

Lincoln Love

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LINCOLN AS PRAGMATIST, OR CIVIL WAR CONSTITUTIONAL HISTORY FROM "THE BOTTOM UP"

By John David Smith

(continued from previous issue)

Interpreting Lincoln as essentially a pragmatist, Neely concludes that the president "rarely thought abstractly about the Constitution and the laws. He usually thought about them when a particularly pressing political problem arose." On civil libertarian issues, for example, "theory usually followed fact." "Form followed function in Lincoln's mind," Neely adds. Lincoln was "a calculating and practical realist," one whose "feel for the practical was unerring." Encountering little political opposition to his first suspension of the writ of habeas corpus (the early arrests actually had bipartisan support), Lincoln was encouraged to use the tactic again and again. Concerning military arrests, then, Lincoln's actions were predicated not by theory, but by military necessity. "In fact," Neely asserts, "constitutional arguments did not interest Lincoln much." "Questions of legal and constitutional form ... took a back seat in the Lincoln administration." Lincoln, Neely insists, had a "profound lack of interest in constitutional theory." Ever the pragmatist, Lincoln "did not think by habit first of the constitutional aspect of most problems.... His impulse was to turn to the practical." In fact, "thinking to constitutional ways did not come naturally to him."

This possibly explains the president's acquiescence — first in Missouri and later elsewhere in the loyal states — to the use of military commissions. Such tribunals had been successfully employed years earlier by Winfield Scott during the Mexican War to restrain the hostile Mexican civilian population. During the Civil War the U.S. Army held a minimum of 4,271 trials by military commission, more than one-half of these in war-torn Missouri, Kentucky, and Maryland. During Reconstruction the army conducted another 1,435 trials by military commission. Defendants were charged with such varied crimes as horse stealing, bridge-burning, and aiding deserters. Neely argues that

Lincoln's use of military courts to try civilians was of "dubious legality" and the practice ultimately proved to be the part of his internal security system most vulnerable to charges of violating civil liberties.

Civil War military commanders, as well as Lincoln and his critics, commonly blurred the important distinction between the suspension of the writ of habeas corpus (imprisoning without charge) and the imposition of martial law (trying civilians by courts-martial). This accounts for the staggering arrest rate in Missouri, a loyal state wracked by guerrilla warfare and military repression. The sheer volume of military arrests — an average of 106 prisoners entered St. Louis's Gratiot Street prison per month from April 1862 through October 1863 — supports Neely's conclusion that Missouri represented an utter failure in policy for the Lincoln administration. For his part, Lincoln argued unpersuasively that the policy of military justice for civilians was "for prevention, ... not for punishment" and was just a temporary expedient for the duration of the war. Neely judges Lincoln's interpretation "untrue in respect to many" cases. "Sentences to hard labor or prison terms fixed by years ... were punishments pure and simple." Neely contends that for all its irrelevance to "protecting liberty," *Ex parte Milligan* at least differentiated clearly between martial law on the one hand, and the suspension of the privilege of the writ of habeas corpus on the other. "Historians," he adds, "not realizing how muddled the law was before 1866, have repeatedly misinterpreted the constitutional history of the Civil War mainly by making the choices seem clearer than they appeared to the protagonists at the time."

Early in the war, at least, the president sported a better record in terms of protecting civil liberties elsewhere in the loyal states. Assessing arrests that occurred before February 15, 1862, Neely concludes that 78.3 percent of those arrested resided in the border states, the District of Columbia, and the Confederacy, not the North. The arrest rate in the North for the ten months of Seward's jurisdiction was less than one person per state per month. Those who were arrested in this period rarely were detained for dissent or free speech, Neely explains. Rather their incarceration resulted from "genuinely complicated problems" — Southerners who were trapped in the North at the beginning of the war or, in the exceptional case of James M. Mason and

John Slidell, Confederate emissaries who were apprehended en route to their posts in Europe.

A new wave of repression of civil liberties, however, enveloped the nation on August 8, 1862, when the War Department suspended the writ of habeas corpus throughout the United States. It did so in order to prevent evasion of the Militia Act of July 1862, legislation that authorized the first national military draft in American history. Armed with immense power, an army of petty bureaucrats was allowed "to decide without any legal guidelines one of the highest matters of state: precisely who ... was loyal or disloyal." The result, not surprisingly, was an onslaught of political arrests — what Neely describes as "a nightmare for civil liberties in the North." Some persons were detained for making allegedly disloyal remarks in public or in private, others for publishing anti-administration opinions, and still others for discouraging enlistments into the Union Army. The alleged dissidents commonly were Democrats and others who frequently alluded to racial themes in opposing Lincoln's policies.

