The Fate of Liberty Study Guide

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BOOKRAGS

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Plot Summary

The Fate of Liberty examines how Abraham Lincoln, his administration, and the military understand, practice, and justify the suspension of the writ of habeas corpus and imposition of martial law during the Civil War. It concludes the practices are expedient in the context and provide no precedents for the future, should a similar crisis arise.

Lincoln is inaugurated Mar. 4, 1861. He is ill prepared to hold the union together, and advised that martial law cannot be applied to civilians and Congress alone can suspend the writ of habeas corpus. Maryland rioters cutting rail lines to Washington and legislators debating secession prompt Lincoln to suspend the writ locally as a practical military consideration, not a political measure. His authority challenged by Chief Justice Taney in *Merryman,* Lincoln tells Congress he exercises war powers sparingly, by popular demand, and for the public good. Historians vilify Seward for aggressiveness and efficiency, but in fact, his State Department is passive, baffled and inefficient. With few disloyal persons in reach, many detainees are sailors under the British flag and residents of the Border States.

In loyal Missouri, General Halleck institutes trials by military commission, structured to restrain summary justice and protect defendants' rights through strict procedures, with capital sentences going to the President. On Aug. 8, 1862, Lincoln expands his policies nationwide to enforce the Militia Act, a de facto national draft, and uncoordinated arrests sweep the North as minor functionaries determine loyalty. When the quotas are met strict enforcement ends. Stanton proves a tougher and more efficient administrator than Seward. A military commission imprisons Ex-Congressman Vallandigham, causing widespread Democratic protests that impel Lincoln to explain his policy in the Corning letter. Congress passes the Habeas Corpus Act and the Enrollment Act, and New York City erupts in violence over the draft. In a new order, Seward cites the Habeas Corpus Act alongside the Constitution as permitting the president to allow military, naval, and civil officers to suspend the writ for the duration specifically for POWs, spies, aiders and abettors, draft resisters, and deserters.

The tempo of arrests increases in Union-controlled parts of Virginia, as residents resume normal life and fall afoul of restrictions on blockade running, smuggling, and carrying contraband goods. The Confederacy by conscription makes every Southern male a "proto-combatant," and General Grant orders scorched earth and round ups in the most bitterly disloyal areas, but looks forward to smoothing reconstruction through gentle treatment when feasible. Confederate deserters are administered oaths of loyalty and released as a means of lessening the risk to the Union Army. Expediency expands the scope of Lincoln's policy, as in forbidding the sale of alcoholic beverages to soldiers and fighting government corruption.

The "Great Speech" of the 1864 campaign, claims "War does not extinguish liberty," and contrasts Lincoln with Washington, who never suspends habeas corpus. How dark the blot of military arrests of civilians is on the Lincoln administration depends largely on their quantity, but scholars are unable to determine this satisfactorily. When President

Johnson declares the war over, he leaves unclear whether habeas corpus is restored. *Milligan* is announced but not published until December, and the Army ends military commissions "where justice can be attained through the medium of civil authority" - not the same formulation as *Milligan*. The first Reconstruction Act empowers commanders to deal with matters civil courts might mishandle. When the last state is readmitted, military commissions end, and *Milligan* is virtually forgotten. Determined to win the war, Lincoln allows for "necessity" in dealing with the constitution. Were a situation to arise like the Civil War and the writ of habeas corpus needed to be suspended, it is doubtful the legal situation could be defined any better than in 1861. The Civil War provides no neat precedents, ground rules, or map.

Chapter 1

Chapter 1 Summary and Analysis

The Fate of Liberty examines how Abraham Lincoln, his administration, and the military understand, practice, and justify the suspension of the writ of habeas corpus and imposition of martial law during the Civil War. It concludes the practices are expedient in the context and provide no precedents for the future, should a similar crisis arise.

Abraham Lincoln is inaugurated Mar. 4, 1861, ill-prepared to hold the union together, having as a yeoman lawyer never needed to think about asserting governmental power. He turns to Secretary of State William H. Seward for advise when, on Apr. 19, Baltimore mobs burn key railroad bridges to prevent troops from Massachusetts passing through to Washington, DC. Assistant Attorney General Titian J. Coffey produces a digest of opinions on martial law, suggesting the Articles of War (1806) forbid applying martial law to civilians and Congress alone can suspend the writ of habeas corpus. The problem has never arisen in U.S. history, but when it occurs abroad, oppression and abuse are common. Lincoln admires Andrew Jackson's imposing martial law in New Orleans during the War of 1812, ignoring a writ of habeas corpus, and jailing the judge who issues it. Northern Republicans are angry at the Baltimore violence and urge Lincoln to deal as harshly as necessary to assure free passage on this key rail line.

Maryland legislators are to debate secession on Apr.26, which General Benjamin F. Butler and General-in-Chief Winfield Scott want to disrupt, but Lincoln restrains them. While anguished at the prospect of isolation, Lincoln believes they have the right to assemble and wants not to make them martyrs. The army is to watch and wait, ready to respond, to the point of bombarding cities and suspending the writ of habeas corpus. Reinforcements arrive, and Maryland Democrats fight off secession. However, on Apr. 27, Lincoln suspends the writ along all rail routes from Philadelphia to Washington. The order is not published, and the outrage over Maryland's violence muffles criticism as word leaks to the press.

The action is clearly a practical military consideration, not a political measure. Lincoln's first *public* proclamation suspending the writ comes on May 10, to protect the loyal citizens of long-seceded Florida. Lincoln has assumed rebels have abdicated their civil liberties. However, when Union officers operating along the Florida coast making arrests on their own authority obtain good results, Lincoln accepts the *fait accompli* and formalizes it.

When John Merryman is arrested for raising forces for the Confederacy, Chief Justice Roger B. Taney issues a writ of habeas corpus and, when it is disobeyed, challenges the President's legal right vis-a-vis Congress to suspend the writ. Taney's opinion is publicized in Baltimore, Philadelphia, across the South, and eventually by the Northern Democratic press. While Attorney General Edward Bates prepares a legal argument for presidential power, Lincoln issues a hurried suspension on Jun. 20, countersigned by

the Seward and issued by the State Department, which administers disloyalty matters until February 1862. It specifies the traitorous Major William Henry Chase. Within two weeks, Lincoln broadens the order to any point in the vicinity of military lines between New York and Washington. On Jul. 44, 1861, Lincoln offers a formal but muddled defense to Congress, emphasizing the harrowing circumstances and assuming legislators will ratify his extraordinary measures, as surely the framers of the Constitution allow.

Lincoln has exercised war powers sparingly, by popular demand, and for the public good. He explains the *Merryman* decision tortuously, suggesting he worries about the emergence of military dictatorship. Lincoln's message fits the context of the Maryland suspension but not the later expansions. Lincoln uses little of the Jacksonian defense of the competency of the three branches to interpret the Constitution independently that Bates prepares for him and that Congress requests, along with the general orders, on Jul. 12. Seward "forgets" to send the Chase order. On Oct. 14, without apparent provocation, Seward ghostwrites an order extending as far north as Bangor, ME.

In the summer of 1861, Lincoln reverses himself and orders Maryland lawmakers arrested to "separate the sheep from the goats" before a scheduled Sep. 17 meeting. General Banks arrests ten from a list approved by Seward and McClelland (not Lincoln) to prevent a vote and General Dix arrests six other activists. McClelland cites military necessity, despite reports of calm in the field consistent enough for Cameron to allow some Baltimore newspapers to resume publishing. An arrestee claims Seward is behind the high-handed action, Lincoln shares guilt for ratifying it, and the Maryland success inspires subsequent arrests. Lincoln claims public safety demands the matter not be discussed at present. It never is.

Historians generally vilify Seward for aggressiveness and efficiency. However, in fact, he and his department issue only 43% of the arrest orders while administering security matters. They are passive, baffled, and inefficient in gathering prisoner information, often learning about innocent detainees through distraught relatives, attorneys, and congressmen - even the British ambassador. Overzealous authorities seize people with no intention of prosecution and record keeping is copious but shoddy, with data from remote forts never reaching Washington. Seward's reputation derives from his tough, nationalistic talk and lack of sympathy towards dissenters, which is what Lincoln needs.

Seward has argued that the Union is not a voluntary matter, divine law is higher than the Constitution defines the slavery issue, and suspected fugitives enjoy habeas corpus rights. After Fort Sumter, he exhausts every avenue for compromise to keep the nation-state strong against foreign powers before acknowledging the South cannot be coerced into reunion under Lincoln. Fearing war will raise opposition in the North, Seward announces he will suspend the writ of habeas corpus, whenever and wherever necessary to prevent the disorganization or demoralization of national forces.

Statistics show that Seward does not crush dissent and presides over only 864 civilian arrests. With some 13,000 arrests taking place during the whole Civil War, Seward's period of control is modest. The War Department oversees the harshest period. Seward

is too busy conducting foreign policy for an inexperienced President and the State Department must rely on outside agencies to make arrests and investigate cases. Lincoln later laments too few are detained for potential risks rather than for proscribed crimes. With few disloyal persons within reach of Northern authorities, many early detainees are stranded or deserting sailors, quickly exchanged. Many sail under the British flag and, championed by the British minister, and are promptly released after taking an oath of allegiance/neutrality.

Border States, lead by Maryland and Missouri, yield over half of the detainees. Northern prisoners are few and widely distributed. Seward rarely acts out of malice. Ex-President Franklin Pierce is nearly arrested on hearsay of sour criticism of the administration and Assistant Judge William M. Merrick is put under surveillance and has his salary cut off. It's a clear violation of the Constitution. Few cases involve freedom of speech or press, but such matters as portraying Confederate Generals on stationary or music, printing blank bills for Confederate government use, omitting the President's name at a church service, wishing Lincoln and/or his cabinet dead, and reprinting critical British journal articles. Newspapermen are arrested, but Lincoln wants not to polarize people needlessly, when there is no palpable threat to the military. Most arrests have little to do with dissent or free speech but with matters about which Northerners care nothing. Seward does net some true menaces, including Rose O'Neal Greenbow and Thomas A. Jones.

Early in the war, the administration institutes a novel internal security system it believes works, and it becomes a truism civil law moves too slowly, making the risk of temporarily jailing the innocent acceptable. Seward is proud to have saved Maryland for the Union and repeats the pattern in Kentucky. The Maryland model - replacing "enemies of the people" with loyalists and expecting the population to follow - is used during Reconstruction in Louisiana. Lincoln and his cabinet are indelibly marked by the emergency measures they take, knowing them to be illegal.

Chapter 1 describes in minute detail the "Actions without Precedent" taken in the first ten months of the Civil War, when Seward is in de facto charge of disloyalty measures. It is an introduction to themes developed in later chapters. These include inefficiency, expediency, Lincoln's image and legacy, and the inability of modern scholars to reconstruct the situation fully from the fragmentary documentary record.

Chapter 2

Chapter 2 Summary and Analysis

Chapter 2, "Actions without Precedent," shows how in Missouri, a *loyal* state, Lincoln allows civilians to be tried by military commissions, suspending the writ of habeas corpus *after* local commanders have suspended civil liberties. Troubles begin on Mar. 10, 1861, when militiamen thought ready to seize the St. Louis arsenal are arrested, Judge Samuel Treat orders Captain Emmett McDonald released, and General William S. Harney refuses, on grounds of "higher law." Operating in a policy vacuum, General John C. Frymont closes the St. Louis *State Journal* and declares martial law. Brigadier General Ulysses S. Grant, allows mere captains to take hostages, seize property, confiscate a newspaper, interfere with mail, and break up river trade, but doubts the legality of his actions and seeks guidance. Fearing Frymont's emancipation policy will cost the Union Kentucky and the summary execution of prisoners will spark retribution, Lincoln controls these and replaces Frymont with Henry W. Halleck, a rare General who has written about international law and is careful to observe legal niceties. After three requests for direction, Seward empowers Halleck to do whatever he deems necessary to secure public safety and government authority, including suspending the writ of habeas corpus. Halleck re-institutes trials by military commission in General Order No. 1 (Jan. 1, 1862) but finds the sentiment for secession so widespread he restricts martial law to St. Louis and the railroad and telegraph lines, to spare the prisons.

