



# Lincoln Lore

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## ANDREW C. McLAUGHLIN ON LINCOLN AND THE CONSTITUTION

The fate of civil liberties under the Lincoln administration has long troubled American historians and political scientists, as well it should. For we are confronted by this painful anomaly: the president of the United States consistently rated the best by America's professional historians happens also to be the president more often described as a dictator than any other. In fact, once the problem is stated in these appropriately stark terms, the real wonder is that American historians have not been more troubled by the question than they have been to date.

For years historical consciences were soothed somewhat by the belief that President Lincoln faced not only the mighty adversary of the Confederate States of America virtually in his front yard but also a formidable fifth-column movement in the rear, the so-called Copperheads. In recent decades, however, the specter of the Copperhead menace has fast been turning into a historical will-o'-the-wisp. Everyone acknowledges that a large loyal opposition in the North kept "Honest Abe" honest, all right, but the estimated size of the disloyal opposition in the North seems to shrink with the appearance of each new book or article on the subject. And if historians take away the problem of disloyalty in the North, then there appear to be fewer and fewer justifications for Lincoln's willingness to curtail traditional American civil liberties.

This is far too knotty a problem to untie in three pages of *Lincoln Lore*, but a brief look at the work of one historian who wrestled with this problem in the past may at least make possible some appreciation for the difficulties involved in characterizing the fate of civil liberties under the Lincoln administration. Andrew C. McLaughlin, born the year Lincoln was inaugurated president, lived through the constitutional difficulties caused not only by the Civil War but also by World Wars I and II. His mature work on the history of the American Constitution was published in the 1930s and included "Lincoln, the Constitution, and Democracy," a paper delivered

at the meeting of the Abraham Lincoln Association in Springfield on February 12, 1936, and published the next year in the *Abraham Lincoln Association Papers*.

McLaughlin, a native of Beardstown, Illinois, and the son of Scottish parents, grew up in Muskegon, Michigan. He earned a degree from the University of Michigan in 1882 and later returned as a student to the law school in Ann Arbor. He eventually taught constitutional history there and married the daughter of the university president, the famous James B. Angell. McLaughlin studied briefly in Germany in the 1890's. Later he became managing editor of the *American Historical Review* and for thirty years was chairman of the history department at the University of Chicago. His *Constitutional History of the United States*, published in 1936,

seven years after he became professor emeritus, won a Pulitzer Prize.

McLaughlin's essay on the Constitution under Lincoln won no prizes and has been somewhat neglected by historians, but it contains an almost agonizingly thoughtful treatment of the fate of civil liberties in the Civil War. What made it particularly agonized was the distressing world situation in 1936, a time of "uncertainty and bewilderment." "We are living in an age which has seen the recrudescence of despots," McLaughlin told the members of the Abraham Lincoln Association. "No mere constitutional formalism can prevent their rise. . . ." Despotism was "thrusting out its mailed fist without decent respect for the opinions of mankind," leaving "the principle of democracy . . . imperiled in the world today."

In general, the books and articles on Lincoln and the Constitution written between the World Wars were marked by a concern to prove that Lincoln was no model for twentieth-century dictators, even if he did on occasion violate the American Constitution. McLaughlin performed this task as ably as anyone, saying:

. . . we gather assurance from the course of the Civil War which was marked on the whole by a respect for dis-



cussion, for freedom of the press, for open election, for the maintenance of legislative debate. So we must remind ourselves of the simple fact that it was not what Lincoln did, but what he failed to do and did not attempt to do, which constitutes the center of his greatness as a democratic leader.

In other words, Lincoln did not postpone elections, outlaw opposition parties, or disallow criticism of his administration in Congress or the press. He missed his golden opportunity to begin establishing a dictatorship by postponing the election of 1864 — because he had no desire to become a dictator.

Yet President Lincoln certainly exercised some powers previously unknown to the Constitution, and such actions as he took in some cases might be the very methods of establishing a dictatorship. Arbitrary arrests seem to have made McLaughlin especially uncomfortable. They were, he admitted,

... the favorite and indispensable agencies of tyranny. What prevents them from becoming the foundation of a despotic government or from being used with crafty cruelty or high injustice? Once again it is the conscience, the moral attitude, the sense of civic duty, and the respect for law in the breast of the man that wields this enormous and dangerous power. . . .

This left McLaughlin uncomfortable still, and it leaves readers today uneasy as well.

From today's perspective McLaughlin's interpretation seems less than adequate because of the almost nervous brevity of his treatment of the problem of arbitrary arrests. Here was a power which could bring cruelty and injustice in the short run and tyranny in the long run, but McLaughlin essentially begged off discussing it fully. "It is quite impossible," he pleaded, "to discuss here in detail the arbitrary arrests which were frequently made during the war." He told the Abraham Lincoln Association members simply, "The President hesitatingly and, I think, reluctantly acquiesced in the practice of imprisonment without a judicial trial because of the necessity of the situation." He "was confronted," after all, "with the most severe and dangerous crisis in American history."

