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ESSAY

ABRAHAM LINCOLN'S FIRST AMENDMENT

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As we confront the challenges of the "War on Terrorism," it is useful to look back at our own history to understand how in past crises we have struck the balance between liberty and security. In this Essay, Professor Geoffrey Stone considers how Abraham Lincoln dealt with the conflict between free expression and military necessity during the course of the Civil War. Although we tend to think of Lincoln's suspension of habeas corpus as the paramount civil liberties issue in this era (apart from slavery), Professor Stone explores how Lincoln, facing often severe criticism of his administration, struggled to balance free speech rights against the imperiled security of the Union.

INTRODUCTION

To comprehend the free speech issues that arose during the Civil War, it is necessary to have some sense of the extraordinary situation facing Lincoln. Lincoln not only was confronted with the issues that are inevitable in a civil war—such as sharply divided loyalties, fluid and often uncertain military and political boundaries, and easy opportunities for espionage and sabotage—but he also faced special dilemmas arising out of the war between the states. These involved the explosive issues of race, slavery, and emancipation, the nation's first experience with conscription, the challenge of winning reelection, and

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the public uncertainty whether, as Horace Greeley advised, the North should just "let 'the erring sisters' go in peace."¹ Moreover, although opposition to a war was not new to the United States, the limits of permissible dissent were as yet undefined, thus posing added difficulties both for the administration and its critics.

Lincoln's Emancipation Proclamation generated vehement opposition. The antiwar Democrats, or "Copperheads,"² opposed the Proclamation because, in their view, it fundamentally transformed the purpose of the war. The goal was now to destroy the old South rather than to restore the Union. The Copperheads made this the central issue of the 1862 elections. They denounced the Proclamation, declaring that there must be "no more bloodshed to gratify a religious fanaticism."³ A mass meeting of New York Democrats resolved that the war "against the South is illegal . . . and should not be sustained."⁴ Governor Seymour of New York condemned emancipation as "bloody" and "barbarous."⁵ Other Democratic newspapers charged that the Proclamation violated the Constitution and the law of nations, that it would lead to a "dark future," and that it would render "the restoration of the old Constitution and Union impossible."⁶ Many Union soldiers shared this view. As one volunteer wrote to his fiancée: "It is not for the emancipation of the African race I fight. I want nothing to do with the negro. I want them as far from me as is possible to conceive."⁷

The challenge of raising an army also posed a serious obstacle for the administration. The attack on Fort Sumter ignited the North and brought forth a flood of enlistments. But as casualty lists lengthened and the grim realities of combat set in, many states had to resort to

¹ Frank L. Klement, *The Limits of Dissent: Clement L. Vallandigham and the Civil War* 45 (1970) (citing N.Y. Trib., Nov. 9, 1860, at 4).

² The term "Copperhead" was originally coined as an epithet to liken the Democrats to the venomous snake. After several years, the Democrats proudly accepted the label and began wearing badges that resembled copper pennies. See James M. McPherson, *Battle Cry of Freedom: The Civil War Era* 494 n.8 (1988); Charles H. Coleman, *The Use of the Term "Copperhead" During the Civil War*, 25 *Miss. Valley Hist. Rev.* 263 (1938); Albert Matthews, *Origin of Butternut and Copperhead*, reprinted in 20 *The Publications of the Colonial Society of Massachusetts* 205 (1918).

³ Klement, *supra* note 1, at 106-07.

⁴ Wood Gray, *The Hidden Civil War: The Story of the Copperheads* 146-47 (1974); McPherson, *supra* note 2, at 592.

⁵ Governor Horatio Seymour, *Annual Message to the Legislature* (1863), in 5 *Messages from the Governors* 445, 482 (Charles Z. Lincoln ed., 1909), cited in William B. Hesseltine, *Lincoln and the War Governors* 284 (1948); see also McPherson, *supra* note 2, at 595.

⁶ David H. Donald, *Lincoln* 380 (1995) (quoting *Spirit of the Press*, N.Y. Evening Express, Sept. 23, 1862).

⁷ J. Matthew Gallman, *The North Fights the Civil War: The Home Front* 128 (1994).

conscription to meet their quotas.⁸ This often triggered violent resistance. Mobs murdered two enrollment officers in Indiana, and the Army had to send troops into Pennsylvania, Wisconsin, Ohio, and Indiana to restore order.⁹ On September 24, 1862, Lincoln issued a proclamation suspending the writ of habeas corpus and declaring martial law in all of these areas for "all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice . . . affording aid and comfort to Rebels."¹⁰ Secretary of War Stanton arrested and imprisoned hundreds of alleged draft resisters without the benefit of trial. Protest groups marched under banners declaring, "We won't fight to free the nigger."¹¹

The Democratic Party grew stronger with each Confederate victory, and the adoption of an unprecedented national conscription law on March 3, 1863 gave the antiwar movement further impetus.¹² Democratic newspapers proclaimed that the draft would force white working men to fight for the freedom of blacks who would come north and take away their jobs.¹³ The government's often heavy-handed efforts to enforce conscription offended many citizens. Provosts-martial, charged with carrying out the draft, conducted house-to-house searches, sentenced drafted boys who failed to report for induction as "deserters," and used troops to break up anti-draft demonstrations.¹⁴

These factors combined to ignite even more violent protests in the hot summer of 1863. Mobs killed several enrollment officers, and anti-draft, anti-black violence erupted in many Northern cities, including Boston and Newark.¹⁵ In July, four days of draft rioting in New York City left 105 people dead.¹⁶ Led by Irish immigrants, it was the worst riot in American history. A black orphanage was burned to the

⁸ McPherson, *supra* note 2, at 490-93.

⁹ *Id.* at 493.

¹⁰ Abraham Lincoln, Proclamation Suspending the Writ of Habeas Corpus (Sept. 24, 1862), [hereinafter Lincoln, Proclamation], in 5 *The Collected Works of Abraham Lincoln* 436, 437 (Roy P. Basler ed., 1953).

¹¹ Robert E. Sterling, *Civil War Draft Resistance in the Middle West* 96-97 (1975) (unpublished Ph.D. dissertation, Northern Illinois University), cited in McPherson, *supra* note 2, at 493.

¹² Alexis de Tocqueville had predicted that the United States would never use conscription: "In America conscription is unknown and men are induced to enlist by bounties. The notions and habits of the people . . . are so opposed to compulsory recruiting that I do not think it can ever be sanctioned by the laws." Alexis de Tocqueville, 1 *Democracy in America* 228 (Phillips Bradley ed., Vintage Books 1990) (1834); see also McPherson, *supra* note 2, at 605.

¹³ McPherson, *supra* note 2, at 609.

¹⁴ Shelby Foote, *A Civil War Narrative* 635 (1963).

¹⁵ McPherson, *supra* note 2, at 609-10; see generally Adrian Cook, *The Armies of the Streets: The New York City Draft Riots of 1863* (1974).

¹⁶ Cook, *supra* note 15, at 193-94; McPherson, *supra* note 2, at 609-10.

ground, black homes were destroyed, and blacks were beaten and lynched on lampposts.¹⁷

To add to these problems, General Meade's failure at Gettysburg to follow up on his victory by cutting off and destroying Lee's retreating army left Lincoln despondent. As Lincoln wrote Meade: "I do not believe you appreciate the magnitude of the misfortune involved in Lee's escape. He was within your easy grasp, and to have closed upon him would . . . have ended the war. As it is, the war will be prolonged indefinitely." Lincoln's recognition that he had failed to win the war on the field heightened his "fear that . . . he might [soon] lose it on the home front."¹⁸ This concern was by no means unfounded.¹⁹

Lincoln told Senator Charles Sumner that he was more worried about "the fire in the rear" (meaning the Democrats) than about "our military chances."²⁰ There were many signs to support this concern. The Republican Governor of Indiana, for example, warned the Secretary of War that the Democratic legislatures of both Indiana and Illinois were threatening to pass resolutions "acknowledging the Southern Confederacy and urging the States of the Northwest to dissolve all constitutional relations with the New England States."²¹ Richard Dana, author of *Two Years Before the Mast*, a founder of the Free Soil Party, and an ardent Republican, wrote from Washington that "the most striking thing is the absence of personal loyalty to the President. It does not exist. He has no admirers, no enthusiastic supporters, none to bet on his head. If a Republican convention were to be held tomorrow, he would not get the vote of a State."²²

It was against this background that Lincoln faced one of the most dramatic confrontations over free speech in our nation's history.

¹⁷ Cook, *supra* note 15, at 77-80, 139-43, 194-96; McPherson, *supra* note 2, at 609-10; see also Gallman, *supra* note 7, at 147-48; Robert S. Harper, *Lincoln and the Press* 270-76 (1951).

The Confederacy initiated conscription a year earlier, in March 1862. This prompted violent protests in the South as well as in the North. Several times during the war, Jefferson Davis declared martial law and suspended the writ of habeas corpus. Protests against martial law were so vehement, however, that the Confederate Congress withdrew from President Davis the authority to suspend the writ of habeas corpus only sixteen months into the war. See McPherson, *supra* note 2, at 428-36.

