Review

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Northerners thought a lot during the Civil War about what treason was and who was committing it. Given that eleven states had declared themselves independent and were waging war on their former fellow citizens and that four more remained slave states and could have bolted, one can easily understand Unionists’ interest in the matter. The problem was that the common view did not necessarily jibe with the Constitution. Treason, notably, is the only crime that the Constitution addresses, and it sets a high bar for prosecution: At least two people have to swear that a suspected traitor has gone to war against the nation or has helped its enemies. Indeed, the only person who had been hanged for treason until the war was John Brown. The legal ground regarding treason was all but unbroken for the Civil War generation.

William A. Blair’s With Malice toward Some takes a deep look at how public opinion shaped the Lincoln administration’s understanding and application of treason law. While legal scholars, and some jurists, held forth about the great restrictions that the Constitution imposed, actual practice was far less high-minded. The outcry from newspapers and the general public, not to mention the actions of men in blue, helped spur the government into creating an elaborate system to enforce loyalty, an arrangement that relied in great part on the army and three different varieties of provost marshal that served under the auspices of the War Department. The resulting actions, Blair writes, “justified confiscation of rebel property . . . ; allowed soldiers to arrest women who taunted them; enabled a Union general in New Orleans to hang a man for tearing down a U.S. flag; caused thousands of arrests by the military in the loyal states for something called ‘treasonable behavior’; encouraged as patriotic acts informing on neighbors with little or no evidence; enabled soldiers to prevent people from voting,” and so on—all of which produced little or no
discomfort to the president’s supporters but sent conservative Demo-
crats into apoplectic fits (1–2).

One of the fundamental problems during the Civil War was in defin-
ing who was a traitor. Confederates considered themselves citizens
of a separate nation. How could they then be held as traitors to the
United States? Whether the Union was facing states in rebellion that
housed treasonous citizens or was fighting constituent parts and resi-
dents of a sovereign nation demanded an answer with a legal logic
to go with it. Scholars plunged into international law and the norms
of western warfare to come up with a defensible position, one that
ultimately was articulated in the Lieber Code. It is not surprising that
both the legal framework and its enforcement worked best in parts
of the country that were loyal not just to the Union but also to the
Republican Party, Blair says.

In a situation where thousands could have been strung up for tak-
ing arms against the government, only one Confederate was hanged,
and he was the commandant of Andersonville. The men who took
the southern states out of the Union, who governed the Confederacy,
who led its armies, were not put to death for treason. Other problems
seemed more pressing during Reconstruction, and the army’s lead-
ers agreed to parole Confederate soldiers who took a loyalty oath.
Northerners forced southerners to pay in other ways, Blair argues,
principally through the Thirteenth, Fourteenth, and Fifteenth Amend-
ments, and in efforts to suppress the votes of white southern men.

This is an important book. It contributes much to our understanding
of the legal and, to a lesser degree, the political history of the period.
With it, Blair joins his recently retired colleague Mark E. Neely Jr. as
one of the most serious critics of Abraham Lincoln of our time.

Still, *With Malice toward Some* is not without flaws. The most obvi-
ous is that this densely written book makes for a difficult read. Blair
gets deep into legal thinking and political maneuvering—to the point
where it is sometimes challenging for readers to get their bearings,
to understand how a detail pertains to the main point of the book, or
even to know what the main point is. That leaves *With Malice toward
Some* a work that is of most value to a fairly specific set of scholars
searching for a single place to find a great deal of information about
how the federal government treated allegations of treason during
and after the war. This volume is not well suited to a casual reader or
an undergraduate. The second shortcoming is that Blair never tack-
les the question that hangs over the book: Were the actions of the
Union in regard to treason justified? Blair makes a compelling case
that individual rights were trampled regularly, but was that defensible given the crisis that confronted the nation? In short, how does Blair assess this statement that Lincoln penned a year before the war ended: “Was it possible to lose the nation, and yet preserve the constitution? By general law life and limb must be protected; yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation.”