



Lincoln Lore

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Presidential Clemency for Civilians Tried by Military Commission

Writers on Lincoln spend so much of their time dispelling myths that cynicism becomes an occupational hazard. It is important to remember that many of Lincoln's attributes which have taken on mythic status were genuine. "Honest Abe" really was honest. Lincoln really was a humorous man in a rather humorless era. He was also a forgiving man in a war-torn period in which hatred was the national norm.

The most memorable instances of President Lincoln's clemency involved stays of soldiers' executions. He was so famous for such acts even in his own day that in 1863 Francis DeHaes Janvier published a poem, "The Sleeping Sentinel," which celebrated the President's last-minute carriage ride, pardon in hand, to save a Vermont soldier boy from the firing squad. William Scott, allegedly sentenced to die for sleeping while on guard duty, was the near-victim in Janvier's poem. James E. Murdoch, a renowned elocutionist, declaimed the poem on numerous occasions, and some say the President himself was present at one of the declamations. "No one," *Harper's Weekly* stated, "ever heard it without being moved to tears."

Historians were later moved not to tears but to the archives

where they had trouble finding documentary proof of the case. A record of William Scott's case reached the President's office from the Judge Advocate General's office (the file is not now present in the JAG papers in the National Archives). William E. Barton, who wrote history in the iconoclastic style typical of the 1920s, chose the myth of the sleeping sentinel as one of the Lincoln anecdotes he exposed as untrue or at least unproved.

Lincoln's reputation for acts of clemency survived Barton's assault, as well it should have. In general, however, that reputation has rested less on definitive statistics than on numerous pieces of testimony from government insiders who knew of the President's kindheartedness. Jonathan T. Dorris, the foremost modern student of pardon and amnesty in Lincoln's era, did find definitive statistics on Presidential pardons in civilian courts, but statistics on military courts have proved elusive.

Military statistics do exist, however. The numerous cases involving soldiers must await further study in the future, but the cases involving civilians tried by military commissions provide a manageable number of cases for analysis here.



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FIGURE 1. St. Louis citizens flocked to the provost marshal's office to procure passes for travel. This was the most widely felt burden of martial law in Missouri.

From 1863 to the end of Lincoln's administration, the Judge Advocate General's office referred 210 cases of civilians sentenced by military courts to the President. The President had the power to pardon, of course, and these cases reached his desk because of appeals from the accused, pleas from influential relatives, doubts on the part of the generals who reviewed court martials, or questions from the Judge Advocate General's office. Moreover, an act of Congress required death sentences resulting from military trials to be reviewed by the President.

Lincoln's action is noted in only 184 of the cases. The chart below shows what actions he recommended in these cases.

Lincoln's Use of the Pardoning Power in Cases of Civilians Tried by Military Commissions, 1863-1865

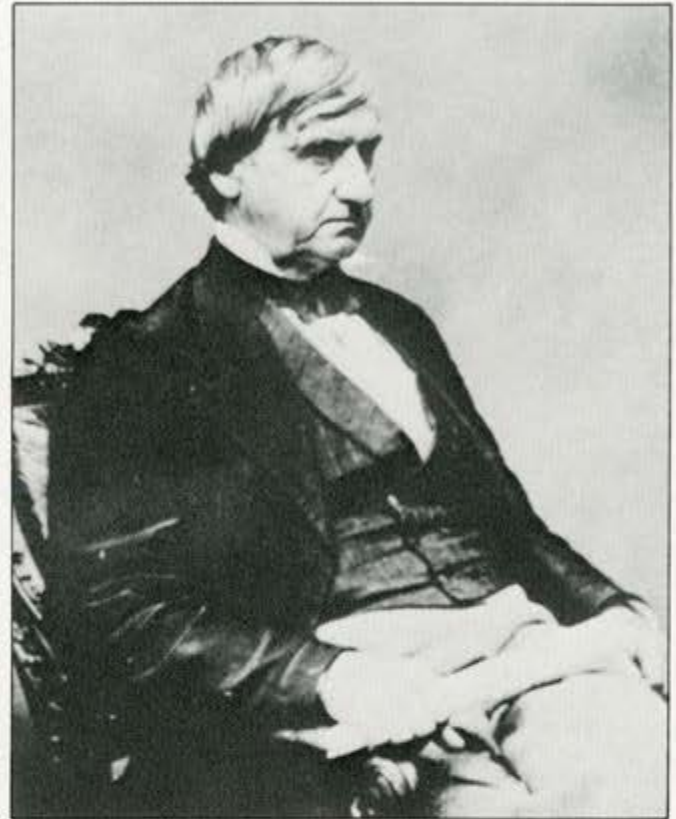
Advice	Approves Punishment	Mitigates Punishment	Increases Punishment
On recommendation of JAG	39	33	
Despite JAG recommendation	5	14	
On general's recommendation		14	
Despite general's recommendation	3	2	
On strong JAG recommendation	20	3	
Despite strong JAG recommendation		8	
No recommendation	23	20	

The last column stands as persuasive testimony to Lincoln's charitable instincts. It should be noted also that Lincoln's approval of punishment in four of the five cases, despite the JAG office's recommendation to increase the punishment, was in essence also Lincoln's refusal to increase the punishment on these same cases.