¹⁸ Foote, *supra* note 14, at 627-28.

¹⁹ See *id.* at 628.

²⁰ *Id.* at 629.

²¹ *Id.*

²² *Id.*

I

CLEMENT VALLANDIGHAM AND GENERAL ORDER NO. 38

In March 1863, Lincoln appointed General Ambrose Burnside Union Commander of the Department of Ohio. Still smarting from his defeat at Fredericksburg and his dismissal as commander of the Army of the Potomac, Burnside was determined that no carelessness on his part would lead to any new disaster.²³ He “soon became concerned about disloyal persons residing within the Union lines who were thought to be giving information and other aid and comfort to the enemy.”²⁴ Burnside was appalled to discover that “newspapers were full of treasonable expressions” and that “large public meetings were held, at which our Government authorities and our gallant soldiers in the field were openly and loudly denounced for their efforts to suppress the rebellion.”²⁵

Although Burnside had no comprehension of the causes of disaffection in this part of the nation,²⁶ he fully appreciated the efficacy of force. Thus, in April, Burnside declared martial law²⁷ and issued General Order No. 38, which announced, among other things, that “[t]he habit of declaring sympathies for the enemy will not be allowed in this Department.”²⁸ In so doing, Burnside established himself as the ulti-

²³ See William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* 64 (1998).

²⁴ *Id.*

²⁵ General Report No. 2: Report of Maj. Gen. Ambrose E. Burnside (Nov. 13, 1865), in *23 The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies*, ser. 1, pt. 1, at 12, 12 (Washington, D.C., Gov't Printing Office, 1889); see Craig D. Tenney, *To Suppress or Not to Suppress: Abraham Lincoln and the Chicago Times*, in *27 Civil War History* 248, 249 (1981) (quoting Burnside's report).

²⁶ Although westerners (during the Civil War the “West” consisted of what we would today consider the Midwest) had enthusiastically supported Lincoln at the outset of the war, they suffered huge losses in the first two years of the conflict, and many had grown disillusioned. The 1863 conscription law promised to have an especially severe effect on western farmers. Moreover, the West had not shared in the general prosperity that the war economy had brought to the Northeast. Perhaps most importantly, few westerners were abolitionists. They did not support the Emancipation Proclamation and feared that emancipation would lead to a heavy migration of freed blacks to the states of the West. See Donald, *supra* note 6, at 417-18.

²⁷ According to Chief Justice Rehnquist:

Whatever the theory of martial law might be, its consequences . . . during the Civil War were quite apparent. Statements critical of the government, whether appearing in the press or made in the course of political oratory, were punished by fine and imprisonment. Homes of suspects could be broken into without warrants. And none of this was in accordance with laws enacted by any legislature or city council. Martial law was the voice of whichever general was in command.

Rehnquist, *supra* note 23, at 73-74.

²⁸ General Order No. 38, Apr. 13, 1863, in *The Trial of Hon. Clement L. Vallandigham by a Military Commission* 7, 7 (Cincinnati, Rickey and Carroll 1863) [hereinafter

mate arbiter of “treasonable expressions.”²⁹ Burnside’s issuance of General Order No. 38 was the impetus for what turned out to be the Civil War’s most celebrated arrest and prosecution for disloyal speech.

A. “Mr. V.”

Clement Vallandigham was one of the most forceful champions of the Copperheads. Tall, young, handsome, and a gifted public speaker, Vallandigham was a strong supporter of popular sovereignty as the best way to preserve the Union. He saw abolitionists as Jacobins who were determined to destroy the comity of the nation’s diverse sections. He thought that abolitionist clergymen should stay out of politics and that politicians should not be in the business of interpreting Christian doctrine.³⁰

A staunch advocate of the Jeffersonian philosophy of a limited federal government, Vallandigham argued that Congress should “not meddle with slavery either in the states where it exists or in the territories.”³¹ He attacked Republicans for their contempt for the Constitution and their advocacy that the cause of abolition rose above the law. Such lawlessness, he stressed, “only bred more lawlessness.”³² After the final meeting of Congress before Lincoln’s inauguration, Vallandigham, then a Congressman from Ohio, wistfully wrote his wife that it had been a day of “tribulation and anguish,” concluding that “[w]hen the secession has taken place, I shall do all in my power first to *restore* the Union, if it be possible; and failing in that, then to mitigate the evils of disruption.”³³

Once war broke upon the nation, Vallandigham scathingly opposed the war, the draft, the military arrest of civilians, suspension of the writ of habeas corpus, and the Emancipation Proclamation. Even though the South had fired the first shot at Fort Sumter, Vallandigham

Vallandigham Trial], quoted and discussed in Michael Kent Curtis, *Free Speech, “The People’s Darling Privilege”: Struggles for Freedom of Expression in American History* 307-08 (2000). A similar order was issued by General Milo Hascall in Indiana. See Curtis, *supra*, at 308-09; Harper, *supra* note 17, at 251-57. Burnside’s order was based on Lincoln’s suspension of the writ of habeas corpus in Missouri in September 1862, when he declared that “during the existing insurrection and as a necessary measure for suppressing the same . . . all persons discouraging volunteer enlistments . . . or guilty of any disloyal practice . . . shall be subject to martial law.” Lincoln, *Proclamation*, *supra* note 10, at 437.

²⁹ Tenney, *supra* note 25, at 249-50.

³⁰ Klement, *supra* note 1, at 18-19.

³¹ *Id.* at 19 (citing *Dayton Daily Empire*, Oct. 30, 1855; Nov. 21, 1855).

³² *Id.*

³³ James L. Vallandigham, *A Life of Clement L. Vallandigham* 144 (Baltimore, Turnbull Bros. 1872) (reproducing letter from Clement L. Vallandigham to Louisa A. Vallandigham, written on December 3, 1860); see also Klement, *supra* note 1, at 48 (quoting from same letter).

blamed Lincoln and the abolitionists for causing the war.³⁴ He argued that “the Southern states could not be forced back into a Union they abhorred.”³⁵ A “true nation,” he explained, “must be built upon good will and trust, not on force, distrust and self-styled superiority.”³⁶ He wrote pessimistically that events had proceeded so far that it may be “too late for anything except *peaceable separation*.”³⁷

Vallandigham was both admired and reviled for his views. The Republican press typically cast him as “disloyal,” “treasonable,” “a friend of Jeff Davis,” “a contemptible traitor,” a “pro-slavery apologist,” a “cold-blooded, mean-spirited coward,” and a “secessionist.”³⁸ He was compared to Benedict Arnold and Aaron Burr.³⁹ Ohio Republicans, with the active assistance of President Lincoln and senior members of his cabinet,⁴⁰ gerrymandered him into defeat in the 1862 congressional elections, but Vallandigham was not about to leave quietly. In a farewell speech to the House on January 14, 1863, he set forth his indictment of the war and his proposals for peace.⁴¹

Vallandigham asserted that he was a better Unionist than the Republicans, who were fighting not for union, but for abolition.⁴² What, he asked, had they accomplished? He replied: “Let the dead at

³⁴ Klement, *supra* note 1, at 63.

³⁵ *Id.* at 67.

³⁶ *Id.*

³⁷ *Id.* at 66. Having described Lincoln’s struggle between upholding civil liberties and maintaining the Union, Klement summarizes Vallandigham’s position:

Vallandigham . . . denied that the Lincoln administration and the government were one and the same. He claimed he was loyal to the government and the Constitution and that every effort of Republicans to confine loyalty to a single pattern, to constrain it to a single formula, was disloyalty to the Constitution and American tradition. He believed the concept of loyalty as conformity a false one and he questioned whether radical Republicans (whom he believed guilty of mockery of the Bill of Rights) had the right to impose their definition of loyalty upon the country.

Id. at 323.

³⁸ See *id.* at 63-67, 94, 109-10, 145.

³⁹ *Id.* at 110. Others who espoused views similar to Vallandigham’s were also subjected to all manner of harassment. See *id.* at 63-67, 94, 109-10, 145. It is important to note that Vallandigham was not “pro-slavery.” Like Senator Stephen Douglas, he opposed slavery. But he did not believe that the national government should attempt to impose that view on those states with a different view.

⁴⁰ President Lincoln, Secretary of War Stanton and Secretary of the Treasury Chase, a former Governor of Ohio, all personally worked to persuade General Robert Schenck to challenge Vallandigham. *Id.* at 102-05. Lincoln told Schenck that “he could do a greater service by sidetracking Vallandigham than by leading a brigade on the battlefield” and assured Schenck of a military promotion. *Id.* at 105.

⁴¹ McPherson, *supra* note 2, at 591-92; see also Klement, *supra* note 1, at chs. 1-6.

⁴² McPherson, *supra* note 2, at 592.

