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Daniel Farber. *Lincoln's Constitution.* Chicago: University of Chicago Press, 2003. ix + 240 pp. $27.50 (cloth), ISBN 978-0-226-23793-0; $14.00 (paper), ISBN 978-0-226-23796-1.

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Abraham Lincoln, *Praetor Maximus*

Examples abound in history, of leaders who have taken on dictatorial powers at the expense of constitutional order--Lucius Cornelius Sulla and Julius Caesar in classical Rome; Mao Zedong, Joseph Stalin, Hideki Tojo, Adolf Hitler, and Benito Mussolini in modern Europe and Asia. It would come as a shock to the sensibilities of most Americans who revere their sixteenth president that Abraham Lincoln is often placed in the company of such leaders. As we approach the bicentennial of Lincoln's birth, it is important to remember that throughout the Civil War he took actions that were viewed by many of his contemporaries--and are still viewed by many scholars--as beyond the limits of *ordinary* presidential authority, as perhaps dictatorial.

In 1861, after the South's attack on Fort Sumter, newly inaugurated President Lincoln opted for several counter-offensives that fell squarely within Article I of the United States Constitution, describing the national legislature's authority--not the president's. He blockaded Southern ports (effectively declaring a state of war); suspended *habeas corpus* between Washington D.C. and Philadelphia, and eventually across the North; expanded the regular army and navy; and ordered the U.S. Treasury to advance two million dollars to a private firm in New York for discretionary use on war supplies. Later he instituted military trials across North and South to dispense justice and ignored a Supreme Court directive challenging his authority to suspend the writ. Even the Emancipation Proclamation, Lincoln himself admitted, would have been beyond his authority in peacetime.

But 1861-65 was a time of rebellion--of Civil War--in the United States. How does this *extraordinary* circumstance change the legal implications of Lincoln's actions?

Enter Daniel Farber.

Farber's book, *Lincoln's Constitution*, could justifiably be re-titled "Lincoln's Constitutionality"(at the expense of the author's double entendre): it is more correctly characterized as an assessment of the legality of Lincoln's presidency than as an analysis of his interpretation (or reinterpretation) of the U.S. Constitution. In fact, this is one notable limit to Farber's legal history of the executive administration of the Civil War. He does not consider, as Garry Wills has, the significance of the Gettysburg Address in changing the Constitution by cleansing it of "that legal compromise" over the issue of slavery and by appealing instead to its "spirit," its moral root in the Declaration of Independence.[1] Except in passing, he does not consider, as David Herbert Donald has, Lincoln's Whig understanding of the Constitution that actually *weakened* the executive branch in relation to Congress and the cabinet, even if in war decisions it tended toward John Quincy Adams's expansive view that, "by

the laws of war an invaded country has all its laws and municipal institutions swept by the board, and martial law takes the place of them.... Whether the war be civil, servile, or foreign ... the military authority takes for the time the place of all municipal institutions, slavery among the rest."[2]

Farber's analysis of Lincoln's abidance by constitutional law, congressional statute, presidential precedent, and Supreme Court ruling is exhaustive. With the possible exception of J. G. Randall, no scholar to date has made as thorough a study of Lincoln's war measures in light of American law. More limited analyses have stopped at the (accurate) assertion that Lincoln himself never claimed his sweeping use of power was ordinarily legal. In essence, he went stovepipe hat in hand to a special session of Congress to ask ratification of his otherwise extralegal usurpation of congressional authority:

"These measures, whether strictly legal or not, were ventured upon, under what appeared to be a popular demand, and a public necessity; trusting, then as now, that Congress would readily ratify them. It is believed that nothing has been done beyond the constitutional competency of Congress."[3]

More limited analyses have pointed to Congress's August 1861 ratification of Lincoln's actions, the Supreme Court's March 1863 *Prize Cases* decision upholding the legality of his early war measures, and Congress's 1863 Habeas Corpus Indemnity Act, which retroactively authorized all arrests and seizures made under authority of the president.

