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Lincoln, Vallandingham, and Anti-War Speech in the Civil War

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LINCOLN, VALLANDIGHAM, AND ANTI-WAR SPEECH IN THE CIVIL WAR

Michael Kent Curtis*

In the early morning hours of May 5, 1863, Union soldiers forcibly arrested Clement L. Vallandigham, a prominent Democratic politician and former congressman, for an anti-war speech which he had given a few days earlier in Mount Vernon, Ohio. Vallandigham's arrest ignited debate about freedom of speech in a democracy during a time of war and the First Amendment rights of critics of an administration. This Article is one in a series by Professor Curtis which examines episodes in the history of free speech before and during the Civil War.

In this Article, Professor Curtis explores the First Amendment's guarantee of free speech and the contention that other constitutional values must supersede this guarantee during a time of war. He discusses and evaluates theories that Vallandigham's contemporaries advocated in support of protection for anti-war speech, as well as theories supporting the suppression of anti-war speech. Curtis concludes that even in a time of war, free speech is essential to the preservation of a representative government and individuals' Constitutional right to discuss issues crucial to their lives.

* * *

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I. INTRODUCTION

A. *The Meaning of Vallandigham's Arrest*

At 2:40 a.m. on May 5, 1863, one hundred and fifty Union soldiers from the command of General Ambrose Burnside arrived at Clement L. Vallandigham's home in Dayton, Ohio. The soldiers' mission was to arrest Vallandigham, a prominent Democratic politician and former congressman, for an anti-war political speech he had made a few days before. After Vallandigham refused to submit, the soldiers attempted to break down his front door. Finally, soldiers forced their way in and captured Vallandigham. They put him on a train bound for Cincinnati. Once there, Vallandigham was to be tried before a military commission appointed, of course, by the same General who had ordered his arrest. Vallandigham's efforts to secure a writ of habeas corpus failed. After his conviction, President Lincoln changed Vallandigham's sentence from imprisonment to banishment to the Confederacy.¹

Within a month of Vallandigham's banishment, General Burnside suppressed publication of the *Chicago Times* newspaper; but this time Lincoln countermanded the order.² Less than a year later, Republicans in Congress introduced a resolution to expel a Democratic congressman for advocating peace and recognition of the

¹ See *The Circumstances of the Arrest of C. L. Vallandigham*, CIN. COM., May 6, 1863, at 2; Frank L. Klement, *Clement L. Vallandigham*, in *FOR THE UNION: OHIO LEADERS IN THE CIVIL WAR* 3, 37-42 (Kenneth W. Wheeler ed., 1968) [hereinafter Klement, *Vallandigham*, in *FOR THE UNION*]. For other discussions of Vallandigham and his arrest, see for example, FRANK L. KLEMENT, *THE LIMITS OF DISSENT: CLEMENT L. VALLANDIGHAM & THE CIVIL WAR* 157-58 (1970) [hereinafter KLEMENT, *LIMITS OF DISSENT*]. Klement, relying in part on accounts many years later and on circumstantial evidence, suggested that Vallandigham courted martyrdom as a means of gaining the Democratic nomination for governor. *Id.* at 154. See also Erving E. Beauregard, *The Bingham-Vallandigham Feud*, 15 *BIOGRAPHY* 29 (1992) (contrasting Vallandigham's education, political beliefs, and Congressional voting record with those of Bingham, a fellow Ohio legislator and chief drafter of the Fourteenth Amendment). For accounts of events reported here which are more sympathetic to the position taken by Lincoln, see for example, ROBERT S. HARPER, *LINCOLN AND THE PRESS* 239-51 (1951); Harold M. Hyman's classic work, *A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION* 124-40 (1973) (concluding that the strength and swiftness of Lincoln's war-time efforts convinced Northern scholars, Union legislators, Union soldiers, and some foreign observers that the Constitution was as adequate in war as in peace). For an analysis that is critical of Republicans, see JEFFREY ROGERS HUMMEL, *EMANCIPATING SLAVES, ENSLAVING FREE MEN: A HISTORY OF THE AMERICAN CIVIL WAR*, chs. 8, 10 (1996). For a less critical analysis of the suppression of free speech in the Vallandigham case, see CRAIG DAVIDSON TENNEY, *MAJOR GENERAL A. E. BURNSIDE AND THE FIRST AMENDMENT: A CASE STUDY OF CIVIL WAR FREEDOM OF EXPRESSION*, reprinted in UMI Dissertation Service, 1977.

² See KLEMENT, *LIMITS OF DISSENT*, *supra* note 1, at 183.

Confederacy in a speech he made on the floor of the House.³ Some cited the Vallandigham case as precedent for the proposed expulsion.⁴

The most immediate response to the Vallandigham arrest was a riot in his home town. A mob burned the local Republican newspaper building and cut telegraph lines. Order was restored only when General Burnside declared martial law and sent in troops.⁵

Vallandigham's arrest produced a tidal wave of criticism. The arrest focused national attention on the meaning of free speech in time of war (especially civil war), on the relation of free speech to democratic government, and on civil liberties for critics of the Lincoln administration. Critics insisted that the arrest violated Bill of Rights guarantees of free speech, free assembly, due process, and the rights to a trial by jury and a grand jury indictment. Both Democrats and Republicans described such rights as "privileges" or "immunities," as well as "rights" and "liberties."⁶ The Vallandigham case raised basic civil liberties issues: the power of the military to try civilians in areas where no combat raged and where civil courts were functioning; the power to try and imprison such persons for anti-war speech; and generally, the scope of the war power. What was the scope of military power during internal rebellion, and to what extent did the First Amendment limit that power? This Article primarily focuses on the free speech issue.

Before the Civil War, abolitionists and, later, Republicans had invoked protective concepts of freedom of speech, press, assembly, and religion to defend against attempts to suppress anti-slavery expression. They claimed the right to discuss questions of public policy fully and freely on every inch of American soil "to which the privileges and immunities of the Constitution extend," as Representative Lovejoy said in 1860. "[T]hat Constitution," Lovejoy insisted, "guaranties me free speech."⁷ In response to an uproar over Republican endorsement of a searing anti-slavery book, Republicans in the United States Senate supported the following resolution: "freedom of speech and of the press, on [the morality and expediency of slavery] and every other subject of domestic [state] and national policy, should be maintained inviolate."⁸ Many Republicans and others described the rights to free speech and press as constitutional privileges belonging to all American citizens and as rights enjoyed by virtue of the Federal Constitution.⁹

³ See *infra* notes 345-407 and accompanying text.

⁴ See *id.*

⁵ See, e.g., *Mob at Dayton*, DET. FREE PRESS, May 7, 1863, at 1.

⁶ E.g. *Free Speech—Free Press, Immense Meeting at Chicago: Protest Against the Order No. 84 of Gen. Burnside*, CHI. TIMES, June 5, 1863, reprinted in DET. FREE PRESS, June 6, 1863, at 1.

⁷ CONG. GLOBE, 36th Cong., 1st Sess. 205 (1860).

⁸ *Id.* at 146.

⁹ See Michael Kent Curtis, *The 1837 Killing of Elijah Lovejoy by an Anti-Abolition Mob: Free Speech, Mobs, Republican Government, and the Privileges of American Citizens*, 44 UCLA L. REV. 1109, 1147-50 (1997) [hereinafter Curtis, *The 1837 Killing*]; Michael Kent Curtis, *The 1859 Crisis Over Hinton Helper's Book, The Impending Crisis: Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth*

Both anti-slavery activists and Republicans implicitly repudiated the notion that freedom of speech or press merely was a protection against prior restraints, but that punishment after publication was permissible. Instead, they insisted that by punishing anti-slavery speech and press, slave states refused to tolerate freedom of speech. Similarly, they implicitly and, sometimes, explicitly rejected arguments that the bad tendency of anti-slavery speech (a tendency that outraged Southerners and their Northern allies insisted threatened slave revolts) justified suppression.¹⁰ The Republican Party slogan in 1856 was "Free Speech, Free Press, Free Men, Free Labor, Free Territory."¹¹

The Civil War raised the free speech and bad tendency issues again, though this time critics of emancipation and the war invoked the protection of free speech and free press. The Vallandigham case reveals a broad and popular free speech tradition at work and in conflict with other interests. The free speech tradition included core ideas: that criticism of the actions of government officials and advocacy of peaceful change in public policy were protected speech; that free speech was a basic human right; that it was central to popular government; that infringements of free speech violated the ultimate sovereignty of the people; and that free speech required broad equality of treatment for opposing views. Broad belief in these core ideas prevented Civil War repression of political speech from becoming more pervasive.

Supporters of Vallandigham's arrest articulated counter-ideas. They distinguished between liberty and license and, in doing so, they made arguments similar to those expressed in judicial cases and in a scholarly tradition that insisted that freedom of speech and press did not encompass license.¹² In time of rebellion, they argued, free

Amendment, 68 CHI.-KENT L. REV. 1113, 1150-59 (1993) [hereinafter Curtis, *The 1859 Crisis*]; MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 34-56 (1986) [hereinafter CURTIS, NO STATE SHALL ABRIDGE].

¹⁰ See generally Curtis, *The 1859 Crisis*, *supra* note 9, at 1174-77 (suggesting that Republican frustration with lack of First Amendment protections for anti-slavery speech in the South was partly responsible for Section 1 of the Fourteenth Amendment).

¹¹ RICHARD H. SEWELL, BALLOTS FOR FREEDOM: ANTISLAVERY POLITICS IN THE UNITED STATES 1837-1860, at 284 (1976).

¹² See, e.g., JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION § 1882 (1833) ("[F]ree, but not licentious, discussion must be encouraged."), reprinted in 5 THE FOUNDERS' CONSTITUTION 182, 184 (Philip B. Kurland and Ralph Lerner eds., 1987) [hereinafter 5 THE FOUNDERS' CONSTITUTION]. Story reserved judgment on whether the national government had the power of "not restraining the liberty of the press, but punishing the licentiousness of the press." *Id.* § 1885, in 5 THE FOUNDERS' CONSTITUTION, *supra*, at 185. But see 3 JAMES BURGH, POLITICAL DISQUISITIONS 254 (Da Capo Press 1971) (1775).

No man ought to be hindered saying or writing what he pleases on the conduct of those who undertake the management of national affairs, in which all are concerned, and therefore have a right to inquire, and to publish their suspicions concerning them. For if you punish the slanderer, you deter the fair inquirer.

Id. Cf. ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES, 1:App. 298-99, 2:App. 12-25, 27-30 (1803), in 5 THE FOUNDERS' CONSTITUTION, *supra*, at 152-58 (stating that Congress may not regulate the press, but that some remedy is available to "an individual" in a state court for attacks on reputation). Cf. *People v. Croswell*, 3 Johns. Cas. 337 (N.Y. 1804),

speech rights are far more limited than in peacetime, even in states that are not in rebellion and that are distant from military conflict. Supporters of Vallandigham's arrest insisted that, in time of rebellion or war, speech tending to produce bad results in the long run should be suppressed.

They also might have invoked the Sedition Act and insisted that freedom of speech was limited to protection against prior restraint. That they did not make such arguments shows the extent to which the popular free speech tradition had repudiated the claim that free press was only a protection against prior restraint.

Vallandigham's story illustrates the long existence of a vibrant and tough free speech tradition—even in times of great national danger. The Vallandigham and *Chicago Times* episodes show that a robust view of free speech was not, as is often supposed, a twentieth-century development, but part of a much older tradition. The history of this earlier robust free speech tradition is worthy of careful study, particularly today when that tradition is under increased scholarly attack.

This Article is an installment in a series that examines episodes in the history of free speech before and during the Civil War. One of these major episodes involved the Sedition Act, under which the government jailed political critics of President John Adams for “false, scandalous and malicious”¹³ criticisms of the President and his policies. (Critics of Adams's likely opponent—Vice President Thomas Jefferson—were not covered by the Act.) The episodes also include an attempt to ban anti-slavery publications from the mails; a ban on discussion of anti-slavery petitions in the United States Congress; the use of the laws of Southern states to suppress anti-slavery and, later, Republican speech; the attempt to pass similar laws in the North; and the use of mob violence in an attempt to silence abolitionists. Each of these episodes involved attempts to suppress political speech on major issues of the time. The episodes involved major decisions about the nature and scope of free speech in America.

When he presented the Bill of Rights in the first Congress, James Madison suggested that courts of justice would “consider themselves in a peculiar manner the guardians of those rights” and would “be an impenetrable bulwark against every assumption of power.”¹⁴ In addition, he said that the Bill of Rights would help

reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra*, at 158, 169.

The founders of our government were too wise and too just, ever to have intended, by the freedom of the press, a right to circulate falsehood as well as truth, or that the press should be the lawful vehicle of malicious defamation, or an engine for evil and designing men, to cherish, for mischievous purposes, sedition, irreligion, and impurity.

Id. Cf. *Updegraph v. Commonwealth*, 11 Serg. & Rawle 394 (Pa. 1824), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra*, at 170, 175 (a blasphemy prosecution).

¹³ See JAMES MORTON SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* 94-95 (1956) (quoting Act of July 14, 1798, ch. 74, § 2, Stat. 596).

¹⁴ 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1031 (Bernard Schwartz ed., 1971).

cultivate public opinion in favor of the rights and so provide additional security for the rights.¹⁵

In these early episodes, public support for free speech loomed larger than judicial protection. The courts were not the only decision makers and, sometimes, hardly were involved at all. When the courts did become involved, they often ratified, rather than checked, abuses of power. Devotion to popular conceptions of free speech was, and remains, an important protection for free speech.¹⁶

The events examined in this Article involve common and recurring problems. These include the conflict between free speech and other important interests such as national unity in time of war and, more generally, the conflict between free speech and the evils free speech is thought to engender. The Vallandigham controversy, like earlier episodes, involved the conflict between the "bad tendency" of free speech to cause serious harm in the long run and the interests of citizens in broad political freedom. Like earlier episodes, the Vallandigham arrest involved the claim that other constitutional values must supersede guarantees of free speech and free press.

B. *The Democratic Party and Vallandigham's Politics*

In the years before the Civil War, the Democratic Party had been an uneasy coalition between, among others, Southern planters and Northern artisans. Slavery was a wedge issue that threatened to split the Northern and Southern wings of the party and to drive Democrats from power. Some Democrats had supported a law to ban anti-slavery publications from the mails and had supported a gag law to prohibit discussion of anti-slavery petitions in Congress. Other Democrats opposed the expansion of slavery, the restrictions on free speech on the subject of slavery, including a law banning abolitionist publications from the mails, and the gag rule. These Democrats contributed crucial votes to defeat the proposed ban on mailing abolitionist pamphlets to the South, and eventually, the gag rule.¹⁷ But as the Civil

¹⁵ See *id.* at 1030-32.

¹⁶ See Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-1837*, 89 NW. U. L. REV. 785 (1995) [hereinafter Curtis, *The Curious History*]; Curtis, *The 1837 Killing*, *supra* note 9, at 1109; Curtis, *The 1859 Crisis*, *supra* note 9, at 1113. For examples of judicial ratification of the Sedition Act, see for example, *United States v. Cooper*, 25 F. Cas. 631 (C.C.D. Pa. 1800) (No. 14,865); *United States v. Callender*, 25 F. Cas. 239 (C.C.D. Va. 1800) (No. 14,709); *Lyon's Case*, 15 F. Cas. 1183 (C.C.D. Vt. 1798) (No. 8,646).

¹⁷ See generally WILLIAM LEE MILLER, *ARGUING ABOUT SLAVERY: THE GREAT BATTLE IN THE UNITED STATES CONGRESS* (1996) (discussing the gag rule-slavery debate of the 1830s and early 1840s); LEONARD L. RICHARDS, *THE LIFE AND TIMES OF CONGRESSMAN JOHN QUINCY ADAMS* (1986) (discussing the activities of anti-abolitionists and the rise of an organized anti-slavery movement in the North, and describing John Quincy Adams's involvement in free speech struggles over slavery); GILBERT HOBBS BARNES, *THE ANTISLAVERY IMPULSE: 1830-1844*, at 109-45 (1933) (noting the significant role that religion played in the abolitionist movement in the West and how this Western anti-slavery movement of the 1830s spread to the North and culminated in a sectional crusade against slavery).

War approached, leaders of the party increased their efforts to satisfy escalating Southern demands to protect the institution of slavery. Ultimately, the effort to satisfy the South failed and, in 1860, the Democratic Party, like the Union itself, split into Northern and Southern parties. With secession, most Democrats supported the war, but many opposed the Emancipation Proclamation. Vallandigham was a member of the peace wing of the Democratic Party.

Vallandigham supported the primary Southern approach to the constitutional crisis that led to the Civil War. By the 1850s, many Southerners demanded the right to settle with their slaves in any of the national territories. This demand was advanced dramatically when Congress passed the 1854 Kansas-Nebraska Act. That Act repealed the Missouri Compromise which had prohibited slavery in territory north of latitude 36°30'. The Kansas-Nebraska Act galvanized Northern sentiment against the expansion of slavery, ignited a political firestorm, and led to the formation of the Republican Party.¹⁸

In 1855, Vallandigham described the Kansas-Nebraska Act as “that most just, most Constitutional, and most necessary measure.”¹⁹ He explained that abolition was the cause of the sectional crisis wracking the United States. With respect to the formation of abolition societies, he said:

The object of attack was the South, the seat of war the North. Public sentiment was to be stirred up here against slavery, because it was a moral evil, and a sin in the sight of the Most High, for the continuance of which, one day, the men of the North were accountable before heaven. Slaveholders were to be made odious . . . as cruel tyrants and taskmasters, as kidnappers, murderers, and pirates, whose existence was a reproach to the North, and whom it were just to hunt down and exterminate.²⁰

Initially, when confronted by the abolitionists, according to Vallandigham:

even the North started back aghast. . . . [Abolition] was denounced as treason and madness from the first. Its presses were destroyed, its assemblies broken up, its publications burned, and its lecturers mobbed everywhere, and more than one among them murdered in the midst of popular tumult and indignation. The churches, the school-houses, the court-houses, and the public halls were alike closed against them.²¹

¹⁸ See generally DON E. FEHRENBACHER, *THE DRED SCOTT CASE 188-92* (1978) (explaining that only seven of the 44 Northern Democrats who voted for the Kansas-Nebraska Act won re-election following passage of the Act and attributing the formation of the Republican Party to the “anti-Nebraska” movement of 1854).

¹⁹ C. L. Vallandigham, *History of the Abolition Movement, Speech Delivered at a Democratic Meeting held in Dayton, Ohio, Oct. 29, 1855*, in *THE RECORD OF HON. C. L. VALLANDIGHAM ON ABOLITION, THE UNION, AND THE CIVIL WAR* 5, 38 (J. Walter & Co. 1863) [hereinafter *VALLANDIGHAM RECORD*].

²⁰ *Id.* at 22.

²¹ *Id.* at 22.

Gradually, Vallandigham said, abolition had established a "Free Soil" anti-slavery party. It had "disguis[ed] its odious principles and its true purposes, under the false pretence of No Extension of Slavery."²²

Like many of his contemporaries, Vallandigham was a racist. "No negro emigrant could be naturalized,"²³ he declared in an 1858 speech in Congress. "[I]t is not alone [the Negro's] descent from slaves . . . that degrades him in the scale of social and political being. It is his color and his blood. It is because he is the descendant of a servile and degraded race."²⁴ After the Civil War, most Democrats initially opposed national protection for the rights of newly freed slaves.²⁵

As a Democratic congressman from Ohio, Clement L. Vallandigham had been one of the most persistent critics of the Lincoln administration's war policy. The state legislature redrew Vallandigham's district and Republicans targeted him for defeat. In 1862, Vallandigham lost his seat in Congress. By January 1863, Vallandigham had decided to run for governor of Ohio.²⁶

In 1863, Vallandigham was a supporter of "the Union as it was"²⁷—a Constitution that recognized and supported slavery in a union of slave and free states. In fact, the Union would not be exactly as it had been. Under a constitutional amendment that Vallandigham proposed after the outbreak of the Civil War, no bill could become a law without support from a majority of senators and representatives from each of the nation's four sections (the South was one); and no one could be elected president without a majority of the electoral college votes from each section.²⁸ The proposal promised long-term security for the institution of slavery because it gave the South a veto on legislation and on the election of a president.²⁹

Vallandigham opposed the draft, but he told an 1862 mass meeting in his congressional district that "[w]hoever should be drafted, should a draft be ordered according to the Constitution and the law, is in duty bound . . . to . . . go; he has no right to resist, and none to run away."³⁰

In 1863, Vallandigham also openly opposed continuing the Civil War. "But ought this war to continue?" Vallandigham asked in an 1863 speech.³¹ "I answer, no—not a day, not an hour. What then? Shall we separate? Again I answer, no, no, no!"³² He quickly dismissed concerns about slavery. "Neither will I be stopped by

²² *Id.* at 26.

²³ *Id.* at 236.

²⁴ *Id.*

²⁵ See, e.g., CURTIS, NO STATE SHALL ABRIDGE, *supra* note 9, at 81.

²⁶ See Klement, *Vallandigham*, in FOR THE UNION, *supra* note 1, at 36.

²⁷ *Id.* at 29 (citing N.Y. TIMES, Dec. 13, 1862, *quoted in* DAYTON EMPIRE (Ohio: Daily), Dec. 18, 1862).

²⁸ See *id.* at 8.

²⁹ See *id.*

³⁰ *Id.* at 24.

³¹ C. L. Vallandigham, The Great Civil War in America, Speech Delivered in the House of Representatives, Jan. 14, 1863, in VALLANDIGHAM RECORD, *supra* note 19, at 168, 183.

³² *Id.*

that other cry of mingled fanaticism and hypocrisy, about the sin and barbarism of African slavery."³³ Vallandigham thought the horror of the war and the policy of the administration required a change of policy. "Sir," he said, "I see more of barbarism and sin, a thousand times, in the continuance of this war, the dissolution of the Union, the breaking up of this Government, and the enslavement of the white race, by debt and taxes and arbitrary power."³⁴

Opposition to the war often was extreme. The *Dayton Daily Empire*, a newspaper Vallandigham influenced heavily, described Ohio governor Dennison's efforts to raise Union troops after Fort Sumter as a scheme to "butcher men, women, and children" of the South.³⁵

Vallandigham hoped anti-slavery feeling was ebbing in the West. He thought Westerners were beginning "to comprehend, that domestic slavery in the South is a question, not of morals, or religion, or humanity, but a form of labor, perfectly compatible with the dignity of free white labor in the same community, and with national vigor, power, and prosperity, and especially with military strength."³⁶ Indeed, part of Vallandigham's solution for the Civil War was to end abolition agitation: "In my judgment, you will never suppress the armed Secession Rebellion till you have crushed under foot the pestilent Abolition Rebellion first. . . . It must be met by reason and appeals to the people, through the press and in public assemblages, and be put down at the ballot-box."³⁷

In general, Vallandigham counseled obedience to the laws. But if Republicans infringed the freedom of the ballot, he and other Democrats suggested revolt would be appropriate. Vallandigham said:

No matter how distasteful constitutions and laws may be, they must be obeyed. I am opposed to all mobs, and opposed also . . . to all violations of [C]onstitution and law by men in authority—public servants. The danger from usurpations and violations by them is fifty-fold greater than from any other quarter, because these violations and usurpations come clothed with false semblance of authority.³⁸

Before his arrest, Vallandigham also criticized the Lincoln administration for its policy of military arrests of civilians and suspension of the writ of habeas corpus. Indeed, he suggested that if the President engaged in further arbitrary arrests, he should be impeached.³⁹

³³ *Id.* at 189.

³⁴ *Id.*

³⁵ HARPER, *supra* note 1, at 195 (quoting DAYTON EMPIRE (Ohio: Daily), reprinted in THE CRISIS (Columbus, Ohio), Apr. 18, 1861).

³⁶ C. L. Vallandigham, The Great Civil War in America, Speech Delivered in the House of Representatives, Jan. 14, 1863, in VALLANDIGHAM RECORD, *supra* note 19, at 168, 189.

³⁷ C. L. Vallandigham, State of the Country, Speech Delivered at Dayton, Aug. 2, 1862, in VALLANDIGHAM RECORD, *supra* note 19, at 135, 148.

³⁸ *Id.* at 137.

³⁹ See Klement, *Vallandigham*, in FOR THE UNION, *supra* note 1, at 16.

C. "Arbitrary Arrests"

Lincoln faced a huge rebellion, rebel sympathizers, and resistance and spies throughout the nation. The loyalty of key states like Maryland, Missouri, and Kentucky was doubtful. It was one of the most extreme threats in the nation's history. The Lincoln administration responded with military arrests and suspension of the writ of habeas corpus. Lincoln explained his policy in his 1861 Message to Congress:

The whole of the laws which were required to be faithfully executed were being resisted, and failing of execution, in nearly one-third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear, that by the use of the means necessary to their execution some single law, made in such tenderness of the citizens's liberty, that practically, it relieves more of the guilty, than of the innocent, should, to a very limited extent, be violated? [A]re all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated? . . . But it was not believed that any law was violated. The provision of the Constitution that "The privilege of the writ of habeas corpus, shall not be suspended unless when, the cases of rebellion or invasion, the public safety may require it," . . . is a provision . . . that such privilege may be suspended when, in cases of rebellion, or invasion, the public safety *does* require it.⁴⁰

Military arrests of civilians not in the immediate theater of war and suspension of the writ of habeas corpus disturbed friends, as well as critics, of the administration. In his biography of Lincoln, David Donald reports that critics of the arrest policy included both Conservative and Radical Republicans. For example, Lincoln's conservative friend, Orville H. Browning, thought "arrests ordered by the Lincoln administration 'were illegal and arbitrary, and did more harm than good.'"⁴¹ Radical senator Lyman Trumbull from Illinois "agreed that 'all arbitrary arrests of citizens by military authority . . . are unwarrantable, and are doing much injury, and that if they continue unchecked the civil tribunals will be completely subordinated to the military, and the government overthrown.'"⁴²

Many others, however, supported the administration and insisted that the Constitution provided sweeping power to address the emergency. In time of civil war, they said, the Constitution justified tough measures.⁴³ They cited a landmark 1849 Supreme Court case, *Luther v. Borden*, to justify military arrests and trials of

⁴⁰ Abraham Lincoln, Messages to Congress in Special Session (July 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 430 (ROY P. BASLER et al. eds., 1953) [hereinafter LINCOLN].

⁴¹ DAVID HERBERT DONALD, LINCOLN 441 (1995).

⁴² *Id.*

⁴³ See generally HYMAN, *supra* note 1, at 124-40 (referring to numerous contemporaneous writings claiming that the Constitution was adequate in time of war).

civilians.⁴⁴ In *Luther v. Borden*, the Rhode Island legislature had declared martial law because it had faced a military and political challenge from those seeking to democratize the highly undemocratic government of the state.⁴⁵ The Supreme Court upheld the statewide imposition of martial law.⁴⁶ The Court said that the question of which government was legitimate was a political one, not appropriate for decision by the Court.⁴⁷ Rhode Island, the Court said, was in a “state of war” so it could act. Accordingly:

And, unquestionably, a State may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government. The State itself must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the State, as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority. It was a state of war; and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition. And in that state of things the officers engaged in its military service might lawfully arrest anyone, who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection; and might order a house to be forcibly entered and searched, when there were reasonable grounds for supposing he might be there concealed. Without the power to do this, martial law and the military array of the government would be mere parade, and rather encourage attack than repel it. No more force, however, can be used than is necessary to accomplish the object. And if the power is exercised for the purposes of oppression, or any injury willfully done to person or property, the party by whom, or by whose order, it is committed would undoubtedly be answerable.⁴⁸

Justice Levi Woodbury dissented. He distinguished martial law from law intended for the governance of soldiers.⁴⁹ Martial law, he argued, was only the rule for the place of battle, the rule to be applied when civil courts were not functioning.⁵⁰ Woodbury explained:

[T]he “martial law” established here over the whole people of Rhode Island, may be seen by adverting to its character for a moment, as

⁴⁴ 48 U.S. 1, 45-46 (1849).

⁴⁵ *See id.*

⁴⁶ *See id.*

⁴⁷ *See id.* at 39-41.

⁴⁸ *Id.* at 45-46.

⁴⁹ *See id.* at 62 (Woodbury, J., dissenting).

