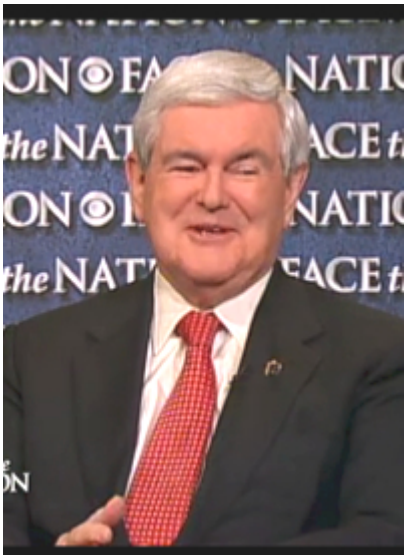
Gingrich and the Courts: No, Sir, That Ain't History



Newt Gingrich is fond of reminding listeners that he was a history professor. As with most things the former Speaker of the House says, there's a bit of truth and a lot of exaggeration in that line of his résumé.

In 1970, Gingrich joined the history department at West Georgia College as an assistant professor. In 1974, he moved to the geography department where he helped found an interdisciplinary environmental studies program. After eight years at West Georgia, the 35-year-old Gingrich was denied tenure and he abandoned his planned professorial profession.

The same year he departed West Georgia College, Gingrich took his third shot at Georgia's Sixth Congressional District seat. With the incumbent's decision not to seek reelection, Gingrich successfully defeated his Democratic challenger and went on to spend 20 years in the House of Representatives, including four years wielding the powerful Speaker's gavel.

The brief biographical sketch provided above casts legitimate doubt on the strength of Gingrich's scholarly claims. Not one to let the facts stand in the way of a good story, Gingrich relies on his paltry professorial past to intimidate opponents and convince voters that he is the thinking man's Republican and thus more intellectually equipped to take on his fellow former professor — Barack Obama.

During an appearance on the CBS Sunday morning mainstay, *Face the Nation* (picture above), presidential candidate Gingrich demonstrated how his time studying history did nothing to improve his woeful understanding of the separation of powers and checks and balances — two of the principal pillars upon which our Republic is built.

This time, Gingrich lectured viewers on the "extreme behavior" of federal judges and how there is a way to restrain these runaway jurists.

Here's the essence of Gingrich's proposal for rebalancing the tripartite power scheme established by the Constitution: "If the Congress and the court say the President is wrong, in the end the President would lose. And if the President and the court agreed, the Congress loses. The Founding Fathers designed the Constitution very specifically in a Montesquieu spirit of the laws to have a balance of power — not to have a dictatorship by any one of the three branches."

Fair enough, the Founding Fathers certainly studied the history of the republics of history and recognized the need for three separate powers all balanced against the other so as to thwart any tyrannical tack by one or the other of the three departments of government.

Tangentially, despite his alleged scholarly familiarity with the history of the United States, Gingrich falls prey to a very popular yet erroneous notion that the Baron de Montesquieu was the primary source of the Founders' views on the separation of powers (or mixed government). While the noble Montesquieu was quoted in *The Federalist Papers*, in those same essays, James Madison made it clear

that he viewed Montesquieu as an intermediary on the subject of separation of powers, more a compiler of the ideas of the ancients on the subject than a composer of his own.

Setting aside Gingrich's rather pedestrian knowledge of the sources of the key components of the Constitution, his ideas for setting "two out of three" of the branches against the other continued to be fleshed out as he responded to questions from the host of *Face the Nation* about specifics of the plan to control "radical" judges.

Gingrich told Bob Schieffer (host of *Face the Nation*) that should judges issue rulings with which the legislative branch disagreed, then Congress should send subpoenas to the offending judges, compelling them to appear before a committee and testify as to their refusal to conform to the Congress's interpretation of the constitutional questions addressed by the judges' holding.

"How would you enforce that? Would you send the capital police down to arrest him [the subpoenaed judge]?" asked Schieffer.

"If you had to," Gingrich responded.

When Schieffer demonstrated disbelief, Gingrich pushed the pedal harder.

"Or you instruct the Justice Department to send the U.S. Marshal," Gingrich stated.

Gingrich rested the case for his constitutionally suspect scenario by rhetorically asking: "Are judges above the rest of the Constitution or are judges one of the tree co-equal branches?"

