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Abraham Lincoln, Civil Liberties and the Corning Letter

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Articles

Abraham Lincoln, Civil Liberties and the Corning Letter

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I. INTRODUCTION

Wartime procedures implemented by President Abraham Lincoln suggest much about politics and philosophy. When the government of a democratic nation imposes harsh methods to sustain itself there rightly will be sincere protest and criticism, and there will be slurs upon democracy itself. This criticism will ensure whether or not the nation survives. Suppose, however, that it does not survive. Suppose it fails because of internal division, dissension, or treason. In such cases, there will be greater criticism, stressing the weakness and inadequacy alleged to be characteristic of a democratic nation in an emergency.

In facing this situation, Lincoln was in a no-win position. He would be condemned regardless of his actions. If he did not uphold all of the provisions of the Constitution, he would be assailed not only by those who genuinely valued civil liberty, but also by ene-

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mies and opponents whose motive was criticism itself. Far harsher would have been his denunciation if the whole experiment of the democratic American Union failed, as seemed possible given the circumstances. If such a disaster occurred, what benefit would have been gained by adhering to a fallen Constitution? It was a classic example of the conflict: Do the ends justify the means?

Such, in part, was Lincoln's dilemma. To merely state the case in this way does not, however, exhaust the subject. Suppression is a matter of degree. To use a judicious amount of it does not imply rampant brutality, severity, and despotism. Measures regarded as severe in Lincoln's time would have seemed soft and "decadent" to a Hitler or a Milosevich. Congress continued to sit, elections were held, the Supreme Court functioned, lower courts sat and dissent was allowed. It becomes, therefore, a matter of importance to examine the Lincoln procedures, to perceive them for what they were, to study them against the backdrop of those threatening times and to note the qualifications, concessions, compromises and ameliorations that appeared in the human application of measures that appear harsh, when considered in isolation.

To speak of the government as Lincoln's is in part true and in part a matter of rhetoric. Abraham Lincoln was the nation's Attorney-in-Chief as well as the Commander-in-Chief. Much that happened was shaped by the force of the personality, discretion and executive procedure of the President. Both the Congress and military leaders took actions which Lincoln disapproved.

In managing the government, Lincoln acted. He took authority; he was proactive; he did not depend upon Congress; he did not take his cues from the courts; he made the presidency, to a large extent, the dominant branch, certainly to a greater degree than it had normally been. Professor Don E. Fehrenbacher, a noted Lincoln scholar, says that "Although Lincoln, in a general sense, proved to be right, the history of the United States in the twentieth century suggests that he brushed aside too lightly the problem of the example that he might be setting for future presidents."[1]

1. Don E. Fehrenbacher, *The Paradoxes of Freedom*, *in* Lincoln in Text and Context: Collected Essays 129, 139 (1987).

II. DEMOCRATIC LEADER OR DICTATOR?

In the words of Professor James G. Randall, another preeminent Lincoln scholar, "No president has carried the power of presidential edict and executive order (independently of Congress) so far as he did. . . . It would not be easy to state what Lincoln conceived to be the limit of his powers."[2]

It has been noted how, in the eighty days between the April call for troops and the meeting of Congress on July 4, 1861, Lincoln performed a whole series of important acts by sheer assumption of presidential power. He proclaimed not a "civil war" in those words, but the existence of "combinations too powerful to be suppressed by the ordinary course of judicial proceedings."[3] He called forth the militia to "suppress said combinations,"[4] which he ordered "to disperse and retire peacefully"[5] to their homes. Congress is constitutionally empowered to declare war, but suppression of rebellion has been recognized as an executive function, for which the prerogative of setting aside civil procedures has been placed in the President's hands. In this initial phase Lincoln also proclaimed a blockade, suspended *habeas corpus*, increased the size of the regular army and authorized the expenditure of government money without congressional appropriation. He made far reaching decisions and commitments while Congress was not in session, and all without public polls. Lincoln could count, and he knew he had the votes of both the people and the Congress. The verdict of history is that Lincoln's use of power did not constitute abuse. Every survey of historians ranks Lincoln as number one among the great presidents.[6]

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2. J.G. Randall, *The Rule of Law Under Lincoln*, *in* Lincoln the Liberal Statesman 118, 123 (1947).

3. Roy P. Basler et al., *Proclamation Calling Militia and Convening Congress, April 15, 1861*, *in* 4 The Collected Works of Abraham Lincoln 331, 332 (1953) [hereinafter Collected Works].

4. *Id.*

5. *Id.*

6. For example, see Arther M. Schlesinger, Jr., *The Ultimate Approval Ratings*, N.Y. Times Magazine, Dec. 15, 1996, at 46-51. Lincoln did well, too, in a survey of famous people in the second millennium. He ranks 32nd behind Gutenberg (1) and Hitler (20). *See* Agnes Hoope Gottlieb et al., 1,000 Years, 10,000 People: Ranking the Men and Women Who Shaped the Millennium (1998). C-SPAN's Historians Survey of Presidential Leadership, prepared by fifty-eight respondents and released on February 16, 2000, ranked Abraham Lincoln first. Franklin D. Roosevelt, George Washington, Theodore Roosevelt and Harry Tru-

By the time of his inauguration on March 4, 1861, seven southern states had already seceded from the Union. But Lincoln played a waiting game, making no preparation for the use of force until the sending of provisions to Fort Sumter in Charleston Harbor, a month later, precipitated its bombardment by the rebels. The situation had become unstable.