⁵⁰ *See id.*

described in judicial as well as political history. It exposed the whole population, not only to be seized without warrant or oath, and their houses broken open and rifled, and this where the municipal law and its officers and courts remained undisturbed and able to punish all offenses, but to send prisoners, thus summarily arrested in a civil strife, to all the harsh pains and penalties of courts-martial or extraordinary commissions, and for all kinds of supposed offenses. By it, every citizen, instead of reposing under the shield of known and fixed laws as to his liberty, property, and life, exists with a rope round his neck, subject to be hung up by a military despot at the next lamp post, under the sentence of some drum head court-martial.⁵¹

He noted that in this nation, in contrast to the British system, legislative power was not supreme. So Woodbury doubted the legislature's or executive's power "to suspend or abolish the whole securities of person and property at its pleasure" by "establish[ing] in a whole country an unlimited reign of martial law over its whole population."⁵² To do so was to make "the reign of the strongest, and . . . mere physical force the test of right. All our social usages and political education, as well as our constitutional checks," he insisted, "are the other way."⁵³ Though the Lincoln administration cited Chief Justice Taney's opinion in *Luther v. Borden* to justify its military arrests of civilians during the Civil War, the concerns of Justice Woodbury resonated powerfully for many Americans.⁵⁴

II. THE VALLANDIGHAM ARREST, MILITARY TRIAL, AND APPLICATION FOR HABEAS CORPUS

A. *The Immediate Context of Vallandigham's Arrest*

On September 24, 1862, Abraham Lincoln issued the following proclamation:

Now, therefore, be it ordered, first, that during the existing insurrection and as a necessary measure for suppressing the same, . . . all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to Rebels . . . shall be subject to martial law and liable to trial and punishment by Courts Martial or Military Commission:

Second. That the Writ of Habeas Corpus is suspended in respect to all persons arrested, or who are now, or hereafter during the rebellion shall be, imprisoned in any fort, camp . . . or other place of confinement

⁵¹ *Id.*

⁵² *Id.* at 69 (Woodbury, J., dissenting).

⁵³ *Id.*

⁵⁴ See George M. Dennison, *Martial Law: The Development of a Theory of Emergency Powers, 1776-1861*, 18 AM. J. LEGAL HIST. 52, 78 (1974).

by any military authority or by the sentence of any Court Martial or Military Commission.⁵⁵

After this proclamation, as well as before it, the military arrested a number of civilians. Congress was sufficiently concerned about such arrests to pass the Act of March 3, 1863 (the "1863 Act").⁵⁶ The 1863 Act both authorized and limited presidential suspension of the writ of habeas corpus. It authorized "the President of the United States . . . to suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof."⁵⁷ No officer was required to produce the body of any person detained by the authority of the President, "but upon the certificate, under oath, of the officer . . . that such person is detained by him as a prisoner under authority of the President, further proceedings under the writ of habeas corpus shall be suspended."⁵⁸

But in the 1863 Act Congress tried to put limitations on executive power. It required the secretaries of state and war to furnish the federal courts with

a list of the names of all persons, citizens of states in which the administration of the laws has continued unimpaired in the said Federal courts, who are now, or may hereafter be, held as prisoners of the United States, by order or authority of the President . . . as state or political prisoners, or otherwise than as prisoners of war.⁵⁹

If "a grand jury having attended any of said courts having jurisdiction in the premises, after the passage of this act, and after the furnishing of said list, as aforesaid, has terminated its session without finding an indictment or presentment, or other proceeding against any such person,"⁶⁰ the Act required a federal judge to bring such person before the court for discharge. Military commanders were required to obey the order of the judge. No one, however, was to be discharged without first taking an oath of allegiance.⁶¹

Lincoln did not issue another proclamation suspending the writ until after the Vallandigham arrest. The effect of the 1863 Act on Lincoln's 1862 proclamation was unclear. At the time of Vallandigham's arrest, many contemporaries doubted that the writ was suspended in Ohio. If the 1863 Act implicitly superseded the prior suspension, a new proclamation would be required. If the suspension of September 24, 1862 continued in effect, it would seem to apply to Vallandigham, but in that

⁵⁵ Abraham Lincoln, Proclamation Suspending the Writ of Habeas Corpus (Sept. 24, 1862), in 5 LINCOLN, *supra* note 40, at 436, 437.

⁵⁶ An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases, ch. 81, § 2, 12 Stat. 755 (1863).

⁵⁷ *Id.*

⁵⁸ *Id.* For discussions of the 1863 Act, see HYMAN, *supra* note 1, at 252-56; J. G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 163-68 (rev. ed. 1951).

⁵⁹ § 2, 12 Stat. at 755.

⁶⁰ *Id.*

⁶¹ *See id.*

case, the 1863 Act seemed to require either a civil trial at the end of the grand jury term or a release.

On March 16, 1863, Lincoln appointed General Ambrose Burnside, fresh from an unsuccessful engagement at Fredricksburg, Virginia, as commanding general of the Department of Ohio.⁶² On April 13, 1863, Burnside issued General Order No. 38 ("Order No. 38") which warned of death for those giving active physical aid to the Confederacy—such as writers and carriers of secret letters.⁶³ But Burnside's Order No. 38 went further and specifically targeted speech: "The habit of declaring sympathies for the enemy will not be allowed in this Department. Persons committing such offenses will be at once arrested. . . . [T]reason, express or implied, will not be tolerated in this Department."⁶⁴ When the order was issued, Union armies had suffered a series of defeats in the East, anti-war sentiment was growing, and morale in the army was low.⁶⁵

The *Cincinnati Commercial* reported that the General was serious about Order No. 38, and that the order covered disloyal language as well as disloyal acts: "We learn from reliable authority that General Burnside is determined to execute his Order No. 38. This order extends not only to acts in favor of rebels, but to words or expressions of sympathy in their behalf."⁶⁶ Many applauded Order No. 38. Colonel Joseph Geiger told a Union mass meeting that he "thanked God that in the person of General Burnside we have a man who will attend to [Northern traitors] with a strong arm . . . who, in enforcing his General Order No. 38, will squelch out the Northern traitors here."⁶⁷ The problem, one writer explained, was the bad tendency of criticism, however pure the motive behind it:

[T]o disaffect the people is to paralyze the Government. Therefore all denunciation of the President, his measures and his motives, in so far as it has any effect at all, being to destroy public confidence in the Government and to disaffect the people, is, to that extent, . . . fatal in its tendencies, and affords direct countenance, aid and comfort to treason and traitors.⁶⁸

Democrats feared that all political opposition to Lincoln administration war policy, a key political issue, was under attack. They had serious reasons for concern. For example, in Indiana, General Milo Hascall issued General Order No. 9 which prohibited newspapers and public speakers from endeavoring "to bring the war policy

⁶² See Klement, *Vallandigham*, in *FOR THE UNION*, *supra* note 1, at 35.

⁶³ See *id.* at 35-36.

⁶⁴ THE TRIAL OF HON. CLEMENT L. VALLANDIGHAM BY A MILITARY COMMISSION 7 (Cincinnati, Rickey & Carroll 1863) [hereinafter VALLANDIGHAM TRIAL] (citing the text of General Order No. 38).

⁶⁵ See JAMES M. MCPHERSON, *THE BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 586-90 (1988).

⁶⁶ *Court-martial—Order No. 38—Warning*, CIN. ENQUIRER, Apr. 28, 1863, reprinted in CIN. COM., Apr. 29, 1863, at 1.

⁶⁷ *Union Mass Meeting in Fifth Street Market-Space*, CIN. COM., Apr. 21, 1863, at 2.

⁶⁸ *Kentucky Politics*, CIN. COM., Apr. 23, 1863, at 1.

of the Administration into disrepute.”⁶⁹ It warned against active opposition “to the war policy of the administration.”⁷⁰ Democratic congressman Joseph K. Edgerton wrote to the General asking just what these phrases meant.⁷¹ General Hascall replied in the press:

What I mean by the expression, “or endeavor to bring the war policy of the Government into disrepute,” is this: Certain measures have been determined upon by the Congress . . . and the Executive, such as the Internal Revenue and Tax Bills, . . . the Confiscation Act, the Conscription Act, the act authorizing the Executive to use negroes in every way possible to cripple the enemy and assist us, the Proclamation of Emancipation . . . , and other measures having an immediate bearing on the war; and these I call the *war policy* of the Government or Administration. . . . The only practical effect, then, of allowing newspapers and public speakers to inveigh against these measures, is to divide and distract our own people, and thus give material “aid and comfort” to our enemies. . . .

It is a more serious thing than many are wont to suppose to divide and distract our country and prolong the war.⁷²

Criticism of measures such as those of General Hascall was not limited to politicians and Democrats. Union General Halleck complained of Union officers who assumed “powers which do not belong to them,” whose conduct was “inciting party passions and political animosities.”⁷³ Meanwhile, Governor Morton of Indiana, faced with rising outrage over Hascall’s suppression of speech and press, demanded that Hascall be replaced because he was harming the Union cause.⁷⁴

Arrests included politicians and ordinary citizens.⁷⁵ On April 23, 1863, the *Detroit Free Press*, then a generally pro-war Democratic paper, complained about “the recent arrest of citizens for wearing a copperhead of the Goddess of Liberty as a badge.”⁷⁶ The arrests, the paper said, “illustrate the strides of power in this country under the rule of the party of ‘free speech, free press, free homes, and free men.’”⁷⁷

⁶⁹ *General Hascall on Order No. 9*, INDIANAPOLIS J., May 5, 1863, reprinted in CIN. COM., May 8, 1863, at 1.

⁷⁰ *Id.* For a brief discussion of General Hascall and Order No. 9, see HARPER, *supra* note 1, at 251-54.

⁷¹ *General Hascall on Order No. 9*, INDIANAPOLIS J., May 5, 1863, reprinted in CIN. COM., May 8, 1863, at 1.

⁷² *Id.*

⁷³ TENNEY, *supra* note 1, at 186-87 (quoting Halleck to Burnside, Q.R. Series II, Vol. 5, 664-65).

⁷⁴ *See id.* at 188-89.

⁷⁵ *See, e.g.*, KLEMENT, LIMITS OF DISSENT, *supra* note 1, at 108-09.

⁷⁶ *War on the Goddess of Liberty*, DET. FREE PRESS, Apr. 23, 1863, at 2.

⁷⁷ *Id.*

If, the paper said, “suppressing the ‘Goddess of Liberty’” was “a small piece of business,” still the principle involved was a basic one.⁷⁸

Even pro-war Democrats saw attacks on allegedly disloyal sentiments as direct attacks on the democratic process and on the sovereignty of the people. On April 14, 1863, the editors of the *Detroit Free Press* sounded a basic theme that would be elaborated and repeated in coming months:

As a party [Democrats] have never declared against the war; but they have a right to do so. As tax-payers, as men liable to the draft, and therefore liable to be shot down, they have the right to say the struggle ought to cease or ought to go on, or ought to be conducted upon this policy or that policy, as their convictions dictate to them. The [C]onstitution and laws accord them that right.⁷⁹

B. *The Arrests and Trials of Clement L. Vallandigham*

The arrest of Clement L. Vallandigham seemed to confirm the Democrats’ fear that the administration was engaged in a pervasive attack on political speech. General Burnside knew that Vallandigham, an outspoken anti-war activist, was scheduled to speak at a Knox County Democratic political rally in Mount Vernon, Ohio on May 1, 1863. Military agents, in civilian clothes, monitored the speech. Soldiers arrested Vallandigham in the early morning hours of May 5. His trial by a military commission of seven officers began the next day. Vallandigham, an experienced trial lawyer, represented himself. The prosecution was represented by the Judge Advocate. By May 7, the court had finished hearing evidence and arguments. It was a speedy trial indeed; Vallandigham was unable, in this very short time, to subpoena one of his defense witnesses.⁸⁰ Vallandigham was tried on the charge of:

Publicly expressing, in violation of General Orders No. 38, from Headquarters Department of the Ohio, sympathy for those in arms against the Government of the United States, and declaring disloyal sentiments and opinions, with the object and purpose of weakening the power of the Government in its efforts to suppress an unlawful rebellion.⁸¹

The following specification supported the charge:

In this, that the said Clement L. Vallandigham, a citizen of the State of Ohio, on or about the first day of May, 1863, at Mount Vernon, Knox County, Ohio, did publicly address a large meeting of citizens, and did utter sentiments in words, or in effect, as follows, declaring the present war “a wicked, cruel, and unnecessary war;” “a war not being waged for

⁷⁸ *Id.*

⁷⁹ *What Do They Mean?*, DET. FREE PRESS, Apr. 14, 1863, at 2.

⁸⁰ See KLEMENT, LIMITS OF DISSENT, *supra* note 1, at 166.

⁸¹ VALLANDIGHAM TRIAL, *supra* note 64, at 11.

the preservation of the Union;” “a war for the purpose of crushing out liberty and erecting a despotism;” “a war for the freedom of the blacks and the enslavement of the whites;” stating “that if the Administration had so wished, the war could have been honorably terminated months ago;” that “peace might have been honorably obtained by listening to the proposed intermediation of France;” . . . charging “that the Government of the United States was about to appoint military marshals in every district, to restrain the people of their liberties, to deprive them of their rights and privileges;” characterizing General Orders No. 38, from Headquarters Department of the Ohio, “as a base usurpation of arbitrary authority,” inviting his hearers to resist the same, by saying, “the sooner the people inform the minions of usurped power that they will not submit to such restrictions upon their liberties, the better;” . . .

All of which opinions and sentiments he well knew did aid, comfort, and encourage those in arms against the Government, and could but induce in his hearers a distrust of their own Government, sympathy for those in arms against it, and a disposition to resist the laws of the land.⁸²

General Burnside did not consult with the President before ordering Vallandigham’s arrest,⁸³ but the General acted in a context set by the President himself. At first, Burnside seemed to have presidential support. On May 8, 1863, after learning of the arrest from the newspapers, President Lincoln wired General Burnside: “In your determination to support the authority of the Government and suppress treason in your Department, you may count on the firm support of the President.”⁸⁴

At the military trial, Vallandigham’s May 1 speech to the large Democratic county political rally was the basis of the charge against him. In addition to Vallandigham, other prominent Ohio Democrats were present at the rally, including Congressmen George S. Pendleton and Samuel S. Cox. The editor of the *Mount Vernon Democratic Banner* presided over the meeting. Vice presidents and secretaries represented various townships in the county, and committees met during the meeting to transact party business. Because the meeting was so large, there were a number of speakers’ stands. Vallandigham gave his speech from the main stand.⁸⁵

⁸² *Id.* at 11-12. See also WILLIAM HARLAN HALE, HORACE GREELEY: VOICE OF THE PEOPLE 267-71 (1950) (discussing communication between Vallandigham and *New York Tribune* editor Horace Greeley in which Vallandigham encouraged Greeley to join him in a covert campaign for mediation by foreign powers).

⁸³ See Abraham Lincoln, To Erastus Corning and Others (June 12, 1863), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-1865, at 454, 462 (Roy P. Basler ed., 1989) [hereinafter LINCOLN SPEECHES].

⁸⁴ Craig D. Tenney, *To Suppress or Not to Suppress: Abraham Lincoln and the Chicago Times*, 27 CIV. WAR HIST. 249, 250 n.11 (1981) (quoting a letter written from Lincoln to Burnside on May 8, 1863) [hereinafter Tenney, *To Suppress*]; see also TENNEY, *supra* note 1, at 150-51 (discussing Lincoln’s likely support of Burnside’s arrest of Vallandigham).

⁸⁵ See KLEMENT, LIMITS OF DISSENT, *supra* note 1, at 153-54 (commenting that a full transcript of Vallandigham’s nearly two hour speech does not seem to exist).

The Judge Advocate who prosecuted Vallandigham undoubtedly set out in the specification and elicited from the testifying officers what he considered to be the most damning passages from the speech.⁸⁶ The following account of the speech comes mainly from the testimony of agents sent to observe it.

Captain H. R. Hill testified that Vallandigham said the war was “wicked, cruel, and unnecessary,” and that peace could have been achieved on the basis of a plan that Vallandigham had proposed. He quoted Vallandigham as saying that a Southern paper had suggested that the Peace Democrats were a greater threat to the Confederacy than “a thousand Swards.”⁸⁷ (Seward was Lincoln’s secretary of state.) According to Hill, Vallandigham attacked Order No. 38:

“[H]e was a freeman;” that he “did not ask David Tod [the governor of Ohio], or Abraham Lincoln, or Ambrose E. Burnside for his right to speak as he had done, and was doing. That his authority for so doing was higher than General Orders No. 38—it was General Orders No. 1—the Constitution. That General Orders No. 38 was a base usurpation of arbitrary power; that he had the most supreme contempt for such power. . . . That he was resolved never to submit to an order of a military dictator, prohibiting the free discussion of either civil or military authority. “The sooner that the people informed the minions of this usurped power that they would not submit to such restrictions upon their liberties, the better.”⁸⁸

Captain John A. Means, another witness for the prosecution, testified that Vallandigham said that the war was an abolition war, rather than a war waged for the preservation of the Union.⁸⁹ In addition, Vallandigham purportedly said that he would spit on Order No. 38 and trample it underfoot.⁹⁰

According to Captain Means, Vallandigham also said “he would not counsel resistance to military or civil law; that was not needed.”⁹¹ He referred to the President as “King Lincoln” and urged his listeners to come together at the ballot box and hurl the tyrant from his throne.⁹² Vallandigham asked Captain Means:

Did I not expressly counsel the people to obey the Constitution and all laws, and to pay proper respect to men in authority, but to maintain their political rights through the ballot-box, and to redress personal wrongs through the judicial tribunals of the country, and in that way put down the Administration and all usurpations of power?⁹³

⁸⁶ For Vallandigham’s biographer’s account of the speech, see *id.*

⁸⁷ VALLANDIGHAM TRIAL, *supra* note 64, at 13-14.

⁸⁸ *Id.* at 14-15.

⁸⁹ *See id.* at 21.

⁹⁰ *See id.* at 24.

⁹¹ *Id.* at 22-23.

⁹² *Id.*

⁹³ *Id.* at 23.

Captain Means responded that he did not understand him “to counsel the people to submit to the authorities at all times.”⁹⁴

In fact, it seems quite likely that Vallandigham advocated only peaceful political action. The Republican *Cincinnati Commercial* reported a Vallandigham speech made shortly before his arrest. According to the *Commercial*, Vallandigham told his followers that Abolitionists instigated the war to put down Democrats and bring about Negro equality, and that the war was designed to free the Negro and enslave the white man.⁹⁵ But instead of counseling revolt, the paper reported that Vallandigham “stopped short, and talked about ‘obeying the laws’ and ‘peaceable remedies.’”⁹⁶ According to the correspondent, “a good many of the admirers of Vallandigham lost confidence in him. He had fallen far short of their expectations.”⁹⁷ If Vallandigham had advocated violence or law breaking, his arch foes at the *Cincinnati Commercial* would have been eager to report the fact. The reported speech sounds much like the one for which Vallandigham was arrested and is likely to be representative of what he was saying at the time.

At trial, Samuel S. Cox, a Democratic congressman from Ohio, testified for the defense. According to Cox, Vallandigham directed no epithet at General Burnside. Vallandigham said nothing to advocate forcible resistance of either laws or military orders:

He stated the sole remedy to be in the ballot-box, and in the courts. I remember this distinctly, for I had been pursuing the same line of remark at Chicago and Fort Wayne, and other places where I had been speaking, and with the purpose of repressing any tendency toward violence among our Democratic people. Mr. Vallandigham did not say a word about the conscription.⁹⁸

After the evidence was presented, Vallandigham entered a protest. He said that he had been “[a]rrested without due ‘process of law,’ without warrant from any judicial officer,” and had been “served with a ‘charge and specifications,’ as in a Court-martial or Military Commission.”⁹⁹ In addition, Vallandigham said:

I am not in either “the land or naval forces of the United States, nor in the militia in the actual service of the United States,” and therefore am not triable for any cause, by any such Court, but am subject, by the express terms of the Constitution, to arrest only by due process of law, judicial warrant, regularly issued upon affidavit, and by some officer or Court of competent jurisdiction for the trial of citizens, and am now entitled to be tried on an indictment or presentment of a Grand Jury of such Court, to

⁹⁴ *Id.*

⁹⁵ See *Vallandigham's Followers—The Butternuts of Butler County*, CIN. COM., May 6, 1863, at 1.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ VALLANDIGHAM TRIAL, *supra* note 64, at 27.

⁹⁹ *Id.* at 29.

speedy and public trial by an impartial jury of the State of Ohio, to be confronted with witnesses against me, to have compulsory process for witnesses in my behalf, the assistance of counsel for my defense, and evidence and argument according to the common laws and the ways of Judicial Courts. And all these I here demand as my right as a citizen of the United States, and under the Constitution of the United States.¹⁰⁰

Furthermore, Vallandigham said, his “alleged ‘offense’” was “not known to the Constitution of the United States” or in violation of any law.¹⁰¹

It is words spoken to the people of Ohio in an open and public political meeting, lawfully and peaceably assembled, under the Constitution and upon full notice. It is words of criticism of the public policy of the public servants of the people, by which policy it was alleged that the welfare of the country was not promoted. It was an appeal to the people to change that policy, not by force, but by free elections and the ballot-box. It is not pretended that I counseled disobedience to the Constitution, or resistance to laws and lawful authority. I never have. Beyond this protest, I have nothing further to submit.¹⁰²

Meanwhile, on May 9, 1863, after the evidence in the military trial had closed but before the verdict and sentence were announced, George Pugh, a leading Democratic lawyer and former senator from Ohio, filed an application for a writ of habeas corpus for Vallandigham in federal court. It was a direct challenge to the military court’s jurisdiction. The reasons Pugh gave to support granting the writ followed those Vallandigham had expressed in his protest.¹⁰³

Judge Humphrey H. Leavitt (who had been appointed to the bench by President Andrew Jackson) ordered a hearing on May 11. General Burnside filed and signed his personal response to the writ. He drew an analogy between the duties of a soldier and those of a civilian:

We are in a state of civil war. One of the States of this Department is at this moment invaded, and three others have been threatened. . . . If it is my duty and the duty of the troops to avoid saying any thing that would weaken the army, by preventing a single recruit from joining the ranks, by bringing the laws of Congress into disrepute, or by causing dissatisfaction in the ranks, it is equally the duty of every citizen in the Department to avoid the same evil. If it is my duty to prevent the propagation of this evil in the army, or in a portion of my Department, it is equally my duty in all portions of it; and it is my duty to use all the force in my power to stop it. . . .

¹⁰⁰ *Id.* at 29-30.

¹⁰¹ *Id.* at 30.

¹⁰² *Id.*

¹⁰³ *See id.* at 37-40.

The press and public men, in a great emergency like the present, should avoid the use of party epithets and bitter invectives, and discourage the organization of secret political societies, which are always undignified and disgraceful to a free people, but now they are absolutely wrong and injurious; they create dissensions and discord, which just now amount to treason. . . .

. . . These citizens do not realize the effect upon the army of our country, who are its defenders. They have never been in the field; . . . and, besides, they have been in the habit of hearing their public men speak, and, as a general thing, of approving of what they say. . . . They must not use license and plead that they are exercising liberty. In this Department it can not be done.¹⁰⁴

Burnside explained that his duty was to support the policy of the administration:

If the people do not approve that policy, they can change the constitutional authorities of that Government, at the proper time and by the proper method. Let them freely discuss the policy in a proper tone; but my duty requires me to stop license and intemperate discussion, which tends to weaken the authority of the Government and army: whilst the latter is in the presence of the enemy, it is cowardly so to weaken it.¹⁰⁵

Remarkably, neither George Pugh, counsel for Vallandigham, nor counsel for General Burnside treated the March 3, 1863 Habeas Act as controlling. Pugh took the position that President Lincoln had not suspended the writ in Ohio and the attorney for Burnside really did not dispute the point.¹⁰⁶

At the hearing before Judge Leavitt, Pugh spoke for Vallandigham while Cincinnati lawyer Benjamin F. Perry and District Attorney Flamen Ball, a former law partner and political ally of Salmon Chase, appeared for the General.¹⁰⁷ George Pugh's argument reviewed the writ of habeas corpus at English law, landmarks of English constitutional history, and English and American decisions on the writ.¹⁰⁸ Pugh argued that Vallandigham was not a member of the land or naval forces of the United States and, therefore, was not subject to military law.¹⁰⁹

¹⁰⁴ *Id.* at 41-42.

¹⁰⁵ *Id.* at 42-43.

¹⁰⁶ After citing the Act, Pugh said that it did "not apply, in terms, to the present case" because "the President of the United States, in whom (solely) the discretion of suspending the privilege of the writ of Habeas Corpus now resides, has not found it necessary to adopt a measure so unusual and extreme." *Id.* at 51. George Pugh had obvious tactical reasons to claim that the writ had not been suspended and that, therefore, the statute of March 1863 did not apply. If it did apply, his client would have remained in jail at least until the end of the grand jury term. *See id.*

¹⁰⁷ *See id.* at 39, 98.

¹⁰⁸ *See id.* at 67-96.

¹⁰⁹ *See id.* at 52.

Pugh also cited the First Amendment. He noted that “General Burnside holds an office created by act of Congress alone—an office which Congress may, at any time, abolish.”¹¹⁰ As a result, he “can make no ‘law’ which Congress could not make. He can not abridge the freedom of speech, or of the press, or the right of the people to assemble and to consider of their grievances.”¹¹¹ Under congressionally enacted Articles of War, soldiers in active service were subject to a different rule, Pugh said. The Articles forbade them to criticize the President or Congress.¹¹² Pugh argued that Vallandigham had exercised a basic right of American citizens.

Beyond the terms of exception thus defined by statute, and in obedience to the Constitution of the United States, article first, section eighth, clauses fifteenth and sixteenth, the right of the American people to deliberate upon and freely to speak of what General Burnside calls the “Policy of the Government” at all times—whether of peace or of war, of safety or of peril, of ease or of difficulty—is a right supreme, and absolute, and unquestionable. They can exhort each other to impeach the President or any executive officer; to impeach any magistrate of judicial authority; to condemn Congressmen and legislators of every description. They can, at pleasure, indulge in criticism, by “wholesale” or otherwise, not only upon “the policy” adopted or proposed by their servants, military as well as civil, but upon the conduct of those servants in each and every particular, upon their actions, their words, their probable motives, their public characters. And, in speaking of such subjects, any citizen addressing his fellow-citizens, by their consent, in a peaceable assembly, may use invective, or sarcasm, or ridicule, or passionate apostrophe or appeal, or—what is, ordinarily, much better—plain, solid, unostentatious argument. . . .

. . . I have merely to say, therefore, that it [the charge against Vallandigham] assumes, as indisputable, an authority at “Head-quarters Department of the Ohio” to enact a LAW abridging the freedom of speech; and this in palpable defiance of the Constitution of the United States.¹¹³

Vallandigham had invited his listeners to resist Lincoln and his minions, but the resistance Vallandigham suggested, Pugh said, was constitutionally protected activity:

But Mr. Vallandigham invited his “hearers to *resist* the same.” Ah!—and how? By telling them to take up arms against it?—to fall into ranks for the purpose of obstructing its execution?—by committing any act of violence or disorder whatsoever? O, no, sir!—but “by saying” that “the sooner the people inform the minions of usurped power that they will not submit to such restrictions upon their liberties the better.” To give this

¹¹⁰ *Id.* at 55.

¹¹¹ *Id.*

¹¹² *See id.* at 55-57.

¹¹³ *Id.* at 58, 63 (citation omitted).

information by their resolutions in primary meetings, by the voices of their favorite orators, by their votes in the ballot-box. Nothing else is alleged; nothing else is pretended; nothing else could reasonably have been imagined.¹¹⁴

Finally, Pugh noted that Vallandigham's conduct did not meet the constitutional definition of treason.¹¹⁵ Basic constitutional guarantees, including the rights to a jury trial and to a grand jury indictment, had been violated.¹¹⁶ The privilege of the writ of habeas corpus was a remedy, and one which the president could temporarily suspend. But even suspension, Pugh insisted, did not justify the invasion of basic constitutional rights.

