

Comment by David Bromwich

A republic divided

Abraham Lincoln said in the House Divided speech that this nation could not endure half slave and half free. It would become all one thing or all the other – all free or all slave. Then he asked, “Have we no tendency to the latter condition?”

Americans face a similar question today. We cannot endure as an empire feared and distrusted throughout the world and as a constitutional republic founded on liberty and governed by consent.

Lincoln, in his speeches of the 1850s and his debates with Stephen Douglas, pointed to symptoms of a degeneration of public opinion. He believed that the reason for the change was a growing passivity to the expansion of slavery. He had carefully laid the groundwork for his criticism, speaking out against the Mexican War, against the opening of the Nebraska Territory to slaveholders, and against Chief Justice Taney’s opinion in the *Dred Scott* decision, which held that the Negro was a form of property whose

possessor was guaranteed the rights due to owners of other forms of property.

A remedy might come, Lincoln believed, from law-abiding resistance to decisions like *Dred Scott*, and from electing officials determined to put slavery back on its old footing. Slavery would then become an institution confined to a limited section of the country and treated not as a social blessing but a temporary necessity, a practice “in course of ultimate extinction.” The program was radical, in that it envisaged an end of slavery, but it was also conservative, for it aimed to return liberty to the central place it once had held in the feelings of Americans.

One difference in our present situation is obvious. We have no party of opposition in matters of constitutional liberty. No politician of national standing has offered an analysis of the loss of liberty to which many Americans in the past five years have resigned themselves – the kind of analysis that Lincoln initiated with the question, “Don’t you find yourself making arguments in support of these measures, which you never would have made before?”

Instead, we have had piecemeal demurrals and episodic complaints about measures that range from barely legal to bluntly unconstitutional.

If we hope to revive public concern with the fate of constitutional liberty, it is instructive to remember Lincoln’s courageous response to events of the 1850s that carry distinct reverberations today.

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In a six-year campaign of persuasion that began in 1854 with the speech on the Kansas-Nebraska Act and ended in 1860 with the Cooper Union speech, Lincoln argued that the nation's founders had considered slavery an embarrassment to the Constitution, an "excrescence." Though this was a controversial view, Lincoln insisted on its veracity; and Americans came to know the evidence better through his teaching. He liked to remind his listeners that the word 'slavery' appeared nowhere in the Constitution. As Lincoln saw it, the record of public acts hostile to slavery that the founders supported in the years after 1788 demonstrated the significance of this omission. Those acts included a law of 1798 that prohibited bringing slaves from Africa into the Mississippi Territory, and the passage in 1807 of a measure that outlawed all African slave trade.

Propagandists today for an expanded American empire or the global spread of democracy – different names for the same thing – agree in citing as a precursor neither Washington nor Lincoln (impossible models for empire builders) but the international 'idealist' Woodrow Wilson. And it is Wilsonian enthusiasm for a permanent peace achieved through war, combined with a flattering and nostalgic interpretation of the cold war, that has underwritten the Bush administration's pursuit of a foreign policy based on intimidation, war, and the threat of war.

Of the scattered reasons offered by James Polk to justify the Mexican War, Lincoln observed: "First he takes up one, and in attempting to argue us into it, he argues himself out of it; then seizes another, and goes through the same process; and then, confused at being able to think of nothing new, he snatches up the old one again . . . His mind, tasked

beyond its power, is running hither and thither, like some tortured creature." A dissenter from the Mexican War, Lincoln thought the United States should be exemplary in its practice of freedom: we should epitomize a political ideal rather than impose our practices on others. He agreed with John Quincy Adams, a president who was later to join Lincoln's own Whig Party, that America "goes not abroad, in search of monsters to destroy. She is the well-wisher to the freedom and independence of all. She is the champion and vindicator only of her own." Adams's warning suggests a truth he did not live to see confirmed. Eagerness for foreign entanglements always stands in inverse proportion to a regard for liberty at home.

Lincoln noticed in the early 1850s that arguments for slavery had grown bolder. A new species of religious apologetics had arisen, and he called it "pro-slavery theology." There was likewise a new shamelessness in avowing the opinion that the Declaration of Independence had set the standard of equality too high. When John Pettit, a Democrat from Indiana, remarked on the floor of the Senate that the maxim "all men are created equal" was "a self-evident lie," nobody challenged the imputation. To Lincoln, this silence was scandalous. The coarsening of political speech was bound to produce, even as it was a product of, a new and reckless brutality of conduct. Had Pettit uttered those words in Independence Hall in 1776, he would have been thrown into the street.

One need not search far to discover a resonance with the present crisis. We have heard a president boast almost casually of his unprecedented power to legalize the assassination of persons abroad. "Put it this way," he said of the targets of secret killings he authorized:

“They are no longer a problem.” Had any earlier president boasted of such acts, the insolence would not have gone unrebuked. But today we lack a public figure willing to take up the burden Lincoln took up in the 1850s: to record, respond, reiterate, and sear the offenses into the public mind.

