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CIVIL LIBERTIES AND CIVIL WAR: THE GREAT EMANCIPATOR AS CIVIL LIBERTARIAN

*Paul Finkelman**

THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES. By *Mark E. Neely, Jr.* New York: Oxford University Press. 1991. Pp. xvii, 278. \$24.95.

Abraham Lincoln remains the great enigma of American history.¹ When nominated for the presidency he seemed almost laughable. An uneducated hick from the plains of Illinois, Lincoln was too tall, too awkward, and far too homely. He had made some impressive speeches while campaigning for the nomination, and he was "unsurpassed when it came to elucidating the moral principles and goals of Republicanism."² But it was still hard to take this unpolished prairie lawyer seriously. The abolitionist Wendell Phillips, who was also a Harvard-trained lawyer, asked: "Who is this huckster in politics . . . this county court advocate?"³

Never had so inexperienced a man seriously competed for the presidency. His resume was spare: a one-term congressman, a failed candidate for the Senate, and a successful but hardly imposing railroad lawyer. Phillips concluded that the Republican candidate was "a first-rate second-rate man."⁴

In 1860, within the Republican Party, Lincoln was a moderate, at best, on race and slavery. More prominent party leaders, like William H. Seward and Salmon P. Chase, actively opposed slavery. As governors, both had refused to extradite to the South free blacks who were wanted for helping slaves escape to their states.⁵ As lawyers, they had

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1. The biographical literature on Lincoln is enormous. The best modern scholarly biography is STEPHEN B. OATES, *WITH MALICE TOWARD NONE: THE LIFE OF ABRAHAM LINCOLN* (1977). For understanding Lincoln's presidency in a larger context, see James M. McPherson's brilliant *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* (1988).

2. OATES, *supra* note 1, at 175.

3. Wendell Phillips, *quoted in* IRVING H. BARTLETT, *WENDELL PHILLIPS: BRAHMIN RADICAL* 221 (1961).

4. Wendell Phillips, *quoted in* RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION* 150 (1948).

5. On Seward, see Paul Finkelman, *The Protection of Black Rights in Seward's New York*, 34 *CIV. WAR HIST.* 211 (1988). Chase's refusal to extradite to Kentucky a free black named Willis Lago set the stage for *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861), *overruled by* *Puerto Rico v. Branstad*, 483 U.S. 219 (1987), in which Chief Justice Roger B. Taney held that a gover-

represented abolitionists accused of aiding runaway slaves.⁶ Chase was involved in so many slavery cases that he was known as the "Attorney General for Fugitive Slaves."⁷

Lincoln hated slavery and opposed its spread to new territories, but unlike most leading Republicans, he still advocated colonization of former slaves outside the United States, and he opposed political rights for free blacks. Moreover, as an attorney he had never been terribly scrupulous about the cases he took. In 1841 he successfully helped a black woman gain her freedom,⁸ but six years later — when men like Chase and Seward were solidifying their reputations as powerful antislavery advocates — Lincoln represented a slaveowner trying to regain custody of a slave he had brought to Illinois.⁹ As a congressman, Lincoln proposed a bill allowing Washington D.C. officials to return fugitive slaves to southern masters.¹⁰ As a presidential candidate, he did not demand repeal of the Fugitive Slave Law. Small wonder Wendell Phillips called Lincoln "[t]he Slave-Hound of Illinois."¹¹

In 1860 Lincoln's greatest qualification for the presidency was his availability. The leading contenders were either too radical or too conservative to have any chance of winning the general election. Not part of any Republican faction, he "had no ideological image within the party."¹² Lincoln's obscurity worked in his favor, gaining him the nomination, virtually all of the North's electoral votes, and the election.¹³ But how would this inexperienced "second-rate man" with no ideological moorings run the country?

I. THE HEROIC LINCOLN

Lincoln of course confounded and surprised both his critics and his friends. He turned out to be a first-rate man, unquestionably the

nor could not be compelled by an act of Congress or judicial authority to extradite an alleged fugitive from another state.

6. Seward argued *Jones v. Van Zandt*, 46 U.S. (5 How.) 215 (1847), before the U.S. Supreme Court. Chase had argued the case in the lower court, 13 F. Cas. 1040 (C.C.D. Ohio 1843) (No. 7501), 13 F. Cas. 1047 (C.C.D. Ohio 1843) (No. 7501), and submitted a brief in the Supreme Court appeal. Their Supreme Court briefs are reprinted in 1 *FUGITIVE SLAVES AND AMERICAN COURTS* 341, 449 (Paul Finkelman ed., 1988). Chase also successfully argued *Norris v. Crocker*, 54 U.S. (13 How.) 429 (1851), which involved Crocker's civil liability for helping Norris's slaves escape. For a detailed discussion of that case, see Paul Finkelman, *Fugitive Slaves, Midwestern Racial Tolerance, and the Value of "Justice Delayed,"* 78 IOWA L. REV. 89 (1992). At the state level, Chase successfully argued *Birney v. State*, 8 Ohio 230 (1837).

7. PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* 157 (1981).

8. *Bailey v. Cromwell*, 4 Ill. 70, 3 Scam. 71 (1841).

9. *In re Jane*, 5 Western L.J. 202 (Ill. Cir. Ct. 1848). For a discussion of this case, see FINKELMAN, *supra* note 7, at 149-50 n.8, 152-53.

10. BARTLETT, *supra* note 3, at 222.

11. *Id.*

12. OATES, *supra* note 1, at 182.

13. *Id.* at 182, 190. New Jersey had split its votes between Lincoln and Douglas.

nation's greatest president, who successfully and compassionately guided the United States through its greatest crisis. In articulating the reasons for maintaining the Union, Lincoln reinterpreted the meaning of *America*, as a "nation, conceived in Liberty, and dedicated to the proposition that all men are created equal."¹⁴

On slavery and race Lincoln ultimately surprised everyone,¹⁵ growing to understand not only that slavery "was, somehow, the cause of the war,"¹⁶ but also that slavery had to end and blacks had somehow to be incorporated into American society to make America whole again. This represented an enormous transition for Lincoln. In his Illinois days Lincoln's views and actions had reflected the racism of his environment and his constituents.¹⁷ During his debates with Stephen A. Douglas, Lincoln reiterated his opposition to black suffrage and general social equality:

I am not, nor ever have been in favor of bringing about in any way the social and political equality of the white and black races, — that I am not nor ever have been in favor of making voters or jurors of negroes, nor of qualifying them to hold office, nor to intermarry with white people.¹⁸

But, even while taking this position on race, Lincoln was more progressive than most of his Illinois neighbors.¹⁹ Lincoln argued that blacks had certain fundamental natural rights, including "all the rights enumerated in the Declaration of Independence."²⁰ This put him light years ahead of Douglas and Illinois Democrats.²¹

Lincoln's commitment to natural rights — "his basic equalitarianism"²² — made him receptive to new views of race, even if he had to

14. Abraham Lincoln, Final Text, Address Delivered at the Dedication of the Cemetery at Gettysburg (Nov. 19, 1863) in 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN 23 (Roy P. Basler ed., 1953) [hereinafter WORKS OF LINCOLN].

15. Except perhaps the Southern extremists, who left the Union because they incorrectly believed Lincoln was an abolitionist who would end slavery. See OATES, *supra* note 1, at 187-88. By leaving the Union and starting the War, the proslavery Southern nationalists set the stage for the fulfillment of their own worst nightmare.

16. Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865) in 8 WORKS OF LINCOLN, *supra* note 14, at 332.

17. Abraham Lincoln, Speech at Charleston (Sept. 18, 1858) in 3 WORKS OF LINCOLN, *supra* note 14, at 145.

18. *Id.*

19. On racism in Illinois, see EUGENE H. BERWANGER, THE FRONTIER AGAINST SLAVERY (1967). For a view that modifies Berwanger's argument, see Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415, 415-82 (1986).

20. Abraham Lincoln, Speech at Quincy (Oct. 13, 1858) in 3 WORKS OF LINCOLN, *supra* note 14, at 249.

21. For a discussion of Lincoln's generally progressive views on race in comparison to Douglas' views, see Finkelman, *supra* note 19, at 418-19.

22. LAWANDA COX, LINCOLN AND BLACK FREEDOM: A STUDY IN PRESIDENTIAL LEADERSHIP 20 (1981).

overcome his long-held personal prejudices.²³ Within a few years Lincoln became the first president to receive a black at the White House to discuss political issues.²⁴ More importantly, he supported the enlistment of black troops at a time when many Northerners doubted that blacks could or should serve as soldiers.²⁵ Lincoln understood that, by fighting for the Union, black soldiers were staking a claim that society could not easily deny.²⁶ By 1865 Lincoln supported suffrage, at the very least, for black veterans.²⁷

By 1863 this "Slave-Hound of Illinois" had become the "Great Emancipator." With the stroke of his pen (and the power of the swords of Generals Grant, Sherman, and others) Lincoln brought more liberty to more people than anyone else in American history. War measure though it was,²⁸ inelegantly written, and not the stuff of heroic language, the Emancipation Proclamation²⁹ nevertheless made liberty meaningful to nearly four million blacks.³⁰ Through the Proclamation, the confiscation acts,³¹ and the enlistment of black soldiers, Lincoln's administration set the stage for the adoption of three constitutional amendments that gave some substance to a new birth of free-

23. *Id.* at 25; see also Phillip Shaw Paludan, *Hercules Unbound: Lincoln, Slavery, and the Intentions of the Framers, in THE CONSTITUTION, LAW, AND AMERICAN LIFE: CRITICAL ASPECTS OF THE NINETEENTH-CENTURY EXPERIENCE* 14-15 (Donald G. Nieman ed., 1992).

