

### Lincoln and the Triumph of the Nation: Constitutional Conflict in the American Civil War

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## Review

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**Neely Jr., Mark E.** *Lincoln and the Triumph of the Nation: Constitutional Conflict in the American Civil War*. University of North Carolina Press, \$35.00  
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### Trekking through the Cloudy Questions of Wartime Constitutionalism

Mark E. Neely, Jr.'s latest book, *Lincoln and the Triumph of the Nation: Constitutional Conflict in the American Civil War*, is the product of more than thirty years of research and thought about Abraham Lincoln and the constitutional struggles that surfaced in the midst of the Civil War. His 1992 Pulitzer Prize-winning *The Fate of Liberty: Abraham Lincoln and Civil Liberties* was his first major, and very successful, salvo in this field of endeavor. In that book, Neely painstakingly sifted through literally a semi-tractor trailer-sized mountain of arrest and court records to determine how many people were actually arrested by Union military authorities when the writ of habeas corpus was suspended and martial law imposed throughout much of the North. Neely's discussion of the Constitution (in both of these books and those that have come between them) engages the important and at times frustrating reality of partisan politics. In *Lincoln and the Triumph of the Nation*, Neely states bluntly, "All parties had to respect the Constitution...and all parties attempted to exploit the provisions of the Constitution to their advantage" (5).

As noted, these are ideas that Neely has wrestled with for years, both in his written work and within the classroom. As one of his doctoral students many years ago at Saint Louis University, I can hear Neely's voice in the pages of this book. No doubt his former and current students at Penn State will have the same experience. In both settings, scholarship and the classroom, Neely is a master of historiographical and primary source dissection. This is a book about the minute details of constitutional and partisan argument from the pens of politicians, lawyers, judges, and journalists, many of whom lent their skills to an avalanche of pamphlets that revolved around every constitutional aspect of the Lincoln

administration's war efforts. Lincoln's use and abuse of the Constitution were ideologically and, at times literally, on trial. How judges and courts dealt with the cases before them often stemmed from their earlier partisan affiliations and, Neely argues, the degree to which nationalism motivated their outlook.

To be certain, this is a complex book written for scholars, and even then scholars who have a deep and detailed interest in the specifics of constitutional thought. Although the book is clearly focused on constitutional issues and utilizes nationalism as an overarching theme to tie the various, sometimes disparate constitutional topics together, one cannot help but get periodically thrown off balance by the range of subjects and sometimes challenging narrative continuity. Nationalism is an overarching theme, but it sometimes appears as an end cap rather than a driving focus.

At the outset Neely confronts the difficult and occasionally amorphous idea of nationalism. He admits that "the flag is all emotion and often defies precise explanation" (10). He rightfully insists that the Constitution and the American nation were not synonymous: "No one could make the nation one with the Constitution. But no one could say that the Constitution was not a vital part of the nation" (9). Neely offers that, "the Constitution sits at the boundary between patriotism and nationalism, between sentiment and the theory that justify and define our 'imagined community,'" borrowing a phrase from Benedict Anderson (9).

These ideas are particularly troublesome and undefined, not just for Neely, but for the nation's history and present. For nationalism can also fall within the bounds of popular passions, and as such drive energies that run opposite to the Constitution's ideals. This, indeed, was one of the great struggles over the Constitution during the Civil War. Did Lincoln have the presidential authority to actually save the nation? Who would decide such a question, and how would the decisions materialize? When Lincoln did make the tough decisions, such as suspending the writ of habeas corpus in the early days of the struggle, of enacting the Legal Tender Act, imposing conscription, or even more problematically issuing the Emancipation Proclamation, what was the ground upon which he stood? Who opposed and who sustained him?

Neely's answer is that partisan hawks from both political parties swarmed around the issues, attacking or defending Lincoln's actions based on their deep-seated partisan fealty. He writes, "There was no such genuine expression of

goodwill on the part of the partisan opponents of the administration. They were grudging and opportunistic critics, for the most part, whose style was brinkmanship in challenging the party in power and not seeking consensus....Alas, the opposite is also true. The president's defenders seem to have made no such constructive suggestions [constitutional amendments], either. The adversarial style of politics (and legal proceedings) was indelibly ingrained, and no one really thought of consensus as something that could be reached" (100).