Thus began Lincoln's period of executive decision. Congress was not in session at the time (nor would it meet until the special session of July 4, 1861), and it was basic to the Whig-Republican theory of government, that Congress was vested with the ultimate power—a theory with which Lincoln, as both Whig and Republican, had long agreed. As a former member of Congress, four-term state legislator and, for twenty-four years a lawyer, Lincoln respected traditional separation of powers. But now "events have controlled me."[7]

III. Suspension of the Privilege of the Writ of Habeas Corpus

The State of Maryland was seething with secessionist tendencies almost more violent at times than some states that did secede. Events in Maryland ultimately provoked Lincoln's suspension of the writ of *habeas corpus*. The writ of *habeas corpus* is a procedural method by which one who is imprisoned can file the writ in an appropriate court to have his imprisonment reviewed. If the imprisonment is found not to conform to law, the individual is entitled to immediate release. With suspension of the writ, this immediate judicial review of the imprisonment is unavailable. This suspension triggered the most heated and serious constitutional disputes over the Lincoln administration.

On April 19, 1861, the Sixth Massachusetts militia arrived in Washington after having literally fought its way through Baltimore. On April 20, railroad communications with the North were severed by Marylanders, almost isolating Washington D.C. from that part of the nation for which it remained the capital. Lincoln was apoplectic. He had no information about the whereabouts of the other troops promised him by Northern governors, and Lincoln

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man followed. *See* C-SPAN Survey of Presidential Leadership, Results (Feb. 8, 2000).

7. 4 Collected Works, *supra* note 3, at 344.

told volunteers on April 24, "I don't believe there is any North. The Seventh Regiment is a myth. Rhode Island is not known in our geography any longer. *You* are the only Northern realities."[8] On April 25, the Seventh New York militia finally reached Washington after struggling through Maryland. The right of *habeas corpus* was so important, that the President considered the bombardment of Maryland cities as preferable to its suspension. Lincoln authorized General Winfield Scott, Commander of the Army, in case of "necessity," to bombard the cities, but only "in the extremist necessity"[9] was Scott to suspend the writ of *habeas corpus.*

IV. THE CASE OF JOHN MERRYMAN

In Maryland, there was at this time a dissatisfied American named John Merryman. Merryman's dissent from the course being charted by Lincoln was expressed in both word and deed. He spoke out vigorously in favor of the South, and recruited a company of soldiers for the Confederate Army. Merryman became their Lieutenant Drillmaster. Thus, he not only exercised his Constitutional right to disagree with what the government was doing, but he engaged in raising an armed group to attack and to attempt to destroy the government. This young man's actions precipitated legal conflict between the President and the Chief Justice of the United States, Roger Taney. On May 25, 1861, Merryman was arrested by the military and lodged in Fort McHenry, Baltimore, for various alleged acts of treason. Shortly after Merryman's arrest, his counsel sought a writ of *habeas corpus* from Chief Justice Taney, alleging that Merryman was being illegally held at Fort McHenry. Taney, already infamous for *Dred Scott*,[10] as a Circuit Judge, took jurisdiction. On Sunday, May 26, 1861, Taney issued a writ to Fort Commander George Cadwalader, directing him to produce Merryman before the Court the next day at 11:00 a.m. Cadwalader respectfully refused on the ground that President Lincoln had authorized the suspension of the writ of *habeas corpus.* To Taney, this was blasphemy. He immediately issued an attachment for Cadwalader for contempt. The marshal could not enter the Fort to serve the attachment, however, so the old justice, recogniz-

8. Tyler Dennett, *Lincoln and the Civil War, in* The Diaries and Letters of John Hay 1, 11 (1939).

9. 4 Collected Works, *supra* note 3, at 344.

10. Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1856).

ing the impossibility of enforcing his order, settled back and produced the now-famous opinion, *Ex Parte Merryman.*[11]

Notwithstanding the fact that he was in his eighty-fifth year, the Chief Justice vigorously defended the power of Congress alone to suspend the right to the writ of *habeas corpus.* The Chief took this position in part, because permissible suspension was in Article I § 9 of the Constitution, the section describing Congressional duties.[12] He ignored the fact that it was placed there by the Committee on Drafting at the Constitutional Convention in 1787 as a matter of form, not substance. Nowhere did he acknowledge that a rebellion was in progress, and that the fate of the nation was, in fact, at stake. Taney missed the crucial point made in the draft of Lincoln's report to Congress on July 4:

> [t]he whole of the laws which I was sworn to [execute] were being resisted . . . nearly one-third of the states. Must I have allowed them to finally fail of execution? . . . Are all the laws but one to go unexecuted, and the government itself go to pieces, lest that one be violated?[13]

This was Lincoln, as both lawyer and politician, at his best.

