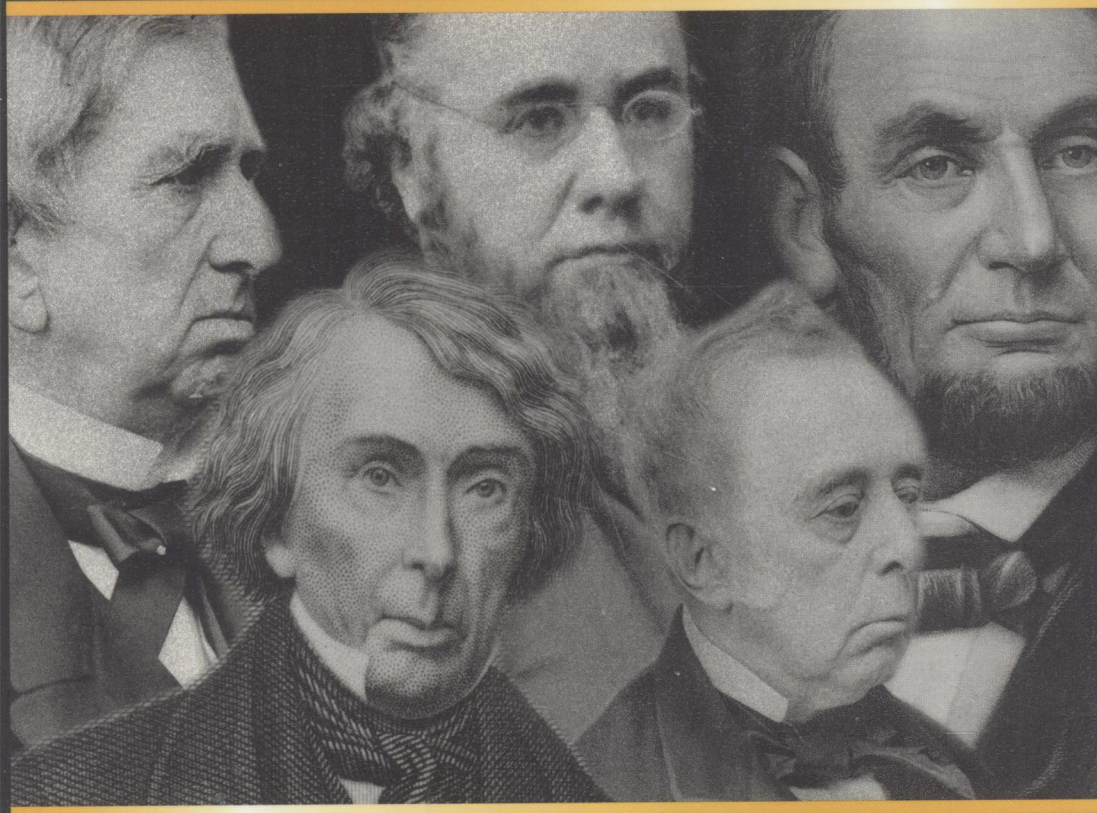
ARTHUR T. DOWNEY



CIVIL WAR LAWYERS

CONSTITUTIONAL QUESTIONS, COURTROOM DRAMAS, AND THE MEN BEHIND THEM

ABA Defending Liberty Pursuing Justice

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Introduction

The history of the American Civil War period is often focused exclusively on military events. But other perspectives are clearly relevant: economic, social, racial, feminist, moral. An important component of Civil War history that is sometimes overlooked and has rarely been treated in a comprehensive fashion is the legal issues and the lawyers who addressed those issues.[1] The purpose of this book is to demonstrate how important the law and the lawyers were during that tortured period of United States history. The law, and the lawyers, dominated many of the fundamental elements of American life—social relations, economics, and the conduct of the War itself. Crucial Supreme Court arguments and Executive decisions on lofty constitutional issues, as well as the tense courtroom trials where individual lives were at stake, shaped the War and shaped the legal landscape in all the years that followed.

Some of the broad legal questions of the Civil War period still have relevance today. For example: How expansive are the powers of the Executive in wartime? To what extent may civil liberties be curtailed in light of threats to national security? Can citizens who are not in the military be tried by military commissions when civil courts are available?

