preventing any Congressional debate as part of a series of self-imposed gag rules, the first of which was passed in 1836. (The last gag order was rescinded in 1845; John Quincy Adams denounced them as “a direct violation of the constitution of the United States, the rules of this House, and the rights of my constituents.”)<sup>13</sup>

In another example of the influence of the *Commentaries*, the Pennsylvania legislature passed a law in 1861 forbidding, among other things, the dissuasion of enlistments or the encouragement of desertion from the army.

Pennsylvania judges interpreted the new law to mean that anti-war speech could be prosecuted as treason, without distinguishing the constitutionality of abridging the freedoms set out in the Bill of Rights.<sup>14</sup> One judge explained “that the government by holding its citizens criminally responsible for every wilful[!] design to interfere with its authority or its plans, in no respect infringes upon any personal right.”<sup>15</sup> Lawmakers categorized anti-war speech as treason, but often bolstered their claims with intimations that the speech was more dangerous during unstable times, “as liberty of speech is a luxury to be enjoyed to its fullest extent only in a time of profound peace.”<sup>16</sup> Likewise, Lincoln supported his decision to suspend the writ of habeas corpus to preserve the public safety, as a function of the Suspension Clause:<sup>17</sup>

Ours is case of Rebellion—so called by the resolutions before me—in fact, a clear, flagrant and gigantic case of Rebellion . . . [The Suspension Clause] is the provision which especially applies to our present case.<sup>18</sup>

Lincoln’s policies on civil liberties were broadly and roughly shaped to win the war first, with the hope that peace would come in the future. In the meantime, the rights of individuals were liable as subterfuge, because:

under cover of ‘Liberty of speech’ ‘Liberty of press’ and ‘Habeas Corpus’ [sympathizers with the Rebellion] hoped to keep on foot among us a most efficient corps of spies, informers, suppliers, and aiders and abettors of their cause in a thousand ways.<sup>19</sup>

Although his decisions were controversial at the time, Lincoln was acting within accepted interpretations of the law. In fact, a clear distinction between the right to freedom of speech and the criminalization of speech due to its treasonous or dangerous nature was not clearly drawn in American law until the early 20th century. In 1917,

the Espionage Act imposed a twenty year sentence on anyone who attempted to interfere with military operation, and criminalized language “disloyal” to the government. President Wilson, spurred by the sinking of the Lusitania, believed that “disloyal” individuals “had sacrificed their rights to civil liberties.”<sup>20</sup> The “bad tendency” test, based on Blackstone’s *Commentaries*, was used to interpret the Espionage Act as a broad prohibition on war dissention.<sup>21</sup>

However, US District Judge Learned Hand, reviewing convictions under the Espionage Act wrote in 1918, that “to establish criminal responsibility, the words uttered must amount to counsel or advice or command to commit the forbidden acts.” The critical distinction — that of the expression from the intention to commit an illegal act — meant the expression itself was not assumed to be harmful, and subject to prosecution, unless intended to bring about the illegal act.<sup>22</sup> Justice Oliver Wendell Holmes, writing for the U.S. Supreme Court, held in 1919 that a criminal conviction under the 1917 Act was constitutional, but delineated more specific conditions to limit free speech:

The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. [...] The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.<sup>23</sup>

Blackstone’s ‘pernicious speech’ or ‘bad tendency’ theory allowed the government to criminalize all speech it considered ‘disloyal’ as deemed necessary to protect the public from violent acts of sedition, demonstrations, or encouraged desertions. The potential harms associated with ‘pernicious’ speech of anti-war editorials and

demonstrators— even without the requirement of ‘clear and present danger’ was enough in Lincoln’s view to outweigh the dangers associated with suspending habeas corpus and closure of anti-war newspapers throughout the Union:

Must I shoot a simple minded soldier boy who deserts, while I must not touch a hair of a wiley [sic] agitator who induces him to desert? ... I think that in such a case, to silence the agitator and save the boy, is not only constitutional, but, withal, a great mercy.<sup>24</sup>

Two litigants brought lawsuits to challenge Lincoln’s actions, but neither case was premised specifically on the grounds of preserving Free Speech. The holding in *Ex parte Merryman* challenged Lincoln’s suspension of habeas corpus—the court ruled that the power to suspend the writ lay with Congress, not with the president. However, the ruling was essentially ignored.<sup>25</sup> *Ex Parte Milligan*, decided during Reconstruction, challenged the application of martial law to civilians as the Supreme Court held that citizens could not be tried by a military tribunal when civilian courts were still operating. The case is often cited as a broader rebuke of Lincoln’s policies during the war. Ultimately, however, both cases failed as effective legal precedent, given the emergence of the Espionage Act during the twentieth century.<sup>26</sup>

Suppressing the rights of the press and individuals during the War, Lincoln’s reasoning was driven by cursory assumptions now considered unusable by modern legal standards, though concerns remain the same. Opinions on their own do not disrupt peace and order, and today are not considered in and of themselves criminal acts. Laws now prioritize free speech as a Constitutional right, even when the speech is controversial or purposefully

provocative. A recent example is the holding this past March in *Snyder v. Phelps*, which upheld the rights of the Westboro Baptist Church to protest military funerals, provided that the protestors observe time and place restrictions set by local authorities. In contrast with the violent suppression of anti-war protests during the Civil War, the Supreme Court, quoting the earlier decision of *New York Times v. Sullivan*, wrote:

The First Amendment reflects a profound national commitment to the principal that debate on public issues should be uninhibited, robust, and wide-open.