Hesitation and reluctance seem difficult to find nowadays when historians survey Lincoln's record on arbitrary arrests. Suspending the privilege of the writ of habeas corpus in certain areas was among the earliest acts of the Lincoln administration. Indeed, it was first ordered less than two weeks after the firing on Fort Sumter, extended several times thereafter, and adhered to as a policy throughout the war. To say that Lincoln was hesitant in this case would be roughly equivalent to saying he was hesitant to impose a blockade on the South.

McLaughlin dealt with the issue of arbitrary arrests at somewhat greater length in *A Constitutional History of the United States*, but, it must be said, with an equally unsatisfactory — with an almost evasive — sketchiness. Dealing with the problem of their frequency and extent, McLaughlin said:

We can scarcely estimate with even an approach to accuracy how many persons were thus arrested beyond the area of actual conflict. The number reached into the thousands, if arrests for all causes be counted; and with this vague statement we may perhaps content ourselves. Competent investigators have found exact enumeration impossible.

Secret societies were formed — the Knights of the Golden Circle and the Order of American Knights, later the Sons of Liberty. How many persons were enrolled among the Knights, no one can say. General H.B. Carrington, who was in the northwest during the war and knew conditions in the most deeply-infected region — the southern portions of Illinois, Indiana, and Ohio —, asserted that there were 70,000 members of the order in Illinois and 87,000 in Indiana.

In this passage, McLaughlin professed a historical agnosticism about both the number of arbitrary arrests and the number of organized disloyalists, but he betrayed a willingness to "tilt," as the modern diplomatic expression puts it, in favor of the administration in power. General Carrington's estimates were, if anything, less reliable than those of the historians who investigated arbitrary arrests. Equally precise figures for the latter, ranging from 38,000 to 13,535 (after February 1862), were available in the literature McLaughlin read, but he did not throw them out for the reader's consideration as he did the estimates of disloyalty. Locating those arrests which fell "beyond the area of actual conflict" would have been especially difficult, it is true, but, on the whole, there is a certain subtle lack of balance and fairness in the passage quoted above.

McLaughlin's discussion of arbitrary arrests in his *Constitutional History* was not by any means a whitewash of the Lincoln administration. He admitted that arbitrary arrests "took place not alone in areas where many persons were known to be secretly disloyal and engaged in more or less active conspiracies, but also in regions where there was no evidence of widespread disaffection or of dangerous combinations." And before the members of the Abraham Lincoln Association, McLaughlin said finally: "And yet, I think the evidence appears to show that arbitrary arrests seriously endangered the Union cause and perhaps, almost certainly in extreme cases, did more harm than good."

"And yet" . . . "I think" . . . "appears" . . . "perhaps" . . . "almost certainly." Professor McLaughlin wrestled with the subject, tried his best to be fair, defended Lincoln without whitewashing him, and thrashed around looking for another solution to the problem. What he came up with did not entirely ease his doubts, but it showed a healthy respect for the facts of the case. Not at all satisfied with the easy answer that everything was all right because Abraham Lincoln was a nice man, McLaughlin came up with a vague but farther-reaching answer. That answer at least recognized that arbitrary arrests represented a far-flung policy too extensive in scope and too disturbing in depth to be explained away by pointing to the virtues of one individual attempting to oversee that policy as well as the greatest war in American history and a revolution in race relations. He expressed it this way in his *Constitutional History*:

That a president armed with the "war power" may some day wreck the whole constitutional system is theoretically possible, and the dictator, if he ever appears, may discover precedents in the conduct of Lincoln. But one thought continues to force itself upon us . . . it is not a written constitution, not the slogan a government of laws and not of men, not formulated doctrines, but the spirit of a people which is actually potent; without a democratic-minded people democratic government is at best a hollow pretense.

The biographical sketch of Andrew C. McLaughlin which appears in the distinguished *Dictionary of American Biography* states that "he was never as deeply influenced by German historical or political scholarship as were some of his . . . colleagues at the University of Chicago." But McLaughlin's view of the Constitution, as evidenced in his writing on that document's time of deepest crisis, reveals a profound debt to the currents of German scholarship, with its emphasis on organic theories of the state and its hostility to formulated doctrines and written plans of society. Before the Abraham Lincoln Association, he praised its namesake thus:

. . . the times called for more than highly technical legalistic analysis. He [Lincoln] did not ignore legal forms and prohibitions or sweep them aside with an impatient gesture; he was forced to go beyond them, or rather, he penetrated to the foundations of a democratic government restrained by law.

A constitution need not be looked upon as only a piece of parchment stored away in a safe, free from the prying eyes of the multitude, consigned to the clever exposition of politicians and subjected to the astute argument of jurists. In a very real sense the actual structure of a nation . . . is something more than a document and all the incrustations of statutes and judicial interpretations; it includes the common and conventional attitudes of the citizens, the principles which animate them, their substantial concepts of justice, liberty, and safety, their readiness to be ruled by others or their determination to compel their rulers to serve them. To the extent that a formal written constitutional system or any other kind of constitution is at variance with the character of a people, it is wanting in substantial reality.