Grant responds to the killing of Union pickets by ordering six miles cleared of spies and Brigadier General Eleazar A. Paine rounds up 100 citizens, vowing to identify and shoot the assassins. Grant insists on due process. Provost Marshal General Bernard G. Farrar declares property does not exist in the absence of law and allows those innocent of armed resistance, after pledging loyalty and posting security, may be freed and serious criminals turned over to officers of the law. Farrar even bans one disloyal minister from preaching.

Chapter 2 also shows how guerilla warfare breaks down the customary distinction between soldiers and civilians, resurrects the use of military commissions, and expands their application to civilians. Scott first uses military commissions to punish unruly troops during the Mexican War (1846-48) for serious crimes (murder, rape, assault, desecration, and theft) and thus to maintain discipline and the Army's honor. Military commissions are structured to restrain summary justice and protect defendants' rights through strict procedures and mandatory review, with capital sentences going to the President. As a by-product, they provide historians rich resources now held in the National Archives (reviewed thoroughly in the Epilogue). Early trials in Missouri are imperfect, dealing with *suspected* disloyalty rather than discrete crimes.

Joseph Aubuchon of Ironton, MO, may be the first civilian so tried, for treason by joining the Confederate Army. The specification falls short of the Constitution's careful definition of treason. However, Aubuchon is convicted and ordered imprisoned at hard labor for

the duration, but Frymont overturns the conviction on legal grounds, showing military commissions are not show trials or sham justice. Another commission frees an innocent defendant and orders the commander to forbid arresting people without evidence of guilt. Missouri commissions typically charge bridge burners with violating the laws of war by taking up arms without being part of a lawfully organized military force at war with the U.S. This forces defendants to plead guilty to the lesser charge of bridge burning but not guilty to violating the laws of war.

After the treason aspect is dropped, 24.1% of defendants plead guilty. Of the rest, 14.6% are acquitted, 24.3% condemned to death and have their sentences confirmed, while the rest have sentences mitigated on review. Rough-and-ready justice is tempered by mercy for youth, stupidity, or previous loyalty. Edmund J. Ellis, editor of the *Boone County Standard* is the only person prior to February 1862 prosecuted for exercising freedom of expression. He is found guilty, banished from Missouri, and has his publishing equipment confiscated.

Chaotic record keeping makes determining precise numbers on civilian arrests impossible, but Missouri clearly accounts for more than any other state under Seward - and is never effectively controlled by Union forces. Civilians and common soldiers are mixed in lists and spelling and orthography by non-scribes create difficulties for scholars. Federal authorities differentiate prisoners of war (uniformed Confederate captives), United States prisoners (military felons), and Prisoners of State (civilians), but field usage is inconsistent and records incomplete. Only 14% of the Missouri records specify cause for arrest. Extrapolating data conservatively suggests 1% of adult male Missourians are POWs at Gratiot Street, only one of the state's prisons. In 1863, Brigadier General Thomas Ewing complains he lacks forces to deal with guerrillas and the two-thirds of the population akin to and supporting them. He is authorized to exile several hundred families of the worst guerrillas and issues General Order No. 10.

Three days later, Ewing issues infamous General Order No. 11 in retaliation for guerrilla chief William C. Quantrill's raid, requiring every citizen in four counties to pledge loyalty or be banished from the state. It creates 20,000 refugees but no direct political prisoners. Lincoln approves but orders caution, calmness, and forbearance in removing populations *en masse*. There should be evidence of "palpable injury" to U.S. military operations. Sixteen months later, with no enemy military forces operating in Missouri, oppression of civilians continues rampant and Lincoln encourages commanders to encourage "neighborhood meetings" to reestablish old friendships and Christian charity. From start to finish, Missouri is a dismal failure for the Lincoln administration and blot on his memory as emancipator and constitutional steward. Chapter 8 will examine the postwar distinction between suspending the writ of habeas corpus and imposing martial law in *Milligan,* and the problems of nomenclature is examined systematically in Chapter 6.

Chapter 3

Chapter 3 Summary and Analysis

Chapter 3, "Low Tide for Liberty," examines the circumstances that lead Lincoln on Aug. 8, 1862, to expand nationwide the measures earlier authorized in particularly problematic locales, and its narrow goal is to enforce Congress' unpopular Militia Act passed on Jul. 17, empowering the secretary of war to draft for nine months those state militias that fail to upgrade. It is a disguised, *de facto* national draft, and another *fait accompli,* Secretary of War Edwin M. Stanton having already issued orders to prevent evasion of military duty and suppress disloyal practices. The orders cover anyone discouraging volunteer enlistments by word or deed, and specify trial by military commissions under Judge Advocate, Major Levi C. Turner.

On Aug. 13, Stanton's General Order No. 104 explains to the press civilian and military authorities are to interfere as little as possible with individual pursuits and businesses while preventing draft dodgers from leaving the U.S. or crossing state lines. Uncoordinated arrests sweep the North as minor functionaries determine loyalty, yielding (poorly) documented 354 arrests and likely dozens more, while contraband trading, blockade, running, and other arrests continue, unrelated to the Aug. 8 orders. Most (54%) involve young men caught fleeing the draft along the Canadian border, but striking examples of partisanship and other corruptions occur.

U.S. Marshal David L. Phillips in Illinois finding traitors in almost any gathering of Democrats, arrests Dr. Israel Blanchard for attending a Knights of the Golden Circle meeting. Blanchard is freed, when his brother-in-law, a decorated Union General, proves to Lincoln his loyalty and the physical impossibility of his being at the KGC rally. In New Hampshire, a *Merryman*-like conflict is avoided when the State Chief Justice backs down over the politically motivated arrest of Nathaniel Bachelder for warning recruits they will go to hell. In New Jersey, Democratic white-supremacist C. Chauncey Burr is arrested for breaking up a recruitment rally, and Turner closes down his Newark *Evening Journal*. Burr later resumes publishing and becomes one of Lincoln's most vocal critics. In Pennsylvania, Wilkes-Barre's Democratic police chief arrests Democratic district attorney Ezra B. Chase for advising people to go to the polls to demand a peaceful settlement rather than go to war.

As Lincoln has not publicized his suspension of habeas corpus nationally, a judge issues a writ, which Turner orders ignored. When Republican Governor Andrew G. Curtin intervenes, he is ignored. In Iowa, Republican Federal Marshal H. M. Hoxie arrests Dennis A. Mahony, editor of the Dubuque *Herald* for discouraging enlistments. The energetic Catholic journalist musters affidavits to prove his loyalty and contacts Archbishop John Hughes, Seward's friend, who asks the Irish fool be allowed to take an oath. Released, Mahony writes *The Prisoner of State* and founds the Prisoners of State Association, which sponsors John A. Marshall's widely read, anti-Lincoln *American Bastile.* In Philadelphia, Democrat Charles Ingersoll publicly likens Lincoln's corruption

to Asian regimes and denigrates both his battlefield successes and motivation for fighting, "to free the nigger."

The U.S. marshal fears Democratic Judge John Cadwalader will issue a writ of habeas corpus, so he wires both the state and war departments before arresting Ingersoll. Turner orders Ingersoll's release three days later. Undiscouraged, the administration continues arrests for brash speech hardly dangerous to national security. Many are nasty drunks and some are insane "objects of pity." Many loudmouth Northerners resent being pawns of abolitionists. Grudges and feuds result in denunciations leading to arrests. Turner particularly despises the cowardly but legal purchasing of draft substitutes and arrests ten New York City advertisers.

On the eve of the 1862 elections, Turner announces the quota of volunteers and militia enrollments are met well enough to end strict enforcement of the orders. Historians have assumed the first ten months of the Civil War the worst for civil liberties in the North, but clearly Stanton after Aug. 8 is tougher and more efficient than Seward. The myth Lincoln's humane personal character colors the internal security system is false, for he intervenes only in Blanchard's case. Stanton frequently pleads ignorance of particular arrests to minimize the government's responsibility. Attempts by historians to link the preliminary Emancipation Proclamation, Sep. 22, with the rise and relaxation of Stanton's security regime are misguided, for they aim strictly at enforcing conscription. Lincoln's Sep. 24 suspension of the writ is anticlimactic and redundant, and at the next crisis involving alleged disloyalty is treated as though it had not been issued.

In the winter of 1862/63, war weariness shortens partisan tempers. General Ambrose Burnside arrests ex-Congressman Clement L. Vallandigham (D-OH) and a military commission sentences him to imprisonment for the duration. Lincoln and his cabinet read about it in the press, do not approve, but back the General. Vallandigham, who has been courting such martyrdom, applies for a writ of habeas corpus, which Stanton fears Lincoln's appointee Justice Noah H. Swayne may grant. Therefore, he drafts a general order on May 13, 1863, declaring Lincoln wills no writ to be granted. Lincoln refuses to sign the legally superfluous and confrontational order, having learned there is little likelihood of a writ. Vallandigham's arrest causes widespread Democratic protests, impelling Lincoln to explain his policy. He does so tersely and vigorously in a Jun. 12, letter to Erastus Corning and fellow leaders of Albany, NY, protests.

The constitutional argument differs little from the July 1861 defense. Rebellion requires action swifter than Congress can deliver. Lincoln claims the rebels' plan all along is to utilize spies, informers, suppliers, and aiders and abettors of their cause to propagandize under the banner of free speech, press, and habeas corpus. Lincoln denies the Constitution restricts the suspension of habeas corpus to areas of military occupation and open insurrection. It applies wherever public safety requires restraint of "mischievous interference." Lincoln asks whether a simple-minded boy who deserts be shot, while the agitator who induces him to desert goes free.

On Mar. 3, 1863, Congress passes two bills. The first is the Habeas Corpus Act, removing any doubt about the legality of Lincoln's actions, which he in practice ignores,

continuing to claim the founders of the Constitution, having deemed rebellion or invasion likely but fail to define who should respond to it, must have assumed the commander-in-chief would. The second is the Enrollment Act to extend draftees' service. The act's name reflects violent public resistance to conscription. On Jul. 11, New York City experiences the worst domestic violence in U.S. history over the draft. Lincoln can understand reluctance to serve, but the obscurantism of state judges confounds and infuriates him. Particularly in Pennsylvania, they are keeping the provost marshals busy responding to writs of habeas corpus and away from their real duties.

On Sep. 14-15, Lincoln angrily tells his cabinet he has the power to stop the copperheads from defeating the government. Bates and Seward agree, but Stanton stays mum. Having seen the Navy disrupted, Welles insists only federal judges are competent to decide military and naval matters. Treasury Secretary Chase fears confrontation with the judiciary - and possible civil war in Pennsylvania -- and requests data on the extent of the problem is. Postmaster General Montgomery Blair, a former Missouri judge, and Interior Secretary John P. Usher support Chase, when Lincoln turns stubborn.

Bates declares the commander-in-chief is above the law, able to disregard judges and to instruct subordinates to follow suit - without suspending habeas corpus. Lincoln proposes ordering all military officers to refuse writs for their prisoners. Fearing this will provoke Northern strife and conflict between branches of government, Chase suggests a bold, direct suspension on the grounds the army's very existence is at risk. People will respect that. All agree and Seward prepares the text, citing the Habeas Corpus Act alongside the Constitution as permitting the President to allow military, naval, and civil officers to suspend the writ for the duration specifically for POWs, spies, aiders and abettors, draft resisters, and deserters. Lincoln quietly approves and issues a provocative order to the provost marshals on Sep. 17, reversing his usual pattern of form following function.

Welles is relieved the public proclamation is generally well received. Chase believes his legal arguments sway Lincoln, but it probable political expediency - re-commanding the public trust - is the inspiration. Up for re-election, Pennsylvania Governor Curtin, who has been calling for legislation on matters short of outright treason, writes Lincoln backing the proclamation, no matter how politically problematic it is in his state.