By addressing Congress, Lincoln ignored Taney. Nothing more was done about Merryman at the time. Merryman was thereafter released from custody, and disappeared into oblivion. Congress, two years later, resolved the ambiguity in the Constitution and permitted the President the right to suspend the writ while the rebellion continued.[14]

Not least is the sense that we get, in a case like *Merryman*, of what a clash between the executive and the judiciary is actually like. This provides a healthy reminder of how much we usually rely, in the last resort, on executive submission in upholding the rule of law. Nevertheless, five years later (after the Union victory and with a Lincoln appointee—Salmon P. Chase—as Chief Justice) the Supreme Court reached essentially the same conclusion as Ta-

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11. *Ex Parte* Merryman, 17 F.Cas. 144 (C.C.Md. 1861). *Ex Parte for Merryman* is reprinted in 1 The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies 578 (Washington, D.C.: Government Printing & Office, 1880-1902).

12. U.S. Constitution, art. I., § 9.

13. 4 Collected Works, *supra* note 3, at 430.

14. *See* An Act Relating to Habeas Corpus, and Relating Judicial Proceedings in Certain Cases, ch. 812, 12 Stat. 755-58 (1863).

ney in a case called *Ex Parte Milligan*.[15] "The Constitution of the United States is a law for rulers and people, equally in war and in peace. . . . The Government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence."[16] *Habeas corpus* could be suspended, but only by Congress; and even then, the majority said, civilians could not be held by the Army for trial before a military tribunal, not even if the charge was fomenting an armed uprising in a time of Civil War.

Lincoln never denied that he had stretched his Presidential power. "These measures," he declared, "whether strictly legal or not, were ventured upon, under what appeared to be a popular necessity; trusting then, as now, that Congress would readily ratify them."[17] Lincoln thus confronted Congress with a *fait accompli*. It was a case of a President deliberately exercising legislative power, and then seeking congressional ratification after the event. There were those who adamantly believed that in doing so, he had exceeded his authority.

V. THE SUPREME COURT SUSTAINS THE PRESIDENT IN THE *PRIZE CASES*

The judiciary was allowed to speak to the constitutional issues. These constitutional questions—the validity of initial war measures, the legal nature of the conflict, Lincoln's assumption of war power—came before the Supreme Court in one of the classic cases ever heard by that tribunal. The decision in the *Prize Cases*[18] arose in March of 1863, though the specific executive acts had been performed in 1861. The particular question before the Court pertained to the seizure of vessels for violating the blockade whose legality had been challenged since it was set up by presidential proclamation in absence of a congressional declaration of war. The issue, however, had much broader implication, since the blockade was only one of the emergency measures Lincoln took by his own authority in the "eighty days."

It was argued in the *Prize Cases* that Congress alone had power to declare war, that the President had no right to institute a blockade until after such a declaration, that war did not lawfully

15. *Ex Parte* Milligan, 71 U.S. (4 Wall.) 2, 120-21 (1866).
16. *Id.*
17. 4 Collected Works, *supra* note 3, at 429.
18. Prize Cases, 67 U.S. (2 Black) 635 (1863).

exist when the seizures were made and that judgments against the ships in lower federal courts were invalid. Had the high court in 1863 decided according to such arguments, it would have been declaring invalid the basic governmental acts by which the war was waged in its early months, as well as the whole legal procedure by which the government in Washington had met the 1861 emergency. The matter went even further, and some believed a decision adverse to the President's excessive power would have overthrown, or cast into doubt, the legality of the whole war.

Pondering such an embarrassment to the Lincoln administration, the distinguished lawyer Richard Henry Dana, Jr. wrote to Charles Francis Adams: "Contemplate, the possibility of a Supreme Court deciding that this blockade is illegal! . . . It would end the war, and how it would leave us with neutral powers, it is fearful to contemplate!"[19]

Given these circumstances, it was a great relief to Lincoln and his administration when the Court sustained the acts of the President, including the blockade. A Civil War, the Court held, does not legally originate because it is declared by Congress.[20] Rather, it simply occurs. The "party in rebellion" breaks its allegiance, "organized armies, and commences hostilities."[21] In such a case it is the duty of the President to resist force by force, to meet the war as he finds it "without waiting for Congress to baptize it with a name." As to the weighty question whether the struggle was an "insurrection," or a "war" in the full sense (as if between independent nations), the Court decided that it was both.[22]

Lincoln's acts were thus held valid, the blockade upheld, and the condemnation of the ships sustained, all by a narrow victory.[23] The decision, handed down on March 10, 1863, was five to four, and Chief Justice Taney was among the dissenters. Again, Lincoln was not Don Quixote—he would count popular, congressional, and judicial votes. He had stacked the Court in his favor. His appointments were decisive in their votes.[24]

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19. James G. Randall, Constitutional Problems Under Lincoln 52 (1951).
20. *See Prize Cases*, 67 U.S. at 649.
21. *Id.* at 666.
22. Randall, *supra* note 19, at 71-72.
23. *See Prize Cases*, 67 U.S. at 649.
24. Justice Robert C. Grier delivered the majority opinion. Three Lincoln appointees joined him—Noah H. Swayne, Samual F. Miller and David Davis. Loyal Justice James M. Wayne of Georgia agreed with the majority.

