H-Net Reviews
in the Humanities & Social Sciences

Burrus M. Carnahan. *Act of Justice: Lincoln's Emancipation Proclamation and the Law of War.* Lexington: University Press of Kentucky, 2007. 202 pp. $40.00 (cloth), ISBN 978-0-8131-2463-6.

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Published on H-CivWar (December, 2008)
Commissioned by Charles D. Grear

A Fresh Perspective on the Emancipation Proclamation

The Emancipation Proclamation altered the course and the very nature of the Civil War, while freeing millions of Americans from the degradation of slavery. With its publication, the Union's national war aim changed, adding freedom to the goal of preserving the Union. Over the course of time, scholars have examined and debated the Emancipation Proclamation from many angles, including the purely military, diplomatic, constitutional, and social. Some have criticized Lincoln for his lethargy in issuing it. With so many in chains, they argue, how could he have waited for so many months to set the slaves free? These advocates point out that, as president, Lincoln literally had the power at his fingertips and that he merely needed to pick up the pen on his desk to write the order. Some civil rights advocates, both then and in more recent times, have even accused Lincoln of secretly supporting slavery and of being a racist who only proclaimed freedom for the slaves once he had no choice but to do so.

In this new study, Burrus Carnahan, a lecturer at the George Washington University Law School and foreign affairs officer at the Department of State, argues that nothing could be further from the truth. He does so by examining the creation of the proclamation from a purely legal perspective. Carnahan's breaks entirely new ground in our understanding of the Emancipation Proclamation. The author carefully examines Lincoln's evolution from publicly proclaiming his inability to act constitutionally against slavery before the war's outbreak to crafting a far-reaching executive proclamation that not only altered the course of the war, but also, in Carnahan's view, made the goal of freedom from oppression an integral part of future American foreign policy. He shows us a Lincoln determined to find a way to emancipate slaves in a manner that could withstand any legal challenge, aiding not only the goals of the war effort but also leading to perpetual freedom for millions of Americans. The result is a fascinating examination of Lincoln's considerable political and legal acumen and, frankly, his ability to adjust and to learn, altering both the war aims of the nation and establishing his vision for its aftermath.

In his introduction, the author opens with a quote from Alexis de Tocqueville stating that virtually every political question in this nation eventually becomes "a judicial question" (p. 1). Clearly, Lincoln was very aware of this fact. As a result, his desire to free the slaves was muted by deep legal concerns. In his first inaugural, he addressed the issue stating that he had no legal grounds to impede or interfere with the South's peculiar institution, despite his clear and unambiguous record on the issue, which, at that very moment, was tearing the country apart. However, once Fort Sumter was fired upon, everything changed. Lincoln was urged to act immediately by abolitionists, almost as if to say that, now that the war was underway, what was there to stop him? After all, they might have been heard to argue, what was the worst that could happen? Carnahan demonstrates that, in Lincoln's mind, there was much that could happen.

Carnahan describes how Lincoln faced a Supreme Court still led by the pro-slavery chief justice, Roger Taney, a Southerner who had issued the infamous Dred Scott decision and the man with whom Lincoln was engaged in legal conflict over the suspension of habeas corpus. Lincoln realized that any policy he might issue with regard to emancipation must be capable of withstanding a challenge in the Taney court. However, Carnahan shows that, even early in the war, Lincoln realized there was a potential avenue for emancipation based on his ability to invoke the law of war as commander-in-chief. As Carnahan demonstrates, at the time, there was no formal international protocol governing the conduct of warfare, and, thus, the law of war was a hazy, undefined legal framework based upon nothing more than the concept

of the generally accepted behavior of civilized nations. However, as the author ably traces, in American jurisprudence and policy, the law of war had solid roots, planted by men like John Quincy Adams, which, on several occasions, had been successfully tested in the Supreme Court, including the court led by Chief Justice Taney. Nevertheless, the law of war applied only to belligerents and, as the war began, few in the Lincoln administration wished to accord the Confederate states that status, as it might amount to tacit admission that the Southern Confederacy was actually a sovereign state and not a collection of rebellious states that still were legally part of the Union.

Therefore, the issue of whether the Union was pursuing a war or countering a criminal conspiracy initially blocked the path to emancipation via the law of war. In the meantime, Congress passed a series of Confiscation Acts, which allowed the seizure and use of slaves as "contraband" property. However, Carnahan points out that these laws punished slave owners more than they offered freedom to slaves. Further, Lincoln wanted to do more than merely seize or deny access to "property." The South's status would eventually evolve toward belligerent status, as the author carefully outlines, simply because the practicalities of executing the war demanded it. The best example of this process that Carnahan offers is the status of Confederate prisoners of war. As soon as the first battles occurred, Union field commanders asked Lincoln and his War Department what they were to do with captive Confederate soldiers. Were they criminals to be turned over to Federal marshals, or military prisoners of war to be treated according to strict army regulations covering that status? Practicality quickly dictated the latter course, with proactive, enterprising Union officers having already made such moves before official policy was even issued. Before long, the official system of paroles and exchanges between the Federal authorities and the Confederate government was in place. Combined with a host of other issues, this led to the South's treatment as a belligerent.

Carnahan next ably reconstructs the crafting of the proclamation in a legal context based on the law of war. Lincoln would create a document that served as a weapon of war employed by the commander-in-chief. Lincoln's basis was that the Constitution "invests its commander-in-chief, with the law of war in time of war," (p. 135) a principle that even the Chief Justice Taney had previously recognized. As such, Lincoln could invoke all means to prosecute the war, short of those universally recognized as being cruel or inhumane. Therefore, he could emancipate the slaves held in the South, denying his enemy a valuable resource, and also allowing those now freed the opportunity to fight their oppressors, There was no emphasis on the slaves as property, but, rather, there was now a vision of them as an oppressed people for whom the war offered a chance, as Lincoln wrote, to be "forever free." (p. 165) At the same time, by articulating the proclamation as both a strategic weapon of war and a national war aim, Lincoln was acting well within the boundaries of his constitutional powers as commander-in-chief.

Carnahan also shows that the effects of the proclamation went beyond the Civil War and freedom for only Americans. Once the proclamation was in place, Carnahan points out that, under the leadership of Dr. Francis Lieber of Columbia College, the U.S. Army adopted General Order 100 in 1863, which, in essence, stated it was now the codified law of war within the U.S. Army that American military force would be used to liberate slaves and place such persons under their protection wherever they might operate. This far-reaching policy would continue as army guidance on the law of war well into the twentieth century. As Carnahan states, "Now freedom would follow the flag" (p. 130). Here, the author postulates that the Emancipation Proclamation did far more than free Americans in slavery, because future tenets of American foreign policy would be built upon its foundation–freeing the oppressed would become a legitimate American policy objective.

With excellent use of notes and appendices, Carnahan's study is clear, concise, and compelling. He adds immeasurably to Civil War historiography and Emancipation Proclamation scholarship. Further, his work enhances our understanding of Lincoln and the role he played in creating the role of commander-in-chief, as we know it today. It should spark renewed debate and study of the Emancipation Proclamation and further enhance Lincoln's status as the "Great Emancipator."

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Citation: Robert Thompson. Review of Carnahan, Burrus M., *Act of Justice: Lincoln's Emancipation Proclamation and the Law of War.* H-CivWar, H-Net Reviews. December, 2008.
URL: http://www.h-net.org/reviews/showrev.php?id=22936

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