Chapter 4

Chapter 4 Summary and Analysis

The absolute number of Maryland civilians arrested drops but the tempo of arrests increases in Union-controlled parts of Virginia. In 1863/64, residents resuming normal life - and falling afoul of restrictions on blockade running, smuggling, and carrying contraband goods - dominate Maryland arrests. Disloyalty and non-commercial charges yield few prisoners, while refugees from the South account for 20.8%.

Historians sometimes label civilians caught in the way of the advancing army "political prisoners" or victims of "arbitrary arrest," terms the Lincoln administration uses interchangeably with "prisoner of state," but without the modern moral connotation. Such civilian prisoners are commonplace in 19th century European warfare, and only in the fourth year of the Civil War does the victimization of civilians in the 20th-century pattern begin to emerge, as some Generals drop distinctions between civilians and soldiers. This is not, as some say, a result of advancing technology, but of conscription and guerrilla tactics, and in practice the tens of thousands of arrests that the rhetoric might have caused do not obtain.

The Confederate Congress turns to conscription before the North, on Apr. 16, 1862, making males 18-35 liable for service (extended in February 1864 to 17-50). In 1864, With every Southern male a "proto-combatant" and the guerrilla tactics of John Singleton Mosby exasperating him, Grant orders General Philip Sheridan to carry off all males under 50 and destroy their means of subsistence. A second order results in the seizing of the relatives of Mosby's men as hostages for the fighters' good conduct. Grant allows the summary executions he earlier rejects in Missouri. Elijah White and Jubal A. Early keep Sheridan too busy to obey Grant, until partisans kill two key aides, inspiring scorched earth retaliation but no civilian round up, because Sheridan cannot afford to have them in tow. When captured or defecting, Mosby and White's fighters are treated as POWs.

Civilians arrested as "scouts" (i.e., spies) tend not to be innocent victims of Union hysteria. As raids grow more irritating, Union forces discriminate less between civilians and combatants but remain within the traditional standards of civilized warfare. When they learn of Grant's Aug. 16, 1864, order to arrest all males 17-50 as combatants (nowhere obeyed), Confederates talk of arresting all U.S. citizens within grasp for use in exchanges. The whole system may break down under the weight of misery. Grant modifies his orders to exclude Quakers and allows Sheridan discretion in minimizing civilian suffering. Even as Lieutenant General setting policy for all theaters and armies, Grant orders scorched earth and round ups in only the most bitterly disloyal areas.

After the fall of Vicksburg in 1863, Grant asks the population to obey U.S. laws peacefully and prohibits molesting the citizens. Necessary seizures of private property must be properly documented for future remuneration. Grant looks forward to smoothing

reconstruction, ordering the populations of Mississippi and Louisiana treated gently. Marching through Tennessee, General William T. Sherman enthusiastically obeys Grant's order to make as favorable an impression as possible. Learning General Eleazar A. Paine is oppressing people in Kentucky, Grant strips him of command, not because Grant is growing soft, but because he tailors his commanders to their commands. He considers Benjamin F. Butler, nicknamed the "Beast" of New Orleans, to head the intractable western border states, where force rather than military finesse is needed.

As Confederate soldiers desert, their status is not spelled out in law, but they are not allowed to languish in ill-equipped POW camps. Rather, they are administered an oath of loyalty and released. They are to be executed, if they again take up arms against the U.S. It offends 19th-century honor to treat enemy deserters more leniently than brave captured soldiers, but this is rationalized as a means of lessening the risk to the Union Army. By comparison, deserters might be spies, so commanders make careful individual inquiries, erring on the side of caution. Discharged Confederate veterans who refuse reenlistment and fall into Union hands may freed like deserters if truly penitent, but are considered more likely than deserters to rejoin the rebellion, and are often held as political prisoners.

Although the sale of alcoholic beverages to soldiers is legal, Generals jail sellers for 30-60 days to stem a perennial problem. It 1862-65, this yields 5,108 inmates, and continues well into Reconstruction. These are strictly expedient acts, not envisioned by Lincoln's suspending habeas corpus, have the puritanical stamp of Republicans. Joseph Griffin, a properly licensed vendor, is arrested by Captain Frank Wilcox, sues him for false imprisonment, and the case is heard on appeal by Indiana Justice Samuel E. Perkins, who is also a Democratic journalist. With the Habeas Corpus Act of 1863, Perkins insists the suspension does not legalize wrongful arrest and imprisonment or exempt the arresting agent from civil damages. Military law applies only to the armed forces, and Wilcox is free to administer it on his drunken troops, but martial law can supercede civil law only in wartime.

Without an act of Congress, citizens' rights can be abridged only when force or the threat of force is immediate. On foreign campaigns, U.S. soldiers may always impose martial law, but domestically they can do so only when no civil authority exists. Where civil authority functions, the Constitution and laws must prevail, irrespective of the suspension of the writ of habeas corpus. There is no precedent justifying the administration's subjecting those who differ with it to military power. Griffin's sale of liquor to soldiers is lost in Perkin's legal argument, which anticipates *Millligan*.

Chapter 4, "Arrests Move South," concludes the four-chapter chronological overview of how Lincoln issues eight orders and proclamations suspending the writ of habeas corpus and come close to another one for Vallandigham. In the Corning Letter, Lincoln claims he has adopted measures "by slow degrees." However, in fact, he lurches from problem to problem, responding to objectives of the moment. His last verbose, redundant order, dated Jul. 5, 1864, deals with public order in Kentucky and specifies it will not interfere with lawful elections, the legislature, or administration of justice unless

military operations are affected. It shows Lincoln's consistent dedication to winning the war and avoiding political abuse. Lincoln knows suspending the writ is a political liability tolerated by the people, only because they recognize the peril to the Union and share the mission of winning the war. In his diary, Welles confides he has never shared Chase's fears of Northern revolt by imposing "odious measures on freedom-loving Americans."

Chapter 5

Chapter 5 Summary and Analysis

Chapter 5, "The Dark Side of the Civil War," examines ethical and practical reactions to government corruption, anti-Semitism, and torture, including how and when money talks in the Lincoln administration. The Civil War produces lucrative opportunities for fraud and plundering that the civil courts cannot control, but the Army can. Federal investigators eagerly go after influential wrongdoers and are largely incorruptible. Bell & Green, Claims Agents, defraud widows and orphans of pensions, invest their funds unwisely, blame government red tape for pension problems, speculate in contraband, and forge widows' names on powers of attorney. In February 1864, the War Department catches on and raids their offices.

During the hasty mobilization for war, few such cases are prosecuted. Nonetheless, "Honest Abe" cannot have corruption taint his administration, and Turner devotes much time investigating fraud. In 1865, the War Department seizes John N. Eitel of New York City for brokering Army enlistments, siphoning off badly needed Navy recruits, to whom he has access as a provider of uniforms. Primitive record keeping makes profitable machinations easy. Complaints and pleas follow Eitel's arrest, but the Bureau of Military Justice refuses to parole him because of the magnitude of his operation ($141,300). Lincoln intervenes, however, and Eitel is released on $10,000 bail, put up by a Republican political appointee.

Assistant Secretary of War Charles A. Dana, who sets Eitel's bail, manages the massive procurement operation, with Peter H. Watson serving as a departmental watchdog. Watson arrests a ring of crooked feed providers whose friends offer Dana money to free them and return their files. Dana prudently informs Watson. A senator convinces Lincoln the money has been returned and the trade is vital to the war effort, and he confronts Watson, who demands *written* orders. In Baltimore, Pardon Worsley convinces clerks for several prominent business firms he has legitimate passes and permits for trading through enemy lines.

On Oct. 17, 1864, the Army closes nine firms and arrests the owners, partners, managers, clerks and other workers - 97 in all -for running goods through the blockade and hustles them off to prison. Worsley testifies at military commissions and some merchants are convicted. Defendant Hamilton Easter points out how ludicrous it is for him to risk his fortune and reputation on blockade running, and prominent Baltimorians rally to his defense. Lincoln involves himself on behalf of Abraham Friedenreich and five other defendants. He specifies, in a long petition, that they had not known they were breaking the law, assumed they would be exonerated by witnesses not allowed to testify, and have suffered enough by confinement and ruination. He also contends that their sole accuser is a "doubtful character." A week later, he leans on the Attorney General and gains their freedom. Stanton, not Lincoln, is the hardliner on tainted commerce.

The tides of war prevent the government from devising a system of accountability in procurements, until the Adjutant General's office issues General Order No. 298 (Dec. 3, 1862), requiring audits of recruiting officers' claims before funds are dispersed. Rejected claims (some 16%) are turned over to Turner for investigation and prosecution. Lincoln defends the early shoddiness as emergency means to save the government from overthrow. He had worried about wasting public funds, but believes not $1 has been. He accepts responsibility along with the heads of departments for indiscretions by subordinates like the disgraced Simon Cameron. Various forms of fraud against the government (forgery, posing as an agent, theft, bribery, and conspiracy) yield only 4.6% of Turner's documented prisoners. On May 81, 1864, the New York *World* and the *Journal of Commerce* publish a bogus presidential proclamation calling for a day of fasting and prayer and announcing a new 400,000-man draft. Fearing Confederate involvement, Lincoln orders the editors, proprietors, and publishers arrested and their offices seized. Seward is anxious to suppress Democratic newspapers, but Welles claims the papers are victims of a hoax by rival journalist Frank A. Mallison. The War Department fears the telegraph system has been compromised and orders telegraphers arrested in four major cities.

As a longtime Whig, Lincoln is more comfortable with business than Democrats and more sympathetic toward financial wrongdoers than Stanton and the Army. Democrats circulate a pamphlet, *Corruptions and Frauds of Abraham Lincoln,* focusing on the New York Customs House. Political cartoonists have a heyday and the word "shoddy" comes to mean second-rate. The "loyal opposition," however, lets Republicans co-opt the issue by passing the Whiting Bill in 1863, removing cracks between military and civilian justice.

Criticizing government fraud and corruption, the cantankerous Republican New York *Tribune* identifies *Jewish* brokers and speculators, revealing the anti-Semitism that infects 19th-century America as it does Europe. Arrest records specify the religion of only Jewish perpetrators - just as they identify race only for Blacks. The age-old stereotype of Jews as rootless profiteers raises Army suspicions where Christian merchants would go unnoticed, and some Christians denounce Jews to the authorities.. On Dec. 17, 1862, Grant expels Jews as a class from Tennessee for violating Treasury regulations. Jews protest to Lincoln, and Halleck revokes the order. Had Jewish *peddlers* been specified, the order might have stood. Grant is not without supporters for his policy. Anti-Semitic officers in the U.S. Army do not rationalize their views into proto-fascist actions like the Dreyfus Affair in France and rabbis are added to the chaplain corps in 1862.

Torture comes to be used to extract confessions and bureaucrats look the other way. Mostly applied to hated guerrillas and scouts, it also befalls Northern deserters. The practice comes to light when released Britons complain to their embassy, and prison officials initially deny allegations of hanging prisoners by handcuffs, a rare occurrence. Water torture, however, is so widely used Turner must investigate. A prison captain claims J. W. Nash is subjected to a gentle stream from a hose, much as prisoners do daily and voluntarily for comfort. Nash had refused to give his name and carried no

papers, and nearly all deserters claim to be British. Lord Lyons is not satisfied and points out international law forbid inflicting bodily pain to extort confessions.

The Judge Advocate limits the use of water baths to punishing verified U.S. deserters for breaking prison rules and forbids its use for torture. Other accounts make clear the water treatment is torture, no one in the administration seeks to cover instances up or to eliminate a practice they do not see as an abuse. Only Lyons raises questions of law or expresses outrage.

Chapter 6

Chapter 6 Summary and Analysis

How dark the blot of military arrests of civilians is on the Lincoln administration depends largely on their quantity. Scholarship having failed to determine this satisfactorily, Chapter 6, "Numbers and Definitions," examines why. *The American Cyclopaedia and Register of Important Events of the Year 1865* sets the number of citizens denied habeas corpus at 38,000 (June 1861-Jan. 1, 1866). Data from Illinois, cleaner than in most states, suggest too few "persons arrested (not deserters)" to extrapolate to 38,000 nationwide. The *Cyclopaedia* article relies on statistically flawed "morning reports" and other fragmentary sources. John A. Marshall's *American Bastile,* a bitterly anti-Lincoln "book of martyrs" (1869) estimates 5,000-10,000 illegal detainees, doubled in the second edition (1885). Not prone to underestimating, Marshall would have used the *Cyclopaedia* figure, had he known about it. Englishman James Bryce in *The American Commonwealth* next mentions the figure, likening Lincoln to Cromwell and offending American historian James Ford Rhodes, who requests a document search in the War Department's Record and Pension Office.

