

The lessons of Lincoln

Abraham Lincoln, it would seem, is in the midst of a career revival. In recent years, the sixteenth President has been praised by the likes of author Doris Kearns Goodwin, and Lincoln boosterism has been prominently featured on high-traffic political blogs such as *Power Line*. Amidst this torrent of praise, it is worth examining the legacy that is being celebrated.

Without a doubt, Lincoln achieved important results during his political career. Most notably, his presidency marked the beginning of the end of the nefarious institution of slavery. For this - as well as for laying the groundwork that extended the equal protection of the laws to all races and creeds - Lincoln has earned a hallowed place in our national history. This is the story we are all familiar with from high school civics class. However, there is another aspect to Lincoln's legacy - one that is less well known, but one that is dutifully studied in neo-conservative political circles, where Lincoln's career has taken on a meaning and import of another kind.

For the neo-conservatives, Lincoln's primary utility lies in providing ideological and historical legitimacy to their vision of a bold, expansive executive authority. As careful readers of history are aware, Lincoln flexed the muscles of the executive branch to a remarkable degree. During the Civil War, he unilaterally suspended habeas corpus, arrested scores of political opponents and newspaper editors, and deployed troops to New York City to force conscription on an unwilling populace. One of Lincoln's contemporaries - Congressman Clement Vallandigham - noted that Lincoln's trespasses included,

".. the quartering of soldiers in private homes without the consent of the owners, and without any manner having been prescribed by law" ... " the censorship over the telegraph, and the infringement, repeatedly, in one or more of the States, of the right of the people to keep and bear arms for their defense ... free speech, too, has been repeatedly denied."

As if to underscore its accuracy, this speech later caused Vallandigham's arrest, and led to his subsequent incarceration in a military prison.

Abraham Lincoln's legacy was not lost on the coterie who surrounded President Bush in the days after 9/11. Lincoln's heavy treading on the

Constitution was reflected in the crisis management model that was adopted in the months after the 2001 terror attacks. For the neo-conservative set, Lincoln's presidential career illustrates a central, animating theme: namely, that exigent methods can be mainstreamed and legitimized when pressed into the service of a noble goal. From this vantage point, the stress that Lincoln applied to key Constitutional guarantees was not merely tolerable, but appropriate and necessary, for he ultimately prevailed, and in doing so secured a higher good - the preservation of the Union's integrity. As Lincoln himself asked in the wake of the Supreme Court's Merryman decision,

"Are all the laws but one to go unexecuted and the government itself go to pieces lest that one be violated?"

The actions of today's neo-conservatives - from their prosecution of the Iraq War, to their domestic counter-terror policies - parallel those of the sixteenth President in their vigor, and their bold design. Today's neo-conservatives wish to act decisively in the present, in order to secure and preserve the future. While we are certainly living in times that call for decisive actions, the prudence of those actions is as important as the urgency that animates them. The neo-conservatives, caught up in their epic vision of a clash of civilizations, have drawn the wrong set of conclusions from Lincoln's experience - particularly regarding executive power, and the rule of law.

Lincoln spoke eloquently and often about the rule of law, but he refused to follow it in many important respects. He addressed this conundrum when he spoke to Congress in 1861, and posed his now famous rhetorical question,

"Must a government, of necessity, be too strong for the liberties of its own people, or too weak to maintain its own existence?"

Lincoln and his associates clearly chose the former option, and cast aside key Constitutional constraints during their prosecution of the Civil War. The current President holds an equally generous vision of his plenary powers, which he views as including the ability to detain US citizens in military brigs, absent a suspension of habeas corpus, and the authority to conduct long-term, warrantless wiretapping programs with a domestic nexus. For the neo-conservatives, the President has the power to do all of

these things, simply by virtue of holding office during a time of war. Both Abraham Lincoln and George W. Bush read much into the provisions of Article II, including a host of unenumerated emergency powers, which they exerted without hesitation.

The ability to exert power, however, does not permit one to re-write the Constitution in one's own image, although there are many who have advocated for this in substance, if not in syntax. In this camp we find John Yoo (formerly of the Justice Department, and now of Boalt Hall) who has held that the Constitution allows the President to declare war in a unilateral fashion, without the consent of Congress. While Yoo has tried to ground his reasoning in an originalist analysis, his argument essentially boils down to the following: America has engaged in over 200 armed conflicts in its history, but has only declared war on five separate occasions. Therefore, true war-making authority rests with the President, rather than Congress, despite the fact that the Constitution places the power to declare war squarely in Article I.