Fredericksburg and Vicksburg answer.”⁴³ The solution, he argued, was to “stop fighting,” to “make an armistice,” and to initiate immediate negotiations for reunion.⁴⁴ He had no use for the objection that peace would preserve slavery. “I see more . . . barbarism and sin . . . in the continuance of this war,” he observed, than in “the sin and barbarism of African slavery.”⁴⁵ He argued that “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.”⁴⁶ The “grand experiment” of war, he maintained, has resulted in the “most bloody failure.”⁴⁷ His prescription for ending the war and healing the nation was to put an end to “the pestilent Abolition Rebellion.”⁴⁸

Although Vallandigham held strong views, he consistently counseled compliance with the law. He argued that “[n]o matter how distasteful constitutions and laws may be, they must be obeyed.”⁴⁹ In one address, Vallandigham predicted that men would not enlist to fight a war for emancipation. “[I]t is easier,” he said, “to die at home.”⁵⁰ He then added: “I beg pardon, but I trust I am not ‘discouraging enlistments.’ If I am, then first arrest Lincoln, [Secretary of War] Stanton, and [General] Halleck,” in whose hands the war is “a most bloody and costly failure”—his implication being that they had done more to “discourage enlistments” than he could ever do.⁵¹

In March 1863, Vallandigham made a speech to the Democratic Union Association in New York during which he denounced the Conscription Act and warned that if the President “failed to heed the wishes of the people, a revolution might visit America.”⁵² The next day, the *New York Times* reported that Vallandigham had advocated resistance to the Conscription Act. Vallandigham immediately wrote a letter to the editor of the *Times* denying that he had “counseled resistance.” Correcting the record, he stated:

⁴³ Clement Laird Vallandigham, *The Great Civil War in America*, Speech in the House of Representatives (Jan. 14, 1863), in 2 *Union Pamphlets of the Civil War, 1861-1865*, at 697, 711 (Frank Freidel ed., 1967), cited in McPherson, *supra* note 2, at 592.

⁴⁴ Vallandigham, *supra* note 43, at 732-34.

⁴⁵ *Id.* at 718-19.

⁴⁶ *Id.* at 719.

⁴⁷ *Id.* at 706.

⁴⁸ Clement Laird Vallandigham, *The State of the Country*, Speech Delivered in Dayton, Ohio (Aug. 2, 1862), in *The Record of Hon. C.L. Vallandigham on Abolition, the Union, and the Civil War* 135, 148 (Cincinnati, J. Walter & Co. 1863).

⁴⁹ *Id.* at 137, quoted in Curtis, *supra* note 28, at 304.

⁵⁰ Foote, *supra* note 14, at 631.

⁵¹ *Id.*

⁵² Klement, *supra* note 1, at 134-35.

I expressly counseled the trial of all questions of law before the judicial courts, and all questions of politics before the commission of the ballot-box. I AM FOR OBEDIENCE TO ALL LAWS—obedience by the people and by the men in power also. I am for a free discussion of all measures and laws whatsoever, as in former times; but FORCIBLE RESISTANCE TO NONE. The ballot-box, and not the cartridge-box, is the instrument of reform and revolution . . .⁵³

B. *The Arrest of Mr. V.*

In April 1863, after the end of his term in Congress, Vallandigham traveled to Columbus for the state Democratic convention. He hoped to receive the nomination for Governor, “but was rejected by party leaders.”⁵⁴ In an effort to advance his languishing candidacy, Vallandigham decided to challenge General Order No. 38. His plan was to have himself arrested and then to ride a favorable tide of public opinion into office.

Thus, on May 1, 1863, Vallandigham addressed a large public gathering in Mount Vernon, Ohio, “where he defended the right of people to assemble at any time to hear the policy of the current administration debated.”⁵⁵ In this speech, Vallandigham described the war as “wicked, cruel, and unnecessary”; charged that the administration could have “honorably terminated” the war “months ago”; depicted the conflict as “a war for the freedom of the blacks and the enslavement of the whites”; characterized General Order No. 38 as a “base usurpation of arbitrary authority”; and argued that “the sooner the people inform the minions of usurped power that they will not submit to such restrictions upon their liberties, the better.”⁵⁶ Vallandigham asserted that his “right to speak and criticize was based upon ‘General Orders, No. 1.,’ The Constitution of the United States.”⁵⁷ He concluded that citizens should use “‘the ballot-box’ to hurl ‘King Lincoln’ from his throne.”⁵⁸ This speech brought rousing cheers from the crowd, many of whom wore copper Liberty-head pennies in their buttonholes.⁵⁹

⁵³ C.L. Vallandigham, Letter to the Editor, N.Y. Times, Mar. 10, 1863, at 1, quoted in Klement, *supra* note 1, at 135.

⁵⁴ Rehnquist, *supra* note 23, at 65; see also Klement, *supra* note 1, at 138-40; McPherson, *supra* note 2, at 596-97.

⁵⁵ Rehnquist, *supra* note 23, at 65.

⁵⁶ Curtis, *supra* note 28, at 310; see also Vallandigham Trial, *supra* note 28, at 11-12. This is not a verbatim transcript of the speech, which does not exist, but the specification of the charge against Vallandigham.

⁵⁷ Klement, *supra* note 1, at 154 (reconstructing Vallandigham’s speech from accounts in *Mount Vernon Democratic Banner* and Vallandigham, *supra* note 43, at 248-59).

⁵⁸ *Id.*

⁵⁹ See Foote, *supra* note 14, at 632.

On May 5, without consulting his superiors, General Burnside ordered Union soldiers to arrest Vollandigham. At 2:30 in the morning they broke down his door, seized him from his bedroom, and carted him off to a prison in Cincinnati. Vollandigham was then brought before a five-member military commission and charged with "[p]ublicly expressing in violation of general orders No. 38, . . . 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."⁶⁰

After a two day trial, at which Vollandigham declined to plead because he denied that the tribunal had any lawful authority over a civilian, the military commission found Vollandigham guilty as charged. The commission was unwilling to put Vollandigham before a firing squad, but it recommended his imprisonment for the duration of the war. Burnside accepted this recommendation.⁶¹ The General designated Fort Warren in Boston Harbor as the place of Vollandigham's incarceration. He explained his actions as follows:

If I were to find a man from the enemy's country distributing in my camps speeches of their public men that tended to demoralize the troops, or to destroy their confidence in the constituted authorities of the government, I would have him tried, and hung if found guilty, and all the rules of modern warfare would sustain me. Why should such speeches from our own public men be allowed? . . . If the people do not approve [the government's] 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 . . . There is no fear of the people losing their liberties; we all know that to be the cry of demagogues, and none but the ignorant will listen to it.⁶²

⁶⁰ *Ex parte Vollandigham*, 28 F. Cas. 874, 875 (C.C.D. Ohio 1863) (No. 16,816). See *Vollandigham*, *supra* note 43, at 254-59, for a vivid account of what was occurring within Vollandigham's house while the armed soldiers attempted to break down the door and execute the arrest.

⁶¹ *McPherson*, *supra* note 2, at 597. One reason the commission did not want to put him before a firing squad was that they did not want to "make him a martyr." *Klement*, *supra* note 1, at 168.

⁶² *Vollandigham*, 28 F. Cas. at 876-77. Chief Justice Rehnquist has neatly described the difficulties inherent in the prosecution of Vollandigham under martial law:

Vollandigham was not only tried by a military commission, rather than a jury, but the charge upon which he was tried was that he violated an order issued by Burnside—an order that forbade the expression of sympathy for the enemy. A [federal] criminal trial in a civil court must be based on a charge that the defendant engaged in conduct prohibited by an Act of Congress. . . . Burnside's

Vallandigham immediately filed a petition for a writ of habeas corpus in the local federal district court, arguing that he had been denied due process of law, the right to be tried on the indictment of a grand jury, the right to a public trial by an impartial jury, the right to confront the witnesses against him, and the right to have compulsory process for witnesses in his behalf, all as guaranteed by the Bill of Rights of the Constitution. Although there was no suspension of the writ of habeas corpus in effect in this area at this time, Judge Humphrey H. Leavitt denied Vallandigham's petition.⁶³

Judge Leavitt reasoned that "[t]he court cannot shut its eyes to the grave fact that war exists, involving the most imminent public danger, and threatening the subversion and destruction of the constitution itself."⁶⁴ "Self-preservation," he added "is a paramount law," and this is "not a time when any one connected with the judicial department" should in any way "embarrass or thwart the executive in his efforts to deliver the country from the dangers which press so heavily upon it." In the face of a rebellion, Leavitt argued, "the president . . . is invested with very high powers," and "in deciding what he may rightfully do" under these powers, "the president is guided solely by his own judgment and discretion, and is only amenable for an abuse of his authority by impeachment."⁶⁵

Turning to the specific circumstances at issue, Judge Leavitt observed that "[a]rtful men, disguising their latent treason under hollow pretensions of devotion to the Union,"⁶⁶ have been "striving to disseminate their pestilent heresies among the masses of the people."⁶⁷ Because the "evil was one of alarming magnitude," General Burnside was reasonable in perceiving "the dangerous consequences of these disloyal efforts" and in resolving, "if possible, to suppress them."⁶⁸ Noting that "there is too much of the pestilential leaven of disloyalty in the community," Judge Leavitt concluded that those who criticize

order had no such pedigree; it was not even based on an order of the President or the Secretary of War. It originated with Ambrose Burnside, the commanding general of the military district of Ohio. . . . Martial law was the voice of whichever general was in command. . . . Members of the armed forces are naturally accustomed to being governed by such orders. But Vallandigham was not a soldier; he was a civilian.

