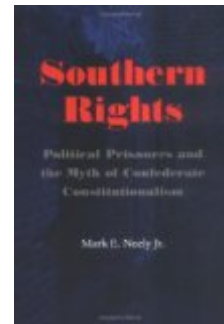




Mark E. Neely, Jr. *Southern Rights: Political Prisoners and the Myth of Confederate Constitutionalism*. Charlottesville: University Press of Virginia, 1999. vii + 212 pp. \$35.00 (cloth), ISBN 978-0-8139-1894-5.

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## Southern Rights, Confederate Wrongs

It is impossible to read Mark Neely's *Southern Rights: Political Prisoners and the Myth of Confederate Constitutionalism* without thinking of his earlier book *The Fate of Liberty: Abraham Lincoln and Civil Liberties*, which won the 1992 Pulitzer prize in history. In *The Fate of Liberty* Neely examined the court and prison records of Americans arrested in the North for various antigovernment activities to determine whether or not Lincoln's rather dark reputation for suppressing political dissent was justified. He found that it was not, and in so doing was rightly praised for his meticulous research and careful, balanced arguments. In *Southern Rights*, Neely's purpose is different, but his methods are much the same. Whereas in *The Fate of Liberty* he wished to determine whether or not Lincoln deserved blame for the state of civil liberties in the North, in *Southern Rights* he tried to discover whether or not Jefferson Davis and the Confederate government rate the generally positive treatment afforded them by Confederate apologists—and many scholars—for their record in preserving Southerners' civil liberties. "Most interpretations assume that restrictions of constitutional liberty went decidedly against the grain of the white people of the South," Neely wrote, "despite their other disagreements, on that point the historians have reached a tacit consensus" (p. 7).

Neely challenged this consensus by examining the available arrest records, court opinions, and other documents related to Confederate wartime arrests of civilians; in other words, he applied basically the same methodology which worked so well in *Fate of Liberty*. Focus-

ing particularly on cases involving suspension of the writ of habeas corpus, declarations of martial law, draft evasion, and other expressions of dissent, he found that the Confederate record was not much different from that of the Union. Confederate authorities, Neely argues, used much the same pragmatic, flexible approach characteristic of the Lincoln administration. "Though Confederate measures taken for internal security, when noticed at all, have been assumed to be necessary, and, if anything, too mild, there is evidence of political repression," Neely wrote (p. 132). People in the Confederacy were arrested for their political beliefs, jailed without benefit of the writ of habeas corpus, and subjected to the sometimes not-very-tender mercies of martial law and military rule.

Given the South's self-proclaimed role as a champion of individual rights, one might have expected an outcry of protests, or at the very least a robust conversation about civil liberties among Southern politicians, lawyers, and newspapermen. But Neely argues that this was not the case. Most white Southerners quietly acquiesced in the suspension of the writ, declarations of martial law, and other such measures. Neely identified a "longing for order in the South, released by independence from the North and quite at odds with region's fabled desire for liberty or 'southern rights'" (p. 34). He was struck by the contrast with the North, where Lincoln's various attempts to curb antiwar protests triggered a boisterous debate about civil liberties in wartime. "It seems remarkable that there are no celebrated cases challenging the power of the Confederate government to interfere with

the daily lives of its citizens," he wrote, "Confederate history does not have its equivalent of *Ex parte Merryman* or of General Andrew Jackson's fine for contempt" (p. 62). The Confederacy was no different from the North; it wanted to win the war. "Southern society was, at bottom, American and much the same as Northern society. It consisted of people who valued both liberty and order. They did not bridle more than normally at restrictive measures taken by the government to fight a war for national existence" (p. 79).

At its heart, *Southern Rights* is about what Neely perceives as an overweening Confederate streak of hypocrisy; the very title of his book is a statement of irony. Neely is impatient with what he characterizes as the "strident" and "noisy" posturing of Confederates on matters of civil liberties and individual rights. He is also deeply distressed by a tendency among Confederate historians to take Southerners' declarations of libertarianism at face value. "Antebellum politicians exaggerated sensitivity about southern rights as a means of combating northern power," Neely wrote, "but historians should not exaggerate as well" (p. 79). There is merit in this argument, and in the book as a whole. Professor Neely should be commended for pursuing this subject matter in the first place. Many scholars of Confederate history, and certainly the lay public, would much prefer to discuss battlefields and generals. Even the admirable recent trend in the field towards studies of social and cultural topics tends to neglect matters of law and constitutionalism. There is also a real paucity of primary source materials available, and these are of a generally fragmentary nature. Arrest records for Confederate political prisoners, for example, are scattered throughout various archive collections, often with no index or other finding aids. Confederate legal and constitutional history is a neglected topic for a very good reason, and Neely should be commended for exhibiting the patience and resourcefulness necessary to pursue this evidence.

