

# Bush's actions compared to Lincoln's



DOES President Bush have the constitutional authority, as he claims, to order the warrantless surveillance of

suspected al-Qaeda agents in the United States?

Yes, he does, say some, who point to Abraham Lincoln's suspension of writs of habeas corpus during the Civil War to defend their position. Then and now, they argue, the commander-in-chief during wartime has an obligation to place national security above Fourth Amendment safeguards that protect individuals' privacy.

But there's a major difference between the two cases, namely the degree to which these two presidents have tilted the delicate balance of power in the federal government in favor of the executive branch. While Lincoln retained his credibility with Congress and the American people, Bush is diminishing his.

Lincoln, confronted with a destructive civil war, was constitutionally obligated to protect and preserve the union. To prevent Washington, D.C., from being encircled by Maryland's and Delaware's pro-secessionist forces and to ensure the transit of loyal troops to the capital, Lincoln, beginning in April 1861, ordered federal soldiers to arrest secessionists, saboteurs, and guerillas in those states.

In peacetime, such activities would have been clearly unconstitutional, violating Fourth Amendment protections. As a result, anti-Lincoln Democrats accused the president of establishing a military dictatorship, a charge that was supported by Chief Justice Roger B. Taney.

Taney challenged the legality of Lincoln's action in the court's 1861 "Ex parte Merryman" ruling that the arrest of suspected secessionists were illegal on two counts: (1) "there was no war" since only Congress can declare war and had not done so; and (2) only Congress had the power to suspend "habeas corpus" if the public's

## COMMENTARY

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Lincoln countered by citing "Luther v. Borden," an 1849 case in which Taney himself ruled that Rhode Island's state government, to defend itself in a public uprising, rightfully resorted to the military arrests of activist civilian dissidents.

Though not a declared war between nations, he argued, a state (and by implication, a nation) has legitimate duties to defend itself when attacked by armed forces from within or outside its boundaries.

As a result, Lincoln's actions were constitutionally valid on the basis that the Civil War presented fundamental and immediate dangers to government and society. He also made sure that the arrests were kept to a minimum and made his subordinates accountable to the measure by carefully monitoring their activities.

Bush, confronted with a war on terrorism, is also constitutionally obligated to protect and preserve the nation. In order to prevent another terrorist attack, the president, on Sept. 14, 2001, asked for and received from Congress permission to "use all appropriate and necessary force" against entities involved in the earlier assault.

Such a "blanket permission," he insists, included his secret authorization of the National Security Agency to spy on hundreds, perhaps thousands, of Americans and other residents. But he's experiencing more difficulty than Lincoln defending his domestic surveillance program.

Democratic lawmakers and civil-liberties advocates accuse the president of deliberately sidestepping the 1978 federal Intelligence Surveillance Act, which created a special court to approve such a domestic eavesdropping. The law includes emergency provisions that let investigators seek court approval up to 72

Bush is now scrambling to defend his actions on the grounds that his role as commander-in-chief during wartime requires that he make national security more important than the privacy of those individuals monitored under the domestic surveillance program. But that position has yet to be tested in the courts.

To be sure, the president should and must enjoy broader constitutional authority in wartime in order to protect the American people. Congress recognized that need when it approved the Patriot Act. But that's not the issue here.

The real issue is Mr. Bush's objective. Specifically, whether his administration is guilty of tilting the delicate balance of power in the federal government too far in the direction of the executive branch. There must continue to be legal safeguards to check such an expansive view of presidential power, and it's up to Congress to ensure them.

To their credit, legislators on Capitol Hill have recently taken a cautious approach to the president's anti-terrorist program. Rejecting Mr. Bush's call to make the Patriot Act permanent, Congress voted to extend it by just six-months.

While Abraham Lincoln created precedents that many of his successors used to excess, he did not harbor the intent to reshape the balance of power between Congress and the presidency and kept himself and his cabinet accountable to all traditional constraints of the democratic process. As a result, Lincoln can be absolved from the charge of "constitutional dictator."

If Mr. Bush had wanted to escape the same charge, he would've tried to have the federal Intelligence Surveillance Act changed instead of circumventing it. Then he might have greater credibility with the American people and their representatives in Congress.

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