Rehnquist, *supra* note 23, at 68, 74; see also *id.* at 86 (explaining Roman legal maxim, *nulla poena sine lege*, which prohibits any "punishment except pursuant to established law").

⁶³ *Vallandigham*, 28 F. Cas. at 922-24.

⁶⁴ *Id.* at 921.

⁶⁵ *Id.* at 922.

⁶⁶ *Id.* at 923.

⁶⁷ *Id.*

⁶⁸ *Id.*

the government in time of crisis “must learn that they cannot stab its vitals with impunity.”⁶⁹

Although Vallandigham had declined to plead his case to the military commission, he was quick to plead it to the public. From his prison in Cincinnati, he issued a succession of statements declaring, for example, “I am here in a military bastille for no other offense than my political opinions.”⁷⁰ Newspapers across the nation were “quick to champion his basic right to freedom of speech, war or no war.”⁷¹ Vallandigham’s arrest triggered a riot in Dayton, his hometown, where a Democratic mob burned the building occupied by the local Republican newspaper to the ground. Similar mass demonstrations followed in almost every major Northern city.⁷²

The Democratic press was livid. The *Albany Argus* described the arrest as a “crime against the Constitution.”⁷³ The *Detroit Free Press* declared that if speakers may be jailed “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.”⁷⁴

A month after Vallandigham’s arrest, the Ohio Democratic Convention enthusiastically nominated him for Governor.⁷⁵ The Convention adopted a resolution maintaining that “rights guaranteed [sic] to [the People] 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

⁶⁹ Id. at 923-24. The Supreme Court declined to review the merits of the decision of the military commission. See *Ex parte Vallandigham*, 68 U.S. 243 (1863).

⁷⁰ Foote, *supra* note 14, at 633.

⁷¹ Id. For the full text of Vallandigham’s address, see Klement, *supra* note 1, at 163-64.

⁷² See Klement, *supra* note 1, at 160-61, 179-80.

⁷³ Curtis, *supra* note 28, at 320 (quoting *The Arrest of Vallandigham*, *Albany Argus*, May 8, 1863, at 2).

⁷⁴ Id. at 324 (quoting *The Military Discretion*, *Detroit Free Press*, Jun. 10, 1863, at 2).

⁷⁵ Political success awaited others who gained notoriety during the war for being perceived as unjustly imprisoned. Dr. Israel Blanchard, imprisoned after being accused of attending a Copperhead meeting and, while in attendance, making “disloyal remarks,” was elected the following year “as a state senator on the Democratic ticket.” Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* 54-55 (1991). Dr. Edson B. Olds, the “editor of the outspoken Ohio Eagle,” was arrested and imprisoned on the orders of Secretary of War Stanton. After languishing in solitary confinement while Lincoln ignored petitions on his behalf, he was elected to a vacant seat in his home district by “the largest vote ever given to a candidate in Fairfield County.” Olds’s victory “embarrassed the administration, and the secretary of war ordered his quiet release.” Klement, *supra* note 1, at 118-19.

endangered, in war, they are ever in peril.”⁷⁶ Democrats, such as Congressman Daniel Voorhees of Indiana, charged that Lincoln had effectively reintroduced the Sedition Act of 1798⁷⁷ but without even the authority of an act of Congress to support him.⁷⁸

Some Republican officials and newspapers praised General Order No. 38 and Vallandigham's arrest and conviction. The *Cincinnati Commercial*, for example, argued that “Order 38 . . . is not designed to abridge the liberty of the individual, where that liberty is not used to the detriment of the Government.”⁷⁹ The *Chicago Tribune* reasoned that although free speech could be tolerated as a “harmless right” in times of peace, this was not appropriate “in times of war and revolution.”⁸⁰ Ohio Senator John Sherman found it remarkable that a nation in the midst of a great war should concern itself at all with protective procedures for loyal citizens, much less openly disloyal ones.⁸¹

Other Republican voices, however, were critical. The *New York Daily Tribune* noted that “our Federal and State Constitutions do not recognize perverse opinions, nor unpatriotic speeches, as grounds of infliction.”⁸² The *New York Evening Post* described free speech as essential to “popular Government” and declared that “no governments and no authorities are to be held as above criticism.”⁸³ The *Bedford Standard* announced that we must “have faith in the power of

⁷⁶ Curtis, *supra* note 28, at 324 (quoting Vallandigham Nominated for Governor: George E. Pugh's Speech, *Cincinnati Daily Com.*, Jun. 12, 1863, at 2).

⁷⁷ The Sedition Act of 1798 prohibited “false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame [them] . . . or to bring them . . . into contempt or disrepute; or to excite against them . . . the hatred of the good people of the United States.” Sedition Act of 1798, ch. 74, § 2, 1 Stat. 596 (1798) (repealed 1801). On the Sedition Act of 1798, see Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein & Mark V. Tushnet, *Constitutional Law* 997-98 (4th ed. 2001); see also James M. Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* (1956).

⁷⁸ See *History Repeats Itself—Persecution of Democrats Under the Old Sedition Law*, *Detroit Free Press*, Aug. 27, 1863, at 2; Speech of Daniel W. Voorhees (Sept. 15, 1863), in *Cincinnati Daily Com.*, Sept. 17, 1863, at 1; see also Curtis, *supra* note 28, at 325-26 (quoting speech and citing article).

⁷⁹ Curtis, *supra* note 28, at 319 (quoting Order Thirty-Eight, *Cincinnati Daily Com.*, May 15, 1863, at 2).

⁸⁰ *Id.* at 334 (quoting Military and Civil Law, *Chi. Trib.*, Jun. 12, 1863, at 2).

⁸¹ Harold M. Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* 262 (1973).

⁸² Vallandigham, *N.Y. Daily Trib.*, May 15, 1863, at 4, quoted in Curtis, *supra* note 28, at 327.

⁸³ *The Voice of Reason*, *Daily Nat'l Intelligencer*, May 16, 1863, at 3 (reproducing column by *New York Evening Post*, which praised Burnside's actions as being “patriotic in spirit” but called them “wrong” and fraught with “dangerous fallacies”); see also Curtis, *supra* note 28, at 326 (quoting article).

truth, and oppose those we believe to be in error with the weapon of truth.”⁸⁴ Even some Republican officials were critical. Senator Trumbull of Illinois, for example, condemned Burnside’s action because “we are fighting for the . . . preservation of the Constitution, and all the liberties it guarantees to every citizen.”⁸⁵

C. *The Chicago Times*

In June 1863, a month after Vallandigham’s conviction, General Burnside ordered Union soldiers to close the *Chicago Times*, which had sharply criticized the Lincoln administration, the conduct of the war, the Emancipation Proclamation and the arrest of Vallandigham.⁸⁶ The *Times* had denounced emancipation as a “monstrous usurpation” and “an act of national suicide”⁸⁷; asserted that “soldier’s lives” were being “sacrificed without cause”⁸⁸; editorialized that “Negroes were destined to be ‘mere hewers of wood and drawers of water to a superior and dominant race’”⁸⁹; characterized Vallandigham’s arrest as “the funeral of civil liberty”⁹⁰; and declared that Union soldiers were “indignant at the imbecility that has devoted them to slaughter for purposes with which they have no sympathy.”⁹¹ A week after Burnside assumed command of the Department of Ohio, the *Times* published a purported letter to the editor from a Union soldier at the front:

All the privations of a soldier’s life could be easily borne—the long, weary march through mud and rain, dust and heat—the blistered feet and aching bones—with no provision other than hard bread [and] no resting place but the damp earth, full of fevers, pain, and

⁸⁴ Curtis, *supra* note 28, at 327 (quoting From the Bedford (Rep.) Standard, Detroit Free Press, May 27, 1863, at 2).

⁸⁵ Curtis, *supra* note 28, at 329 (quoting Senator Trumbull’s Chicago Speech, Cincinnati Daily Com., Jun. 11, 1863, at 2).

⁸⁶ See Tenney, *supra* note 25, at 251.

⁸⁷ *Id.* at 252 (quoting Chi. Times, Sept. 23, 1862, at 2).

⁸⁸ Harper, *supra* note 17, at 258.

⁸⁹ Tenney, *supra* note 25, at 251 (citing Chi. Times, Sept. 13, 1862, at 2). Referring to the idea of colonization, the *Chicago Times* stated that “Negroes lacked ‘manhood to govern and energy to work.’” *Id.* The *Times* also leveled sharp political critiques at the administration. In an editorial in May 1863, for example, it “likened the situation to the period of the Alien and Sedition Acts, with the American public discovering that ‘however disreputable and contemptible [the administration’s] measures, our people might be imprisoned or banished for truly, candidly and intelligently discussing them.’” *Id.* at 252-53 (citing Chi. Times, May 30, 1863, at 2); cf. Speech of Daniel W. Voorhees, *supra* note 78 (comparing Lincoln’s maneuvers to Sedition Act while proclaiming that “the black man must be subject to the white man (us)” because “[h]e was born with no such capacity” to build cities and machines or develop natural resources).

⁹⁰ Tenney, *supra* note 25, at 252 (citing Chi. Times, May 27, 1863, at 2).

