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Rebuttal: Abraham Lincoln, Civil Liberties, and the New York Connection—The Corning Letter

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WARTIME PROCEDURES implemented by 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 endure if the nation survives, but suppose 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 the provisions of the Constitution, he would be assailed not only by those who genuinely valued civil liberty, but also by enemies 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 se-

vere in Lincoln's time would have seemed soft and "decadent" to a Hitler or a Milosevic. 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 its commander-in-chief. Much that happened was shaped by the force of personality, discretion, and executive procedure of the President. The Congress and military leaders took actions of 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. 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]

Democratic Leader or Dictator?

In the words of James G. Randall, another pre-eminent 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 per-

[1] Don E. Fehrenbacher, *Lincoln in Text and Context: Collected Essays* (Stanford, CA: Stanford University Press, 1987), 139.

[2] J. G. Randall, *Lincoln the Liberal Statesman* (New York: Dodd, Mead, 1947), 123.

formed a whole series of important acts by sheer assumption of presidential power. He proclaimed not "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 the *habeas corpus* rights, 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 the Congress if not of the people. He put necessity above popularity, and suffered for it in the 1862 elections. 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, although he would not have fared as well had the war been lost.[6]

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 and made 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.

Now 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), and it was basic to the Whig-Republican theory of govern-

[3] Roy P. Basler, editor-in-chief, *The Collected Works of Abraham Lincoln*, 9 vols. (New Brunswick, NJ: Rutgers University Press, 1953–55), 4:332 (hereafter cited as *Collected Works of Lincoln*).

[4] Ibid.

[5] Ibid.

[6] For example, see Arthur M. Schlesinger, Jr., "The Ultimate Approval Ratings," *New York Times Magazine* (December 15, 1996), 46–51. Lincoln did well, too, in a survey regarding famous people in the second millennium. He ranks thirty-second, behind Gutenberg (1) and Hitler (20). See Agnes Gottlieb, et al., *1,000 Years, 1,000 People: Ranking the Men and Women Who Shaped the Millennium* (New York: Kodansha International, 1998).

ment 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, as he put it, "events have controlled me."[7]

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 during the Lincoln administration.

On April 19, 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 the capital from the rest of the Union. Lincoln was apoplectic. He had no information about the whereabouts of the other troops promised him by Northern governors, and he 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 the suspension of the writ, having authorized General Winfield Scott, Commander of the Army, in case of "necessity," to

[7] *Collected Works of Lincoln*, 4:344.

[8] Tyler Dennett, ed., *Lincoln and the Civil War in the Diaries and Letters of John Hay* (New York: Dodd, Mead, 1939), 11.

bombard the cities, but only "in the extremist necessity"[9] was Scott to suspend the writ of *habeas corpus*.

The Case of John Merryman

In Maryland, there lived 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 against the Union and 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 destroy the government. This young man's actions precipitated legal conflict between the President and 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] took jurisdiction as a circuit judge. 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, so the old justice, recognizing 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

[9] *Collected Works of Lincoln*, 4:344.

[10] *Dred Scott v. Sanford*, 19 Howard 393 (1857).

[11] *Ex Parte Merryman* is reprinted in *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies*, ser. II, vol. 1 (Washington, DC: Government Printing Office, 1880–1902), 578.

position in part because permissible suspension was in Article I § 9 of the Constitution, the section describing congressional powers. 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.[12] Nowhere did he acknowledge that a rebellion was in progress or 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 . . . by 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 at his lawyer and politician 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, as it is the executive branch that, under the Constitution, is responsible for enforcing the laws.

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 Taney in a case called *Ex Parte Milligan*. "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."[15] *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

[12] Constitution, Art. I., Sec. 9.
[13] *Collected Works of Lincoln*, 4:429.
[14] *Habeas Corpus Act of March 3, 1863.*
[15] *Ex Parte Milligan*, 4 Wall. 2 (1866), 120–21.

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."[16] 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. Some, especially Democrats, adamantly believed that in doing so he had exceeded his authority.

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 heard by that tribunal. The decision in the *Prize Cases*[17] arose in March 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 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 govern-

[16] *Collected Works of Lincoln*, 4:429.
[17] *Prize Cases*, 67 U.S. 635 (1863).

ment at Washington had met the 1861 emergency. The matter went even further and some supposed that 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!"[18]

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. It simply occurs. The "party in rebellion" breaks its allegiance, "organized armies, and commences hostilities." 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.[19]

Lincoln's acts were thus held valid, the blockade upheld, and the condemnation of the ships sustained. It was a narrow victory. 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.[20]

Emancipation as a Military Measure

Another illustration of Lincoln's legal and political astuteness relates to emancipation. The problem was prodigious. Nothing in the Con-

[18] James G. Randall, *Constitutional Problems Under Lincoln*, rev. ed. (Urbana: University of Illinois Press, 1951), 52.

