

Lincoln and the Court¹

Reviewed by *Captain Brett A. Farmer**

*[T]he lives, backgrounds, experiences, temperaments, and characters of the judges who sat on the Supreme Court during the time that Lincoln was president . . . are not only informative but also essential to understanding the decisions that the Court made and how the president and the Court interacted.*²

I. Introduction

In *Lincoln and the Court*, author Brian McGinty makes the case that while the fate of the Union was decided on the battlefield by the military personnel and other personalities with whom most Civil War buffs and historians are most familiar, the members of the Supreme Court also had a significant part to play. The Supreme Court's decisions on the legality of those men's actions ultimately preserved both the Union and the Constitution.³ As McGinty makes clear in his introduction, *Lincoln and the Court* is a book designed to "appeal to scholars and general readers, to lawyers, judges, and laymen, to those who are steeped in constitutional history, and those who know little about it."⁴ However, it is not a "law book."⁵ McGinty does not "analyze the great legal issues of the Civil War to the point of exhaustion,"⁶ but rather offers a survey of "the legal controversies that arose during the fighting."⁷ *Lincoln and the Court* presents these legal controversies in an easily digestible manner such that someone with a minimal background in constitutional law could follow along.

More importantly, however, *Lincoln and the Court* serves as an examination of the lives and personalities of the jurists and policymakers who resolved the legal issues of this period. McGinty largely succeeds in his goal of humanizing the members of the Court.⁸ Whereas libraries of books have been written about Lincoln's life, personality, opinions, and historical context, relatively little has been written about the men who sat on the Supreme Court at that time.⁹ As Daniel Hamilton notes, "the most innovative part of the book is to

put the Court in active juxtaposition to Lincoln, existing not as a foil for the President's ambitions but in its own right."¹⁰ For many readers, these justices are only names at the beginnings of judicial opinions, if even that. By understanding their lives, backgrounds, and personalities, "McGinty [brings] the Court to life and put[s] it back into the frame as a crucial actor during the war."¹¹ In the end, McGinty is successful in his "[attempt] to portray the Supreme Court justices of Lincoln's time as living and breathing human beings."¹²

II. Background

Brian McGinty is an author and attorney. He has written several books about American history and law during the Civil War era, including *John Brown's Trial* and *The Body of John Merryman: Abraham Lincoln and the Suspension of Habeus Corpus*.¹³

III. The Human Factor

One of the central themes of McGinty's book is that judges are not merely "cogs in an impersonal machine,"¹⁴ but flesh-and-blood human beings who are not always able to "overcome their emotions, [or] to apply the law dispassionately."¹⁵ McGinty believes that if the reader comes to know these justices as people then the reader can "better understand the arguments they advanced and the decisions they made."¹⁶

McGinty is largely successful in this endeavor. The book describes in detail the background of each justice who sat on the Supreme Court during Lincoln's presidency, and also provides illuminating and humanizing facts about them. Most will forever remember Chief Justice Taney for his

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

² *Id.* at 10.

³ *Id.* at 2.

⁴ *Id.* at 11.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 10.

⁹ Daniel W. Hamilton, *History: Getting Right Without Lincoln*, 45 TULSA L. REV. 715, 717 (2010) (reviewing *Lincoln and the Court* as well as other works in the context of their discussion of the important legal issues faced during the Civil War).

¹⁰ *Id.*

¹¹ *Id.* at 715.

¹² MCGINTY, *supra* note 1, at 10.

¹³ BRIAN MCGINTY, *JOHN BROWN'S TRIAL* (2009); BRIAN MCGINTY, *THE BODY OF JOHN MERRYMAN: ABRAHAM LINCOLN AND THE SUSPENSION OF HABEUS CORPUS* (2011).

¹⁴ MCGINTY, *supra* note 1, at 10.

¹⁵ *Id.*

¹⁶ *Id.*

racist pronouncements in the *Dred Scott* decision.¹⁷ McGinty shows that at the time he rendered his opinion, Taney was an old man whose adult daughters were entirely dependent upon him for support,¹⁸ who was well-respected by his peers,¹⁹ and who had previously argued against slavery as an attorney earlier in his career.²⁰ By the end of the book, which concludes with a chapter about the heated debate that took place in the Senate about whether or not to erect a bust of Chief Justice Taney,²¹ McGinty has presented Taney as a deeply flawed, but “great and able and learned man,”²² who made an “erroneous” and “discreditable” decision.²³