VI. EMANCIPATION AS A MILITARY MEASURE

Another illustration of Lincoln's legal and political astuteness relates to emancipation. The problem was prodigious. Nothing in the Constitution authorized the Congress or the President to confiscate property without compensation. When the preliminary Emancipation Proclamation, issued on September 22, 1862, declared slaves in the states, still in rebellion, to be free on January 1, 1863, the legal basis for this action seemed obscure. Lincoln cited two acts of Congress for justification.[25] Although reference to the two acts occupied much of the Proclamation, they actually had little to do with the subject, indicating that Lincoln had not really settled in his own mind the extent of his power, and on what authority to issue the Proclamation. But, by the time of the final Emancipation Proclamation on January 1, 1863, Lincoln had concluded his act to be a war measure taken by the Commander-in-Chief to weaken the enemy.

> Now, therefore, I, Abraham Lincoln, President of the United States by virtue of the power in me vested as Commander-in-Chief of the Army and Navy of the United States, in time of actual armed rebellion against the authority and government of the United States, and as a fit and necessary war measure for suppressing said rebellion, do . . . Order and declare that all persons held as slaves within said designated States and parts of States are, and henceforward shall be free. . . .[26]

It may have had all "the moral grandeur of a bill of lading," as Professor Richard Hofstader stated,[27] but the basic legal argument for the validity of his action could be understood by everyone. And, the time was ripe. To a hypothetical critic he wrote:

> You dislike the Emancipation Proclamation, and perhaps would have it retracted. You say it is unconstitutional. I think differently. I think the Constitution invests its Commander-in-Chief with the law of war. The most that can be said—if so much—is that slaves are property. Is there, or has there ever been any question that by the law of war, property, both of friends and enemies, may be taken when needed?

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25. *See* An Act to Make an Additional Article of War, March 13, 1862, and An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate Property of Rebels, and for Other Purposes, July 17, 1862. 5 Collected Works, *supra* note 3, at 434-35.

26. 4 *Id.* at 29-30.

27. Richard Hofstader, The American Political Tradition 169 (1974).

> And is it not needed whenever taking it helps us, or hurts the enemy?[28]

This is the Lincoln that consistently took the shortest distance between two legal points. The proposition as a matter of law may be argued. But it is not the law being analyzed, but rather Lincoln's political *and* legal approach to it. Lincoln saw the problem with the same directness with which he dissected most problems: the Commander-in-Chief may, under military necessity, take property. Slaves were property. There was a military necessity. Therefore, Lincoln, as Commander-in-Chief, took the property. Not only could Lincoln count votes, he could reason clearly even during crisis.

VII. VALLANDIGHAM AND THE CORNING LETTER

Clement Laird Vallandigham, the number one Copperhead[29] of the Civil War, was perhaps President Lincoln's sharpest critic. An Ohioan, this "wily agitator"[30] found many substantial supporters for his views in New York State. Active in politics throughout most of his life, he was elected to Congress from Ohio in 1856, 1858 and 1860. Before he was defeated for the 38th Congress in 1862, he returned to Ohio to seek the Democratic nomination for Governor. In Congress he made a bitter political speech on July 10, 1861, criticizing Lincoln's inaugural address and the President's message on the National Loan Bill. He charged the President with the "wicked and hazardous experiment" of calling the people to arms without counsel and authority of Congress; with violating the Constitution in declaring a blockade of Southern ports; with "contemptuously" setting at defiance the Constitution in suspending the writ of *habeas corpus*; and with "cooly" coming before the Congress and pleading that he was only "preserving and protecting"

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28. 4 Collected Works, *supra* note 3, at 29-30.

29. Copperhead, a reproachful epithet, was used to denote Northerners who sided with the South in the Civil War and were therefore deemed traitors, particularly those so-named Peace Democrats who assailed the Lincoln administration. It was borrowed from the poisonous snake of the same name that lays in hiding and strikes without warning. However, "Copperheads" regarded themselves as lovers of liberty, and some of them wore as a lapel pin the head of the Goddess of Liberty cut out of the large copper penny minted by the Federal treasury.