Lawyers in the Mid-Nineteenth Century

The leadership in America for the first several generations was composed, to an extraordinary degree, of lawyers.[2] During the first seventy-six years the United States existed, from 1789 to 1865, there were sixteen presidents—twelve of whom were lawyers.[3] In contrast, during the most recent seventy-eight years (1932–2010), the trend was almost completely

reversed. There were fourteen presidents during this period, only five of whom were lawyers.[4]

The trend is the same with respect to the Congress. The Thirtieth Congress (1847–1849), in which Lincoln served as a member from Illinois, was composed predominately of lawyers—74 percent. Businessmen constituted 16 percent, farmers 7 percent, and educators and clergymen 1 percent. In 1845, 95 percent of the U.S. Senators had legal training.[5] In contrast, in the One Hundred Eleventh Congress (2009–2011), for the first time, the leading occupation was "public service/politics," and law is the second-ranking occupation, almost tied with business and education.[6] Thus, since the 1840s, the dominance of lawyers in the Congress has vanished, and this is consistent with the sharp decline in lawyer-presidents.[7]

Why is it that lawyers so dominated public and political life during the first third of American history? Some insight is offered in an excellent biography of lawyer-President Andrew Jackson:

> The legal profession, in the 1780s as later, was to American society what the clergy and the military were to certain other countries and cultures: an avenue of advancement for those with talent and ambition but with neither wealth nor connections. Protestant America had no church hierarchy to speak of, precluding the priestly route to success, and it had no standing army, making a military career unappealing. Yet every society requires means for the humble to get ahead, lest their frustrated ambitions destabilize the status quo. In America, the law long served that purpose.[8]

Needless to say, hostility toward lawyers also flourished, especially toward the lawyer-politicians. One Democratic legislator from Massachusetts claimed in 1834 that the lawyers' union deliberately monopolized political office.[9] Years before he became Lincoln's vice president, Andrew Johnson, during his 1851 congressional race, pointed out that all but 23 of the 223 members of Congress were lawyers. Johnson asserted that the "laboring man of America is ignored, he has no proportionate representation, though he constitutes a large majority of the voting population." Johnson felt that lawyers were corrupted by their reading of English law books, which led lawyers to appreciate the British government more than their own.[10]

During the formative period of the United States, and well into the nineteenth century, there were no law schools as we know them today, and there were no bar exams. Lawyers usually learned through apprenticeships with established lawyers. In 1840, only eleven out of thirty states required all lawyers to complete an apprenticeship.[11] Lincoln, for example, was admitted to the Illinois bar without any written examination. He fulfilled the statutory requirements of a certificate of good moral character

offered by a county judge, and he then passed a perfunctory examination given by two justices of the state supreme court, and then in 1837, he was "enrolled" by the clerk of the state supreme court, i.e., he was admitted to the bar.[12]

The lives of Americans in the early and mid-nineteenth century, and lawyers in particular, were linked to their own state. The national government was remote, and during much of the first half of the nineteenth century, it was seen as weak. In the 1830s, Alexis de Tocqueville noted that

> the Union executes vaster undertakings, but one rarely feels it acting. The [state] government does smaller things, but it never rests and it reveals its existence at each instant. . . . The Union assures the independence and greatness of the nation, things that do not immediately touch particular persons. The state maintains freedom, regulates rights, guarantees the fortune, secures the life, the whole future of each citizen.[13]

For lawyers, the focus within their state was the county courthouse.

> Lawyers formed a unique kind of community; in some states they traveled in groups, "riding circuit" from county seat to county seat, following a court that was equally peripatetic. They stayed in local inns, sometimes sharing a room and even a bed with their fellow travelers after an evening of food and drink.[14]

As a result of the close relationships fostered by the nature of law practice at the time, many of the lawyers who were prominent during the Civil War period were aware of each other professionally and had also practiced law and tried cases together—sometimes against each other.[15] While they did not reach the same political or legal conclusions, most of them were trained and practiced their craft in a similar fashion: they read Cicero, Blackstone,[16] and Kent, and tried to think dispassionately and analytically. (Appendix 2 sets out a dozen examples of how the professional lives of many of the important lawyers intersected.) The lawyers got to know each other's thought processes, as well as virtues and vices.[17] For example, Chief Justice John Marshall arranged accommodations for the Supreme Court Justices in one boarding house to foster fellowship; when it opened in 1820, the Indian Queen Hotel near Capitol Hill was the most prestigious hotel in Washington, where members of Marshall's Court lived during Court terms, sharing meals and conversation in an atmosphere that encouraged consensus.[18]