Aides to Colonel F. C. Ainsworth execute a "protracted and exhausting examination," which convinces Ainsworth "nothing but a guess" of 13,535 civilian prisoners is possible. Scholars accept this figure unquestioningly, including James G. Randall, a critic of amateur historians, who has no choice, when he is denied access to the closed records while researching *Constitutional Problems under Lincoln.* Ainsworth's work cannot be duplicated, because his bureau has been abolished. The fragmentary rolls preserved in the National Archives cannot support 13,535 names.

Rhodes and Randall both seek to defend Lincoln's humanity and fail to describe the administrative processes his overzealous subordinates use, and subsequent writers continue emphasizing Lincoln's personal character. Kenneth A. Bernard (1951) emphasizes how the war President finds time to rectify mistakes. Dean Sprague (1965) depicts Lincoln as caught in an agony between preserving the Union and violating civil rights, intercedes for mercy, and spares the nation scapegoat Seward's harshness.

Sentiment has clouded historical writing for 70 years but cannot mitigate a terrifying internal security system too vast for Lincoln to monitor, no matter how dedicated to mercy. His only intervention in the first phase, Blanchard, is politically motivated, and only the influential and connected come to his attention. He averages one intervention per quarter in the Old Capitol prison, which holds 147-336 civilians at all times, turning over frequently. Outlying prisons are less accessible. Lincoln could have issued guidelines for arrests, but does not. Scholars today must focus on the field and voluminous arrest records, rather than on repeating what historians have been quoting since Lincoln's own day.

Neely has examined many things. First, he's reviewed the Lafayette C. Baker-Levi C. Turner Papers, 1862-65, now Record Group 94, Adjutant General's Records, War Department Division, National Archives, opened in 1953 and much of it microfilmed. Also, he's delved into the Union Provost Marshal's File of Papers Relating to Individual Civilians, 300 reels of shapeless documents. Finally, he's studied the Union Provost Marshal's File of Papers Relating to Two or More Civilians, 94 reels. Rearrangement of the records prevents Neely in two years of work from duplicating Ainsworth's search, but allows him to discern the extent and nature of military arrests of civilians. All records are corrupt and indiscriminately mixed with POW data. Congress had required systematic record keeping, but 19th-century standards are not up to complying, and the current files are a hodgepodge of handwritten fragments. Forms when used are rarely filled in completely. There are no standards for spelling names and alphabetized lists, when provided, are by the initial letter of surnames only. Ainsworth certainly does not take the time to sort out such problems, and the ambiguity in what "political prisoners" mean in the era (introduced in Chapter 2) makes it doubtful he even looks for what Rhodes requests.

"Arbitrary arrests" is another much-used term, not mentioned in the Constitution, Bill or Rights, or standard antebellum legal reference works. A Civil War-era pamphleteer points out that with the exception of Jackson in New Orleans, the U.S. has never, even during the Revolution, resorted to such measures. Stanton prefers "extraordinary arrests," and "illegal" and "wholesale" are other adjectives used before 1863, when "arbitrary" becomes standard in the Democratic press. In debates over presidential war powers, even Republicans - including Lincoln in the Corning letter - use it. Democrats point out the difference between viewing habeas corpus as a constitutional privilege and as an inalienable right. Many of those held in Northern military prisons would have been there with or without habeas corpus, because, in Lincoln's words, "friction and abrasion" inevitably accompany incidents of war.

While the myriad sources do not support quantification, they do allow analysis of who is arrested by whom, why, and when, providing historians ask the right questions. Teasing facts out of the unheralded Pohock Church incident in 1861, raises only additional questions of what happened and why, and the *Official Records* are filled with such incidents. Likely, those recorded are a fraction of those that take place. General John A. Pope writes Lincoln in 1862 about arresting all males, freeing those willing to take an oath of allegiance, and deporting to the South those who will not. Lincoln approves and Pope keeps no record of the number of arrests he makes. Scholars have been thwarted in examining the effect of warfare in such circumstances by lack of data other than newspaper debates about the legality of curtailing liberties. Northerners do not question the need to detain Confederates near or behind the lines and are little concerned with detaining civilians in the Border States. Wholesale arrests in the North, however, questions are raised, even by some Republicans.

Postwar sentiment questions the practice anywhere, but how extensive they are can never be determined. Nevertheless, Neely looks back at chapters 1-4 to quantify his findings and describe the sources from which he draws them. Chapter 1 yields 5,442 from the Turner-Baker Papers. Chapter 2, dealing with the West, has almost no overlap,

adding -very partially - at least 5,014 cases. Military commission transcripts, in Chapter 3 added 4,271 well-documented cases, not duplicated in Turner-Baker, but overlapping the Missouri data in all but 2,331 cases. The resulting 12,787 nearly matches Ainsworth's figure, without taking into account thousands of documents alluded to in extent sources but now lost. Transfer prisons like Louisville are known to have specialized in civilians, but keeps at best sporadic records. This exercise could be extended, but to little purpose. Close examination of Northern arrests show most are for contraband trading, desertion, or draft dodging rather than civil liberty issues. Many are held for eight days and generate no records.

Monthly summaries in the *Official Records*, while incomplete, provide a check on the scale and extent of civilian arrests. The records are doubtless kept to control overcrowding, both for practical and propaganda reasons. A chart comparing October and November 1864 totals for 25 prisons serves as a matrix for describing individual institutions on which no finer documentation is available and surmising on the populations at the high point in such arrests. Pro-Lincoln historians like Randall have distorted the picture by generalizing the prisoners' danger, without breaking out what sorts of people are held in various facilities. Anti-Lincoln writers like Frank Klement, exaggerate partisan abuse and political exploitation, which is negligible, and these cases generally found their way to Turner, Stanton, or Lincoln's desk. Military arrests of civilians are more numerous than earlier stated but less significant on civil liberty grounds.

Chapter 7

Chapter 7 Summary and Analysis

Chapter 7, "The Revival of International Law," looks systematically and episodically at the complexities of dealing with blockade-runners and hostages, questions raised earlier. The number of vessels seized by the Union rises steadily throughout the war, but the number of prisoners lags by 80%, because the U.S. adheres to principles laid down in textbooks like Halleck's. Neutral ships and cargoes may be confiscated, but neutral crewmen are personally inviolable. Early on, Turner extends this to contraband traders and smugglers plying inland waters. Britain continues importing cotton to feed its industrial growth, and some Southerners serve on multinational crews. Seward advises Welles against demanding seamen vow not to resume blockade running as a condition of release. They may be detained only to serve as legal witnesses and then may not be treated as POWs. The U.S. cannot afford to provoke Britain into allying with the Confederacy and has historically been the neutral nation that needs the protection of international law against British and French combatants.

In 1863, the USS *Fulton* seizes the *Banshee,* whose captain is on his eighth blockade run (third capture). All but one of the 40-man crew claims foreign citizenship, guaranteeing immediate release. Many have run the blockade three to seven times. Frustrated, the War Department through General E. R. S. Camby, declares *Bansee* an agent of the Confederacy rather than a neutral ship and her undocumented crew Confederate employees and potential spies if released. Although it is 1864 before the Confederate Congress legislates reserving for government needs half the cargo space on all ships visiting Southern ports, U.S. District Attorney Richard H. Dana, Jr., points to proof found on other ships of Confederate ownership and Welles laconically orders persons captured on such vessels detained. Similar proof falls into Stanton's hands, and he convinces Seward not to interfere with the new policy.

On May 16, 1864, Welles reverses the order and again exempts British sailors, inadvertently allowing the famous Confederate Captain John Wilkinson to slip through again, posing as a Briton. Non-foreign sailors are always liable to detention under conflicting designations until January 1864, when a military commission ordered by General John A. Dix orders all blockade runners discharged, because no *federal* statute applies. This sweeping principled dictum anticipates *Milligan* by two years. Turner complains bitterly, stretching Canby's arguments and citing pubic safety.

The Navy Department allows professional seamen and perpetual offenders to be arrested, but with the fall of the last great blockade running port, Wilmington, Welles deems detention of 42 seamen not worth the effort, and they are exchanged. Blockading rebellious ports (as opposed to international ones) is legally problematic and squabbles within the administration are common. The Stanton/Seward enmity increases this, and Welles himself is not consistent. U.S. practices are not officially codified until 1886.

The eclectic Turner-Baker Papers show a modest increase in civilian blockade-runners during Stanton's period over Seward's partly because of the archive's bias for noting arrests on water, and because coastal areas honeycombed with rivers and trade routes come under Union control. Many never go to sea, but daily ply inland waterways and are regarded by Welles as troublesome "petty contrabandists." The case of the *Ella and Annie* raises special questions, for when she rams the USS *Niphon* in a vain, swashbuckling attempt to escape, Skipper F. N. Bonneau is charged of piracy (a capital offense), even though he identifies himself as a commissioned Confederate lieutenant to gain immunity as a POW. The common sailors, civilians, are complicit in an "act of war," but the Union compromises by considering them prisoners of state without hope of speedy release.

Other special cases include drunken loudmouths arrested boasting on shore of blockade running and licensed oystermen being mistaken for blockade-runners. Some detainees know they should be released under international law and request it and military commissions are sometimes sympathetic to sailors languishing in terrible conditions and order them freed. The Navy vows to hold pilots, but identifying them is often difficult.

The Civil War fails to degenerate into savagery as Europeans expect, even in the case of hostage taking, a practice recognized by international and American law but rarely used after 1748. War Department General Order No. 100 (1863), drafted by pioneer political scientist Francis Lieber, specifies hostages be treated as POWs and naively assumes good faith agreements between gentlemen exchanging them. Few hostage situations arise in the first 21 months of the war. In Tennessee in May 1862, to prevent the "repetition of unlawful acts," and in Mobile, AL, due to the seizure of 70 Union loyalists, the fiery military governor Andrew Johnson orders 70 "vile secessionists" arrested. When he asks Lincoln's approval of exchanging those that swear loyalty (any that refuse will be sent South and hanged as spies if they dare return), the President replies with a double negative to distance himself from hostage taking while approving the plan.

In the spring of 1864, two famous hostage situations occur. In the "White Flag Affair," three Confederates hail Union pickets under a white flag only to seize, rob, and parade them through Leesburg, VA, the heart of "Mosby's Confederacy." Union General Christopher C. Augur arrests the ambushers' fathers and, with Halleck's permission, another eight principal secessionists as hostages for the pickets' return and the perpetrators' surrender. Judge Advocate General Joseph Holt denounces the Confederates' baseness and atrocity and vows to use all means known to civilized warfare to compel the criminals' surrender. The Confederate version holds they are hunting down a deserter and shoot only when the men in a boat prove to be armed Union soldiers. The Union's hostages refuse to pledge allegiance to the U.S., two are released and the rest imprisoned briefly at Fort Delaware. One is lost in the shuffle until Christmas Eve.

Another incident, at Fredericksburg, VA, involves larger numbers and more wholesale justice. After the Battle of the Wilderness, 60 slightly wounded Union soldiers surrender

to local citizens and are sent to a Richmond military prison. The Secretary of War orders 60 civilians arrested as hostages for these men. Only 30 males can initially be found, but eventually 64 are incarcerated, aged 17-70. A Union lieutenant informs officials the Union captives had been straggling, unwounded looters, and recommends only the three hostages seized armed be held. Holt refuses on the grounds it is illegal for non-combatants to take prisoners. The Fredericksburg common council requests an exchange, and during negotiations, Lincoln orders the immediate release of John J. Chew, who had ministered to Union wounded alongside rebels. In another instance, prisoners Dr. Samuel K. Jackson and Joseph Mead, who are selected by the War Department to serve as special hostages for James Hamilton and J. P. Culbertson, imprisoned for 13 months in Salisbury, NC, who are released when they promise to work for the release of two other prominent Virginians.

