LINCOLN AND THE COURT[1]

REVIEWED BY MAJOR ROBERT C. STELLE[2]

My paramount object in this struggle is to save the Union, and is not either to save or to destroy slavery. If I could save the Union without freeing any slave I would do it, and if I could save it by freeing all the slaves I would do it . . . . What I do about slavery, . . . I do because I believe it helps to save the Union.[3]

I. Introduction

The challenge of protecting civil liberties during war is not a new issue. Tensions between the competing interests of protecting these fundamental rights and effectively prosecuting a war have been part of our political landscape for many generations. Today, as our national leaders grapple with this issue once again in the context of the ongoing overseas contingency operations, the Civil War era provides an excellent example from which we can draw many lessons.

In *Lincoln and the Court*, a meticulously researched, well-organized, and engaging narrative, author Brian McGinty provides much more than just another history book.[4] His detailed account of executive and judicial decision-making in a time of national crisis reminds us of just how difficult some of these issues can be. Likewise, his insight into President Lincoln's relationship with the Supreme Court and the politics of his judicial appointments serves to remind us that personal agendas and partisanship must always be taken into account. Indeed, the Civil War marks one of the most tumultuous times in the history of our constitutional democracy. The President was determined to save the Union; many others, including some on the Court, were equally as determined to uphold the institution of slavery.

McGinty's work is extremely useful for today's practicing Judge Advocates, providing an excellent historical reference for us to better understand the constitutional nuances implicated by our conduct in the Global War on Terrorism. This book review not only summarizes the key points of *Lincoln and the Court*, but also discusses and builds upon the author's analysis of one of today's most difficult legal issues: our continuing efforts to strike a balance between the protection of civil liberties and the exercise of executive authority in a time of war.

II. Summary of the Book

One central theme in McGinty's book is that judges are human, a fact that "inevitably enters into even the most careful judicial decision."[5] By synthesizing an amazing collection of primary and secondary sources, he presents the "Supreme Court [J]ustices of Lincoln's time as living and breathing human beings, . . . attempting to live up to their judicial oaths, sometimes failing but mostly succeeding, shaped by . . . the pressures of the war."[6] As the book progresses, McGinty provides a detailed background for each of them as they are introduced into the story.[7]

As for the Civil War itself, McGinty argues that it "was, *at its heart*, a legal struggle between two competing theories of constitutional law."[8] One camp believed that the United States was a loosely configured "league of sovereign states whose legal ties were severable at any time and for any reason,"[9] while the other felt that the nation was a "permanent union of

---

[1] BRIAN MCGINTY, LINCOLN AND THE COURT (2008).

[2] U.S. Army. Currently assigned as Special Prosecutor, U.S. Army Legal Servs. Agency, with duty at Fort Bragg, N.C. LL.M., 2009, The Judge Advocate General's Legal Ctr. & Sch., U.S. Army, Charlottesville, Va. The author wishes to thank Mr. Frederic L. Borch, historian of the U.S. Army Judge Advocate General's Corps, for his insights and advice during the preparation and editing of this book review.

[3] Letter from President Abraham Lincoln to Horace Greeley (Aug. 22, 1862), *in* 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN388 (Roy P. Basler ed., 1955), *available at* http://home.att.net/~rjnorton/Lincoln78.html.

[4] MCGINTY, *supra* note 1.

[5] *Id.* at 10 (quoting WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 222 (1998)).

[6] *Id.*

[7] *See infra* notes 24, 43 and accompanying text..

[8] MCGINTY, *supra* note 1, at 1 (emphasis added).

[9] *Id.*

states, . . . tied together by . . . firm bonds of nationhood."[10] Indeed, Lincoln believed that the Union was perpetual and existed *before* the Constitution.[11] As he stated in his First Inaugural Address:

> [W]e find the proposition that, in legal contemplation, the Union is perpetual, confirmed by the history of the Union itself. The Union is much older than the Constitution. It was formed, in fact, by the Articles of Association in 1774. It matured and continued by the Declaration of Independence in 1776. It was further matured, and the faith of all the then thirteen States expressly plighted and engaged that it should be perpetual, by the Articles of Confederation in 1778. And, finally, in 1787, one of the declared objects for ordaining and establishing the Constitution was, *to form a more perfect Union.*[12]

Throughout his book, McGinty details how this fundamental difference of interpretation, starkly reflected in the personalities on the Court, played a critical role in the deliberative process for many of the era's key decisions.[13]