IV. Shaping the Court

Another one of McGinty’s key themes is how Lincoln used his Supreme Court nominations to shape a court that seemed hostile to his wartime policies at the beginning of his presidency, but that upheld most—though not all—of his policies afterward. As Robert Grier Stephenson observes, “by the time of Lincoln’s assassination in April 1865, the Court that had been predominantly Democratic in its membership and perceptibly pro-Southern in slavery cases became mainly a Republican, or Lincoln, Court.”²⁴ While Lincoln did have some success appointing justices whose jurisprudence was in line with his and who would support his policies, they were not mere “hacks” who rubber-stamped all of Lincoln’s initiatives.²⁵

Some scholars contend that the Supreme Court is a “majoritarian” institution. In the opinion of Lucius A. Powe, Jr., the Court is nothing more than “part of a ruling regime doing its bit to implement the regime’s policies.”²⁶ As Donald Grier Stephenson explains,

[I]nstead of persisting in a counter-majoritarian role at odds with the popular

mood, the Court eventually reverts to a legitimizing role in which the Justices place the stamp of approval on policies that once may have been deemed constitutionally unacceptable. The proposition assumes that time is on the side of the dominant political party, either precipitating a change of mind by a previously contrarian Bench or allowing the appointment of Justices who reflect the values of the ruling coalition.²⁷

Some of the Court’s decisions during the Civil War and Reconstruction eras do seem to support Stephenson’s cynical assessment, but others emphatically do not. McGinty attributes the Court’s rulings favorable to the Lincoln administration during the Civil War to the Court’s efforts to “support the government of which it was a part, oppose the secession, and help the president bring the war to an end.”²⁸ According to McGinty, the Court was willing to “‘stretch’ constitutional doctrine” to preserve a Union that was facing an existential crisis.²⁹ However, after the war, the Court seemed more willing to declare Lincoln’s wartime measures to be unconstitutional.³⁰

One of the Court’s controversial decisions during the war came in the *Prize Cases*, the outcome of which McGinty feels was as important as any battlefield victory for the Union.³¹ In 1863, during the height of the Civil War, prior to Lincoln’s reelection, and at a time when public opinion about the war was decidedly mixed, the Supreme Court held that Lincoln’s order for the Navy to blockade Southern ports was within his Constitutional powers.³² Of the five justices who ruled in favor of Lincoln’s actions, Lincoln had appointed three.³³ This does support Stephenson’s claim that newly appointed justices will reflect the values of the ruling coalition.

However, the Court did not rubber-stamp all of Lincoln’s policies, particularly after the war, even though Lincoln had managed to appoint five justices to the Court by that time.³⁴ In the 1866 case *Ex parte Milligan*, the court unanimously held that the President’s establishment of

¹⁷ See *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857) (Chief Justice Taney stated in his opinion, among other things, that people of African descent were “considered as a subordinate and inferior class of beings,” and were “so far inferior that they had no rights which the white man was bound to respect.”).

¹⁸ MCGINTY, *supra* note 1, at 201.

¹⁹ *Id.* at 20.

²⁰ *Id.* at 15.

²¹ *Id.* at 292 (The Senate in earlier years had voted to erect busts of all the previous Chief Justices without incident but many in the Senators in 1865 were still outraged by Taney’s opinion in *Dred Scott*.)

²² *Id.* at 293.

²³ *Id.* at 295.

²⁴ Donald Grier Stephenson, *The Judicial Bookshelf*, 35 J. SUP. CT. HIST. 267, 270 (2010).

²⁵ MCGINTY, *supra* note 1, at 28.

²⁶ LUCIUS A. POWE, JR., *THE SUPREME COURT AND THE AMERICAN ELITE, 1789–2008*, at ix (2009).

²⁷ Stephenson, *supra* note 24, at 270.

²⁸ MCGINTY, *supra* note 1, at 190.

²⁹ *Id.* at 142.

³⁰ See *Ex parte Milligan*, 72 U.S. 2 (1866) (holding that civilians could not be tried by military tribunal in jurisdictions where the civilian courts were still functioning); see also *Hepburn v. Griswold*, 75 U.S. 603 (1870) (holding that the Legal Tender Act was unconstitutional with respect to preexisting debts).

³¹ MCGINTY, *supra* note 1, at 1.

³² *Id.* at 137.

³³ *Id.* at 140.