When Hamilton reveals the horrors of his confinement, the War Department directs conditions at Fort Delaware reduced to the same level. Responding to stories in the Richmond *Examiner,* Grant proposes to Lee a personal exchange of civilian detainees by social class, excluding spies, in keeping with the Christian tradition of soldiering.

Chapter 8

Chapter 8 Summary and Analysis

Chapter 8, "The Irrelevance of the *Milligan* Decision," turns systematically to martial law and trials by military commission, mentioned at many points earlier in the book and finally reveals what *Milligan* is about. As Army regulations require transcripts of courts martial, and military commissions amount to courts martial for civilians, rich treasures of transcripts are buried for investigators to unearth and make up for the dearth of scholarly attention given to military commissions, which so damage Lincoln's reputation. In 1864, Lieber allows - even requires - military commissions to try those who endanger the country, because a country at war is *wholly* at war everywhere, not only on discreet battlefields, and every citizen is a potential belligerent. This conforms to Lincoln's argument in the Corning letter on the role of martial law in maintaining public safety, restraining interference with the raising and supplying of armies, and suppressing rebellion wherever necessary.

Following English law, many contemporaries find legally dubious military commissions outside battle and occupation zones, and deem it "no law at all." The record, however, of military commissions is procedurally superior to civil courts after the appointment of Joseph Holt as Judge Advocate General in 1862. Reviewing local verdicts, Holt and departmental commanders frequently overturn convictions on procedural technicalities. Holt can be - and often is - overruled by General-in-Chief Halleck for ignoring justice in favor of such correctness. At the top, the President has final say, particularly on death sentences.

Partial ledgers survive of "U.S. Army Court Martial Cases" sent to Lincoln 1863-65. In 95 of 184 cases, Lincoln upholds Holt, but when he disagrees, usually does so on the side of mercy. In the case of Wes Bogan, a black man tried for the murder of his ex-master, Holt recommends the sentence of hanging be overturned and, because this coincides with Lincoln's revolutionary agenda, there is no question Bogan will go free. The number of such cases that reach Holt and Lincoln are too few to invite slave insurrection that some fear will follow the Emancipation Proclamation.

Military courts try civilians before and after the Civil War, including hundreds of support employees ("sutlers and retainers to the camp,") occupied populations, and some Native Americans. In 1862-63, Congress subjects some civilian contractors to the articles of war, and in 1865, Holt declares the army in the field has needs that, if not met, must be dealt with by courts martial. In all, the Army conducts at least 4,271 trials by military commission, 55.5% percent in Border States with Missouri, the birthplace of such trials, having by far the most. See Chapter 2. Delaware, which escapes both guerrilla warfare and occupation, has no trials, showing the incidence military commissions is a function of civil disorder. When dealing with partisans, the key question is whether they operate under Confederate orders or their own initiative, but testimony tends to focus instead on specific acts of violence and theft. Often

commissions rely on charges a given defendant has violated an earlier oath of allegiance by returning to battle, but sloppy record keeping prevents many convictions.

Other defendants claim to have been drafted against their will by the Confederacy, which rarely works. In one case, Holt upholds a death sentence to show oaths of allegiance must be taken seriously. Citing Liebler, Holt warns rebel defectors behind Union lines may be messengers or agents (Lincoln commutes the sentence). In rough Missouri, a majority of 50 guerrillas admits guilt in whole or part, and only 4% are acquitted. Missouri is so dangerous that citizens do not have to harbor rebels to be jailed. Merely allowing them to lurk in one's neighborhood is enough. The Army learns it is impractical to try Missourians merely for uttering sentiments against the war effort, but some cases do come before its commissions, such as an elderly man charged with violating repeated oaths of allegiance by innocently writing his son in the Confederate Army.

The District of Columbia sees many military trials by virtue of its border position (many defendants being Virginians and Marylanders) and the need to ferret out corruption by military suppliers and other perpetrators of fraud. In the sparsely populated and ideologically distant Western territories, military commissions are statistically insignificant and unrelated to the war. Isolated outposts simply police their areas. New Mexico Associate Justice Joseph G. Knapp protests to Bates this misuse of Lincoln's order so vigorously Halleck rebukes the New Mexico military, nullifies past decisions, orders damages repaid, and discontinues the practice. Knapp conflicts with the local General again over required travel passes, and Bates notes a general tendency of the military to treat civil government contemptuously.

Only 5% of all military commission trials occur north of the border areas and often involve border-state or Confederate defendants. Kentuckians often rendezvous in Ohio before heading south to enlist. In Pennsylvania, the Army overreacts to the "Fishingcreek Confederacy," rumors about organized anti-conscription rioting, and in a military commission, 15 of 33 defendants are acquitted. Irish-Americans in Luzerne Country are tried for interfering with the execution of congressional acts, membership in the Knights of the Golden Circle, draft resistance, threatening provost marshals, and discouraging enlistments by characterizing the conflict a "Nigger War." Lincoln does not defend such trials as temporary, necessary, measures. Indeed, he scarcely admits they occur.

Defending Vallandigham's arrest, Lincoln tells Ohio Democrats such actions are preventative rather than punitive, and rarely go to trial or punishment. From the voluminous papers that cross his desk, Lincoln knows this is untrue. He wants not to admit an alternative to civil courts has been set up and hopes it will disappear quietly at war's end and be forgotten.

After the war, military commissions occur only in the South and result in the landmark Supreme Court decision, *Ex parte Milligan*, called in Charles Warren's three-volume history of the high court "one of the bulwarks of American liberty" and "the palladium of the rights of the individual," an assessment later scholars repeat, to the point of saying it

differentiates the U.S. from Nazi Germany or Stalinist Russia. At the time of its issuance, however, *Milligan* is denounced as a blow to Reconstruction and cheered only by Democrats and white Southerners. Republican *Harper's Review* likens it to the *Dred Scott* decision as a political statement, while the Richmond *Enquirer* sees it as giving hope the Constitution will be saved and the South vindicated.

The nonpartisan decision, issued by a court dominated by Lincoln appointees and written by his old friend, is ironically politicized. It is eminently quotable but settles none of the complex civil liberty questions raised during the war. It declares martial law and military trials of civilians illegal in the U.S., whenever local courts are open and functioning. The *threat* of invasion does not suffice to justify such measures. Courts must actually be closed and civil administration deposed. Jurisdiction is restricted to the locality of actual war. Thus, Lambdin P. Milligan, the Democratic politician arrested on his sickbed in 1864 for involvement with the disloyal Sons of Liberty and condemned to death by a military commission in Indianapolis, is freed and the Lincoln administration soundly scolded. The Constitution shields all classes of men at all times and under all circumstances, including war. Suspending it leads to despotism.

Nevertheless, military commissions conduct trials through 1870, their numbers declining every year. Many deal with events at the close of the war or with earlier perpetrators as they are apprehended. Lincoln's assassins are so tried. Other trials derive from the Army's efforts to keep peace in the conquered South. Few involve political or racial issues beyond ordinary brawls, although some freedmen seek Army justice, hoping it will be fairer than white juries. Most prosecutions are for perennial problems like fraud or liquor sales to soldiers, or for Scott's original intention of restraining undisciplined occupying forces. President Johnson declares the war over on Apr. 2, 1866, but leaves unclear whether habeas corpus is restored. *Milligan* is announced that same month but not published until December, leaving the Army unsure about the legality of any proceedings. With Johnson's approval, the Army ends military commissions "where justice can be attained through the medium of civil authority" - not the same formulation as *Milligan*.

On Mar. 2, 1867, Congress passes the first Reconstruction Act, among other things empowering commanders of Southern military districts to use military commissions to deal with matters civil courts might mishandle. When the last state is readmitted to the Union, military commissions end, and *Milligan* is little mentioned for the rest of the century, except to be mischaracterized in the prestigious *Cyclopedia of Political Science* as allowing martial law on mere threat of war. Author John W. Clampitt goes on, inaccurately, to say civil offenses in wartime become military offenses even where civil tribunals exist, including capital crimes, which the Constitution requires always take place before juries. Clampitt accurately enumerates violations prosecuted during the war, but adds other "ordinary crimes" the Army still assumes lie in its jurisdiction. Clampitt sees military commissions as plugging loopholes in the law in wartime - unlike his characterization of Mary Surratt's commission as "illegal," being "organized to convict," when he serves as her defense attorney.

Political scientists for the rest of the 19th century hope *Milligan* will never have to be tested in wartime and cannot predict the outcome. During World War I, in the absence of enemy invasion or rebellion, suspending the writ of habeas corpus is out of the question. President Wilson waits for Congress to endorse his war powers and uses the Justice Department to prosecute 2,168 cases against left-wingers including Eugene V. Debs. Odious laws still on the books from the immediate post-Revolutionary era allow Wilson to detain 6,300 enemy aliens by proclamation, and he "arrests" 40,000 draft resistors by the American Protective League's quasi-vigilante "Slacker Raids." After World War I and the "Red Scare," *Milligan's* reputation grows and Wilson is seen as obeying the law, only because U.S. involvement is so brief and at a safe distance.

Samuel Klaus in *The Milligan Case* sees an affirmation that constitutional liberties apply in wartime as well as peace, and foresees no situation in which the emotionality of the Civil War will arise in the 20th century, where civil conflict is industrial. By World War II, *Milligan* has lapsed into disuse and President Roosevelt incarcerates 120,000 Japanese-Americans by executive order. One the writ of habeas corpus is filed for a Nikkei, citing *Milligan,* but the government argues the heightened danger of modern war renders its argument moot. The judge delays the decision a year and then dismisses the petition. Thus, when the chips are down, *Milligan* does not matter. It has a powerful legacy in books on constitutional history, because it for the first time distinguishes sharply between terms muddied before and during the Civil War. Writers repeatedly misinterpret wartime events by making them appear clearer than they are at the time. Outside of books, *Milligan* has little effect on history.

Chapter 9

Chapter 9 Summary and Analysis

Chapter 9, "The Democratic Opposition," looks systematically at the role of the Democrats in keeping the Republican administration on its toes. Their slowness to react to civil liberties questions, desire to help preserve the Union, and inept protests have been mentioned occasionally earlier in the book. Early suspensions of the writ receive little attention in even the most rabidly anti-Republican newspapers. Traumatized by military arrests, Maryland protests by satirical songs and the state legislature issuing 25,000 pamphlets talking about Lincoln's arbitrariness, "gross and unconstitutional abuse of power," and "revolutionary subversion of the Federal compact."

Judge S. S. Nicholas, who in the 1840s opposes refunding Jackson's fine, publishes an I-told-you-so pamphlet about martial law threatening slavery. Democrats are not seriously stirred until Taney's *Merryman* decision, civil liberties are absent during the Pennsylvania elections, and from the newspapers it would appear no political arrests are occurring. In Ohio, when Democratic papers do acknowledge arrests, they approve of treating rebels as rebels. In Chicago, Congress is criticized for neglecting its duty to detain spies and traitors and Lincoln's firmness is hailed.

Initially, the debate focuses closely on whether President or Congress has the power to suspend the writ, and dissident Republicans to the right and left of Lincoln, prompt much of it. Professor Joel Parker justifies refusing to obey the writ under martial law, because when martial law is in effect, the writ is *ipso facto* suspended. Democrats watch safely from the sidelines as Senate Republicans debate the legality of military arrests and trials in the loyal states. Horace Binney's pamphlet, *The Privilege of the Writ of Habeas Corpus under the Constitution* (1862) claims the U.S. President is more accountable to the people than the English king and better positioned to be accountable than Congress, where loyalties are locally divided. Nicholas points to a lack of endorsement for Binney's argument as proof the 70-year tradition of congressional initiative is correct and rejects the Jacksonian precedent. Some Democrats secretly sympathize with the Confederacy but protesting executive power is not in their historical tradition and there are no martyrs around whom to rally. Reporting on arrests is spotty and ginger, because editors take their lead from Congress, where Democrats remain mum. Only when they rise to embarrass Republicans over ex-President Pierce's near-arrest does the *Illinois State Register* speak up. It protests the unnecessary appointment of provost marshals in this peaceful state, contending corps of military police will *cause* public injury rather than prevent it.