24. The caller was Frederick Douglass. See FREDERICK DOUGLASS, *THE LIFE AND TIMES OF FREDERICK DOUGLASS* 347-48 (reprinted 1962 (1892)); OATES, *supra* note 1, at 385.

25. See generally DUDLEY T. CORNISH, *THE SABLE ARM: NEGRO TROOPS IN THE UNION ARMY, 1861-1865* (1956) (discussing the political process leading to the acceptance of blacks within the union forces, and the practical implementation of this goal); JOSEPH T. GLATTHAAR, *FORGED IN BATTLE: THE CIVIL WAR ALLIANCE OF BLACK SOLDIERS AND WHITE OFFICERS* (1990) (exploring the relationships between black soldiers and their officers, and their understandings of the impact of the war on perceptions of race and racial equality).

26. COX, *supra* note 22, at 23. The current opposition to allowing gays and lesbians to join the military may stem from this understanding as well. If gays and lesbians can claim the status of veterans, then denying them full equality and full protection of the law in civilian society is all the more difficult. This does not mean that antigay discrimination will disappear with a change in the law any more than racism disappeared when blacks joined the Union forces. My point is simply that open and legal military service of gays and lesbians severely undermines the self-styled moral position of homophobes.

27. "It is also unsatisfactory to some that the elective franchise is not given to the colored man. I would myself prefer that it were now conferred on the very intelligent, and on those who serve our cause as soldiers." Abraham Lincoln, Last Public Address (Apr. 11, 1865) in 8 *WORKS OF LINCOLN*, *supra* note 14, at 403.

28. Among the many reasons given for the proclamation are military necessity, desperation, political necessity, and, of course, higher moral values. My own view is that Lincoln understood the moral necessity of ending slavery long before he issued the Emancipation Proclamation but that political and military considerations forced him to delay any direct assault on slavery.

29. Proclamation No. 17, 12 Stat. 1268 (1863), in 6 *WORKS OF LINCOLN*, *supra* note 14, at 28.

30. On the history of the Proclamation itself, see JOHN HOPE FRANKLIN, *THE EMANCIPATION PROCLAMATION* (1963).

31. Confiscation Act, ch. 60, 12 Stat. 319 (Aug. 6, 1861); Second Confiscation Act, ch. 195, 12 Stat. 589 (July 17, 1862). The Supreme Court upheld the constitutionality of these acts in *Miller v. United States*, 78 U.S. (11 Wall.) 268 (1871).

dom in the nineteenth century and provided the basis for at least formal legal equality in the late twentieth century.

Such then is the majestic Lincoln, the heroic president, the great emancipator. This is the Lincoln who sits on a marble throne in his memorial in Washington. More than any other great president, Lincoln's record as a leader and a human being stands up over time. Thomas Jefferson, for example, wrote beautiful phrases about liberty, while never lifting a finger to combat slavery.³² Lincoln's record as a leader on emancipation and racial fairness, on the other hand, is actually *better* than his rhetoric. He did more than he said, and when he said he was doing nothing, he was often preparing to take action.³³ On the vital issues of his day — and our own — no American leader stands up as well as Lincoln to probing historical scholarship or moral scrutiny.

II. LINCOLN: THE DARKER SIDE

Yet, lurking in the shadows of the great Lincoln there has always been a more sinister image of the sixteenth president. This is the president who suspended habeas corpus throughout the nation and ran roughshod over civil liberties; the president whose generals shut down opposition newspapers,³⁴ arrested civilians, and expelled Jews from their homes.³⁵ Under the influence of the administration's dark side,

32. Paul Finkelman, *Jefferson and Slavery: "Treason Against the Hopes of the World,"* in JEFFERSONIAN LEGACIES 181 (Peter S. Onuf ed., 1993). Similarly, he wrote brilliant arguments in favor of civil liberties, while at the same time secretly pushing for the suppression of his opponents. LEONARD W. LEVY, JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE (1963). As I will discuss later, Lincoln never sought to suppress political opponents, and he authorized suppression of civil liberties only over issues of national concern, not his own ego. More importantly, he curtailed liberties in the open, taking full responsibility.

33. For example, in August 1862 Lincoln declared that he had no plans to end slavery. Letter from Abraham Lincoln to Horace Greeley (Aug. 22, 1862), in 5 WORKS OF LINCOLN, *supra* note 14, at 388-89. But at the time he had already written the Emancipation Proclamation and was simply waiting for the right time to announce it. Emancipation Proclamation — First Draft (July 22, 1862), *id.* at 336-37.

34. Letter from Abraham Lincoln to John A. Dix (May 18, 1864), in 7 WORKS OF LINCOLN, *supra* note 14, at 347-48, (ordering Dix to arrest the editors of the New York *World* and the *Journal of Commerce* and seize the papers' offices). On the other hand, in June 1863 Major General A.E. Burnside suppressed the *Chicago Times*, but Lincoln quickly had this order countermanded. FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT 229-32 (Harold L. Nelson ed., 1967).

35. On December 17, 1862, in General Orders Number 11, Major General Ulysses S. Grant declared:

The Jews, as a class, violating every regulation of trade established by the Treasury Department, and also Department orders, are hereby expelled from the Department. . . . Within twenty-four hours from the receipt of this order by Post Commanders, they will see that all of this class of people are furnished with passes and required to leave, and any one returning after such notification, will be arrested and held in confinement until an opportunity occurs of sending them out as prisoners unless furnished with permits from these Head Quarters. . . . No permits will be given these people to visit Head Quarters for the purpose of making personal application for trade permits.

7 THE PAPERS OF ULYSSES S. GRANT, DECEMBER 9, 1862-MARCH 31, 1863, at 50 (John Y.

Lincoln's minions arrested opposition politicians, critical newspaper editors, and obscure opponents of his administration. Thus, his hometown *Springfield Register* described Lincoln as "the ineffable despot, who, by some inscrutable dispensation of providence presides over the destinies of this vast republic."³⁶

In *The Fate of Liberty: Abraham Lincoln and Civil Liberties*, Mark E. Neely, Jr.³⁷ offers the best overall study yet written of the Lincoln administration and the problem of civil liberties during wartime. Neely's great contribution comes from his careful examination of the records of thousands of people arrested and incarcerated by military and civilian authorities during the war.

Lincoln's critics assert that he directed the arrests of thousands of civilians in order to maintain power,³⁸ allowed for the military prosecution of civilians,³⁹ and created a regime aptly dubbed an *American Bastille*.⁴⁰ Lost-cause partisans and popular writers have kept alive the image of Lincoln as an oppressive dictator. According to novelist Gore Vidal, Lincoln was "able to make himself absolute dictator without ever letting anyone suspect that he was anything more than a joking, timid backwoods lawyer"⁴¹ Vidal's fictional Lincoln reflected literary critic Edmund Wilson's description of Lincoln as a dictatorial precursor of Bismarck and Lenin, who was "succeeded by agencies which continued to exercise this power and to manipulate the peoples he had been unifying in a stupid, despotic and unscrupulous fashion."⁴² In Wilson's paranoid view, Lincoln not only denied his own citizens civil liberties but set into motion the forces that led to the I.R.S., the F.B.I., and countless federal bureaucracies.

Simon ed., 1979) [hereinafter PAPERS OF ULYSSES S. GRANT]. In Paducah, Kentucky, Grant's subordinates expelled a number of Jews, including two Union veterans. When Lincoln found out about this, he ordered Grant to revoke the orders. BERTRAM W. KORN, *AMERICAN JEWRY AND THE CIVIL WAR* (1951).

36. DAILY ILLINOIS STATE REGISTER (Springfield), Aug. 7, 1864, quoted in ROBERT S. HARPER, *LINCOLN AND THE PRESS* 224 (1951).

37. John Francis Bannon Professor of History and American Studies, St. Louis University.

38. Neely argues that relatively few Democratic politicians were arrested under Lincoln, and the burden of his book is to show that the civilian arrests were nonpartisan. P. xii. However, Neely also acknowledges that some zealous local commanders ordered the arrest of Democratic politicians for partisan reasons. Pp. 56-58.

39. The best-known example of this led to *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); see also Frank L. Klement, *The Indianapolis Treason Trials and Ex parte Milligan*, in *AMERICAN POLITICAL TRIALS* 101 (Michal R. Belknap ed., 1981).