More limited analyses have gone back further to emphasize the 1787 Constitutional Convention's decision to replace Congress's authority to "make" war with its authority to "declare" war, leaving it to the president to repel sudden attacks. Much more limited analyses have claimed broad, inherent, executive war powers--out of reach of the legislative and judicial branches--and other exclusively presidential prerogatives deduced from Article II clauses of the United States Constitution. These analyses have used the uncharacteristic claim of a preeminent constructionist, Thomas Jefferson, that jeopardizing the nation's "very high interests ... by scrupulous adherence to written law, would be to lose the law itself ... thus absurdly sacrificing the end to the means."[4] Or they have used Lincoln's refrain defending suspension of the writ, "are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?"[5] Together, these arguments can be used to make a strong case for the constitutionality of Lincoln's war measures, and all are assessed by Farber--most of them in one chapter.

But it is important--especially as debates persist today over the balance between national security and individual rights, presidential and congressional authority, national and state sovereignty--to remember that Lincoln's presidency was extraordinary in our history. It is important, as we read presidential historian Michael Beschloss trumpeting the supreme value of presidential courage, to look closer at Lincoln's actions and understand where at crucial moments he probably overstepped his authority--even if he has been vindicated by history.[6] It is important, as Lincoln scholar Vernon Orville Burton pins the roots of an "imperial presidency" in the sixteenth president's "cavalier" approach to civil liberties, to recognize where the president was squarely within his legal bounds and where he showed great restraint.[7]

For this, we can return to Daniel Farber's legal history of Lincoln's war decisions. Farber, the Sho Sato Professor of Law at the University of California, Berkeley, and McKnight Presidential Professor of Law at the University of Minnesota, has given us a disciplined and fair look at the sixteenth president's most controversial decisions. Farber considers a wide range of arguments both defending and condemning Lincoln: from his pre-presidential conclusion that secession was indeed illegal--that the federal government had authority to coerce state governments into recognizing the supreme law of the land--to his exercise of powers ordinarily reserved by Congress, to his administration's infringements on individual liberties in North and South. The author is decisive where possible but allows uncertainty to remain where it must--particularly on constitutional questions of "original intent" that the framers themselves debated until their deaths.

Farber's conclusions, overall, are favorable to Lincoln's legacy. With the exception of some prominent freedom of speech infringements and cases of unjustified abridgement of individual rights in the North, most of what Lincoln did was strictly constitutional, falling within explicit presidential or congressional authority. It is a vital distinction, of course, that Lincoln's use of congressional powers--though probably necessary and in line with the "classic liberal view of emergency power"--were "approved and in all respects legalized and made valid" by Congress (p. 194). "Nowhere was there any thought," writes Farber, "that necessity alone gave the president an exemption from the legal consequences of violating statutory or constitutional requirements. Lincoln does not seem to have claimed such legal authority" (p. 195). Instead, Lincoln was retroactively granted executive and legislative prerogative to deal with the consequences of rebellion in the South.

Such being the case, Abraham Lincoln's accusers turn out to be right. In the classical Roman sense, he may accurately be called a dictator--a *praetor maximus*--vested temporarily with extraordinary power to deal with crisis. It is lucky, Farber reminds us, that at the crucial moment a man of "unshakable determination, combined with a shrewd sense of reality" was available to lead (p. 199).

Notes

[1]. Garry Wills, *Lincoln at Gettysburg: The Words That Remade America* (New York: Simon & Schuster, 1992), 38.

[2]. Charles Francis Adams, "The Sifted Grain and the Grain Sifters," *American Historical Review* 6, no. 2 (1901): 233.

[3]. Lincoln's Special Session Message, July 4, 1861, *Messages and Papers of the Presidents* (New York: Bureau of National Literature, 1897), 7: 3225.

[4]. Thomas Jefferson to John B. Colvin, September 20, 1810, *Works of Thomas Jefferson* (New York: G. P. Putnam's Sons, 1905), 11: 146.

[5]. Lincoln's Special Session Message, July 4, 1861, *Messages and Papers of the Presidents* (New York: Bureau of National Literature, 1897), 7: 3226.

[6]. Michael Beschloss, *Presidential Courage: Brave Leaders and How They Changed America, 1789-1989* (New York: Simon & Schuster, 2007), ix.

[7]. Vernon Orville Burton, *The Age of Lincoln* (New York: Hill and Wang, 2007), 225.