Even poorly controlled arrests after Aug. 8, 1862, fail to provoke significant Democratic protests. The Republican New York *Tribune* holds postwar investigations will show 90% of the military arrests unjustified and make Americans more zealous about seeing constitutional safeguards on liberty are not "debauched and broken down" again. During the 1862 elections, Democrats focus on the preliminary Emancipation Proclamation and

shortage of Union victories rather than capitalizing on civil liberties. The *Illinois State Register* accepts martial law as a *fait accompli*, and sees the loss of Lincoln's old seat in Congress to a Democrat proof voters are against emancipation.

After the elections, the opposition press takes note of civil liberties, which improve when the draft quotas are met and arrests drop off markedly. The able Democratic Governor of New York, Horatio Seymour leads a major reformulation of party policy. Preparing his first annual message, Seymour consults distinguished lawyer John V. L. Pruyn on habeas corpus and devotes two-thirds of his speech to national rather than state issues, including military arrests. He refutes the idea loyal Northerners can lose their rights, when Southerners secede. He quotes Lord Coke, a defender of English liberty, "Where courts of law are open, martial law cannot be executed." Seymour is quoted in newspapers across the nation and New Jersey Governor Joel Parker follows his lead. Articles and editorials appear denigrating the embarrassing precedent set by the Democratic Party's founder by saying Jackson had dealt with a besieged city.

In the face of new Democratic cohesion, Republicans rather than closing ranks, call for a system of accountability for those arrested. Congressmen have no more familiarity with martial law than Lincoln, so the debates are technically uninformed, giving little attention to military commissions. It's the only issue that later troubles the Supreme Court. A genre of protest writing begins as former detainees describe all the guiltless endure in prisons. Sidney Cromwell reacts to Francis Key Howard's tale by pointing out prisoners fare better than the soldiers defending the country and reaches back to the Continental Congress for a precedent in disarming, arresting, and trying delegates who vote against the Revolution.

Passage of the Habeas Corpus Act in March 1863 removes the Democrats' principal complaint, but they continue their discontent, mildly. Vallandigham's ridiculous martyrdom can only help Democrats politically. Seymour leads an indignation rally in Albany, which Democratic papers across the North cover. Erastus Corning forwards the Albany resolutions to Lincoln, who responds with his famous Corning letter. The Democrats' reply in pamphlet form, signed by 23 committeemen led by Pruyn, is precisely written, original, but too legalistic for maximum political effect. It denies the writ of habeas corpus may be suspended for the safety of the government by creating new and unknown classes of crimes. Habeas corpus as a "remedial writ" making sure detentions are valid is a pale reflection of the radical Magna Carta for which English patriots fight and die over 600 years to restrain venal judges and tyrannical kings, and only one of many technical procedural remedies safeguarding personal liberty, including impeachment and the "supreme right of revolution."

In the Corning letter, Lincoln impugns the loyalty of those who remain silent or qualify their loyalty, to which the New York Democrats reply "but" and "if" are part of the "vocabulary of freedmen." The theme, "Eternal vigilance is the price of liberty," spreads to pro-Vallandigham rallies across the Old Northwest. Pruyn's committee avoids Lincoln's mention of Jackson in the Corning letter. Many Democrats prefer not to be reminded of the incident, but their predecessors' willingness in 1844 to accept military

arrests of civilians as legal under the conditions Jackson faces leaves the party in the 1860s ill prepared to defend civil liberties.

The Habeas Corpus Act of Mar. 3, 1863 (see Chapter 3) can be seen either as enabling or merely endorsing the President's power to suspend the writ of habeas corpus. It eliminates the judicial argument used by Judge Nathan K. Hall to justify a writ to the pacifist preacher Judson D. Benedict. The Vallandigham case - and Lincoln's publicizing his approval in the Corning letter - offers the opposition a new focus for political resistance on constitutional grounds. Democratic pamphleteers tell of clergymen, judges, ladies, mourners, and children being seized, praise Taney, and portray the 1863 Act as an admission Lincoln had been usurping power while the courts are open. Substituting the arm of the President for the arm of the law is declared inexcusable.

Andrew D. Duff, an obscure Illinois politician arrested in 1862 for discouraging enlistments, predicts Lincoln will not permit the November voting. His *Footprints of Despotism* draws from Kreighly's *History of England* to show dangerous precedents for Lincoln's actions. Such denunciations of "arbitrary arrests" escalate during the election, but cannot become the Democrats' principal focus, because they repudiate their prewar position on slavery and the antiwar wing by nominating George B. McClellan. Rival Horatio Seymour before the convention wants to make a sharp issue of draft riots, the seizure of newspapers, and his calling out of 75,000 of the state militia partly to ward off arbitrary encroachments on citizens' liberties, but withdraws and backs McClellan, painfully defending his actions under orders from men acting without time for reflection. No libertarian, McClellan talks of waging a limited war in keeping with Christian civilization, tolerates military arrests only during actual hostilities, and opposes emancipation, which will disintegrate the army.

McClellan is a military hero uninterested in politics and his selection blurs the party's only consistent ideological issue. McClellan campaigns on a promise to restore the Union by waging a better war than Lincoln, and mainline Democrats disavow Vallandigham's principles while sticking up for his rights. The arrests of Milligan and other Indiana Democrats for contacts with Confederate agents do not initially hurt the Republicans. Seymour gives the "Great Speech of the Campaign," claiming the Republican's harsh actions - emancipation and atrocities - will make postwar reunion difficult. He draws thunderous applause, when he declares, "War does not extinguish liberty," and contrasts Lincoln with Washington, who never suspended habeas corpus.

Chapter 10

Chapter 10 Summary and Analysis

Chapter 10, "Lincoln and the Constitution," concentrates briefly on the most central character in the Civil War, beginning by claiming Lincoln is no dictator, but a practical man not averse to tyranny. Lincoln is a Whig twice as long as he is a Republican, and as such takes a broad view of what the Constitution allows the federal government to do. His impoverished rural youth makes him impatient with Democratic arguments in the late 1840s that economic improvements cannot be funded. As a congressman in 1848, he advocates expediency, confident the Constitution will somehow be on his side, but opposes President Polk's impractical and time-consuming call for an amendment. Lincoln thinks it best to treat the Constitution as untouchable and to use "express authority" and reasonably broad interpretation as a means of doing as one must.

The turning point in Lincoln's awareness of the importance of constitutional issues is the Mexican War, which he hates as an unconstitutional action entered upon only to win Polk votes and draw attention away from problems in the Pacific Northwest. Lincoln insists the Constitution gives Congress the power to declare war because of the dangerous precedent of kings. Lincoln votes for the Wilmot Proviso, banning slavery in any territory taken from the Mexicans and when pressed is consistently against slavery.

However, Lincoln dislikes the tendency in his day to make every political question into a constitutional issue. He believes the Founders go along with slavery reluctantly and as an expedient, and word the Constitution in a way that will allow the peculiar institution to be forgotten once it is eradicated by time. Lincoln thinks about the Constitution only when forced by events like mistreatment of unpopular minorities in his Lyceum speech (1838), the failure of bench and bar to deliver justice in *Dred Scott* (1857). Some paint Lincoln as at odds with the unruly and aggressive democracy of Jacksonian America, but this is unfair. Lincoln looks past the admittedly anti-slavery Constitution to Jefferson's slogans and the Declaration of Independence, but, not being a systematic thinker, fails to develop the theme of the Constitution smothering the free spirit of the revolutionary era.

As President and facing civil war, Lincoln allows for "necessity" in dealing with the constitution. Jefferson, he says, has no constitutional power to acquire territory but is wise enough not to pass up the Louisiana Purchase, but when first pressed to maintain order he is stricken by paralyzing constitutional scrupulousness (see Chapter 2). In explaining his censure of Frymont, Lincoln says seizing property - including slaves - temporarily as military expediency is valid under martial law, but for any other reason it is purely political and amounts to dictatorship. Such recklessness surrenders rather than saves the government. As early as 1836, John Quincy Adams declares as soon as slaveholding states become a theater of war, Congress's war powers extend to them and slavery may be abolished. Adams reiterates this in 1842, discussing Texas, and

turns to his nemesis Jackson as proof even individual Generals in wartime have local authority over everything, including slavery.

The President has the universal power to emancipate slaves. When Lincoln abandons hopes of freeing slaves through the Constitution, he looks initially to Congress for action, but eventually is convinced he effect emancipation by executive proclamation in enemy territory without becoming a dictator. Well before Sep. 22, 1862, Lincoln leaks hints he can do so as a wartime measure, when the time is ripe. For good reason, Lincoln worries more about the consequences of emancipation than the suspension of the writ of habeas corpus. Americans will accept the latter, knowing it is temporary, but the former must be permanent. To protect freedmen, he reverses himself on the use of constitutional amendments.

Epilogue

Epilogue Summary and Analysis

In the Epilogue, Neely returns to the historiography to flesh out comments in Chapter 8 and set the historical record straight on what can and cannot be learned about civil liberties from the Civil War. Lincoln never discusses most of the arrests described in this book, instead too heartily defending his constitutional right to order them. The Corning letter explains why dissent cannot be safely tolerated and even silence can be a crime. He speaks of habeas corpus more s a symbol of American freedom than a specific legal instrument, and this mythic approach has been followed in most history books since the Civil War.

Historical literature on civil liberties in the Civil War is meager and unsatisfying. The only book-length scholarly treatise is Randall's *Constitutional Problems under Lincoln* (1926). There are many noisy denunciations of Lincoln's record between the Civil War and World War I, including Marshall's anecdotal *American Bastile* (1869), which introduces the theme of Northerner civilians as the primary victims. When Republicans jump on Democratic disloyalty, later editions shift to emphasis on Mary Surratt's military trial and execution for conspiring to kill Lincoln. David M. Dewitt in 1895 writes *The Juridical Murder of Mrs. Surratt.*

Through 1887, no books or articles appear on Lincoln and the Constitution, which is regarded as lacking teeth to let the government defend itself in legal scholar Sydney George Fisher's "The Suspension of Habeas Corpus during the War of the Rebellion" in the fledgling *Political Science Quarterly.* The Progressive Era admires executive leadership and vigorous nationalism and Lincoln comes off well in his first academic biography, by Nathaniel W. Stephenson. Political scientist William Archibald Dunning first establishes the theme of Lincoln as dictator in 1897, and returns to the theme after World War I, in which he finds "far-reaching parallelism in incidents and ideas."

Randall reshapes his pre-World War I thinking condemning Union methods like Sherman's march through Georgia. Randall is influenced by his Southern-born advisor and has a strong religious, reformist, and prohibitionist spirit, making him critical of war as unjustifiable on social Darwinian grounds. Nevertheless, he writes propaganda for the Wilson administration and criticizes the Kaiser's record on civil liberties. He writes of dangerous possibilities in suspending the writ of habeas corpus and the notion war replaces the rule of law with the rule of force. He sees merit in the "peace party" raising up agitators like Vallandigham, but also defends Lincoln as temperamentally milder than those who carry out Union policy. Developments in world politics, political theory, and historical scholarship erode praise for Lincoln's wartime leadership. Scholars prove arbitrary arrests are widespread in areas posing no danger to the Union. Revisionist historians like Klement demolish the myth of well-organized, secretive disloyalty, and the Espionage Act (1917) disturbs Harvard professor Zechariah Chafee, Jr., to writer *Freedom of Speech,* which says dictatorship should be feared in the even of another

war. Pulitzer Prize-winning constitutional author Andrew C. McLaughlin makes this point in *Constitutional History of the United States* (1926). Not until the 1970s is the topic taken up again and by then the obvious lessons of the civil rights movement are prominent. Scholars like Harold Hyman look at aspects of the Civil War not covered by Randall. Non-academicians, such as Edmund Wilson, Dwight C. Anderson, Gore Vidal and William Safire rush in with popular works that show Lincoln as a dictator like Bismarck, Lenin or Robespierre. It is vital for readers to understand the popular authors' ideological perspective.