Between August 8 and September 8, 1862, no fewer than 354 northern civilians were imprisoned under what Neely terms "careless orders." This was the only period during the war that even approximated the systematic military arrests that the Democrats complained about. The War

Department's actions, according to Neely, "had momentous effect on civil liberties in the United States," ushering in a "brief period of sweeping and uncoordinated arrests" that "constituted the lowest point for civil liberties in the North during the Civil War, the lowest point for civil liberties in U.S. history to that time, and one of the lowest for civil liberties in all of American history. It showed the Lincoln administration at its worst — amateurish, disorganized, and rather unfeeling." It was this period, not the first year of the war when Seward oversaw internal security, that represented the nadir of civil liberties under Lincoln. And Neely challenges those "apologists for this internal security system" who "have insisted that Abraham Lincoln's humane, charitable, and lenient personal character colored the whole system, or at least ameliorated its harsher mistakes." After reviewing seemingly endless case files of military arrests, Neely dismisses "this sentimental argument," the alleged importance of his "magnanimous character," as inaccurate and unfair to Lincoln. Though the president certainly was "a man of compassion," Neely reminds us that "he was not ubiquitous." For example, during the August 8 - September 8, 1862, period, Lincoln intervened in only one instance to correct an erroneous arrest. At Washington's Old Capitol prison, the president intervened on average in only one civilian case every three months from August 1864, to the conclusion of the war. In general Lincoln examined "only the cases of men of influence ... because these were the only ones likely to be called to his attention." Neely argues that historians have erred in assuming that "Lincoln's legendary penchant for pardoning soldiers" could be "applied ... to civilians." Even so, he admits that when Lincoln did indeed review a verdict rendered by military commission, he "usually was inclined to mercy."

Though Neely maintains that the numerous military arrests "were not always exempt from political prejudice," he argues that they generally resulted from sincere attempts by Lincoln's administration to end draft evasion. A majority (54 percent) of the men rounded up by Stanton's provost marshals were charged with attempting to escape conscription. Six weeks after the War Department's August 8 orders, in his proclamation of September 24, 1862, Lincoln suspended the writ of habeas corpus throughout the nation — in essence reaffirming the War Department's established policy of handling draft resisters. The writ of habeas corpus was suspended for "all Rebels and insurgents, their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice." Prisoners, denied access to civil courts, were liable to trial by military commission under martial law. Congress put its seal of approval on the administration's policy of military arrests in the Habeas Corpus Indemnity Act of March 3, 1863, which Neely



In late summer 1862, "the lowest point for civil liberties in U. S. history to that time," citizens could be arrested for discouraging enlistments, among other things. Detail from a cartoon entitled "Rebels In Our Midst," from Frank Leslie's Illustrated Newspaper, August 30, 1862.

shrewdly describes as "a model of legislative ambiguity." This act left unclear whether or not previous suspensions of the writ of habeas corpus had been legal. Six months later, on September 15, 1863, Lincoln suspended the writ of habeas corpus again — this time to defy judicial writs issued in northern states that interfered with implementation of the draft. And there would be additional suspensions of the writ (the final one appeared on July 5, 1864) as well. Neely concludes that Lincoln's habeas-corpus policy — administered "piecemeal and unsystematically" — stemmed not from logical constitutional doctrine, but rather "lurched from problem to problem drafting hasty proclamations and orders to meet the objective of the moment." The president viewed the suspension of the writ of habeas corpus "as an exception for a temporary emergency."

Neely no doubt is correct, but his excellent volume falls short of explaining satisfactorily the political identification or other concerns of many of those who were indeed arrested. For all his emphasis on writing constitutional history from "the bottom up," the Democrats still receive short shrift in *The Fate of Liberty*. Whether writing about military arrests in New Mexico, Ohio, New York, or Virginia, the focus of the book is undeniably on Lincoln and his evolving policies. As Neely admits, political motivation played a role in a number of these arrests. The July 1863, New York City draft riots, for example, represent more than simply a violent response to conscription. There is no way to prove Neely's point that suspension of the writ of habeas corpus proved significantly less jarring to American society than Lincoln's conscription policy. Examined more broadly, the riots appear as the culmination of responses to Lincoln's entire civil and military policies, as well as a specific reaction to the specter of military enrollment. Another question concerns how much control Lincoln actually had over enforcement. Given the scope of the North's internal security network, abuses no doubt crept into the system. Neely might have kept a clearer focus on the opposition had he consistently informed readers of the resolution of many of the cases he mentions (see the case of Edward Downs of Virginia, for example).

Still Neely properly corrects the historical record when he argues that the Democrats' denigration of Lincoln as a dictator has had "more influence on history than it merited." Neely confirms historian Frank L. Klement's important conclusions that the Civil War North contained a much smaller disloyal opposition than previous scholars had identified. Neely interprets the paucity of organized resistance to the military arrests as evidence that public outcry against Lincoln's restrictions on civil liberties was far less than the Democrats had charged. Defending Lincoln from accusations that he "was nakedly opportunistic or embarrassingly shallow," Neely goes so far as to assert that "a

majority of the arrests would have occurred whether the writ was suspended or not."

