

ESSAY REVIEW

Abraham Lincoln and American Civil Liberties

The Fate of Liberty: Abraham Lincoln and Civil Liberties. By MARK E. NEELY, JR. (New York and Oxford: Oxford University Press, 1991. xvii, 278p. Index. \$24.95.)

Coming to terms with Abraham Lincoln and civil liberties has never been easy. He was, for whatever the reasons one might ascribe, the "Great Emancipator." With the stroke of his pen (and the enforcing arms of Generals Grant and Sherman) Lincoln brought more liberty, to more people, than perhaps anyone else in history. War measure though it was, inelegantly written, and not the stuff of heroic language, the Emancipation Proclamation nevertheless made civil liberties meaningful to nearly four million blacks. Moreover, through the Proclamation, the confiscation acts, and the enlistment of black soldiers, Lincoln's administration set the stage for the adoption of three constitutional amendments that gave some substance to the new birth of freedom in the nineteenth century, and provided the basis for at least formal legal equality in the late twentieth century.

There is another way in which Lincoln and his legacy have profoundly affected American liberty. Before the Civil War the protections of the federal Bill of Rights did not apply to the states. The First Amendment, after all, begins with the words "Congress shall make no law. . . ." In 1833 and again in the 1840s the U.S. Supreme Court unequivocally held that the Bill of Rights was binding only on the federal government. The Republicans of the 1850s and 1860s believed these decisions were wrong. The Fourteenth Amendment was designed to remedy this situation, and over the years the Court has applied most of the Bill of Rights to the states through a process known as "incorporation."

Thus, Americans of today owe much of their freedom—their civil liberties and their civil rights—to Lincoln and his legacy. This is the Lincoln our culture pays homage to in so many ways.

Then there is the other Lincoln—the president who suspended habeas corpus, whose generals shut down opposition newspapers in the North and expelled Jews from their fields of operation. There is the Lincoln whose

agents arrested more than 13,000 civilians (according to standard histories), allowed for the military prosecution of civilians, and created a regime that one post-war critic called *An American Bastille* [sic]. This Lincoln was described by Gore Vidal as “able to make himself absolute dictator without ever letting anyone suspect that he was anything more than a joking, timid backwoods lawyer . . .” (Vidal quoted, p. 232). Vidal’s fictional Lincoln reflected the man described by the literary critic Edmund Wilson 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” (Wilson, quoted, p. 231). Lincoln, in other words, not only denied his own citizens civil liberties, but set into motion the forces that led to the IRS, the FBI, the CIA, and countless federal bureaucracies that plague us (or at least plagued Edmund Wilson).

Many historians have accepted this portrait of Lincoln riding roughshod over civil liberties. Sadly, most of this history has been based on little research and faulty analysis. At last, some 125 years after the end of the Civil War, we have a more accurate and honest understanding of the Lincoln administration and civil liberties. After years of painstaking archival research Mark Neely presents a compelling argument that history should be left to those who do research and not to novelists, literary critics, or those with political axes to grind, like the “lost cause” partisan who wrote *American Bastille*.

Neely’s book, which is the best scholarly examination of this issue ever written, will rehabilitate Lincoln’s reputation on civil liberties. Ironically, the book demonstrates that the traditional figure for civilian arrests, 13,535, is probably low—maybe by as much as 200 percent—although we will never know the true number arrested. The records were never very good to begin with, and many have been lost or destroyed. But, finding more records, counting more bodies in jail, would not change very much the picture that Neely paints. What is important is not numbers, but their meaning. While showing “there were more arrests” than any other scholars have found, Neely also shows “they had less significance for traditional civil liberty than anyone has realized” (p. 138).

The traditional charges against Lincoln seem to be threefold: first, that his administration used military arrests and arbitrary civilian arrests to stifle the political opposition; second, that the opposition press suffered grievously under Lincoln; third, that the administration’s wholesale disregard for civilian rights created something of a police state in the North. The extremely convincing picture Neely paints shows that both aspects of received historical wisdom are quite wrong.

Most—indeed virtually all—arrests were not political in nature. Furthermore, Neely makes a logically and historically persuasive argument that none of the missing records would be likely to change this analysis. If there were other Lambdin Milligans and Clement Vallandigham's out there, we would not need arrest records to know about them. Their cases would have been reported in the newspapers, discussed in pamphlets, debated in Congress, and doubtless appealed to some higher court. The fact that there were so few political trials under Lincoln underscores Neely's thesis, that the Lincoln administration did not engage in wholesale political repression.