30. 6 Collected Works, *supra* note 3, at 266 (Letter to Erastus Corning and others).

the Constitution and demanding and expecting the thanks of Congress and the country for his "usurpations of power."[31]

In his last extended speech in Congress, on January 14, 1863, Vallandigham reviewed his lifelong attitude on slavery and espoused the extreme Copperhead doctrine when he said:

> [n]either, sir, can you abolish slavery by argument. . . . The South is resolved to maintain it at every hazard and by every sacrifice; and if "this Union cannot endure 'part slave and part free,' then it is already and finally dissolved. . . . But I deny the doctrine. It is full of disunion and civil war. It is disunion itself. Whoever first taught it ought to be dealt with not only as hostile to the Union, but as an enemy of the human race. Sir, the fundamental idea of the Constitution is the perfect and eternal compatibility of a union of States 'part slave and part free' . . . . In my deliberate judgment, a confederacy made up of a slave-holding and non-slave-holding States is, in the nature of things, the strongest of all popular governments.[32]

Later that year, on March 25, 1863, General Ambrose B. Burnside took command of the Department of the Ohio with headquarters at Cincinnati. Burnside, who had succeeded McClellan in the command of the Army of the Potomac, had failed miserably before General Robert E. Lee at Fredericksburg. He was smarting from failure, and anxious to repair his military reputation. The seat of the Copperhead movement was in this area. Wholesale criticism of the war was rampant. It was particularly offensive to Burnside at this time. On March 21, the week after Vallandigham's return from Washington, and four days before Burnside took command of the Department of the Ohio, Vallandigham made one of his typical speeches at Hamilton, Ohio. On April 13, General Burnside, without consultation with his superiors, issued his famous General Order No. 38, in which he announced that all persons found within the Union lines committing acts for the benefit of the enemies of the country would be tried as spies or traitors, and, if convicted, would suffer death.[33] The Order enumerated the various classes of persons falling within its scope, announced that the habit of declaring sympathy for the enemy would not be allowed in the De-

31. Cong. Globe, 37th Cong., 1st Sess., 23, 100, 348 (1861). *See* Frank L. Klement, The Limits of Dissent: Clement L. Vallandigham and the Civil War (1998).

32. Cong. Globe, 37th Cong., 2d Sess., Appendix, 52-60 (1862).

33. *See* Klement, *supra* note 31, at 149.

partment and that persons committing such offenses would be at once arrested with a view to being tried or banished from the Union lines.

Learning that Vallandigham was to speak at a Democratic mass meeting at Mt. Vernon, Ohio, on May 1, 1863, Burnside dispatched two captains in civilian clothes from his staff to listen to Vallandigham's speech. One of the captains leaned against the speaker's platform and took notes. The other stood a few feet from the platform in the audience. As a result of their reports, Vallandigham was arrested in his home at Dayton, on Burnside's orders, early after midnight on May 5 and escorted to the military prison, Kemper Barracks, at Cincinnati. On May 6 and 7, he was tried by a military commission convened by General Burnside, found guilty of violation of General Order No. 38 and sentenced to imprisonment for the duration of the war.[34]

On the first day of his imprisonment, Vallandigham smuggled out a message "To the Democracy of Ohio," in which he protested that his arrest was illegal and for no other offense than an expression of his "political opinion." He urged his fellow Democrats to "stand firm" and assured them, "As for myself, I adhere to every principle, and will make good through imprisonment and life itself, every pledge and declaration which I have ever made, uttered or maintained from the beginning."[35] Vallandigham's counsel applied to the United States Circuit Court, sitting at Cincinnati, for a writ of *habeas corpus*, which was denied. This time, unlike in *Merryman*, the Court agreed with the suspension. An application was made later for a writ of *certiorari* to bring the proceedings of the military commission for review before the Supreme Court of the United States. This application was denied on the ground that the Supreme Court had no jurisdiction over a military tribunal.[36]

General Burnside approved the finding and the sentence of the military commission, and made plans to send Vallandigham to Fort Warren, Boston Harbor, for imprisonment. Before these plans could be carried out, President Lincoln telegraphed an order that commuted the sentence to banishment from Union lines.[37]

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34. *See id.* at 152-68.

35. *Id.* at 163-64.

36. *See id.* at 171. The Supreme Court would exercise such jurisdiction after the war in *Ex Parte Milligan*.

37. *See id.* at 177-78.

In conformity with the President's order, Vallandigham was conducted by way of Louisville, Kentucky, and Murfreesboro, Tennessee, to the Confederate lines. He reached the headquarters of General Braxton Bragg May 25, 1863. Upon reaching the Confederate outpost and before the Federal officers left him, Vallandigham stated: "I am a citizen of Ohio, and of the United States. I am here within your lines by force, and against my will. I therefore surrender myself to you as a prisoner of war."[38] Vallandigham found his way to Richmond, where he was received indifferently by the Confederate authorities, and the fiction that he was a prisoner of war was maintained. Having resolved before leaving Cincinnati to endeavor to go to Canada, Vallandigham, without interference, took passage on June 17, 1863, on the blockade runner *Cornubia* bound for Bermuda from Wilmington, arriving on June 20, 1863. After ten days in Bermuda he went by steamer to Halifax, arriving on July 5, 1863. He then found his way to Niagara Falls, Canada. He settled at Windsor, opposite Detroit, where he remained until he returned to Ohio on June 15, 1864.