40. JOHN A. MARSHALL, *AMERICAN BASTILLE* (1883).

41. GORE VIDAL, *LINCOLN: A NOVEL* 459 (1984).

42. EDMUND WILSON, *PATRIOTIC GORE: STUDIES IN THE LITERATURE OF THE AMERICAN CIVIL WAR* xviii (1962), quoted at p. 231.

A. *The Merryman and Milligan Cases and the Case
Against Lincoln*

Critics of Lincoln frequently employ two cases, *Ex parte Merryman*⁴³ and *Ex parte Milligan*,⁴⁴ to confirm their image of Lincoln as an authoritarian devoid of any appreciation of civil liberties and the rule of law.⁴⁵

Merryman appears to reveal the epitome of an imperial president ignoring the rule of law. Shortly after the firing on Fort Sumter, Lincoln authorized the military to suspend "the writ of Habeas Corpus for the public safety" between Philadelphia and Washington.⁴⁶ Lincoln did this on his own, without consulting Congress, which was out of session.⁴⁷

At 2:00 a.m. on May 25, soldiers arrested John Merryman for "drilling Marylanders in a scheme to take them south and join the Confederate army" (p. 10). Merryman was a member of the Maryland legislature and a captain in a state militia unit.⁴⁸ While incarcerated in Fort McHenry, Merryman obtained from Chief Justice Roger B. Taney a writ of habeas corpus directed at General George Cadwalader, the commander of the military district. Cadwalader refused to appear before Taney but sent a subordinate to inform the Chief Justice that Merryman was charged with treason and that the army had suspended the writ of habeas corpus under Lincoln's orders.⁴⁹ Taney responded with a published opinion, castigating Lincoln for suspending the writ in violation of the Constitution.⁵⁰ Lincoln neither obeyed this opinion nor directly responded to it; he simply ignored it.⁵¹

For modern Americans, Lincoln's actions regarding *Merryman* seem to confirm his dark side. He had unilaterally suspended the writ of habeas corpus. Then he ordered his generals to disobey the Chief

43. *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487). For a discussion of Merryman, see HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875*, at 238-41 (1982); 5 CARL B. SWISHER, *OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD, 1836-1864*, at 844-54 (1974).

44. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); see also Klement, *supra* note 39, at 101.

45. *Merryman* and *Milligan* are but the tip of an iceberg of civilian arrests. Standard histories of the War put the number of civilian arrests at over 13,500. The book contains a delightful account of the way in which this erroneous figure found its way into virtually all scholarly studies of the subject. Pp. 115-19. Neely himself estimates that "far more than" this number of arrests probably took place. P. 130.

46. Letter from Abraham Lincoln to Winfield Scott (Apr. 27, 1861), in 4 *WORKS OF LINCOLN*, *supra* note 14, at 347.

47. This in itself might appear to exemplify Lincoln's disregard for constitutional rights, but, as I will suggest, such an interpretation cannot hold up under careful scrutiny.

48. 5 SWISHER, *supra* note 43, at 844-45.

49. *Id.* at 845.

50. *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).

51. MCPHERSON, *supra* note 1, at 288-89.

Justice of the United States. This was not the rule of law, but the rule of a single man.

Ex parte Milligan seems equally troublesome. Lambdin P. Milligan was a minor Indiana Democratic politician who opposed the war, Republicans, and Lincoln. In December 1864, a military commission in Indiana sentenced him to death for his allegedly treasonous activities. Although the civilian courts were fully functional in Indiana, federal officials, at the prompting of Indiana Republican leaders, insisted on trying Milligan before a military commission.⁵²

After the war the Supreme Court overturned Milligan's conviction, ruling that the military did not have the power to try civilians where the civilian courts were functioning.⁵³ But the blot on Lincoln's record is clear. His policies allowed Milligan to be tried by a military commission rather than by a civilian court. Lincoln could easily have intervened to end such proceedings or have had them shifted to civilian courts. Equally damning, clear political overtones enveloped Milligan's prosecution. He was an active Democrat. Indiana Republicans pushed for the prosecution, which began in the fall of 1864, so as to affect the election. Furthermore, unlike John Merryman, who had been recruiting soldiers for the Confederacy at a time when Maryland might very well have gone over to the other side, Milligan's plot contained little substance. His "conspiracy" turns out to have been more of a comic opera than a real threat to the nation.⁵⁴

In general, critics level three traditional charges against Lincoln. First, his administration's wholesale disregard for civilian rights created a police state in the Nation. Merryman's early morning arrest by soldiers illustrates this allegation. Second, Lincoln used military arrests and arbitrary civilian arrests to stifle the political opposition. Milligan, the Democratic politician arrested before the 1864 election and tried by the military, certainly fits into that category. Third, the opposition press suffered grievously under Lincoln. During the war the administration arrested editors, and generals sometimes took it upon themselves to arrest editors or shut down opposition papers. Illustrative of this is Lincoln's letter to Major General John A. Dix, ordering him to arrest the editors of the New York *World* and the *Journal of Commerce*, and seize the papers' offices, for publishing a "false and spurious proclamation purporting to be signed by the President . . . which publication is of a treasonable nature . . ."⁵⁵

52. Klement, *supra* note 39, at 109-11.

53. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

54. Klement, *supra* note 39, at 107-08, 111-13.

55. Letter from Abraham Lincoln to John A. Dix, (May 18, 1864), in 7 WORKS OF LINCOLN, *supra* note 14, at 347-48. Most of the correspondence and other material connected to this case is conveniently collected in FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT, *supra* note 34, at 232-47.

B. Neely's Answer and the Problem of Defining the Problem

In *The Fate of Liberty* Neely vigorously argues that the traditional image of Lincoln and civil liberties is false. The key question for Neely is whether Lincoln suspended habeas corpus for partisan political purposes, or merely to secure the safety of Washington. Neely's careful analysis of arrest records supports his contention that "[s]uspending the writ of habeas corpus was not originally a political measure, and it would never become primarily political" (p. 9). He also argues that, while the total number of civilian arrests under Lincoln vastly exceeds what other scholars have found, these arrests "had less significance for traditional civil liberty than anyone has realized" (p. 138).

Neely's important new research proves his first point so successfully that I doubt anyone will ever again seriously argue the other side. Neely shows that the vast majority of those arrested were inconsequential individuals, charged with such mundane offenses as draft evasion, desertion, running the federal blockade of southern ports, trading with the Confederacy, fraud in government contracts, or being citizens of the Confederacy (pp. 131-38). Furthermore, he shows that, with the exception of draft evaders and deserters, the overwhelming majority of those arrested were either from the Confederate states or the border slave states, and that they were arrested in areas that were "in Rebellion" or in combat zones.⁵⁶ While the suspension of habeas corpus was not "primarily political," more political arrests occurred, and their significance may be greater than Neely acknowledges. This is especially true for arrests of newspaper editors, the one significant category that Neely ignores.

Neely's second point, on the arrests' significance for civil liberties, is more problematic. Neely seems to argue that, because most of the arrests were not blatantly political, they did not violate civil liberties. This, however, is not necessarily so. Arbitrary arrests are still arbitrary and unfair, even if the motivations for them are noble and nonpolitical. The lack of due process for an alleged blockade runner or an alleged military deserter is just as much a violation of civil liberties as is the arbitrary arrest of someone for giving a political speech. If by *civil liberties* Neely means freedom of expression, then his point is well taken, although undermined by his failure to examine suppression of the press during the war. But this is a cramped notion of civil liberties.

Despite these caveats and criticisms, Neely makes a very important contribution to our understanding of Lincoln, the Civil War, and the problem of civil liberties during wartime. Neely's story shows a con-

56. I believe that the nature of the war made arrests in those areas quite different from arrests in the North. See *infra* text accompanying notes 64-68.

fused administration with uncertain policies. It also demonstrates the importance of maintaining due process and civil liberties during wartime.

Neely's book rehabilitates Lincoln's reputation on civil liberties by showing that most of the arrests of civilians during the war were not politically motivated, in the narrow sense of the term. Indeed, the vast majority of the arrests were probably justifiable even by the standards of modern civil libertarians. But the book also demonstrates that Lincoln and his administration are not above reproach. Neely is clearly correct that the suspensions of habeas corpus were designed to allow the military and other federal officials maximum flexibility in the nation's most unique crisis. But, if most arrests were for high purpose, some were crude attempts to suppress dissent and eliminate the political opposition. The Civil War experience confirms that if truth is the first casualty of wartime, then civil liberties is surely the second.⁵⁷

III. THE NATURE OF THE EVIDENCE

The burden of Neely's argument is to demonstrate that military arrests of civilians during the Civil War were not essentially political. To show this, Neely has examined vast bodies of existing arrest, jail, and court records. He did not look at all the existing records — to do so might have taken another decade. Nor could he carefully examine every arrest, because many of the records from this period have disappeared and many arrests were never documented. The evidence he did examine thoroughly supports his contention that most of the wartime arrests were not political. He has put to rest the vision of Lincoln as a tyrant who used the military to suppress northern Democrats. Yet, in order to fully accept this proposition, one must examine the kind of evidence Neely has employed.

Neely's book is based on extraordinary research into the arrest and prison records that remain from the Civil War. Much of this information is buried in the National Archives or in scores of large, heavy volumes that make up the official record of the war.⁵⁸ His painstaking exploration of this evidence constitutes a great contribution to our understanding of civil liberties during the Civil War.