In doing so, Neely shed light on some very dark and musty corners of Confederate history. He wrote a brilliant little chapter on the relationship between the prohibition of alcohol and martial law in the Confederacy. He introduced the reader to the almost completely unknown office of "habeas corpus commissioners," quasi-legal government officials who acted as "the War Department's shadow courts" (p. 80). Neely also examined the careers of some obscure but fascinating individuals like Thomas C. Hindman, the irascible military governor of Arkansas who unabashedly proclaimed the need to take harsh measures against Southern dissenters, and

North Carolina judge Richmond M. Pearson, who employed some very interesting legal arguments to block conscription in his state. It is also to Neely's credit that he does not shirk from pointing out what should have been obvious to any historian of the Confederacy, but which has been strangely overlooked; that the issue of civil liberties in the Confederacy should be seen as one involving black as well as white Americans. Neely points out that the vaunted Confederate concern for individual rights was a concern for white rights only. African-Americans didn't much enter the Confederate field of vision on this point. It is high time that Confederate history reconceptualize itself as a field involving black and white subjects alike, and Neely's work should help. These are all valuable contributions to the literature on the Confederacy. Nevertheless, *Southern Rights* does possess shortcomings. I suspect they are shortcomings produced by the book's close proximity to the methods and questions prevalent in *The Fate of Liberty*. Neely applied almost exactly the same questions to the Confederacy that he asked of Lincoln and the North, questions about martial law, suspension of the writ of habeas corpus, enforcement of conscription statutes, and arrest of civilian political prisoners. In doing so, however, he failed to examine some aspects of the Confederate experience that actually were quite different—not better—from the North. The widespread Confederate military practice of property impressment, for example, was a burning issue of personal rights vs. government power, yet Neely didn't address this subject. Neely also rarely mentions sequestration—the confiscation of Yankee-owned property in the South—a practice which took up the lion's share of the Confederate federal court system's time and resources throughout the war.

These issues were important, because much of what constituted a Confederate conversation concerning personal rights and government interference involved matters like sequestration and impressment, matters which have no direct counterpart in the legal history of the North. This might also have caused Neely to moderate his conclusion that the South had no real conversation about civil liberties. In fact, impressment cases raised serious concerns about individual rights in the South. And the Confederacy may well have had its version of *Ex parte Merryman* in a sequestration case called *James Louis Petigru vs. The Confederate States of America*, in which a South Carolina Unionist challenged the Confederate national government's right to conduct sequestration investigations which impinged upon Confederates' personal rights. Both impressment and sequestra-

tion involved property rights, and it is plausible to suggest that this question of property constituted a conversation about civil liberties which, while differing from the North's debate over habeas corpus and martial law, was in its way quite robust.

I also wondered if Professor Neely was quite fair in his analysis of Jefferson Davis. He is annoyed with invidious comparisons between Lincoln and Davis where civil liberties are concerned, taking special umbrage with the suggestion by many historians that Davis was less reluctant to suspend the writ and declare martial law because of "habitual and consistent constitutional principles" which Lincoln lacked. On the contrary, Neely argued, Davis was willing to repress political dissent when he thought circumstances warranted such action. "Lincoln was no 'dictator,'" Neely wrote, "and Jefferson Davis was no 'constitutionalist'" (p. 172). Perhaps unwittingly, Neely is actually rehabilitating Davis's reputation here, for the Confederate president has often been criticized for being so stiff and formal in his constitutional scruples that he lacked the necessary flexibility to meet Confederate war needs. Neely suggests that the opposite is true. But I think Neely presses this point a bit too far. He cuts Lincoln a great deal of slack, suggesting that, when Lincoln quickly moved to suspend the writ of habeas corpus in Kentucky and Maryland in 1861, he "recognized the realities of power." On the other hand, he suggests that Davis rather cynically "opted for a pose of dedication to civil liberty as a way of attracting these states to his side"(p. 154). Perhaps this made sense as good political strategy for Davis; but why should we assume it was a "pose"? Perhaps Davis pursued a policy here that

was, at least to his mind, both pragmatic and principled. Maybe he really believed himself to be both a defender of constitutional liberty and a flexible political leader. Lincoln scholars—Neely among them—have long suggested (and rightly so) that it is wrong to draw too cynical a distinction between principle and practical politics where Lincoln is concerned. Should it be less so for Davis?

Neely is impatient with the hypocrisy, in Confederates themselves and in much of Confederate history, which suggests an unusual anxiety for civil liberties in a Confederate nation which he believes was in fact all too comfortable with wartime violations of those liberties. On the whole this is laudable; it encourages scholars of Confederate history to press beyond the well-worn shibboleths of Lost Cause mythology. If such an approach can also strike a blow at the abominable history perpetrated (often all too successfully) by modern neo-Confederates, so much the better. Yet I wonder if those of us who write Civil War history might be better served by a more balanced, charitable point of view, suggesting that each side was afflicted not with hypocrisy, but with unresolved internal contradictions and tensions on a whole host of issues, including the proper balance between liberty and order. To this end, Professor Neely's *Southern Rights* is a useful beginning, a starting point for a conversation we should be having about the intellectual underpinnings of the Confederacy, and the Union as well.

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