

Lincoln Love

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

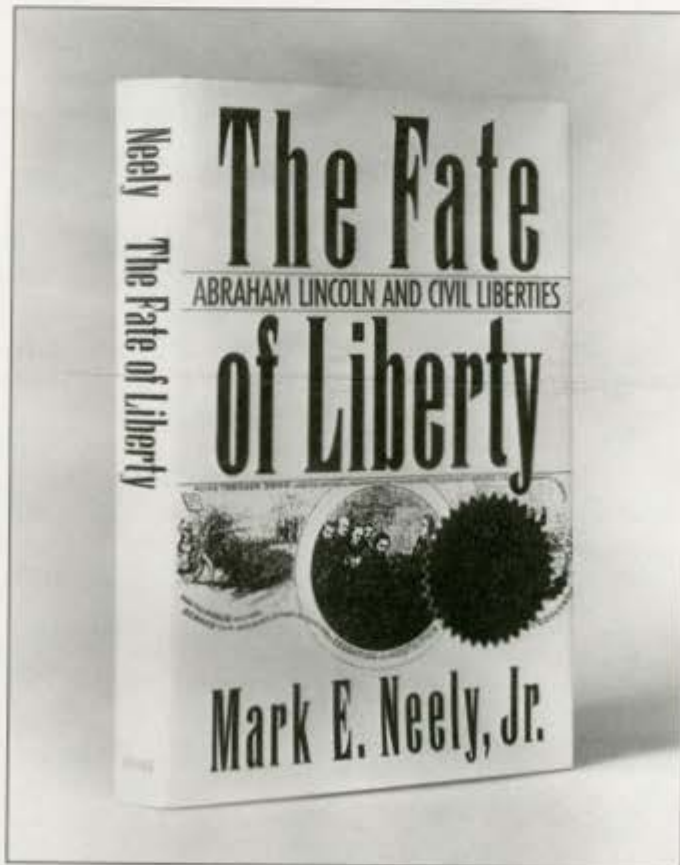
By John David Smith

On April 27, 1861, less than two weeks after the fall of Fort Sumter, President Abraham Lincoln became the first American president to suspend the privilege of the writ of habeas corpus and declare martial law. He authorized General Winfield Scott to arrest persons without making specific charges "at any point on or in the vicinity of the military line...between the City of Philadelphia and the City of Washington." During the confused aftermath of the secession crisis, Lincoln feared that pro-Southern Marylanders might block vital communication lines with the North. Determined to protect the capital, the president considered it essential to keep avenues to Washington open for military reinforcements.

Within a month, however, on May 25, 1861, Lincoln faced a potentially major constitutional crisis when John Merryman, a Confederate sympathizer, was arrested under the president's suspension of the writ of habeas corpus. In *Ex parte Merryman*, U.S. Supreme Court Chief Justice Roger B. Taney challenged Lincoln's suspension, arguing that the president had violated the law because only Congress, not the chief

executive, could suspend the writ of habeas corpus. Lincoln ignored Taney's protest and U.S. military officers disregarded Taney's issuance of a writ on Merryman's behalf. Though a constitutional stand-off was averted over the Merryman case, the stage nonetheless was set early in Lincoln's administration for recurring conflicts over civil liberties. By war's end, well over thirteen thousand civilians were arrested by federal military authorities. But significantly, during the war the Supreme Court never questioned the suspension of the writ of habeas corpus. Not until Reconstruction, in *Ex parte Milligan* (1866), did the Supreme Court declare unconstitutional martial law and military trials of civilians in jurisdictions where civil courts were able to function.

From Lincoln's vantage point, the president had to move swiftly to prevent dissenters and Confederate sympathizers in the North from sabotaging his efforts to suppress the rebellion. As the war dragged on, the president also had to police blockade runners, non-combatant Southerners who violated federal travel and trade restrictions, and northerners who evaded the draft, deserted, committed fraudulent and corrupt business practices, and swindled recruits. Early in the war the North's internal security system consisted of a hodge-podge of fragmented jurisdictions, including various state officials and the Army and Navy. Secretary of State William H. Seward, who lacked adequate enforcement apparatus, officially supervised the 864 military arrests that occurred between April 15, 1861, and February 15, 1862. For the remainder of the war this function was



The winner of the 1992 Pulitzer Prize in History.



Old Capitol Prison

performed by the tough and efficient Secretary of War, Edwin M. Stanton. Ultimately the North possessed a vast internal security system.