Then, he put the cap on the concept by donning his threadbare professor's robe: "I think part of the advantage I have is that I'm not a lawyer. As a historian, I look at the context of the judiciary and the Constitution in terms of American history."

Perhaps it was Gingrich's unabashed yet uninformed understanding of the Constitution and the role of the three branches of the federal government created by it that contributed to his failure to gain tenure at West Georgia College.

In the campaign for President, candidates often take momentary detours off the reservation that result in weeks of trying to steer their way back onto the well-traveled campaign trail.

To the end, it is important to understand what could possibly compel a candidate to go off message. Is it an attempt to appeal to a specific segment of the electorate? Or, is it one of the rare occurrences when a candidate allows his genuinely held opinions to percolate past the filters put in place to keep him from spouting controversial concepts?

In the case of Gingrich and the separation of powers, another remark he made might reveal the impetus for his shot across the bow of the judiciary.

Bob Schieffer asked Gingrich, "You said in the Gingrich administration you would just tell the national security officials to ignore the Supreme Court's recent rulings on national security. Do you just follow only the laws you wish to follow under your doctrine? How does that work?"

The response that followed likely uncovers Gingrich's ultimate aim in muzzling the courts.

"You follow the law. I think the commander in chief has the power to defend his country…. The recent court decisions in which the court intervened in national security, they're taking on their shoulders defending America. They are totally unprepared to do it. It is unconstitutional. Somebody should stand up to them and say no."

Three points need to be made:

First, nowhere in Article II of the Constitution is the President empowered to "defend his country." There are four small sections in that article. The powers are few, limited, and very well defined.

Second, the Constitution does not need an accumulation of auxiliary precautions against the despotism of activist judges. Article III gives Congress substantial say over the metes and bounds of the power of the judiciary. Although there may be only one Supreme Court, Congress may decide the number of "inferior courts" it wishes to "ordain and establish." Furthermore, the very scope of the Supreme Court's appellate jurisdiction is to be left to the discretion of the Congress (see Article III, Section 1).

Third, the cases that candidate Gingrich finds so offensive and "unconstitutional" are the decisions in *Hamdi* and *Padilla*. Those cases upheld the right of American citizens to habeas corpus and to not be indefinitely detained without access to a lawyer and without being apprised in a timely manner of the charges laid against them. Those decisions may impact national security, but more importantly they uphold the principles of freedom that have been central elements in Anglo-American liberty for over 600 years. As the recent passage by Congress of the National Defense Authorization Act demonstrates, the legislative branch cannot be relied upon to uphold those core constitutional guarantees, so thankfully the Supreme Court has stepped up and filled the gap.

Finally, Newt Gingrich supports the NDAA, he supports the PATRIOT Act, he supports a war against Iran, and he thinks he has history and the Constitution on his side. Not one of these tenets of totalitarianism is provided for in the Constitution. In fact, they are contrary to the very limited, narrowly defined, specifically enumerated powers granted to the three branches of the federal government in that document.

Gingrich would see the President wear a tyrant's crown with power to decide which laws he will obey and which decisions of the Supreme Court he will respect. To defend his untenable position, he invokes the need for national security. Perhaps the *soi-dissant* historian should read — and voters should heed — this timeless warning from the Father of the Constitution, James Madison: "The means of defense against foreign danger historically have become instruments of tyranny at home."

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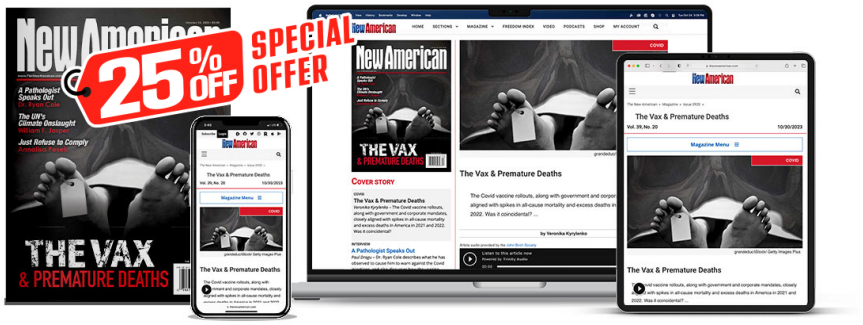

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