Freedom of the press and of speech in times of instability continues to spark debate among scholars, legal professionals, and lawmakers as to how best to manage personal freedoms and national security in such perilous times. More modern courts have held the government's concern should be limited to the censorship of "advocacy of action, not of ideas."

Analysis of Lincoln's decisions in hindsight, through a fully articulated body of 21st century First Amendment law both illuminates and distorts our understanding of his decisions in the context of legal strategies employed by those he saw as his contemporaries. In the light of 150 years of additional lawmaking and adjudication, these issues are no less complex today than they were during the Civil War. Scholarship of Lincoln's wartime record on civil liberties suffers for the same reason the record became controversial. Freedom of speech is one of the most basic and most important of our civil liberties — but in unstable times, is also notoriously vulnerable.

### Author's Note:

*This article has been written with an eye to developing a general discussion on the legal traditions and practice that affected freedom of speech during the Civil War, and is not intended as a historical critique of Lincoln's motivations or capabilities. In particular, this period involves an incredibly complex set of issues which include due process of law, criminal law, Constitutional interpretation, freedom of speech, and freedom of the press.*

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### END NOTES

1 A Lincoln "Letter to Erastus Corning and Others" June 12, 1863, <http://teachingamericanhistory.org/library/index.asp?document=612>.

2 Mark Neely Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (New York: Oxford University Press, 1991) p. 69.

3 Mark Neely Jr., *Abraham Lincoln and the Promise of America: The Last Best Hope of Earth* (Cambridge, Massachusetts: Harvard University Press, 1993) p. 126.

4 Akhil Reed Amar, "Abraham Lincoln and the American Union" Yale Faculty Scholarship Series, Paper 854, (2001), p. 111 [http://digitalcommons.law.yale.edu/fss\\_papers/854](http://digitalcommons.law.yale.edu/fss_papers/854) citing Lincoln's First Inaugural Address.

5 Dean Sprague, *Freedom Under Lincoln* (Boston: Houghton Mifflin, 1965) p. 302; Thomas J. DiLorenzo, *The Real Lincoln: A New Look at Abraham Lincoln, his agenda and an unnecessary war* (New York: Three Rivers Press, 2002) p. 159.

6 Allen C. Guelzo, *Abraham Lincoln: Redeemer President* (Grand Rapids, Michigan: William B. Eerdmans Publishing Company, 1999) p. 77.

7 Guelzo, p. 77.

8 William Blackstone, *Commentaries on the Laws of England* #37 (Cavendish, 2001), cited in Stone (2002).

9 Blackstone, *Commentaries* 4L 150---53: "But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty." Retrieved at [http://press-pubs.uchicago.edu/founders/documents/amend1\\_speeches4.html](http://press-pubs.uchicago.edu/founders/documents/amend1_speeches4.html).

10 Walter Berns, "Freedom of the press and the alien and sedition laws: a reappraisal." *The Supreme Court Review*, (1970), p. 140.

11 Guelzo, p. 78.

12 Guelzo, p. 77.

13 Berns, p. 149.

14 Pennsylvania Historical Society <http://www.hsp.org/node/2913>.

15 Pennsylvania Historical Society <http://www.hsp.org/node/2913>.

16 Pennsylvania Historical Society <http://www.hsp.org/node/2913>.

17 Article I, Section 9, Limits on Congress: which provides the "Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it". Lincoln believed that as the Executive he could constitutionally suspend the writ, provided that Congress later passed legislation approving his action. See Amar, *America's Constitution*, pp.132-133.

18 Letter to Erastus Corning.

19 Letter to Erastus Corning.

20 Stone, p. 412, citing Wilson's Third Annual Message to Congress as quoted in David M. Kennedy, *Over Here: The First World War and American Society* (New York: Oxford, 1980) 24.

21 Stone, p. 413.

22 *United States v. Nearing*, 252 F 223, 227 (S D NY 1918).

23 *Schenk v. United States*, 249 U.S. 45 at 50.

24 Letter to Erastus Corning and others, June 12, 1863, cited by Geoffrey R. Stone *The Wiley Agitator and the American Free Speech Tradition* (New York: W.W. Norton & Co., 2004).

25 17 F. Cas 144 (C.C.D. Md. 1861).

26 Neely, *Fate of Liberty* p. 184.

27 562 U.S. \_\_\_\_\_ (2011), at 11, citing *New York Times Co. vs. Sullivan*, 376 U.S. 254, 270 (1954).