Neely shows that much of our understanding of the war at home turns on definitions of civilians, war zones, and arbitrary arrests. The largest number of "civilians" arrested turn out not to be civilians at all, at least not in the traditional sense. They are draft evaders, army deserters, or Confederate citizens found in the North. The bulk of the other civilians arrested were northerners trading with the enemy or defrauding the government. In one set of records, involving 154 persons arrested in the North, only thirteen were arrested for "words they were alleged to have spoken or written about the war." Of these "only two cases were 'politically' significant." Most of the rest were drunken boasts or "expressions of delight at the assassination of President Lincoln" (p. 132). It is certainly hard to blame Lincoln for the latter category of arrests.

The law of the time considered draft evaders to be already in the military, and thus subject to military arrest. 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 makes some sense. While we might quarrel with the idea of arresting Virginians living in New York when the war began, if they retained their allegiance they were citizens of an enemy nation in time of war. Similarly, it is hard to argue against arresting people who trade with the enemy in time of war.

By modern civil libertarian standards, these thirteen arrests (and the other arrests for opinion found in other collections of records) are unacceptable. They illustrate the propensity for prosecutorial zeal during wartime. But they do not constitute the stuff of a reign of terror or an imposition of tyranny. 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.

Despite the century-old charge that he suppressed the press, there is very little evidence that this in fact happened. The opposition press in the North was vibrant, vigorous, and often vicious. The closing down of the opposition

New York World is the most famous example of press suppression during the war. Neely brings new light to this unpleasant episode. The *World* was closed after it published a bogus presidential proclamation. Neely's persuasive analysis shows that the administration closed the paper because it believed the paper was involved with a Confederate plot. It turns out the hoax had a more mundane root—the false proclamation was planted by two newspapermen who hoped to make a killing in the gold market by manipulating the news. The *World* quickly reopened and continued to attack the administration. As it did throughout the war, the administration did nothing to stop these assaults.

Lincoln's suspension of habeas corpus in Maryland, Missouri, and elsewhere led to many unnecessary arrests. With Washington surrounded by Confederate forces and pro-rebel civilians destroying railroad tracks, telegraph lines, and bridges, it is no wonder that Lincoln declared martial law. The key question is, did Lincoln suspend habeas corpus for political purposes, or merely to secure the safety of Washington? Neely's careful analysis of arrest records supports his contention that "Suspending the writ of habeas corpus was not originally a political measure, and it would never become primarily political" (p. 9). If anything, Neely's portrayal of Lincoln and habeas corpus, while sympathetic to Lincoln, may not be sympathetic enough. The Constitution allows for the suspension of habeas corpus only under very clear circumstances "when in Cases of Rebellion or Invasion the public Safety may require it." If there was ever a time when the suspension of habeas corpus was legitimate, it was during the Civil War—a case "of Rebellion."

Neely shows that in Missouri the application of martial law was particularly harsh. Mistakes were made, and more than a few times "persons who were disloyal in heart, mind, and outward behavior" were nevertheless 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. At the beginning of the war the military—especially in far off places like Missouri—was not equipped to handle the nuances of the law of treason. All this seems unsurprising and hardly the stuff of tyranny. Missouri was a war zone; a large part of the population was in open or covert rebellion; there was a rump government trying to secede. As we know from recent work on the war in Missouri, the guerilla war here was at its most ruthless.

Despite this horrible border war, Neely finds that only one man, a 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. Far from proving

the oppression of the Lincoln administration, this one case stands out because it is unique. Even in a war zone, where habeas corpus was suspended and the military was free to act against civilians, less than 1 percent of the military commission trials involved political activities or opinion. In other words, the First Amendment and other civil liberties were respected, even when the administration was not obligated to do so.

Indeed, compared to civil wars in other nations, Lincoln's actions seem like a model of restraint. Lincoln did not, for example, order the arrest of all persons in the North of southern birth or ancestry. Such an order would have been absurd, but absurdity did not stop Franklin D. Roosevelt from following such a policy against American citizens of Japanese ancestry during World War II.

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 mistakes—grievous and painful mistakes—were made. There are 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 come off as far more sensitive to civil liberties than Woodrow Wilson or Franklin Roosevelt.

In 1862 Lincoln observed that "the incidents of the war can not be avoided" and that 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 war" (p. 123). The irony of the war is that the same "friction and abrasion" that helped destroy slavery also threatened personal and civil liberties. The lesson of the Lincoln years, taught well in Neely's book, is that war threatens individual liberties, even when the chief executive is sensitive to civil liberties and disinclined to be oppressive. When the chief executive cares little for civil liberties, or worse yet is openly hostile to individuals and organizations dedicated to their preservation, the climate during wartime can be truly oppressive. This is true to civil wars, international conflicts, and domestic crusades, such as the Red Scare of 1919 or the "war on drugs" of today.

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