[19] Ibid., 71–72.

[20] Justice Robert C. Grier delivered the majority opinion. Three Lincoln appointees joined him: Noah H. Swayne, Samuel F. Miller, and David Davis. Loyal Justice James M. Wayne of Georgia agreed with the majority.

stitution 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.[21] 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 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. . . .[22]

It may have had all "the moral grandeur of a bill of lading," as Professor Richard Hofstader stated,[23] 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, in time of war. The most that can be said, if so much, is that slaves are property. Is there—has there ever been—any question that by the law of war, property, both of enemies and friends, may be taken when needed? And is it not needed whenever taking it, helps us, or hurts the enemy?[24]

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[21] "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; *Collected Works of Lincoln*, 5: 434–435.

[22] *Collected Works of Lincoln*, 6:29–30.

[23] Richard Hofstader, *The American Political Tradition* (New York: Vintage Books, 1974), 169.

[24] *Collected Works of Lincoln*, 6:408.

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 a crisis.

Vallandigham and the Corning Letter

Clement Laird Vallandigham, the preeminent Copperhead[25] of the Civil War, was perhaps President Lincoln's sharpest critic. An Ohioan, this man whom Lincoln called a "wily agitator"[26] 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" the Constitution and demanding and expecting the thanks of Congress and the country for his "usurpations of power."[27]

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[25] 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 lies 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.

[26] *Collected Works of Lincoln*, 6:266.

[27] *Congressional Globe*, 37 Cong., 1 sess., 23, 100, 348. See also Frank L. Klement, *The Limits of Dissent: Clement L. Vallandigham and the Civil War* (New York: Fordham University Press, 1998).

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.[28]

Later that year, on March 25, 1863, Union General Ambrose E. 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 against General Robert E. Lee at Fredericksburg. He was smarting from defeat 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.[29] The order enumerated the various classes of persons falling within its scope, and announced that the habit of declaring sympathy for the enemy would not be allowed in the Department 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

[28] *Congressional Globe*, 37 Cong., 2 sess., Appendix, 52–60.
[29] Klement, *Limits of Dissent*, 149.

meeting at Mt. Vernon, Ohio, on May 1, 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.[30]

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 arose 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."[31] 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 *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, too, on the ground that the Supreme Court had no jurisdiction over a military tribunal.[32]

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.[33]

In conformity with the President's order, Vallandigham was conducted by way of Louisville, Kentucky, and Murfreesboro, Tennessee, to the Confederate lines. He arrived at the headquarters of

[30] Ibid., 152–68.
[31] Ibid., 163–64.
[32] Ibid., 171. The Supreme Court would exercise such jurisdiction after the war in *Ex Parte Milligan*.
[33] Ibid., 177–78.

General Braxton Bragg on May 25. 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."[34] Vallandigham soon 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 on the blockade runner *Cornubia* of Wilmington, bound for Bermuda, arriving on June 20. After ten days in Bermuda he went by steamer to Halifax, arriving on July 5. He then found his way to Niagara Falls, Canada. He settled at Windsor, opposite Detroit, where he remained until returning to Ohio on June 15, 1864.

The arrest, military trial, conviction, and sentence of Vallandigham aroused excitement throughout the country. Criticism of Burnside for issuing 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 capitol in the park, it was presided over by the Hon. Erastus Corning, a distinguished congressman from Albany. The meeting was endorsed by Democratic Governor 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."[35]

[34] Ibid., 181–83.
[35] Ibid., 180–81.

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."[36] 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 and by the vice-presidents and secretaries. The resolutions were couched in dignified and respectful language, but were clear that those attending the meeting regarded the arrest and imprisonment of Vallandigham illegal and unconstitutional, and deplored the abridgement of personal rights by the Administration.[37]

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."[38]

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 his criticisms of Lincoln's administration. If 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" (see Epilogue). In a closely reasoned document of more than three thousand 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

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

[37] Ibid., 182. Klement, *Limits of Dissent*, 182.

[38] *Collected Works of Lincoln*, 6:235.