The rights of the people, as enumerated in the several clauses of the Constitution which I have read, can not be affected, in any degree, by the suspension of the privilege of the writ of Habeas Corpus. Harsh as that suspension would be, and unnecessary (as I think) except in the States where insurrection and rebellion prevail, it would not authorize any arrest of a citizen by the military power while the ordinary course of justice remains unobstructed, nor even, without a warrant, except in the cases I have already specified, by a civil magistrate. It would not dispense with the necessity of a trial by jury, and upon indictment: it would justify none of the acts of General Burnside in this particular case.¹¹⁷

Aaron Perry's argument for General Burnside was simple and direct. He relied on the rebellion, the law of war, and war powers. These provided, he insisted, legal justification for the arrest. Because the arrest was justified and legal, habeas corpus should not be available.

There is on foot an organized insurrection, holding by military force a large part of the United States

This insurrection has for impulse, feelings and opinions growing out of the past civil history of the country. As a matter of course it can not be, and as a matter of fact it is not, limited to places, or described by geographical descriptions. . . .

The power and wants of the insurrection are not all nor chiefly military. [I]t needs hope and sympathy. . . . It needs argument to represent its origin and claims to respect favorably before the world. . . . It needs help to paralyze and divide opinions among those who sustain the government, and needs help to hinder and embarrass its councils. It needs that troops should be withheld from government. . . . It needs that an opinion should prevail in the world that the government is incapable of success, and unworthy of sympathy. Who can help it in either particular

¹¹⁴ *Id.* at 66.

¹¹⁵ *See id.* at 82.

¹¹⁶ *See id.* at 86-88.

¹¹⁷ *Id.* at 93-94.

I have named, can help it as effectually as by bearing arms for it. . . . Since all these helps combine to make up the strength of the insurrection, war is necessarily made upon them all, when made upon the insurrection. . . . All this is implied in war, and in this war with especial cogency.¹¹⁸

Free speech is only one right among many, Perry insisted, and like other rights, it could be limited to ensure the safety of all.¹¹⁹ Because Vallandigham described the purposes of the war as crushing out liberty and establishing despotism, he had aided the enemy directly and attempted to thwart the army. So the army could arrest and try him.¹²⁰

Aaron F. Perry said he chose not to rely on suspension of the writ.¹²¹ Instead, he insisted that the arrest and trial were justified under the war power and the power of the president as commander in chief. These powers simply existed along with and, when necessary, superseded the civil law for the duration of the conflict.¹²² Perry stated that:

There is no inference to be drawn from the [March 1863 habeas] act of Congress against that part of . . . [Lincoln's 1862 proclamation] which proclaims martial law; but in the view I am urging of the principles of public law, such a proclamation can perform no office except to give publicity to a fact before existing. To whatever extent the fact of war brought into play the laws of war, those laws had their full force without a proclamation.¹²³

In Vallandigham's habeas hearing, both Burnside's and Vallandigham's counsel either assumed the President had not suspended the writ in Ohio or did not rely on its suspension.¹²⁴

By avoiding reliance on suspension of the privilege of the writ of habeas corpus, Perry also may have attempted to avoid the force of the 1863 Act and its apparent

¹¹⁸ *Id.* at 109-10.

¹¹⁹ *See id.* at 114.

¹²⁰ *See id.* at 119-20.

¹²¹ *See id.* at 106.

¹²² *See id.*

The first section of the act of March 23, 1863 authorizes the President . . . to suspend the writ of Habeas Corpus. The learned counsel says he has not suspended it. Undoubtedly, if he had suspended it, there would be an end of this case. I do not claim that it is suspended. My whole argument proceeds on the ground that it is not suspended, but in full force.

Id.

¹²³ *Id.* at 107-08. With reference to the writ of habeas corpus, modern scholars have assumed that Lincoln's September 1862 proclamation suspending habeas corpus covered Vallandigham's case. Mark Neely, for example, said that a special proclamation of suspension prepared by the Secretary of War specifically for Vallandigham's case—a paper that Lincoln did not sign—was redundant. *See* MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 65-66 (1991); DONALD, *supra* note 41, at 420.

¹²⁴ *See* VALLANDIGHAM TRIAL, *supra* note 64, at 51, 106.

requirement for civil trial or release if no indictment was forthcoming by the end of the grand jury session. Perry's approach was consistent with the position of Judge Advocate General Holt, who construed the 1863 Act as inapplicable to civilians arrested or tried by the military.¹²⁵

Judge Leavitt denied the application for habeas corpus. He relied on an unpublished precedent that held the court would not issue a writ for an applicant in military custody. Deference was due to a coordinate branch of government, especially when the life of the nation was in peril.¹²⁶ Still, he went on to discuss the merits of the case. Judge Leavitt conceded that if the criminal procedure guarantees of the Bill of Rights were applicable, the arrest would have been illegal. However, Leavitt pointed to other factors including "the present state of the country, and . . . the [in] expediency of interfering with the exercise of the military power."¹²⁷ He said:

The Court can not shut its eyes to the grave fact that war exists[,] . . . threatening the subversion and destruction of the Constitution itself. In my judgment, when the life of the republic is imperiled, he mistakes his duty and obligation as a patriot who is not willing to concede to the Constitution such a capacity of adaptation to circumstances as may be necessary to meet a great emergency, and save the nation from hopeless ruin. Self-preservation is a paramount law.¹²⁸

The judge explained that the Constitution provided for suppression of insurrection and rebellion, made the president commander in chief, and required him to see that the laws were faithfully executed.¹²⁹ General Burnside was the representative and agent of the President.¹³⁰ "In time of war," the judge explained, "the President is not above the Constitution, but derives his power expressly from the [commander in chief] provision of that instrument"¹³¹ Although "[t]he Constitution does not specify the powers he may rightfully exercise in this character," these were "very high powers, which it is well known have been called into exercise on various occasions during the present rebellion."¹³²

Judge Leavitt then proceeded to review briefly the situation (or his understanding of it) in which General Burnside had acted:

Formidable invasions have been attempted, and are now threatened. Four of the States have a river border, and are in perpetual danger of invasion. The enforcement of the late conscription law was foreseen as a positive necessity. In Ohio, Indiana, and Illinois, a class of mischievous politicians had succeeded in poisoning the minds of a portion of the

¹²⁵ See RANDALL, *supra* note 58, at 167.

¹²⁶ See VALLANDIGHAM TRIAL, *supra* note 64, at 262.

¹²⁷ *Id.* at 263.

¹²⁸ *Id.* at 263-64.

¹²⁹ See *id.* at 264.

¹³⁰ See *id.* at 266.

¹³¹ *Id.*

¹³² *Id.*

community with the rankest feelings of disloyalty. Artful men, disguising their latent treason under hollow pretensions of devotion to the Union, were striving to disseminate their pestilent heresies among the masses of the people. The evil was one of alarming magnitude, and threatened seriously to impede the military operations of the government, and greatly to protract the suppression of the rebellion.¹³³

The judge's decision was forceful, but it was not technical. Leavitt cited almost none of the mass of authority mustered by lawyers on each side of the case. He also said he was concerned that if he issued the writ, it would be ignored—and, indeed, that is probably what the Lincoln administration would have done. At any rate, the judge was hostile to anti-war speech. He announced: "And here, without subjecting myself to the charge of trenching upon the domain of political discussion, I may be indulged in the remark, that there is too much of the pestilential leaven of disloyalty in the community."¹³⁴ Judge Leavitt denied the writ and vindicated Vallandigham's military trial.¹³⁵

Then, on May 16, 1863, the military commission found Vallandigham guilty as charged for uttering most of the words alleged in the specification. The commission sentenced Vallandigham to close confinement for the duration of the war. On May 19, 1863, President Lincoln changed Vallandigham's punishment to banishment to the Confederacy and ordered that Vallandigham be put "beyond our military lines."¹³⁶

Transcripts of the trial and habeas proceeding were published both in the press and as a book.¹³⁷ As a result, the words for which Vallandigham was prosecuted and arguments about them reached a large audience.

C. *Events After Vallandigham's Banishment*

Massive protests followed Vallandigham's May 5, 1863 arrest and subsequent trial. The Democratic press was uniformly critical. Protest meetings were held in many cities. Even many Republicans were critical. Burnside offered to resign; Lincoln declined the offer. On May 29, 1863, however, Lincoln telegraphed Burnside (in code): "All the cabinet regretted the necessity of arresting, for instance, Vallandigham, some perhaps, doubting, that there was a real necessity for it—but, being done, all were for seeing you through with it."¹³⁸

¹³³ *Id.* at 268.

¹³⁴ *Id.* at 270.

¹³⁵ *See id.* at 259-72.

¹³⁶ *Id.* at 34.

¹³⁷ *See, e.g., Finding and Sentence*, CIN. COM., May 19, 1863, at 1; *The Trial of C. L. Vallandigham—The Specifications and the Evidence*, CIN. COM., May 9, 1863, at 2. A large advertisement for the report of the military trial and habeas proceedings appears in *The Book Trade, Ready June Tenth, The Official Report of the Trial By Court Martial of Hon. C. L. Vallandigham*, CIN. COM., June 10, 1863, at 2.

¹³⁸ Letter from Abraham Lincoln to Ambrose E. Burnside (May 29, 1863), in *LINCOLN SPEECHES*, *supra* note 83, at 451. For a sampling of some protests, see *The Vallandigham*

Judging by reports in the *Cincinnati Commercial*, Vallandigham's arrest was far from the only arrest under Order No. 38 for the expression of disloyal sentiments. The arrests included a Democratic newspaper editor, many people who expressed otherwise unreported "disloyal language," a critic of Vallandigham's arrest, a man who expressed hope for Confederate victory, and a man who allegedly advocated shooting officers who captured deserters.¹³⁹ In addition, the military closed a number of newspapers, at least temporarily, or threatened them with closure.¹⁴⁰

In early June, 1863, apparently unchastened by the Vallandigham experience, General Burnside issued Order No. 84 suppressing publication of the *Chicago Times* newspaper. (Illinois was also in the area under Burnside's command.) Wilbur Storey, the editor of the *Times*, was a racist who had written of the "natural and proper loathing of the negro."¹⁴¹ After the Emancipation Proclamation, he denounced the war as a "John Brown raid on an extended scale."¹⁴² Storey had protested the Vallandigham arrest and banishment. The rights of free speech and press and assembly, Storey insisted, "existed before the Constitution, but lest they might be invaded, the Constitution forbade . . . any law circumscribing them."¹⁴³ Still, President "Lincoln and . . . 'military satraps' had 'punished as crimes the exercise of these constitutional privileges."¹⁴⁴

This time the case came before a judge less sympathetic to suppression. Around midnight, Federal Judge Thomas Drummond issued a temporary order forbidding the military suppression of the *Times* before a full hearing. News reports suggest that Judge Drummond had telegraphed Supreme Court Justice David Davis, a close Lincoln advisor who was critical of military arrests of civilians, asking Davis to join him in hearing the case.¹⁴⁵ On granting the temporary order, Judge Drummond made this statement:

"I desire to give every aid and assistance in my power to the Government, and to the Administration, in restoring the Union; but I have always wished to treat the Government as a government of law and a government of the Constitution, and not as a government of mere physical force. I

Outrage: The Voice of the People, ATLAS & ARGUS (Albany, N.Y.: Daily), May 26, 1863, at 2.

¹³⁹ See, e.g., Letter from Abraham Lincoln to John M. Schofield (July 13, 1863), in 6 LINCOLN, *supra* note 40, at 326, 326; see also *Arrests For Using Disloyal Language*, CIN. COM., June 15, 1863, at 2; *Covington*, CIN. COM., June 12, 1863, at 3; *From Columbus*, CIN. COM., May 14, 1863, at 3; *Newport*, CIN. COM., May 12, 1863, at 2.

¹⁴⁰ See, e.g., *Suppression of Newspapers*, NAT'L INTELLIGENCER, May 13, 1863, at 3.

¹⁴¹ Garry Wills, *The Colonel: The Life and Legend of Robert R. McCormick 1880-1995*, N.Y. REV. BOOKS, Sept. 25, 1997, at 32 (book review).

¹⁴² *Id.* The description here is abbreviated. For a detailed account, see Tenney, *To Suppress*, *supra* note 84, at 248. See also HARPER, *supra* note 1, at 257-64 (describing Lincoln's revocation of General Burnside's order to suppress the *Chicago Times*).

¹⁴³ TENNEY, *supra* note 1, at 168 (quoting CHI. TIMES, May 29, 1863, at 2).

¹⁴⁴ *Id.*

¹⁴⁵ See *The Chicago Times Establishment Taken Possession of by the Military Authorities—Meeting of its Friends in the Evening*, CHI. TRIB., June 4, 1863, at 4.

personally have contended, and shall always contend, for the right of free discussion, and the right of commenting, under law, and under the Constitution, upon the acts of officers of the Government."¹⁴⁶

At 3:30 a.m. on June 3, 1863, soldiers disregarded Judge Drummond's order, entered the *Times*' office, and destroyed recently printed papers. As the *New York Tribune* headline commented: "THE SUPPRESSION OF THE CHICAGO TIMES: The Writ of the Court Disregarded."¹⁴⁷ On the same day, General Burnside attempted to justify his order to the public by returning to his theme of the civilian as soldier:

[The citizen] too, has sacrifices to make; but the country's demand upon him is comparatively but small. . . . [I]t merely asks that he shall imitate the loyal example of the soldiers in the field, so far as to abate somewhat of that freedom of speech which they give up so entirely. The citizen would be . . . unfaithful to his country, if . . . he were unwilling to give up a portion of a privilege which the soldier resigns altogether. That freedom of discussion and criticism which is proper in the politician and the journalist in time of peace, becomes rank treason when it tends to weaken the confidence of the soldier in his officers and his Government.¹⁴⁸

In his diary, Gideon Welles, Lincoln's secretary of the navy, described the arrest of Vallandigham and the suppression of the *Chicago Times* as "arbitrary and injudicious" and an infringement on "the constitutional rights of the parties."¹⁴⁹ Every member of the Cabinet, he wrote, "regrets what has been done";¹⁵⁰ but the Cabinet was divided as to what to do next. In war many things could be done, Welles mused, that were not permitted in peacetime—the blockade of Southern ports, interdiction of trade, seizure of property, etc. Though Welles thought Vallandigham and the *Chicago Times* were aiding the rebellion and were traitors in their hearts, still, he concluded by lamenting that military commanders should "without absolute necessity disregard those great principles on which our government and institutions rest."¹⁵¹

Massive protest followed the seizure of the *Chicago Times*. There was a huge public rally in Chicago, hostile press reaction, and a telegram from local leaders to

¹⁴⁶ *The Chicago Times Demonstration—No Disturbance Apprehended*, CIN. COM., June 4, 1863, at 3 (quoting Judge Drummond's statement granting the restraining order).

¹⁴⁷ *The Suppression of the Chicago Times: The Writ of the Court Disregarded*, N.Y. DAILY TRIB., June 4, 1863, at 1.

¹⁴⁸ *General Burnside's Orders—The President Directs the Revocation of the Order Suppressing the Circulation of the New York World and the Publication of the Chicago Times*, CIN. COM., June 5, 1863, at 1.

¹⁴⁹ I GIDEON WELLES, DIARY OF GIDEON WELLES 321-22 (1911).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* At the time, Republicans thought that Vallandigham secretly was involved with pro-Confederate societies that were conspiring with rebel agents. James McPherson concluded that while a lunatic fringe existed and engaged in such activities, Vallandigham and other prominent Democrats probably took no active part. See MCPHERSON, *supra* note 65, at 783.

President Lincoln that called for revocation of the order suspending the *Chicago Times*.¹⁵²

Congressman Isaac Arnold and Senator Lyman Trumbull (both Illinois Republicans) telegraphed the President to urge him to give the requests to revoke the order serious consideration. Yielding to intense political pressure, Arnold then sent a second telegraph saying that the first was not intended to express an opinion on the merits.¹⁵³ The Illinois House of Representatives passed a resolution of protest.¹⁵⁴ The President also received an urgent telegram urging revocation from both Supreme Court Justice David Davis and his law partner William Herndon: "We deem it of the highest importance that you revoke the order . . . suppressing the *Chicago Times*."¹⁵⁵ Davis was Lincoln's close confidant, political advisor, 1860 campaign manager, and appointee to the Supreme Court.

This time, President Lincoln promptly revoked the order and the *Chicago Times* resumed publication.¹⁵⁶ Facing a strong backlash from some Illinois Republicans, Arnold and Trumbull defended the revocation and made at least one public statement which explained their telegram as simply seeking prompt attention for a request by constituents.¹⁵⁷ Arnold said he approved of President Lincoln's revocation order because "in my judgment the order of Gen[eral] Burnside was unwarranted by the law and the Constitution."¹⁵⁸

Lincoln had second thoughts about his order of revocation and, apparently, wanted more time to see which way the political wind was blowing. He sent a later dispatch to Burnside and told him if he had not yet revoked the order to let the matter stand and to await further instructions. This presidential message arrived after Burnside had revoked his order suppressing the *Chicago Times*. So, the revocation stood.¹⁵⁹

¹⁵² See, e.g., notes 159, 178-270 and accompanying text.

¹⁵³ See Tenney, *To Suppress*, *supra* note 84, at 248, 254-55.

¹⁵⁴ See *Action of the Illinois Legislature on General Burnside's Recent Order*, CIN. COM., June 4, 1863, at 3. See also *The Revocation*, CHI. TRIB., June 5, 1863, at 1 (noting the public's surprise at the government's revocation of General Burnside's order); *Copperheadiana*, CHI. TRIB., June 4, 1863, at 2 (reporting the enactment of the Illinois resolution denouncing General Burnside's suppression of the *Chicago Times*); *From Chicago*, DET. FREE PRESS, June 5, 1863, at 4 (reporting that the proprietors of the *Chicago Times* received a telegram on June 4 indicating that Burnside's order was revoked); *From Illinois*, DET. FREE PRESS, June 4, 1863, at 1 (reporting the passage of the Illinois resolution against General Burnside's order).

¹⁵⁵ Tenney, *To Suppress*, *supra* note 84, at 255 (quoting Telegram from Davis and Herndon to Lincoln (June 2, 1863), in *War Dept. Telegrams, Telegrams Addressed to the President*, roll 2, vol. 4, frame 72).

¹⁵⁶ See *The Revocation*, CHI. TRIB., June 5, 1863, at 1.

¹⁵⁷ See Tenney, *To Suppress*, *supra* note 84, at 255-56.

¹⁵⁸ *The Attempted Suppression of the Chicago Times: And Its Defeat*, ATLAS & ARGUS (Albany, N.Y.: Daily), June 13, 1863, at 2.

¹⁵⁹ See Tenney, *To Suppress*, *supra* note 84, at 256-57.

After the large public meeting in Chicago to protest the suppression order and after Lincoln's revocation, the *Chicago Times* engaged in some editorial crowing:

Wednesday was a day for Chicago to be proud of. By the voice of her citizens she proclaimed to the world that the right of free speech has not yet passed away; that *immunity* of thought and discussion are yet among the inalienable *privileges* of men born to freedom. . . . Twenty thousand bold men with one acclaim decreed that speech and press shall be untrammelled, and that despotism shall not usurp the *inborn rights of the American citizen*.¹⁶⁰

Meanwhile, to the great interest of the press, Clement L. Vallandigham, "The Great Banished," as one Republican paper later referred to him,¹⁶¹ made his way to Wilmington, North Carolina, boarded a blockade runner, and eventually arrived in Canada. On June 11, 1863, the Democratic Party of Ohio nominated Vallandigham for governor. From his rather remote Canadian base, he proceeded to campaign as best he could for governor of Ohio.¹⁶²

To face Vallandigham, Republicans and War Democrats formed a Fusion Union ticket and nominated John Brough, a pro-war Democrat. Union victories at Gettysburg and Vicksburg in July of 1863 raised Northern hopes of attaining peace through victory. During the campaign, Republicans got as much political mileage as they could out of Vallandigham's conviction by the military tribunal.¹⁶³ Republican senator John Sherman referred to him as a "convicted traitor."¹⁶⁴ In another speech, Sherman asked, "Would you be willing to trust a known thief with your property, even if he had been illegally arrested and convicted of felony?"¹⁶⁵

Brough overwhelmingly defeated Vallandigham for governor. According to the *Cincinnati Commercial*, Brough received 288,136 votes to Vallandigham's 187,807.¹⁶⁶ After the election, the *Cincinnati Commercial*, which had strongly supported the military trial of Vallandigham, decided that he should be allowed to return to the United States. The *Commercial* announced that "[t]here is no occasion that the impotent reptile be kept waiting and watching over the border any longer. If it is desirable that he should spend the remainder of his days in exile, let him come

¹⁶⁰ *Free Speech—Free Press, Immense Meeting at Chicago: Protest Against the Order No. 84 of Gen. Burnside*, CHI. TIMES, June 5, 1863, reprinted in DET. FREE PRESS, June 6, 1863, at 1 (emphasis added). The words "privileges" and "immunities" are used regularly by both supporters and critics of suppression of anti-war speech to describe the rights of free speech, free press, and assembly. This fact is significant because drafters of Section 1 of the Fourteenth Amendment used the words in this way to describe Bill of Rights liberties. Their usage was common at the time.

¹⁶¹ *From Niagara Falls*, CHI. TRIB., July 24, 1863, at 2.

¹⁶² See Klement, *Vallandigham*, in FOR THE UNION, *supra* note 1, at 44.

¹⁶³ See *id.*

¹⁶⁴ *Id.* at 48.

¹⁶⁵ *Union Meeting at Hillsboro*, CIN. COM., Aug. 13, 1863, at 1.

¹⁶⁶ See *The Full Vote of Ohio on Governor, Including the Soldiers' Vote by Counties*, CIN. COM., Nov. 24, 1863, at 3.

to Ohio."¹⁶⁷ In Ohio, "waters of oblivion will soonest swallow forever his poor remains."¹⁶⁸

On February 15, 1864, the Supreme Court dismissed Vallandigham's petition to review his military conviction.¹⁶⁹ The Court said it was certain that it lacked the jurisdiction to hear an appeal from a military commission: "[w]hatever may be the force of Vallandigham's protest that he was not triable by a court of military commission."¹⁷⁰ No review, apparently, had been sought from the Federal Court's denial of Vallandigham's habeas petition.

Finally, in June of 1864, Vallandigham returned to Ohio,¹⁷¹ unmolested by the administration. He attended the 1864 Democratic National Convention, where he helped write the peace plank into the party platform. The peace plank called for immediate efforts to end hostilities "with a view to an ultimate convention of all the States."¹⁷²

III. REACTION TO THE VALLANDIGHAM ARREST AND THE *CHICAGO TIMES* CASE: THE FREE SPEECH TRADITION CONFRONTS THE WAR POWER

A. *Support for the Arrest*

The nation's press widely reported Vallandigham's arrest. Some Republican papers greeted the arrest as long overdue: "The arrest of this individual by order of Gen[eral] Burnside," the editors of the *Cincinnati Commercial* noted with apparent satisfaction, "is an act that will convince the most heedless that Order No. 38 will be enforced, and the lines definitely drawn between traitors and patriots."¹⁷³ The writer said he did not know "[u]pon what specific charge the arrest . . . has been made," but, nonetheless, he was pleased with the arrest: "Those who are not the friends of the Government are its enemies. Mr. Vallandigham is one of its enemies."¹⁷⁴

¹⁶⁷ *The Late Mr. Vallandigham*, CIN. COM., Oct. 15, 1863, at 2.

¹⁶⁸ *Id.*

¹⁶⁹ *See Ex parte Vallandigham*, 68 U.S. 243 (1864).

¹⁷⁰ *Id.* at 251. If Vallandigham had sought review from denial of his habeas petition he might have fared better, at least if the matter had not reached the Court until after the war. *See Ex parte Milligan*, 71 U.S. 2 (1866) (holding that in a state not under martial law, a military tribunal may not try a private citizen in denial of the citizen's right to trial by jury, and so, the federal court should have issued a writ of habeas corpus). *See also* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 59 (2d ed. 1988) ("Until 1983, Congress had never granted the Supreme Court appellate jurisdiction to supervise the administration of criminal justice in the military.").

¹⁷¹ *See From Cincinnati, Vallandigham Returned*, CHI. TRIB., June 16, 1864, at 1.

¹⁷² Klement, *Vallandigham*, in *FOR THE UNION*, *supra* note 1, at 59 (quoting the peace plank).

¹⁷³ *The Case of C. L. Vallandigham*, CIN. COM., May 6, 1863, at 2.

¹⁷⁴ *Id.* In looking for reaction to the arrest, I examined a number of major newspapers from the Mid-west and the East. I reviewed both Republican and Democratic papers, and one anti-slavery paper. The papers I examined were the *New York Tribune*, the *Cincinnati*

A few days later, the *Commercial* returned to its defense of Order No. 38: “[T]here is nothing in the celebrated Order 38 which should disturb the feelings of any loyal man. It is not designed to abridge the liberty of the individual, where that liberty is not used to the detriment of the Government.”¹⁷⁵ While “temperate” discussion would be permitted, the editors noted that “violent and incendiary language and . . . arguments” that would lead to “violent opposition to the enforcement of the laws” would not be tolerated.¹⁷⁶ Most Ohio Republican papers and politicians endorsed the arrest.¹⁷⁷

To justify the action against Vallandigham, the *Commercial* cited the most provocative rhetoric used by critics of the arrest. It quoted the *Dayton Empire*, a pro-Vallandigham paper, as announcing immediately after Vallandigham’s arrest:

If the spirit of the men who purchased our freedom through the fiery ordeal of the revolution, still lives in the hearts of the people, as we believe it does, then all will yet be well, for it will hurl defiance to military despotism, and rescue, through *blood and carnage*, if it must be, our now endangered liberties.¹⁷⁸

B. *The Free Speech—Popular Sovereignty Response*

For many Democrats, the Vallandigham arrest was not an isolated event, but part of a larger attack on political freedom. For that reason, many Democrats who rejected Vallandigham’s peace proposals rallied to his defense. Some criticisms of the arrest were general.¹⁷⁹ Others focused particularly on free speech values.¹⁸⁰ Many noted that Vallandigham was not accused of violating any specific statute.

1. *General Condemnation*

The *Atlas & Argus*, published in Albany, New York, denounced the arrest as a “crime against the Constitution”,¹⁸¹ and the *Detroit Free Press* lamented that “[t]he

Commercial, the *Cincinnati Enquirer*, the *Detroit Free Press*, the *Atlas & Argus*, the *Chicago Tribune*, the *National Intelligencer*, and the *Anti-Slavery Standard*. Because many newspapers typically and extensively reprinted views from other papers and often reported political speeches in detail, the limited number of papers examined provides a somewhat more comprehensive view than it might seem. I did not attempt to survey all the papers or even all the major ones. Rather, I attempted to find representative papers. Examination of more sources would, of course, increase our understanding. The findings here, like all findings, are partial and tentative.

¹⁷⁵ *Order Thirty-Eight*, CIN. COM., May 15, 1863, at 2.

¹⁷⁶ *Id.*

¹⁷⁷ See KLEMENT, LIMITS OF DISSENT, *supra* note 1, at 164.

¹⁷⁸ DAYTON EMPIRE (Ohio: Daily), *reprinted in* CIN. COM., May 7, 1863, at 2.

¹⁷⁹ See *infra* notes 181-91 and accompanying text.

¹⁸⁰ See *infra* notes 195-226 and accompanying text.

¹⁸¹ *The Arrest of Vallandigham*, ATLAS & ARGUS (Albany, N.Y.: Daily), May 8, 1863,

arrest of Mr. Vallandigham, and his hasty trial before a secret military court, is an event which arouses the indignation of all lovers of the [C]onstitution and laws."¹⁸² After Judge Leavitt's decision, the *Detroit Free Press* wrote, "With a deep sense of the responsibility of every word we put upon the printed page, we solemnly declare our conviction that the Republic is in the deepest peril which ever menaced her."¹⁸³ The paper insisted that "[t]he right to speak, to give intelligent utterance to our wants, passions, desires, impulses, the Heaven giving privileges of man over the brute, must be exercised untrammelled by fear, unmolested by power, or there is nothing worth living for left to American citizens."¹⁸⁴ In an earlier editorial, the same paper said:

We have never been champions of Mr. Vallandigham. In many particulars we have disagreed with him in opinion; but we have seen nothing in his course which he was not permitted by the [C]onstitution and laws to do; but even if he is guilty of any offense, he is entitled to a trial by a jury of his country and by the law of the land. If, in his case, a military court—the most offensive of tribunals to a free people—is allowed to usurp the office and functions of these, we will be justified in asserting that the worst apprehensions of the designs of the administration are fulfilled, and that American liberty is so dead, that even its forms are no longer observed.¹⁸⁵

The *Detroit Free Press* recited the charge against Vallandigham. The charge did not allege that Vallandigham had "violated any law of the United States,"¹⁸⁶ but simply an order issued by a General. "There is no pretence that he transcended the privileges guaranteed to him by the [C]onstitution and laws."¹⁸⁷ Indeed, there was no proof offered that he "has ever persuaded one man not to enlist, one to desert his flag, one to falter in his duty to the Union."¹⁸⁸ In essence, the Vallandigham case was

an announcement that no man, in these free and loyal States, shall utter a sentiment which the hero of Fredericksburg disapproves of. . . . [I]t is monstrous to hold that men who may be taxed or drafted, shall not advocate peace whenever and wherever they please; provided they do it in accordance with the [C]onstitution and the laws.¹⁸⁹

New York Democratic governor Horatio Seymour sent a letter to a protest meeting held in Albany, New York. He wrote that the Vallandigham arrest "involved a series of offenses against our most sacred rights. It interfered with the freedom of speech; it molested our rights to be secure in our homes against unreasonable

at 2.

