

Book Note

LINCOLN AND THE COURT, by Brian McGinty¹

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THROUGHOUT *LINCOLN AND THE COURT*, Brian McGinty firmly relates the legal lessons established during the Civil War to America's current foreign adventures and its domestic struggle to preserve civil liberties in the face of grave national security threats. In analyzing the relationship between Abraham Lincoln and the White House and the Supreme Court, the topical question of presidential power during wartime is revisited in an invigoratingly different context. Although McGinty concludes that Lincoln ultimately proved victorious against the initially hostile Court in expanding executive prerogatives in areas such as civilian detentions, the seizure of private property, and fiscal policy, he also contends that America is fundamentally a land of law and, in its most difficult hours, maintains fidelity to the rule of law rather than permitting dictatorial efficiency.

Divided into eleven chapters, the book meticulously chronicles the pivotal actors, cases, and legal reasoning that appeared against the backdrop of civil infighting that reigned from the first state's secession through the Union's painful post-war Reconstruction period. In chapter one, McGinty reviews the circumstances of Lincoln's improbable ascension to the country's highest office, the crumbling relations between North and South over slavery's expansion and morality, and the conservative nature of an increasingly elderly Supreme Court stacked with Andrew Jackson appointees. This Court's bitterly divisive 1857 opinion in *Dred Scott*—perhaps the most infamous legal case in American history—is highlighted in chapter two. The case helped propel Lincoln, a Republican lawyer, into the White House and foreshadowed the national disintegration.

Like the second chapter, parts four, seven, and eight address less presently relevant topics. Respectively canvassing the Congressional expansion of the Supreme Court in 1863; the death of the controversial chief justice, Roger Taney;

1. (Cambridge: Harvard University Press, 2008) 375 pages.

and the appointment of his successor, Lincoln's former Secretary of the Treasury, Salmon Chase, McGinty's analysis focuses on the President's volatile relationship with the Court. Once self-anointed as the bulwark against the executive's tendency towards collecting more power, the Court's dynamic evolved throughout the war to a more Union friendly stance as Lincoln appointees began to pack the bench's vacancies. For example, discussing the issue of states' rights versus federal authority, the elder judges of the Taney Court indicated their fulsome opposition to state succession, yet also opined that Washington had no constitutional right to militarily coerce the Confederacy back into the Union. Conversely, as the mantle of power shifted to the younger Chase Court, it affirmed Lincoln's seizure of power, which was needed to wage warfare against a rebellious domestic enemy without a constitutionally required Congressional declaration of war.

The remainder of the book, however, presses that the Court, despite providing for some excesses in the name of defeating the Confederate rebels, never abandoned its commitment to the rule of law. Here, the author's analysis echoes greatly with present American struggles against unconventional enemies in Iraq, Afghanistan, and at home, especially insofar as McGinty points to the Court's Civil War rulings as a guidepost for controlling abuses of power during wartime. McGinty emphasizes that in cases essential to the American legal lexicon such as *Ex parte Merryman* (1861) and *Ex parte Milligan* (1866), the Court ruled that the President lacks the constitutional power to suspend the writ of *habeas corpus* and that the wartime application of military tribunals to civilians and non-combatants while civilian courts are operational is unconstitutional. Additionally, the author suggests that if *Ex parte Vallandigham* (1863) had been properly treated, the presidential orders to indefinitely detain dissident Democrats found to be sympathizing with the South would have been struck down.

In the end, McGinty presses that the Court's Civil War decisions have new resonance within the current climate of the War on Terror as America debates over its ability to stifle basic domestic freedoms in the name of security. Indeed, the book notes that in the recent Supreme Court decision in *Hamdan v. Rumsfeld*, Justice Sandra Day O'Connor, applying *Milligan's* controlling holding, argued, "We have long since made clear that a state of war is not a blank cheque for the President when it comes to the rights of the Nation's citizens."² Ultimately, McGinty's book examines a different context to reinforce this same contention.

2. *Ibid.* at 311.