Many arrest records for the War are incomplete or lost; therefore, one potential argument against Neely's analysis is that fuller records would better reveal the political nature of Lincoln's suppression of dissent. To make this case as strong as possible, let us assume that during or immediately after the Civil War Lincoln's partisans systematically

57. For a view of this in another context, see Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. (forthcoming 1993).

58. E.g., *THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES* (Washington, Government Printing Office, 1880-1902) (128 vols.) [hereinafter *WAR OF THE REBELLION*].

destroyed the records of political arrests, leaving only those that are nonpolitical. This would undermine Neely's basic thesis. Does Neely's research truly reflect the nature of civilian arrests during the War? Without complete arrest and incarceration records, can we trust Neely's conclusions? The answer to both questions is an unqualified yes. More complete records might show a few nuances here and there, but such records would not reveal a dramatic alteration of the nature of the arrests.

The reason for this conclusion is fairly simple. Most of the records Neely has examined describe the arrests of quite ordinary people. This is not surprising, because such people made up the bulk of those arrested. Without these records, we would probably know little about these ordinary arrests. If all of the records had been destroyed or lost, no scholar could have reconstructed the nature of most arrests. However, if all of the arrest records that Neely used were unavailable, we could still study the political aspects of the arrests. Political arrests generated other kinds of documents and records. Evidence of political arrests jumps out of newspapers, speeches, and the voluminous private papers and memoirs of the many politicians, editors, and others who opposed the war. Other evidence comes from the papers, letters, and memoirs of supporters of Lincoln. In addition, Lincoln himself referred to the suspension of habeas corpus in a message to a special session of Congress⁵⁹ and wrote a number of letters on the case of Clement Vallandigham, the Ohio copperhead politician arrested and then banished to the Confederacy.⁶⁰ Similarly, Lincoln wrote letters about the suppression of newspapers⁶¹ and personally ordered the arrest of some newspaper editors.⁶² The papers and memoirs of other prominent leaders, as well as published military records, would harbor similar correspondence about the arrest of famous individuals. Finally, there are records of prominent people who appealed their incarcerations or convictions to Lincoln or the courts. This large body of documents suggests that all the arrests of political figures are known

59. Message to Congress in Special Session (July 4, 1861) in 4 WORKS OF LINCOLN, *supra* note 14, at 430-31. Although he did not mention the *Merryman* case or Taney's opinion by name, he clearly had both in mind in his discussion. MCPHERSON, *supra* note 1, at 288.

60. Letter from Abraham Lincoln to General Ambrose E. Burnside (May 29, 1863), in 6 WORKS OF LINCOLN, *supra* note 14, at 237; Letter from Abraham Lincoln to Erastus Corning and Others (June 12, 1863), in 6 WORKS OF LINCOLN, *supra* note 14, at 260, 266-67; Letter from Abraham Lincoln to Matthew Birchard and Others (June 29, 1863), in 6 WORKS OF LINCOLN, *supra* note 14, at 300-06.

61. Letter from Abraham Lincoln to General John M. Schofield (July 13, 1863), in 6 WORKS OF LINCOLN, *supra* note 14, at 326 (chastising Schofield for arresting the editor of the *Missouri Democrat*); Letter from Abraham Lincoln to Isaac N. Arnold (May 25, 1864), in 7 WORKS OF LINCOLN, *supra* note 14, at 361 (writing about the revocation of the order suspending the *Chicago Times*).

62. Letter from Abraham Lincoln to John A. Dix, (May 18, 1864), in 7 WORKS OF LINCOLN, *supra* note 14, at 347-48 (ordering Dix to arrest the editors of the New York *World* and the *Journal of Commerce* and seize the papers' offices).

or can be discovered through existing sources. If there were another Lambdin Milligan, John Merryman, or Clement Vallandigham, we would know about him.

The infrequency of political trials underscores Neely's thesis that the Lincoln administration did not engage in wholesale political repression. If the missing military and jail records held the accounts of vast political suppression, we would surely find that evidence elsewhere. We do not find such evidence, because the hoards of political arrests that opponents of Lincoln denounced never existed.

IV. SUSPENDING HABEAS CORPUS IN TIMES OF REBELLION

Any discussion of Lincoln and civil liberties is relevant to modern America. How we treat civilians in time of war is a measure of our Constitution's meaning. On this subject we can learn much from the Civil War experience.

In order to draw any conclusions or lessons from the Civil War experience, we must look at two historical factors that make the Civil War experience for civilians different than any subsequent American conflict. First, we must consider how we define certain terms: this leads to the question of who was arrested and whether they should be considered civilians. Second, we must examine the nature of the war itself. This leads to a consideration of the various regions within the nation and whether the arrest of civilians differed in substance and constitutional significance in different parts of the nation.

A. *Defining the Terms — Were All the Civilians Really Civilians*

Our understanding of the war on the home front turns on definitions of civilians, war zones, and arbitrary arrests. Neely demonstrates that many of the "civilians" arrested turn out not to be civilians at all, at least not in the traditional sense. They are draft evaders, army deserters, Confederate citizens found in the North, or citizens of Confederate states arrested behind Union lines in the South. Many other arrested civilians were alleged Confederate supporters living in contested regions of Missouri, Maryland, and Kentucky and as such may have considered themselves to be citizens of the Confederacy. Neely also demonstrates that the vast majority of all civilians arrested lived in the border states or the Confederacy (pp. 137-38).

Neely argues that while there were more arrests than most historians have presumed, "they had less significance for traditional civil liberty than anyone has realized" (p. 138). At another point he argues that "most" of the arrests "had nothing to do with dissent or political opposition in the loyal states above the border states" (p. 137). This is true, but it misses at least one point. By suspending habeas corpus and allowing the military to arrest and incarcerate civilians without trial, the administration did undermine "traditional civil liberty," because

civil liberty means more than simply political liberty. It also encompasses fundamental notions of due process.

Consider the problem of draft evaders. The law of the time considered draft evaders to be already in the military and thus subject to military arrest; therefore, draft age men were regularly seized. Neely would not classify these arrests as violating traditional civil liberty, because they were neither motivated by political ideology nor designed to suppress ideas or speech (pp. 131-33). In his view, these arrests were merely part of the conscription process. We might quarrel with the idea of a draft; scholars and civil libertarians may very well dislike conscription. But certainly if conscription is legal then arresting draft evaders is reasonable. If men subject to the draft were not considered civilians but were already technically in the military, then the military was the most appropriate body to arrest them.

However, this analysis is not quite so simple. Neely admits that "government detectives or provost marshals were eager to arrest as bounty-jumpers any man of draft age holding substantial cash and boarding a train" (p. 131). As a result, many innocent men spent up to "eight days in a post guard house" (p. 132). This underscores the problem of distinguishing political from nonpolitical arrests, and assuming, as Neely does, that only politically motivated arrests violated civil liberties.

Also complicated was the status of Southerners living in the North when the war began. If they retained their state allegiance they were citizens of an enemy nation in time of war. To arrest such people is no different from actions detaining citizens of Germany at the beginning of World War I and World War II.⁶³ However, place of birth is a crude measure of allegiance, especially in a civil war. Some Southerners served in the Union Army or worked for the federal government. Moreover, even in wartime, national (or state) origins should hardly subject someone to arrest and incarceration without trial.

Neely also dismisses the idea that the arrests of those who traded with the enemy could be considered violations of civil liberties (p. 139). But innocent civilians mistakenly arrested for trading with the enemy certainly must have believed they had been denied due process and civil liberty. Probably wartime exigencies precluded those arbitrarily arrested (mistakenly or not) in the South from making a constitutional claim. But the constitutionality of the arrests does not make them any less a deprivation of civil liberties.

63. It is quite different, however, from the internment of Japanese Americans, most of whom were born in the United States and were citizens of the country.

B. *Why Is This War Different from All Other Wars?*

Except for some naval encounters, the Civil War was fought entirely on American soil, or at least on what Lincoln claimed still to be American soil. Lincoln's record on civil liberties must be examined in that context, something that critics of Lincoln have often failed to do. Neely, although far from critical of Lincoln, would have improved his argument by grounding it more firmly in the special circumstances of the Civil War. This analysis acknowledges that the Lincoln administration denied basic civil liberties to many people, but it essentially finds the actions constitutionally legitimate because of the nature of the war. In this sense, Neely's argument is half right. He is correct that most of the arrests were not political, that they were justified by the exigencies of a civil war, and were thus constitutionally legitimate. But he is wrong in thinking that these arrests were not deprivations of civil liberties merely because they were not politically motivated.

The first key to this analysis is coming to agreement on what one calls the conflict that took place between 1861 and 1865. Some people still call it the "War Between the States." This antiseptic name, which makes the war seem like a squabble over interstate politics and political entities, hides the fratricidal nature of the war. Some lost-cause Southerners and a few Northerners⁶⁴ refer to the conflict as the "War of Southern Independence."⁶⁵ This certainly suggests the nature of Southern goals and implies the South was seeking independence from an oppressive Northern regime.⁶⁶ This designation also leads to the official name, according to the U.S. government at the time the war was fought: "The War of the Rebellion."⁶⁷ The "Civil War" is closer to reality and properly conjures up notions of the brutal and bloody nature of the war. It is also a "neutral" term that does not imply a right and wrong side. This makes it the term of first choice in our own era.