¹⁸² *The Arrest of Vallandigham*, DET. FREE PRESS, May 8, 1863, at 2.

¹⁸³ *A Public Meeting*, DET. FREE PRESS, May 21, 1863, at 2.

¹⁸⁴ *Id.*

¹⁸⁵ *The Arrest of Vallandigham*, DET. FREE PRESS, May 8, 1863, at 2.

¹⁸⁶ *Mr. Vallandigham and Free Speech*, DET. FREE PRESS, May 15, 1863, at 2.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

searches and seizures; it pronounced sentence without trial, save one which was a mockery, which insulted as well as wronged."¹⁹⁰

Criticism by the Democratic *Cincinnati Enquirer* was muted. Burnside had visited the editors on the day of Vallandigham's arrest and warned them that they too could be imprisoned.¹⁹¹

2. *Advocacy of a Political Response to Suppression*

After the arrest and after the suppression of the *Chicago Times*, many Democratic speakers and papers counseled against violent action—at least unless the administration made direct efforts to interfere with the ballot. Francis Kernan was a highly regarded lawyer and Democratic member of Congress who had first attained prominence as a brilliant orator for the anti-slavery Free Soil Party.¹⁹² Kernan spoke to an "immense meeting" at the state capitol in Albany called to protest the Vallandigham arrest.¹⁹³ He expressed a common Democratic theme, obedience to law:

We will allow none to lead us into violence, but by our firmness and calm determination to stand by our rights, we will force our opponents into respect for them. We have one remedy in the ballot box. If those in authority do not observe our rights, we can turn them out, through the ballot box. We have another remedy, if we believe the laws of our law makers unconstitutional, in the courts. And we have still another, which is quite as good and efficacious, and that is in the voice of the people, uttered from assemblages such as this, where we are discussing our rights, peacefully but manfully—a voice terrible to those who are delinquent in their trusts.¹⁹⁴

¹⁹⁰ Letter from Governor Seymour, Executive Dep't (May 16, 1863), in *Vallandigham:—Immense Meeting in Albany*, DET. FREE PRESS, May 20, 1863, at 1 (referring to an entire report of the meeting's events in *The Vallandigham Outrage: Immense Meeting at the Capitol*, ATLAS & ARGUS (Albany, N.Y.: Daily), May 18, 1863, at 2).

¹⁹¹ See KLEMENT, LIMITS OF DISSENT, *supra* note 1, at 163.

¹⁹² See 5 DICTIONARY OF AMERICAN BIOGRAPHY 356 (Dumas Malone ed., 1932, 1933).

¹⁹³ Speech of Hon. Francis Kernan, in *The Vallandigham Outrage: Immense Meeting at the Capitol*, ATLAS & ARGUS (Albany, N.Y.: Daily), May 18, 1863, at 2.

¹⁹⁴ *Id.* See also Speech of Judge Parker at the Brooklyn Meeting, in ATLAS & ARGUS (Albany, N.Y.: Daily), June 15, 1863, at 2 (arguing that acts of government should be resisted by open discussion rather than by force); *Hon. C. L. Vallandigham*, CIN. ENQUIRER, May 19, 1863, at 2 (quoting Vallandigham as advocating "no revolution, except through the ballot box").

3. *Free Speech and Representative Democracy: A Tough Central Core—Rejection of “License” as a Justification for Suppression*

Other protest meetings were held throughout the North.¹⁹⁵ George V. N. Lothrop, a scholarly leader of the bar and former Michigan attorney general,¹⁹⁶ spoke to a protest meeting held at the Detroit City Hall.¹⁹⁷ Lothrop was a Democrat who opposed Vallandigham’s views and who, by his own account, had “unreservedly” supported the government “against the insurrection.”¹⁹⁸

Nonetheless, Lothrop insisted on a broad and tough definition of freedom of speech. He said that soldiers had arrested Vallandigham for allegedly “expressing sympathy for rebels, declaring disloyal sentiments and opinions with a view to weaken the power of the government.”¹⁹⁹ “[W]ithout inquiring whether the words [Vallandigham] used will fairly bear this construction,” Lothrop rejected the claim that they did or could state a legal offense.²⁰⁰ “I dwell not on the uncertainty of what is disloyal; but the point I make is whether a man can be arrested for any quality of opinions on public affairs?”²⁰¹ Lothrop said it was a postulate that “*without free discussion there can be no free government*. . . . Hence we can readily see at what price we must lay down this right.”²⁰²

For Lothrop, the right to free speech had a tough central core, impervious to government invasion: “What is free speech under the [C]onstitution? Clearly the right to canvass and discuss without reserve public measures and acts. Anything short of this is inadequate.”²⁰³ As a result, “Mr. Vallandigham had the full right to

¹⁹⁵ See KLEMENT, LIMITS OF DISSENT, *supra* note 1, at 179-80 (reporting that citizens of nearly every Northern city held a protest meeting).

¹⁹⁶ See 6 DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 192, at 424.

¹⁹⁷ See Speech of Hon. Geo. V. N. Lothrop, Delivered at the City Hall, Detroit (May 25, 1863), in DET. FREE PRESS, June 7, 1863, at 2.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* See also EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 282-84 (1988) (noting that popular sovereignty is a legal fiction; this fact creates the need for a Bill of Rights to protect people from the oppression of their government’s “agents” exceeding their powers); Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising The Slaughter House Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1, 9-10 (1996) (discussing the belief of the Levellers that popular governments need bills of rights to guard against the corruption of those granted authority); Steven D. Smith, *Radically Subversive Speech and the Authority of Law*, 94 MICH. L. REV. 348, 351-52, 360, 362, 365-67, 369 (1995) (discussing the political fiction that the people rule and the sense in which it is true and false); Speech of Judge Parker at the Brooklyn Meeting, ATLAS & ARGUS (Albany, N.Y.: Daily), June 15, 1863, at 2 (discussing the importance of freedom of speech to democratic government).

²⁰³ Speech of Hon. Geo. V. N. Lothrop, Delivered at the City Hall, Detroit (May 25, 1863), in DET. FREE PRESS, June 7, 1863, at 2.

approve, criticise or denounce the war and all acts and measures of the administration at his pleasure. As a citizen he might form any opinion on these subjects and freely express them."²⁰⁴ All agreed on the right to "approve and applaud" administration policy.²⁰⁵ But while Vallandigham's accusers considered approval meritorious, "they object when he condemns and denounces."²⁰⁶

Lothrop responded to a friend who claimed that freedom of speech did not protect "license":

He meant that the expression of opinions regarded as unsound, unpatriotic, or of evil tendency, should be deemed not a true freedom, but a license to be restrained. But this obviously destroys all free discussion. . . . It makes, if I apply the rule, all opinions that I reject contraband to all other persons. But the very fact of a guaranty of freedom of speech implies that men will honestly differ, and that the privilege of expression is to be equal to all. The right of expression shall not depend upon . . . the quality of the opinions in the judgment of another. The guaranty means this or it means nothing.²⁰⁷

The "constitutional guaranty," Lothrop insisted, was "framed . . . to protect what you call license[.]"²⁰⁸ After all, it was "the *unpopular* opinion of to-day that needs these guaranties[.]"²⁰⁹ The idea of limiting free speech to ideas that were popular would mean that free speech principles would be applied only when not needed. "The man who runs with the majority needs no guaranty. He is never disloyal."²¹⁰

"[A]buses and licenses," the Republican *Evening Post* admitted "of course adhere to this unlimited freedom of public criticism; but these are apparently inseparable from the use, and without the abuse we should scarcely have the use."²¹¹ Who, the *Post* asked, should draw such lines outside of the courts? The question might suggest that, so long as the courts drew the line, punishment for expression was permissible. The *Evening Post's* comments and its general editorial policy suggest that the editors did not believe that anyone should be permitted to treat peaceful political criticism of government policy as abuse.²¹²

A mass meeting was held in Albany to protest Vallandigham's arrest. The resolutions adopted at the meeting insisted on protection for political speech and quoted from Daniel Webster:

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² See *The Voice of Reason*, N.Y. EVENING POST, reprinted in NAT'L INTELLIGENCER, May 16, 1863, at 3.

“It is the ancient and undoubted prerogative of this people to canvass public measures and the merits of public men. It is a ‘home bred right,’ a fireside privilege. It had been enjoyed in every house, cottage, and cabin in the nation. It is as undoubted as the right of breathing the air or walking on the earth. . . .”²¹³

With increasing emphasis, critics noted the threat to popular government posed by actions of the administration. Free speech was essential to democracy. “If freedom of speech is surrendered,” the *Detroit Free Press* noted, “it will no longer be pretended, we presume, that the ballot-box can represent the views and wishes of the majority of the people. . . . Without freedom of speech, the ballot box is a farce”²¹⁴ If the President could use the war power to stifle speech, he could make elections meaningless, for elections without free speech are a mockery. By the same war power logic, the President simply could dispense with elections. As the *Detroit Free Press* glumly observed:

[I]t is plain that if meetings may be [dispersed], speakers banished, and journals suppressed because they are opposed to the war or the conduct of it, the polls may be closed, or voters excluded from them, for the same reason. If it is disloyal to make a speech against the war, it is doubly disloyal to vote for men who are opposed to it.

. . . If the president may suspend the *habeas corpus*, suppress the courts, and put the lives, liberty and property of the citizens of loyal and peaceable States into the keeping of military tribunals, we cannot see why he cannot suppress the ballot box and declare it a “military necessity” to continue the Presidency in himself . . . so long as he has an army to back him.²¹⁵

The nexus between free speech and democracy was a theme at many Democratic conventions, including the Ohio convention that nominated Vallandigham. There, the delegates resolved:

First, that the will of the people is the foundation of all free government: that to give effect to this will, free thought, free speech and a free press are absolutely indispensable. Without free discussion there is no certainty of sound judgment[;] without sound judgment there can be no wise government[.] That it is an important and constitutional right of the people to discuss all measures of their Government, and to approve or disapprove, as to their best judgment seems right; that they have a like right to propose and advocate that policy which, in their judgment, is best,

²¹³ *The Vallandigham Outrage: Immense Meeting at the Capitol*, ATLAS & ARGUS (Albany, N.Y.: Daily), May 18, 1863, at 2 (quoting Daniel Webster).

²¹⁴ *Will The People Be Allowed To Vote?*, DET. FREE PRESS, June 5, 1863, at 2; see also Hon. Geo. E. Pugh’s Speech, in CIN. ENQUIRER, Aug. 7, 1863, at 2 (discussing the relation of free speech to popular government).

²¹⁵ *The Military Discretion*, DET. FREE PRESS, June 10, 1863, at 2.

and to argue and vote against whatever policy seems to them to violate the Constitution, to impair their liberties, or be detrimental to their welfare; that these and all other rights guaranteed to them by their Constitution are their rights in time of war as well as in times of peace, and of far more value and necessity in war than in peace, for in peace, liberty, security, and property are seldom endangered, in war, they are ever in peril.²¹⁶

In addition, the resolutions condemned the Emancipation Proclamation.²¹⁷

George Pugh, the former United States senator who served as Vallandigham's habeas corpus lawyer, was the Democratic nominee for lieutenant governor. In his speech to the Convention, he explained, "The question of prosecuting the war, or concluding a peace, can not be intelligently decided till we hear both sides, and all sides. Any idea of discussing such questions, under fear of military dictation, or the Order 38, [is] shame and mockery."²¹⁸

4. *The Principal-Agent Metaphor and the Sedition Act Analogy*

The right of free speech followed from the principal-agent relation between the people and elected officials—from the basic idea of representative government. The Ohio Democratic convention resolved that administrations and government officials were merely the agents of the people "subject to their approval or condemnation, according to the merit or demerit of their acts."²¹⁹ The *Detroit Free Press* argued that the claim that opposition to the war amounted to disloyalty was "heretical and wicked. It is only another form of saying that the people have ceased to be sovereign, and must sustain every act of their agents, right or wrong."²²⁰ The *Free Press* said that whether a war should be supported depended on a number of factors: was it a just war?; could it be terminated by an honorable adjustment?; was there a reasonable hope of success?; and was it practicable, constitutional, and consistent with public liberty?²²¹ As the *Free Press* wrote:

In a free country at least, the men who are liable to fight, and who *must* be taxed to support the war, can never surrender the right to ask these questions, and to answer them according to the convictions which their consciences entertain. And no one can legally accuse them of disloyalty because he does not agree with their answer.²²²

²¹⁶ *Ohio Democratic State Convention, Vallandigham Nominated For Governor, George E. Pugh's Speech*, CIN. COM., June 12, 1863, at 2.

²¹⁷ *See id.*

²¹⁸ *Id.*

²¹⁹ *Id.*; see also *Maine Democratic State Convention: An Immense Gathering*, ATLAS & ARGUS (Albany, N.Y.: Daily), Aug. 12, 1863, at 2 (quoting a resolution from the Maine Democratic State Convention using similar language).

²²⁰ *Loyalty—Disloyalty*, DET. FREE PRESS, June 26, 1863, at 2.

²²¹ *See id.*

²²² *Id.*; see also *Speech of Judge Parker at the Brooklyn Meeting*, in ATLAS & ARGUS (Albany, N.Y.: Daily), June 15, 1863, at 2 (discussing the status of governmental officials

Some Democrats suggested that the Lincoln administration was reviving the tyranny of the Sedition Act used by the John Adams administration against its political opponents.²²³ In *Vallandigham's* case, however, Congress had not even passed a law purporting to authorize the arrests.²²⁴ Congressman Daniel Voorhees from Indiana said the Republicans were the ideological heirs of the Federalists who enacted the Sedition Act—

a law by which, if Mr. Vallandigham, or myself, or anybody else, made a speech that the President didn't like, he would be taken up, and confined, and put in prison as a seditious person. Now a days, without any such law, they take a man up, keep him in prison as long as they like, and turn him out whenever they get tired of him, without making explanation or apology to him.

... I, upon the other hand, dare to trust the people, and clothe them with power to regulate their own affairs. I stand by the literal meaning of the Constitution, that Congress shall pass no law abridging the freedom of speech or of the press.²²⁵

One writer for *Harper's Weekly* suggested that the administration's error was its distrust of the people: "Arresting seditious talkers implies a fear that the people have not sense or strength of mind enough to resist the appeal of sedition"²²⁶

5. *Political Speech and "Treason"*

Critics of the administration further insisted that calling criticism "treason" did not dissolve the principles of free and equal speech. Democrats regularly highlighted the Constitution's limited definition of treason and the historical and functional reasons for the limit. As former Democratic congressman David Seymour explained at a meeting in Troy, New York, in America "no such offence *as implied treason*"

as agents of the people).

²²³ See *History Repeating Itself—Persecution of Democrats Under the Old Sedition Law*, DAYTON EMPIRE (Ohio: Daily), reprinted in DET. FREE PRESS, Aug. 27, 1863, at 2 (discussing the history of the Sedition Act during the John Adams administration and relating it to the acts of the Lincoln administration).

²²⁴ See *id.*

²²⁵ Speech of Daniel W. Voorhees at Bucyrus, Crawford County, O[hio] (Sept. 15, 1863), in CIN. COM., Sept. 17, 1863, at 1. On its face, at least, the scope of the Sedition Act of 1798 only reached malicious falsehoods, while the action against Vallandigham reached opinions. As it was used, however, the Sedition Act reached and punished political opinions and perhaps, for that reason, Voorhees did not point out the Sedition Act required falsity. See, e.g., Act of July 14, 1798, ch. 74, §3, 1 Stat. 596 (1798); *U.S. v. Cooper*, 25 F. Cas. 631 (C.C.D. Pa. 1800) (No. 14,865) (trying a pamphleteer for criticizing the president's actions regarding the raising of an army and navy amid escalating tension with France); *Lyon's Case*, 15 F. Cas. 1183 (C.C.D. Vt. 1798) (No. 8,646) (trying a citizen for publishing criticisms of the president for pursuing pomp and adulation and for using religion for political purposes).

²²⁶ *The Arrest of Vallandigham*, 7 HARPER'S WEEKLY, May 30, 1863, at 338.

existed.²²⁷ The use of bold and even severe free speech about government policy “is not and cannot be held to be ‘adhering’ to our enemies, ‘giving them aid and comfort.’ Any different construction of this constitutional definition,” he explained, “would confound all right of free speech.”²²⁸

6. *Republican Critics of Suppression*

Opposition to the Vallandigham arrest and the suppression of the *Chicago Times* was not limited to Democrats. The *New York Evening Post*, a pro-Republican and pro-emancipation paper, was strongly critical. The *Evening Post* refuted General Burnside’s assertion that because soldiers could not criticize the war policy of the administration, neither could civilians: “But he forgets that persons ‘in the military and naval service of the United States’ are subject to military law, while the ordinary citizen is subject exclusively to civil law.”²²⁹ General Burnside’s theory was subversive of democratic government:

[N]o governments and no authorities are to be held as above criticism, or even denunciation. We know of no other way of correcting their faults, spurring on their sluggishness, or restraining their tyrannies, than by open and bold discussion. How can a popular Government, most of all, know the popular will, and guide its course in the interests of the community, unless it be told from time to time what the popular convictions and wishes are?²³⁰

The *New York Daily Tribune*, a strongly anti-slavery Republican paper, doubted that any good would come from the episode and hoped that the President would free Vallandigham. The *Tribune* wrote that:

²²⁷ Speech of Hon. David L. Seymour at the Mass Meeting on Saturday Evening, in *Arbitrary Arrests: Meeting in Troy*, ATLAS & ARGUS (Albany, N.Y.: Daily), May 28, 1863, at 4.

²²⁸ *Id.* Article III, section 3 of the Constitution provides: “Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.” U.S. CONST. art. III, § 3, cl. 1. See also William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91 (1984) (discussing the treason clause as a guarantee of free speech); Alexander H. Shapiro, *Political Theory and the Growth of Defensive Safeguards in Criminal Procedure: The Origins of the Treason Trials Act of 1696*, 11 LAW & HIST. REV. 215 (1993) (discussing treason under English law and the background of American guarantees under the Constitution).

²²⁹ *The Voice of Reason*, N.Y. EVENING POST, reprinted in NAT’L INTELLIGENCER, May 16, 1863, at 3.

²³⁰ *Id.* See also Letter From Ex-Governor Washington Hunt (May 16, 1863), in *The Vallandigham Case*, ATLAS & ARGUS (Albany, N.Y.: Daily), May 22, 1863, at 2 (stating that criticism of government policies is protected free speech).

Vallandigham [was] a Pro-Slavery Democrat of an exceedingly coppery hue. . . . [I]f there were penalties for holding irrational, unpatriotic and inhuman views with regard to political questions, he would be one of the most flagrant offenders. But our Federal and State Constitutions do not recognize perverse opinions, nor unpatriotic speeches, as grounds of infliction²³¹

A few days later the *Tribune* returned to the subject of Vallandigham's arrest. It suggested that Vallandigham unintentionally helped the government, and it noted the free speech problems with the arrest. "We reverence Freedom of Discussion—by which we mean Freedom to uphold perverse and evil theories, since nobody ever doubted the right to uphold the other sort."²³²

A German anti-slavery paper expressed shock when it learned that Vallandigham's only crime was "a public speech."²³³ It denounced the sentence as despotism because "Mr. Vallandigham . . . was sentenced simply for making use of the freedom of speech guaranteed by the [C]onstitution. . . . [W]e do not acknowledge any *misuse* of free speech, as was invented by the European police."²³⁴ The paper's prescription for the "so-called misuse of the freedom of speech" was that it "be neutralized by the counteracting better use of the same."²³⁵ The *Bedford Standard*, another Republican paper, also criticized the arrest:

[A]t a time when we see the opinions we have so long advocated in the face of many who would gladly have silenced us, so rapidly gaining favor among the people, we think there is no need of attempting to shut the mouths of such men as Vallandigham. If we are successful all his tirades will fall unheeded. If we are unsuccessful, and continually so, no power on earth can prevent the formation of such a public opinion as will compel a change of policy on the part of the administration, or lead to the election of a new one. Let us have faith in the power of truth, and oppose those we believe to be in error with the weapon of truth.²³⁶

²³¹ *Vallandigham*, N.Y. DAILY TRIB., May 15, 1863, at 4.

²³² *Sympathy for Vallandigham's Treason in Albany: Gov. Seymour Exciting Citizens Against the Government*, N.Y. DAILY TRIB., May 18, 1863, at 5. Curiously, the *New York Daily Tribune* rejected the claim that Vallandigham could not be amenable to military authority. *Id.*

²³³ *The Traitor Vallandigham*, BOSTON PIONEER, reprinted in DET. FREE PRESS, May 27, 1863, at 2.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ BEDFORD (REP.) STANDARD, reprinted in *Abolition "Sentiment" on Vallandigham*, DET. FREE PRESS, May 27, 1863, at 2.

Colonel A. S. Diven spoke to a Republican meeting at Albany, New York.²³⁷ Diven was a strongly anti-slavery lawyer, soldier, and railroad promoter.²³⁸ He had been a Free Soil candidate for governor of New York in 1859 and served in Congress from 1861 to 1863, during which time he had supported emancipation in the District of Columbia and authored the first bill authorizing the use of black troops.²³⁹ According to Albany's *Atlas & Argus*, Diven said that "[h]e was opposed to the abridgement of discussion. He maintained the right of the people to discuss and criticise the action of the government, whether in peace or in war, to the fullest extent!"²⁴⁰

The extent of the condemnation of the Vallandigham arrest is difficult to determine. The *Detroit Free Press* suggested that opposition to the arrest was quite general and it "was not . . . confined to any one party."²⁴¹

This is shown conclusively, by the extracts we have published from the leading editorials of such republican papers as the *New York Tribune*, the *New York Evening Post*, the *New York Commercial Advertiser*, the *Albany Statesman*, the *Boston Advertiser*, the *Boston Traveller*, the *Springfield Republican*, backed as the *New York Evening Post* truly says, by at least three-fourths of the republican party itself. But the republican press and party among those who voted for Lincoln do not stand alone, for the anti-slavery press are unanimous in condemning the course of the administration.²⁴²

In fact, abolitionists were split. Ezra Heywood, a radical who had left the ministry to become a lecturer for the Massachusetts Anti-Slavery Society, introduced a resolution at the Society's 1863 meeting supporting free speech and criticizing the prosecution of Vallandigham. The resolution was met with the argument that it should not be passed by an anti-slavery organization because the resolution helped the South, and it was tabled.²⁴³

In contrast to the *Detroit Free Press*, the Democratic *Atlas & Argus* complained that most Republican journals had failed to support free speech.²⁴⁴ Certainly, Republican papers like the *Cincinnati Commercial* and the *Chicago Tribune*, and

²³⁷ See Remarks of Col. A. S. Diven at the Republican Meeting at the Capitol (May 20, 1863), in *ATLAS & ARGUS* (Albany, N.Y.: Daily), May 22, 1863, at 2.

²³⁸ See 3 *DICTIONARY OF AMERICAN BIOGRAPHY*, *supra* note 192, at 322.

²³⁹ See *id.*

²⁴⁰ Remarks of Col. A. S. Diven at the Republican Meeting at the Capitol (May 20, 1863), in *ATLAS & ARGUS* (Albany, N.Y.: Daily), May 22, 1863, at 2.

²⁴¹ *The Vindication of the Right of Free Speech*, *DET. FREE PRESS*, May 28, 1863, at 2.

²⁴² *Id.*

²⁴³ See DAVID RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 32-33 (1997) (citing MARTIN HENRY BLATT, *FREE LOVE AND ANARCHISM: THE BIOGRAPHY OF EZRA HEYWOOD* 29-31 (1989)).

²⁴⁴ See *Wanted—Free Speech!*, *ATLAS & ARGUS* (Albany, N.Y.: Daily), May 20, 1863, at 2.

many Republican orators, fully supported Burnside's suppression of critical speech. For example, the editors of the *Chicago Tribune*, mixing metaphors, lamented that Vallandigham, the "Queen Bee of the Copperhead hive," only had been sent South "instead of being hung, as he deserved."²⁴⁵

Still, there was substantial Republican opposition to General Burnside's suppressions of speech and press. A large crowd assembled to protest the General's suppression of the *Chicago Times*. "A full half of the crowd that got together in the Court house Square last evening," the *Chicago Tribune* complained, "was, we are sorry to say, made up of Republicans . . ." ²⁴⁶ These the *Tribune* found "out of place" in an "assemblage" pretending to defend free speech. In fact, the *Tribune* insisted, the crowd "met to assail the Government and weaken its power."²⁴⁷ Republican senator Lyman Trumbull addressed a crowd that included a number of Republicans who were unhappy about his telegram urging President Lincoln to give immediate consideration to the request to overrule General Burnside.²⁴⁸ "Has it come to this," Trumbull asked

that you will deny in the free city of Chicago the right of a citizen to discuss the acts of the President? [Cries of "We won't allow it" . . .] Is there a man in this audience who has not expressed today his dissatisfaction with some act of the President? [Cries of "Yes," "Yes," "We have none of us expressed any dissatisfaction."] Ah! do all of you, then, think the President's revocation of Gen[eral] Burnside's order suppressing the *Chicago Times* was *right*? [Cries of "No!" "No!" "It was wrong!" . . .] *Then you all deserve to be taken in hand by the military power and sent beyond the lines.*²⁴⁹

Trumbull insisted that the Republican Party should not surrender its position as the advocate of liberty and free speech. He thought that incidents like the suppression of the *Chicago Times* were damaging the administration and the war effort. Such acts allowed critics to charge that

we are opposed to the freedom of speech and opinion, to the freedom of the press; in favor of curtailing personal liberty, and in favor of a despotism. Now we should not allow these things. We have been the advocate of free speech for the last forty years, and should not allow the party which during the whole time has been using the gag to usurp our place. We are fighting for the restoration of the Union, and the preservation of the Constitution, and all the liberties it guarantees to every citizen.²⁵⁰

²⁴⁵ *The Mask Off*, CHI. TRIB., May 30, 1863, at 2.

²⁴⁶ *That Crowd*, CHI. TRIB., reprinted in CIN. COM., June 5, 1863, at 2.

²⁴⁷ *Id.*

²⁴⁸ See *The Limitations of Criticism*, NAT'L INTELLIGENCER, June 10, 1863, at 3.

²⁴⁹ *Id.*

²⁵⁰ Senator Trumbull's Chicago Speech, in CIN. COM., June 11, 1863, at 2.

C. *The Nature of Free Speech*

1. *Tough Protection for Core Speech*

For many there was a central core of protected expression which the government could not suppress, regardless of how impressive its interest in doing so appeared. This core included expression of opinion on public policy—such as the wisdom of pursuing the war and the legality, tyranny, or wisdom of General Burnside's suppression of expression. For many others, the very grossness of the suppression—an arrest or prior restraint based on the edict of a general issued outside the immediate area of military conflict, unsupported by a law passed by Congress, and unreviewed by a court—meant that detailed discussion of the limits of free speech was unnecessary.