Writing after the 1863 military arrest of Clement L. Vallandigham, a former Democratic congressman from Ohio, Lincoln defended the suspension of the writ of habeas corpus as vital to protect against fifth-column threats. It was necessary, Lincoln informed New York Democrat Erastus Corning, because the Confederacy purposely relied upon freedom of expression in the North "to keep on foot amongst us a most efficient corps of spies, informers, suppliers, and aiders and abettors of their cause in a thousand ways." Confederate victories during the first years of the war underscored the importance of squelching disloyal actions and potentially dangerous rear guard actions. In addition, then, to his suspension of the writ of habeas corpus of April 27, 1861, on September 24, 1862, and on September 15, 1863, Lincoln again suspended the writ — now for the entire country. Congress had empowered the president with the right to suspend the writ "in any case" when it passed the Habeas Corpus Indemnity Act on March 3, 1863. As a result, thousands of allegedly disloyal civilians were arrested during the war. Many of these men and women were charged with overt crimes. But others were incarcerated for voicing opposition to Lincoln's war effort on what later generations of historians would term "political" grounds.

For years scholars have debated the extent to which Lincoln stretched the intent of the U.S. Constitution in authorizing these arrests. Historians sympathetic to Lincoln rationalized the president's suspensions of the writ of habeas corpus and the accompanying avalanche of arrests

by pointing to the grave necessities of war, the presence of numerous traitors among the North's citizenry, and the ambiguity of the Constitution on the question of habeas corpus. Lincoln's critics, not surprisingly, condemned the president's "arbitrary" arrests for allegedly "political" crimes as gross violations and typical usurpations of power by the tyrannical sixteenth president. They excoriated him as a dictator who stifled dissent and crushed civil liberties. These writers viewed the Democrats — who reportedly bore the brunt of the military arrests — not as traitors, but as victims of abusive partisan excess at the hands of the Republicans.

Curiously, few historians have systematically examined Lincoln's record on civil liberties. Despite the outpouring of writings on Lincoln and the Civil War, the literature on civil liberties has constantly remained not only thin and unanalytical, but tentative as well. The cadre of Lincoln scholars has tiptoed around the subject nervously, fearful that Lincoln's contemporary Democratic critics just might have been right all along. Members of the Lincoln fraternity, generally uncritical of the president and prone to examine minutely virtually every facet of his life, have avoided mention of Lincoln's military arrests and suppression of newspapers. They, too, feared embarrassment or simply could not bear to think of Lincoln as someone who ran roughshod over civil liberties.

Though James G. Randall's pathbreaking *Constitutional Problems Under Lincoln* (1926) set a high scholarly standard for its day, the book straddled the fence so constantly that it diminished whatever arguments Randall might have intended to make. Randall's summary of Lincoln's implementation of martial law typified his mugwumpery. On the one hand, Randall declared that "arbitrary arrests were unfortunate, that Lincoln's conception of the executive power was too expansive, and that a clearer distinction between military and civil control would have been desirable." Yet Randall was unwilling to classify these as abuses. "If," he added, "the Government under Lincoln erred in these respects, it erred under great provocation with the best motives; and its policy may not be justly criticized without a full understanding of the alarming situation which confronted the nation." Again, when commenting on Lincoln's suspension of the habeas corpus privilege, Randall reminded his readers that "extreme legislation was characteristic of the period," and that the 1863 Indemnity Act represented "the sort of irregularity that creeps into the law during war or other times of great disturbance."

In *The Fate of Liberty* (Oxford University Press, 1991), Mark E. Neely, Jr., provides the first systematic examination of Lincoln's stance on civil liberties. Neely's book raises essential questions concerning the extent to which traditional freedoms of speech, press, and assembly were

trampled upon by Lincoln as he sought to suppress civil war. Neely breaks fresh ground by examining for the first time all sides of the debate on the military arrests of civilians during the Civil War. He looks beyond the White House and Lincoln's intentions in suspending the writ of habeas corpus. He focuses instead on the "practical impact on civil liberties," and "the hard social realities" upon those who were arrested and languished in dank prison cells in such "American Bastilles" as Fort Lafayette in New York harbor, Old Capitol prison in Washington, and Myrtle Street prison in St. Louis. Unlike previous scholars, Neely trained his sights on unravelling the identity of those who were arrested by the Lincoln administration. In other words, Neely is less interested in the formulation and execution of the laws than in their implications for those heretofore nameless citizens accused of disloyal conduct. Significantly, then, Neely's brand of constitutional history is written mainly from "the bottom up."

