H-Net Reviews
in the Humanities & Social Sciences

Stephen C. Neff. *Justice in Blue and Gray: A Legal History of the Civil War.* Cambridge: Harvard University Press, 2010. 350 pp. $45.00 (cloth), ISBN 978-0-674-03602-4.

Reviewed by Jonathan Lurie (Rutgers)
Published on H-Law (June, 2011)
Commissioned by Christopher R. Waldrep

Professor Neff has written a comprehensive legal history of the Civil War. It supplements but does not supplant J. G. Randall's classic text *Constitutional Problems Under Lincoln* (1926), while it goes far beyond Randall in scope. Yet, at the outset of his study Neff acknowledges that he has not examined the legal structure of the Civil War in its entirety. There is no sustained analysis, for example of the famous Confederate cotton strategy. Nor does Neff offer more than minimal treatment concerning the issues of conscription, prisoner exchange, and federal policy in the occupied territories. Further, the book emphasizes the Union side of the conflict rather than the Confederate, if only because it "is the law from that side … which has gone on to become part of our present legal heritage" (p. 3). Neff is not to be faulted for these omissions, as they make what is included more manageable for the reader.

An underlying theme of Neff's book concerns the inability of both North and South to conceptualize exactly what the conflict that embroiled them for four years, and at a cost of more than half a million lives, actually represented. Lincoln never wavered in his insistence that the war was primarily an attempt to save the Union, to prevent the South from secession, and nothing more. As late as 1862, abolition did not play a prominent role in his public statements. "I would save the Union," he wrote to Horace Greeley in August, 1862, "the shortest way under the Constitution.… My paramount object in this struggle is to save the Union and is not either to save or to destroy slavery."[1] But even as he wrote this famous letter, Lincoln had to confront what Neff well describes as "a dualistic Janus-faced affair"–sometimes using legal concepts related to sovereign rights, and sometimes using doctrines common to belligerent rights "as the legal basis for actions taken" (p. 4).

This duality permeates Neff's work. Should the Confederates be treated as the equivalent of foreign nationals and thus as belligerents in war, or as rebellious criminals attacking the Union as a sovereign entity? Lincoln consistently refused to recognize the South as anything but in rebellion, and his administration worked with diligence–and ultimate success–to insure that no sovereign power ever recognized the Confederacy. But at the same time, for the most part the Union commanders consistently treated Southern soldiers as if the traditional rules of war applied. This dual emphasis gave Lincoln's administration important flexibility as the war intensified. Secession might be illegal, but the conduct of those fighting for it came within recognized military parameters of international law; and Lincoln never wavered in his acceptance of this dichotomy. His administration consistently insisted that it was nothing more than "a unilateral humanitarian gesture, a matter of grace and free will on its part, and not of true legal entitlement on the part of the Confederates themselves" (p. 21).

Neff notes further that Lincoln employed a number of tactics to gain ultimate victory over the Confederacy. Early in the conflict, for example, in the famous case of a notorious Maryland malcontent, he suspended the writ of habeas corpus even though Supreme Court Chief Justice Roger B. Taney held that only Congress had such power. Lincoln was too able an attorney not to know that Taney's position was fundamentally sound in law. But with the decision of Maryland to remain a Union state far from certain in April, 1861, he acted; and the writ obtained by one John Merryman was ignored. On July 4th, in his first Message to Congress Lincoln urged his fellow countrymen to keep their priorities straight, a point well noted by Neff.

The president conceded that Congress could indeed suspend the writ, but what if Congress was not in session when the crisis arose? Lincoln could not believe that the framers "intended that, in every case, the danger should run its course, until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion" (p. 37). Indeed,

as the war lengthened into years, in 1863 Congress gave Lincoln enhanced authority concerning the writ. But the legislature shied away from a direct grant of presidential power. Rather it enabled Lincoln to block judicial action on a writ. When a prisoner was being held on presidential orders, the appropriate court had to be informed. After such action, "further proceedings under the 'writ' would be suspended." Authority to issue the writ in the first place remained with the courts, but the 1863 statute enabled Lincoln's administration to close off "habeas corpus actions in the federal courts as an effective avenue of opposition to the war policies of the Lincoln administration" (p. 39). Indeed, "during the war, no effective judicial constraint on vigorous executive action materialized" (p. 44).

Neff discusses other methods employed by the Union to gain victory besides military arms, including use of martial law. He explains the differences between its imposition and the writ of habeas corpus. Sometimes imposition of the one could include suspension of the other. In the area(s) where it might be imposed, and they usually had to be specifically identified, martial law might result in "a total replacement of the ordinary civil law by military rule." Suspending habeas corpus, on the other hand, was a more limited policy. During the Civil War, it dealt with "suppression of one particular remedial pathway for the contesting of one particular [alleged] wrong" (pp. 40-41).

Other wartime "innovations" employed by Lincoln included the imposition of a blockade as early as early as 1861 when Union ships on the east coast were few and far between, and calling out 75,000 militia troops without federal funds to pay for them. During the summer of 1861, Congress ratified Lincoln's actions "as if they had been issued and done under the previous express authority and direction of the Congress" (p. 32). Later, his administration utilized the concept of contraband of war to resolve the problem of escaping slaves. It printed paper money in the form of "greenbacks" to help finance the war. Further, the relevant statute mandated that with few exceptions such notes were to be considered legal tender–valid for most debts. Finally, in 1863, Lincoln issued his Emancipation Proclamation which, on the basis of his war power authority, freed all slaves in territories a) uncontrolled by federal forces, and b) in rebellion against the national authority.