2. *Free Speech and Equal Free Speech Rights*

For many critics of the suppression, free speech was a basic principle that involved equal rights for the critics as well as supporters of governmental policy—including the war policy. As George Lothrop said, “the very fact of a guaranty of freedom of speech implies that men will honestly differ, and that the privilege of expression is to be equal to all.”²⁵¹ To deny expression to those with contrary views risked weakening the basic framework that supported liberty for all. “We freely concede,” said the *Bedford Standard*, “to any one the same right to criticise the administration which we claim for ourselves. If we disapprove of a pro-slavery policy, we expect to say so without molestation. Let those who disapprove of an anti-slavery policy do the same.”²⁵² Former Democratic congressman David Seymour spoke at a Democratic rally in Troy, New York, and insisted that the Constitution broadly protected free expression of ideas.²⁵³ Seymour argued that protection for diverse views is implicit in a broad right of free speech:

No gag law on the press; no swords nor bayonets, nor chains, nor prisons, nor exile, can, under our Constitution, legally restrain or repress them. This is true in morals, in social life and in religion. It is true of the atheist, the mormon and the abolitionist. Even the abolitionists—the Phillipses, the Sumners, the Wades, the Garrisons, and their whole tribe—have a right to preach heretical doctrines.²⁵⁴

²⁵¹ Speech of Hon. Geo. V. N. Lothrop, Delivered at the City Hall, Detroit (May 25, 1863), in *DET. FREE PRESS*, June 7, 1863, at 2.

²⁵² *BEDFORD (REP.) STANDARD*, reprinted in *Abolition "Sentiment" on Vallandigham*, *DET. FREE PRESS*, May 27, 1863, at 2.

²⁵³ See Speech of Hon. David L. Seymour at the Mass Meeting on Saturday Evening, in *Arbitrary Arrests: Meeting in Troy*, *ATLAS & ARGUS* (Albany, N.Y.: Daily), May 28, 1863, at 4.

²⁵⁴ *Id.*

At a mass meeting in Erie County, Sandford Church exclaimed, "Let Vallandigham talk! Let Anna Dickinson talk! Let all the host of radical declaimers in petticoats or breeches talk!"²⁵⁵

Because of the broad principle of liberty, those who disagreed with Vallandigham felt free to come to his defense. "The views of Mr. Vallandigham have nothing to do with the question," the *Detroit Free Press* explained.²⁵⁶ "The same feeling would have been aroused if Mr. Greeley [editor of the *New York Tribune*] or [abolitionist orator] Wendell Phillips had been arrested and thrown into prison for exercising the rights guaranteed to them under the [C]onstitution."²⁵⁷

A number of speakers warned Republicans against establishing a principle that later could be turned against them. Wirt Dexter, a leading Republican lawyer in Chicago,²⁵⁸ spoke to the crowd which gathered to protest the suppression of the *Chicago Times*: "I don't wish to see this kind of treatment turned upon the party of which I am a member; and I say to republicans to-night, gentlemen, be careful how you approach this abyss that opens before us."²⁵⁹ Senator Trumbull made the same point, applying it to executive and military suppression of a newspaper. "Did it ever occur to you," Trumbull asked, "that the next election may put an entirely different face upon affairs? . . . The same chalice you hold to the lips of your adversaries today, to-morrow may be returned to your lips."²⁶⁰ The editors of the *New York Journal of Commerce* explained the "distinction between discussion or counsel and 'treason'":²⁶¹

"The most ardent partizan can see it by reversing circumstances and imagining an administration in power which should attempt to pursue a policy contrary to his views. In such a case he would readily perceive his own right of discussing the policy, and . . . to endeavor by argument, by reason, by publication . . . to influence the votes of his fellow-citizens at coming elections."²⁶²

²⁵⁵ *Mass Meeting of the Citizens of Erie County*, BUFFALO DAILY COURIER, reprinted in ATLAS & ARGUS (Albany, N.Y.: Daily), June 5, 1863, at 2.

²⁵⁶ *The Vindication of the Right of Free Speech*, DET. FREE PRESS, May 28, 1863, at 2.

²⁵⁷ *Id.* See also Speech of Hon. David L. Seymour at the Mass Meeting on Saturday Evening, in *Arbitrary Arrests: Meeting in Troy*, ATLAS & ARGUS (Albany, N.Y.: Daily), May 28, 1863, at 4.

²⁵⁸ See 3 DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 192, at 283.

²⁵⁹ *Free Speech—Free Press. Immense Meeting at Chicago*, CHI. TIMES, June 5, 1863, reprinted in DET. FREE PRESS, June 6, 1863, at 1.

²⁶⁰ Senator Trumbull's Chicago Speech, in CIN. COM., June 11, 1863, at 2.

²⁶¹ *Free Speech*, DET. FREE PRESS, May 26, 1863, at 2 (quoting the N.Y. J. COM.).

²⁶² *Id.*

The *Boston Pioneer* emphasized the point by demanding “a right for all.”²⁶³ Otherwise, those who approved of Vallandigham’s sentence could not complain if they were packed off to prison in Florida for criticizing the administration.²⁶⁴

Several papers claimed that the rule of suppression was selective. According to them, Vallandigham said that the war aim had changed from preserving the Union to freeing the slaves.²⁶⁵ His statements were part of the basis for his conviction. Meanwhile, Wendell Phillips, the fiery abolitionist orator, had said that the war had become a war for abolition and had advocated disunion rather than union with slave states. No one suggested prosecuting him.²⁶⁶ The *National Intelligencer* suggested that proposed distinctions between the cases would not wash, and drew the following conclusion:

We know it will be said that the difference between Mr. Vallandigham and Mr. Phillips is this: . . . [Vallandigham’s] purpose is to *weaken* the Government, while the purpose of [Mr. Phillips] . . . is rather to *strengthen* the Government in its struggle with the rebellion. But who does not see that such a representation assumes that very point in dispute? At the same time it ascribes to Mr. Vallandigham a disunion purpose which he constantly disclaims, while Mr. Phillips has expressly announced that he will accept disunion on the condition of emancipation being secured. We believe that the Government might better afford to let Mr. Vallandigham and Mr. Phillips enjoy the privilege of “free speech” according to their respective notions of propriety, than to proceed against either of them for words spoken in public discussion.²⁶⁷

3. *A Rare Narrow View: Free Speech as Limited to Freedom from Prior Restraint*

One critic of the suppression took a narrow view of free speech. James F. Joy, a Republican lawyer who announced that he despised his clients’ politics, represented the owners of the *Chicago Times*. Joy assumed that freedom of speech was limited to protection against prior restraint, and he argued that Congress could declare what speech to allow and what to proscribe:

It is fully competent for Congress to enact a law punishing licentiousness of the press,—punishing libels upon the government, or upon public officers, or any other form of publication calculated to injure the government and bring it into disrepute, or to throw obstacles in the way

²⁶³ *The Traitor Vallandigham*, BOSTON PIONEER, reprinted in DET. FREE PRESS, May 27, 1863, at 2.

²⁶⁴ *See id.*

²⁶⁵ *See Declaring Disloyal Sentiments*, NAT’L INTELLIGENCER, May 14, 1863, at 3.

²⁶⁶ *See id.*; see also *An Irrepressible in Freedom of Speech*, CIN. ENQUIRER, June 4, 1863, at 2 (quoting Wendell Phillips’ statement to the *Boston Post*).

²⁶⁷ *Declaring Disloyal Sentiments*, NAT’L INTELLIGENCER, May 14, 1863, at 3.

of its measures, or tending to sedition and disturbance of the public peace.²⁶⁸

In fact, Madison, Jefferson, many Framers of the Constitution, and many members of Congress, at the time of the Sedition Act and during the mid-1830s, believed that Congress had no such power.²⁶⁹ But, Joy suggested, Congress dared not pass such statutes because of the popular view that they would infringe freedom of speech and of the press.²⁷⁰

Many recognized limitations upon protected speech. Senator Trumbull suggested that if the editors of the *Chicago Times* had encouraged resistance to the draft, they could have been arrested, tried in federal court, and thrown into prison.²⁷¹ Unlike Joy, Trumbull did not suggest that Congress could make false criticisms of the government a crime. By emphasizing that he did not advocate disobedience to the law, however, Vallandigham and many of his supporters recognized that such advocacy was problematic.

D. *The Defense of the Lincoln Administration*

1. *The Hypocrisy Defense*

Defenders of the Lincoln administration took several tacks. First, they pointed out that criticism of the suppression of free speech came with poor grace from a party many of whose members had supported suppression of anti-slavery speech. “[S]ince the arrest of the treason-shrieker, Vallandigham,” the *Chicago Tribune* noted, “his disciples fill the air with cries about the Constitutional right of ‘free speech.’ [W]e wish to ask those Copperhead defenders of free speech how much of this *Constitutional and sacred privilege* did their party allow to be exercised in the South before the war broke out?”²⁷² The paper asked: “How much ‘free speech’ was

²⁶⁸ Argument of Hon. James F. Joy: On the Preliminary Application of the *Chicago Times* for an Injunction in the United States Court, DET. FREE PRESS, June 9, 1863, at 2.

²⁶⁹ See, e.g., Curtis, *The Curious History*, *supra* note 16, at 794-96, 817-36; see also AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 36 (1998) (discussing views of the Framers and Ratifiers of the original Constitution).

²⁷⁰ See Argument of Hon. James F. Joy: On the Preliminary Application of the *Chicago Times* for an Injunction in the United States Court, in DET. FREE PRESS, June 9, 1863, at 2.

²⁷¹ *The Limitations of Criticism*, NAT’L INTELLIGENCER, June 10, 1863, at 3; see also *Mass Meeting of the Citizens of Erie County*, BUFFALO DAILY COURIER, reprinted in ATLAS & ARGUS (Albany, N.Y.: Daily), June 5, 1863, at 2. Mr. Ganson, a speaker at a protest meeting in Erie County, New York said that “[t]he right [of free speech] contended for by us is as clear now in the loyal States as in times of peace. If it is abused, the offender can be punished under the civil laws.” *Id.* Sanford Church, another speaker at the meeting, asked “[w]here is our boasted free speech,” if it is left to any man as to say what may and what may not be spoken?” *Id.*

²⁷² *Free Speech*, CHI. TRIB., June 1, 1863, at 2 (emphasis added).

tolerated in Secessia during the twenty years before the war?"²⁷³ Opponents of slavery were

arrested, imprisoned, fined, tar and feathered, rode on a rail, whipped, ducked, and even hung, for daring to exercise [their] "Constitutional right of free speech[.]" "Ah, but," replies a Copperhead, "that abridgment of free speech was made to prevent any discussion of the 'divine institution;'" Very true; but is slavery above the Constitution? . . . If Southern Democrats may, by mob violence, backed by Southern courts, stifle free speech in defiance of the Constitution, on the plea that slavery must not be discussed, with what consistency do Northern Democrats complain of the Generals of the army, in time of war and national peril, who forbid violent and seditious assaults upon the Government, the intention and effect of which is, to strengthen the enemy and weaken the Union?²⁷⁴

John Brough was the Union candidate for governor of Ohio who ran against Vallandigham. Brough noted that George Pugh, the Democratic candidate for lieutenant governor, had supported a bill for the Kansas territory that contained the following section: "if any man shall print, publish, indite or give form or shape to published matter, tending to stir up a rebellion of slaves in Kansas, he shall be punished in a fine of \$500, and with imprisonment for six months."²⁷⁵ Pugh had said he regretted the section, but he had defended it as necessary where slavery existed: "The difference between us," Brough announced to the delight of his audience, "seems only to be that we recognize a 'military necessity,' and he [Pugh] a 'negro necessity.'"²⁷⁶ The paper reported the audience responded with "[l]aughter."²⁷⁷

The pro-Republican *New York Daily Tribune* softened its criticism of suppression by noting the effort to silence abolitionists through legal actions and violence in the 1830s. These efforts, the paper suggested, enjoyed considerable Democratic support.

Politicians, lawyers, bankers, merchants—all who considered themselves anybody or aspired to be somebody—held meetings to denounce and silence [abolitionists]; "respectable" halls and churches were sternly refused them; . . . vicious boys and rowdies rotten-egged them, . . . while Mayors, Congressmen and dry goods jobbers wrote letters to the South, proclaiming their intense disgust and abhorrence of their "treasonable" inculcations.²⁷⁸

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ Great Speech of the Hon. John Brough, Immense Union Mass-Meeting in Fifth Street Market-Space (July 27, 1863), in *CIN. COM.*, July 28, 1863, at 2.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Free Speech*, N.Y. DAILY TRIB., May 20, 1863, at 4.

The *Tribune* noted with satisfaction (and barely repressed glee) the conversion of many Democrats to a strong view of free speech:

The times have bravely altered since then, and altered, we rejoice to say, for the better. The right of free discussion—which means the right to proclaim and defend unpopular views, since the other sort have no need of protection—is now affirmed and upheld by those who for a quarter of a century persistently scouted and trampled on it.²⁷⁹

Indeed, the paper said, in the midst of civil war, with the nation on the brink of destruction, Democrats held meetings during which “determination to resist the draft, to repudiate the public debt, and to embarrass and cripple in every way the National authorities, is proclaimed amid thunders of applause.”²⁸⁰ The *Tribune* concluded that free speech has limits, “[b]ut, truth is truth, though the devil utter it, and Free Speech is one of the most precious of the Rights of Man.”²⁸¹

There were charges of inconsistency on all sides. Republicans, after all, had campaigned in 1856 and 1860 as the free speech party. The *National Intelligencer* acknowledged that some advocates of free speech were recent converts, but concluded that fact should not obscure the merits of the case. The paper urged its readers “to separate a good cause from the infirmities of the men into whose hands it is suffered to fall.”²⁸² It was a mistake to judge the free speech principle solely by the consistency of its advocates.

2. *Liberty versus License*

Those who supported suppression of Vallandigham and the *Chicago Times* insisted that free speech did not protect the license indulged in by Vallandigham and the *Times*. Politicians and citizens, General Burnside announced, “must not use license and plead that they are exercising liberty.”²⁸³ After all, the nation was at war. “[I]n times of peace,” a writer in the *Chicago Tribune* announced, free speech could be tolerated “as a harmless right.”²⁸⁴ But things were quite different “in times of war and revolution.”²⁸⁵ Ordinarily, “even the licentiousness of speech is better than a too rigid restriction of it; but we can’t afford to be quite so generous,” the writer noted, “at the present time, when . . . the very existence of the nation” is at stake.²⁸⁶

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Respect for Law*, NAT’L INTELLIGENCER, May 27, 1863, at 3.

²⁸³ *The Application for Writ of Habeas Corpus for the Release of Hon. C. L. Vallandigham—General Burnside’s Statement to the Court, Cincinnati, Ohio*, May 11, 1863, in DET. FREE PRESS, May 14, 1863, at 2 (reporting the statement of Flamen Ball, Esq.).

²⁸⁴ *Civil and Military Law*, CHI. TRIB., June 12, 1863, at 2.

²⁸⁵ *Id.*

²⁸⁶ *Id.* The *Tribune* published two additional and lengthy installments supporting the actions of the administration. See *Military Law and Civil Law—No. 3*, CHI. TRIB., June 18,

Republican congressman Jehu Baker of Illinois said: "The advocates of treason talk of liberty of speech and the press, without once thinking of the distinction between the liberty of a man and the license of a beast Suppose," the Congressman asked, a man should gather young people together and "tell them that the principles of the Decalogue are all bosh; . . . that a graven image is as good a God as any Incomparably worse are the fruits of the teaching of treason against a just and excellent government."²⁸⁷ Baker invoked the metaphor of fire to emphasize the danger.²⁸⁸

3. *Denial of Repression Based upon Unpunished and Extreme Anti-Administration Speech*

In addition to distinguishing liberty from license, and noting the inconsistency of their opponents, supporters of the Lincoln administration pointed to examples of extreme anti-administration rhetoric which had not resulted in arrest. Certainly this fact shows that the Lincoln administration was not consistent or relentless in its effort to stamp out anti-war or anti-administration speech. The administration, rather, was concerned primarily with the negative effects of anti-war speech on the war effort. At least initially, Lincoln remained relatively passive and left the matter to the discretion of subordinates whom he tended to support. Lincoln's reply to New York critics suggested that the commander in the field was the best judge of necessity of suppressing of speech.²⁸⁹

The public outrage over the Vallandigham episode and *Chicago Times* case made Lincoln more cautious. His acute political sensitivity led him quietly to restrain subordinates.²⁹⁰ "The moral of the event would be lost[,]" the *Detroit Free Press* noted after the revocation of the order suppressing the *Chicago Times*,

if we did not emphasise the force of public opinion—the fear of consequences which prompted it. Every one knows that Burnside's crazy acts, the arrest of Vallandigham and his illegal trial, his turgid, incendiary order, and his suppression of newspapers had heated the popular mind to an ominous extent.²⁹¹

The *Detroit Free Press* hoped for a repudiation of the policy that led to Vallandigham's arrest and the closure of the *Chicago Times*. "What public opinion

1863, at 3; *Military Law and Civil Law—No. 2*, CHI. TRIB., June 13, 1863, at 2.

²⁸⁷ Suspension of the Habeas Corpus and Arbitrary Arrests: Extracts from the Speech of Jehu Baker, Delivered in the Hall of the House of Representatives (Feb. 4, 1863), in CHI. TRIB., June 19, 1863, at 3.

²⁸⁸ See *id.*

²⁸⁹ See DONALD, *supra* note 41, at 419-20; see also Abraham Lincoln, To Erastus Corning and Others (June 12, 1863), in LINCOLN SPEECHES, *supra* note 83, at 454, 462.

²⁹⁰ See William G. Carleton, *Civil War Dissidence in the North: The Perspective of a Century*, 65 S. ATL. Q. 390, 400-01 (1966).

²⁹¹ *What Will He Do With It?*, DET. FREE PRESS, June 9, 1863, at 2.

demands from [President Lincoln,]" the paper said, "is an express disclaimer of the power to do such things in the future."²⁹²

In private, Lincoln reined in his generals. "I regret to learn of the arrest of the *Democrat* editor," Lincoln wrote General John Schofield in July of 1863, shortly after the Vallandigham and *Chicago Times* affairs.²⁹³ He continued: "I fear this loses you the middle position I desired you to occupy. . . . Please spare me the trouble this is likely to bring."²⁹⁴ In October of the same year, Lincoln again wrote General Schofield who, in an effort to root out rebels, had required all the inhabitants of a county to leave their homes. Lincoln specifically addressed the suppression of speech and press, and urged restraint:

"Under your recent order, which I have approved, you will only arrest individuals, and suppress assemblies, or newspapers, when they may be working *palpable* injury to the Military in your charge; and, in no other case will you interfere with the expression of opinion in any form, or allow it to be interfered with violently by others. In this, you have a discretion to exercise with great caution, calmness, and forbearance."²⁹⁵

On the day General Burnside issued his order suppressing the *Chicago Times*, Secretary of War Stanton, wrote General Burnside to advise him that President Lincoln disapproved of General Hascall's interference with newspapers in Indiana. Stanton added:

Since writing the above letter the President has been informed that you have suppressed the publication or circulation of the Chicago [sic] *Times* in your department. He directs me to say that in his judgment it would be better for you to take an early occasion to revoke that order. The irritation produced by such acts is in his opinion likely to do more harm than the publication would do. . . . But while military movements are left to your judgment, upon administrative questions such as the arrest of civilians and the suppression of newspapers not requiring immediate action the President desires to be previously consulted.²⁹⁶

So, perhaps Lincoln finally decided that suppression of political speech outside the war zone was really too important a matter to be left to his generals.

²⁹² *Id.* Craig D. Tenney, in his account of the case, also concludes that press and public criticism was the main determinant of Lincoln's change of course. *See Tenney, To Suppress*, *supra* note 84, at 259.

²⁹³ Abraham Lincoln, Telegram from Abraham Lincoln to General J. M. Schofield (July 13, 1863), in 6 *THE WRITINGS OF ABRAHAM LINCOLN* 355, 355-56 (Arthur Brooks Lapsley ed., 1923).

²⁹⁴ *Id.* at 356.

²⁹⁵ NEELY, *supra* note 123, at 48 (quoting President Lincoln's letter to General John M. Schofield which gave advice concerning "notorious" General Order No. 11).

²⁹⁶ RANDALL, *supra* note 58, at 495 (citations omitted).

4. *The Argument from Necessity and National Survival*

The claim that when the survival of the nation was at stake, all other considerations became secondary was a powerful war power argument for suppression. The Constitution provided for the war power,²⁹⁷ the power of the President as commander in chief,²⁹⁸ and that habeas corpus could be suspended in a time of rebellion or invasion.²⁹⁹ As a result, supporters of the administration argued, the war power, the law of war, and the law of necessity trumped everything, including free speech. Administration lawyers expressed these arguments and so did Northern intellectuals who supported the administration. Constitutional justifications of the President's power were sweeping. As a writer for the *Chicago Tribune* explained, "[t]he war power is limited only by the laws and usages of nations. This power is tremendous: it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, of prosperity and of life."³⁰⁰ The same writer noted that "[o]ne of the great evils of the war, is that it requires for its prosecution such a concentration of power in the hands of the executive, that there is a very great danger of abuse in its exercise."³⁰¹ But a perfect choice was not available: "[W]e must never forget that in this unhappy condition of things our choice is reduced to a choice of evils. Shall we submit to a temporary despotism now, in order that we may be saved from one ten-fold more fearful in the future?"³⁰² William Whiting, solicitor for the War Department, explained that while the war power was constitutional, it was not limited. "Nothing in the Constitution or laws can define the possible extent of any military danger. Nothing therefore in either of them can fix or define the extent of power necessary to meet the emergency. . . ."³⁰³ As a result, Whiting broadly justified military power to arrest civilians far from the scene of battle:

Military crimes, or crimes of war, include all acts of hostility to the country, to the government, or to any department or officer thereof . . . provided that such acts of hostility have the effect of opposing, embarrassing, defeating, or even of interfering with, our military or naval operations in carrying on the war, or of aiding, encouraging, or supporting the enemy.

²⁹⁷ See U.S. CONST. art. I, § 8, cl. 11.

²⁹⁸ See *id.* art. II, § 2, cl. 1.

²⁹⁹ See *id.* art. I, § 9, cl. 2.

³⁰⁰ *Military Law and Civil Law*, CHI. TRIB., June 12, 1863, at 2.

³⁰¹ *Military Law and Civil Law—No. 3*, CHI. TRIB., June 18, 1863, at 3.

³⁰² *Id.*

³⁰³ WILLIAM WHITING, WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES: MILITARY ARRESTS, RECONSTRUCTION, AND MILITARY GOVERNMENT 169 (Leonard W. Levy ed., Da Capo Press 1972) (1871); see also HYMAN, *supra* note 1, at 132 (explaining the views of prominent Pennsylvania judge Daniel Agnew).

... [M]ilitary arrests may be made for the punishment or prevention of military crimes.³⁰⁴

“Soldiers and sailors give up much of their personal liberty,” Whiting noted.³⁰⁵ Similarly, in civil war, every citizen “must . . . be curtailed of some of his accustomed privileges,” including civil, municipal, and constitutional rights.³⁰⁶

Some critics were blunt. “The President of the United States has, in effect, been created Dictator,” with power over liberty comparable to that of the Russian Czar, wrote George William Curtis in *Harper’s Weekly*.³⁰⁷ “But,” he concluded, “it is well” for the power of the President was necessary for success.³⁰⁸ Ralph Waldo Emerson concluded that “absolute powers of a Dictator” were necessary during the war.³⁰⁹

President Lincoln crafted two politically potent defenses of his policy. The first came in response to a letter from a New York group critical of the Vallandigham arrest; the second responded to the Ohio Democrats’ demand for Vallandigham’s release. Because Lincoln’s responses need to be read in connection with the criticism he faced, the next section will first review the critique of Lincoln’s actions.

5. *The Arguments Lincoln Answered*

The New Yorkers objected to Vallandigham’s military arrest and trial because it took place in an area where the civilian courts were functioning; because it deprived Vallandigham of constitutional guarantees such as jury trial and a grand jury indictment; and because the arrest was based on a political speech.³¹⁰ A major subject of dispute was the war power of the president. If the president, as Commander in Chief, can dispense with civil courts and constitutional guarantees for civilians in areas that are not part of the theater of war, then the president can suspend freedom of speech in war time. Indeed, the government advocated something like that position in the Vallandigham habeas case.³¹¹

Critics of the war power argument rejected unlimited presidential power. They insisted that application of military law must be limited to the theater of war and to members of the armed services. Senator Trumbull, for example, took this position in his Chicago speech about the suppression of the *Chicago Times*:

³⁰⁴ WHITING, *supra* note 303, at 188.

³⁰⁵ *Id.* at 162.

³⁰⁶ *Id.*

³⁰⁷ Lorraine A. Williams, *Northern Intellectual Reaction to Military Rule During the Civil War*, 27 THE HISTORIAN 334, 347 (1965) (citing 7 HARPERS’S WEEKLY, May 30, 1863, at 162).

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 346-47 (citing Ralph Waldo Emerson, *American Civilization*, 9 ATL. MONTHLY 508-09 (1862)).

³¹⁰ See *Union Pamphlets: Letter of the Committee*, reprinted in 2 UNION PAMPHLETS OF THE CIVIL WAR 741-42 (Frank Freidel ed., 1967).

³¹¹ See VALLANDIGHAM TRIAL, *supra* note 64, at 159-68.

In certain districts the military law is supreme. Gen[eral] Grant is in command of an army in the State of Mississippi, which is in revolt. Will any one deny his right to make arrests, his right to suppress newspapers . . . ? No. . . . The great difficulty is in these districts, where rightful civil Government is in operation, where the judicial tribunals are open and the law respected—the laws which afford a remedy for every wrong. As a rule, we must remember that the civil law is superior to the military law, and the cases are rare, very rare, where the rule can be reversed. It here resolves itself into the plain naked question of whether the President and his Generals, by the simple clicking of the telegraph can cause the imprisonment of A, B, or C. If one General can do it, another can do it, and where is the end? . . . [Great sensation and murmurs.] Do you propose to interfere with the ballot-box? [Cries of “No! No!” “Never! Never!” . . .] I am glad to hear you say that, and glad you are so unanimous. Did it every occur to you that the next election may put an entirely different face upon affairs?³¹²

The *Evening Post* made a similar analysis and rejected General Burnside’s claim that the duty of civilians could be based on the rule for the military. “But he forgets,” the *Evening Post* insisted, “that persons ‘in the military and naval service of the United States’ are subject to military law, while the ordinary citizen is subject exclusively to civil law.”³¹³ Vallandigham was not a soldier nor was he in a place where combat raged. Martial law had not “been proclaimed to exist in the department of the Ohio,” the *Post* continued.³¹⁴ But even had it “been proclaimed, we doubt whether any authority under it can be exercised against persons who are not immediately within the scope of active military operations.”³¹⁵

A reasonable reading of the Act of Congress authorizing the suspension of the writ of habeas corpus is that Congress used the theater of war distinction. The Act denied the immediate benefit of the privilege of habeas corpus to political prisoners arrested by authority of the President. But in areas where the civil courts were functioning, Congress required either indictment before the end of the term of the grand jury or release for those who were seized.³¹⁶

The *National Intelligencer* printed a long, detailed, and scholarly article on the subject. It insisted that the March 1863 Habeas Act rendered Vallandigham’s military trial improper. He should have been turned over to civil authorities for trial or release. The newspaper bolstered this conclusion by asserting that Congress had

³¹² Senator Trumbull’s Chicago Speech, in CIN. COM., June 11, 1863, at 2.

³¹³ *The Voice of Reason*, N.Y. EVENING POST, reprinted in NAT’L INTELLIGENCER, May 16, 1863, at 3.

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ See An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases, ch. 81, § 2, 12 Stat. 755 (1863); *The Law in the Case*, NAT’L INTELLIGENCER, May 20, 1863, reprinted in ATLAS & ARGUS (Albany, N.Y.: Daily), May 23, 1863, at 2.

made the charges against Vallandigham an offense subject to jurisdiction in the federal courts.³¹⁷

In his 1951 study, *Constitutional Problems Under Lincoln*, Professor Randall also takes the view that the 1863 Act should have applied to cases like that of Vallandigham. He says: "Had this law been complied with, the effect would have been to restore the supremacy of the civil power."³¹⁸ According to Professor Randall, "the way was laid by congressional action for the speedy release of all citizens against whom no violation of Federal law could be charged."³¹⁹ He reports, however, that the Act rarely was complied with and that Judge Advocate General Holt construed the Act not to apply to citizens, like Vallandigham, who were arrested or tried by the military.³²⁰

6. *President Lincoln's Responses to His Critics*

President Lincoln made telling use of the necessity argument in reply to his critics. One irony is that the arrest of Vallandigham, based on supposed military necessity, produced extensive and vehement criticism of the Lincoln administration and open discussion of the possibility that armed resistance might become necessary. These critics generally were not arrested.

