Subverting Sovereignty: Political Theology and the American Constitution

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JACOB KRIPP, MAR 6 2015

The principles of the American Constitution rest on a series of checks and balances that prevent any one of the three branches of government from dominating power. From the perspective of liberal constitutionalism, this is a positive that prevents tyranny and protects the rights of the people. The checks and balances of the government, according to James Madison in Federalist Number 51, ensure that "a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."[1] In times of crisis, however, this division of power among different branches of government can lead to a contradiction of power.

This critique of liberal constitutionalism is best articulated in Carl Schmitt's *Political Theology*. Carl Schmitt writes that in crisis situations:

"The most guidance the constitution can provide is to indicate who can act in such a case. If such action is not subject to controls, if it is not hampered in some way by checks and balances, as is the case in a liberal constitution, then it is clear who the sovereign is."[2]

Carl Schmitt critiques the inability of liberal constitutionalism to clearly define who the sovereign is by stating that such a state "attempts to repress the question of sovereignty by a division of mutual control and competences."[3] Sovereignty, for Carl Schmitt, is distinct from a traditional liberal definition of sovereignty, "he who decides on the exception."[4] By such a definition, to say that "the Union, then…is emphatically, and truly a government of the people"[5] is a pointless statement that has no practical application. A question arises then: to what extent is the American Constitution capable of providing practical advice for political leaders in times of crisis? This paper will examine the role of the constitution during the tumultuous presidency of Abraham Lincoln to determine to what extent Carl Schmitt's critique of liberal constitutionalism is applicable to the American Constitution. Abraham Lincoln's presidency and the words of the Founding Fathers seem to effectively counter Carl Schmitt's critique of liberal constitutionalism's inability to deal with crisis. However, the fact that the American presidency, at least since the time of Lincoln, lives up to the strong executive vision of Carl Schmitt must make one question how we traditionally conceive sovereignty in the United States.

James Buchanan, the president preceding Abraham Lincoln, seems to epitomize Carl Schmitt's critique of liberal constitutionalism, and verify Schmitt's belief that by subverting the question of sovereignty, the liberal constitutionalism is incapable of dealing with crisis. Buchanan interpreted the Constitution in such a way that gave him no power to hold together a country even as states were seceding. Buchanan instead believed that this power belonged to Congress, "the only human tribunal under Providence possessing the power to meet the existing emergency."[6] Buchanan's failure to assert his own authority against what he believed to be Constitutional is indicative of what Schmitt calls, "The tendency of liberal constitutionalism to regulate the exception as precisely as possible, means, after all, the attempt to spell out in detail the case in which law suspends itself."[7] Buchanan failed to obtain a "monopoly to decide" (13) by deferring to the Constitution and to Congress and subverted the question of sovereignty to the point where both Congress and the President were left at an impasse, unable to counter the greatest crisis the nation had, or has, ever faced.

If Buchanan represents the epitome of Carl Schmitt's critique, then Abraham Lincoln's presidency embodies the strong sovereign that Schmitt believed was necessary to handle emergencies. Lincoln's presidency, however, raises more questions than it answers. Lincoln is widely acknowledged as the man who saved the Union and one of the United States' greatest presidents. Yet one must question whether or not his actions undermine our conventional American understanding that the people are sovereign.

Lincoln's actions at the outset of the Civil War were unprecedented, in part, because the United States faced a nearly unimaginable crisis. Faced with a torn nation and an impending Civil War, Lincoln enacted a number of measures that may otherwise be construed as unconstitutional. John Yoo points out that Lincoln removed millions from the treasury in order to fund the military, a power that is traditionally left to Congress under Article I Section 8, which states that Congress has the power to "raise and support armies."[8] Abraham Lincoln also unilaterally ordered a blockade on Southern Ports, an action that eventually led to the Prize Cases.[9] Though Lincoln's actions were later ratified by Congress and upheld by the Supreme Court, they represented a clear expansion of executive prerogative from what was conventionally held to be true.[10]