The arrest, military trial, conviction and sentence of Vallandigham aroused excitement throughout the country. Criticism of Burnside for the issuance of General Order No. 38, and for using it against Vallandigham was widespread. President Lincoln was also severely criticized for not countermanding the sentence instead of commuting it. The general dissatisfaction with the case was not confined to the radical Copperheads. Many conservative Democrats, loyal supporters of the Government in the prosecution of the war, were disturbed. Many Republican newspapers joined in questioning the action. Public meetings of protest were held in many cities.

One of the most dignified and impressive protest meetings was held by the Democrats of Albany, New York, on Saturday evening, May 16, 1863, three days before Lincoln altered Burnside's sentence of imprisonment, and ordered that Vallandigham be sent beyond federal lines. Held in front of the Capital in the park, it was presided over by the Honorable Erastus Corning, a distinguished congressman from Albany. The meeting was endorsed by Gover-

38. *Id.* at 181-83.

nor Horatio Seymour who, unable to attend, sent a letter which said:

> The action of the Administration will determine in the minds of more than one half of the people of the loyal States whether this war is waged to put down rebellion at the South, or to destroy free institutions at the North. We look for its decision with the most solemn solicitude.[39]

Fiery speeches criticized Burnside for his action against Vallandigham, and pent-up feeling was expressed against the alleged arbitrary action of the Administration in suppressing the liberty of speech and of the press, the right of trial by jury, the law of evidence and the right of *habeas corpus,* and, in general, the assertion of the supremacy of military over civil law. A series of resolutions was adopted by acclamation, and it was ordered that a copy of these resolutions be transmitted "to his Excellency the President of the United States, with the assurance of this meeting of their hearty and earnest desire to support the Government in every Constitutional and lawful measure to suppress the existing Rebellion."[40] Bearing the date of May 19, 1863, the resolutions were addressed to the President along with a brief note signed by Erastus Corning as president of the assemblage, as well as by the vice-presidents and secretaries. The resolutions were couched in dignified and respectful language, but the clear implication was that those attending the meeting regarded the arrest and imprisonment of Vallandigham illegal and unconstitutional, and that they deplored the usurpation of personal rights by the Administration.[41] On May 28, 1863, the President acknowledged receipt of the resolutions in a note addressed to "Hon. Erastus Corning," and promised to "give the resolutions consideration" and to try "to find time and make a respectful response."[42]

There is no record that Lincoln was consulted by General Burnside in advance of the issuance of General Order No. 38, nor upon the arrest, trial and sentence of Vallandigham. Lincoln was, of course, thoroughly familiar with Vallandigham as leader of the Copperheads, and with the criticisms of his own administration. If

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39. *Id.* at 180-81.

40. The *Albany Resolves* are in Edward McPherson, The Political History of the United States of America: During the Great Rebellion 163 (1864).

41. *See* Klement, *supra* 31, at 182.

42. 6 Collected Works, *supra* note 3, at 235.

left to Lincoln, he doubtless would have counseled that Vallandigham be allowed to talk himself to death politically.

On June 12, 1863, the President sent his studied reply to the Albany Democrats, addressed to "Hon. Erastus Corning & others." In a closely reasoned document of more than 3,000 words, and in lawyer-like fashion, Lincoln justified the action of the Administration in the arrest, trial, imprisonment and banishment of Vallandigham, and elaborated his view that certain proceedings are constitutional "when in cases of rebellion or invasion, the public Safety requires them, which would not be constitutional when, in absence of rebellion or invasion, the public Safety does not require them."[43] The President defended the action not on free speech grounds but on the effects of such speech.[44]

The political instincts of the lawyer-President emerged in Lincoln's reply, when he said:

> In giving the resolutions that earnest consideration which you request of me, I cannot overlook the fact that the meeting speak as 'Democrats.' Nor can I, with full respect for their known intelligence, and the fairly presumed deliberation with which they prepared their resolutions, be permitted to suppose that this occurred by accident, or in any other way than that they preferred to designate themselves 'democrats' rather than 'American citizens.' In this time of national peril, I would have preferred to meet you upon a level one step higher than any party platform.[45]

Erastus Corning referred Lincoln's response to the committee that reported the resolutions. Under date of July 3, 1863, Mr. Corning forwarded to the President the rejoinder of the committee, a document of more than 3,000 words. This rejoinder dwelt at length upon what it deemed "repeated and continued" invasions of constitutional liberty and private right by the Administration, and asked anew what the justification was "for the monstrous proceeding in the case of a citizen of Ohio."[46] The rejoinder, drawn mainly by an ex-justice of the State Court of Appeals, John V.L. Pruyn, did

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43. *Id.* at 264.

44. *See id.* at 260-72.

45. *Id.* at 267.