The first of these critical opinions was the infamous *Dred Scott* case.[14] Using persuasive evidence to support his position, McGinty depicts this case as one of the precipitating events that ultimately led to war. Ostensibly, the legal question before the Court was the constitutionality of legislation that restricted slavery in the western territories.[15] The case took on much greater significance, however, serving to clarify the legal and moral positions of both sides on the issue of slavery in general.[16] It held the nation's attention for more than three years, and the release of the Court's opinion in 1857 was one of the key factors that led to the Civil War.[17]

Speaking for a divided Court in *Scott*, Chief Justice Roger Taney asserted that the Constitution provided no rights whatsoever to persons of African descent.[18] Indeed, Taney wrote, the Founders did not intend to include persons of color when asserting in the Declaration of Independence that "all men are created equal."[19] Thus, under the law, "Africans . . . 'had no rights which the white man was bound to respect.'"[20]

Predictably, the case became a major point of public debate and ultimately helped propel Lincoln, an outspoken critic of the Court's ruling and of Chief Justice Taney, to the Presidency.[21] When he was inaugurated in 1861, the Court only had eight members,[22] seven of whom were Democrats who supported slavery.[23] McGinty provides a thorough background for each of the Justices in support of his compelling argument that personal history was a critical factor in explaining why members of the Court voted the way they did.[24]

Soon after Lincoln took office, the Civil War broke out with the rebel bombardment of Fort Sumter, South Carolina.[25] To put down the insurrection in the south, Lincoln ordered the mobilization of 75,000 militiamen in the north, including

---

[10] *Id.* at 2 (citations omitted).

[11] Abraham Lincoln, First Inaugural Address, *in* AMERICAN HISTORICAL DOCUMENTS, 1000–1904, at 313, 316 (Charles W. Eliot ed., 1980).

[12] *Id.*

[13] MCGINTY, *supra* note 1.

[14] Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[15] MCGINTY, *supra* note 1, at 48, 52.

[16] *Id.* at 46–51.

[17] *Id.* at 39 ("It would be an exaggeration to say that the *Dred Scott* decision *caused* the Civil War. But it certainly pushed the nation far closer to that war.") (quoting PAUL FINKELMAN, *DRED SCOTT V. SANDFORD*: A BRIEF HISTORY WITH DOCUMENTS 2 (1997)).

[18] *Id.* at 52 (citing *Scott*, 60 U.S. at 404). Justice Curtis issued a strong dissent and ultimately resigned over his disagreement with Chief Justice Taney. *Id.* at 56.

[19] *Id.* (citing *Scott*, 60 U.S. at 410–11).

[20] *Id.* (citing *Scott*, 60 U.S. at 407).

[21] *Id.* at 58–62.

[22] *Id.* at 21–22. Associate Justice Peter Daniel had died in 1860; his replacement had yet to be nominated by the time Lincoln took office. *Id.* at 22.

[23] *Id.* at 21.

[24] *Id.* at 14–17 (Taney, C.J.), 22–24 (McLean, J.), 24 (Wayne, J.), 24–25 (Catron, J.), 25–26 (Nelson, J.), 26 (Grier, J.), 26–28 (Campbell, J.), 28 (Clifford, J.).

[25] *Id.* at 66–67.

troops from Pennsylvania and Massachusetts.[26] To get from their locations in the North to where they were needed in the South, these Soldiers had to pass through Maryland, a state with strong southern sympathies.[27] As they passed through Baltimore, Union troop formations quickly became popular targets for both protests and violent attacks.[28] In response, based on his constitutional authority as Commander-in-Chief, Lincoln ordered the suspension of habeas corpus and gave military leaders authority to arrest and detain persons who supported the insurrection.[29] Lincoln was concerned that without the suspension of habeas, judges with southern sympathies could release "dangerous persons as quickly as the army could arrest and detain them."[30]

Very quickly, the President's order came under judicial scrutiny. After a resident of Maryland was arrested by the Army for treason and held at Fort McHenry, Chief Justice Taney, sitting as a federal circuit judge for Maryland, ordered the commander of the confinement facility to appear in Baltimore and to produce the detainee.[31] When the commander refused to comply, Taney issued an opinion declaring Lincoln's order illegal because, in his view, the power to suspend habeas rested with Congress, not the President.[32] Taney believed that "there was no place for . . . military detentions or military trials in places like Maryland. . . . [V]iolations of the criminal law had to be dealt with in the usual way before the usual courts."[33]