Neely, who has emerged as the leading authority on Lincoln, possesses an unrivaled grasp both of Lincoln's own writings as well as the historiography of the field. In *The Fate of Liberty*, he performs insightful detective work — comparing versions of holograph draft letters to describe changes in drafts and determining whether drafts of documents were written by Lincoln or Seward. Only someone with Neely's experience could find special meaning and importance in Lincoln's language, his syntax, his use of the passive voice and the double negative. The author also employs Civil War-era pamphlets, broadsides, cartoons, photographs, prints, and drawings to sort through the maze of contemporary partisan rhetoric in manuscript, published, and iconographic formats. Though the book inexplicably contains no illustrations from the rich collection at Neely's finger tips in Fort Wayne, he nonetheless drew upon many of these to support his arguments.

Neely placed these materials into context by evaluating the often vague and contradictory judgments not only of modern constitutional and legal historians but of nineteenth-century commentators and political scientists as well. Most importantly, Neely is the first scholar to sift through and quantify (counting, then sampling) the cumbersome and dusty bundles of records of military arrests at the National Archives, including the State Department files, the Turner-Baker Papers, the Record of Prisoners of State, the Provost Marshal General's File of Two or More Civilians, and the Records of the Office of the Judge Advocate General (Army). These record groups, Neely explains, were "subject to the frustrating vagaries of nineteenth-century record-keeping." Commenting, for example, on Missouri's records, Neely found "the jumble of papers...unsystematic to the point of chaos." He describes the Union provost marshal's files in the National Archives similarly as "chaot-

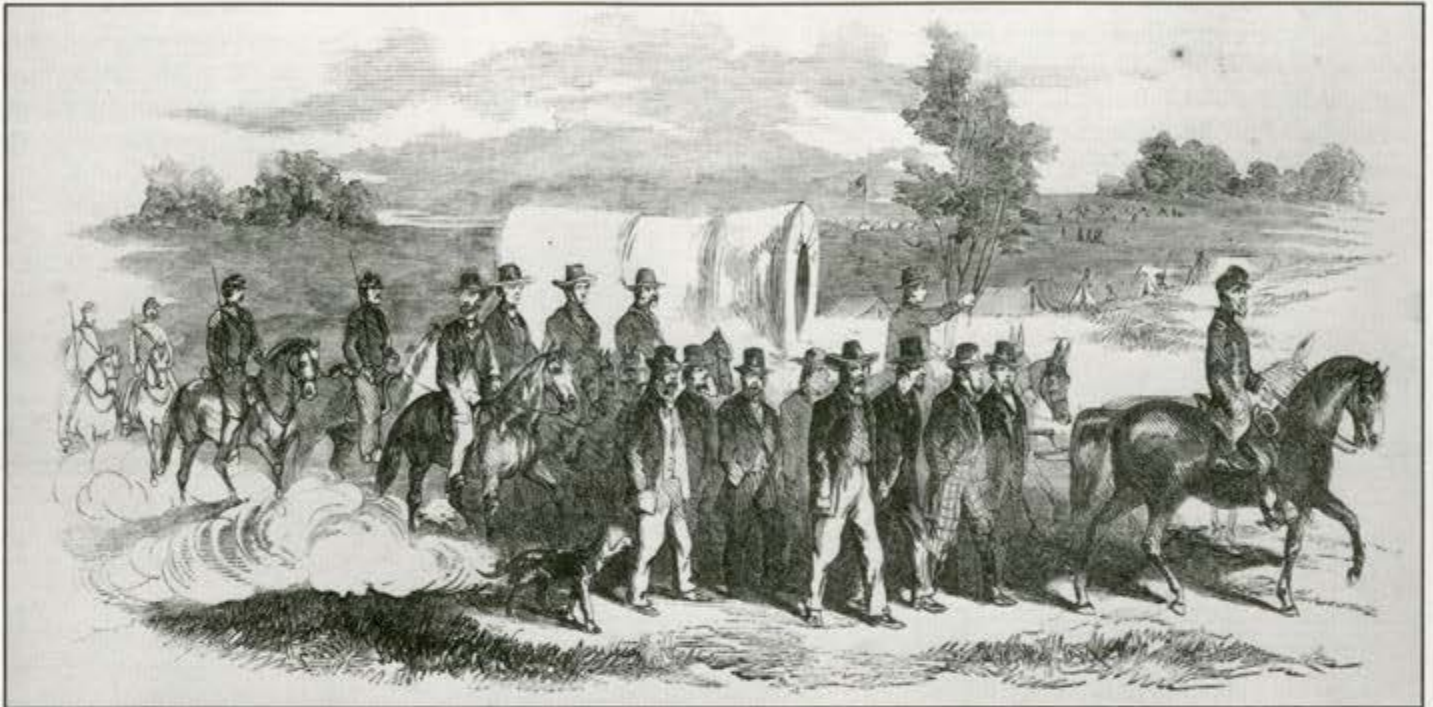
ic and fragmentary." In spite of "the voluminously unmanageable records," Neely nonetheless dug deeply into this arsenal of sources to settle once and for all the dilemma of *who* was arrested by the Lincoln administration, by *whom*, *why*, and *when*.