One should keep in mind the official designation — The War of the Rebellion — when examining Lincoln's actions. From Lincoln's perspective, the actions of Southerners were acts of treason, and the war was a rebellion. The U.S. Constitution provides for the suspension of the writ of habeas corpus "when in Cases of Rebellion or Invasion the

64. EUGENE D. GENOVESE, *THE POLITICAL ECONOMY OF SLAVERY* 14 (1965).

65. I once met a high school teacher from South Carolina who called the events of 1861-1865 the "War of Yankee Aggression." Genteel Southerners to this day sometimes refer to the "late unpleasantness."

66. That such a regime had never existed is beside the point. Before Lincoln's election only six presidents had never owned slaves. John Quincy Adams and to a lesser extent his father John Adams were the only presidents openly hostile to slavery. The four other nonslaveholding Northerners — Martin Van Buren, Millard Fillmore, Franklin Pierce, and James Buchanan — were extraordinarily sympathetic to the demands of the South.

67. WAR OF THE REBELLION, *supra* note 58.

public Safety may require it.”⁶⁸ The War of 1861-1865 was clearly a “Rebellion” in the context of the Constitution.

We should also remember that, at the time of the war, the United States had no national law enforcement agencies. The only federal law enforcement officers were a few marshals scattered about the country. They lacked the manpower and resources to deal with large numbers of lawbreakers. Thus, Lincoln turned to the army to arrest civilians because he had no other force to do the arresting. Similarly, he initially turned to martial law because no legislation was at his disposal to deal with the crisis. Congress was not in session when the war began and did not come back into session until July 1861, when it retroactively approved the steps Lincoln had taken to defend the Constitution and preserve the Union. Even if Congress had been in session, Lincoln would likely have used the military as he did because Congress could not have quickly created any civilian agency to deal with the crisis.⁶⁹

C. The Public Safety Justification

Under the Constitution, Lincoln (or Congress) may well have had the power to suspend the writ of habeas corpus everywhere in the United States where “the public Safety . . . require[d] it.” To understand the public safety issue, however, it is necessary to divide the United States into three regions.

1. The Confederate States

The suspension of habeas corpus and the imposition of martial law in the Confederacy was appropriate and constitutionally legitimate on three separate grounds. First, these eleven states were unequivocally in a state of “rebellion.” They clearly fell under the rule for suspending habeas corpus. Second, these states claimed to be out of the Union. They had, in effect, abdicated any claim to the protection of the Constitution. Lincoln’s goal was to bring them back under the umbrella of the Constitution, but, until that happened, the Constitution clearly did not apply to them. Finally, these states were theaters of actual warfare. The Constitution clearly functions during a war, but it does not function fully on a battlefield or in a war zone.⁷⁰

In the eleven states of the Confederacy, civil liberties as such had

68. U.S. CONST. art. I, § 9, cl. 2.

69. See J.G. RANDALL & DAVID DONALD, *THE CIVIL WAR AND RECONSTRUCTION* 301-07 (2d ed., 1969). In 1863 Congress further empowered Lincoln to act with impunity in using the army and declaring martial law to suppress the Rebellion. Habeas Corpus Act, ch. 81, 12 Stat. 755 (1863).

70. Obviously the power of Congress to regulate the armed forces applies to the battlefield, as does the constitutional authority of the President to act as Commander-in-Chief. But other rights, such as those protected in the first eight amendments, do not function in a battle zone.

been suspended by secession and armed rebellion. Thus, to talk about the suppression of civil liberties in the South during the War is a non sequitur. This means, for example, that even General Grant's infamous order expelling Jews from the area of his command was constitutional, to the extent it applied to the rebellious states.⁷¹ Lincoln, of course, had the power to countermand the order, which he quickly did. The order offended Lincoln's sense of fairness and equality;⁷² it was also bigoted, impolitic, and counterproductive. But, at least as it applied to Tennessee and Mississippi, Grant's order was not obviously unconstitutional, because the Constitution was no longer functioning in those places.

The issue of emancipation, more than Grant's antisemitic order, illustrates the way in which the Constitution did not apply to the Confederate states. From the perspective of slaveowners, emancipation violated the due process and takings clauses of the Fifth Amendment⁷³ whether the freeing of their slaves resulted from the Second Confiscation Act of 1862,⁷⁴ Lincoln's more sweeping proclamation of 1863, or the actions of the Union army, which was the true agent of freedom during the War. Clearly, emancipation denied masters their "property" as defined by their own states, the U.S. Constitution, and the Supreme Court. Like the right to habeas corpus, the right to property was a sacred, fundamental right of Americans. Arthur Lee articulated this view on the eve of the Revolution: "The right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty."⁷⁵ But, in the Confederacy the Constitution no longer applied, military law did apply, and the Congress, President, and army were all free to convert slave property into free people.

71. Ulysses S. Grant, 7 PAPERS OF ULYSSES S. GRANT, *supra* note 35, at 50. Neely places Grant's order in the context of common antisemitic assumptions within the army and among many politicians and notes that "[a]nti-Semitism in the U.S. Army was a trait shared with other armies in the Western world in the second half of the nineteenth century." P. 109. Government officials noted when they arrested Jews, but "no other religion was" noted in arrest records. P. 107. However, the issue of antisemitism, like other issues relating to civil liberties under Lincoln, is mixed and complex. The United States under Lincoln was extraordinarily progressive in its treatment of Jews compared to Great Britain and France at the same time. Well before Grant's expulsion order, Lincoln had appointed the first Jewish chaplain in U.S. military history, thirty years before the British did the same. P. 109.

72. General Henry W. Halleck wrote Grant that Lincoln objected to Grant's order because it used "terms [which] proscribed an entire religious class, some of whom are fighting in our ranks. . . ." 6 WORKS OF LINCOLN, *supra* note 14, at 71 n.1.

73. "No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

74. See *supra* note 31.

75. ARTHUR LEE, AN APPEAL TO THE JUSTICE AND INTERESTS OF THE PEOPLE OF GREAT BRITAIN, IN THE PRESENT DISPUTE WITH AMERICA (1775), *quoted in* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 26 (1992).

2. The Loyal Slave States

Four slave states — Delaware, Maryland, Kentucky, and Missouri — remained in the Union, as did a number of counties in Virginia, which were organized as the state of West Virginia in 1863. The following discussion focuses on the three most important of these: Maryland, Kentucky, and Missouri.⁷⁶ These states were not officially in the Confederacy, but parts of them were obviously in a state of rebellion. Battles took place in all of them. Missouri was the site of some of the most horrible guerilla fighting of the war. The first Northern fatalities occurred in Baltimore, a hotbed of Confederate sympathizers, and Maryland was the site of one of the bloodiest battles of the war, Antietam. Confederate troops invaded Kentucky throughout the early years of the war. Most important of all, the sentiments of the people in these states were divided. "Maryland, Kentucky and Missouri contained large and resolute secessionist minorities."⁷⁷ Had these states seceded, they would have enlarged the South's pool of white military manpower by forty-five percent, increased the Confederacy's manufacturing capacity by eighty percent, and vastly altered the strategic position of the North by putting a Southern army on the Ohio and the upper Mississippi rivers.⁷⁸ With Maryland in the Confederacy, the nation's capital would have been cut off from the rest of the country. Although in the Union, these states provided large numbers of troops for the Confederacy.⁷⁹ Some legislators in all three wanted to secede, as did governors in Missouri and Kentucky.⁸⁰

a. *Missouri.* Some of the most bitter and vicious fighting of the war took place in Missouri.⁸¹ A large part of the population was in open or covert rebellion; a rump government was trying to secede. William C. Quantrill, who had a Confederate commission, commanded "some of the most psychopathic killers in American history."⁸² After seizing the town of Lawrence, Kansas, Quantrill's

76. Delaware remained loyal and provided no appreciable number of troops for the South. MCPHERSON, *supra* note 1, at 297. However, Confederate sympathizers in Delaware destroyed railroad tracks leading to Washington in the first month of the war. *Id.* at 286. Apparently no military trials or arrests occurred in Delaware. P. 173. Civilians were arrested in West Virginia, which was also the site of fierce fighting. However, in contrast to the other states under discussion here, West Virginia's loyalty was made clear by its decision to secede from Virginia and remain in the Union. For a discussion of the war in West Virginia, see MCPHERSON, *supra* note 1, at 297-307.

77. MCPHERSON, *supra* note 1, at 284.

78. *Id.* "Little wonder that Lincoln was reported to have said that while he hoped to have God on his side, he must have Kentucky." *Id.*

79. *Id.* at 293.

80. *Id.* at 290, 293, 294.

81. WILLIAM E. CONNELLEY, *QUANTRILL AND THE BORDER WARS* (1910); MICHAEL FELLMAN, *INSIDE WAR: THE GUERRILLA CONFLICT IN MISSOURI DURING THE AMERICAN CIVIL WAR* (1989); MCPHERSON, *supra* note 1, at 784-88.