Lincoln's most infamous violation of the Constitution was his unilateral suspension of habeas corpus, a power that is most explicitly reserved to Congress. The clause permitting the suspension of Habeas Corpus is contained in Section I Article 9 of the Constitution and states: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[11] Though the Constitution does not explicitly state who can suspend habeas corpus, the fact that it is contained in the first section of the Constitution indicates beyond a doubt that it is exclusively a power of Congress. Lincoln would have been aware of this fact, having received Supreme Court Joseph Story's opinion that only Congress could suspend habeas corpus.[12] Even with this knowledge in mind, Lincoln decided to suspend habeas corpus within the Union from Philadelphia to Washington on April 27, 1861.[13]

Steven C. Calabresi and Christopher S. Yoo, who argue in favor of the unitary executive theory, held that Lincoln believed"that the Commander in Chief Clause, when read in conjunction with the Take Care Clause, conveyed upon him the "war power," which empowered him to take the sweeping actions that he did."[14] Yet Mark E. Neely Jr.'s account of Lincoln's suspension of habeas corpus argues more persuasively that Lincoln did not care for Constitutional "niceties."[15] Neely argues that Lincoln found it difficult to make antislavery arguments using the Constitution because of the implicit defense of slavery held in three separate clauses of the Constitution. This is not to say that Lincoln did not revere the Constitution, but it is to say that Lincoln held practical solutions to be more pertinent than Constitutional ones. Lincoln's own words on the matter indicate as much: "I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation."[16] Lincoln believed that the impracticality of waiting for Congressional approval for the suspension of habeas corpus necessitated executive action, regardless of the constitutionality.

Lincoln's arguments justifying his suspension of habeas corpus without congressional approval mirror the arguments Carl Schmitt makes for a strong executive not bound by Constitutional limitations. Carl Schmitt argued that"What characterizes an exception is principally unlimited authority, which means the suspension of the entire existing order. In such a situation it is clear that the state remains while the law recedes."[17] Lincoln felt that the state of exception was necessary to save the Union and that only he could determine such a state. It was clear that the entire order of law that was held to be sacred was suspending, and yet the state remained. No essential changes were made to the political process and the Union still conceived of itself as the United States. John Yoo points out that Lincoln did all that was in his power to maintain the democratic processes of elections during the Civil War. Lincoln believed that "We cannot have free government without elections; and if the rebellion could force us to forego, or postpone a national election, it might fairly claim to have already conquered and ruined us."[18] Lincoln's commitment to maintaining the principals of the state even when the law receded demonstrates his ability, from the Schmittian perspective, to effectively navigate a political crisis as the sole sovereign.

When Lincoln's sovereignty was challenged by the Supreme Court of the United States, Lincoln did all that was in his power to maintain his own policy. Ex Parte Merryman challenged the validity of Lincoln's suspension of habeas corpus, in the case of John Merryman. Merryman was seized and charged with various acts of treason. He petitioned

Chief Justice Roger B. Taney for a writ of habeas corpus, which was denied as valid by those who held Merryman under the President's suspension. Justice Taney responded by issuing Ex Parte Merryman, which held that "the privilege of the writ could not be suspended except by act of Congress."[19] Taney declared Lincoln's act unconstitutional regardless of the grave threat to the Union, stating, "Nor can any argument be drawn from the nature of sovereignty, or the necessities of government for self-defense, in times of tumult and danger."[20] Taney's arguments, if valid, would have confirmed Carl Schmitt's critique of liberal constitutionalism because it would have prevented any one branch of government from making authoritative decisions that would be necessary in times of crisis. Instead, sovereignty would be hidden, as Schmitt remarks, under the layers of checks and balances that hinder the ability of liberal governments to cope with crises.

Justice Taney's condemnation of Lincoln's actions were largely ignored by the executive and Lincoln continued his suspension of habeas corpus. In response to the decision of the Supreme Court, Lincoln appealed to the people: "'Are all the laws but one to go unexecuted, and the government itself to go to pieces, lest that one be violated?"[21] Lincoln acknowledged that the unilateral suspension of habeas corpus (and perhaps his other actions as well) were unconstitutional but reiterated that they were necessary in the particular emergency situation. Lincoln acknowledged the court's decision but also affirmed that the court had no enforcement power, and refused to abide by their ruling. Lincoln's disdain for the Supreme Court culminated in the belief that "the policies of the Supreme Court do not create important politically binding obligations for the coordinate branches of the federal government."[22] Gary Jacobsohn and Mark Neely argue that Lincoln's disdain for the court may have stemmed from his distrust with the Dred Scott decision, reached less than a decade before the Civil War.[23] Regardless of the origins of Lincoln's contempt, it is clear that he felt that practical remedies to the situation took precedent over specific Constitutional claims.