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. . . ." The President defended the action not on free speech grounds but on the effects of such speech.[39]

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 designated 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. . . .[40]

Erastus Corning referred Lincoln's response to the committee that reported the resolutions. Under the date of July 3, 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." The rejoinder, drawn mainly by an ex-justice of the State Court of Appeals, John V. L. Pruyn,[41] did not maintain the even dignity of the original resolutions, charged Lincoln with "pretensions to more than regal authority,"[42] and insisted that he had used "misty and cloudy forms of expression"[43] in setting forth his pretensions. The committee was especially sensitive of Lincoln's remark that the resolutions were presented by "Democrats" instead of by "American

[39] Ibid., 267.

[40] Ibid., 267.

[41] 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 (New York, 1863). The pamphlet is in Frank Freidel, *Union Pamphlets of the Civil War, 1861–1865* (Cambridge: Harvard University Press, 1967), 760 (page references are to that reprint).

[42] Ibid., 755.

[43] Ibid.

citizens"[44] and sought to turn the tables on the President. Lincoln was too busy with a thousand other issues to engage in prolonged debate. As was his wont, he had his say in his reply in the initial resolutions; he ignored this rebuttal and turned to other matters.

Almost simultaneously, Lincoln was engaged in a parallel 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 E. 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 of them members of Congress, addressed their communication from Washington on June 26 "To His Excellency the President of the United States."[45] 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.[46] 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.[47]

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,

[44] Ibid., 763.

[45] James Laird Vallandigham, *A Life of Clement L. Vallandigham* (Baltimore: Turnbull Brothers, 1872), 305.

[46] Ibid., 304.

[47] Ibid., 305–311.

have been for *prevention*, and not for *punishment*—as injunctions to stay injury, as proceedings to keep the peace. . . .[48]

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 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.[49]

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.

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." 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."

The Democrats of Ohio carried on a vigorous campaign for the

[48] *Collected Works of Lincoln*, 6:303.
[49] Ibid., 305.

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.[50]

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.[51]

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

[50] Klement, *Limits of Dissent*, 248.
[51] Ibid., 252.

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.

The proposed resolution was killed by a vote of 37 to 35.[52]

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." He then proceeded to Albany to confer "with leading men of the party on the state of the country." 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.

In the presidential contest of 1864, Vallandigham campaigned in New York State and elsewhere in support of General McClellan. His last visit to the state is believed to have taken place in 1868 when he attended the Democratic National Convention in New York City.

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."[53] He knew that as President he had to act.

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[52] *Congressional Globe*, 38 Cong., I Sess., 859 (1864).
[53] *Collected Works of Lincoln*, 6:264.

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 wiley [*sic*] 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 feelings, 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.[54]

Conclusion

What made Lincoln a successful Commander-in-Chief was his constitutional flexibility, which allowed him to bend the Constitution 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."[55] He could not have done this had he 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 performance of his life in the courtroom of world opinion. In his "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."[56]

President Lincoln knew and understood this.

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[54] Ibid., 266.

[55] Ibid., 5:537.

[56] Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (New York: Oxford University Press, 1991), 235.

Epilogue

Abraham Lincoln's Letter to Erastus Corning and Other New York Democrats June 12, 1863

ON MAY 16, 1863, a group of enraged New York Democrats held a mass indignation rally in Albany, led by the prominent local leader Erastus Corning. There they passed a widely publicized resolution reproaching the Lincoln administration for the military arrest of a prominent anti-war Democrat, Congressman Clement Laird Vallandigham of Ohio. New York's Democratic governor, Horatio Seymour, had aroused the rally with a strong letter warning darkly that if the arrest were sustained, "our liberties are overthrown." The mass meeting enthusiastically obliged with a formal declaration that "the people of this State, by an emphatic majority, declared their condemnation of the system of arbitrary arrests, and their determination to stand by the Constitution."[1]

Vallandigham's seizure, trial, and conviction for speaking out in opposition to the draft—followed by President Lincoln's decision to banish the "Copperhead" leader to the Confederacy as punishment—had unleashed a small storm of protest. Albany's anti-Lincoln Democrats, led by Corning, bitterly opposed the President's suspension of the writ of habeas corpus to engineer these and similar so-called arbitrary arrests. Lincoln countered that suspension of this Constitutional guarantee was in fact specifically allowed by the Constitution itself in times of rebellion or invasion, and was therefore necessary to save the Union from enemies within.