82. MCPHERSON, *supra* note 1, at 785; see also ALBERT CASTLE, *WILLIAM CLARK QUANTRILL: HIS LIFE AND TIMES* (1962).

Missouri-based gang of thugs murdered 182 unarmed men and boys. After this massacre General Thomas Ewing issued General Order No. 11, which "ordered the evacuation of four counties in western Missouri" (p. 47). In 1864 an offshoot of Quantrill's group, led by "Bloody Bill" Anderson, and including Frank and Jesse James, slaughtered hundreds of civilians and unarmed soldiers on furlough. After one battle Anderson and his troops executed, by shooting them in the head, wounded soldiers seeking to surrender.⁸³ In St. Louis a mob of Confederate sympathizers opened fire on Union soldiers in 1861.⁸⁴ In the early days of the war, Missouri's largest city was in chaos and the throes of Rebellion. As late as 1864 Confederate forces moved into Missouri. Missouri, then, barely differed from the Confederacy. In fact, the Confederacy considered Missouri its twelfth state, and Missourians sat in the Confederate Senate.⁸⁵

Neely shows that the application of martial law in Missouri was particularly harsh. Mistakes were made. Some innocent civilians were doubtless arrested, incarcerated, and in other ways harmed. Under General Ewing's Order No. 11 some loyal unionists were forced out of Southwest Missouri. More often, "persons who were disloyal in heart, mind, and outward behavior" were arrested and tried for the wrong crimes (p. 41). Some Missourians were tried for treason when they should have been tried for specific acts, like bridge burning or cutting telegraph wires. These mistakes show that the military was not equipped to handle the nuances of the law of treason. But they do not show a tyrannical government trying to destroy the liberty of the people.

Were these actions illegitimate suppressions of civil liberties, or the results of civilians both being in the way of military operations and covertly participating in military actions in a theater of war? Given the guerrilla warfare in Missouri, a strong case exists for the latter interpretation.

b. Kentucky. Kentucky declared itself neutral in the War, its governor openly sided with the South, and at least two fifths of the soldiers from the Bluegrass State wore Gray uniforms.⁸⁶ Early in the war Confederate troops under General Leonidas Polk, a distinguished West Point graduate, invaded Kentucky. This invasion violated Kentucky's "neutrality" and led the legislature to declare its support for the Union, over the objections of Governor Beriah Magoffin, who then tried to set up a rump Confederate state government.⁸⁷ Meanwhile, General Polk ran into barely trained Illinois volunteers led by an un-

83. McPHERSON, *supra* note 1, at 787.

84. *Id.* at 291.

85. *Id.* at 293.

86. *Id.* at 293-94.

87. *Id.* at 296-97.

known and undistinguished Union commander named Ulysses S. Grant. Kentucky remained in the Union because of Confederate miscalculations and Grant's superior generalship. But for the next few years the state would be a battleground.

Given the circumstances of Kentucky politics — with the duly elected governor proclaiming his state out of the Union and forty percent of its young men in Confederate uniforms, one can easily argue that the state was in rebellion. Thus, the suspension of habeas corpus there seems legitimate. The only question might be whether a suspension should have applied to *all* the state. That is, should areas firmly under Union control have been considered "in rebellion"? But until the end of the war, could any of the slave-holding states stand firmly under Union control? Federal troops, the Congress, and the President never doubted the answer to this question.

c. *Maryland.* To reach Washington for his inauguration, Abraham Lincoln had to pass through Baltimore, "a city rife with secession sympathizers."⁸⁸ Assassination plots forced Lincoln to travel through the city incognito at 3:00 a.m.⁸⁹ At this time the national government provided no protection for the president-elect. Without a secret service, F.B.I., or any other federal police system, Lincoln was on his own.

Lincoln reached Washington safely, but some Union troops were less fortunate. On April 19, 1861, the 6th Massachusetts regiment arrived in Baltimore, on its way to protect Washington. The troops had to change trains in Baltimore, and that required them to actually march across town from one station to another. Confederate sympathizers attacked the Massachusetts soldiers, and by the time the regiment had fought its way to the train station, four soldiers and twelve civilians were dead.⁹⁰ That night local authorities burned railroad bridges connecting Baltimore to Washington. The secessionist mayor of Baltimore claimed this was done to prevent Union troops from rioting in his city. But to Lincoln, "[b]ridge-burning looked like plain treason" that left Washington "defenseless and cut off from the rest of the North" (p. 5). In the wake of these events, Lincoln issued his first order suspending habeas corpus, which encompassed the railroad lines between Washington and Philadelphia. Lincoln's order would later apply to all east coast railroad lines. Federal troops would later arrest John Merryman under this suspension order.

Under these circumstances, Merryman's arrest seems justified. At the time a large hostile army stood within a day's march of the nation's capital. Loyal troops were on their way to protect the national government and preserve the Constitution. Maryland itself was wa-

88. *Id.* at 261.

89. *Id.* at 261-62; OATES, *supra* note 1, at 211-12.

90. MCPHERSON, *supra* note 1, at 285.

vering in its commitment to the Union, and in Baltimore neither local nor state authorities were willing to protect vital transportation links between Washington and the North. John Merryman was helping to destroy these links while trying to recruit soldiers for the enemy. It would be hard to imagine a situation more perfectly designed to fit the provision in the Constitution allowing for the suspension of habeas corpus and the use of federal troops.

While mobs threatened troops and railroad lines, politicians nearly brought Maryland out of the Union, and the governor declared the state neutral.⁹¹ Lincoln accepted neutrality in Kentucky, and indeed it worked to his advantage when Confederate troops invaded the state first. But neutrality in Maryland was impossible, because Union troops had to cross Maryland to reach Washington. Moreover, pro-Confederate legislators in Maryland were not content with neutrality. In August they denounced Lincoln and the war effort and scheduled a special September session, when they hoped to win a secession vote. Federal troops blocked access to Frederick, Maryland, where the legislature was to meet, and then arrested thirty-one secessionist legislators before they could reach the meeting.⁹² Others arrested at the time included the mayor of Baltimore. Not surprisingly, with most of the secessionists absent, the legislature supported the Union. Most of those arrested remained in federal custody until February 1862, but some did not gain their freedom until December 1862. Meanwhile, in the November 1861 election, with the secessionists still in jail, the Union party won a "smashing victory."⁹³

This is perhaps the most political of the military arrests of civilians during the war. State legislators were on their way to conduct public business. The army arrested them so they could not conduct that business. But once arrested they were not released until after the next election. Neely suggests that these arrests "were more likely harmful than helpful to the administration's cause by supplying an issue to the opposition. In some counties, in fact, the opposition called itself 'the habeas corpus party' " (p. 18). That, of course, is beside the point; the issue is the legal or constitutional basis for the arrests, not their political efficacy.

This is surely a close call, but, under the circumstances, the initial arrests do not seem constitutionally out of bounds. The arrests were not to prevent an opposition party from holding office, nor were they to stop the normal political process. On the contrary, they were designed to stop an illegal action — secession — after a rebellion had already begun.

If the suspension of habeas corpus was legal and constitutional, as

91. *Id.* at 287.

92. *Id.* at 288-89.

93. *Id.* at 289.

I have argued, the arrests of the Maryland legislators were permissible. But does that make their incarceration legitimate? Here, it seems to me, is where the excesses of the Lincoln administration become most clear. The government acted reasonably to prevent the secession of Maryland through military intervention. If Lincoln could use troops to bring Virginia back into the Union, surely he could use troops to prevent Maryland from leaving the Union.

But, once the army had prevented a vote on secession, was there any justification for keeping the legislators in jail? I think not. The purpose of the incarceration was to prevent a vote on secession and to keep Maryland in the Union. The arrests accomplished this. The state legislators had not, at that point, done anything to make war on the government or to rebel. Once the threat of secession was over, little justification remained for keeping the legislators in jail. Further incarceration seems to have been politically motivated.

3. *The North*

By the end of the War most of the nation had felt the suspension of habeas corpus and the long arm of the Lincoln administration. Initially Lincoln suspended the writ in the North along the east coast railroad lines (p. 51). Under this order — as well as through the acts of individual military officers, federal officials, and state actors — the military had arrested and held numerous civilians in the North on various charges. In August and September 1862, Lincoln and Secretary of War Edwin M. Stanton suspended the writ for the entire nation (pp. 52-53). This set into motion what Neely calls “the lowest point for civil liberties in U.S. history to that time, and one of the lowest in all of American history. It showed the Lincoln administration at its worst — amateurish, disorganized, and rather unfeeling” (p. 53).

Were these suspensions constitutional? Were they justified? Were they merely a manipulation of raw power for the purpose of political gain? These questions lie at the heart of the analysis of civil liberties under Lincoln.

The nation was in a state of civil war — a rebellion was in progress. The constitutional provision for the suspension of habeas corpus “in Cases of Rebellion” is not limited by geography.⁹⁴ However, it is limited to “when . . . the public Safety may require it.”⁹⁵ The constitutional question, then, was whether the “public Safety” required the suspension everywhere. In many cases the public safety did not require it. What threats there were to the public safety in Maine is hard to imagine, although Lincoln suspended habeas corpus along the railroad line from Washington to the Canadian border. How did the

94. U.S. CONST. art. I, § 9, cl. 2.

95. U.S. CONST. art. I, § 9, cl. 2.

"public Safety" require the arrest of newspaper editors in upstate New York, northern Ohio, or Maine?⁹⁶ In the North, many of the arrests were simply for statements hostile to the administration. In one set of records involving 154 persons, only thirteen "were arrested for words they were alleged to have spoken or written about the war" (p. 132). Of these "[o]nly two cases were 'politically' significant" (p. 132). Most of the other thirteen were drunken boasts or "expressions of delight at the assassination of President Lincoln" (p. 132).