Much has been made of the Supreme Court decision in Ex Parte Milligan refuted Lincoln's policy and was a triumphant victory for civil liberties vis-à-vis the national government. In Ex Parte Milligan, the majority held, in a unanimous decision, that military tribunals could not try citizens while the normal court circuit was still in operation. The case, decided in 1866, was relevant to Milligan himself, but perhaps not a reflection of the judicial branch exercising its authority over Lincoln.[24] The decision was reached after the Civil War had ended, the crisis had passed, and Lincoln was no longer alive. Though it is viewed as a landmark decision for civil liberties today, Mark Neely points out that it was reviled as a political decision by most Republicans and seen as an impediment to Reconstruction in its own time.[25] Mark Neely also points out that despite the courts clear condemnation of military tribunals, they continued regardless of the Supreme Court's decision.[26] Now that the irrelevance of Ex Parte Milligan has been established, it is clear that Lincoln's disregard for Constitutional particulars represents the ideal sovereign for Carl Schmitt in times of crisis. It is unclear, however, to what extent this vision squares with that of the Founding Fathers and the Constitution itself.

The Founding Fathers, far from denying the role of a strong executive as Carl Schmitt's critique would indicate, actually vindicate Lincoln's actions either expressly or by remaining silent. Alexis de Tocqueville, observing the pre-Civil War United States in his impressive work, *Democracy in America*, notes that the executive is limited in many ways that the French king is not.[27] De Tocqueville acknowledges, however, that the prerogative of the President has room to grow within the United States Constitution. Should the United States become more active in foreign affairs, the power of the Executive would grow exponentially. De Tocqueville writes:

"The president of the United States possesses almost royal prerogatives, which he has no occasion to make use of, and the rights which, up to now, he can use are very circumscribed: the laws permit him to be strong, circumstances keep him weak."[28]

For the sake of simplicity, we will assert that the Civil War falls under the president's ability to handle international affairs, and that it is under this duty that Lincoln's power grew.

De Tocqueville's observation that the laws permit the Executive to be strong in foreign affairs, and in times of crisis, is supported by the words of Alexander Hamilton and James Madison in the Federalist Papers. Alexander Hamilton writing in Federalist Number 70 observes that "Energy in the executive is a leading character in the definition of good government…It is essential to the protection of the community against foreign attacks."[29] Instead of submerging the

idea of sovereignty as Carl Schmitt would claim, Hamilton, at least in foreign affairs, acknowledged the need of a strong executive to present a united front against foreign attacks.[30] Hamilton also acknowledged that crises might arise, and that in such situations political decisions must be embodied in one person. A multiplicity of decision makers in such situations "might impede or frustrate the most important measures of the government in the most critical emergencies of the state."[31] Hamilton then was profoundly aware of the situation of exception that Carl Schmitt did not believe liberal constitutionalism to be capable of handling.

De Tocqueville, Hamilton, and Schmitt all agreed that democracy is an inefficient method for managing international relations. Lincoln's unilateral decisions to appropriate money for the funding of a military, suspend habeas corpus, and enforce a blockade on Southern ports can all be supported by the Federalist Papers, if not the Constitution itself. If one is willing to acknowledge that after Fort Sumter, a state of war existed, then Alexander Hamilton might be willing to concede that all things relating to that war be under the purview of the executive. He indicates as much in Federalist No. 74 by stating,"Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand."[32] Alexis de Tocqueville in his travels of the United States came to a similar conclusion. De Tocqueville wrote that "External policy requires the use of almost none of the qualities that are proper to democracy, and demands, on the contrary, the development of almost all those it lacks."[33] External policy, therefore, should be contained in one Executive Branch, with the decisiveness of a single President as its sole author.