³⁴ *Id.* at 168.

military tribunals was unconstitutional in jurisdictions where there was no active insurrection and where there were functioning courts.³⁵ Justice Davis, a Lincoln appointee and the author of the opinion striking down the military tribunals' authority, had been so close to Lincoln that he was Lincoln's campaign manager during the 1860 election. He was Lincoln's executor after his assassination.³⁶ With the war over, the Republicans firmly in control of the government, and anti-Southern sentiment still running high in the country,³⁷ the Court clearly ruled against the tide of public opinion and ruled "according to the light which God [had] given [them]."³⁸ In McGinty's view, *Ex parte Milligan* "stands for the proposition that partisan loyalties will not trump important constitutional principles."³⁹

Another example of the Court's willingness to rule "at odds with the popular mood"⁴⁰ occurred in 1871 when the Court decided by four votes to three that Lincoln's Legal Tender Act, a fundraising measure used during the Civil War in which the government issued paper money that was not backed by gold, was unconstitutional.⁴¹ The author of the opinion, Chief Justice Salmon P. Chase, a Lincoln appointee, had been a staunch advocate of the Legal Tender Act when he served as Lincoln's Secretary of the Treasury during the war.⁴² Justice Field, another Lincoln appointee, concurred in Chase's opinion.⁴³ While the holding was narrow in scope and applied only to debts that arose before the passage of the act that were paid with the government-issued "greenbacks,"⁴⁴ it reaffirms McGinty's position that justices make up their own minds and are not "cogs in [a] . . . machine."⁴⁵

VI. Conclusion

Lincoln and the Court effectively summarizes the constitutional issues that President Lincoln addressed and the manner in which he addressed them during his time in office. It also provides sufficient historical context to understand those issues both before and after Lincoln's presidency. McGinty's extensive bibliography, which

includes first-person accounts, personal letters, manuscripts, contemporary newspaper articles and biographies, as well as modern scholarly works, provides a holistic view of the constitutional challenges of the period. Readers looking for not only a scholarly discussion of the constitutional issues, but also something more than a mere dry recitation of historical cases and their holdings, will be pleased by McGinty's clear, lively writing and his examination of some of the characters and personalities who wrestled with those issues.

For judge advocates, there is a wealth of discussion about the legal issues faced by Lincoln and the Supreme Court. The struggles they faced over matters of presidential wartime powers and civil liberties still resonate today.⁴⁶ The insight that McGinty provides into their reasoning can help modern judge advocates inform and refine their own opinions in this ever-contested field of law. The afterword to *Lincoln and the Court*, entitled "The Legacy," should be of particular interest to modern-day judge advocates. In this section, McGinty compares and contrasts the Court's rulings on the Civil War era cases previously discussed with the modern Court's holdings in some key areas of constitutional interpretation. As presidential wartime powers and civil liberties during times of war are likely to be hot-button issues for some time, it is important for judge advocates, acting as the legal advisors to those who execute national policy, to understand the evolution of those issues.

Finally, judge advocates, just like Supreme Court justices, have a duty to uphold the law. Just as the members of the Court seek to apply the law dispassionately and not succumb to outside influences like a hostile public or a powerful executive branch, so too must judge advocates have the courage to settle issues and provide advice according to their own judgment and knowledge in the face of sometimes demanding or obstinate commanders.

³⁵ *Id.* at 258.

³⁶ *Id.* at 247.

³⁷ *Id.* at 265.

³⁸ *Id.* at 264 (quoting 6 CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, 1864–88, pt. 1, at 234 (1971)).

³⁹ *Id.* at 314.

⁴⁰ Stephenson, *supra* note 24, at 270.

⁴¹ MCGINTY, *supra* note 1, at 281.

⁴² *Id.* at 282.

⁴³ *Id.* at 284.

⁴⁴ *Id.*

⁴⁵ *Id.* at 10.

⁴⁶ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (holding that a U.S. citizen who is detained as an enemy combatant must be able to challenge the factual basis for his detention); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding that the military commission established to try and punish an enemy combatant violated the Uniform Code of Military Justice and did not satisfy the Geneva Convention); *Rasul v. Bush* 542 U.S. 466 (2004) (holding that the federal *habeas* statute entitles enemy combatants held at Guantanamo Bay, Cuba to contest the legality of their detention in federal court); Wayne McCormack, *Emergency Powers and Terrorism*, 185 MIL L. REV. 69 (2005) (discussing the extent of executive powers during times of national emergency not amounting to war); Donald Gutierrez, *Universal Jurisdiction and the Bush Administration*, HUMANIST, Mar. 1, 2007 (discussing the perceived radicalism of the Patriot Act).