Neely presents this evidence to clear Lincoln of the charge that the arrests of civilians were politically motivated. Most of them were not.⁹⁷ However, the arrest of citizens who denounced Lincoln and his administration suggests the state of mind of public officials during and immediately after the War. It also illustrates the profound danger of allowing the government to arrest arbitrarily people who disagree with it.

The thirteen arrests mentioned above (and the other arrests for opinion found in other records) were clearly motivated by political concerns. But the small number of such arrests do not constitute the stuff of a reign of terror or an imposition of tyranny that Democrats complained of during the War and that lost-cause partisans have complained of in subsequent years. Neely argues that "most" arrests "had nothing to do with dissent or political opposition in the loyal states above the border states" (p. 137). But the import of this is not as clear as Neely would have us believe. He has found vast numbers of nonpolitical arrests, but that does not necessarily diminish the importance of the political arrests about which we already knew. If "most" of the arrests he describes were for nonpolitical reasons, then some clearly were not. That Neely has found hundreds, or thousands, of legitimate and nonpolitical arrests does not justify the illegitimate ones.

V. PRESS SUPPRESSION

Curiously, for a book on civil liberties in wartime, *The Fate of Liberty* does not examine the suppression of the press under Lincoln.⁹⁸ This is one of the major weaknesses of the book. Instead of discussing the issue, he notes that Robert S. Harper's *Lincoln and the Press* dealt with cases involving the press (p. 28). But this book, published in 1951, is somewhat outdated and untouched by any of the vast recon-

96. P. 23; HARPER, *supra* note 36, at 127-29, 193.

97. Certainly it is absurd to blame Lincoln for the arrests of those who took delight in his death. A New Jersey man, for example, was arrested when he "draped his hog pen in black for Lincoln's funeral." P. 132.

98. His inadequate discussion of the arrest of the editors of the *New York World* and the *Journal of Commerce* is offered as part of a larger discussion of fraud during the War. The newspapermen arrested did not make Neely's rather long list of "Prisoners of State."

siderations of press freedom of the past forty years. Furthermore, this offhand reference to the press does not explain the significance of press suppression during wartime.

As with other aspects of civil liberties, some definitions are in order. The army and other branches of the federal government suppressed papers in areas of the South that fell back into Union hands and in border states. This makes sense and seems not terribly surprising or outrageous. These were war zones, and even most First Amendment absolutists concede that full freedom of the press does not extend to the battlefield and the front.⁹⁹ For the same reason, evidence of censorship by the military does not prove the Lincoln administration was tyrannical. By the standards of modern warfare, where the military dictates which "pool reporters" will get to the front, the press during the Civil War was remarkably unfettered.

Most suppression of the press took place in or near the war zones. Neely notes that, despite the horrible border war in Missouri, only one newspaper editor was tried by a military commission for "mere political beliefs or freedom of expression" (p. 44). "He was accused of publishing information for the benefit of the enemy and of encouraging resistance to the U.S. government" (p. 44). His punishment was banishment. Neely notes that the army also arrested "several Missouri editors" in the early months of the war (p. 28). In fact, by the end of the war at least a dozen Missouri editors had been arrested or had their papers closed.¹⁰⁰ Nevertheless, shutting down a press in Missouri was not the same as closing one in Chicago or New York. Missouri was a war zone. Fighting was going on everywhere. The army's mission was to keep Missouri in the Union.

Rather than talk about the suppression of the press, Neely merely notes in passing that before February 1862 military authorities arrested twelve different newspapermen, plus "several Missouri editors."¹⁰¹ Elsewhere he notes the arrest of the odd editor, here and there (pp. 58-59). This fits with his theme that most arrests were not political. Even if only a few editors had been arrested, however, such an arrest, or the closing of a newspaper, obviously had a more dra-

99. As Chief Justice Charles Evans Hughes noted in *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931), "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." 283 U.S. at 716. For more recent commentary, see THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970). "[C]ommunications dealing with military movements in wartime are plainly subject to military censorship. Likewise, dissemination of information classified as a military secret is subject to controls based on the requirements of the military system, although the issue of what constitutes a military secret may be subject to civilian judicial review." *Id.* at 58.

100. HARPER, *supra* note 36, at 141-48 (authorities also banned another dozen or so papers from other states).

101. P. 28. At least six Missouri papers were closed and some of their editors arrested in this period. HARPER, *supra* note 36, at 142-44.

matic impact on civil liberties than the arrest of a civilian charged with speaking out against the war.

The fact is that not just a few or "several" editors were arrested. Federal authorities arrested some editors simply because of their anti-administration and antiwar activities. The arrest of the Missouri editor who was allegedly aiding the enemy seems reasonable, given that the war was raging there. But little justification exists for the arrests of editors in places as remote from the front as Malone (New York), Long Island (New York), Columbus (Ohio), Paris (Illinois), Dubuque (Iowa), Belfast (Maine), and Canton (Ohio).¹⁰² In addition to official suppression, mobs that were often led by soldiers destroyed many other papers. Some soldiers faced disciplinary action for their attacks on antiwar papers, but soldiers and officers who attacked anti-administration presses were generally not disciplined.¹⁰³

The arrest of Archibald McGregor, the editor of the *Stark County Democrat*, published in Canton, Ohio, illustrates the political nature of press suppression during the war and the importance of Neely's failure to discuss this issue. In August 1861, a mob destroyed McGregor's office. McGregor identified all fourteen men in the mob, including the leader, an army lieutenant who was also the son of Canton's mayor. For this reason the Canton city council agreed to reimburse McGregor for his loss. But in October 1862, the army arrested McGregor on unspecified charges. The Republican postmaster of Canton accompanied the soldiers who arrested McGregor, making the political implications of this arrest obvious. Three weeks later the military released McGregor.¹⁰⁴

Arrests like this one reveal the political dangers of Lincoln's policies. The potential for suppression was present throughout the war, and created what twentieth-century constitutional scholars immediately recognize as a chilling effect on freedom of expression. Nevertheless, despite these examples, during the war a vigorous opposition press constantly criticized Lincoln, military policy, and the whole purpose of the war itself. The *Springfield Register* called Lincoln's reelection "the heaviest calamity that ever befell this nation" and a "farewell to civil liberty."¹⁰⁵ But the paper was not suppressed. The opposition press in the North was vibrant, vigorous, and often vicious.

Lincoln seems to have understood, at a political level if not necessarily a constitutional one, that a free press was important. He also understood that unbridled suppression of the opposition was probably politically counterproductive, especially in the North, where secession was impossible and support for the Confederacy weak. Thus, when

102. P. 27; HARPER, *supra* note 36, at 128-29, 298, 225, 341, 148, 193, 198.

103. HARPER, *supra* note 36, at 151-52, 198, 230-33.

104. *Id.* at 197-98.

105. *Id.* at 224.

General Ambrose Burnside suppressed the anti-administration *Chicago Times*, Lincoln quickly interceded.¹⁰⁶ Lincoln was "embarrassed" by this suppression, which he saw as "the question between what was due the Military service on the one hand, and the Liberty of the Press on the other."¹⁰⁷

On the other hand, Lincoln personally ordered the arrest of the editors of the *New York World* and the *Journal of Commerce* after they published a bogus presidential proclamation.¹⁰⁸ Lincoln ordered Major General John A. Dix to arrest the editors for publishing a "false and spurious proclamation, purporting to be signed by the President, and to be countersigned by the Secretary of State, which publication is of a treasonable nature, designed to give aid and comfort to the enemies of the United States . . ." ¹⁰⁹ Neely's persuasive analysis shows that the administration closed the papers because it truly believed the papers were involved with a Confederate plot (pp. 104-05). When the hoax was revealed, Lincoln rescinded this order.¹¹⁰ It turns out the hoax had a more mundane root — two newspapermen planted the false proclamation hoping to make a killing in the gold market by manipulating the news. The *World* quickly reopened, and it continued to attack the administration. Throughout the War, the administration did nothing to stop these assaults.¹¹¹

VI. LINCOLN AND THE CONSTITUTION

In the end, Lincoln's record on the press is in fact mixed, as is his overall record on civil liberties. Neely's careful combing of the extant archives shows that most of those arrested were not political activists. Generally, but not always, the administration recognized the distinction between speech and action in the North. In the border states and

106. See Letter from Abraham Lincoln to Isaac N. Arnold, (May 25, 1864), in 7 WORKS OF LINCOLN, *supra* note 14, at 361 (writing about the suppression of the *Chicago Times*). Most of the correspondence and other material connected to this case is conveniently collected in FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT, *supra* note 34, at 229-32. Lincoln also chastised General John M. Schofield for arresting the editor of the *Missouri Democrat*, which despite its name was a Republican paper. The *Democrat* had not criticized the administration, but rather had published a letter Lincoln had written to Schofield that could have embarrassed the General and the administration. Letter from Abraham Lincoln to General John M. Schofield, (July 13, 1863), in 6 WORKS OF LINCOLN, *supra* note 14, at 326; HARPER, *supra* note 36, at 144-46.

