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## Book Review: Lincoln and the Court by Brian McGinty

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opponents, but also from experienced allies . . . experts in the traditionally conservative military and the FBI, and perhaps most surprisingly, from a series of loyal Republican lawyers inside the administration itself. The number of patriotic critics . . . who threw themselves into trying to head off what they saw as a terrible departure from America's ideals, often at enormous price to their own careers, is both humbling and reassuring.

Of course, it's hard to know if events unfolded as Mayer describes them. It may be tempting to dismiss her work as a liberal polemic on a conservative administration. Although the genesis of the book is a series of articles she wrote for *The New Yorker*, a cursory glance at the book's endnotes reveals the great extent to which she relied on the work of others. The preliminary chapters are sprinkled with textual references to Bob Woodward's books, Steve Coll's *Ghost Wars*, and others. In a sense, *The Dark Side* is a work of historiography. But, despite the pull to dismiss it as merely political or overly reliant on secondary material, the book's primary sources and gifted integration of other's work make such a dismissal difficult.

Mayer's synthesis of her material is skillful and persuasive. But, *The Dark Side* is also an important read because it confronts us with a stark reality—respect for the rule of law may mean very different things to different people. Mayer's book demonstrates that commanders have an enduring need for independent legal advice at all levels. Ultimately, Mayer makes a compelling case that maintaining respect for the law, even in face of the unparalleled emotion of war, preserves the ability to fight and moves us one step closer to eviscerating the advantage of terrorism.

To see an interview with Jane Mayer discussing her book, follow the link to C-SPAN:

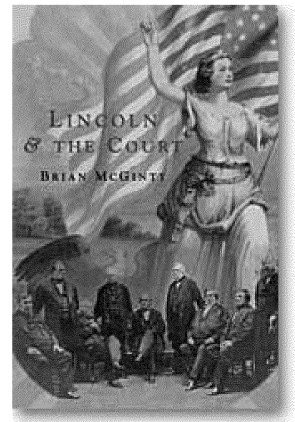
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## Lincoln and the Court

Brian McGinty, (Harvard University Press, \$28)

*Review by Major Joshua E. Kastenberg, Staff Judge Advocate, Joint Task Force-Global Network Operations*

Our generation has become familiar with prominent Civil War era cases such as *Ex Parte Milligan*, the *Prize Cases*, and *Ex Parte Vallandigham* in large part because the post 9/11 legal landscape has brought comparisons of the wartime conduct of the Lincoln and Bush administrations and commentary on the Supreme Court's reaction to each. *Ex Parte Milligan*, the *Prize Cases*, *Ex Parte Vallandigham*, and a number of other decisions shaped and governed the executive branch's authority to conduct military operations during the United States' greatest national emergency.



Most modern historic treatises address these cases in light of Lincoln's military and political strategy. Moreover, contemporary use of these cases has caused a reexamination of separation of powers and the Constitution's stretch to captured combatants, lawful or otherwise. Few of these cases were ever judicially repudiated (though the legislative branch has certainly modified outcomes over the past century and a half). But, until McGinty's book, no modern study has ever examined Lincoln's relationship to the justices on the Court. McGinty does a superb job of it.

The primary strength of McGinty's book is in its approach to legal history. Lawrence Friedman, the late twentieth century's foremost legal historian, argued that legal history is more than reciting the holdings of decisions or the results of trials. Rather, he claimed it's a study of the interaction of personalities and the formation of law. *Lincoln and the Court* follows this model, lending context to the Court's critical decisions and their effects. McGinty's description of the judges sitting on the Court, their ideologies, and their transition to supporting Lincoln or remaining silent, is successfully woven throughout the book.

Among the book's strengths is its dispassionate presentation of conflicting viewpoints. For instance, historians have long assumed pro-southern Democrats remaining in the Union, "Copperheads," were a nuisance falsely "conflated" as a national threat to serve Lincoln's war aims. To false conflation subscribers, this resulted in unlawful military arrests and trials of such persons as the former congressman, Clement Vallandigham. Without judgment, McGinty incorporates recent credible work refuting the conventional view on the Copperhead threat and addresses the issue even-handedly.

Early on, McGinty makes several points that have been forgotten by critics of Lincoln's expansion of military law during the war. Chief Justice Taney, now mostly known for authoring the repugnant *Dred Scott* decision, unwittingly enabled Lincoln to exert the executive branch's authority toward emancipation, military trials of civilians, and military governance over captured southern geography. McGinty rightly argues that in *Luther v. Borden*, a case arising from an 1841 working class insurrection in Rhode Island, Taney's view of the population's right to a Republican government included the authority of a government to preserve that right through martial law and other undemocratic means. In that case, Taney had, in fact, sided with a conservative governor who had ordered the state militia to crush the rebellion.

McGinty points out that Taney's relationship with Lincoln was not, at first, antagonistic, but Lincoln's conduct in *Ex Parte Merryman* created judicial mistrust. He also successfully argues Taney's personal courage in confronting Lincoln in the case. False rumors abounded that Lincoln intended to imprison Taney, yet Taney travelled alone and was never cowed into submitting to Lincoln's wishes. On the other hand, McGinty's rightly faults Taney as never understanding the gravity of the South's insurrection and what it meant to the Constitution. Wedded to slavery, Taney's judgment was always at odds with any concept of increased executive authority in wartime.

The book uniquely addresses the Supreme Court's brief increase to ten justices. Lincoln's detractors accused him of seeking a tenth justice to ensure the continuance of radical Republican policies. Lincoln's selection, Stephen J. Field, lent some credibility to Democrat criticism, but only because Field's brother was a prominent abolitionist. Yet, McGinty proves the truth of Lincoln's argument that the Court needed an additional judge because of increased workload and a western judge to parse conflicting Mexican and Spanish land claims. Ultimately, Stephen Field did not support all of Lincoln's policies and, indeed, later sided with *Plessy v. Ferguson's* establishment of the "separate but equal doctrine."

*Lincoln and the Court* does have weaknesses. For example, McGinty's primary source material fails to make extensive use of the personal correspondences of some of his book's subjects, like Associate Justice James Moore Wayne, the author of *Ex Parte Vallandigham*. A Georgian whose son fought for the Confederacy, Wayne remained on the bench as one of Lincoln's allies. The justice's extensive letters are readily available to the public at the Georgia Historical Society, and they provide great insight into Wayne's thought processes. Additionally, McGinty did not make use of the personal correspondences of James Speed, Lincoln's second attorney general, or General Joseph Holt, the Army's Judge Advocate General. Both collections have extensive correspondences related to the subject matter in McGinty's book. But, most historic works contain some shortcomings, and McGinty's are outweighed by the book's strengths.

This book is unique in its approach and topic. Its quality ranks with other recent works on Lincoln and the Civil War such as Doris Kearns Goodwin's *Team of Rivals*, despite its minor shortcomings. The real winner in this book is the reader. Anyone interested in the expansion of military law, particularly in the post-9/11 world, will find great merit in McGinty's work.

*Have you read a book recently that is worthy of attention from others in the JAG Corps? Reviews and recommendations may be submitted to the editor, Captain Jodi Velasco, at [jodi.velasco@maxwell.af.mil](mailto:jodi.velasco@maxwell.af.mil).*