⁹¹ *Id.* at 251 (citing Chi. Times, Apr. 13, 1863, at 2).

death . . . were it the precursor of resuming peace and the restoration of our old Union. But alas! the great bulk of the northern army have been most grossly deceived. . . . I now know that it was only a trap by which to get an immense army of patriotic men, who, once in the clutch of an abolition administration, would be used by it, against their will, to carry on an abolition crusade against the South. . . . Each day sheds new light upon the darkness of the plot.⁹²

As one commentator has sardonically observed, the *Times's* war coverage and editorial policies were hardly "calculated to encourage a rush on enlistment offices."⁹³ The Republican governors of Illinois and Indiana both complained to Secretary of War Stanton about the *Chicago Times* on the ground that it was doing "incalculable injury" to the Union cause, and General Burnside explained that his order to suppress the *Chicago Times* was "on account of the repeated expression of disloyal and incendiary sentiments."⁹⁴

Upon learning of Burnside's order, Wilbur F. Storey, the forty-year-old publisher and editor of the *Times*, who was viewed by Republicans as the "very ogre of Copperheadism,"⁹⁵ sought relief from Federal Judge Thomas Drummond, who issued a temporary restraining order prohibiting Burnside from taking any action against the *Chicago Times* until a full hearing could be held on the matter.⁹⁶ The judge observed that this is "a government of law and a government of the Constitution, and not a government of mere physical force."⁹⁷

The next morning, in direct disregard of Judge Drummond's order, General Burnside ordered his troops to seize and close the office of the *Chicago Times*.⁹⁸ Burnside justified this action on the ground that "freedom of discussion and criticism, which is proper . . . in time of peace, becomes rank treason when it tends to weaken" confidence in the government in time of war.⁹⁹ Once again, there were public protests, sharp criticism from the press, and angry demands that the Lincoln administration rescind the order closing the *Chicago Times*. A noon meeting of prominent Chicagoans, presided over by the

⁹² Id. (citing Chi. Times, Mar. 31, 1863, at 1). It is not clear whether such letters were genuine or invented by the editors. See id.

⁹³ Id.

⁹⁴ General Order No. 84 (June 1, 1863), in 23 *The War of the Rebellion*, supra note 25, ser. 1, pt. 2, at 381, 381; see also Tenney, supra note 25, at 253 (quoting General Order 84).

⁹⁵ Frank L. Mott, *American Journalism, a History: 1690-1960*, at 357 (3d ed. 1962), quoted in Harper, supra note 17, at 257.

⁹⁶ See Curtis, supra note 28, at 315.

⁹⁷ Id. (quoting Chicago Times Demonstration, Cincinnati Daily Com., Jun. 4, 1863, at 3).

⁹⁸ Curtis, supra note 28, at 315.

⁹⁹ Id.

mayor, voted unanimously that the President should revoke the suspension. Later that evening a crowd of 20,000, including many Republicans, gathered to protest Burnside's conduct and to celebrate the news that the Illinois legislature had denounced the General for his conduct.¹⁰⁰

II

ABRAHAM LINCOLN AND HIS CRITICS

Lincoln was embarrassed by Burnside's arrest of Vallandigham. The former Ohio congressman was not the type of agitator Lincoln expected the military to arrest. Throughout the conflict Lincoln's internal security policy was aimed primarily at deserters, draft dodgers, bridge-burners, and others who gave concrete aid to the secessionists. Vallandigham, however, was a Democratic Party leader who had been arrested for a political speech.¹⁰¹

Although Lincoln was disturbed by Burnside's action, he concluded that he would do more harm by repudiating Burnside than by upholding his action. Thus, upon learning of Vallandigham's arrest and conviction, Lincoln, who tended to defer to his generals, wired Burnside that he could count on the administration's support.¹⁰² In an effort to minimize the political consequences, however, Lincoln ordered Burnside to commute Vallandigham's sentence from imprisonment to banishment to the Confederacy.¹⁰³ Lincoln explained that the purpose of "the original sentence of imprisonment . . . was to prevent

¹⁰⁰ Foote, *supra* note 14, at 634.

¹⁰¹ Gideon Welles, Lincoln's Secretary of the Navy, declared that Vallandigham's imprisonment "was an error on the part of Burnside," while members of Lincoln's cabinet doubted that the arrest was necessary and questioned the legitimacy of trying him before a military commission. Gideon Welles, 1 *Diary of Gideon Welles* 306 (1911); see also Donald, *supra* note 6, at 420; Neely, *supra* note 75, at 67; Rehnquist, *supra* note 23, at 73 ("The argument for detaining someone like John Merryman, who had helped to burn the railroad bridges that would bring troops through Baltimore to Washington, was much stronger than that for arresting and trying Vallandigham, who had simply expressed views strongly critical of the administration.").

¹⁰² Lincoln wrote Burnside, "All the cabinet regretted the necessity of arresting . . . Vallandigham, some perhaps, doubting, that there was a real necessity for it — but being done, all were for seeing you through with it." Letter from Abraham Lincoln to Ambrose E. Burnside (May 29, 1863), in *Abraham Lincoln, Speeches and Writings, 1859-1865*, at 451, 451 (Don E. Fehrenbacher ed. 1989) [hereinafter *Speeches and Writings*]. The cabinet took up the Vallandigham matter at its meeting on May 19, 1863. The general view was that Burnside's action "had been a mistake," but that now that it had been done "there was no way to back down." Rehnquist, *supra* note 23, at 67.

¹⁰³ See McPherson, *supra* note 2, at 597. General Burnside protested this decision. He argued that the military commission had fully discussed the option of banishment and decided against it. Moreover, he argued that a change in the sentence would imply a criticism of the "validity of the military commission." Lincoln rejected this plea. Klement, *supra* note 1, at 177-78.

[future] injury to the Military service," rather than to punish Vallandigham, and that "the modification of [the order] . . . was made as a less disagreeable mode to him, of securing the same prevention."¹⁰⁴

The President's commutation of Vallandigham's sentence did not defuse the situation. This matter arose at a low point in the war for the North. The Union had just suffered a devastating defeat at Chancellorsville, and the public's confidence in the administration was dwindling. As gloom settled over Washington, Democratic editors launched a "blistering attack upon Burnside and Lincoln."¹⁰⁵ The *Iowa City State Press* praised Vallandigham's nobility; the *Ashland Union* predicted a dictatorship; and the *Crisis* characterized Lincoln's decision as a "great blunder."¹⁰⁶ Other Democratic editors used such phrases as "Caesar," "usurper," "demagogue," "tyrant," and "dictator" to describe the President.¹⁰⁷ The *Dubuque Herald* declared that "a crime has been committed against . . . the right to think, to speak, to live," and the *Detroit Free Press* complained that "Vallandigham was arrested for no crime known to law." At a huge rally in New York, one speaker proclaimed that if Lincoln did not reverse Vallandigham's arrest "free speech dies, and with it our liberty, the constitution and our country." Another speaker reminded Lincoln that his own denunciation of President Polk during the Mexican War was at least as strong as Vallandigham's criticism of him.¹⁰⁸

The Republican press continued to chime in as well. *The New York Independent* criticized the administration's "great mistake"; the

¹⁰⁴ Letter from Abraham Lincoln to the Ohio Democratic Convention (June 29, 1863), in *Speeches and Writings*, supra note 102, at 465, 468. Shortly after modifying Vallandigham's "sentence" from imprisonment to banishment, Lincoln offered even to cancel Vallandigham's exile. There was, however, a catch. In response to a petition from the Ohio Democratic Convention asking him to reverse Vallandigham's conviction on the ground that it violated the Constitution, a proposition Lincoln firmly rejected, Lincoln proposed a deal. He implied in terms that could not be misunderstood, that the authors of the petition might themselves be guilty of encouraging "desertion, resistance to the draft and the like" because of their nomination of Vallandigham as the Democratic candidate for Governor—an implication, in the circumstances, not to be taken lightly. Lincoln then proposed, no doubt with some considerable sarcasm, that if they would sign their own petition and return it to him, "with the understanding that those signing are thereby [publicly] committed [not to] . . . do any thing . . . to hinder the increase, or favor the decrease, or lessen the efficiency of the army or navy, while engaged in the effort to suppress the rebellion," he would revoke "the order in relation to Mr. V." *Id.* at 469-70.

¹⁰⁵ Klement, supra note 1, at 178.

¹⁰⁶ *Id.* (citing various publications).

¹⁰⁷ *Id.* at 178-79.

¹⁰⁸ Donald, supra note 6, at 420. In 1847 and 1848, Lincoln was one of the most vehement critics of the Mexican War, challenging President Polk to prove that it was Mexico rather than the United States that initiated the conflict. See *id.* at 122-28.

