

Uncivil Warriors: The Lawyers' Civil War

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Recommended Citation

Roberts, Tim (2018) "Uncivil Warriors: The Lawyers' Civil War," *Civil War Book Review*: Vol. 20 : Iss. 4 .

DOI: 10.31390/cwbr.20.4.22

Available at: <https://digitalcommons.lsu.edu/cwbr/vol20/iss4/22>

Review

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Fall 2018

Hoffer, Peter Charles. *Uncivil Warriors: The Lawyers' Civil War*. Oxford University Press, \$27.95 ISBN 9780190851767

Peter Hoffer, Distinguished Research Professor at the University of Georgia and author of many books on American legal history, has now brought his expertise to the sectional crisis. *Uncivil Warriors* argues that lawyers exercised an important influence on policy-making during the Civil War. This may seem axiomatic, but the book, particularly in its focus on the role of lawyers in political and military positions in the Union, attempts to show two things. First, the conflict remained, as Hoffer puts it on page 119, a “civil Civil War,” meaning that the war’s prosecution reflected a search for conduct according to various laws of war, rather than devolving into “extremes of brutality,” as he writes on page 3, which have characterized more modern civil wars. Second, the war’s political outcome in the constitutional end of slavery was possible, again, because of lawyers’ prominent role in formulation of early Reconstruction policy in 1865.

Introduced by a prologue emphasizing how the 1858 debates between Abraham Lincoln and Stephen Douglas were a nationally publicized contest between two lawyers, the book’s chapters are organized around several topics of the Civil War’s development in which lawyer-politicians played a prominent role. These were arguments over the legality of secession; the impact of lawyers on the respective presidential cabinets; the Lincoln administration’s suspension of civilian law and prosecution of southern sympathizers John Merryman, Clement Vallandigham, and Lambdin Milligan under military rule; the status of the Union blockade and treatment of ships and cargo seized as blockade runners; Francis Lieber’s promulgation of General Order 100, a code for the conduct of Union army forces during the war, known as the Lieber Code; the legal basis for the Emancipation Proclamation and Proclamation of Amnesty and Reconstruction; and the rationale and impact of the Thirteenth Amendment. An Epilogue discusses how postwar conditions and changes, including new civil rights laws, the increased

jurisdictions of federal courts, and the Constitution's Thirteenth, Fourteenth, and Fifteenth Amendments, affected lawyers' work, North and South.

Generally, Hoffer's conclusions about the Lincoln administration's observance of the rule of law, if not faithfulness to the old Constitution, accords with previous studies by Mark Neely (*Fate of Liberty: Abraham Lincoln and Civil Liberties* (1991)), and Daniel Farber (*Lincoln's Constitution* (2004)), although Farber concluded that Lincoln's unilateral transfer of funds from the U.S. Treasury to private banks to procure military supplies early in the war was likely unconstitutional.

Hoffer goes beyond these other studies to explore the writings of several Confederate lawyer-politicians. Not surprisingly, he concludes that generally these individuals' views of law, illustrated by Confederate Vice President Alexander Stephens's *Constitutional View of the Late War between the States* (1870), were far more static than their northern counterparts'.

Hoffer argues that the number and quality of lawyers in Lincoln's administration were superior to those in Confederate President Jefferson Davis's, and that this disparity played a role in shaping the war, including in its outcome of a Union victory. Besides Lincoln himself, William Seward, Salmon Chase, Edward Bates, Gideon Welles, and Montgomery Blair were all lawyers. Simon Cameron was a businessman, not a lawyer; his resignation as Secretary of War on charges of disorganization and corruption, and replacement by Edwin Stanton, a lawyer, bolsters Hoffer's case. In Davis's government, there were lawyers Judah Benjamin, Robert Toombs, Alexander Stephens, Robert M. T. Hunter, John Breckinridge, and Christopher Memminger. But for Hoffer, the fact that Davis, though a former U.S. senator and secretary of war, was not a lawyer, contributed to his failure to organize his cabinet and to motivate southern state governors effectively to achieve the Confederacy's independence. Lincoln, for example, was trained to listen to dissents from his opinion before reaching decisions; Davis's close-mindedness was notorious.

Hoffer also cites Davis's lack of legal training to explain his violation of accepted laws of war on at least two occasions concerning the Union military's enlistment of African Americans - even if Davis did not accept the Lieber Code, Swiss jurist Emmer de Vattel's widely known *Laws of Nations* (1758) was taught at West Point, the Confederate president's alma mater. The first was Davis's proclamation that Union General Benjamin Butler was a "common enemy of mankind," punishable by death, for treating slaves as war contraband. The second was his

proclamation that captured African American soldiers and their white officers were not prisoners of war, but were to be prosecuted in accordance with the southern states' antebellum laws against encouraging or participating in slave insurrections.

Concerning the impact of lawyers' presence in positions of wartime leadership, Hoffer notes the decision of prominent southern lawyers Thomas and Howell Cobb and Laurence Keitt to join the Confederate military, rather than serve in the Confederate executive branch. In what he calls on page 68 a "highly speculative hypothesis," Hoffer suggests that these individuals' choice reflected the influence of a southern code of honor, piqued by northerners' criticisms of slavery, which "could only be defended on the field of battle." In other words, southern honor may have robbed the Confederate government of, as Hoffer puts it on the same page, "good lawyering," which could have made it far more efficient. This is an interesting counterfactual idea, though it implies that the South had manpower equivalent to the North's, or at least adequate to allow lawyer-politicians in the region to make the same choices about how to serve their government that Lincoln's men did.

Given the book's focus on northern lawyers' contributions to using the opportunity of the war to reshape the relationship of the federal government and the states, a reader may wish that Hoffer had extended this intriguing but compact study at least through the immediate postwar period, to explore the contributions of lawyer-politicians to the emergence of new civil rights law. It was Ohio Congressman and attorney John Bingham, the "[James] Madison of the first section of the Fourteenth Amendment," in the words of Justice Hugo Black in 1947, and other Radical Republicans who, as Gregory Downs showed in his *After Appomattox: Military Occupation and the Ends of War* (2015), developed the argument for military occupation of the South continuing after 1865, and who institutionalized the Civil War's legal revolution.

Tim Roberts is an historian of nineteenth-century America, especially the Civil War and American foreign relations. His most recent publications are This Infernal War: The Civil War Letters of William and Jane Standard (Kent State University Press, 2018), and "Republican Citizenship in the Post-Civil War South and French Algeria 1865–1900," American Nineteenth Century History 19 (2018), 81-104, DOI: 10.1080/14664658.2018.1441646 . He may be contacted at tm-roberts@wiu.edu.