There can perhaps be no greater example of partisan motivation than arguments over Lincoln's suspension of the writ of habeas corpus, a power that is plainly outlined in the Constitution, but debated as to who may properly claim it. Lincoln did so and Supreme Court Chief Justice Roger Taney immediately denied that the president had such an authority. Taney was largely ignored by the government. As Neely notes, "Abraham Lincoln, in short, was not about to let the writ of habeas corpus stand in the way of the life of the nation" (64-65).

The matter certainly was not ignored by either the president's critics or supporters. Neely points to the remarkable number and detail of the pamphlets produced during the war as a means of understanding and appreciating the level of intense constitutional argument that occurred over this and other war measures. One of Lincoln's most stalwart champions was a Philadelphia attorney named Horace Binney, who prepared an intricate argument defending the president's right in times of emergency to suspend habeas corpus and, in doing so, save the nation.

The difficulty for Binney was his previous party affiliation and position on such matters. Neely explains that "Binney's fondness for presidential power in the Civil War was new and a repudiation of his old anti-Jackson views, though he never said so. Taney had made a similarly dramatic ideological migration from his earlier views" (79). Neely continues, "When the presidency was in Democratic hands Binney was critical of the president's power, and when it was in Republican hands he buttressed the president's power. Still, Binney's unconscious impulse was partisan....Seeing the nation through partisan eyes, as nearly everyone did in the nineteenth century, could put any politician on the brink of ignoring the country in its hour of need in certain circumstances" (80).

This is all familiar ground for Neely, as it was a mainstay of *The Fate of Liberty*. What is critical to the discussion here is the degree to which changing

partisan viewpoints impact our wider conceptual understanding of nationalism and constitutionalism. These are issues about which Neely knows a great deal, yet I cannot help but wish he had spent more time developing some of the background. Neely knows well the precedent of Andrew Jackson's suspension of habeas corpus and imposition of martial law in New Orleans in 1814-15, for which he was fined \$1000 for contempt of court. He paid the fine, and in the 1840s pursued reimbursement by Congress. The matter became embroiled in the party battles of the day, but resulted in a remarkably detailed discussion of the power to suspend habeas corpus and the very definition of martial law. Most important, nationalism, or the life of the nation, was argued as a basic right that trumped the Constitution itself. Democrats held such positions, while Whigs spoke out against tyranny in the hands of the military. Twenty years later, Democrats abandoned their previous views and Whigs turned Republican embraced habeas suspension and martial law.

Neely notes that "The story of Andrew Jackson's actions had been a part of Lincoln's political education..." and explains that Lincoln's Corning letter (in which he justified his suspension of habeas corpus, in part on Jackson's action and Congress's approval – they refunded Jackson's \$1000) "was a blistering and uncompromising justification of the internal security measures of his administration, replete with the tough language presidents use in war when the enemy gets near the gates. In fact, the Corning Letter of Abraham Lincoln is the strongest statement ever made by any American president asserting the power of the government to restrict civil liberty" (97, 86).

What Neely does not stress enough is the crucial point that the underlying issues that Democrats argued in the 1840s are exactly the points made by Republicans in the 1860s. Equally intriguing is that Taney himself, a Jackson Supreme Court appointee, had in 1843 fully supported Jackson's suspension of habeas corpus. His reversal in 1861 with *Ex Parte Merryman* speaks to the exact sort of partisanship that Neely discusses. Perhaps it was Taney's southern, or Confederate, nationalism.

The question then becomes does nationalism, promulgated by partisanship, actually trump and cancel out constitutionalism? This is different than Neely's conclusion that nationalism was a powerful force, that it did not prove to be conservative, and that it "did not find the Constitution an incumbrance to be shed" (109). The fact is that Republicans, the party in power, had no need to shed

the Constitution as long as they could theorize around it; as long as war sentiment, Union sentiment – nationalism – remained strong.