If Yoo is correct, then the Constitution is a malleable document, which can easily bend to accommodate executive necessity. This analysis puts him at odds with the very logic of the Constitution itself. The employment of extra-constitutional methods does not make them Constitutional, by default. One cannot deform the Constitution to one's wishes (as Lincoln believed), in order to preserve it for use another day. Once bent, any doctrine is difficult to return to its previous state. This idea was once central to conservative Constitutional theory – at least until recent years.

Newt Gingrich - who recently stood in Lincoln's shadow at New York's Cooper Union - provides an example of how the neo-conservative Constitutional critique has shaken the political right to its foundations. Only a handful of years ago, Gingrich was poised at the helm of the Republican revolution that swept into the halls of the nation's Capitol in the early nineties. The '94 Congress came to Washington with a firm ideological commitment to small government conservatism, which was formalized in the famous "Contract with America." Goldwater-style downsizing and budget cutting were the order of the day – from the Department of Education, to federal law enforcement agencies such as the BATF.

With the fires of Waco still a recent memory, some in the Republican

establishment were openly concerned about the potential for Constitutional rights to be crushed under the boot-heel of federal authority. Hearings were conducted. Subpoenas were issued. FBI and Justice Department officials were publicly lambasted by insurgent Republican representatives. The President's intervention in the Waco siege was characterized (at best) as a tragic mistake, and (at worst) a symptom of impending tyranny.

Flashing forward a decade, we find few traces of that spirit on today's American right. Conventional wisdom in Republican circles is that executive agencies should enjoy expansive powers in the war on terrorism, and that President Bush should be trusted to employ these powers as he sees fit, largely without the intervention of Congress or the courts. Gingrich, we find, has also re-made himself in accord with this ethos. In a 2006 New Hampshire speech, he addressed the scope of the First Amendment in war time, and found it to be too permissive, given the scope of the threat posed by Islamic terrorism. According to Gingrich,

"This is a serious, long-term war. Either before we lose a city or, if we are truly stupid, after we lose a city, we will adopt rules of engagement that use every technology we can find to break up their capacity to use the Internet, to break up their capacity to use free speech, and to go after people who want to kill us to stop them from recruiting people."

Expanding on his premise, Gingrich said,

"I want to suggest to you that we right now should be impaneling people to look seriously at a level of supervision that we would never dream of, if it were not for the scale of this threat."

This, then, is the state of discourse within an influential segment of today's Republican establishment. In the realm of national security, many have foresworn principals of limited government and original intent, and have adopted a Constitutional analysis that strays far from the careful formulations of the Founders. Those who have cast their lot with Lincoln would do well to study the final outcome of his Constitutional experiment, however. Even a casual reading of the historical and legal record will reveal that Abraham Lincoln's exigent methods were borne out neither by the courts, nor by history.

In a series of Civil War and Reconstruction-era rulings, Lincoln's broad

executive initiatives were rejected by the Supreme Court as violations of Constitutional norms and safeguards. *Ex Parte Merryman* struck down the Civil War-era assertion of a Presidential prerogative to suspend habeas corpus. While Lincoln ignored the admonitions of *Merryman* at the time, it was Chief Justice Taney's vision of presidential power – not Lincoln's - that ultimately prevailed. Taney's words have helped shape our historical view of the metes and bounds of habeas corpus, right down to the current court's imperfect - but important - opinion in the *Hamdi* matter. Likewise, the high court rebuked Lincoln for empanelling military tribunals in states where the civil courts were open and functional. Taney's language in *Ex Parte Miligan* reaffirmed the primacy of the Constitution's guarantee of civil process, even in the face of grave threats:

"The Constitution," wrote Taney, "is a law for rulers and for people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."

Taney's opinions were a stern reminder to the executive - both then and now - that even in times of crisis, desired political ends must be achieved through Constitutional means. The fact that we have today such a vigorous public debate over President Bush's post-9/11 security policies means, ultimately, that Lincoln's views on executive power proved to be historical footnotes, rather than lasting re-formulations of key Constitutional doctrines.

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