Historians have simply shied away from Lincoln's record on the Constitution, but this will not cause the problem to go away. The old approaches and accepted myths must give way to studies of the individuals arrested by Union military authority. Had there been 13,535 purely political arrests, Lincoln would have had more trouble than he does. Tens of thousands rise in opposition to conscription, but few protest political arrests. The volume of writing on *Vallandigham* and *Milligan* show politicians and reporters do not ignore such cases. The answer is seen in the fact most prisoners are Confederates, blockade-runners, foreign nationals and others likely to provoke little reaction from Northern voters.

A majority of the arrests would have taken place even without suspension of the writ of habeas corpus, because they are simply part of the "friction of war." The resulting prisoners are hardly "political," and their arrests are hardly "arbitrary" in the dictionary sense. The figure 35,535 is unverifiable and erroneous. Neely abandons his own examination of the sources long before documents run out, because no new patterns are emerging. An exhaustive study is impossible, given the state of the archives. Conscription arrests die out after the quotas are met.

Military justice and discipline expands for convenience sake in some areas. Southern conscription and guerrilla warfare break down the age-old distinction between combatants and noncombatants late in the war and mostly only in theory. International law is remarkably well adhered to, even though it contradicts U.S. interests, and the U.S. drafts the first code in history to govern its armies - in the midst of the conflict. In the 1864 Dix Commission, the Army even rules itself ineligible to try civilians in military courts. Lincoln is determined to win the war, to keep the country whole so democracy cannot be said to have failed. He is indifferent to how this is accomplished and issues redundant orders and proclamations throughout the war. Were a situation to arise like the Civil War and the writ of habeas corpus needed to be suspended, it is doubtful the legal situation could be defined any better than in 1861. The Civil War provides no neat precedents, ground rules, or map.

Characters

Abraham Lincoln

William H. Seward

Edwin M. Stanton

Ulysses S. Grant

F. C. Ainsworth

Joseph Aubuchon

Edward Bates

E. R. S. Camby

Ezra B. Chase

Salmon P. Chase

Titian J. Coffey

John A. Dix

Thomas Ewing

Bernard G. Farrar

John C. Frymont

Henry W. Halleck

Joseph Holt

Andrew Jackson

Francis Lieber

George B. McClelland

John Singleton Mosby

Eleazar A. Paine

Samuel E. Perkins

William C. Quantrill

James G. Randall

Winfield Scott

Horatio Seymour

Roger B. Taney

Levi C. Turner

Clement L. Vallandigham ("Valiant Val")

Gideon Welles

Objects/Places

Articles of War (1806)

In 1861, the standard Bates-Coffey law digest says the Articles of War restricts martial law to members of the armed forces.

Copperheads

Copperheads is a nickname given to Northern "Peace" Democrats, who oppose the Civil War and call for a peace settlement with the Confederates. Copperheads form mysterious organizations like the Knights of the Golden Circle, which, pursuant to Secretary of War Stanton's General Order No. 104, U.S. martial David L. Phillips in Illinois raids and arrests Dr. Israel Blanchard for attending a public meeting. The most famous Copperhead is Clement L. Vallandigham.

Ex Parte Merryman

The writ of habeas corpus issued by U.S. Supreme Court Chief Justice Roger B. Taney to John Merryman after the Maryland resident is arrested for raising forces for the Confederacy. It is disobeyed and Taney protests only Congress has the power to suspend the writ. This precipitates the first public discussion of Lincoln's actions, which expand in breadth.

Ex Parte Milligan

After the war, military commissions occur only in the South under reconstruction, and result in the landmark Supreme Court decision, *Ex parte Milligan*, called by Charles Warren's three-volume history of the high court "one of the bulwarks of American liberty" and "the palladium of the rights of the individual," an assessment that later scholars repeat, to the point of saying it differentiates the U.S. from Nazi Germany or Stalinist Russia. At the time of its issuance, however, *Milligan* is denounced as a blow to Reconstruction and cheered only by Democrats and white Southerners. Republican *Harper's Review* likens it to the *Dred Scott* decision as a political statement. The Richmond *Enquirer* sees it as giving hope the Constitution will be saved and the South vindicated. The nonpartisan decision, issued by a court dominated by Lincoln appointees and written by his old friend, is ironically politicized. It is eminently quotable and clear, but settles none of the complex civil liberty questions raised during the war. It declares martial law and military trials of civilians illegal in the U.S. whenever local courts are open and functioning.

The *threat* of invasion does not suffice to justify these measures. Courts must actually be closed and civil administration deposed. Jurisdiction is restricted to the locality of actual war. Thus, Lambdin P. Milligan, the Democratic politician arrested on his sickbed in 1864 for involvement with the disloyal Sons of Liberty and condemned to death by a

military commission in Indianapolis, is freed and the Lincoln administration soundly scolded. The Constitution shields all class of men at all times and under all circumstances, including war. Suspending it leads to despotism. It does not question the suspension of the writ of habeas corpus during war, with resulting civilian arrests without charges.

Habeas Corpus

James Kent's *Commentaries on American Law* declares the privilege of this writ is a constitutional right at all times except in cases of invasion or rebellion. It says nothing about domestic civil liberties or martial law. Joseph Story's *Commentaries on the Constitution of the United States* notes the problem has never arisen in U.S. history, but has occurred often abroad. He warns oppression and abuse are frequent in such cases.

Martial Law

Under the Articles of War (1806), martial law can be applied only to members of the armed services. Its application to civilians in time of war is hard to define and some authorities believe it inapplicable.

Mexican War

Led by General Winfield Scott, The U.S. Army invades Mexico in 1846-48, without explicit instructions from Congress about dealing with such crimes as murder, rape, assault, desecration, and theft committed by irregular troops. Scott responds by instituting martial law to maintain discipline and the honor of the U.S. Army, innovations not well received in Democrat-controlled Washington. It sets a precedent for using military commissions in the Civil War, their scope extended beyond the fighting troops to the civilian population suspected of disloyalty.

Military Commissions

The U.S. Army's response to bridge burning and other rebellious actions during the Civil War, military commissions are an outgrowth of General Winfield Scott's innovation during the invasion of Mexico 15 years earlier. Military commissions are required to have a minimum of three officers sitting in judgment, defendants being allowed legal counsel (who may not, however, speak in their behalf), verbatim transcripts (not yet a feature of civil law), automatic review by superiors, and, in the case of capital sentences, review by the President personally. Political science professor Francis Lieber allows - even requires - military commissions to try those who endanger the entire country.

A country at war is *wholly* at war everywhere, not only on discreet battlefields and every citizen a potential belligerent. Once Joseph Holt, a punctilious lawyer becomes Judge

Advocate General Sep. 3, 1862, the laxity of early military trials in Missouri is swept away, and he becomes known for frequently overturning of military commissions and courts martial on legal technicalities. William W. Winthrop assembles some of Holt's decisions as a digest on military justice.

Militia Draft of 1862

An act enacted on Jul. 17, 1862, empowering the secretary of war to draft for nine months those state militias that fail to upgrade. It is a *de facto* national draft and occasions the expansion of the suspension of the writ of habeas corpus nationwide on the Florida pattern. The act results in a series of orders issued by Secretary of War Edwin M. Stanton proscribing flight to evade military service and any act or word challenging the draft. It is finalized in Stanton's General Order No. 104. A horde of minor functionaries is tasked to determine loyalty/disloyalty and many innocent detainees' reputations are ruined. Stanton assigns Judge Advocate Levi C. Turner to schedule trials, not to act as a watchdog as he does, seeking to rein in overzealous constables and prompt reluctant ones to do their duty. For a brief period, sweeping, uncoordinated, unfeeling arrests in the North mark the low point of U.S. civil liberties.

National Archives

National Archives today hold massive documentation on military law during the Civil War from a variety of agencies and commands, hopelessly confused as the issuing bodies and intermediary repositories are closed and the papers folded together. Much of the data has been microfilmed and is now open to scholars, but past confusion makes confirming earlier figures impossible and precludes a comprehensive view of the effect of the suspension of the writ of habeas corpus possible. Author Mark E. Neely, Jr., gives up examining records after about 14,000, when he finds no new patterns of arrests emerging.

Themes

Civilized Warfare

The Fate of Liberty maintains that by and large, both sides in the American Civil War live up to the standards of "civilized" or "Christian" warfare, despite a number of temptations to depart from them. At sea, Union ships obey international law that prescribes releasing seamen on neutral ships caught trying to run the blockade into Southern ports. Most ships are British, and the crews are multinational. However, some Southerners are among them and claim the same right to speedy release as the foreigners. The ships and cargoes are forfeit under international law, but the crews must be freed. The Navy objects most of those released sign onto other voyages, but can do nothing until it is shown many vessels are, in fact, owned by the Confederate government. Pilots and other key crewmen then begin to be held as prisoners of war. Having always been the country needing the protection of international law on the high seas, the U.S. is loath to depart from the standards when the roles are reversed. On land, new technologies are emerging, but the temptation to use them as they will be in World War I is resisted.

Nearly universal male conscription by the Confederacy and the forming of non-traditional guerrilla bands tempts many field commanders to treat the entire population as potential combatants, erasing a traditional distinction. Ulysses S. Grant orders the routine detention of all captured males under 50, but this is nowhere followed scrupulously. The taking of hostages to ensure the good behavior of their fighting relatives and/or to exchange for others is an accepted part of civilized warfare in Europe and is followed in areas where guerrillas enjoy the greatest success and can be controlled by no other means. Finally, following lessons learned in the Mexican War, General Winfield Scott's use of military commissions is instituted to prevent troops from committing murder, rape, assault, desecration and theft, which Congress has failed to legislate against.

Inefficiency

The Fate of Liberty shows much inefficiency in the conduct of the Civil War. Abraham Lincoln comes to the presidency in 1861 with no executive experience and unformed thoughts about the writ of habeas corpus and martial law, which prove to be nearly immediately necessary. He delegates to Secretary of State William H. Seward preparing the first proclamation suspending the writ of habeas corpus along the railways from Philadelphia to Washington, to prevent the capital from being cut off. Expansion of the order southward to Florida merely confirms the local General's actions, and the expansion northward in stages to Maine departs from the original narrow and practical intent.

Seward's State Department takes charge of civil liberties matters although it lacks personnel to make arrests or investigate cases, and has to hire personnel from other

departments. As arrests grow in number, record keeping is haphazard. Professional scribes and pre-printed forms are relatively rarely used, resulting in masses of confusing arrest and trial records. The situation is worsened by 19th-century spelling, handwriting, and alphabetization conventions. When the War Department under Edwin M. Stanton issues the first nationwide suspension of the writ of habeas corpus, claiming to act on Lincoln's verbal direction, it de facto takes over administration of the internal security program, and is somewhat better prepared for the daunting task. Military commissions for civilians are treated like courts martial, which insist on transcripts and documentation superior to civil courts and mandatory appeals of sentences.

Those in capital cases must go to Lincoln, whose desk is soon inundated. Lincoln learns of arrests and convictions most often from distraught relatives of detainees, their lawyers, or congressmen. Many times he hears from the British consul on behalf of blockade-runners. The administration creates three distinct classes of prisoners but, in reality, muddles them constantly and never understands the distinction between martial law and the suspension of the writ of habeas corpus.

Expediency

The Fate of Liberty maintains Abraham Lincoln makes most of his decisions for expediency and, if a decision raises enough controversy, justifies it on constitutional and historical grounds. His first suspension of the writ of habeas corpus causes him angst over its legality - it never having been done in 70 years and being left in the Constitution unclear whether it falls in the provenance of the executive or legislative branch - is issued, because Marylanders have rioted and threaten to cut Washington, DC, off from the rest of the North. He has no choice but to keep the rail lines open. The order expands southward by his giving de facto recognition to orders given by local authorities. Again, it is expedient to legalize the matter.