It has frequently been asserted that in reality, the Proclamation failed to free a single slave. In fact, the constitutionality of this document was never established, and it may well be that in a legal atmosphere free from civil strife, his proclamation might not have survived rigorous judicial scrutiny. The issue was rendered irrelevant by adoption of the Thirteenth Amendment which went to the states before Lincoln's death. But the Proclamation's real significance far transcended what can be called the trite and superficial issue of legality. After all, like any other federal statute, Lincoln's Proclamation was presumed to be constitutional until declared otherwise, and this never happened. Lincoln had been thinking about emancipation even as he wrote the letter to Greeley, quoted above. Now, his message transformed the war, turning it from a battle to keep the Union together to a commitment of freedom for thousands of human beings, whose fate was now linked to that of the Union.

Neff explores other legal aspects of a conflict, starting with the law of war itself. He describes the way in which Union general Henry Halleck, himself a distinguished scholar in international law, approached Francis Lieber for a "convenient and usable summary of the laws of war–succinct but comprehensive, readable but detailed" (p. 57). Because Lieber restated and clarified rules of war already in effect, rather than introduce new laws of war, there was no need to submit his work to Congress–and in 1863, Lincoln distributed the Code to the Union Armies in the form of a general order. Neff discusses a number of legal concepts that were noted in Lieber's code, and figured in several instances during the Civil War.

He explains, for example, that military necessity does not refer "to an emergency situation in which transgressions of the laws of war are justified." In a strict legal sense, the term "refers to situations in which acts which are *permitted* [emphasis in original] by the laws of war in principle become exercisable in practice." In other words, to such measures "which are indispensable in securing the ends of the war, *and* [emphasis in original] which are lawful according to the … law and usages of war" (pp. 60-61). In 1864, General William T. Sherman justified removal of the entire civil population from Atlanta on the grounds of military necessity; a step endorsed by General Halleck. Closely related is the term "reprisal," or as some have described it, "victor's justice." Neff observes that reprisal is "intended to be a law enforcement mechanism … in response to some prior violation of the laws of war." It is meant less as a means for revenge, "but rather to induce the law-breaking side to alter its methods in the future." Lieber describes it as "a means of protective retribution," contrasted with "a measure of mere revenge." Neff comments, correctly, that "in practice, this fine distinction could sometimes be lost in the heat of conflict" (p.

63). At least two incidents at the end of the war could be described as protective retribution: the trial of the eight accused of participating in Lincoln's assassination, and the trial–also by military commission–of the Andersonville prison commandant.

Neff finds one characteristic of the Civil War "most drastic":the intentional destruction of supplies, accompanied by the "systematic destruction of civilian infrastructure and economic assets" (p. 98). By1865, such conduct had occurred on a scale thus far unmatched in American history. In 1861, for example, "Stonewall" Jackson destroyed more than 40 locomotives, and 356 railroad cars. He burned more than 20 bridges and destroyed over 100 miles of telegraph lines (p. 99). According to General Sherman, his famous march to the sea resulted in destruction of more than more than $100 million in property, with an additional $20 million of property taken for Union use (p. 100). Besides detailing other examples of such destruction, Neff also discusses Union occupation of Southern territory such as New Orleans in 1862. He explains and clarifies the differences between contraband of war, belligerent occupation, and conquest.

Neff has given his readers a systematic and thoughtful legal history of our civil war, even though his background is that of a reader in public international law at Edinburgh Law School. Not surprisingly, therefore, his command of the subject matter as briefly described above is impressive. But his book suffers from a lack of historical context. Two examples may suffice. Neff cites with virtually no analysis, the famous High Court decision of *Jones v. Alfred H. Mayer Co* (1968). He writes that "the critical difference between the Thirteenth and Fourteenth Amendment ... remains that, the Thirteenth Amendment clearly covers private action, while the Fourteenth Amendment covers only state action. It is therefore not impossible that the Thirteenth Amendment may harbor some surprises for the future" (p. 149). But both amendments contain the enforcement clause which, as Willard Hurst used to remind his legal history class, has potential for future congressional use which can only be imagined. Similarly, Neff fails to demonstrate Lincoln's change from an urbane to humane leader, who was himself transformed by what he led. As a whole, however, Neff's book is informative and well written, with much that attracts the reader.

Note

[1]. Lincoln to Horace Greeley, August 11, 1862, in *Collected Works of Abraham Lincoln*, ed. Roy P. Basler (New Brunswick, NJ: Rutgers University Press, 1953), vol. 5, 388.

If there is additional discussion of this review, you may access it through the list discussion logs at:
http://h-net.msu.edu/cgi-bin/logbrowse.pl.

Citation: Jonathan Lurie. Review of Neff, Stephen C., *Justice in Blue and Gray: A Legal History of the Civil War*. H-Law, H-Net Reviews. June, 2011.
URL: http://www.h-net.org/reviews/showrev.php?id=30744

This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 United States License.