

LINCOLN LORE

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A LETTER ON CONSTITUTIONAL PROCEDURE

The Constitution was almost a fetish from Abraham Lincoln's viewpoint and it would seem sacrilegious to allow Constitution Day to pass without making some reference to Lincoln's profound respect for the "Higher Power" as he referred to the document.

During his entire life time, Lincoln had never seen an amendment to it, ratified by the states, and he hesitated to do anything that would seem to reflect upon its grandeur. He said on the occasion when there were those who would amend it: "No sir, let it stand as it is. New hands have never touched it."

One of the finest letters Lincoln ever wrote in which he discussed his constitutional rights in a time of rebellion, was written to Erastus Corning and others, with reference to the Vallandigham case. Excerpts from this letter which makes special mention of constitutional procedure follows.

"Executive Mansion, Washington, June 12, 1863.

"Hon. Erastus Corning and Others.

"Gentlemen: Your letter of May 19, inclosing the resolutions of a public meeting held at Albany, New York, on the 16th of the same month, was received several days ago.

"The resolutions, as I understand them, are resolvable into two propositions—first, the expression of a purpose to sustain the cause of the Union, to secure peace through victory, and to support the administration in every constitutional and lawful measure to suppress the rebellion; and, secondly, a declaration of censure upon the administration for supposed unconstitutional action, such as the making of military arrests.

"Ours is a case of rebellion—so called by the resolutions before me—in fact, a clear, flagrant, and gigantic case of rebellion; and the provision of the Constitution that '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,' is the provision which specially applies to our present case. This provision plainly attests the understanding of those who made the Constitution that ordinary courts of justice are inadequate to 'cases of rebellion'—attests their purpose that, in such cases, men may be held in custody whom the courts, acting on ordinary rules, would discharge. *Habeas corpus* does not discharge men who are proved to be guilty of defined crime; and its suspension is allowed by the Constitution on purpose that men may be arrested and held who cannot be proved to be guilty of defined crime, 'when, in cases of rebellion or invasion, the public safety may require it.'

"This is precisely our present case—a case of rebellion wherein the public safety does require the suspension. Indeed, arrests by process of courts and arrests in cases of rebellion do not proceed altogether upon the same basis. The former is directed at the small percentage of ordinary and continuous perpetration of crime, while the latter is directed at sudden and extensive uprisings against the government, which, at most, will succeed or fail in no great length of time. In the latter case arrests are made not so much for what has been done, as for what probably would be done. The latter is more for the preventive and less for the vindictive than the former. In such cases the purposes of men are much more easily understood than in cases of ordinary crime. 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; much more if he talks ambiguously—talks for

his country with 'buts,' and 'ifs' and 'ands.' Of how little value the constitutional provision I have quoted will be rendered if arrests shall never be made until defined crimes shall have been committed, may be illustrated by a few notable examples: General John C. Breckinridge, General Robert E. Lee, General Joseph E. Johnston, General John B. Magruder, General William B. Preston, General Simon B. Buckner, and Commodore Franklin Buchanan, now occupying the very highest places in the rebel war service, were all within the power of the government since the rebellion began, and were nearly as well known to be traitors then as now. Unquestionably if we had seized and held them, the insurgent cause would be much weaker. But no one of them had then committed any crime defined in the law. Every one of them, if arrested, would have been discharged on *habeas corpus* were the writ allowed to operate. In view of these and similar cases, I think the time not unlikely to come when I shall be blamed for having made too few arrests rather than too many.

"By the third resolution the meeting indicate their opinion that military arrests may be constitutional in localities where rebellion actually exists, but that such arrests are unconstitutional in localities where rebellion or insurrection does not actually exist. They insist that such arrests shall not be made 'outside of the lines of necessary military occupation and the scenes of insurrection.' Inasmuch, however, as the Constitution itself makes no such distinction, I am unable to believe that there is any such constitutional distinction. . . .

"If I be wrong on this question of constitutional power, my error lies in believing that certain proceedings are constitutional when, in cases of rebellion or invasion, the public safety requires them, which would not be constitutional when, in absence of rebellion or invasion, the public safety does not require them; in other words, that the Constitution is not in its application in all respects the same in cases of rebellion or invasion involving the public safety, as it is in times of profound peace and public security. The Constitution itself makes the distinction, and I can no more be persuaded that the government can constitutionally take no strong measures in time of rebellion, because it can be shown that the same could not be lawfully taken in time of peace, than I can be persuaded that a particular drug is not good medicine for a sick man because it can be shown to not be good food for a well one. Nor am I able to appreciate the danger apprehended by the meeting, 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 which I trust lies before them, any more than I am able to believe that a man could contract so strong an appetite for emetics during temporary illness as to persist in feeding upon them during the remainder of his healthful life. . . .

"I further say that, as the war progresses, it appears to me, opinion and action, which were in great confusion at first, take shape and fall into more regular channels, so that the necessity for strong dealing with them gradually decreases. I have every reason to desire that it should cease altogether, and far from the least is my regard for the opinions and wishes of those who, like the meeting at Albany, declare their purposes to sustain the government in every constitutional and lawful measure to suppress the rebellion. Still, I must continue to do so much as may seem to be required by the public safety."

"A. Lincoln."