Lincoln rejected the claim that Vallandigham, a person who was neither in the military nor in a theater of war, was entitled to the criminal procedure guarantees of the Bill of Rights.³²¹ Lincoln noted that the civil war was a case of rebellion and, in such a case, the Constitution authorized the suspension of the writ of habeas corpus when public safety required it.³²² Arrests by ordinary civil process and those required in cases of rebellion were different. In the case of rebellion, "arrests are made, not so much for what has been done, as for what probably would be done. The latter is more for the preventive and less for the vindictive than the former."³²³ In rebellions, therefore, basic Bill of Rights guarantees did not apply because it was necessary to restrain people who were guilty of no crime. "The man who stands by and says nothing when the peril of his Government is discussed, cannot be misunderstood," Lincoln announced. "If not hindered, he is sure to help the enemy; much more, if he

³¹⁷ See *id.* See, e.g., Speech of Hon. Geo. V. N. Lothrop, Delivered at the City Hall, Detroit (May 25, 1863), in *DET. FREE PRESS*, June 7, 1863, at 2 (stating that the 1863 Act required that any civilian placed under "military arrest" should receive a civil trial); Remarks of Col. A. S. Diven at the Republican Meeting at the Capitol (May 20, 1863), in *ATLAS & ARGUS* (Albany, N.Y.: Daily), May 22, 1863, at 2 (asserting that the laws established by Congress were not applied in Vallandigham's arrest).

³¹⁸ RANDALL, *supra* note 58, at 164.

³¹⁹ *Id.* at 165.

³²⁰ See *id.* at 167.

³²¹ See Abraham Lincoln, To Erastus Corning and Others (June 12, 1863), in *LINCOLN SPEECHES*, *supra* note 83, at 454, 460.

³²² See *id.* at 457.

³²³ See *id.* at 458.

talks ambiguously—talks for his country with ‘buts’ and ‘ifs’ and ‘ands.’”³²⁴ The New Yorkers had insisted that no military arrests should be made “outside of the lines of necessary military occupation, and the scenes of insurrection.”³²⁵ Lincoln rejected the distinction: “Inasmuch, however, as the Constitution itself makes no such distinction, I am unable to believe that there *is* any such constitutional distinction.”³²⁶

Lincoln denied that Vallandigham was arrested for criticism of administration policy and of General Burnside’s edict:

It is asserted, in substance, that Mr. Vallandigham was, by a military commander, seized and tried “for no other reason than words addressed to a public meeting, in criticism of the course of the Administration, and in condemnation of the Military orders of the General.” Now, if there be no mistake about this; if this assertion is the truth and the whole truth; if there was no other reason for the arrest, then I concede that the arrest was wrong. But the arrest, as I understand, was made for a very different reason. Mr. Vallandigham avows his hostility to the War on the part of the Union; and his arrest was made because he was laboring, with some effect, to prevent the raising of troops; to encourage desertions from the army; and to leave the Rebellion without an adequate military force to suppress it.³²⁷

In his later reply to the Ohio Democrats who demanded Vallandigham’s return, Lincoln admitted, “I certainly do not *know* that Mr. V. has specifically, and by direct language, advised against enlistments, and in favor of desertion, and resistance to drafting,” but that was the effect of his words.³²⁸ “[T]his hindrance, of the military,” Lincoln said, “including maiming and murder, is due to the course in which Mr. V. has been engaged, in a greater degree than to any other cause; and” to Vallandigham personally “in a greater degree than to any other one man.”³²⁹

Only military force could suppress the rebellion, Lincoln continued, and military force required armies.³³⁰ “Long experience has shown,” Lincoln noted, “that armies cannot be maintained unless desertions shall be punished by the severe penalty of death. . . . Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wily agitator who induces him to desert?”³³¹ It was a powerful point. But judging by Vallandigham’s case, it applied to anti-war political speech that even *tended* to cause desertion or draft resistance—as inevitably would be true in some cases. After all, Vallandigham repeatedly had counseled obedience of the law and

³²⁴ *Id.*

³²⁵ *Id.* at 459.

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ Abraham Lincoln, Reply to Ohio Democrats (June 29, 1863), in LINCOLN SPEECHES, *supra* note 83, at 465, 468.

³²⁹ *Id.* at 469.

³³⁰ See Abraham Lincoln, To Erastus Corning and Others (June 12, 1863), in LINCOLN SPEECHES, *supra* note 83, at 454, 460.

³³¹ *Id.*

use of the ballot box to effect change.³³² Acceptance of Lincoln's bad tendency principle, in short, seems to outlaw anti-war political speech and to put the democratic process in abeyance for the duration of the war.

Finally, Lincoln denied that his acts would prove to be a precedent for repression in time of peace:

I can no more be persuaded that the Government can constitutionally take no strong measures in time of rebellion, because it can be shown that the same could not be lawfully taken in time of peace, than I can be persuaded that a particular drug is not good medicine for a sick man, because it can be shown not to be good food for a well one.³³³

E. *The Rejoinder to the Lincoln Defense*

The Democratic press promptly challenged Lincoln's defense of Vallandigham's banishment. The *Detroit Free Press* debunked the claim that the military courts tried and punished Vallandigham for encouraging desertions. "To say that [President Lincoln] is disingenuous," the paper commented tartly, "would be to use a very mild expression for a very strong fact."³³⁴ In fact, the paper said, Vallandigham was tried and convicted for violating Order No. 38 because he declared disloyal sentiments with the object of weakening the government in its effort to suppress the rebellion.³³⁵ "Not one word," the *Free Press* insisted,

can be found in it accusing him of encouraging desertions. That would be an offen[s]e against the laws for which Congress have [sic] provided adequate punishment through the medium of the civil courts, and for which, if he was guilty of it, he was only amenable in the loyal and peaceable State of Ohio to those courts.³³⁶

If Vallandigham's offense was encouraging desertions, the *Free Press* demanded, why was he not charged with that offense?³³⁷

As to the President's claim that the rebellion in other states allowed military trials in Ohio, the *Free Press's* response was equally acid:

In a word, Mr. Lincoln claims that he possesses absolute power where there is no rebellion, simply because it may be necessary to exercise it where there is—that whenever his opinion of public welfare justifies it,

³³² See VALLANDIGHAM TRIAL, *supra* note 64, at 22-23.

³³³ Abraham Lincoln, To Erastus Corning and Others (June 12, 1863), in LINCOLN SPEECHES, *supra* note 83, at 454, 460.

³³⁴ *The President's Claim of Power*, DET. FREE PRESS, June 16, 1863, at 2.

³³⁵ See *id.*

³³⁶ *Id.*

³³⁷ See *id.*

he may strike down the laws passed by Congress in any given case, and substitute some general order 38 in their stead.³³⁸

The New York Committee's response to the President was also printed in much of the press and circulated as a pamphlet. New Yorkers denied that the power to suspend habeas corpus in time of invasion or rebellion meant that Lincoln rightfully could suspend all constitutional guarantees of liberty:

Inasmuch as this process may be suspended in time of war, you seem to think that every remedy for a false and unlawful imprisonment [sic] is abrogated; and from this postulate you reach, at a simple bound, the conclusion that there is no liberty under the [C]onstitution which does not depend on the gracious indulgence of the Executive only. This great heresy once established, and by this mode of deduction there springs at once into existence a brood of crimes or offenses undefined by any rule, and hitherto unknown to the laws of the country; and this is followed by indiscriminate arrests, midnight seizures, military commissions, unheard of modes of trial and punishment, and all the machinery of terror and despotism.³³⁹

The New York committee indignantly rejected the idea that such arrests were justified because they were based on conduct or threats of injury not forbidden by the criminal law. It quoted Lincoln's assertions that the "arrests are made not so much for what has been done, as for what probably would be done," and his claim that the dangerousness of the man who "says nothing when the peril of his government is discussed," justified arrest.³⁴⁰ They highlighted Lincoln's acknowledgment that the arrests were not for the constitutional crime of treason or "for any capital or otherwise infamous crimes," and his assertion that the arrests were not "in any constitutional or legal sense criminal prosecutions."³⁴¹

These statements by the President, the committee insisted, proved just how dangerous the claimed power was:

The very ground, then, of your justification is, that the victims of arbitrary arrest were obedient to every law, were guiltless of any known or defined offense, and therefore were without the protection of the [C]onstitution. The suspension of the writ of *habeas corpus* instead of being intended to prevent the enlargement of arrested criminals, until a legal trial and conviction can be had, is designed, according to your doctrine, to subject innocent men to your supreme will and pleasure. Silence itself is punishable, according to this extraordinary theory, and still more so the expression of opinions, however loyal, if attended with criticism upon the

³³⁸ *Id.*

³³⁹ President Lincoln Answered: Reply of the Albany Democracy to the President's Letter of June 12, 1863, in DET. FREE PRESS, July 7, 1863, at 2.

³⁴⁰ *Id.*

³⁴¹ *Id.*

policy of the government. We must respectfully refuse our assent to this theory of constitutional law. We think that men may be rightfully silent if they choose.³⁴²

Finally, the Committee explicitly rejected the idea that the power to suspend the writ of habeas corpus also suspended the effect of constitutional guarantees of liberty. Arrests without warrant that violated constitutional guarantees could not “become in any sense rightful, by reason of a suspension of the writ of *habeas corpus*.”³⁴³ The “suspension of a single and peculiar remedy for such wrongs” did not “bring[] into existence new and unknown classes of offenses, or new causes for depriving men of their liberty.”³⁴⁴

IV. THE APRIL 1864 MOVE TO EXPEL AN ANTI-WAR CONGRESSMAN

Almost a year after Vallandigham’s arrest, the issue of anti-war speech re-emerged in an effort to expel a congressman for an anti-war speech made on the floor of Congress.³⁴⁵ The case raised again the question of whether anti-war speech that had the tendency to discourage the troops should be permitted. Those favoring expulsion cited the Vallandigham case as precedent. But in the 1864 effort to expel, two constitutional guarantees were involved: the free speech guarantee and the guarantee that protected debate in Congress from being questioned in “any other place.”³⁴⁶

Ohio representative Alexander Long concluded that the Civil War could not be won without exterminating the people of the South. The cost of the war, in terms of lives and suffering, he said, was not worth the effort.³⁴⁷ On April 8, 1864, he expressed these views in the House of Representatives and advocated ending the war and recognizing the Confederacy.³⁴⁸ Schuyler Colfax, the Speaker of the House, promptly made a motion to expel Representative Long for his speech.³⁴⁹ The Constitution provides: “Each house may . . . punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.”³⁵⁰ A debate on the motion to expel ensued. Eventually, Republican representative John Broomall of Pennsylvania amended the motion to expel to one of severe censure;³⁵¹ and the House approved the motion.³⁵²

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ See CONG. GLOBE, 38th Cong., 1st Sess. 1499 et seq. (1864).

³⁴⁶ U.S. CONST. art. I, § 6, cl. 1 (stating that “for any Speech or Debate in either House, [the speaker] shall not be questioned in any other Place”).

³⁴⁷ See CONG. GLOBE, 38th Cong., 1st Sess. 1499-500 (1864).

³⁴⁸ See *id.*

³⁴⁹ See *id.* at 1505-06.

³⁵⁰ U.S. CONST. art. I, § 5, cl. 2.

³⁵¹ See CONG. GLOBE, 38th Cong. 1st Sess. 1593 (1864).

³⁵² See *id.* at 1634.

Republicans generally spoke in favor of expulsion. Congressman Garfield of Ohio, a former general, denounced Long as “a Benedict Arnold” who “proposes to surrender us . . . to the accursed traitors.”³⁵³ Garfield later admitted that “at the first view of the case the right of free speech would seem to be decisive.”³⁵⁴ But times and circumstances change. “What might have been said with propriety . . . three years ago [could not] be said with propriety and loyalty to-day.”³⁵⁵ For today, “[e]very citizen . . . is in some sense a soldier.”³⁵⁶

Speaker Colfax explained, “I believe in the freedom of speech,” but Long had “declared . . . in favor of the recognition of this so-called confederacy.”³⁵⁷ For Representative Orth, the matter was simple enough: “A man is free to speak so long as he speaks *for* the nation,” but he should not be permitted to speak “*against* the nation . . . on this floor.”³⁵⁸ Failure to expel would “lead to demoralization in our Army . . . and riots all over the land.”³⁵⁹

Long’s case, said Representative Spaulding, was like that of Vallandigham. Vallandigham was “‘waiting and watching over the border’ because he indulged in too much license of speech. And so it must be . . . in Congress and out of Congress. No citizen can be permitted to utter sentiments, in time of war, that shall distract and dishearten our own soldiers . . .”³⁶⁰ Earlier, on February 29, 1864, the House of Representatives had rejected, by a party line vote, a resolution denouncing Vallandigham’s arrest and banishment.³⁶¹ Democrats often repudiated Vallandigham’s views and those of Long. But, New Jersey Democrat Andrew Jackson Rogers nonetheless insisted that the Vallandigham arrest and banishment had “struck a deadly blow at the rights of the free people of America.”³⁶²

Critics of the motion to expel insisted the issues were free speech, democracy, and representative government. For Representative Charles Eldridge of Wisconsin, the question “involve[d] the sacred right of free speech in general, and the right of free parliamentary debate.”³⁶³ Representative Kernan, a Democrat from New York, saw the issue as “our free system of government, and that free discussion among the people, and free debate in our legislative bodies, without which our institutions and

³⁵³ *Id.* at 1503.

³⁵⁴ *Id.* at 1514.

³⁵⁵ *Id.*

³⁵⁶ *Id.* See also *id.* at 1539 (declaring that “[e]very man . . . is . . . a citizen soldier” and that soldiers were not allowed to suggest that the war could not or should not be won. This statement was made by Representative Schenck who was a former Union general who had defeated Vallandigham in his bid for Congress.).

³⁵⁷ *Id.* at 1506.

³⁵⁸ *Id.* at 1546.

³⁵⁹ *Id.* at 1547.

³⁶⁰ *Id.* at 1581.

³⁶¹ See *id.* at 879 (reporting that all 47 democrats voted “yea” and 76 republicans and unionists voted “nay”).

³⁶² *Id.* at 1621.

³⁶³ *Id.* at 1577.

liberties cannot long be maintained.”³⁶⁴ The issue of war or peace was one for Congress and the people. Long’s “erroneous views should be controverted by arguments,”³⁶⁵ Kernan said, not silenced by expulsion. Kernan warned that under the proposed course, in times of excitement, the representative who advocated unpopular views “will be expelled and thus silenced. You will have no debate except that which runs in the one groove.”³⁶⁶

Kernan and others relied on the Constitution’s protection for free speech. The Constitution, he noted, provides that “Congress shall make no law abridging the freedom of speech or of the press.” Kernan said: “If [Long’s opinions] can be expressed or discussed anywhere in the country, they certainly may be here. . . . This is the body to decide upon questions of peace or war. . . .”³⁶⁷ New Jersey Democrat Andrew Jackson Rogers insisted Long could not “be expelled for the exercise of any right guaranteed by the Constitution.”³⁶⁸ The speech would not be unlawful, in the constitutional sense, outside of Congress, Rogers argued, because of the guarantees of the First Amendment.³⁶⁹

“Are we to be told,” demanded Representative William Finck of Ohio, “that the grave questions of peace and war cannot be discussed here? What questions . . . are of greater importance to the people than questions of peace and war?”³⁷⁰ Finck, and others, suggested partisan motivation was at work. Republicans were ordering hundreds of copies of Long’s offending speech, obviously planning to circulate it.³⁷¹ “If that speech gives aid and comfort to the enemy,” Finck asked, “why do gentlemen on the other side of the House give so much aid and comfort to the speech?”³⁷² Finck pointed out that, in 1863, Representative Conway, a Republican from Kansas, had made the same proposal as Representative Long, but no one had demanded that *he* be expelled or censured.³⁷³ Finck cited Daniel Webster’s 1834 speech on the “high constitutional privilege” of free speech.³⁷⁴ Representative Eldridge also cited Webster on the “ancient and undoubted prerogative of this people to canvass public measures” (a “fireside privilege”); and he cited Thomas Jefferson on the danger of political intolerance and on “the safety with which error of opinion may be tolerated where reason is left free to combat it.”³⁷⁵

³⁶⁴ *Id.* at 1549.

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 1619.

³⁶⁹ *See id.*

³⁷⁰ *Id.* at 1552.

³⁷¹ *See id.*

³⁷² *Id.*

³⁷³ *See id.*

³⁷⁴ *Id.* at 1554.

³⁷⁵ *Id.* at 1577.

Representatives on both sides did not limit themselves to the precise issue under consideration. Eldridge, for example, warned of Republican plans for agrarian reform and complained about the Emancipation Proclamation.³⁷⁶

Representative George H. Pendleton of Ohio, said that "it is not within the constitutional power of the House to expel a member for the expression of any opinion upon any political question, when . . . pertinent to the measure before it."³⁷⁷ Opinions were for "constituents" who "were to decide whether they were wise and sound."³⁷⁸ To expel their representative was to "disfranchise them" and to "enact again the farce of the British House of Commons in the case of Wilkes."³⁷⁹ Pendleton relied on the Speech and Debate Clause:

A member shall not be called in question for a libel uttered upon this floor, nor for any offense against private rights. He is not to be intimidated by fear of the law, whether invoked in the criminal or civil courts . . . ; and, *à fortiori*, he is not to be called in question here by the House itself for the free expression of opinion in fair debate.³⁸⁰

The power to expel, Pendleton insisted, was limited to disorderly conduct.³⁸¹ In the 1830s and 1840s, John Quincy Adams waged a long struggle to vindicate the right to present anti-slavery petitions.³⁸² Pendleton recalled the attempt to censure Adams for presenting a petition from citizens in favor of dissolution of the Union:

[Adams] rose in his place all trembling with excitement, and in one of those historic speeches which will live as long as the history of the English language shall remain, vindicated the right of the people to petition for a redress of their grievances, and the right of Representatives to present their petitions And he argued the question against all comers . . . until, ashamed of the efforts they had made to repress this freedom of debate in the American Congress, the majority . . . at last laid the resolution on the table.³⁸³

Several Republicans cited, as precedent for the action against Long, the censure of Joshua R. Giddings by a Democratic Congress. Giddings had introduced a resolution that justified the right of slaves on the high seas to rebel against their

³⁷⁶ See *id.* at 1579-80.

³⁷⁷ *Id.* at 1585.

³⁷⁸ *Id.*

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ See *id.*

³⁸² See *id.* at 1586. See generally MILLER, *supra* note 17, *passim* (discussing the congressional battle over the gag rule).

³⁸³ CONG. GLOBE, 38th Cong., 1st Sess. 1586 (1864).

captivity.³⁸⁴ Andrew Jackson Rogers, a Democrat from New Jersey, said that the Giddings precedent was a bad one that he would “not justify.”³⁸⁵

As amended, the motion to censure did not refer explicitly to Long’s speech in the House. It cited “his open declarations in the national Capitol and publications in the city of New York [apparently of the speech in Congress] . . . in favor of a recognition of the so-called confederacy”³⁸⁶ It declared him unworthy of membership in the House.³⁸⁷ In the end, the motion to censure carried by a vote of eighty to sixty-nine with Republicans generally voting “yes” and Democrats, along with a number of Union representatives, voting “no.”³⁸⁸

One factor leading Republicans to amend the expulsion resolution to one of censure may have been the strongly negative reaction from the press, including many Republican papers. (Republican representative Broomall, however, explained the change as one motivated by the impossibility of getting a two-thirds vote.³⁸⁹) At any rate, press comment on the proposed expulsion was quite negative. The *National Intelligencer* wrote:

We are . . . glad . . . that the leading organs of the Republican party . . . , while condemning the opinions and views of Mr. Long, propose to answer them by the force of argument and rational appeal . . . and not by the violent proceeding of parliamentary expulsion—thereby sacrificing in the person of Mr. Long the right of free discussion which pertains to him as a Representative of the People³⁹⁰

Press criticism of Republican treatment of Long, like criticism in Congress, invoked freedom of speech as well as freedom of debate in Congress.

The *New York Evening Post* insisted that “Mr. Long’s speech was a perfectly legitimate expression of opinion. He thinks that the rebels must be allowed to go in peace or be extirpated; and he stated his thought calmly and respectfully, in proper words.”³⁹¹ The *Post* strongly disagreed with him, but it was “not, however, unwilling that those who have come to other conclusions should have the full liberty to express them, whether in the newspapers or on the floors of Congress.”³⁹² Congressmen who “controvert argument by argument,” and who “present only logic, eloquence, appeal, in favor of their views,” were simply “exercising the rights which belong to all freemen.”³⁹³ The *New York Evening Post* argued, rather optimistically, that truth

³⁸⁴ See *id.* at 1600. For a discussion of Giddings’s censure, see MILLER, *supra*, note 1, at 444-54.

³⁸⁵ CONG. GLOBE, 38th Cong., 1st Sess. 1620 (1864).

³⁸⁶ *Id.* at 1593.

³⁸⁷ See *id.*

³⁸⁸ See *id.* at 1634.

³⁸⁹ See *id.* at 1593.

³⁹⁰ *The Parliamentary Issue*, NAT’L INTELLIGENCER, Apr. 14, 1864, at 3.

³⁹¹ *The Freedom of Debate*, N.Y. EVENING POST, Apr. 11, 1864, reprinted in *Republican Opinion*, in NAT’L INTELLIGENCER, Apr. 14, 1864, at 3.

³⁹² *Id.*

³⁹³ *Id.*

would conquer falsehood:³⁹⁴ “Our laws assume the intelligence and good sense of the people, and allow every man to be heard. They are not afraid of discussion. They demand, indeed, the fullest and freest ventilation of every subject, that the good and evil of it may be known”³⁹⁵ Those who chose the side of “foul wrongs” could be left safely “to the contempt of contemporaries, and to the execration of posterity.”³⁹⁶

The Constitution provides that members of Congress may not be questioned “in any other place” for speeches and debates on the floor of Congress.³⁹⁷ It allows expulsion, but does not discuss specifically expulsion of a member of Congress by the House or Senate for political opinion expressed in *congressional* debate.³⁹⁸ Critics in the press looked at the spirit of the speech and debate guarantee. An editorial in the *New York Times*, a strongly pro-administration paper, made explicit what was at least implicit in many press comments:

The Constitution takes care to secure the utmost freedom of debate in Congress by making special provision that “for any speech or debate in either House, members shall not be questioned in any other place.” What could have been the object of this unlimited immunity but the recognized necessity that every Representative should be in a position to do completest justice to his own sentiments and those of his constituents? That is a principle which lies at the foundation of every representative Government. But why is it not as much a violation of this principle for men in the Capitol to deter a Representative from speaking his sentiments as for men outside the Capitol? It is the intimidation that is the evil, and it [does not] matter a particle whence the intimidation proceeds. For any power in Congress or out of Congress to exercise it is to violate one of the most sacred principles of the Constitution.³⁹⁹

“It is the duty,” the *Times* insisted, “of every honest legislator, when great public concerns are at stake, to declare his honest convictions.”⁴⁰⁰ The duty was greater “if these convictions are opposed to the dominant sentiment. It is the weakest side that has the strongest need of argument; for it is their only power.”⁴⁰¹ The claim that Congressman Long’s speech was treasonous was “preposterous.”⁴⁰² “It is not

³⁹⁴ *See id.*

³⁹⁵ *Votes of Censure*, N.Y. EVENING POST, Apr. 12, 1864, reprinted in *Republican Opinion*, in NAT’L INTELLIGENCER, Apr. 14, 1864, at 3.

³⁹⁶ *Id.*

³⁹⁷ U.S. CONST. art. I, § 6, cl. 1.

³⁹⁸ *See id.* (“[F]or any speech or debate in either House, they shall not be questioned in any other place.”). For the provision providing the power to expel a member by a two-thirds vote, see *id.* art. I, § 5, cl. 2.

³⁹⁹ *Freedom of Debate in Congress*, N.Y. TIMES, Apr. 12, 1864, reprinted in *Republican Opinion*, in NAT’L INTELLIGENCER, Apr. 14, 1864, at 3.

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² *Id.*

treasonable to advocate, or question, or gainsay any construction of the Constitution. It is not treasonable to look at the gigantic proportions of the rebellion and draw the conclusion that it cannot be put down."⁴⁰³ In another editorial, the *Times* told "these men in Washington that passion is making them mad."⁴⁰⁴ How, the *Times* asked, "is it possible for true men so to misunderstand the American people as to suppose they will submit quietly to this destruction of free debate in the council halls of the nation?"⁴⁰⁵ Other papers reached similar conclusions.⁴⁰⁶

The rejection by leading Republican papers, like the *New York Times*, of the attempt to expel Long implicitly rejected the Vallandigham arrest as well. The sentiments in each case were similar; only the *location* was different. If the war power or necessity supersedes all other constitutional guarantees, or if arguing for peace is intolerable, then it is hard to understand why Representative Long's colleagues should have spared him. Indeed, such rationales justified Long's censure. If the claim that necessity and war time trump constitutional rights is false, it is hard to see why Vallandigham should have been exiled.

Of course, the speech and debate clause explicitly protects speech in Congress, but it does not explicitly protect it from actions by Congress itself. The First Amendment protects speech outside of Congress and, critics argued, also within Congress.⁴⁰⁷ In one sense, speeches made in Congress had more potential for mischief. Speeches made in Congress were reported in the press and often circulated throughout the nation, while Vallandigham's May 1 speech reached a comparatively small audience—at least, until his arrest. Free speech in the nation at large is essential for representative government. So is free speech in Congress.

V. WHERE ARE THEY NOW? THE CIVIL WAR RATIONALES TODAY

This section briefly looks at current legal understanding of some doctrines involved in the cases of Vallandigham and the *Chicago Times*. The discussion is not exhaustive or definitive, nor does it suggest that the issues finally have been settled. Instead, this section simply considers some comparatively recent and relevant decisions. The free speech tradition is ongoing. The degree of public understanding of and support for the tradition is a crucial determinant of just how much protection freedom of speech will have in the future. Final, definitive answers do not exist. The law is a river, living, moving, and sometimes changing its shape.⁴⁰⁸

⁴⁰³ *Id.*

⁴⁰⁴ *How the Rebellion is Abetted*, N.Y. TIMES, Apr. 13, 1864, reprinted in *Republican Opinion*, in NAT'L INTELLIGENCER, Apr. 14, 1864, at 3.

⁴⁰⁵ *Id.*

⁴⁰⁶ *See, e.g., Freedom of Debate*, N.Y. COM. ADVERTISER, Apr. 12, 1864, reprinted in *Republican Opinion*, in NAT'L INTELLIGENCER, Apr. 14, 1864, at 3.

⁴⁰⁷ *See* U.S. CONST. amend. 1.

⁴⁰⁸ *See* MARK TWAIN, *Perplexing Lessons*, LIFE ON THE MISSISSIPPI ch. 8 (1982); Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984).

A. *The Bad Tendency Approach*

How (in Vallandigham's case,) should the law have answered Lincoln's powerful rhetorical question about the simple soldier boy and the wily agitator? The problem with Lincoln's bad tendency approach—if advocacy of peaceful action to change war policy makes one a wily agitator—is that it puts advocacy of ending a war off limits for political debate. If one applies the rationale outside the context of war, it is a powerful vehicle for punishing dissident speech. As Justice Brandeis recognized, all criticism of existing law increases the likelihood of its violation.⁴⁰⁹ If the tendency to cause a violation of the law or to cause other harm is enough to suppress speech, then the circle of protected speech and the sphere of popular government will be reduced dramatically. To cite just one example, Southerners justified the suppression of anti-slavery speech because of its bad tendency to cause slave revolts and disunion.⁴¹⁰

Lincoln insisted that key constitutional values beyond free speech and the right to a jury trial were at stake—these values included the survival of the Constitution and of a united nation.⁴¹¹ He denied that free speech and other constitutional rights should trump these constitutional values.⁴¹² He saw his role as resolving the tension between competing claims; and for Lincoln, the proper resolution justified some suppression of free speech.⁴¹³ Throughout much of our history, courts have allowed other values—protection of republican government from advocacy of violent revolution and protection of impartial trials by banning newspaper criticism of judges while cases are pending—to trump free speech claims.⁴¹⁴ This approach to the problem has not often been used in recent cases, but there have been powerful calls for its revival.⁴¹⁵ Under a more speech-protective analysis, the right to speak

⁴⁰⁹ See *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

⁴¹⁰ See Curtis, *The Curious History*, *supra* note 16, at 802-04.