From 1850 to 1857, the national morale regarding slavery passed from compromise to retrogression. The first great step backward was the repeal of the Missouri Compromise included in the Kansas-Nebraska Act – an action that effectively permitted slavery in new territories north of the Missouri line. The *Dred Scott* decision took the next step. The Court gave legal sanction to the bringing of slaves to the territories when it argued that slaveholders had rights under the Constitution whereas Negroes did not.

Compare the disastrous slide of 2001 – 2006. Once again, we find ourselves making arguments we would never have made before. Our version of pro-slavery theology is pro-torture sophistry. We deplore the atrocities at Guantánamo and Abu Ghraib, yet we refuse to acknowledge that they were a result of directives by officials of our government, which approved forbidden methods of humiliation and deliberate cruelty. As in the 1850s, the change has been accomplished by degrees, through encroachment on an old policy. This has required considerable rhetorical and legal sleight-of-hand. Formerly discountenanced methods therefore were not inculcated as doctrine all at once. Rather, the Bush administration introduced them as emergency measures – backed by Justice Department memorandums that redefined the war in Iraq so as to exclude the United States from the Geneva Conventions, and by memorandums that narrowed the definition of torture so as to permit

all abuse that did not openly intend maiming or killing.

When Lincoln asked whether the United States had no tendency to the condition of a slave republic, he was inviting his listeners to consider the machinery put in place by recent legislation and court decisions. Behind the Kansas-Nebraska Act lay a tacit determination that power and influence and sheer numbers were going to decide the admission or exclusion of slavery in new states. Lincoln believed it needed only a second *Dred Scott* decision to expand the new permissiveness toward slavery from the territories to the states.

Why did he call the *Dred Scott* decision “an astonisher in legal history”? Because it nullified rights that the Constitution implied and gave cash value to rights about which the Constitution said nothing. A similar contempt for the common understanding of basic rights appears in a recent claim by Alberto Gonzales, the former White House counsel and now attorney general. Gonzales asserts that the president has an “inherent right” to authorize warrantless searches of Americans. In assuming such a prerogative – acting outside the law and abridging the Bill of Rights for the declared purpose of protecting Americans – this president and his attorney general have produced an astonisher in legal history.

All of Bush’s and Gonzales’s innovations in justice obey this maxim: change the law if possible; if visible change is thwarted, change the law invisibly; if both tactics fail, break the law and find a justification afterward. Like President Polk in the Mexican War, President Bush was able to change the law visibly to authorize the war he wanted in Iraq. To effect a demoralization of the law on torture, he had to solicit counsel to

change the law invisibly. In the case of domestic spying, he circumvented the existing machinery and, when discovered, claimed authorization from expanded emergency powers.

Of all the equivocal utterances of the 1850s, the one that drew Lincoln's deepest scorn was Stephen Douglas's remark that he did not care whether the people in the territories voted slavery up or down. This may seem almost a predictable feature of Douglas's argument that the popular will is the highest value of democracy. But no event of the time seems to have shocked Lincoln more than this expression of indifference. It may have done as much as any other circumstance to convince him to run for president.

Lincoln had assumed that Americans agreed that slavery was wrong – a necessity, perhaps, but wrong in itself. And yet if slavery was wrong, how could anyone not care whether the people voted it up or down? This looked like saying it was right not to care whether people chose right or wrong. Yet it ought to be morally impossible to feel that something is wrong while supporting a result that makes it legally right. By this way of thinking, the “miners and sappers” against equality – apologists for slavery as well as indifferent conciliators like Douglas – cheapened the value and meaning of life for all people in all sections of the country.

A comparable sign of degeneration today is our growing indifference to torture. How many have gone from believing that torture is simply wrong to conceding that the president may declare it right against certain persons in certain situations, as determined by officials he has chosen? What president before has presumed himself virtuous enough to deserve such power?

We used to suppose that a person arrested for a crime has a right to confront the charges against him. Without quite surrendering this idea, we have allowed ourselves to entertain a new suggestion: that by dictate of the president, certain persons may be picked out and imprisoned without charges. In Lincoln's day, the miners and sappers excused themselves by saying they did it to avoid a war. Now they say they do it to prevent an attack.

“My obligation to protect you” – in recent weeks President Bush has uttered these words again and again. But with these words, he both misquotes and misinterprets his oath of office. As specified in Article II, Section 1 of the Constitution, the presidential oath commits the holder of the office to “preserve, protect and defend the Constitution of the United States.” A king protects his people. A president of the United States swears to protect the Constitution, for a free people do not imagine they need any protector better than laws. To address the people as if they required a personal protector is to speak the language of kings.

In the House Divided speech, Lincoln said that he thought he could see the elements of a conspiracy to nationalize slavery. He did not have in mind an organization that met in secret, but rather an unavowed design shared by well-placed persons:

When we see a lot of framed timbers, different portions of which we know have been gotten out at different times and places and by different workmen – Stephen, Franklin, Roger and James, for instance – and when we see these timbers joined together, and see they exactly make the frame of a house or a mill, all the tenons and mortices exactly fitting, and all the lengths and proportions of the differ-

ent pieces exactly adapted to their respective places, and not a piece too many or too few – not omitting even scaffolding – or, if a single piece be lacking, we can see the place in the frame exactly fitted and prepared to yet bring such piece in – in such a case, we find it impossible to not believe that Stephen and Franklin and Roger and James all understood one another from the beginning and all worked upon a common plan or draft drawn up before the first lick was struck.