Lincoln replied to the Albany resolutions on June 12 with a long, logical, and lucid argument in which he made a compelling case that he must suspend certain civil liberties temporarily in order to pre-

[1] John G. Nicolay and John Hay, *Abraham Lincoln: A History*, 10 vols. (New York: The Century Co., 1914 ed.), 7:341–343.

serve them for all time. The so-called "Corning Letter" ranks as one of Lincoln's most accomplished legal-moral arguments, a vigorous state paper that adroitly defended his entire war policy and also pointed out that the Administration's reaction to protest had in fact been quite restrained. The letter first appeared in the *New York Tribune* on June 15—Lincoln made certain that it was published—and was widely reprinted in the weeks to come. "So terse and vigorous" was the language, declared the President's admiring private secretaries when they attempted to excerpt the letter for their Lincoln biography, "that it is difficult to abridge a paragraph without positive mutilation. . . ."[2]

A frustrated Corning responded to Lincoln's tract with a brilliant letter of his own in which he termed Lincoln's arguments "a monstrous heresy . . . tending to the establishment of despotism," and predicted that "the American people will never acquiesce in this doctrine."[3] But although this rejoinder, too, was published, Lincoln's response has deservedly earned the greater reputation. Writing to the President a few days later, an admirer named William A. Hall praised Lincoln's Corning Letter as more valuable "to the cause than a victory," adding: "You have not left them a simple peg to hang on."

Within days, the *Tribune* ordered 50,000 copies printed in pamphlet form. "Your friends in New York are taking steps to give every soldier in the field a copy of it," Hall revealed. "In a word it has done us all great good. God bless you for this. . . ."[4]

Lincoln's Corning Letter—indeed his entire policy on civil liberties—has remained a matter of scholarly and legal debate ever since. Historians like J. G. Randall, Frank L. Klement, and Mark E. Neely, Jr., among others, have confronted the subject in succeeding generations.[5] Although Neely has convincingly demonstrated in recent years

[2] Ibid., 7:343.

[3] See Roy P. Basler editor-in-chief, *The Collected Works of Abraham Lincoln*, 9 vols. (New Brunswick, NJ: Rutgers University Press, 1953–55), 6:261.

[4] William A. Hall to Abraham Lincoln, June 15, 1863, Abraham Lincoln Papers, Library of Congress. Reprinted in Harold Holzer, ed., *Dear Mr. Lincoln: Letters to the President* (New York: Addison-Wesley, 1993), 128.

[5] See, for example, James G. Randall, *Constitutional Problems Under Lincoln* (New York: D. Appleton & Co., 1926), esp. 184; Frank L. Klement, *The Limits of Dissent: Clement Vallandigham and the Civil War* (Lexington: University of Kentucky Press, 1970; reprinted New York: Fordham University Press, 1998), and Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (New York: Oxford University Press, 1991).

that Lincoln was no tyrant, the debate continues. One thing, however, remains indisputable: the Corning Letter was one of the most important state papers Lincoln ever wrote, offering crucial insight into his deftly balanced management of domestic and war policy.

Since it was originally written to New Yorkers, this often neglected masterpiece is reproduced here (complete with Lincoln's occasional misspellings) as an essential document without which no study of the Empire State and the Civil War could hope to be complete.

Lincoln's Letter to Erastus Corning and Others

Executive Mansion
Hon. Erastus Corning & others Washington [June 12] 1863.

Gentlemen

Your letter of May 19th., inclosing the resolutions of a public meeting held at Albany, N.Y. on the 16th. of the same month, was received several days ago.

The resolutions, as I understand them, are resolvable into two propositions—first, the expression of a purpose to sustain the cause of the Union, to secure peace through victory, and to support the administration in every constitutional, and lawful measure to suppress the rebellion; and secondly, a declaration of censure upon the administration for supposed unconstitutional action such as the making of military arrests.

And, from the two propositions a third is deduced, which is, that the gentlemen composing the meeting are resolved on doing their part to maintain our common government and country, despite the folly or wickedness, as they may conceive, of any administration. This position is eminently patriotic, and as such, I thank the meeting, and congratulate the nation for it. My own purpose is the same; so that the meeting and myself have a common object, and can have no difference, except in the choice of means or measures, for effecting that object.

And here I ought to close this paper, and would close it, if there were no apprehension that more injurious consequences, than any merely personal to myself, might follow the censures systematically