Taney's opinion, however, was issued as a federal court judge, not as an official Supreme Court decision, and Lincoln ultimately refused to comply.[34] Instead, relying on his constitutional authority to do so, the President authorized the Army to continue making arrests, suspend habeas when and where necessary, hold trials before military commissions, and hand out punishments.[35] These orders never came before the Court again until after the end of the war and, by then, Taney's primary legal objection was moot because Congress had specifically acted to ratify all orders of the President made after the start of the war.[36]

In addition to the suspension of habeas corpus several of Lincoln's other war measures eventually ended up before the Court. Among these were a challenge to the blockade of southern ports,[37] a challenge to the Legal Tender Act which authorized the creation of paper money as payment for all debts,[38] and a free speech case involving the Army's detention of an Ohio man for declaring his "sympathy for the enemy."[39] McGinty does an excellent job explaining the legal nuances and political dynamics of each of these important cases.

In each decision, the author argues, the Court "*could* have defied Lincoln's intention to preserve the Union and thwarted his efforts to 'defend' the Constitution."[40] The Court "*could* have struck down the president's major war measures . . . . [and made] it all but impossible for Lincoln to prosecute the war to a successful conclusion. But the Court chose *not* to do so."[41] While many other factors were involved, McGinty suggests that the primary reason for this was the President's appointment

[26] *Id.* at 66.

[27] *Id.*

[28] *Id.* at 66–67.

[29] *Id.* at 70–71.

[30] *Id.* at 69.

[31] *Id.* at 72–73.

[32] *Id.* at 73–74 (citing *Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487)).

[33] *Id.* at 78–79 (citing *Merryman*, 17 F. Cas. at 152).

[34] *Id.* at 87.

[35] *Id.*

[36] *Id.* at 83–84.

[37] *Id.* at 133–42 (referencing The Prize Cases, 67 U.S. (2 Black) 635 (1863)).

[38] *Id.* at 276–86 (referencing The Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1870)).

[39] *Id.* at 185 (referencing *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243 (1864)).

[40] *Id.* at 9 (emphasis added).

[41] *Id.* (emphasis added).

of five new Justices during his term in office.[42] Throughout his book, the author admirably details the political and personal issues involved with each of these five appointments.[43]

III. Analysis and Applicability to Current Events

In addition to being a superb history book, *Lincoln and the Court* is also a great supplement to the growing body of work exploring the interplay between the President's war powers and civil liberties. McGinty takes up this issue with his analysis of Ex parte *Milligan*[44] in which the *full* Court finally considered the detention and trial of a U.S. citizen by a military commission.[45] Mr. Milligan had been arrested in Indiana for "disloyal practices" and for membership in "a secret 'army' dedicated to ending the war on terms favorable to the South."[46] In finding his detention illegal, the Court pointed out that Milligan had not been a belligerent; to the contrary, "[t]here was no war in Indiana when Milligan was arrested, and the courts were open and functioning. [Thus], trial by military commission was neither necessary nor constitutionally permissible."[47]

Jumping forward almost eighty years, this precedent was put to the test when a group of German spies, including an American citizen, was captured on U.S. soil and tried before a military commission ordered by President Roosevelt.[48] Unlike *Milligan*, however, the detainees in Ex parte *Quirin*[49] were *active* belligerents who were eventually tried, convicted and sentenced to death for offenses against the law of war.[50] Under these facts, the Court had no difficulty distinguishing *Milligan* and upholding the jurisdiction of the military commission.[51]

Today, once again, the United States finds itself at war and the use of military commissions has returned as a hot topic of political and legal debate. How do *Milligan* and *Quirin* affect the current war and our efforts to try captured terrorists before military tribunals? McGinty attempts to answer this question by looking at some of the Court's key decisions since 9/11. While the Justices have repeatedly cited these two precedents, neither case has provided the sole basis for any of the Court's recent rulings. Indeed, the Justices dodged the issue altogether in one case by declaring that a captured terrorist had filed his petition in the wrong district.[52] Likewise, they avoided the tough constitutional issues in another case by finding statutory authority for the federal courts to exercise habeas jurisdiction over detainees held in Cuba.[53]

The Court, however, has been forced to tackle some of these issues. In a 2004 case, Justice O'Connor addressed *Milligan* and *Quirin* by explaining that both are valid law.[54] Justice O'Connor then elaborated that *Quirin* served to update *Milligan*, and the difference between the two cases turned "in large part on the fact that Milligan was not a prisoner of war."[55] As in *Quirin*, where a detainee is a prisoner of war, his detention as an enemy combatant is legal.[56] Justice O'Connor made it clear, however, "that a state of war is not a blank check for the President when it comes to the rights of [our] citizens."[57] But

---

[42] *Id.* at 291.