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FIGURE 2. *Harper's Weekly* was still celebrating the case of the pardoned sentinel as late as February 26, 1870.



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FIGURE 3. Joseph Holt.

In the fourteen cases in which Lincoln mitigated the punishment on the recommendation of a general, he was doing so despite the fact that the JAG did not endorse the general's recommendation. Those cases in which both a general and the JAG's office recommended mitigation are included in the category "On recommendation of JAG" (6 of the 33 cases). In other words, Lincoln was always looking for an excuse to pardon crimes and lessen punishments. All it took was some recommendation — from a general if not from the JAG — to make Lincoln's kindly heart respond. In only four cases did Lincoln's approval of the court's sentence constitute a tougher penalty than the JAG (one case) or the generals (three cases) thought proper.

Most often, Lincoln followed the recommendation of the JAG (95 of 184 cases). Judge Advocate General Joseph Holt was a tough man whose roots in strife-torn Kentucky helped him appreciate that rewarding loyalty and punishing disloyalty were the ways to keep the Union whole. Even so, his office found cause to pardon or to soften punishment in 19.6% of the cases referred to the President. Lincoln almost always found it easy to follow those suggestions.

The important statistics are those that document the ease with which Lincoln ignored the recommendations of the JAG's office for carrying out the punishments the military commissions had thought proper. He defied the military commissions in 12.9% of the cases that came to him (in 22.1% of the cases on which the JAG chose to give him advice). These were the actions not only of a forgiving and kindly man but also of a strong and independent President never afraid to act on his own judgment. When the choice was left entirely to the President, he mitigated punishments more than 50% of the time.

By mentioning loyalty and disloyalty earlier, this article may have given the impression that these cases involved what would be called political dissent today. One might thus imagine that in the cases under discussion here Lincoln's choice was easy and should have been easier. After all, the United States Supreme Court would eventually rule that military trials of civilians when the civilian courts were operating were illegal. Moreover, the Supreme Court would so rule in a case in which the accused, Lambdin P. Milligan, had taken no overt action but had been a member of a suspicious group and had spoken in a way that staunch supporters of the war effort usually did not.



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FIGURE 4. Martial law was meant to protect Unionist refugees like these as well as to punish the disloyal.

Actually, one could describe most of these cases as matters of political dissent only if one could call the attempt to create the Confederate States of America and the Civil War that followed matters of political dissent. The citizens whose cases Lincoln adjudicated came overwhelmingly from the border area: Missouri (41.5% of the 147 cases identifiable by state), Tennessee (25.9%), Maryland (6.8%), Arkansas (4.8%), and Virginia (4.1%). Missouri and Tennessee thus accounted for two-thirds of the 147 cases. Both states were the scene of actual military operations, and Tennessee, of course, had seceded and was a part of the Union only to the degree that military power made it so. Since Missouri never seceded, disloyalty was a problem circumscribed by certain traditional constitutional limits, but martial law existed there as well.

The generals who declared martial law did not do so just to make it easier to enforce ideological purity on the local inhabitants. The following are the crimes for which the cases in Missouri were convicted (individuals were often accused of more than one crime; 61 individuals were responsible for these crimes):

Aiding and abetting enemy	1
Arson	1
Assault with intent to kill	2
Attempted robbery	1
Disloyalty	2
Encouraging rebellion	1
Grand larceny	3
Guerrilla	11
Larceny	2
Marauder	1
Military insurgent	2
Murder	6
Robbery	8
Selling government property	1
Spy	1
Taking up arms against U.S.	1
Violating Act of 17 July 1862	3
Violating Laws and Customs of War	21
Violating Military Orders	1
Violating Oath of Allegiance	23
Violating Dept. of Missouri Orders	1
Violating Parole	2