⁴¹¹ See Abraham Lincoln, Messages to Congress in Special Session (July 4, 1861), in 4 LINCOLN, *supra* note 40, at 421, 430; Abraham Lincoln, Proclamation Suspending the Writ of Habeas Corpus (Sept. 24, 1862), in 5 LINCOLN, *supra* note 40, at 436, 437.

⁴¹² See *id.*

⁴¹³ See *id.*

⁴¹⁴ See Eugene Volokh, *Freedom of Speech and the Constitutional Tension Method*, 3 U. CHI. L. SCH. ROUNDTABLE 223, 225-27 (1996).

⁴¹⁵ For a discussion of the issue, see generally *id.* at 223-41 (describing situations in which free speech was forgone in favor of competing constitutional values); see also Mark A. Graber, *Old Wine in New Bottles: The Constitutional Status of Unconstitutional Speech*, 48 VAND. L. REV. 349, 366-72 (1995) (discussing cases in history that used this approach); Michael Kent Curtis, *The Critics of "Free Speech" and the Uses of the Past*, 12 CONST. COMMENTARY 29 (1995) (exploring arguments in support of a radical revision of current free speech doctrine in order to permit more extensive suppression of some forms of speech including hate speech and pornography). For examples of what Professor Volokh calls the "constitutional tension method," see *Bridges v. California*, 314 U.S. 252, 282 (1941) (Frankfurter, J., dissenting) (stating that the value of impartial judicial decisions justifies contempt conviction of a newspaper and labor leader for criticism related to a pending case);

freely on issues of peace and war on one hand, and the power to wage war on the other, are respectively a constitutional privilege or immunity and a governmental power. Allowing free speech on issues of war and peace can make pursuit of war more difficult; but free speech does not encroach directly on the war power. Neither should the war power be permitted to encroach on the right to use the democratic process to discuss alternative courses of action—including abandoning the war.⁴¹⁶

The *Cincinnati Enquirer* attempted to address the bad tendency issue. It was quite difficult, the paper said, to identify “what sentiments have a plain or any other tendency to stir up war in society; or to discriminate between those that have and those that have not such tendency. Every man probably believes his own opinions not only innocent of danger, but right and wholesome”⁴¹⁷ Remarkably, and quite optimistically, the paper insisted that the “idea of danger as applied to sentiment is erroneous.”⁴¹⁸ Like gun powder, the paper argued, sentiments were dangerous only when confined.⁴¹⁹

Justice Brandeis has shaped much current free speech doctrine. Brandeis wrote in the context of suppression of political speech during and after World War I. He suggested that the ordinary remedy must be punishment for any crime the listener committed, not punishment of the political speaker.⁴²⁰ “Among free men,” Justice Brandeis said, concurring in *Whitney v. California*, “the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgement of the rights of free speech and assembly.”⁴²¹ He also suggested that “the fitting remedy for evil counsels is good ones.”⁴²² “[E]ven advocacy of [law breaking] . . . ,” he wrote, “is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on.”⁴²³

Minersville School District v. Gobitis, 310 U.S. 586, 596-600 (1940) (explaining the need for national unity as a key constitutional value that justified the expulsion of a Jehovah’s Witness child from school for refusal to salute the flag); *Gitlow v. New York*, 268 U.S. 652, 666-68 (1925) (asserting that the value of representative government justifies suppression of the advocating of violence as a means of political change). *Cf.* *Patterson v. Colorado*, 205 U.S. 454 (1907) (upholding a contempt citation of Patterson for newspaper criticism made while a petition for re-hearing was pending; the criticized decision involved a truly extraordinary abuse of power by the state supreme court). In *Patterson*, the Court assumed that the First Amendment was limited to protection against prior restraint. For a lively and important account of the facts in *Patterson*, see LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA* 1-7 (1991).

⁴¹⁶ See Volokh, *supra* note 414, at 234-35.

⁴¹⁷ *Human Liberty—The Right of Speech and the Origin of Government*, CIN. ENQUIRER, Aug. 15, 1863, at 2.

⁴¹⁸ *Id.*

⁴¹⁹ *See id.*

⁴²⁰ *See Whitney v. California*, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring).

⁴²¹ *Id.*

⁴²² *Id.* at 375 (Brandeis, J., concurring).

⁴²³ *Id.* at 376 (Brandeis, J., concurring).

The modern free speech doctrine is similar to the rule suggested by Justice Brandeis. Government may not punish political speech except when it is directed to inciting or producing imminent lawless action and is clearly likely to incite or produce such action.⁴²⁴ In short, at least for an anti-war speaker who does not directly incite imminent draft resistance, the fact that the speaker argues that a war is unwise or evil and that some listeners may agree and later desert as a consequence is not a sufficient basis for punishing the speaker. According to this rationale, if anyone should be punished, it must be the soldier who deserts, not the politician who publicly questions, even vigorously, the wisdom of a war. Otherwise, the government could proscribe all political criticism in wartime.⁴²⁵ Still, the Supreme Court has not expressly overruled some earlier and less protective decisions.⁴²⁶ In times of war, civil liberty often shrinks.⁴²⁷

In *Bond v. Floyd*,⁴²⁸ decided during the Vietnam War, the Court held that the Georgia legislature could not refuse to seat a recently elected member of the state legislature who endorsed statements encouraging resistance to the draft. Bond endorsed a Student Non-Violent Coordinating Committee statement. It suggested the war in Vietnam was "a hypocritical mask behind which [the United States] squashes liberation movements;" that the United States was murdering the Vietnamese people; and it expressed "support" for young men "unwilling to respond to the military draft."⁴²⁹ In his endorsement, Bond emphasized legal alternatives to military service. In that context, the Court found that Bond had not incited violation of the draft law. It rejected the state's argument that a higher standard of loyalty was required from legislators than from other citizens.⁴³⁰ During the Vietnam War, of course, the threat

⁴²⁴ See *Texas v. Johnson*, 491 U.S. 397, 409 (1989); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Bridges v. California*, 314 U.S. 252, 278 (1941) (applying a strong version of the test to convictions for contempt of court for criticism directed at judicial action). The strong version of the clear and present danger principle, however, did not survive when the threat of Communism seemed great. See *Dennis v. United States*, 341 U.S. 494, 510 (1951) (redefining the principle for purposes of prosecuting leaders of the Communist party so that the new test was the gravity of the evil discounted by its improbability).

⁴²⁵ See *Johnson*, 491 U.S. at 409 (holding a statute forbidding flag burning unconstitutional as applied to political speech); *Cohen v. California*, 403 U.S. 15, 24-26 (1971) (holding the slogan "Fuck the Draft" on a jacket protected under certain circumstances); *Brandenburg*, 395 U.S. at 447; *Bond v. Floyd*, 385 U.S. 116 (1966).

⁴²⁶ See, e.g., *Dennis*, 341 U.S. at 510 (holding the gravity of the evil of a communist revolution in the United States discounted by its improbability justified punishing advocacy of revolution).

⁴²⁷ See, e.g., *id.*; *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding executive order for incarceration of West Coast Japanese Americans). For antecedents of the current approach, see *Whitney*, 274 U.S. at 378 (Brandeis, J., concurring). Cf. *Masses Pub. Co. v. Patten*, 244 F. 535 (1917) (granting a preliminary injunction against a postmaster who had refused to deliver plaintiff's publication voicing opposition to World War I).

⁴²⁸ 385 U.S. 116 (1966).

⁴²⁹ *Id.* at 120.

⁴³⁰ See *id.* at 133-35.

to the nation (if there ever was a truly significant one) was much more remote. In addition, at the time of the Vietnam War, the free speech tradition had stronger support in the Supreme Court and in the nation than in Vallandigham's time.

B. *Prior Restraint*

By our current understanding of the First Amendment, an order suppressing an entire newspaper, as opposed to prosecution for a particular violation of the law, would be highly suspect. In the Pentagon Papers case, the Court refused to enjoin the publication of the classified papers that discussed the origins of the Vietnam War.⁴³¹ Closure of an entire newspaper for publishing offending articles goes well beyond the suppression of the few articles that the government unsuccessfully sought in the Pentagon Papers case. Closing a newspaper was an affront even to the narrowest reading of the First Amendment.

C. *Trials by Military Commission*

After the Civil War ended, the Supreme Court decided *Ex parte Milligan*.⁴³² It held that trials by military commissions of persons who were not residents of rebellious states, prisoners of war, or in the military, were not constitutionally permissible in states that had not been invaded, that were not in rebellion, and where the civil courts were functioning. The Court insisted that martial law must be confined to the location of actual war and it doubted that Indiana (where Milligan was arrested) was in the theater of war.⁴³³ While the government had the physical power to arrest, and the Constitution permitted it to suspend the writ of habeas corpus, the Court concluded that a jury trial and a grand jury indictment were required before conviction.

In the emergency of the times, an immediate public investigation according to law may not be possible; and yet, the peril to the country may be too imminent to suffer such persons to go at large. Unquestionably, there is then an exigency which demands that the government, if it should see fit in the exercise of a proper discretion to make arrests, should not be required to produce the persons arrested in answer to a writ of *habeas corpus*. The Constitution goes no further. It does not say after a writ of *habeas corpus* is denied a citizen, that he shall be tried otherwise than by the course of the common law; if it had intended this result, it was easy by the use of direct words to have

⁴³¹ *New York Times v. United States*, 403 U.S. 713 (1971).

⁴³² 71 U.S. 2 (1866). For a careful discussion of *Ex parte Milligan*, see STANLEY I. KUTLER, *JUDICIAL POWER AND RECONSTRUCTION POLITICS* 90-95 (1968).

⁴³³ See *Milligan*, 71 U.S. at 123-27. Four justices concurred and found that Milligan was entitled to discharge under the 1863 Act authorizing and regulating habeas suspension. The concurring justices denied that Congress lacked the constitutional power to authorize trials by military commission in these circumstances. *Id.* at 132, 136.

accomplished it. The illustrious men who framed that instrument were guarding the foundations of civil liberty against the abuses of unlimited power; they were full of wisdom, and the lessons of history informed them that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. Knowing this, they limited the suspension to one great right, and left the rest to remain forever inviolable.⁴³⁴

It was the “birthright of every American citizen when charged with crime, to be tried and punished according to law. . . . By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people.”⁴³⁵ The Court also interpreted the Habeas Corpus Act of 1863⁴³⁶ to require release of civilians, like Milligan, whom the military had arrested if the grand jury had not indicted them by the end of its term.⁴³⁷

During World War II, however, in another time of deep crisis, President Franklin Roosevelt, also relying on a general, ordered the evacuation and incarceration of Americans of Japanese descent who lived on the west coast. The Supreme Court upheld the relocation order.⁴³⁸ During the Korean War, in *Youngstown Sheet & Tube Co. v. Sawyer*,⁴³⁹ however, the Supreme Court held that the power of the president as commander in chief did not permit him to seize the steel mills. The Court did not consider American steel mills to be part of the theater of the Korean War.⁴⁴⁰ One explanation for the disparity may be that the threat seemed far greater in World War II than in the Korean War. In the Korean War, the President had an alternative to seizure in the Taft-Hartley Act.⁴⁴¹

D. *The Crime of Silence*

In his reply to the New Yorkers’ protest against Vallandigham’s arrest, President Lincoln said: “The man who stands by and says nothing when the peril of his government is discussed, cannot be misunderstood. If not hindered, he is sure to help the enemy; much more if he talks ambiguously—talks for his country with ‘buts’ and ‘ifs’ and ‘ands.’”⁴⁴² In this passage, Lincoln seemed to suggest that a person who hears, for example, the remarks for which Vallandigham was convicted and who does

⁴³⁴ *Id.* at 125-26.

⁴³⁵ *Id.* at 119.

⁴³⁶ An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases, ch. 81, § 2, 12 Stat. 755 (1863).

⁴³⁷ *See id.* at 136.

⁴³⁸ *See Korematsu v. United States*, 323 U.S. 214 (1944).

⁴³⁹ 343 U.S. 579 (1952).

⁴⁴⁰ *See id.* at 587. *See generally* TRIBE, *supra* note 170, at 239-40 (discussing the decision in *Youngstown Sheet & Tube Co.*).

⁴⁴¹ 29 U.S.C. §§ 151-69 (West 1988).

⁴⁴² Abraham Lincoln, To Erastus Corning and Others (June 12, 1863), in LINCOLN SPEECHES, *supra* note 83, at 454, 458.

not dissent, should be arrested. Still, Lincoln seems not to have acted on this principle.

On the eve of World War II, public schools expelled Jehovah's Witness children for refusing to salute the flag.⁴⁴³ At first, the Supreme Court upheld the expulsions in *Minersville School District v. Gobitis*.⁴⁴⁴ Justice Frankfurter, writing for the Court, explained that the state reasonably could conclude that the flag salute promoted national unity, and that national unity was necessary for national survival.⁴⁴⁵ Indeed, Justice Frankfurter quoted Lincoln. The *Minersville* case, he explained, was an illustration of Lincoln's profound dilemma: "Must a government of necessity be too *strong* for the liberties of its people, or too *weak* to maintain its won existence?"⁴⁴⁶ Frankfurter used this idea to justify expelling young children from public school when their religious convictions taught them it was wrong to salute the flag.

In the midst of World War II, the Court reconsidered its decision. In *West Virginia State Board of Education v. Barnette*,⁴⁴⁷ the Court held that the expulsion for refusal to salute the flag violated the First Amendment right against being compelled to speak. "If there is any fixed star in our constitutional constellation," the Court said,

it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.⁴⁴⁸

To the extent that the Court adheres to *Barnette* and its progeny, the crime of failure to dissent from "disloyal" political opinions would be unconstitutional.⁴⁴⁹

E. *Expulsion of a Congressman for Political Opinions*

In *Bond v. Floyd*, the Court held that the Georgia legislature's refusal to seat Julian Bond violated the First and Fourteenth Amendments.⁴⁵⁰ The Court said that state power could not "be utilized to restrict the right of legislators to dissent from national or state policy or that of a majority of their colleagues under the guise of judging their loyalty to the Constitution."⁴⁵¹ It was beyond question that "the First Amendment protects expressions in opposition to national foreign policy in Vietnam

⁴⁴³ See *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 599-600 (1940).

⁴⁴⁴ See *id.*

⁴⁴⁵ See *id.* at 595-96.

⁴⁴⁶ *Id.* at 596.

⁴⁴⁷ 319 U.S. 624 (1943).

⁴⁴⁸ *Id.* at 642.

⁴⁴⁹ See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (holding that "the right of freedom of thought protected by the First Amendment . . . includes . . . the right to refrain from speaking at all").

⁴⁵⁰ See *Bond v. Floyd*, 385 U.S. 116, 132-33 (1966).

⁴⁵¹ *Id.* at 132.

and to the Selective Service system.”⁴⁵² The Court rejected the state’s argument that a statement like Bond’s might be protected for a private citizen by the First Amendment, but that the legislature could apply a stricter standard to its members.⁴⁵³ To the extent that the Court adheres to the rationale in *Bond v. Floyd* and applies it to Congress (a co-equal branch of government), an expulsion like that the Congress attempted to apply to Representative Long would be unconstitutional. Though the Constitution expressly gives to Congress the power to expel, the Supreme Court should hold that an expulsion for political advocacy in debate violates the express limits of the First Amendment and the basic structure of republican government just as other congressional powers are subject to constitutional limitations.⁴⁵⁴ Of course, the Court might find instead that the question is committed solely to the discretion of Congress and, therefore, is a political question beyond the power of the Court.⁴⁵⁵ Such an approach would permit a majority to expel members of the minority simply because of their political philosophies.

VI. REFLECTIONS

A. *Democracy and the War Power*

The *Vallandigham* and *Chicago Times* cases pitted free speech against the power of the President as commander in chief. The most powerful argument for free speech during war came from the nature of the United States government—from democracy. This free speech argument insisted that democracy entailed the right of the people who will be affected by government policy to attempt to persuade other citizens to change it. Because the right was a continuing one, government policy must always be open to criticism and revision. The agency metaphor captured at least part of this idea.⁴⁵⁶ In that metaphor, the people were the principal, government officials were the agents, and free speech, free press, and free assembly were the only means the principal could use to communicate their wishes and decide to replace governmental

⁴⁵² *Id.*

⁴⁵³ *See id.*

⁴⁵⁴ For cases citing *Bond* see, for example, *Chandler v. Miller*, 117 S. Ct. 1295, 1302 (1997) (holding that mandatory drug tests for state legislators violated the Fourth Amendment); *Rankin v. McPherson*, 483 U.S. 378, 387-91 (1987) (finding that termination of an employee who “serves no confidential, policymaking, or public contact role,” cannot be based on the fact that the employee’s speech may be interpreted as contrary to the employer’s “mission”); *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969) (citing *Bond*, 385 U.S. at 134). *Cf.* *Powell v. McCormack*, 395 U.S. 486, 550 (1969) (finding that refusal to seat congressmen for misbehavior—as opposed to seeking expulsion—is a violation of Article I).

⁴⁵⁵ *See, e.g., Nixon v. United States*, 506 U.S. 224 (1993) (finding that textual commitment of the sole power of impeachment to the Senate and other factors precluded judicial review of the mode of trial of impeachment of a federal judge).

⁴⁵⁶ *See supra* notes 219-26 and accompanying text; *see also infra* note 457 and accompanying text.

agents. Government policy cannot legitimately foreclose free speech because that foreclosure would rob the people of their collective right to determine their fate and their individual right to try to persuade others to change course. By this understanding, individuals retain a personal right to speak even though the majority may decide it has heard enough and wants to shut them up. Though popular sovereignty is a metaphor and, therefore, highlights one aspect of the truth while hiding others, the aspect it highlights is powerful and important.

In setting out these principles, critics of suppression of speech were correct. In representative government, people have a right to seek to control their fate both by deciding who should represent them and by keeping their representatives informed of their needs and desires. People liable to be conscripted, shot, maimed, or killed, and people who are likely to have these things happen to friends and loved ones, should have a continuing right to consider the wisdom of the war in which the government demands such sacrifices. The alternative is to turn the lives of the many over to the unchecked and unscrutinized power of a few. Free speech is essential to preserving the structure of representative government under the Constitution, and it reflects the basic right of individuals to talk about crucial issues that shape their lives.

At first blush, the idea that democracy precludes majority suppression of minority arguments may seem paradoxical. But, a people deprived of a continuing right to evaluate alternatives, is a people deprived of their right to chart their own course. As Friedrich Von Hayek has noted, one should not confuse what the law is with what the law ought to be:

If democracy is to function, it is as important that [what the law is] can always be ascertained as that [what the law ought to be] can always be questioned. Majority decisions tell us what people want at the moment, but not what it would be in their interest to want if they were better informed; and, unless [majority decisions] could be changed by persuasion, they would be of no value. The argument for democracy presupposes that any minority opinion may become a majority one.⁴⁵⁷

Daniel Voorhees, a Democratic member of the House of Representatives from Indiana during the Civil War, insisted that the question involved in cases like that of *Vallandigham* was an old one:

It involves the old struggle for power between the governors and the governed—the rulers and those who are ruled.

In a Government of kings, the theory is that all power comes from him and is derived from him. But the theory of this Government is quite different from that. It is that all power is derived from the people, and that the people are the only source of power.⁴⁵⁸

⁴⁵⁷ FRIEDRICH A. VON HAYEK, *THE CONSTITUTION OF LIBERTY* 109 (1960). *See also* *American Booksellers v. Hudnut*, 771 F.2d 323, 332 (7th Cir. 1985) (“Free speech has been on balance an ally of those seeking change.”).

⁴⁵⁸ Speech of Daniel W. Voorhees at Bucyrus, Crawford County, O[hio] (Sept. 15, 1863), *in* *CIN. COM.*, Sept. 17, 1863, at 1.

The problem, of course, was the Unionists' fear that it was difficult and dangerous to adhere to free speech and popular sovereignty norms in time of war. This was especially so in a civil war, a "rebellion," in which the Constitution permitted suspension of the privilege of the writ of habeas corpus. The proponents of free speech attempted to address this dilemma by distinguishing, first, between soldiers and civilians and, second, between areas where military operations were ongoing and areas where civil courts and other civil institutions continued to function. For free speech advocates, free speech was a fundamental right to be preserved, if at all possible. Free speech was also described as a limited area where the government lacked power.

Lincoln's critics insisted that the power to suspend the privilege of the writ of habeas corpus—to suspend one remedy for unlawful arrest—should not be taken as broadly supporting the right to suspend free speech. A second argument was that suspension could be justified only in the theater of war when the civil courts are not in operation. Conversely, the suspension was not justified outside the area of immediate conflict where the courts could function. This reading narrowly construes the justification for suspension—"shall not be suspended, unless when, in Cases of Rebellion . . . the public Safety may require it"⁴⁵⁹—and limits the cases in which necessity can be found. The response, of course, is that the language of the Habeas Clause referred to cases of rebellion when the public safety required suspension and did not explicitly refer to whether the courts could function or whether the speech occurred in the theater of war. Lincoln insisted that the military could act preventively in the interest of public safety.⁴⁶⁰

A clear tension exists between Lincoln's reading of the Habeas Clause and the structural idea of representative government with guarantees of freedom of speech, press, petition, and assembly. The amendments in the Bill of Rights came after the Constitution's Habeas Clause; and the Fifth Amendment provision for grand jury indictment expressly excepted cases "arising in the land or naval forces . . . when in actual service, in time of War, or public danger."⁴⁶¹ No express exception was made for trial of civilians in wartime or time of public danger. Nor was an exception made to free speech guarantees. Because of the centrality of free speech to individual freedom and democratic decision making, those who rejected the government's broad claim of power to suppress free speech even during civil war were correct.

Suppose Lincoln were correct about the power to suspend the writ. Suppose he could constitutionally use the suspension to arrest civilians outside areas of conflict for political speech advocating peaceful change. Still, that fact would not justify the course the Lincoln administration pursued. The power to detain without trial should not justify convicting and banishing people after a military trial by a stacked court. That is particularly so because of the stigma that a conviction for disloyalty entails. In addition, the argument justifying the Vallandigham arrest because of the power to

⁴⁵⁹ U.S. CONST. art I, § 9, cl. 2.

⁴⁶⁰ See Abraham Lincoln, To Erastus Corning and Others (June 12, 1863), in LINCOLN SPEECHES, *supra* note 83, at 458.

⁴⁶¹ U.S. CONST. amend. V.

suspend the writ is weakened by the fact that the attorney for the government and the trial judge in *Vallandigham's* case did not rely on the Habeas Clause to justify the arrest, trial, and conviction.⁴⁶² Instead, they relied on the war power.⁴⁶³ Furthermore, there is a powerful argument that the power to suspend is, at least, one *shared* by the president and Congress. If that is so, then Congress can limit the power.⁴⁶⁴ It is hard to see why the congressional statute limiting suspension of the privilege by providing for indictment or release at the end of the grand jury term should not control.

Many critics expressed faith that truth would conquer error.⁴⁶⁵ The critics' rhetoric about truth conquering error was overstated. Truth does not always conquer error, and many exposed to false doctrine may never be exposed to counter-speech. There is, however, reason to believe that better decisions are more likely to come from debate and counter-speech than from an enforced orthodoxy that uses punishment to silence dissenters. As Justice Brandeis suggested, counter-speech is the fitting remedy for error, even though it is far from perfect.⁴⁶⁶

Free speech advocates confronted the powerful argument that national survival was at stake and that necessity was the highest law.⁴⁶⁷ According to this view, the war power trumped all other rights for the duration of the war or rebellion.⁴⁶⁸ President Lincoln argued along these lines, although he relied on the fact of rebellion and the constitutional provision allowing suspension of the privilege of habeas corpus.⁴⁶⁹ Indeed, Lincoln saw the Civil War as a war against democracy, a war launched by a minority that refused to accept the verdict of the people. "It continues to develop," Lincoln told Congress in 1861, "that the insurrection is largely . . . a war upon the first principle of popular government."⁴⁷⁰

He was convinced that, in cases of rebellion, the Constitution permitted strong but temporary measures to save democracy. He could no more believe that military arrests in time of rebellion would lead to the loss of "[p]ublic [d]iscussion, the [l]iberty of [s]peech and the [p]ress" in the peaceful future, than he could "believe that a man could contract so strong an appetite for emetics during temporary illness as to persist in feeding upon them during the remainder of his healthful life."⁴⁷¹

The limits of Lincoln's compelling metaphor appeared in the arrests of critics of World War I.⁴⁷² Then, arrests were based on statutes and enforced by civil courts.

⁴⁶² See *VALLANDIGHAM TRIAL*, *supra* note 64, at 105-06, 259-72.

⁴⁶³ *Id.* at 105-06.

⁴⁶⁴ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634, 637 (1952) (Jackson, J., concurring).

⁴⁶⁵ See *supra* text accompanying notes 236, 375.

⁴⁶⁶ *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

⁴⁶⁷ See *supra* text accompanying notes 300, 303.

⁴⁶⁸ See *id.*

⁴⁶⁹ See *supra* text accompanying note 40.

⁴⁷⁰ Abraham Lincoln, Annual Message to Congress (Dec. 3, 1861), in *LINCOLN SPEECHES*, *supra* note 83, at 279, 295.

⁴⁷¹ Abraham Lincoln, To Erastus Corning and Others (June 12, 1863), in *LINCOLN SPEECHES*, *supra* note 83, at 454, 460-61.

⁴⁷² For a conservative historian's comparison of World War I and Civil War "disloyalty"

In World War I, the Court used a war-time-is-different analysis and misplaced metaphors about shouting fire in a crowded theater to justify suppression of speech.⁴⁷³ There was no rebellion or invasion. The danger was far less than it had been during the Civil War. Nonetheless, the nation returned to the strong medicine of suppressing political criticism for a much less acute illness.

Still, Lincoln was unwilling to carry his rebellion-war power logic to its ultimate conclusion which would have justified suspending elections. On October 19, 1864, Lincoln responded to those who had suggested that, even if the Democrats should win, he would not accept electoral defeat.⁴⁷⁴ "I am struggling," Lincoln said, "to maintain government, not to overthrow it."⁴⁷⁵ Therefore, he would serve until the end of his term and no longer unless he was re-elected:

This is due to the people both on principle, and under the [C]onstitution. Their will, constitutionally expressed, is the ultimate law for all. If they should deliberately resolve to have immediate peace even at the loss of their country, and their liberty, I know not the power or the right to resist them. It is their own business, and they must do as they please with their own. I believe, however, they are still resolved to preserve their country and their liberty; and in this, in office or out of it, I am resolved to stand by them.⁴⁷⁶

On November 10, 1864, Lincoln elaborated his conclusion.⁴⁷⁷ An election in the midst of a great civil war was dangerous because it divided a nation that needed all of its strength to put down the rebellion.⁴⁷⁸ In spite of the danger, Lincoln said "the election was a necessity."⁴⁷⁹ He continued: "[w]e can not have free government without elections; and if the rebellion could force us to forego, or postpone a national election, it might fairly claim to have already conquered and ruined us."⁴⁸⁰

It is equally true that we cannot have free elections without free speech. Ultimately, the legitimacy of the government depends on the theory of popular sovereignty which requires free elections *and* free speech. Lincoln was right about elections and wrong about anti-war speech. His justification of Vallandigham's arrest was a serious departure from a fundamental principle that he otherwise acknowledged.

When Vallandigham was nominated for governor, the tension between his arrest and democracy became acute. The mayor of Cincinnati gave a speech to the police,

issues, see William A. Dunning, *Disloyalty in Two Wars*, 24 AM. HIST. REV. 625 (1919).

⁴⁷³ See *Schenck v. United States*, 249 U.S. 47, 52 (1919).

⁴⁷⁴ Abraham Lincoln, Response to Serenade (Washington, D.C.) (Oct. 19, 1864), in LINCOLN SPEECHES, *supra* note 83, at 635, 635.

⁴⁷⁵ *Id.*

⁴⁷⁶ *Id.* at 635-36.