[43] *Id.* at 106–07 (Swayne, J.), 108–10 (Miller, J.), 113–17 (Davis, J.), 176–80 (Field, J.), and 212–21 (Chase, C.J.).

[44] 71 U.S. (4 Wall.) 2 (1866).

[45] MCGINTY, *supra* note 1, at 248–50, 257–60.

[46] *Id.* at 248.

[47] *Id.* at 258 (summarizing the facts of *Milligan*, 71 U.S. (4 Wall.) at 122–25).

[48] *Id.* at 308.

[49] 317 U.S. 1 (1942).

[50] MCGINTY, *supra* note 1, at 308–09.

[51] *Id.* at 309; *see also* JEFFREY F. ADDICOTT, TERRORISM LAW 88–89 (4th ed. 2007) (analyzing *Quirin* and its import in understanding the struggle between effectively prosecuting a war and protecting civil rights); REHNQUIST, *supra* note 5, at 221, 224–25 (detailed discussion reconciling *Milligan* and *Quirin*).

[52] *Id.* at 309–10 (citing Rumsfeld v. Padilla, 542 U.S. 426 (2004)).

[53] *Id.* at 310 (citing Rasul v. Bush, 542 U.S. 466 (2004)).

[54] *Id.* at 310–11 (citing Hamdi v. Rumsfeld, 542 U.S. 507, 521–23 (2004)).

[55] *Id.* at 311 (citing *Hamdi*, 542 U.S. at 522).

[56] *Id.* at 310.

[57] *Id.* at 311 (citing *Hamdi*, 542 U.S. at 536).

instead of addressing the specific limits of the President's authority, the Court again dodged the critical issue by rationalizing that the right of habeas corpus had not actually been suspended and once again finding statutory authority for a detainee to have access to the federal courts.[58]

Finally, in a highly fractured 2006 decision featuring six differing opinions, the Court granted relief to another military detainee being held for trial by a military commission.[59] As before, the Court found that the President could hold a detainee, but that he had no authority to try or punish him because the proposed military commission "did not satisfy the requirements of the Uniform Code of Military Justice and the Geneva Convention."[60]

The only real shortcoming of McGinty's book is his failure to include Congress's response to this series of cases in his analysis. When Congress passed the Military Commissions Act of 2006,[61] it established a procedure for the current military commissions which is "consistent with the requirements of Common Article 3 of the Geneva Conventions,"[62] and likely to survive appellate scrutiny in light of Justice O'Connor's assertion in *Hamdi v. Rumsfeld* that "the standards [of due process articulated by the Court] *could* be met by an appropriately authorized and properly constituted military tribunal."[63] Only time will tell. On 6 August 2008, the first military trial of a detainee in the Global War on Terrorism resulted in a conviction of the accused for providing aid to terrorism,[64] a case which is sure to become the subject of appellate litigation very soon.

The Global War on Terrorism may make civil liberties "more *vulnerable* to erosion, but the so-called 'slippery slope' argument which resists all changes in the law must be viewed against the clear and present threat [of terrorism]."[65] As 9/11 taught us, "[t]he all too real specter of mass casualties . . . and civil disorder absolutely demands that the federal government fulfill its primary mission of ensuring the safety of its citizens."[66]

IV. Conclusion

Lincoln and the Court is a valuable resource for today's Judge Advocates. Military commissions are in full swing, not only as a tool of national policy to aid in the prosecution of the Global War on Terrorism, but also as a means of distributing justice to those who wish to do us harm. This book provides insight into many of the legal issues associated with our current war, and gives readers an excellent historical context for understanding how previous generations have dealt with similar concerns.

---

[58] *Id.* at 305, 310–12.

[59] *Id.* at 311–12 (citing Hamdan v. Rumsfeld, 548 U.S. 557 (2006)).

[60] *Id.* at 311.

[61] ADDICOTT, *supra* note 51, at 107 (referencing Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948a–950p (2006))).

[62] *Id.*

[63] 548 U.S. 507, 538 (2004) (emphasis added).

[64] Alan Gomez, *Split* Hamdan *Decision Illustrates Cases' Difficulty*, USA TODAY, Aug. 7, 2008, *available at* http://www.usatoday.com/news/world/2008-08-06-gitmo_N.htm.

[65] ADDICOTT, *supra* note 51, at 160.

[66] *Id.*