Included in Lincoln's suspicious and cogent surmise were Stephen Douglas, who by opening the Nebraska Territory created a legislative crisis that gave urgency to the *Dred Scott* case; Roger Taney, the chief justice who wrote a constitutionally improbable majority opinion profoundly comforting to slaveholders; Franklin Pierce, the outgoing president, who said that the courts would soon solve the slavery issue in the territories; and James Buchanan, the incoming president, who welcomed the decision when it arrived.

Compare their efforts to the present-day collaboration of the president, the director of the CIA, and the secretary of defense, together with certain reporters, in making the case for war with Iraq. Consider the joined timbers and fitted tenons and mortices of the president, the CIA, and the Department of Defense in working out the policy of "extraordinary rendition," the legalized kidnapping and transportation of foreign nationals for interrogation at hidden sites. Look at the collusion of the office of the vice president and journalists in leaking the name of a CIA agent whom the vice president and his circle had determined to put out of action.

A conspiracy is seldom a group of people acting in concert according to a settled plan. All that need be aligned are

their interests – both overt and tacit interests – and their knowledge of each other's presence and power. As Lincoln knew, the word 'conspiracy' means literally 'a breathing together,' but in few conspiracies are the actors found in a huddle. It is more accurate to picture a group of people standing far apart but singing a tune with parts that nicely harmonize. They may catch their cues from different places in a very large auditorium.

Lincoln diagnosed in the new acceptance of slavery a "debauching" of public opinion. In his speech of July 4, 1861, he accused Southern propagandists of having "sugar-coated" rebellion, so that they exposed the country to the one peril worse than civil war: destruction of the sentiments that form the basis of civil liberty.

The Patriot Act, hurried through Congress in the panic of 2001, gave the FISA courts a broad scope to authorize undeclared searches and wiretaps. Now we find that even as Congress was passing that law, the president was secretly arrogating to himself the power to instigate warrantless searches. Some Americans, sufficiently drugged by the mystique of the war on terror, appear to believe that there are two sides to this question; that it is right not to care much whether we vote up or down the Fourth, Fifth, and Sixth Amendments. It may need only the passage of a second Patriot Act to produce silent consent to the continuous warrantless monitoring of Americans.

Eventually, through the publicity from his debates with Douglas and patient explanation of the emergent Republican doctrine on the expansion of slavery, Lincoln in 1858, 1859, and 1860 gave a character to the party whose candidate he would become. Without that

record and without the national understanding it set in motion, he could not have assumed the strong position he occupied in 1861. Without those earlier steps, his speech of July 4, 1861, which drew thousands of young men to enlist in the Union army, would have been inconceivable. There had been a long work of preparation in the years when he educated the public mind on the political necessity of a constitutional opposition. A campaign of moral resistance had preceded his campaign for the presidency.

To follow Lincoln's pattern in this respect is to place a tremendous burden on the statesman as a reformer of public opinion. Such a leader does not suppose himself either a protector or a follower of the people. Instead, he is their interpreter, and there is hardly a moment when he is not explaining the choices they face. Nor does the task stop there. Lincoln believed – and his life illustrates the principle – that a true statesman is also concerned with the moral constitution of man; a work that goes beyond interpreting the fluctuating opinions held by the majority. Accordingly, Lincoln could not have been any sort of populist, just as, to remain a true republican, he could not have been any sort of imperialist. He supported the American experiment as limited and exemplary. He did not regard democracy, the idea or the political arrangement, as a charm against the violence of misery and oppression.

What would an opposition party look like today if it could emulate the resistance of the Republican Party in 1860? We are a long way from that. In 2002, the Democratic Party in Congress chose a fast authorization of war over a serious debate that might have discharged its obligation to educate the public. In 2004, the Democrats chose to dispute the tactical conduct of the war, and not the lies

and forgeries that launched it. At present, the opposition leaders and its probable candidates for 2008 endorse an escalation of the war. They urge the addition of more soldiers and more armor, and have backed away from a plan for disengagement that came from their own ranks. These acts of tactical leverage have been pusillanimous: the weakness, almost bankruptcy, of principle that underlies them is patent and easily exposed.

Though we have an opposition party in name, we are now close to the condition of the United States after the collapse of the Whigs in the mid-1850s. Where, then, do we find ourselves?

After the fall of Communism, there was an opening that passed. The United States never fully entered the world of nations. The burden of a constitutional opposition today must include education in the significance of this fact. For the sound part of the balance-of-power doctrine always lay in the idea that no one nation can control the world. We may still be the world's best hope; it should be a comfort that we are no longer its last hope. But we cannot endure half empire and half republic. We will become all one thing or all the other: an empire that expands by the permanent threat of war, and invents power after power to enlarge the authority and reach of the state; or the oldest of modern republics, vigilant against the reappearance of tyranny and firm in repelling any leader who sets himself above the law.

– February 23, 2006