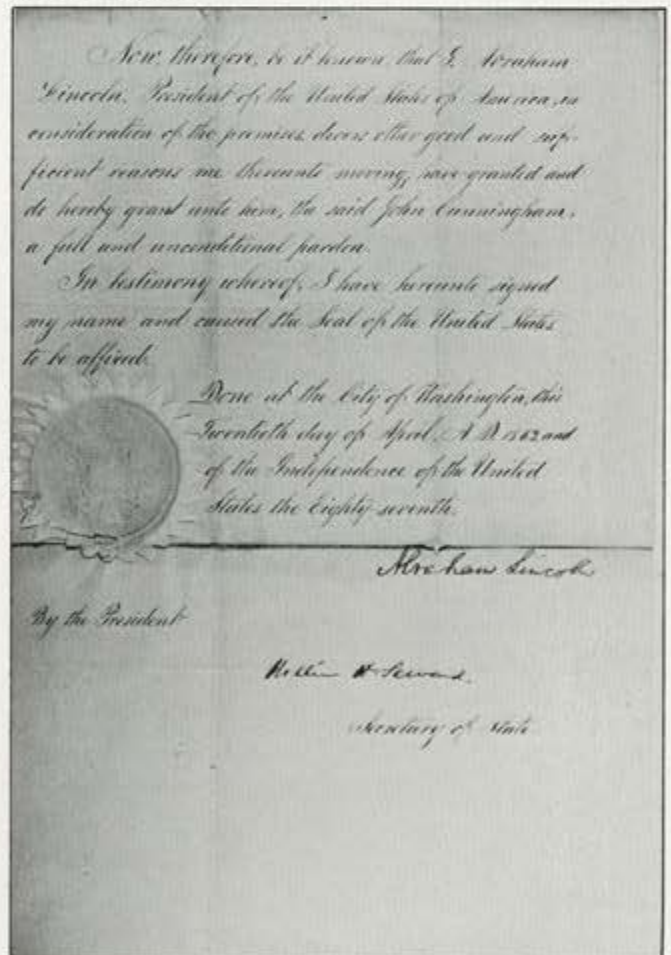
Where martial law is declared, the military supercedes the civil power. Nevertheless, in Missouri it did not do so entirely, and the civil courts clearly handled many cases even in areas

where martial law was in effect. William E. Parrish's history of Missouri in the Civil War era notes that martial law "by no means eliminated civilian courts or controls but relegated these functions to military supervision when demanded by the exigencies of war." He states further that:

Political prisoners usually had a fairly prompt hearing before a military board, which resulted in their being released on bond or banished, depending upon the severity of their case. If they had been involved in serious guerrilla activity, they could be sentenced to death or permanent imprisonment. In the latter case, they were usually transferred to the new federal prison at Alton, Illinois, which opened in February, 1862.

Although Confederate forces were driven out of Missouri after the Battle of Pea Ridge, March 7-8, 1862, the state became the scene of the most vicious guerrilla conflicts of the Civil War. William C. Quantrill, Dr. Charles R. "Doc" Jennison, and James H. "Jim" Lane gained unenviable reputations for ruthless waging of the sort of civil war that is not fought in uniform. Those guerrillas and others less famous sowed the seeds of bitter animosity which carried over into "feuding" and banditry long after the Civil War was over. Union soldiers and martial law did what they could to stop it. The names of many of those they stopped eventually wound up on President Lincoln's desk.

To judge from the cases on which Lincoln acted, one can say that military trials of civilians were exceedingly rare outside the Confederate and Border States. Among the 184 cases in which Lincoln took some action, no more than 12 involved Northerners outside the District of Columbia (which was officially under martial law), and it is not clear that all of these were tried in the Northern states of which the accused were citizens. Military trials of civilians occurred mainly in areas where the military commission was the only form of justice or where it was as likely to dispense justice as the local civil court was. Even then, its victims, if they may be called that, sometimes got another hearing before a singularly humane and forgiving President.



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FIGURE 5. A Presidential pardon.

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by Mary Jane Hubler

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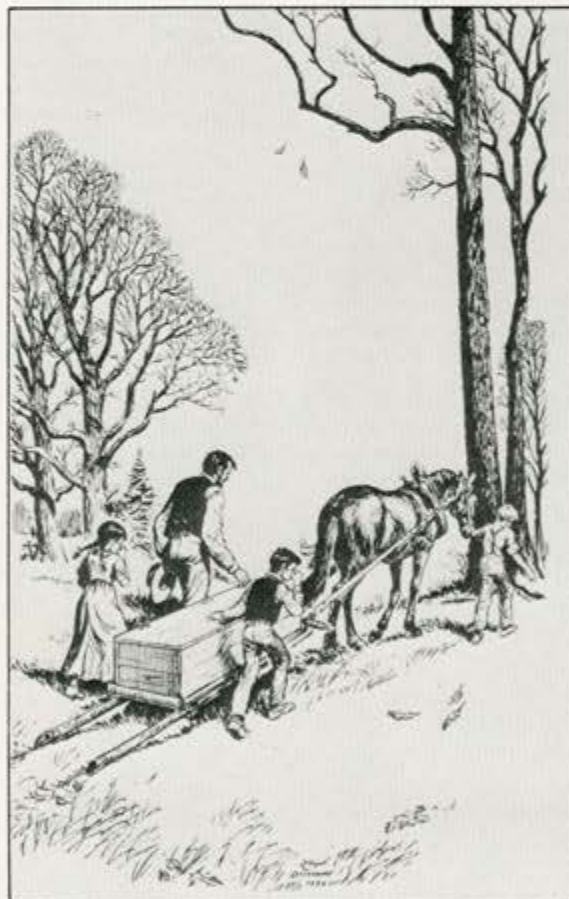


FIGURE 6. Illustration by Lloyd Ostendorf from *No Luck for Lincoln*.

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