Anti-Slavery Standard chastised the government for its “blunder”; and the *New York Sun* observed that although “the Union can survive the assaults” of the South, “it cannot long exist without free speech and free press.”¹⁰⁹

A. *The Albany Resolves*

Democrats held protest meetings in almost every Northern city to denounce the President’s action. Among these many meetings, the most important was held in Albany on May 16, 1863. The leaders of this rally demanded to know whether the Civil War was being waged to restore the Union or “to destroy free institutions” in the North. At the end of the meeting, the leaders adopted ten resolutions against the Lincoln administration, known as the “Albany Resolves.” These resolutions insisted that the nation and its President honor and protect the liberties of citizens; assailed the military’s arbitrary arrests of citizens and its use of military commissions to try civilians; and maintained that Vallandigham had been unlawfully convicted and exiled “for no other reason than words addressed to a public meeting.”¹¹⁰ On May 19, after the Albany Resolves had been ratified by the entire meeting, the presiding officer, Erastus Corning, sent them to Lincoln with a request that he give his “earnest consideration” to the resolutions.¹¹¹

The Albany Resolves gave Lincoln an opportunity to explain his position to the public. He prepared a lengthy and carefully crafted reply that was intended as a state paper for broad dissemination. Lincoln’s goal was “to check the rising tide of public indignation caused by Vallandigham’s arrest, trial, and exile.”¹¹² Lincoln’s reply merits careful attention because it provides rare insight into Lincoln’s views on the freedom of speech.

After crediting the authors of the resolutions with being “eminently patriotic” in their “censure” of the actions of his administration, he contested the assertion that the arrest, conviction, and banishment of Vallandigham was unconstitutional:

It is asserted . . . 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

¹⁰⁹ See Klement, *supra* note 1, at 181 (citing sources as quoted in *Crisis*, May 27, 1863).

¹¹⁰ *Id.*; see also Harper, *supra* note 17, at 246.

¹¹¹ Klement, *supra* note 1, at 181; see also Harper, *supra* note 17, at 247.

¹¹² Klement, *supra* note 1, at 182.

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. He was not arrested because he was damaging the political prospects of the Administration, or the personal interests of the Commanding General, but because he was damaging the Army, upon the existence and vigor of which the life of the Nation depends. He was warring upon the Military, and this gave the Military constitutional jurisdiction to lay hands upon him. If Mr. Vallandigham was not damaging the military power of the country, then his arrest was made on mistake of fact, which I would be glad to correct on reasonably satisfactory evidence.

. . . Long experience has shown 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? This is none the less injurious when effected by getting a father, or brother, or friend, into a public meeting, and there working upon his feeling till 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 shall desert. I think that in such a case to silence the agitator, and save the boy is not only constitutional, but withal a great mercy.¹¹³

Lincoln then turned to two key questions: How should the Constitution apply in wartime? What about the concern that once we compromise our liberties in wartime, we will lose them forever?

[T]he Constitution is not, in its application, in all respects the same, in cases of rebellion or invasion involving the public safety, as it is in time of profound peace and public security. The Constitution itself makes the distinction [in the habeas corpus provision]; and 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. Nor am I able to appreciate the danger apprehended by [those who drafted the Albany Resolves that] the American people will, by means of military arrests during the Rebellion, lose the right of Pub-

¹¹³ Letter from Abraham Lincoln to Erastus Corning and Others (June 12, 1863), in *Speeches and Writings*, supra note 102, at 454, 459-60. Lincoln added in passing that, "I do not know whether I would have ordered the arrest of Mr. Vallandigham," but nonetheless he believed that "the commander in the field is the better judge of the necessity in any particular case." *Id.* at 462.

lic Discussion, the Liberty of Speech and the Press, . . . throughout the indefinite peaceful future, which I trust lies before them, any more than I am able to 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.¹¹⁴

B. The Ohio Resolves

At almost exactly the moment Lincoln was circulating his reply to Erastus Corning, Ohio Democrats were meeting in Columbus to nominate a candidate for Governor. Their overwhelming choice was Clement Vallandigham, who was still, of course, in exile. The delegates also approved twenty-three resolutions, which, for example, proclaimed that free government is endangered by military decrees; challenged the legality of the Emancipation Proclamation and the suspensions of the writ of habeas corpus; and condemned the conviction and banishment of Vallandigham and demanded his release from exile. On June 22, the Ohio Democrats agreed that a delegation consisting of nineteen members, representing each of the state's nineteen congressional districts, should travel to Washington to present these resolutions to the President. On June 25, Judge Mathias Birchard, the chairman of the delegation, handed the resolutions to Lincoln in a brief meeting at the White House.

On June 29, Lincoln published his reply. Although this message covered much of the same terrain as his June 12 response to the Albany Resolves, it elaborated his view of the Vallandigham situation:

You claim . . . that according to my own position in the Albany response, Mr. V. should be released; and this because, as you claim, he has not damaged the military service, by discouraging enlistments, encouraging desertions, or otherwise . . . 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. We all know that combinations, armed in some instances, to resist the arrest of deserters, began several months ago . . . These had to be met by military force, and this . . . has led to bloodshed and death. And now, under a sense of responsibility more weighty and enduring than any which is merely official, I solemnly declare my belief that this hindrance, of the military, including maiming and murder, is due to the course in which Mr. V. has been engaged, in a greater degree than . . . to any other one man. These things have been . . . known to all, and of course known to Mr. V. . . . When it is known that the whole burthen of his speeches has been to stir up men against the prosecution [sic] of the war, and

¹¹⁴ Id. at 460-61.

that in the midst of resistance to it, he has not been known, in any instance, to counsel against such resistance, it is next to impossible to repel the inference that he has counseled directly in favor of it.¹¹⁵

III

ABRAHAM LINCOLN AND THE FIRST AMENDMENT

After reading these letters, almost every lawyer will ask: What standard would Lincoln apply for the suppression of speech in wartime? Lincoln clearly endorses the proposition that the Constitution governs in times of war as well as in times of peace, but he also embraces the view that the Constitution may be different in "application" in these different circumstances. He derives this largely from the habeas corpus provision of the Constitution, which allows the writ to be suspended in time of "Rebellion or Invasion."¹¹⁶ Because he is concerned exclusively in these letters with the limits of dissent in wartime, we cannot infer anything definitive about his view of this issue in peacetime.

A careful reading of these letters, however, suggests several significant propositions about free speech in wartime. First, at least in wartime, Lincoln clearly does not accept the *literalist* position that "Congress shall make no law . . . abridging the freedom of speech, or of the press."¹¹⁷ If he had accepted this understanding of the First Amendment, he necessarily would have overturned Vallandigham's conviction.

Second, Lincoln emphasizes that had Vallandigham been convicted "for no other reason than words addressed to a public meeting, in criticism of the course of the Administration," then "I concede that

¹¹⁵ Abraham Lincoln, Reply to the Ohio Democratic Convention (June 29, 1863), in *Speeches and Writings*, supra note 102, at 465, 468-69. Lincoln then turned his sights directly on the Ohio Democrats. In effect, he asserted that by nominating Vallandigham as their candidate for Governor, "your own attitude . . . encourages desertion, resistance to the draft and the like, because it teaches those who incline to desert, and to escape the draft, to believe it is your purpose to protect them." To rebut this inference, he invited them to declare that use of military force to suppress the rebellion is constitutional and that they will do everything in their power to support the military forces of the Union. He promised that if they were to make such a declaration, he would lift Vallandigham's sentence of exile. *Id.* at 469-70.

Judge Birchard responded to this part of Lincoln's reply, "expressing surprise that the president impugned the loyalty of those who did not agree with him or who opposed administration measures," and arguing that Vallandigham "was entitled to his rights—they were not a favor held in the hands of the president." Letter from Matthew Birchard et al. to Abraham Lincoln (July 1, 1863) (on file with the Abraham Lincoln Papers, Library of Congress), http://memory.loc.gov/cgi-bin/query/P?mal:10:/temp/~ammem_3oUD::; see Klement, supra note 1, at 189 (quoting letter).

¹¹⁶ U.S. Const. art. I, § 9, cl. 2.

¹¹⁷ U.S. Const. amend. I.

the arrest was wrong.”¹¹⁸ This is an important concession. It states unequivocally that, even in wartime, the government cannot constitutionally punish a speaker for criticizing the policies, programs, or actions of the government, regardless of their potential to interfere with the activities of the military.

Third, Lincoln asserts that this was not the situation presented in Vallandigham’s case, for “the arrest, as I understand, was made for a very different reason.”¹¹⁹ Vallandigham was arrested “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.”¹²⁰ This is a complicated sentence. A critical ambiguity is whether “*laboring*” implies that Vallandigham was *expressly advocating* desertion and refusal of induction, or whether it implies only that he was *intending* to cause such results.¹²¹

There is no definitive way to answer this question from the text of the June 12 letter, but there is good reason to believe that at the time Lincoln wrote his reply to Erastus Corning he believed that Vallandigham had expressly advocated unlawful conduct. Such expression was not uncommon among the more rabid Democrats during the war, and Lincoln was sufficiently concerned with Vallandigham to help engineer his defeat in the 1862 congressional election.¹²² Moreover, two months earlier, in March 1863, the *New York Times* had inaccurately reported that Vallandigham had counseled resistance to the Conscription Act. It was this article in the *Times* that led to Vallandigham’s angry letter to the editor correcting the report and re-affirming that he was “for obedience to all laws” and for “forcible resistance to none.”¹²³ Lincoln was apparently aware of the *Times* article that inaccurately reported Vallandigham’s New York speech, and it presumably shaped his assumptions about Vallandigham’s later speech in Ohio.¹²⁴

¹¹⁸ Letter from Abraham Lincoln to Erastus Corning and Others, *supra* note 113, at 459-60. See *supra* text accompanying note 113 for the letter quoted at length.