46. John V.L. Pruyn et al., Reply to President Lincoln's Letter of 12th of June 1863, Papers from the Society for the Diffusion of Political Knowledge, no.10 (1863). The pamphlet is in Frank Freidel, Union Pamphlets of the Civil War, 1861-1865, at 760 (1967) (page references are to that reprint).

not maintain the even dignity of the original resolutions, charged Lincoln with "pretensions to more than regal authority"[47] and insisted that he had used "misty and cloudy forms of expression" in setting forth his pretensions.[48] The committee was especially sensitive of Lincoln's remark that the resolutions were presented by "Democrats," instead of by "American citizens,"[49] and sought to turn the tables on the President. Lincoln was too busy with a thousand other issues to engage in prolonged debates. As was his wont, he had his say in his reply to the initial resolutions, ignored this rebuttal and turned to other matters.[50]

Almost simultaneously, Lincoln was engaged in a similar encounter with Democrats in Ohio. The Ohio Democratic State Convention held at Columbus on June 11, 1863, while Vallandigham was still within the Confederate lines, nominated him for Governor by acclamation. George B. Pugh, Vallandigham's lawyer in the *habeas corpus* proceedings, was nominated for Lieutenant Governor. The convention passed a series of resolutions condemning the arrest, trial, imprisonment and banishment of Vallandigham and appointed a committee of 19 members to communicate with the President and to request the return of Vallandigham to Ohio.

The committee, all members of Congress, addressed their communication from Washington on June 26, 1863, "To His Excellency the President of the United States."[51] The committee called on the President at the White House and filed with him its protest, including the detailed resolutions adopted by the Ohio Democratic State Convention. The resolutions were similar in import to those adopted by the Albany Democrats, and held that "the arrest, imprisonment, pretended trial and actual banishment of Clement L. Vallandigham" was a "palpable" violation of the Constitution.[52] The committee went on to elaborate its view that the Constitution is not different in time of insurrection or invasion from what it is in time of peace and public security.[53]

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47. *Id.* at 755.

48. *Id.*

49. *See id.* at 763.

50. Klement, *supra* note 31, at 183.

51. James Laird Vallandigham, A Life of Clement L. Vallandigham 305 (1872).

52. *Id.* at 304.

53. *See id.* at 305-11.

Employing the arguments used in his letter to the Albany Democrats, and not departing from the principles there expressed, Lincoln very promptly replied to the Ohio committee. He added "a word" to his Albany response:

> You claim that men may, if they choose, embarrass those whose duty it is to combat a giant rebellion, and then be dealt with in turn, only as if there was no rebellion. The constitution itself rejects this view. The military arrests and detentions, which have been made, including those of Mr. V. which are not different in principle from the others, have been for *prevention* and not for *punishment*—as injunctions to stay injury, as proceedings to keep the peace.[54]

In concluding his reply, Lincoln introduced a new and lawyer-like proposal. He insisted that the attitude of the committee encouraged desertion and resistance to the draft, and promised to release Vallandigham if a majority of the committee would sign and return to him a duplicate of his letter committing themselves to the following propositions:

> 1) That there is now a rebellion in the United States, the object and tendency of which is to destroy the national Union; and that in your opinion, an army and navy are constitutional means for suppressing the rebellion.
>
> 2) That no one of you will do anything which in his own judgment, will tend to hinder the increase, or favor the decrease, or lessen the efficiency of the army or navy, while engaged in the effort to suppress that rebellion; and,
>
> 3) That each of you will, in his own sphere, do all he can to have the officers, soldiers and seamen of the army and navy, while engaged in the effort to suppress the rebellion, paid, fed, clad, and otherwise well provided and supported.[55]

The Ohio committee was prompt in their rejoinder to Lincoln, dating their immediate response in a letter from New York City on July 1, 1863. The committee spurned Lincoln's concluding proposals and asked for the revocation of the order of banishment, not as a favor, but as a right, without sacrifice of their dignity and self-respect. Lincoln did not reply to the rejoinder of the Ohio committee.

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54. 6 Collected Works, *supra* note 3, at 304.

55. *Id.* at 305.

Safe in his retreat in Canada, Vallandigham accepted the nomination for Governor of Ohio by the Democratic State Convention, in an impassioned address by letter "To the Democrats of Ohio." The name of Burnside was "infamous forever in the ears of all lovers of constitutional liberty," and the President was guilty of "outrages upon liberty and the Constitution."[56] Vallandigham's "opinions and convictions as to war," and his faith "as to final results from sound policy and wise statesmanship," were not only "unchanged but confirmed and strengthened."[57]

The Democrats of Ohio carried on a vigorous campaign for the Governorship. The Republicans nominated a former Democrat, John Brough, for Governor. The keynote of the campaign was expressed by the Republican State Convention in the declaration and proposal that "in the present exigencies of the Republic we lay aside personal preferences and prejudices, and henceforth, till the war is ended, will draw no party line but the great line between those who sustain the government and those who rejoice in the triumph of the enemy."

The tone and temper of the Democratic campaign was typically illustrated in an address by George E. Pugh, candidate for Lieutenant Governor, at St. Mary's, Ohio, on August 15, 1863.