Neely is on sturdier ground when he underscores the irony of how during the war the Republicans and Democrats reversed their antebellum postures regarding habeas corpus. Before the war, whereas the Democrats opposed the writ because it was used to free captured runaway slaves, the Republicans defended the writ because it offered runaways a measure of protection before the law. During the war, however, as Lincoln's party suspended the writ in order to defeat the Confederacy, the Democratic opposition defended it as a means of keeping the traditional freedoms of speech and press alive. In the midst of revolutionary change, then, Lincoln possessed the uncanny "ability to balance short-term practicality and long-term ideals." Determined to suppress the rebellion at all costs, Lincoln resorted to any means to guarantee "that democracy could not be said to have failed."



On the staff of The Lincoln Museum from 1977 to 1979, John David Smith is now Alumni Distinguished Professor of History at North Carolina State University in Raleigh. He is the author of An Old Creed for the New South: Proslavery Ideology and Historiography (1985; 1991) and is the coeditor of The Dictionary of Afro-American Slavery (1988).



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NEWS FROM THE ABRAHAM LINCOLN ASSOCIATION

GARRY WILLS TO DELIVER LINCOLN'S BIRTHDAY ADDRESS

Garry Wills — one of the most influential writers in America and the author of a new, best-selling book on the Gettysburg Address — will be the guest speaker at the 1993 Abraham Lincoln Association Banquet. The event takes place on the evening of February 12 in Springfield, Illinois.

Wills's latest book, *Lincoln at Gettysburg: The Words That Remade America*, has been widely praised by critics and has emerged as one of the most popular Lincoln books in generations, clinging for weeks to a secure place on *The New York Times'* bestseller lists. David Herbert Donald called the book "stimulating, original, and altogether absorbing." Wills is a former Henry R. Luce Professor of American Culture and Public Policy at Northwestern University. Earlier he served as a Washington Irving Professor of American History and Literature at Union College, and a Welch Professor of American Studies at Notre Dame University.

Among his many books are *Nixon Agonistes*, *The Kennedy Imprisonment*, *The Second Civil War*, *Confessions of a Conservative*, and *Cincinnatus: George Washington and the Enlightenment*. His best-known book, *Inventing America*, won the National Book Critics Award as well as the Merle Curti Award of the Organization of American Historians.

The 1993 banquet is also expected to feature presentation of the ALA's annual Award of Achievement, which was won last year by Willard Bunn Jr., and the previous year by the New York State Lincoln on Democracy Project.

Reservations for the 1993 banquet may be made by telephone (217-785-7954), or by mail to the Abraham Lincoln Association, Old State Capitol, Springfield, IL 62701.

LINCOLN THE WHIG IS SUBJECT OF 1993 SYMPOSIUM

"Lincoln and the Whig Party" will be examined in detail by four prominent historians at this year's annual ALA Symposium. The event, which is open to the public, begins at 1:30 p.m. at the Old State Capitol on Lincoln's Birthday, February 12.

Papers will be delivered by: Drew McCoy, professor of history at Clark University and the author of an acclaimed recent biography of James Madison; Daniel Walker Howe, formerly of UCLA and currently Rhodes Professor of American History at Oxford University, England, and author of *The Political Culture of the American Whigs*; and Major L. Wilson, professor of history at Memphis State

University and author of the milestone 1974 study, *Space, Time, and Freedom: The Quest for Nationality and the Irrepressible Conflict, 1815-1861*.

Commentator for the program will be John Niven, professor of history at the Claremont graduate school and author of the recent book *The Coming of the Civil War*.

Once again, the moderator for the program will be Thomas F. Schwartz, and the opening remarks will be delivered by ALA President Frank J. Williams.

HOW TO BECOME A MEMBER

The Abraham Lincoln Association offers membership at five different levels — all of which include a subscription to the *ALA Journal* and advance invitations to the annual symposium and banquet.

Individual memberships are \$25 per year; patron memberships \$50; sponsor memberships \$125; benefactor memberships \$250; and corporate memberships \$500.

To join — or to obtain more information on membership benefits — write: Georgia Northrup, c/o The Abraham Lincoln Association, Old State Capitol, Springfield, IL 62701.

TWO JOURNALS PLANNED FOR 1993

The acclaimed *Journal of the Abraham Lincoln Association* will appear twice in 1993 — the first year in which two editions will be published.

Volume 14, Number 1 — expected around Lincoln's birthday — will feature papers from the 1991 ALA symposium, including Charles B. Strozier's "The Lives of William Herndon," and Douglas L. Wilson's "William H. Herndon and His Lincoln Informants."

Volume 14, Number 2 will include articles by Matthew Pinkster and Michael Vorenberg, as well as ALA President Frank J. Williams's review of "Lincolniana in 1992."

Thomas F. Schwartz, curator of the Henry Horner Lincoln Collection at the Illinois State Historical Library, is the editor of the *Journal*. Mr. Schwartz welcomes submissions c/o The Old State Capitol, Springfield, IL 62701.

ALA FUNDS NEW SALEM VISITORS CENTER EXHIBITS

The ALA has awarded a \$1,000 grant to the New Salem State Park visitors center, it was announced by Frank J. Williams, president of the association.

The new museum installation at the visitors center examines Lincoln's life in the prairie village. ALA funding will help fill out new exhibit space with additional material.