¹¹⁹ *Id.*

¹²⁰ *Id.* (emphasis added).

¹²¹ This turns out to be an important distinction in the evolution of First Amendment jurisprudence. See Stone et al., *supra* note 77, at 1005-44.

¹²² See *supra* notes 39-40 and accompanying text.

¹²³ *N.Y. Times*, Mar. 10, 1863, at 1, quoted in Klement, *supra* note 1, at 135; see *supra* note 53 and accompanying text.

¹²⁴ See Klement, *supra* note 1, at 135, 175. In fact, express advocacy of law violation would have been completely inconsistent with Vallandigham’s long record as a public speaker, and the most credible witness to the Ohio speech, Congressman S.S. Cox, testified before the military commission that Vallandigham “had not counseled resistance to the laws.” See Rehnquist, *supra* note 23, at 66.

Fourth, another significant ambiguity in Lincoln's statement—that Vallandigham had been arrested "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"¹²⁵—concerns the phrase "with some effect." Is it essential, in Lincoln's view, that the speech have "some effect" in order to justify its suppression? If so, how much effect? In the June 12 letter to Erastus Corning, Lincoln did not elaborate on this. But in his June 29 letter to the Ohio Democrats, he emphasized his belief that "hindrance of the military, including maiming and murder, is due" more to the speeches of "Mr. V." than to "any other one man."¹²⁶ This is a powerful condemnation (whether warranted or not) and suggests that the banishment of Vallandigham was justified in Lincoln's mind in no small part because of what he perceived to be its demonstrably dangerous "effect."

Fifth, a critical, if unstated, assumption of Lincoln's June 12 message is that Vallandigham could not constitutionally be exiled, even in wartime, if he did not *intend* to precipitate unlawful conduct. This assumption follows both from Lincoln's use of the word "laboring" and from his assurance that Vallandigham's conviction would have been "wrong" if it was "for no other reason than words addressed to a public meeting, in criticism of the course of the Administration." Had Vallandigham merely been negligent in condemning the war in circumstances where members of the audience might be demoralized, he could not be accused of "laboring" to bring about this effect.

Sixth, Lincoln seems clearly taken aback by the claim by the Ohio Democrats that, according to his "own position in the Albany response, Mr. V. should be released."¹²⁷ Their argument is that Vallandigham had not discouraged enlistments or encouraged desertion, as Lincoln had assumed in his June 12 message. To this Lincoln defensively concedes that "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."¹²⁸ If Lincoln thought that express advocacy of law violation was essential to the suppression of Vallandigham's speech, he either would have conceded that the conviction was "wrong" or sought additional facts. That he

¹²⁵ Letter from Abraham Lincoln to Erastus Corning and others, *supra* note 113, at 459-60 (emphasis added).

¹²⁶ Lincoln, Reply to the Ohio Democratic Convention, *supra* note 115, at 468-69; see *supra* text accompanying note 115 for Lincoln's Reply quoted at length.

¹²⁷ *Id.*

¹²⁸ *Id.*

did neither makes clear that he did not think express advocacy necessary.

That still leaves Lincoln with the problem of finding *intent*. And that is precisely where he turns next. Lincoln argues not only that Vallandigham's speeches were more harmful than those of "any other one man," but also that the harm caused by his speeches was "of course known to Mr. V."¹²⁹ Thus, Lincoln relies upon circumstantial evidence to justify his characterization of Vallandigham's intent:

When it is known that the whole burthen of his speech has been to stir up men against the prosecution of the war, and that in the midst of resistance to it, he has not been known, in any instance, to counsel against such resistance, it is next to impossible to repel the inference that he has counseled directly in favor of it.¹³⁰

Lincoln does not contend that Vallandigham is guilty merely because he should have known that one effect of his expression might have been to foster discontent and possibly cause desertion and refusal of induction. To the contrary, Lincoln seems to understand that such a position would be incompatible with his view that Vallandigham could not be punished "for no other reason than words addressed to a public meeting, in criticism of the course of the Administration."¹³¹ As Lincoln appears to recognize, *any* such criticism will inevitably contribute to discontent and therefore some possible desertion and refusal of duty.¹³²

To escape this dilemma, Lincoln finds a middle ground. He argues that Vallandigham can justly be held responsible, not because his speech criticized the administration, but because, knowing the danger he created, he did not "counsel against" unlawful resistance to the

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Letter from Abraham Lincoln to Erastus Corning and others, *supra* note 113, at 459-60.

¹³² Lincoln is thus more advanced in his thinking about the dynamics of free speech than most of the federal courts that interpreted the First Amendment during World War I. See Geoffrey R. Stone, *The Origins of the Bad Tendency Test: Free Speech in Wartime*, 2002 Sup. Ct. Rev. (forthcoming). For example, in *Debs v. United States*, 249 U.S. 211 (1919), the popular Socialist leader Eugene V. Debs was convicted under the Espionage Act for giving an antiwar speech at a rally in Canton, Ohio. Writing for a majority of the Court, Justice Holmes upheld the conviction and ten-year sentence, reasoning that, in context, the speech had the "natural tendency and reasonably probable effect" to obstruct recruiting. *Id.* at 216. In a strange parallel to Vallandigham who ran for Governor of Ohio from exile, see *infra* note 145 and accompanying text, Debs ran for President from prison, garnering over 900,000 votes in the 1920 election. He was pardoned in 1921 by President Harding. For information on Debs's life, see generally the Official Site of the Eugene V. Debs Foundation, at <http://www.eugenevdebs.com/> (last visited Mar. 3, 2003). For the text of Debs's Canton Speech, go to Great American Speeches, at <http://www.pbs.org/greatspeeches/timeline/#1910> (last visited Mar. 3, 2003).

law. In effect, following Lincoln's reasoning, a speaker like Vallandigham could, in theory, both criticize the government *and* mitigate the danger that his speech might be misconstrued by expressly discouraging unlawful conduct. This is an interesting argument, but it surely has no fair application to "Mr. V.," who consistently counseled against such resistance,¹³³ a fact of which the President presumably was unaware.

Finally, there is Lincoln's famous hypothetical about the "simple-minded soldier boy."¹³⁴ This example has been praised as a "stroke of genius" because it seemed rhetorically unanswerable.¹³⁵ How, after all, could the President justify shooting a "simple-minded soldier boy" for deserting while not touching "a hair of a wily agitator who induces him to desert"? In such a case, Lincoln maintained, "to silence the agitator, and save the boy is not only constitutional, but withal a great mercy."

If one wants to quarrel with Lincoln's reasoning in this instance, there is plenty of opportunity to do so. If the soldier boy is truly "simple-minded," perhaps the government should not execute him for desertion.¹³⁶ That would be a "great mercy" *without* sacrificing anyone's right to criticize the government. Moreover, to restrict freedom of expression because of the possible reactions of the most susceptible members of the audience runs the risk, as Justice Frankfurter once observed, of reducing "the adult population . . . to reading only what is fit for children."¹³⁷

Whatever the arguable deficiencies of Lincoln's analysis in these messages, they demonstrate a serious effort to think through hard First Amendment questions at a level of detail and with a degree of scrutiny that was unprecedented at this time. Although the debates over the Sedition Act of 1798 were often stunningly eloquent and deeply insightful, they rarely approached this level of analytic rigor. These letters show Lincoln not only as a brilliant politician and rhetorician but as an effective constitutional lawyer as well.

¹³³ See *supra* notes 49-53 and accompanying text.

¹³⁴ See *supra* note 113 and accompanying text.

¹³⁵ Klement, *supra* note 1, at 183.

¹³⁶ Cf. *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that execution of mentally retarded criminals is "cruel and unusual punishment" prohibited by Eighth Amendment).

¹³⁷ *Butler v. Michigan*, 352 U.S. 380, 383 (1957). Justice Stevens referenced Justice Frankfurter's comment in his majority opinion in *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1996) (criticizing vagueness and overbreadth of two provisions of Communications Decency Act of 1996, which sought to protect minors from harmful material on Internet), and then in dissent in *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 604-05 (2002) (Stevens, J., dissenting) (questioning overbreadth of Child Online Protection Act, which Congress designed to correct constitutional defects in Communications Decency Act).