Neely's careful sleuthing led him to conclude that because of incomplete records, various methods of record-keeping, and different definitions of the term "prisoners," the exact number of citizens arrested by the military during the Civil War will never be known. Military officers recorded three different classes of prisoners: "prisoners of war," "United States prisoners," and "prisoners of state." "In the field," Neely explains, "the usage was inconsistent at best." Another term — "arbitrary arrests" — also has proven to be problematical in assessing Civil War arrest statistics because it was "neither very precise, technical, nor legally well-defined. In this term," explains Neely, "lay the major conceptual problem with previous interpretations."

Despite these stumbling blocks, Neely nevertheless is certain that far more civilians (well in excess of 13,535) were arrested by the Lincoln government than previous authorities had calculated. Most of those who were arrested were not from the North, but rather were either Confederates (especially after 1862), or residents of the border states. Overall there were few arrests north of Mason's and Dixon's line. Significantly, the vast majority of those arrested "had done something other than criticize the war in words." Northern civilians generally were jailed for war-related crimes and had little connection to political dissent. "There were more arrests," than previous scholars have assumed, Neely admits, "but they had less significance for traditional civil liberty than anyone has realized." In fact, in none of Lincoln's suspensions of the writ of habeas corpus did Neely discover overt political motivation. To the contrary, he underscores Lincoln's "steady desire to avoid political abuse under the habeas-corpus policy," and insists that "military goals rather than political ones remained uppermost with Lincoln when restricting civil liberties."

The president provided insights into his arrest policy in an October, 1863, letter to General John M. Schofield. Arrests, Lincoln said, were intended not to suppress free speech or political organization, but instead were intended to prevent "*palpable* injury to the Military in your charge." Lincoln reminded Schofield that the general had, in addition to his responsibility of enforcing the law, "a discretion to exercise" this policy "with great caution, calmness, and forbearance." Lincoln realized that such discretion was essential to ward off critics within the Republican ranks as well as to muffle protests of the loyal opposition, the Democrats.

Though Democratic protests against the suspension of the writ of habeas corpus "started late and ended early," the



Virginia farmers being taken to the Provost Marshal's headquarters to take the oath of allegiance to the United States.
From Frank Leslie's Illustrated Newspaper, August 30, 1862.

party eventually attacked the administration for usurping the constitutional right of Congress to suspend the writ of habeas corpus. From early 1863 until late 1864, New York Governor Horatio Seymour led the Democrats' partisan defenses of personal liberty. Nevertheless, in the 1864 election year the Democrats hesitated to make civil liberties the foremost focus of their campaign. This, Neely explains, resulted from Democratic presidential candidate George B. McClellan's participation in the arrest of Maryland legislators in 1861. As a result, the Democrats countered Lincoln's arrests with objections that Neely describes as "sporadic and somewhat muted," "fairly short-lived and opportunistic," and lacking "depth and sincerity." Neely contends that Democratic protests nonetheless "helped keep the army and the Republicans honest" by pressuring Lincoln to renounce convenient military trials and interference in elections.

Neely interprets Lincoln's use of military arrests as consistent with the President's utilitarian determination to end the rebellion at all costs. "Historians," Neely explains, "have long tried to unearth hidden meanings in the orders and proclamations suspending the writ of habeas corpus, while neglecting their straightforward meanings and true intent." Previous scholars "have been too willing to take the literature written by the opposition at face value, while searching for hidden motives behind the arguments in favor of suspending the writ." Whether applied to persons selling liquor to federal soldiers, or contractors palming off shoddy

merchandise onto the government, Lincoln employed military arrests largely to resolve practical problems connected with the war effort.

(To be continued)

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