107. Letter from Abraham Lincoln to Isaac N. Arnold, (May 25, 1864), in 7 WORKS OF LINCOLN, *supra* note 14, at 361.

108. Letter from Abraham Lincoln to John A. Dix, (May 18, 1864), in 7 WORKS OF LINCOLN, *supra* note 14, at 347-48. Most of the correspondence and other material connected to this case is conveniently collected in FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT, *supra* note 34, at 232-47.

109. Letter from Abraham Lincoln to John A. Dix, (May 18, 1864), in 7 WORKS OF LINCOLN, *supra* note 14, at 347-48.

110. HARPER, *supra* note 36, at 297.

111. *Id.* at 297-303.

in the South, the distinction itself was less clear because the War was a rebellion.

Neely is clearly right that Lincoln was not a dictator. The Democratic Party functioned throughout the War, electing opposition and antiwar candidates to office. Lincoln fully expected to lose the election of 1864, and yet he did not try to influence the outcome by massive partisan arrests. Indeed, in an 1864 proclamation suspending habeas corpus in Kentucky, Lincoln carefully explained that he did not want to interfere in the upcoming elections (p. 209). Nevertheless, the incarceration of Maryland legislators during the election of 1861 and the *Milligan* case also show that some arrests were decidedly calculated to affect elections.¹¹²

Neely's exhaustive work also clearly indicates that many arrests of civilians were probably justifiable. The Constitution, after all, did allow for the suspension of habeas corpus in times of rebellion. The Civil War was certainly that. Nevertheless, unjustified deprivations of liberty took place under Lincoln. Some newspapers were closed, innocent civilians were jailed without trial, and some people in custody were grievously mistreated.¹¹³ But compared to the trampling of civil liberties in other nations during civil wars, what happened under Lincoln seems almost innocent and naive. There were no mass executions or even summary killings of civilians. Today we remember John Merryman because Lincoln ignored Chief Justice Taney's writ of habeas corpus directing his release. But, in another context, Merryman's arrest is astounding because he had access to an attorney. As Harold Hyman and William Wiecek have noted, this was "a globally unique privilege for a civilian in military custody."¹¹⁴ That the army allowed Merryman's attorney to travel from Baltimore to Washington in order to appeal directly to Taney, and then allowed Taney to hold court in Baltimore and openly challenge military authority, is in itself remarkable. No one later thought to interfere with Taney when he published his opinion castigating Lincoln. This could hardly happen in very many other places during a civil war.

Lincoln's policies also seem mild, reasonable, and much more firmly grounded in the Constitution when compared to the policies of subsequent presidents in other American wars. During World War II the United States was not invaded¹¹⁵ and certainly no "rebellion" took place. Popular support for a war has never been as high. Yet Franklin Roosevelt had no qualms about authorizing the suspension of liberty for nearly 120,000 Americans of Japanese ancestry or birth

112. See *supra* notes 52-54 and accompanying text.

113. Pp. 109-12 (describing the torture of some suspected deserters from the Army).

114. HYMAN & WIECEK, *supra* note 43, at 239.

115. The Japanese attacked or invaded some territories such as Hawaii, Alaska, Guam, and the Philippines, but none of these actions constituted an invasion of the United States.

merely because of their national origins. When planning the Japanese-American internment, John McCloy, the prominent Wall Street lawyer then serving as Assistant Secretary of War, declared, "if it is a question of the safety of the country [and] the Constitution. . . . Why the Constitution is just a scrap of paper to me." ¹¹⁶

For Lincoln, the Constitution was never a "scrap of paper," even if he had no clearly thought-out theories of constitutional rights and "probably did not have a conscious theory of [constitutional] interpretation." ¹¹⁷ Neely argues that Lincoln came to the presidency with few strong constitutional principles. He had rarely discussed or considered the Constitution in his earlier political career (pp. 211-13). Even his discussions of slavery were relatively light on constitutional issues (pp. 214-15), especially when compared to the highly developed constitutional arguments against slavery. ¹¹⁸ As Neely notes, "[e]ven to survey Lincoln's ideas on the Constitution is to run the risk of overemphasizing his constitutional concerns, because thinking in constitutional ways did not come naturally to him" (p. 215).

Lincoln was a railroad lawyer, a practitioner. He seems not to have discovered the Constitution, in any serious way, until Taney's *Dred Scott* opinion ¹¹⁹ forced him to think about the role of the Supreme Court in interpreting that document. ¹²⁰ As I noted earlier, unlike other leading Republicans, Lincoln had not been involved in antislavery litigation. ¹²¹ Thus he had not developed a respect for the writ of habeas corpus from constantly using it to try to protect blacks seized as fugitive slaves. Because he was never part of the antislavery movement, he never came to appreciate the value of free speech and free press. Throughout the antebellum period abolitionists struggled for the right to express their views. ¹²² In Alton, Illinois, not far from where Lincoln grew to maturity, the abolitionist publisher Elijah P. Lovejoy died at the hands of a proslavery mob while he defended his printing press. ¹²³ Salmon P. Chase entered the abolitionist movement by serving as counsel for an abolitionist printer whose press a mob

116. John McCloy, *quoted in* ROGER DANIELS, *THE DECISION TO RELOCATE THE JAPANESE-AMERICANS* 35 (1975).

117. Paludan, *supra* note 23, at 13.

118. DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* (1978); FINKELMAN, *supra* note 7; WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848* (1977).

119. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

120. See Abraham Lincoln, *A House Divided*, Speech at Springfield, Illinois (June 16, 1858), in 2 *WORKS OF LINCOLN*, *supra* note 14, at 461.

121. See *supra* notes 9-11 and accompanying text.

122. RUSSELL B. NYE, *FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY, 1830-1860* (1963).

123. Ironically, the contemporary report of the riots was published by one William S. Lincoln. WILLIAM S. LINCOLN, *ALTON TRIALS* (1838), *reprinted in* *ABOLITIONISTS IN NORTHERN COURTS* 281 (Paul Finkelman ed., 1988).

destroyed.¹²⁴ Such a background gave him, and other antislavery activists, an insight into civil liberties and constitutional rights that Lincoln lacked. But, while Lincoln lacked constitutional experience and even interest, he never lacked political sense. He understood the importance of maintaining democratic institutions, even if he was unconcerned about the constitutional theory behind them.

VII. BEYOND LINCOLN

Neely's book forces us to rethink Lincoln's reputation as a destroyer of civil liberties. The book demonstrates that during wartime — especially during a civil war — some opponents of the government are likely to be oppressed. Neely also shows that grievous and painful mistakes were made. The book describes instances of brutal jailers, arbitrary prosecutors, and bigoted, stupid military commanders. But what is most surprising is how few actual deprivations of civil liberties took place during the war. For a civil war, when spies and enemy agents were often indistinguishable from the general population, the record of the Lincoln administration seems surprisingly good. Lincoln and those under him were far more sensitive to civil liberties than Woodrow Wilson¹²⁵ or Franklin Roosevelt.¹²⁶

The arrests and violations of civil liberties under Lincoln illustrate the propensity for prosecutorial zeal during wartime. Compared to the massive arrests during World War I, or the Red Scare of 1919, the Lincoln administration comes off rather well. This is especially true when we are reminded, as Neely might have done more emphatically in his book, that a civil war is quite different from an international war and overwhelmingly different from any domestic crisis that might have existed during the Red Scare.

In 1862 Lincoln urged a group of loyal slaveowners from Delaware, Kentucky, Missouri, Tennessee, and West Virginia to support a scheme of compensated emancipation.¹²⁷ Otherwise, he warned, "the incidents of the war can not be avoided" and the longer the war continued the more likely it would be that slavery would be "extinguished by mere friction and abrasion — by the mere incidents of the war."¹²⁸

Ironically, the same "friction and abrasion" that helped destroy slavery also threatened personal and civil liberties. The lesson of the

124. FINKELMAN, *supra* note 7, at 160; BETTY FLADELAND, JAMES GILLESPIE BIRNEY: SLAVEHOLDER TO ABOLITIONIST 142-44 (1955).

125. On Wilson and civil liberties see PAUL MURPHY, WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES (1978).

126. Roosevelt had few qualms about denying fundamental civil liberties to over 100,000 Americans of Japanese ancestry. DANIELS, *supra* note 116, at 44-45; PETER H. IRONS, JUSTICE AT WAR 63 (1983); see Exec. Order No. 9066, 7 FED. REG. 1407 (1942).

127. Appeal to Border State Representatives to Favor Compensated Emancipation (July 12, 1862) in 5 WORKS OF LINCOLN, *supra* note 14, at 317-18.

128. *Id.* at 318.

Lincoln years, taught well by Neely's book, is that war threatens individual liberties, even when the chief executive is sensitive to democracy and disinclined to be oppressive. When the chief executive cares less for freedom, or worse yet is openly hostile to individuals and organizations dedicated to its preservation, the climate during wartime can become truly oppressive.