Resistance to the military draft requires his most sweeping order, but as soon as draft quotas are met in a month, the order is relaxed. Local commanders by this point have gotten used to arresting uncooperative populations and the number of arrests does not drop. It is easier to take people in and sort them out afterwards, including many whom the authorities have no intention of prosecuting. Particularly when dealing with Confederate guerrilla forces it is expedient to consider all males under 50 potential fighters, and General Ulysses S. Grant issues a general order on the subject. Having massive numbers of civilian prisoners following the troops is not, however, expedient, and the order is never obeyed universally. Hostage taking in particularly troubling areas is a convenient alternative.

Even after suspending the writ of habeas corpus nationwide and having his right confirmed by Congress through the Habeas Corpus Act of 1863, Lincoln continues issuing superfluous proclamations to fit specific situations, as though no precedent exists. The Emancipation Proclamation is caught up in expediency, because Lincoln realizes its significance for the nation's future is permanent. He waits for a major

battlefield victory to announce it and goes against his long-held belief the Constitution ought not to be amended by proposing a permanent, unchallengeable solution.

Style

Perspective

According to the back cover, Mark E. Neely, Jr., is one of America's outstanding authorities on Abraham Lincoln, Director of the Lincoln Museum, author of *The Abraham Encyclopedia,* co-author of *The Lincoln Image*, and other studies on the Civil War era. In both the introduction and epilogue, Neely observes professional historians have been either blinded by the Lincoln myth or embarrassed by his so-called dictatorial treatment of constitutional issues. They have overlooked abundant source materials on what was said and done, and Neely sets out to examine matters from the bottom up. Determined not to take Republican claims that only traitors are arrested and Democratic cries of partisan excesses, Neely spends fourteen months working in the National Archives to compile *The Fate of Liberty,* working with records badly mangled and intermingled during transfers between earlier repositories.

Neely tries but is unable to reproduce the quantitative figures given in earlier studies, and sets about determining how much can responsibly be said about who makes arrests and are arrested, what offenses are charged, when and where the arrests occur, and why they are made. After examining some 14,000 records, Neely determines no new patterns are emerging, and stops his research. No definitive answer can be given (because the extent records are partial), so Neely is content to examine large numbers of episodes, connecting them and contextualizing them for the reader.

Neely does not state for whom he writes, but produces a simple, lively narrative non-specialists interested in history can follow readily. Some passages presume familiarity with persons and events that requiring look up online or in reference books on the Civil War and for those who object to such exercises, this book will prove frustrating. Neely seeks to overturn myths and stereotypes and succeeds. He also seeks to let participants in the Civil War, great and small alike, to have their stories be known. He succeeds in this even more admirably.

Tone

The Fate of Liberty is written in the third person past tense, for the most part in subject terms. In Chapter 8 and the Epilogue, Mark E. Neely, Jr., takes earlier scholars - who are far fewer than the subject matter deserves - to task for neglecting primary sources and relying on the myths of their particular eras. Lincoln and the suspension of the writ of habeas corpus are understudied in Neely's eyes and a number of myths have been unfairly created and perpetuated by people who find Lincoln's legacy in this area inconvenient or uncomfortable. Neely is candid about how difficult his task is in compiling this book and how no better outcome than *The Fate of Liberty* is possible, given the fragmentary, disorganized, and flawed nature of the surviving records. He is subjective about the need for more professional scholarship in this area.

Over all, the effect of *The Fate of Liberty* on the reader is to appreciate that the Civil War throws at Lincoln, his cabinet members, the military, and the bureaucracy unprecedented issues that must be dealt with swiftly. That they too easily do what is expedient is lamentable but understandable. Neely neither deifies nor demonizes anyone and often explains where traditional views of men like Lincoln, Seward, and Grant are inaccurate and even patently unfair. In doing so, Neely does not back down from the moral high ground by claiming the suspension of the writ of habeas corpus and the imposition of martial law are anything but dangerous in a democracy, but he cloaks this in these men's ultimate concern for preserving the Union and the dream of American democracy.

Structure

The Fate of Liberty consists of a 17-page Introduction very briefly outlining the antebellum history of the writ of habeas corpus in America and describing his goal in writing the book. It also contains ten chapters of text, an Epilogue recapitulating and extending earlier remarks about historiography, bibliographic and explanatory endnote, and two fairly thorough indexes. Lamentably, there is no systematic bibliography.

The first four chapters chronicle the expanding use of suspending the writ of habeas corpus. Chapter 1, "Actions without Precedent, " deals with the first limited instances of the writ of habeas corpus and its spread north- and southward from Maryland; Chapter 2, "Missouri and Martial Law," describes the situation in the state where the suspension of the writ of habeas corpus and imposition of martial law come to be systematically applied. Chapter 3, "Low Tide for Liberty," describes the situation in the Border States and, selectively, in the North. Chapter 4, "Arrests Move South," describes how the advance of Union forces into Virginia changes the complexion of the problem. Chapter 4, perhaps too briefly, also summarizes the effects across the South and sets up the grave problems during Reconstruction.

The next four chapters are more topical. Chapter 5, "The Dark Side of the Civil War," looks at government corruption, anti-Semitism, and torture, including how and when money talks in the Lincoln administration. Chapter 6, "Numbers and Definitions," seeks to clarify what all the statistics in the first four chapters show, and fail to show. Chapter 7, "The Revival of International Law," looks at how the Union sometimes goes against its own best interests in dealing with blockade -runners and other problematic situations.

Chapter 8, "The Irrelevance of the *Milligan* Decision," finally describes precisely what the oft-mentioned Supreme Court decision is about and why history afterwards has found it irrelevant. Chapter 9, "The Democratic Opposition" and Chapter 10, "Lincoln and the Constitution," examine and wrap up the key concerns of how Lincoln's opponents fairly and unfairly deal with his questionable actions. The division of *The Fate of Liberty* into chronological and thematic parts is a bit frustrating and results in considerable rehashing of material. On balance, however, the topical treatments provide for a fuller understanding of what is going on in the Civil War.

Quotes

"In detecting the sincerity in Lincoln's first message to Congress, Randall uncovered only part of the deeper meaning of the document. What is also apparent in it is the work of a fledgling president, uncertain of his legal ground and his proper audience, nervous, and at once too candid and too forthcoming. This was not the work of a statesman or of a sure politician. Lincoln would learn fast, but he had not mastered the job by July 1861." Chapter 1, pg. 13

"Federal authorities early on developed terms to describe the three important classes of prisoners held in military prisons: 'prisoners of war' were captured Confederate soldiers and sailors; 'United States prisoners' were members of the U.S. armed services held for crimes committed in camp, like theft or murder; 'prisoners of state' were civilians. Consistent use of the terms, however, was confined to those who administered military prisons and to other high-ranking officials. In the field, the usage was inconsistent at best." Chapter 2, pg. 45

"Still another in Hamilton, Ohio, spoke of the war as a 'nigger-freeing' affair and urged letting the abolitionists fight it themselves. He proved to be 'a mere boy without influence,' twenty-one years old. And in New Jersey, Joseph Wright was alleged to have said that anyone who enlisted was 'no better than a goddamned nigger.' If the offending language reported by arresting authorities contained specific social or political content rather than mere exhortations or expletives, race and abolition were the issues most often alluded to." Chapter 3, pg. 60

"When the first New York draftees under the new law were called up on July 11, 1863, the greatest incidence of domestic violence in all of United States history ensued: the New York City draft riots. Afterward, the unpopularity of conscription became a political byword, a serious practical problem for the Lincoln administration, and a genuine impediment in many people's eyes to the war effort. Lincoln's mind boggled at government officials who opposed the draft and at political obscurantism that impeded the draft. He could comprehend the reluctance of the common man, but resistance from responsible men infuriated him." Chapter 3, pg. 69

"It required the extreme provocation of the frustrating campaigns of the summer of 1864, knowledge of the relentlessness of confederate conscription, and the embarrassing irritations of Mosby and White to drive Grant to declare on August 16, 1864, that essentially all Southern males between the ages of seventeen and fifty be treated as combatants. And afterward, no one really acted on the new declaration. The union armies never gathered all Southern males, aged seventeen to fifty, from any area and took them as military prisoners. Sheridan, who was specifically told to do so, did not." Chapter 4, pg. 81

"This category of arrest accounts for few of the civilian prisoners in the North, but it reveals one of the tendencies of the program of military arrests in the Civil War. Arrests eventually were made, for convenience's sake, for causes never dreamed of when the

president took his first hesitant steps toward suspending the writ of habeas corpus and imposing martial law. And, as administered by the Republicans, the arrest program took on a somewhat puritanical, moralistic, or purifying cast." Chapter 4, pgs. 86-87

"The letter is one of the many minor masterpieces that lie buried in *The Collected Works of Abraham Lincoln,* wonderfully clear, economical, comprehensive, fair-minded, and withal, sparkling in tome. Despite the grim subject and the drearily legal and bureaucratic context, Lincoln rose to the occasion with a small gem of a letter. Holt and Turner, although they dealt with similar problems almost daily, produces nothing remotely like this document." Chapter 5, pg. 102

"The conflict between Knapp and Brigadier General James H. Carleton, commanding in Santa Fe, led to a minor constitutional crisis when Knapp refused to hear cases at a session of the supreme court in protest of the army's preventing him from traveling out of the territory without a military pass. Halleck's letter settled the crisis, but Knapp's justifiable agitation apparently provoked Attorney General Bates to say: 'There seems to be a general and growing disposition of the military, wherever stationed, to engross all power, and to treat the civil government with contumely, as if the object were to bring it into contempt.'" Chapter 8, pg. 173

"But political resistance on constitutional grounds to military arrests of civilians did not end. This was partly because of the imperatives of partisanship for the Democratic party. It was partly because General Ambrose Burnside foolishly provided the opposition a new issue - trials by military commission - by arresting and trying a celebrated politician, Clement L. Vallandigham. It was due as well to Lincoln's decision to uphold Burnside's action and to justify it in the widely circulated Corning letter without referring to the congressional act of March 3, 1863." Chapter 9, pgs. 202-203

"The Democratic depiction of Lincoln as a tyrant was to have more influence on history than it merited, but like many political caricatures, it contained a certain element of truth. To be sure, there was nothing of the dictator in Lincoln, who stood for reelection in 1864 and, until General Sherman captured Atlanta, genuinely fearer that he would lose the presidency. But he did not by habit think first of the constitutional aspect of most problems he faced. His impulse was to turn to the practical." Chapter 10, pg. 210

"When he finished that part of the letter, Lincoln wrote, 'So much for principle. Now as to policy.' And then he proceeded to talk about Kentucky. It seems striking that when delaying freedom for the slave, Lincoln thought first of constitutional principle, then of policy. But policy considerations came first with him in dealing with the crisis following the firing on Fort Sumter. Was he willing to go farther to save the Union than to free the slaves? Did he value the Union more than liberty after all?" Chapter 10, pg. 219

"Emancipation, though perhaps a matter of situational ethics in the midst of war, would necessarily affect American society for all time to come. Lincoln was a practical man, all right, but he did occasionally think about the country's 'permanent future condition.' He saw no danger in the temporary suspension of habeas corpus during rebellion on invasion, but the case of black people was clearly different. Only rigid safeguards would

protect freedmen from popular race prejudice and possible reenslavement. Black freedom might prove as temporary and situational as the whites' brief loss of customary liberties during the Civil War. So Lincoln's thoughts necessarily turned to a constitutional amendment to end slavery in the United States." Chapter 10, pg. 221

Topics for Discussion

What makes Abraham Lincoln dictatorial without being a dictator?

How does Woodrow Wilson in World War I vindicate Lincoln in the Civil War?

How does guerrilla warfare challenge Union forces enough to come close to abandoning the norms of "civilized warfare"?

Should the Union have dealt more directly with the phenomenon of blockade-running" professional sailors?

How does the Declaration of Independence have priority over the Constitution in Lincoln's view?

How do General Andrew Jackson's actions in New Orleans affect the course of debate over civil liberties in the Civil War?

How does the Emancipation Proclamation cause Lincoln to reconsider his views on the Constitution?