In short, the Civil War period was a time when prominent politicians were predominantly lawyers. De Tocqueville in the 1830s found that lawyers in the United States "naturally form a body. It is not that they agree among themselves and direct themselves in concert toward the same point; but community of studies and unity of methods bind their mind to

one another as interest could unite their wills."[19] It is not surprising that the key members of Lincoln's cabinet were *all* lawyers,[20] or that Lincoln's key diplomatic appointments were *all* lawyers,[21] or that the five men who tried to end the War at the Hampton Roads Peace Conference on February 3, 1865, were *all* lawyers.[22]

The Legal Issues

This book attempts to explore significant legal issues during the period leading up to and through the Civil War.[23] They are addressed in a variety of contexts, the most obvious of which is in decisions of the Supreme Court. The most significant Supreme Court decision just prior to the War (*Dred Scott*), and the *only* significant Supreme Court decision during the War (the *Prize Cases*), are each reviewed, as well as the dramatic decision of the Chief Justice in *Ex parte Merryman*, dealing with presidential powers.

Courtroom trials—some electric with high drama—also illustrate the role of the law and the lawyers. The courtroom experience of the John Brown trial in Virginia and his "second trial" by a select Senate investigating committee is explored, along with the piracy trials of the Confederate privateers in New York and Philadelphia. And of course, it would be inappropriate not to review the trials of the Lincoln assassination conspirators and other key figures of the time, including the non-trial of Jefferson Davis.

Apart from judicial decisions and courtroom trials, the book reviews the way in which presidents dealt with the legality or constitutionality of their decisions, such as Buchanan's understanding of the limits of his power to confront secession, and Lincoln's understanding of his authority to sign the bill accepting the secession of West Virginia from Virginia or to issue the Emancipation Proclamation. The objective purity of the law during the Civil War period was occasionally overthrown for the sake of expediency. In the *Merryman* case, Lincoln took the position that, despite the rich heritage of the liberty-protecting writ of habeas corpus enshrined in the Constitution, he should suspend the writ in secret, because he felt it was expedient to protect the Union from the adventures of Confederate sympathizers. It proved to be expedient for Attorney General Bates to take no action to accelerate the progress toward the Supreme Court of the cases involving vessels taken as prizes, until Lincoln had sufficient time and opportunity to add his own appointees to the Court. An early decision in the *Prize Cases*—i.e., a decision made at a special term of the Court—without the benefit of new Justices appointed by Lincoln probably would have resulted in an adverse decision, which would have

harmed the Union's war effort. Perhaps President Buchanan should have relied on "expediency" during the last several months of his administration, rather than wholly accept the tight legal limits on his room for action—as defined by his Attorney General—in which case he might have been able to act to prevent or at least curtail secession.

The law also shaped and influenced many Civil War era events without directly controlling or determining the outcomes. There were many reasons Lincoln crafted the Emancipation Proclamation to be applicable only in territory controlled by the Confederacy—one of which was to reduce the chances that an aggrieved former slaveholder could pose a court challenge to the constitutionality of the Proclamation. While the fear of war with Great Britain clearly was the deciding factor in Lincoln's successful resolution of the *Trent* affair, the fact that the U.S. capture of the Confederate envoys Mason and Slidell was a clear violation of international law was an influential factor as well.

Finally, the dark side of the law was also revealed during this heated period. The post-assassination revenge trials dishonored sound legal principles and demonstrated that justice may be disregarded in an atmosphere of such enflamed passions. The revenge trials essentially exposed the unfairness of a system of justice that was appropriate for the military, but that was outside the traditional tensions between the law and lawyering in civilian courts. Joseph Holt, a brilliant lawyer and master prosecutor used the law—probably abused the law—to advance the administration's goal of purging the evil of the Confederacy from the nation. At the other extreme, however, the lawyers, the prosecutors, and the judge at John Brown's trial bent over backwards to ensure that Brown would receive a fair trial. Ironically, they ended up giving Brown a platform to spread his message of martyrdom.

Larger-than-Life Lawyers

Civil War lawyers animated, argued, and articulated the law. The legal issues of the day come to life as these lawyers appear and re-appear throughout the period. (Appendix 1 offers brief biographical sketches of one hundred and one lawyers prominent during the period; Appendix 2 sets out a dozen examples of how the professional lives of many of the important lawyers intersected.)