So, what constitutional "standard" does Lincoln embrace for the restriction of seditious speech in wartime? We can infer that Lincoln would uphold such a restriction if three conditions are satisfied: (1) the speaker specifically intends to cause unlawful conduct; (2) the speech will seriously interfere with the activities of the military; and (3) the speaker does not expressly discourage unlawful conduct. If this is, in fact, the "standard" Lincoln contemplated in these messages, it would represent a substantial step forward from the Sedition Act of 1798.¹³⁸

Lincoln's letters to Erastus Corning and the Ohio Democrats were published throughout the nation, and the response was generally enthusiastic. It is estimated that these letters were read by as many as ten million people.¹³⁹ John Nicolay and John Hay, Lincoln's private secretaries, later reported that they were among the most successful of Lincoln's state papers in terms of their "impression upon the public mind."¹⁴⁰

The public protests to Burnside's actions against Vallandigham and the *Chicago Times* did not pass unnoticed in the White House. When Burnside closed the *Chicago Times*, a month after the Vallandigham arrest, Lincoln responded immediately.¹⁴¹ Secretary of War Stanton wrote Burnside that the President "directs me to say that in his judgment it would be better for you to take an early occasion to revoke that order" because the "irritation produced by such acts is in his opinion likely to do more harm than the publication would do."¹⁴² Stanton added that, in the future, on such questions as "the suppression of newspapers not requiring immediate action the President

¹³⁸ Of course, it is impossible to know whether this is the "standard" that Lincoln contemplated. We know only that he was prepared to exile an individual whose expression (he believed) satisfied these three conditions. We do not know that he would not have banished or punished others whose speech did not satisfy one or more of these conditions. Certainly, not every person arrested during the Civil War for their expression met these conditions. One of Lincoln's failings in this regard is that he never did make clear to subordinates the ground rules that were to govern such matters. For discussion of the Sedition Act of 1798, see *supra* note 77.

¹³⁹ See Donald, *supra* note 6, at 444.

¹⁴⁰ 7 John G. Nicolay & John Hay, *Abraham Lincoln: A History* 349 (New York, Century Co. 1890), quoted in Neely, *supra* note 75, at 68.

¹⁴¹ It is not clear that Lincoln's prompt response was guided by a clear-cut sense of principle. Lincoln certainly vacillated about this decision. A year later, he recalled that he had been "'embarrassed with the question between what was due the military service on the one hand, and the liberty of the press on the other.'" Tenney, *supra* note 25, at 256; see also Letter from Abraham Lincoln to Isaac N. Arnold (May 27, 1864), in Lincoln, *Collected Works*, *supra* note 10, at 363, 364 ("I am far from certain to-day that the resolution revocation was not right.")

¹⁴² J.G. Randall, *Constitutional Problems Under Lincoln* 495 (1951).

desires to be previously consulted.”¹⁴³ The *Chicago Times* was promptly allowed to resume publication.¹⁴⁴

And what of Vallandigham? Ironically, Mr. V. was not welcome in the Confederacy because he considered himself a loyal citizen of the Union. He was therefore shipped to the West Indies, from where he made his way to Canada. Having in the interim been nominated as the Democratic candidate for Governor of Ohio, he campaigned vigorously, but unsuccessfully, from across the border.¹⁴⁵ A year later, Vallandigham returned to the United States, “wearing false hair on his face and a large pillow strapped beneath his waistcoat,”¹⁴⁶ in disregard of the warning that the original sentence of imprisonment would be imposed if he violated the terms of his commutation. By this time, Lincoln had learned the lessons of experience, so he chose simply to ignore Vallandigham’s presence. In July 1864, Vallandigham played a key role in drafting the Democratic Party’s platform, which included planks condemning the government’s “arbitrary military arrests” and its “suppression of freedom of speech and of the press.”¹⁴⁷

IV

THE CONSTITUTION MATTERED

At the outset of the Civil War, the United States had had little experience with “the freedom of speech, and of the press” in time of war. In the sixty years since the Sedition Act of 1798, there had been almost no federal restrictions on free expression, and there was thus

¹⁴³ Id. It has been noted that “had there been any element of urgency in transmitting the president’s message, Stanton would have telegraphed it.” Instead, Stanton sent the message by mail, and even “then only after a few days had passed.” Thus, “Burnside had no immediate knowledge that his action against the *Times* had evoked Lincoln’s displeasure.” This gave Lincoln more time to test “the political waters swirling about the *Times* affair and then take whatever administrative or political action might seem prudent—even letting the suppression order stand.” Tenney, *supra* note 25, at 253-54, 257. Moreover, despite the final outcome in this incident, it has been argued that it “was not a tender regard for the First Amendment that guided Lincoln’s hand in signing the order lifting the suppression. It was something more basic to the president’s nature—a regard for politics.” Id. at 249.

¹⁴⁴ Although Lincoln’s action was generally applauded, it did not escape criticism. Joseph Medill of the *Chicago Tribune* protested Lincoln’s revocation of Burnside’s order as “a most unfortunate blunder.” It is, he declared, “a triumph of treason.” Harper, *supra* note 17, at 261.

¹⁴⁵ Vallandigham was defeated “by more than one hundred thousand votes,” giving his opponent “the greatest majority for governor in any state up to that time.” Id. at 251.

¹⁴⁶ Foote, *supra* note 14, at 634.

¹⁴⁷ McPherson, *supra* note 2, at 771-72. For the platform adopted at the 1864 Democratic National Convention, see Edward McPherson, *The Political History of the United States of America During the Great Rebellion* app. at 419-20 (Washington, D.C., Philp & Solomons, 2d ed. 1865). For a full account of Vallandigham’s life after his conviction by the military commission, see Klement, *supra* note 1, at 190-313.

no developed understanding of the permissible limits of dissent.¹⁴⁸ Some constitutional scholars of the era thought that "there is something exquisitely absurd in the supposition that a civil . . . war can be waged under the protection of the Bill of Rights."¹⁴⁹ Others argued that the Constitution should "apply as if nothing going on since Sumter was different from what obtained earlier." Lincoln managed to chart a middle course.¹⁵⁰

The nation did not enact a Sedition Act during the Civil War, most dissent was left undisturbed, and most individuals who were arrested for their expression were quickly released.¹⁵¹ Moreover, as Professor Michael Curtis has observed, "[t]he high public regard for freedom of speech and concern for the relation of free speech to popular government" during the Civil War kept the tendency towards repression in check.¹⁵² Indeed, even "many Republicans . . . stood up to protect" the rights of Vallandigham and other dissenters, "believing that assaults on the tradition [of free expression] ultimately threatened the liberty of all."¹⁵³

In his single-minded devotion to keeping "the country whole so that democracy could not be said to have failed,"¹⁵⁴ Lincoln melded his deep sense of the practical with his lifelong commitment to the law. He claimed for himself—as President—powers both unprecedented and extraordinary, but he took care to root these claims of

¹⁴⁸ As one nineteenth-century scholar explained:

The American people are engaged in a great struggle, in the progress of which they begin to be, for the first time, thrown upon the serious discussion of the most fundamental and vital principles of . . . constitutional liberty. . . . They have lived so long in the almost unparalleled enjoyment of liberty, but have realized no occasion to study it, and have not analyzed or defined it.

Robert L. Breck, *Habeas Corpus and Martial Law* 9-10 (1862), quoted with alterations in Hyman, *supra* note 81, at 72.

¹⁴⁹ John N. Pomeroy, *An Introduction to the Constitutional Law of the United States* 379 (Cambridge, Riverside Press 1886).

¹⁵⁰ See Hyman, *supra* note 81, at 99-101; Randall, *supra* note 142, at 31 (arguing that it was fundamental to Americans during Civil War "to admit that the Constitution is binding during war and yet to maintain that it sanctions extraordinary powers" when they are needed). For a more negative assessment, see Neely, *supra* note 75, at 73 (arguing that "[q]uestions of legal and constitutional form . . . took a back seat in the Lincoln administration").

¹⁵¹ See Hyman, *supra* note 81, at 72; Randall, *supra* note 142, at 152-53.

¹⁵² Curtis, *supra* note 28, at 352; Randall, *supra* note 142, at 46.

¹⁵³ Curtis, *supra* note 28, at 353.

¹⁵⁴ Neely, *supra* note 75, at 235. Lincoln saw the Civil War as dedicated to proving that a "nation, conceived in Liberty, and dedicated to the proposition that all men are created equal, . . . can long endure" and to ensuring that "government of the people, by the people, for the people, shall not perish from the earth." President Abraham Lincoln, Address at Gettysburg, Pennsylvania (Nov. 19, 1863), in *Speeches and Writings*, *supra* note 102, at 536, 536.

authority in the Constitution. Even at the darkest moments of the Civil War, Lincoln never lost sight of the nation's most fundamental values.¹⁵⁵ What impresses most about his handling of the Vallandigham affair was his persisting concern for harmonizing liberty and power through constitutional discourse and his unflinching insistence that "the Constitution mattered."¹⁵⁶

¹⁵⁵ See Gallman, *supra* note 7, at 194-95. The dominant view in the eighteenth and early nineteenth centuries held that the executive could act outside the authority of the Constitution in times of grave crisis. Representing this view, Charles Sumner declared that constitutional rights must be "superseded by war, which brings into being other rights which know no master." Cong. Globe, 37th Cong., 2d Sess. 2196 (1862). Lincoln's approach was more moderate, for he strained to connect his actions to the terms of the Constitution itself. See Jill Elaine Hasday, *Civil War as Paradigm: Reestablishing the Rule of Law at the End of the Cold War*, 5 Kan. J.L. & Pub. Pol'y 129, 131-32 (1996).

¹⁵⁶ Hyman, *supra* note 81, at 100-01.