THE CRISIS (Columbus, Ohio) for September 16 published the address in full. Pugh paid his compliments to Lincoln in language which outdid Vallandigham:

> Beyond the limits and powers confided to him by the Constitution, he is a mere County court lawyer, and not entitled to any obedience or respect, so help me God [Cheers and cries of 'Good'.] And when he attempts to compel obedience beyond the limits of the Constitution by bayonets and by swords, I say that he is a base and despotic usurper, whom it is your duty to restrict by every possible means if necessary, by force of arms. [Cheers and cries 'That's the talk'.] If I must have a despot, if I must be subject to the will of any one man, for God's sake let him be a man who possesses some great civil or military virtues. Give me a man eminent in council, or eminent in the field, but for God's sake don't give me the miserable mountebank who at present exercises the office of President of the United States.[58]

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56. Vallandigham, *supra* note 51, at 320.
57. *Id.* at 321.
58. Klement, *supra* note 31, at 248.

This extreme language, inspired originally by Vallandigham, no doubt contributed to the result of the election. The total vote in Ohio was more than 476,000. Brough received a majority of 61,752 at home and 40,000 in the armed forces. The Republicans won 29 of the 34 seats in the State Senate and 73 of the 97 in the House.[59]

One more formal effort was made in Vallandigham's behalf. On February 29, 1864, Congressman George H. Pendleton from Ohio offered the following resolution in the House of Representatives and moved the previous question for adoption:

> *Resolved* . . . That the military arrest, without civil warrant, and trial by military commission, without jury, of Clement L. Vallandigham, a citizen of Ohio, not in the land or naval forces of the United States, or the militia in active service, by order of Major General Burnside, and his subsequent banishment by order of the President, executed by military force, were acts of mere arbitrary power, in palpable violation of the Constitution and laws of the United States.[60]

The proposed resolution was killed by a vote of 37 to 35.[61]

VIII. VALLANDIGHAM AND NEW YORK

Vallandigham had visited New York State not long before his arrest in Ohio, and again shortly after returning from Canada. On each occasion he addressed large sympathetic crowds. In March, 1863, before he celebrated his arrest, he had spoken to the Democratic Union Association in New York City, receiving "loud and protracted cheers."[62] He then proceeded to Albany to confer "with leading men of the party on the state of the country."[63] A few weeks later he was arrested at his home in Dayton, Ohio, on General Burnside's orders.

Ending his exile in mid-June, 1864, Vallandigham was soon back on the oratorical platform. The first meeting he addressed outside Ohio was at Syracuse on July 18—"the number in attendance estimated at seventy-five thousand," an improbable estimate as the Syracuse census of 1865 showed a population of 32,000.

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59. *See id.* at 252.
60. Cong. Globe, 38th Cong., 1st Sess., 879 (1864).
61. *See id.*
62. Vallandigham, *supra* note 51, at 236.
63. *Id.* at 237.

IX. The Doctrine of Necessity

The crux of Lincoln's policy was his support of the doctrine of necessity. In his view, the civil courts were powerless to deal with the insurrectionary activities of individuals, saying:

> he who dissuades one man from volunteering, or induces one soldier to desert, weakens the Union cause as much as he who kills a Union soldier in battle. Yet this dissuasion, or inducement, may be so conducted as to be no defined crime of which any civil court would take cognizance.[64]

He knew that as president he had to act.

In his most famous passage on the subject, contained in the Corning Letter, Lincoln stated eloquently:

> 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? This is nonetheless injurious when effected by getting a father, or brother, or friend in a public meeting, and there working upon his feelings until he is persuaded to write the soldier boy that he is fighting in a bad cause, for a wicked administration of a contemptible government, too weak to arrest and punish him if he so deserts. I think that, in such a case, to silence the agitator and save the boy is not only constitutional, but withal a great mercy.[65]

X. Conclusion

What made Lincoln a successful Commander-in-Chief was his constitutional flexibility, that allowed him to bend the text within the framework of his wise, honest, restrained, temperament without breaking it. Lincoln the lawyer-President avoided narrow overemphasis, and understood the difference between distortion for personal aggrandizement and clarification for a higher purpose—that of preserving the greatest legal framework ever devised: the Constitution. Lincoln alternately preached to the American people and ordered arms to fulfill the true destiny of the Union as "the last best hope of earth."[66] He could not have done this if he had not been first a lawyer, and then a president. Rather than limit himself to the role of Commander-in-Chief or Attorney-in-Chief, he used his background to deliver the greatest perform-

64. 4 Collected Works, *supra* note 3, at 264.
65. *Id.* at 266.
66. 6 Collected Works, *supra* note 3, at 537.

ance of his life in the courtroom of world opinion. In the "Epilogue" to his *Fate of Liberty*, Mark E. Neely, Jr., closes by saying:

> If a situation were to arise again in the United States when the writ of *habeas corpus* were suspended, government would probably be as ill-prepared to define the legal situation as it was in 1861. The clearest lesson is that there is no clear lesson in the Civil War—no neat precedents, no ground rules, no map. War and its effect on civil liberties remain a frightening unknown.[67]

President Lincoln both knew, and understood this to be true.

67. Mark E. Neely, Jr., The Fate of Liberty: Abraham Lincoln and Civil Liberties 235 (1991).