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Executive Orders and the Decline of Law, Part 2

by William L. Anderson

The longest-lasting legacy of Lincoln is not the War Between the States or even the violent way in which slavery ended in the United States. Lincoln was able to use brute force to “settle” the various arguments regarding the centralization of political power in this country. As the late Shelby Foote said during an interview on Ken Burns’s PBS documentary on the Civil War, in the years before the war people spoke of the United States in the plural, as in “the United States *are*.” However, after the war, people spoke of the country in the singular, as in “the United States *is*.”

Perhaps the most famous document to come from the war was the Emancipation Proclamation, an executive order which Lincoln issued on January 1, 1863. Despite the continuing belief that Lincoln’s proclamation “freed the slaves,” in reality, it freed no one, but it did have the effect of further concentrating power in the executive branch.

The Emancipation Proclamation declared that all slaves living in the areas of the Confederate States of America which were *not* secured by Union forces were legally free. In and of itself, it was a curious claim, as it failed to emancipate slaves held in Union slave states such as Delaware and Kentucky; and people living in the Confederate States did not believe themselves to be subject to Lincoln or any other Northern political institution, so it could not free slaves in those places, at least by itself.

(Union soldiers did use the Emancipation Proclamation to justify releasing slaves as they occupied new territories in the South. However, given the state of the fighting, it is just as likely that Union forces would have freed those slaves anyway, if for no other reason than to cripple the economies of the Southern states, making it more difficult for the Confederates to continue to fight.)

In issuing his order, Lincoln did not refer to any specific statutes — as there were none that he could have claimed as the basis of the Emancipation Proclamation. Instead, he said that the Constitution gave him that particular power. (Indeed, following the war, Congress pushed through the Thirteenth Amendment to abolish chattel slavery, as abolitionists fretted about the legality of Lincoln’s order, and decided to anchor the prohibition into the Constitution itself. The

popularity of the order notwithstanding, abolitionists rightly feared that the Supreme Court would overturn it because of the absence of any legal basis for Lincoln's actions.)

While the Lincoln presidency and the War Between the States did not lead to an immediate flood of new executive orders, it did help to set a longer-term precedent of concentrating powers in the executive branch. When the Progressive Era came to the United States, one can say that Lincoln helped to "set the table" when the intellectuals and political classes began to demand that government be centralized and that the presidency be strengthened.

The Great Depression and the subsequent New Deal of Franklin D. Roosevelt were a major turning point, as far as the power of the executive branch is concerned. Because the business downturn was so severe, Americans were willing to try *anything*, and that "anything" from the Roosevelt administration was the old Progressive agenda of turning power over to the executive branch.

Growth of executive orders

As Paul Craig Roberts and Lawrence W. Stratton point out in their book *The Tyranny of Good Intentions*, the entire business of congressional lawmaking changed. Instead of passing legislation that was carefully written and aimed at laying down clear boundaries, Congress began to crank out laws willy-nilly that were hastily written and unclear both in their language and their intent. (That is still the case, as most lawmakers do not even *read* the legislation they pass, preferring to leave that job to staffers, as well as the lobbyists and people from the executive branch, since those two groups actually are the authors of much current legislation.) Roberts and Stratton write that Joseph T. Robinson (Senate Majority Leader, 1933–1937) "wept" at the realization of what Congress was doing.

Most important was that Congress came to accept its role as being secondary in the legislative process, and the courts agreed to give up part of their role in the interpretation of congressional law. This should not be surprising, given that one of the tenets of Progressivism was that "experts" should be the decision-makers when it came to the workings of government. Thus, if prosecutors and U.S. Department of Justice attorneys were the "experts," the courts agreed to defer to them.

(One obvious example of this deference was how the U.S. Supreme Court in the 1970s began to interpret the 1964 Civil Rights Act. The law specifically forbade the use of racial quotas, and one of the bill's sponsors, Sen. Hubert Humphrey, declared he would "eat" the pages of the law itself if it permitted racial quotas. However, at the prodding of the U.S. Civil Rights Commission, the high court later declared that it would defer to the "expert" opinion of the commission and interpret the 1964 law as requiring employers to have certain numerical standards — quotas, if you will — in order to be in "compliance" with the law. In this case, it was

the triumph of the bureaucracy over the wishes of the White House, which only underscores the tremendous power that the bureaucracies wield.)

Emboldened by the failure of Congress and the courts to hold their ground, the executive branch has grown in power, authority, and its ability to control the lives of individual Americans without fear of legal retribution. From Roosevelt's executive order seizing private gold holdings of Americans, to his order to illegally intern Japanese-Americans during World War II, to Clinton's executive order to bomb Serbia in 1999, to the slew of orders from the Bush administration, executive orders have become tools for the president and executive-branch bureaucrats to impose their own agendas that by themselves could not get past Congress. Moreover, Bush's recent statements after signing an "anti-torture" bill from Congress that he would interpret the law in any way he saw fit shows only how big the problem has become.

Both Republicans and Democrats are fond of referring to the "imperial presidency" when someone from the opposite party is in the White House. Yet both parties have acted to protect and strengthen the presidency when it was to their advantage. For example, while Republicans supposedly favor more "decentralized" government, they consistently have given the central government more power (at the expense of the states) since they came to control Congress in 1995. Democrats, on the other hand, who coined the term "imperial presidency" during Richard Nixon's years in office, nevertheless raised no objection when Bill Clinton ordered dozens of military interventions across the globe.

The Framers of the Constitution understood the dangers of the executive branch's grabbing most of the powers of government. Unfortunately, while federal officials today — in all three branches of the federal government — profess their oath to "protect and defend the Constitution from all enemies, foreign and domestic," they quickly join the ranks centralizing power in the executive. Unless members of the other branches are willing to act on the important principle of decentralization of power, the American Experiment will end up being nothing but a footnote of history.

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