These lawyers could be clever and inventive: Dred Scott's lawyer in Missouri figured out a way to get his case heard in a federal court, after being unsuccessful in the state court system. Ben Butler, a lawyer-turned-political-general at Fortress Monroe, used his legal skills to figure out that slaves assisting the Confederate war effort might legally be taken and protected as "contraband."

Strong and prominent lawyers sometimes took courageous positions representing unpopular individuals. Virginia attorneys Botts and Green (the mayor of Harpers Ferry) took on the task of defending John Brown after he led the attack that killed many of their fellow townspeople. Imagine the fear in the hearts of the defense team representing the CSA privateers in New York when Secretary of State Seward ordered that the lead lawyer, Algernon S. Sullivan, should be arrested and confined as a "political prisoner." Justice Curtis was so disappointed by Taney's opinion of the Court in the *Dred Scott* case that he left the bench. Years later, Curtis took the principled, but unpopular, position that Lincoln had overstepped constitutional bounds with his Emancipation Proclamation and impairment of civil liberties. Reverdy Johnson, perhaps the most prominent constitutional lawyer of the time, unsuccessfully defended Mary Surratt. Charles O'Conor, one of New York's most famous trial lawyers, successfully defended Jefferson Davis.

The legal ethics context in which lawyers worked at that time was not as clear as it is today. Thus, it did not seem wrong when President-elect Buchanan wrote to one of the Supreme Court Justices and asked him to persuade another Justice to move toward a majority position in the *Dred Scott* case. No one seemed to be bothered that one of Dred Scott's lawyers (George T. Curtis), who argued the case before the U.S. Supreme Court, was the brother and former law partner of one of those Justices (Benjamin R. Curtis). Justice Curtis just happened to agree with his brother's legal position. The winning lawyer (David Dudley Field) in the key Supreme Court civil liberties case of the time, *Ex parte Milligan*, was the brother and former law partner of one of the Justices (Stephen Johnson Field) who agreed with the opinion of the Court.

The Unresolved Constitutional and Legal Issues

There were important and broad constitutional issues that surfaced during the War that were *not* selected for close treatment in this book because they were not finally resolved until *well after* the War. For example, at the beginning of the War, the U.S. government was virtually insolvent, and it became necessary, literally, to print money. Constitutional challenges to this step, known collectively as the *Legal Tender Cases*, were not decided by the Supreme Court until February 1870.[24] Another major step in financing the War was the country's first income tax law passed by Congress in August 1861.[25] While its constitutionality was challenged immediately, the Supreme Court did not address the question until its unanimous decision in February 1869.[26] In the end,

the Sixteenth Amendment to the Constitution, ratified in 1913, was required to resolve the constitutional issue.

Even more important than financing the War was supplying the manpower to fight it. The first conscription law, the Enrollment Act of March 1863, was controversial on constitutional grounds, and the draft notices that were issued in July of that year were met with evasion and horrible riots. But the issue of the constitutionality of the conscription law never reached the Supreme Court, in large part because the suspension of the writ of habeas corpus effectively blocked courts from releasing draft resisters. Indeed, it was not until the twentieth century that the Court had occasion to decide—unanimously—that conscription was indeed constitutional.[27]

Apart from broad constitutional issues, there were more purely "legal" developments that had lasting significance, but that also are not treated in this book because they were so narrowly focused. An illustration is the "Lieber Code," approved by Lincoln and published in April 1863.[28] This was America's first code regulating the conduct of its army in wartime, and it led directly to the adoption of the first international treaties on the law of war—the Hague Conventions on land warfare of 1899 and 1907, and later to the Geneva Conventions.[29]

The goal of this book is to demonstrate that the law, and the lawyers, were unusually important during the Civil War period; they were, perhaps, the warp and woof of its fabric.

Contents

❧ CHAPTER 1

Prologue: 1776 to 1857

Almost three generations separate the American Founding Fathers from the *Dred Scott* case, which marks the beginning of the Civil War period. The Founding Fathers produced three fundamental legal documents, the last of which—the U.S. Constitution—is the framework within which the great issues of the Civil War period were debated. Following is a brief look at the country and the government these documents helped establish and their use—and abuse—during the Civil War era.