In the writings of Hamilton, one may also find a defense for the actions of Lincoln when he explicitly defied the Supreme Court decision of Ex Parte Milligan. Jacobsohn points out that Lincoln's defiance is part of a longer tradition of interpretation that is influenced by Thomas Jefferson and James Madison.[34] In such an interpretation, the executive branch and the legislative branch have an equal claim to interpret the constitution as the judicial branch, and so any of the other branches could defy the judicial branch if they held a law to be constitutional. Lincoln decided that "No court could issue a writ requiring compliance by the President, just as no President could order a court how to decide a case."[35] Lincoln's interpretation, though unorthodox in history, does have the support of the Founding Fathers. Alexander Hamilton addressed the fears of the anti-Federalist that an unelected body (the Supreme Court) would be able to exercise tyranny over the United States. In Federalist No. 78, Hamilton states that "[the Judicial Branch] may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for efficacy of its judgments."[36] Here one finds a justification for Lincoln's actions and unwillingness to carry out the ruling in Ex Parte Merryman. Hamilton acknowledged that a situation might arise in which the Supreme Court may be wrong and that the executive could deny its duty to enforce the ruling if it deemed it to be unconstitutional.

The strongest support for the actions of Lincoln and the failure of Carl Schmitt to fully comprehend the ability of liberal democracy to handle crises is found in the writing of James Madison. Carl Schmitt defined the exception as "a case of extreme peril, a danger to the existence of the state, or the like. But it cannot be circumscribed factually and made to conform to a preformed law."[37] Schmitt's critique, then, rests on the idea that the exception in liberal constitutionalism is attempted to be codified into law. James Madison, one of the founding fathers, seems to address this problem by prescribing nearly unlimited power for the state in the arena of international relations. Madison attempted to address the anti-Federalist fear that standing armies in times of peace were unnecessary and in fact, dangerous. Madison responded, "If a federal Constitution could chain the ambition or set bounds to the exertions of all other nations, then indeed might it prudently chain the discretion of its own government and set bounds to the exertions for its own safety."[38] Madison makes an argument similar to Thucydides that in international relations, fear, honor, and self-interest govern nations and little can be done to prevent this except to prepare as strong a defense as possible.[39] James Madison, far from attempting to prescribe a set of rules that would regulate international relations and emergency situations, stated, "It is in vain to oppose constitutional barriers to the impulse of self-preservation."[40]

The arguments of James Madison and of Alexander Hamilton indicate that the Constitution of the United States does not effectively restrict the actions of the executive in times of crisis. The implication is that Carl Schmitt's critique of liberal constitutionalism is inapplicable to the United States, at least in the arena of foreign affairs. The United States, at least in the time of Lincoln, had a sovereign "who decides on the exception" and suspends the law in order to save

the state and this sovereign's actions were supported by the Founding Fathers.[41] This brings ups the question, then, if a total reconception of who is sovereign in the United States is necessary. Sanford Levinson points out:

"The Constitution may proclaim that sovereignty rests with "We the People." But the implication of both Madison's and Hamilton's arguments is that, practically speaking, at least in times of war, sovereignty really rests with a handful of government officials- not with "the People."[42]

Levinson's arguments lends credence to the critiques of the American Constitution from those who oppose the views of Carl Schmitt, mainly that the voice of the people is not adequately represented by the Constitution.

The unique situation represented by Abraham Lincoln and the Civil War represent a number of restraining measures on the executive that may not give him complete unilateral power in emergency situations. The problem of actually deciding on the exception, which is the essence of Schmitt's critique, is less clear in other historical contexts than it was during the Civil War and the other branches of government, and the American people may not readily accept the acts of a President if they do not accept that situation to be a crisis. The New Deal Court until 1937 is an example of such a failure to acknowledge complete deference to the executive. The reason for this may be found in the fact that the executive clearly has less leeway in domestic affairs than he does in international relations. Schmitt's critique, which was intended for a Weimar Republic that was decimated by internal strife, may still be applicable to domestic affairs. This may assure some that the American people still maintain some degree of autonomy in the domestic arena. As de Tocqueville points out, however, one must still be wary of the growing power of the executive as the United States has assumed center stage in international politics.

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Written by: Jacob Kripp
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