I may be taking liberties with the word "constitution" when I include within it the actual life and the living philosophy of a nation. But probably no one will seriously object to the statement that, in a country which is more than merely a pretended democracy, there is and must be conformity between legal practices and underlying fact. There is, however, more to be said: a nation is a living thing, the product of vital forces; it transcends all written words; it embodies the thoughts, the traditional beliefs, the inherited tone and temper of the people. "The mystic cords of memory, stretching from every battlefield and patriot grave to every living heart and hearthstone" — these are in part the foundations of any constitutional system, and, above all, of a system founded on the principles of democracy. If memories are benumbed, if men have forgotten achievements, failures, and aspirations, the nation loses its character, its sense of self, its very essence; and constitutional forms are likely to give way to tumult or be dissipated by the spirit of distraction and essential uncertainty.

Now, McLaughlin himself characterized the times as these "days of uncertainty and bewilderment." Could he have been afraid that precisely that loss of character mentioned above was occurring in the Western democracies of his own day?

An answer to this question will have to wait on a little further analysis of Professor McLaughlin's view of Lincoln and the Constitution. The constitution McLaughlin described above may well be too misty and mystical to offer much in the way of aid to the study of the United States Constitution during the Civil War, but his use of the idea reveals McLaughlin's conscientious search for answers to the problem of arbitrary arrests beyond the mere personality of Abraham Lincoln. Thus McLaughlin asserted that arbitrary arrests failed to become instruments of tyranny in the Civil War not only because of Lincoln's personal sense of civic duty but because of the values generally shared in his society: ". . . this sense of civic duty must be maintained and strengthened by the unflinching devotion of the people to the primary principle of free government." In other words, a majority of the people in the North sustained Lincoln's attempts to save the country and its Constitution without losing their sense that the measures used by Lincoln were temporary and extraordinary.

Unlike some earlier writers on the subject, McLaughlin had no interest in finding precedents for expanding the power of the president vis-as-vis the other branches of government:

Forty years and more after the Civil War, Theodore Roosevelt asserted that he had acted on the Jackson-Lincoln theory of the presidency. I have spent many hours of perplexing thought in an endeavor to interpret that declaration and to discover its validity. . . . Lincoln sought not to magnify the office or to disregard the Constitution but to save it. . . . I have discovered no evidence of any particular additions to that office which were applicable to a state of peace and not of war. If we seek to find a single

principle of Lincoln's administration, we shall not find it to be an attempt so to interpret the Constitution as to expand presidential authority on the general theory of the paternalistic duty of the president, as the steward of the people, to promote the general welfare.

Nor did Professor McLaughlin seek to excuse the actions of the United States president in 1936, Franklin D. Roosevelt. McLaughlin delivered his paper in Springfield in the shadow of the court-packing controversy and allowed himself this aside:

To pack a court in order to overthrow a decision interfering with partisan purposes or individual desires has been properly condemned in this country as a dangerous and demoralizing proceeding; but if the court should be deliberately packed, the process might not be technically unconstitutional; it might and probably would insult and assault the very spirit of the Constitution. . . .

To return now to the question of McLaughlin's own frame of mind at the time he wrote about *Lincoln and the Constitution*, one finds that the biographical sketch in the *Dictionary of American Biography* suggests faltering confidence by the 1930s: "The loss of his son Rowland, killed in action in France in 1918, the failure of Wilsonian idealism, and the repudiation of the League of Nations severely tried McLaughlin's faith and optimism, yet he did not give way to cynicism or despair." No, he did not, but the uncertainties of his defense of Lincoln do seem to suggest some rather profound doubts.

These doubts may show up more clearly in his writings on Lincoln and on arbitrary arrests for another reason. The biographical sketch fails to mention that during World War I Professor McLaughlin worked for the Committee on Public Information, an agency which organized intellectuals to produce propaganda for the American war effort. He aided the authors of *German Plots and Intrigues in the United States during the Period of Our Neutrality*, published in July 1918. McLaughlin himself had justified intervention in the war and criticized American isolationism in an article in *History Teacher's Magazine* in June 1917. He went on a lecture tour in England in 1918, arguing for Woodrow Wilson's policy of making the Monroe Doctrine a worldwide policy.

Of course, such activities have a rather magnified significance since the publication of George Orwell's *1984* and in light of rather revolting modern developments in government uses of mass media. But still, one cannot regard a scholar's work on the subject of the Constitution in wartime with easy confidence in its objectivity when one learns that the scholar wrote propaganda for a wartime government. Perhaps some of Professor McLaughlin's uneasiness about the fate of American civil liberties under Lincoln's administration stemmed from his own personal knowledge of the new abilities of wartime governments to reshape the sensibilities of the democracy that underlay the Constitution and ultimately provided the only true safeguards of civil liberties.

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### 1984

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"The Days Are Yet Dark"/L. J. Weichmann's Life/After the Lincoln Conspiracy Trial/By/Joseph George, Jr./Offprint from Records of the American Catholic Historical Society of Philadelphia, Volume 95, Number 1-4, 1984/(Cover title)/

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#### LINCOLN MEMORIAL UNIVERSITY

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#### LINCOLN TIMES

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