⁴⁷⁷ See Abraham Lincoln, Response to a Serenade (Washington, D.C.) (Nov. 10, 1864), in 8 LINCOLN, *supra* note 40, at 100, 101.

⁴⁷⁸ See *id.*

⁴⁷⁹ *Id.*

⁴⁸⁰ *Id.*

insisting on equality of treatment for members of both political parties. The police must not, he warned, “permit personal feeling or prejudice to move you to arrest the members of one political party rather than those of another.”⁴⁸¹ He elaborated: “[i]n other words, you must not arrest a man for huzzaing for Vallandigham any more than you would if he did so for Brough [the Union candidate]. It is no offense for a citizen to give utterance to his preference for any candidate. . . .”⁴⁸² If Vallandigham’s speech could be punished, however, why were voters free to cheer for him and his ideas or to vote for him? If, as Lincoln suggested, silence in the face of disloyal sentiments justified arrest, why was cheering protected?

Lincoln failed to come to grips with the extent to which arrests like Vallandigham’s threatened the value of popular rule that he cherished. Basically, he accepted the idea that the bad tendency of speeches like Vallandigham’s and the importance of other constitutional values justified suppression. That, read in the context of the Vallandigham case, was the meaning of his powerful question: “Must I shoot a simple soldier boy who deserts but not touch one hair on the head of the wily agitator who induces him to desert?”⁴⁸³

Acceptance and full implementation of Lincoln’s principle would outlaw anti-war political speech and put the democratic process in abeyance for the duration of the war. That is so because a strong criticism of war *will*, as advocates of suppression insist, increase the number of those who are unwilling to risk their lives for the cause. Silencing the anti-war politician rather than disciplining the deserter, however, ends democracy in wartime. The threat to democracy and to the strong negative reaction it produced, may be why such suppression never became more pervasive during the Civil War.

Suppression poses dangers because it threatens the function of free speech as a framework for democracy. Free speech, like democracy, is a process, not a result. Broad rules to ensure that people will pick only wise leaders or that they will select only wise ideas cannot be achieved without weakening the framework of democracy. The logic of repression calls for more repression. After the original speaker is silenced, what about those who denounce the silencer as a despot? Once one side treats elections or political speech as subject to suspension, there is a danger that, when circumstances change, the other side will respond in kind—destroying the democratic process. Departures from the principle of faith in the people to choose most often occur in the transition from autocratic to democratic government, and for a limited time. Disfranchisement also has occurred after civil wars, including that of the United States. In short, departure from the free speech tradition has serious long-term risks.

Vallandigham’s speech was made at a political rally. He counseled obedience to the laws. It was a far cry from a situation such as a mob outside a jail when a speaker cries, “break down the doors and lynch him.” In that situation, immediate

⁴⁸¹ Address of the Mayor to the Police, in *CIN. COM.*, Aug. 20, 1863, at 2.

⁴⁸² *Id.*

⁴⁸³ Abraham Lincoln, To Erastus Corning and Others (June 12, 1863), in *LINCOLN SPEECHES*, *supra* note 83, at 454, 460.

harm is likely to occur, and there is no real chance for counter-speech. It is true, however, that some may never hear pro-war counter-speech and that some may decide to resist the draft.

B. *Necessity Revisited*

Even in the great crisis of the Civil War when the argument of necessity was the most compelling, leaders seem to have exaggerated, for public consumption at least, the necessity of suppressing Vallandigham's anti-war speech.⁴⁸⁴ Furthermore, the Constitution, as read by Lincoln, only justified Vallandigham's arrest if "public safety" required it. Ultimately, someone must judge; and Lincoln insisted that he was the judge. Still, it is hard to distinguish the Vallandigham case from that of the *Chicago Times*; and it is important to note the significant doubt in the Cabinet about necessity in either case. The editors of the *New York Tribune* admitted they could not "harmonize the decision of the Executive in this [*Chicago Times*] case with [Lincoln's] action in regard to Vallandigham."⁴⁸⁵ The writer concluded, however, that it was better to be inconsistently right than consistently wrong.⁴⁸⁶ While there are legal differences between the two cases, the *New York Tribune* was largely correct.

The approach taken in the two cases was not consistent. Vallandigham made a speech at a political rally. The *Chicago Times* and other newspapers reached at least as many people. People hearing an anti-war speech in Ohio or in the congressional galleries, or reading an anti-war newspaper article or a report of an anti-war speech in Congress were probably all equally likely to conclude that the war was not worth the risk to their lives and to refuse to serve.

The administration was not limited to either suppressing Vallandigham's anti-war speech or doing nothing. It could sanction unlawful acts and incitement highly likely to lead to immediate lawlessness.

After the Vallandigham episode, Lincoln sometimes acted to restrain generals like Burnside from interfering with free speech and free press; and officers similarly restrained their troops. These restraints may have been pragmatic; but they may also have involved a recognition by Lincoln of the relation between free speech and democratic government. Lincoln's restraint, except in the case of the *Chicago Times*, was often done in private; but his validation of the Vallandigham arrest and conviction was highly public.

Lincoln's response to his New York critics concerning Vallandigham's arrest was a great political success.⁴⁸⁷ Lincoln biographer David Donald estimates that

⁴⁸⁴ For a thoughtful and somewhat more sympathetic appraisal, see Don E. Fehrenbacher, *The Paradoxes of Freedom*, in *LINCOLN IN TEXT AND CONTEXT: COLLECTED ESSAYS* 129-42 (1987).

⁴⁸⁵ *Burnside—The President—The True Course*, N.Y. DAILY TRIB., June 6, 1863, at 4.

⁴⁸⁶ See *id.*

⁴⁸⁷ Lincoln's response was published by the *New York Tribune* and other papers, and at least 500,000 pamphlet copies were printed. See DONALD, *supra* note 41, at 444.

10,000,000 people read it.⁴⁸⁸ The President's defense even impressed some skeptics. The *New York Tribune* found the President's defense of his constitutional power complete and satisfactory; yet, the paper insisted that exercising the power was unwise.⁴⁸⁹ By his politically potent justification of suppression and by tolerating (for a time) significant suppression of speech and press, Lincoln injured the free speech tradition.

C. *The Power of the Free Speech Tradition*

The high public regard for freedom of speech and concern for the relation of free speech to popular government kept the repression from becoming more extensive. The Detroit Free Press probably was right in attributing Lincoln's decision to revoke the suppression of the *Chicago Times*, at least in part, to the "force of public opinion—the fear of consequences."⁴⁹⁰ The strong negative reaction to the Vallandigham case probably led Lincoln to restrain General Burnside in the case of the *Chicago Times*. Americans' support for, and use of, free speech checked and limited the administration. A strong, popular free speech tradition, therefore, can be important in checking the tendency to suppress.

Important concepts in the free speech tradition were a broad and general right to free speech that entailed equality of rights and specific protection for speech that was thought to be evil, wrong, or dangerous. As a result, many Republicans and opponents of slavery stood up to protect the rights of Vallandigham and the *Chicago Times*, believing that assaults on their rights ultimately threatened the liberty of all. The Washington correspondent of the *National Anti-Slavery Standard* warned that administration policy imperiled the idea of free speech:

Let the Democrats . . . obtain power and make a compromise with the rebels upon the basis of a pro-slavery government, it would instantly be claimed that the good of the country required that all agitation of the question of slavery must cease. . . . It is the good of the country which now justifies the suppression of Copperhead journals. Necessity is the plea.⁴⁹¹

Wirt Dexter, the Republican lawyer who spoke against the suppression of the *Chicago Times*, made the point directly: "[W]ithout any remarkable foresight, I can see that this thing may return to plague the inventors of it. . . . I don't wish to see this kind of treatment turned upon the party of which I am a member."⁴⁹² Republican senator Lyman Trumbull asked in a speech defending his opposition to the

⁴⁸⁸ *See id.*

⁴⁸⁹ *See The President's Letter*, N.Y. DAILY TRIB., June 16, 1863, at 4.

⁴⁹⁰ *What Will He Do With It?*, DET. FREE PRESS, June 9, 1863, at 2.

⁴⁹¹ *Our Washington Correspondence*, NAT'L ANTI-SLAVERY STAND., June 13, 1863, at 3 (suggesting that there should be no interference with the press except by law and through the courts).

⁴⁹² *Free Speech—Free Press: Immense Meeting at Chicago*, CHI. TIMES, June 5, 1863, reprinted in DET. FREE PRESS, June 6, 1863, at 1.

suppression of the *Chicago Times*: “Did it every occur to you that the next election may put an entirely different face upon affairs?”⁴⁹³ In reference to the same case, Congressman Arnold explained that he did not want to

“aid in the establishment of [a] precedent which will limit my freedom of speech, nor prevent my declaring what I believe, that the cursed spirit of Human Slavery is the cause of all our troubles, and that we shall never have permanent peace and union until it has been destroyed.”⁴⁹⁴

Under this view, free speech, like an election, is a framework for political choice, not a result. Suppression of political freedom of speech threatened the framework in a very basic way.

There is, of course, another way to read the evidence. One could see arguments about free speech as strategic political rhetoric employed by partisans when handy—as a weapon for political advantage, not a principle to be followed. Professor Stanley Fish suggests that general free speech principles do not exist. Free speech instead is “the name we give to verbal behavior that serves the substantive agendas we wish to advance.”⁴⁹⁵ “[C]ontest the[] relevance” of free speech principles fashioned by your enemy, Professor Fish advises, “but if you manage to refashion them in line with your purposes, urge them with a vengeance.”⁴⁹⁶

A cynic could read the battle over anti-slavery and anti-war speech from Fish’s point of view. The Vallandigham case reveals some remarkable inconsistencies. The Republican Party came to power as the party of free speech. It protested state and national attempts to suppress anti-slavery speech. Southerners and some Democrats invoked the bad tendency test, constitutional protections provided for slavery, the need to protect the feelings and reputations of slaveholders, and the danger of slave revolts and civil war to justify suppression of anti-slavery literature. In the Vallandigham case, Democrats demanded free speech for critics of the war policy of the administration, and Republicans (to justify suppression) pointed out its dangers and bad tendencies, and invoked the power to suppress rebellion.

As these bad tendency arguments show, speech, including protected speech, can and does threaten harm. To confine freedom of speech to certifiably harmless speech, however, is to reduce the scope and benefit of free speech and the scope of the democratic process. Enforced silence also threatens great harm.

In the 1830s, many Democrats were advocating expulsion or censure of anti-slavery congressmen for speeches made in Congress.⁴⁹⁷ In 1864, the shoe was on the other foot—Republicans were attempting to expel a Democrat for anti-war speeches

⁴⁹³ Senator Trumbull’s Chicago Speech, in CIN. COM., June 11, 1863, at 2.

⁴⁹⁴ *The Chicago Times Case*, N.Y. DAILY TRIB., June 16, 1863, at 4 (quoting Congressman Arnold’s public address asking the President to give serious consideration to the revocation of the suppression of the *Chicago Times*).

⁴⁹⁵ STANLEY FISH, THERE’S NO SUCH THING AS FREE SPEECH AND IT’S A GOOD THING TOO 102 (1994).

⁴⁹⁶ *Id.* at 114.

⁴⁹⁷ See *supra* text accompanying notes 383-84.

and citing the censure of an anti-slavery congressman as a precedent.⁴⁹⁸ In 1863 and 1864, both parties gleefully pointed out the inconsistencies of their adversaries.⁴⁹⁹ In his reply to the New York Democrats, Lincoln pointed to the case of General Andrew Jackson.⁵⁰⁰ Jackson had continued martial law in New Orleans after the peace treaty of 1814.⁵⁰¹ An editor had criticized him, and Jackson arrested the editor.⁵⁰² A judge issued a writ of habeas corpus, and Jackson arrested the judge. He did pay the \$1,000 fine the judge later imposed on him.⁵⁰³ Nearly thirty years later, Stephen A. Douglas, another Democratic saint, induced Congress to remit the fine.⁵⁰⁴ Clearly, Democratic sensitivity to civil liberty had increased during the Civil War. The *National Intelligencer* noted the inconsistencies and took a thoughtful view:

It is easy to perceive that many who now raise their voice in vehement championship of "free speech" are seeking rather to subserve the interests of party than to promote the ends of justice and patriotism. It is from the midst of such mingled motives that truth nearly always emerges, for it is difficult to separate a good cause from the infirmities of the men into whose hands it is suffered to fall. But if the Administration will not do homage to the law it must be content to see its opponents profit by such suicidal recreancy.⁵⁰⁵

In both the Vallandigham episode and in earlier controversy over anti-slavery speech, however, a number of people invoked free speech principles despite inconsistency with their general political agendas. In the 1830s, dissident Northern Democrats and border state Whigs had refused to vote for a law banning anti-slavery publications from the mails.⁵⁰⁶ Anti-abolition newspapers (as the *New York Evening Post* then was) and a number of Democrats stood up for free speech for abolitionists.⁵⁰⁷ Many Republicans and Republican newspapers rejected the Vallandigham arrest and the suppression of the *Chicago Times*. Republican attorney, Wirt Dexter, spoke against the military suppression of the *Chicago Times*. "[A] man who refuses to act in a crisis like this," he said "because in so doing he may incidentally rescue his political opponent, is a demagogue and unworthy [of] the name of citizen."⁵⁰⁸ In short, many believed free speech entailed basic principles more important than short term partisan advantage, and their belief was an important

⁴⁹⁸ See *id.*

⁴⁹⁹ See, e.g., *supra* text accompanying notes 76-77, 272-82.

⁵⁰⁰ Abraham Lincoln, To Erastus Corning and Others (June 12, 1863), in LINCOLN SPEECHES, *supra* note 83, at 454, 461-62.

⁵⁰¹ See *id.*

⁵⁰² See *id.*

⁵⁰³ See *id.*

⁵⁰⁴ See *id.*

⁵⁰⁵ *Respect for Law*, NAT'L INTELLIGENCER, May 27, 1863, at 3.

⁵⁰⁶ See Curtis, *The Curious History*, *supra* note 16, at 785, 835.

⁵⁰⁷ See, e.g., *id.* at 817-36.

⁵⁰⁸ *Free Speech—Free Press: Immense Meeting at Chicago*, CHI. TIMES, June 5, 1863, reprinted in DET. FREE PRESS, June 6, 1863, at 1.

factor in protecting freedom of speech from far more extensive suppression. These people and the tradition they adhered to were important protectors of free speech at a time when the courts provided little if any protection.

D. *The Legacy of Suppression*

From the point of view of a believer in powerful principles of free speech, the positive significance of the Vallandigham case is that strong public commitment to broad free speech rights helped to contain and limit repression. Still, the Lincoln administration's departure from free speech principles had both short and long-term negative consequences. For example, Lincoln's idea that rebellion justified suppression of Vallandigham's anti-war speech may have had a considerable influence on the Supreme Court justices during World War I, including Oliver Wendell Holmes, Jr. In 1919, Justice Holmes upheld the jailing of Eugene Debs, the socialist politician and labor leader, for making an anti-war speech.⁵⁰⁹ Other anti-war advocates met a similar fate.⁵¹⁰ "When a nation is at war," Justice Holmes wrote in *Schenck v. United States*, "many things that might be said in time of peace . . . will not be endured."⁵¹¹ The principle Lincoln invoked for "rebellion" slid easily into a principle for wartime generally. Indeed, supporters of the administration often invoked the war power in general.

Holmes had fought for the Union in the Civil War. The controversy over the Vallandigham case and Lincoln's reply likely were etched in his memory. In an 1863 oration supporting broad power for the president to combat the rebellion, Holmes' father announced that "fear of tyranny" was merely "a phantasm conjured up by the imagination of the weak acted on by the craft of the cunning."⁵¹² So suppression of conservative and reactionary anti-war speech during the Civil War may well have paved the way for suppression of progressive and socialist anti-war speech during World War I. The Lincoln administration's punishment of anti-war speech was the first federal criminal prosecution of political speech since the nation repudiated the Sedition Act.

There was an ugly side to the suppression of anti-war speech in the Civil War. Treating such speech as illegitimate or treasonous encouraged mob violence. For example, Union soldiers unsuccessfully attempted to break up the Albany Meeting held to protest Vallandigham's arrest. They rushed the stage, attempted to drive off the speakers, and smashed chairs.⁵¹³ Simply put, they attempted to deny free speech to people meeting to protest a denial of free speech.

⁵⁰⁹ See *Debs v. United States*, 249 U.S. 211 (1919).

⁵¹⁰ See *Gilbert v. Minnesota*, 254 U.S. 325 (1920); *Schenck v. United States*, 249 U.S. 47 (1919).

⁵¹¹ *Schenck*, 249 U.S. at 52; see Dunning, *supra* note 472, at 625.

⁵¹² Williams, *supra* note 307, at 346-47 (citing OLIVER WENDELL HOLMES, ORATION DELIVERED BEFORE THE CITY AUTHORITIES AT BOSTON 5 (Philadelphia, 1863)).

⁵¹³ See, e.g., *Sympathy for Vallandigham's Treason in Albany: Gov. Seymour Exciting Citizens Against the Government*, N.Y. DAILY TRIB., May 18, 1863, at 5.

The correspondent of the *Cincinnati Commercial* reported from the Democratic convention in Indiana. His report included the following account:

[Y]oung fellows, in soldiers' clothes, but with no arms, and having no authority to make arrests, . . . perambulated through the crowd, and whenever they heard any one expressing butternut sentiments, such as disapproval of Vallandigham's sentence, opposition to the war, etc., they would say, "We can't allow this; it is in violation of Order No 38." or something of the kind, and if he uttered another word, of the kind, they would nab him by the arms or collar, and march him up street, to headquarters, with an immense crowd following.⁵¹⁴

In another incident, convalescent soldiers seized a group of Vallandigham delegates returning from a state Democratic convention and forced them to kneel and take an oath of allegiance.⁵¹⁵ Other incidents also occurred: "A butternut [a phrase used for Vallandigham supporters] was hung until almost lifeless, by a crowd of excited citizens . . . for traitorous language. He was allowed to go home alive."⁵¹⁶ Frank Klement reports that in Ohio in 1864, "[t]he Democratic Press at Wauseon was destroyed by 'a mob of soldiers.'"⁵¹⁷ A few weeks later, soldiers destroyed the printing plant of the *Dayton Empire* and threatened to hang the editor. On March 5, 1864, soldiers and civilians mobbed the *Greenville Democrat*.⁵¹⁸ Meanwhile authorities attempted to control excesses produced, in part, by their own actions and rhetoric.⁵¹⁹

Mark Neely, in his study of civil liberty during the Civil War, concluded that there were about 14,000 arrests of civilians after February 1862, but he finds most were not aimed at suppressing political opponents. Instead, they were designed to advance the war and protect enlistment and conscription.⁵²⁰ The Vallandigham case, Neely insists, was simply not representative of most arrests. It is true, however, that the Ohio papers were full of reports of arrests, under the orders of General Burnside, for expression of unspecified disloyal sentiments. Both before and after Vallandigham's arrest, throughout the nation, the administration suppressed newspapers, banned them from the mails, and arrested editors.⁵²¹ As a result of

⁵¹⁴ *Unauthorized Arrests*, CIN. COM., May 22, 1863, at 2.

⁵¹⁵ *See From Columbus*, CIN. COM., June 13, 1863, at 3.

⁵¹⁶ *From Indianapolis*, CIN. COM., June 13, 1863, at 3.

⁵¹⁷ Klement, *Vallandigham*, in *FOR THE UNION*, *supra* note 1, at 54.

⁵¹⁸ *See id.* For a collection of episodes of suppression of Democratic papers in Ohio, together with some of the more extreme anti-war rhetoric, see HARPER, *supra* note 1, at 194-207. Republican papers sometimes lent their printing establishments to their rivals until the papers could be rebuilt. *See id.*

⁵¹⁹ *See, e.g., Excitement in Columbus, Ohio; Invalid Soldiers Tear Down a Vallandigham Flag—All the Soldiers Arrested*, ATLAS & ARGUS (Albany, N.Y.: Daily), Aug. 6, 1863, at 2.

⁵²⁰ *See NEELY, supra* note 123, at 233-35. For a detailed review of Neely's book, see Paul Finkelman, *Civil Liberties and Civil War: The Great Emancipator as Civil Libertarian*, 91 MICH. L. REV. 1353 (1993).

⁵²¹ *See TENNEY, supra* note 1, at 17-28.

Burnside's orders, an Ohio publisher abandoned publication of a book of Vallandigham's speeches. Burnside showed an interest in finding the plates so that he could prevent printing elsewhere.⁵²²

The idea that Vallandigham's arrest should be dismissed as atypical overlooks the chilling effect of the episode on other potential critics and the encouragement it gave to freelance suppressors. History, however, seems to cut both ways. While threats of arrest by the military deterred many from speaking, those threats provoked others to protest.

Of course, there were excesses on all sides. In referring to Lincoln, some Democratic orators ominously invoked the memory of Charles I of England and of Julius Caesar. Some Republicans had directed similar rhetoric against Vallandigham.⁵²³

E. *Free Speech with a Tough Central Core*

The Vallandigham arrest raises questions about free speech doctrine. General Order No. 38 directly targeted political speech. Hans Linde has suggested that the First Amendment's command against abridging freedom of speech at least should prohibit laws directly aimed at the content of speech, laws that expressly target expression.⁵²⁴ The principle would hold at least for speech not within some historic and well established exception, such as libel of a private person. An order against expressing "disloyal" sentiments targets political speech. One result of a prosecution for disloyal sentiments was that while courts justified the arrest on the ground that Vallandigham was interfering with raising troops, they required no proof of that fact. Linde suggested that courts should subject laws aimed at conduct (such as ones interfering with recruiting) and that affect speech to the clear and present danger test as revised by Justice Brandeis.⁵²⁵

Under such an approach, the conviction of Vallandigham would have failed because Order No. 38 directly targeted speech. A prosecution for interfering with recruiting should also fail because of the lack of direct incitement to violate the law and because the danger was not so imminent that Vallandigham could not be answered by counter-speech. Of course, the general applicability of a law that targets protected speech because of its communicative impact (e.g., silencing criticism of the conduct of a public official because it causes emotional distress or silencing political criticisms of a war because some who hear them will refuse to serve) should not save it. Indeed, such a law has much in common with one aimed directly at speech.⁵²⁶

⁵²² See *id.* at 176-77.

⁵²³ See KLEMENT, LIMITS OF DISSENT, *supra* note 1, at 121 (referring to Brutus, Caesar, and Vallandigham); *id.* at 180 (quoting the N.Y. HERALD, May 19, 1863).

⁵²⁴ See Hans A. Linde, "Clear and Present Danger" Reexamined: *Dissonance in the Brandenburg Concerto*, 22 STAN. L. REV. 1163, 1174 (1970).

⁵²⁵ See *id.*

⁵²⁶ Professor Eugene Volokh made this point on reading an earlier version of this piece, and it is one with which I agree entirely. See Michael Kent Curtis, "Free Speech" and Its Discontents: *The Rebellion Against General Propositions and the Danger of Discretion*, 31

One might argue that courts should convict Vallandigham because, despite what he said, his *purpose* was to aid the South and hurt the North. To empower prosecutors or generals to arrest political critics based on the prosecutors' assumptions about motives is dangerous. Politicians typically suspect the motives of their opponents. Judges using such a standard are more likely to make decisions based on the hysteria of the moment.

The *Vallandigham* case again raises a question asked by Justice Hugo Black. The question is not whether freedom of speech and of the press are absolute and apply generally to all speech without limitations. Rather, it is whether there are discrete areas in which freedom of speech and the press are agreed to apply, that are simply beyond the power of government to suppress, though it may have very strong reasons for wanting to do so.⁵²⁷ Should, for example, the government be permitted to suppress political speech that advocates changing governmental policy by peaceful democratic means and that explicitly counsels against breaking the law? Should political speech be protected even if peaceful discussion of changing course causes genuine and serious harm to the war effort?

The Vallandigham arrest is also disturbing because it was not based on any federal law. Such a law would, at least, have gone through debate, both inside and outside Congress.

F. *The Great Emancipator and Free Speech*

Finally, what are we to make of Abraham Lincoln, the president who presided over the suppressions of free speech described in this paper? Lincoln was a great American president. He saved the Union, though at a very great cost in human life and suffering. He led the nation to abolish slavery, and moved it closer to the spirit of the Declaration of Independence. By abolishing slavery, the nation alleviated much suffering. Lincoln was also the first American president to entertain a black man, Frederick Douglass, in the White House.⁵²⁸ In doing so, he began to depart from the deep racism that has scarred American life.

Psychologists suggest a halo effect influences and distorts our evaluation of another's acts: "If a person has one salient (available) good trait, his other characteristics are likely to be judged by others as better than they really are."⁵²⁹ The same thing happens in reverse of course—a horns and pitchfork effect. So advocacy of free speech, peaceful change, and democratic decision making by many Democrats

WAKE FOREST L. REV. 419, 426 (1996); Michael Kent Curtis, *Reading the First Amendment by the Light of the Burning Flag*, in 1 THE CONSTITUTION AND THE FLAG: THE FLAG SALUTE CASES lii-liii (Michael Curtis ed., 1993) [hereinafter Curtis, *Burning Flag*].

⁵²⁷ See Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867 (1960); Curtis, *Burning Flag*, *supra* note 526, at xxiii-xxiv; Laurent Frantz, *The First Amendment in the Balance*, 71 YALE L. J. 1424, 1430-32 (1962). For an extended and thoughtful discussion, see Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417 (1996); Volokh, *supra* note 414, at 223.

⁵²⁸ See Finkelman, *supra* note 520, at 1356.

⁵²⁹ STUART SUTHERLAND, *IRRATIONALITY: THE ENEMY WITHIN* 28 (1992).

outraged over the Vallandigham arrest tends to disappear because many of those individuals were racists who opposed emancipation.

Real life heroes, unlike those of fiction, are human beings. Good people in difficult circumstances can make dreadful mistakes. Franklin Roosevelt, another great president, having listened to his generals after the bombing of Pearl Harbor, approved a military plan to incarcerate Americans of Japanese descent.⁵³⁰ The war power theory generated to support suppression of speech by the Lincoln administration would also support the constitutionality of the Japanese internment.

Lincoln's Emancipation Proclamation was also based on the war power, and if it was justified by the war power, one might ask why punishment of Vallandigham was not justified. Lincoln aimed the Emancipation Proclamation at parts of the nation which were in rebellion and where the federal government was not in control. It struck directly at the labor supply necessary to sustain the Confederate war effort and, with one bold stroke, converted former slaves and many of those who were working for the enemy into soldiers fighting for freedom.⁵³¹ The question is not whether the war power provides vast sources of power which would otherwise not exist; rather, it is whether this vast power may be used to suspend free speech and the democratic process in areas outside of the theater of war.

The nation has recognized its mistake in the Sedition Act cases.⁵³² It has recognized its mistake in the Japanese internment.⁵³³ It would be wise to recognize that Lincoln was wrong in his justification of Vallandigham's arrest and to recognize that he seriously departed from the better free speech tradition. Apologists for the administration's action left a legacy of a limitless war power that supported the suppression of free speech in World War I.

Suppression of political speech did not begin with the Lincoln administration's suppression of anti-war speech. Lincoln confronted a grave crisis unique in American history. Still, one fact is worth repeating. The administration justified the first criminal punishment of speech by the federal government since the Sedition Act.

Support for free political speech by Vallandigham and his followers would have been more inspiring if so many Americans of African descent were not omitted from their political calculus. It would have been more inspiring if more Vallandigham partisans had supported free speech for abolitionists and opponents of slavery. But many Americans—Democrats, Republicans, and Abolitionists—supported both free speech for opponents of slavery and for Vallandigham. These people helped to preserve our free speech tradition for future generations.

⁵³⁰ See, e.g., JAMES MACGREGOR BURNS, *ROOSEVELT: THE SOLDIER OF FREEDOM* 213-217 (1970).

⁵³¹ See *The Prize Cases*, 67 U.S. 635, 693 (1863). The justices who dissented from the decision holding Lincoln, rather than Congress, had the power to blockade Southern ports, said that the laws of war, including civil wars, "convert every citizen of the hostile State into a public enemy." *Id.*

⁵³² See CONG. GLOBE, 26th Cong., 1st Sess. 410-414, 478 (1840) (discussing a decision to refund a fine imposed on Matthew Lyon).

⁵³³ See Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 904 (codified at 50 U.S.C. app. § 1989b (1988)).