This is especially true in the case of the Emancipation Proclamation, one of the most engaging and enlightening parts of the book. Whereas Neely concludes that the Constitution was not a problem for the majority of Lincoln's war measures, emancipation proved the exception. He writes curtly: "But for emancipation the Constitution was a problem" (121). Democrats were on firm ground with the Constitution's protection of slavery, and even Lincoln admitted in his first inaugural that he had no authority over the matter. Yet, explains Neely, "Lincoln rather quickly figured out how to make it constitutionally acceptable if and when he deemed it expedient" (123).

Neely notes that there were Republicans who realized that the Constitution was inadequate in this instance. Grosvenor Lowrey, whom Neely describes as the Binney of the emancipation issue, "made the argument that the office of commander in chief was derived from the Constitution but that the powers of the commander in chief were, frankly, 'extra-constitutional'" (148). The issue of extra-constitutionality is something that Democrats had offered when defending Jackson's use of martial law in New Orleans.

Such ideas flow into other difficulties for the Civil War. Neely spends a great deal of time focusing on state court cases stemming from the Legal Tender Act, Conscription, and habeas corpus filings for underage soldiers. The latter was particularly problematic because it could result in a weakening of the Union army. In all of these cases, Republican judges, often with the help of a few Democratic judges, managed to find case law and constitutional theory that upheld the government's actions. Neely concludes that "Nationalism was so powerful a force...." (What filled out the remainder of the sentence is most important) "...however, that Republican judges left the door open for invoking *inter arma silent leges* if somehow their interpretation of the law proved faulty" (198).

*Inter arma silent leges* – in the midst of arms the laws are silent – is the key. For it is not unreasonable to argue that had "nationalism" failed to hold sway in the courts, the Lincoln administration would have taken the next step and done what was necessary to maintain the life of the nation. In such a case, military necessity trumps the Constitution. Or, as some Democrats in the 1840s theorized when defending Jackson's use of martial law, national self-defense existed prior

to the Constitution and thus was “extra-constitutional.”

Such ideas bring readers to the last of Neely’s subjects in *Lincoln and the Triumph of Nation* – the Confederate Constitution. For the very nature of secession, what Neely refers to as “deratification of the Constitution of 1787,” was extra-constitutional (241). There was nothing in the Constitution that specifically authorized a state’s withdrawal from the Union, but southerners argued that, just as sovereign bodies of the people came together for ratification, they could also come together to deratify, or secede. Here was the brilliance of John C. Calhoun.

Neely’s discussion is fascinating, engaging not only the rationale for why Confederates chose to mirror the U.S. Constitution so closely, but wrestling with the question of popular southern support versus a slave power oligarchy in declaring secession. Among the questions he asks: “Was secession carefully and fully considered in rational political debate?” (243). Neely not only concludes that secession was a popular movement, but that in reality more was written in pamphlet form and in southern newspapers about secession – with all the complicated ideological and constitutional arguments that swirled about – than was produced for the ratification of the Constitution in 1787. Neely insists that it created “a discourse that was much richer than the one on ratification and reached back over at least a generation” (245).

Once the Confederacy was born and the war started in earnest, southern political leaders did not confront the scope of constitutional problems faced by Lincoln. Neely notes that this had nothing to do with the “old myth of constitutionalism,” but was a matter of nationalism and a preoccupation with survival (286). Still, President Jefferson Davis suspended habeas corpus for a time, until the Confederate Congress refused to extend such a power any longer. By the time they did so, the South was headed for an unalterable defeat.

There is much to argue about in *Lincoln and the Triumph of Nation*. This is clearly Neely’s goal. He notes from the outset, “The aim is not to kill the subject with claims of ‘definitive’ treatment but to prove that there was genuine drama in the constitutional history of the Civil War, the equal at times of its much-studied military history” (17). He ends the book with a similar commentary, and a plea to historians: “I was convinced, when I completed this book, that it should be only the beginning and not the end. I hope it will be the beginning of something greater than renewed attention to the constitutional

history of the Civil War. I would like to see it launch a new series of titles, beginning with 'Constitutional Problems under Madison' and stretching through all of our wars until we have accumulated a shelf of volumes that reconsider the role of the Constitution in America's wars" (349). When that shelf is ready, this book will hold pride of place.

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