cast upon me for doing what, in my view of duty, I could not forbear. The resolutions promise to support me in every constitutional and lawful measure to suppress the rebellion; and I have not knowingly employed, nor shall knowingly employ, any other. But the meeting, by their resolutions, assert and argue, that certain military arrests and proceedings following them for which I am ultimately responsible, are unconstitutional. I think they are not. The resolutions quote from the constitution, the definition of treason; and also the limiting safe-guards and guarrantees therein provided for the citizen, on trials for treason, and on his being held to answer for capital or otherwise infamous crimes, and, in criminal prossecutions, his right to a speedy and public trial by an impartial jury. They proceed to resolve "That these safe-guards of the rights of the citizen against the pretentions of arbitrary power, were intended more *especially* for his protection in times of civil commotion." And, apparently, to demonstrate the proposition, the resolutions proceed "They were secured substantially to the English people, *after* years of protracted civil war, and were adopted into our constitution at the *close* of the revolution." Would not the demonstration have been better, if it could have been truly said that these safe-guards had been adopted, and applied *during* our revolution, instead of *after* the one, and at the *close* of the other. I too am devotedly for them *after* civil war, and *before* civil war, and at all times "except when, in cases of Rebellion or Invasion, the public Safety may require" their suspension. The resolutions proceed to tell us that these safe-guards "have stood the test of seventy-six years of trial, under our republican system, under circumstances which show that while they constitute the foundation of all free government, they are the elements of the enduring stability of the Republic." No one denies that they have so stood the test up to the beginning of the present rebellion if we except a certain matter at New Orleans hereafter to be mentioned; nor does any one question that they will stand the same test much longer after the rebellion closes. But these provisions of the constitution have no application to the case we have in hand, because the arrests complained of were not made for treason—that is, not for *the* treason defined in the constitution, and upon the conviction of which, the punishment is death—; nor yet were they made to hold persons to answer for any capital, or otherwise infamous crimes; nor were the proceedings following, in any constitutional or legal sense, "criminal prossecutions."

The arrests were made on totally different grounds, and the proceedings following, accorded with the grounds of the arrests. Let us consider the real case with which we are dealing, and apply to it the parts of the constitution plainly made for such cases.

Prior to my instalation here it had been inculcated that any State had a lawful right to secede from the national Union; and that it would be expedient to exercise the right, whenever the devotees of the doctrine should fail to elect a President to their own liking. I was elected contrary to their liking; and accordingly, so far as it was legally possible, they had taken seven states out of the Union, had seized many of the United States Forts, and had fired upon the United States' Flag, all before I was inaugerated; and, of course, before I had done any official act whatever. The rebellion, thus began soon ran into the present civil war; and, in certain respects, it began on very unequal terms between the parties. The insurgents had been preparing for it more than thirty years, while the government had taken no steps to resist them. The former had carefully considered all the means which could be turned to their account. It undoubtedly was a well pondered reliance with them that in their own unrestricted effort to destroy Union, constitution, and law, all together, the government would, in great degree, be restrained by the same constitution and law, from arresting their progress. Their sympathizers pervaded all departments of the government and nearly all communities of the people. From this material, under cover of "Liberty of speech" "Liberty of the press" and "*Habeas corpus*" they hoped to keep on foot amongst us a most efficient corps of spies, informers, supplyers, and aiders and abettors of their cause in a thousand ways. They knew that in times such as they were inaugerating, by the constitution itself, the "Habeas corpus" might be suspended; but they also knew they had friends who would make a question as to *who* was to suspend it; meanwhile their spies and others might remain at large to help on their cause. Or if, as has happened, the executive should suspend the writ, without ruinous waste of time, instances of arresting innocent persons might occur, as are always likely to occur in such cases; and then a clamor could be raised in regard to this, which might be, at least, of some service to the insurgent cause. It needed no very keen perception to discover this part of the enemies' programme, so soon as by open hostilities their machinery was fairly put in motion. Yet, thoroughly imbued with a reverence for the guarran-

teed rights of individuals, I was slow to adopt the strong measures, which by degrees I have been forced to regard as being within the exceptions of the constitution, and as indispensable to the public Safety. Nothing is better known to history than that courts of justice are utterly incompetent to such cases. Civil courts are organized chiefly for trials of individuals, or, at most, a few individuals acting in concert; and this in quiet times, and on charges of crimes well defined in the law. Even in times of peace, bands of horse-thieves and robbers frequently grow too numerous and powerful for the ordinary courts of justice. But what comparison, in numbers, have such bands ever borne to the insurgent sympathizers even in many of the loyal states? Again, a jury too frequently have at least one member, more ready to hang the panel than to hang the traitor. And yet again, 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.

Ours is a case of Rebellion—so called by the resolutions before me—in fact, a clear, flagrant, and gigantic case of Rebellion; and the provision of the constitution that "The previlege of the writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion, the public Safety may require it" is *the* provision which specially applies to our present case. This provision plainly attests the understanding of those who made the constitution that ordinary courts of justice are inadequate to "cases of Rebellion"—attests their purpose that in such cases, men may be held in custody whom the courts acting on ordinary rules, would discharge. Habeas Corpus, does not discharge men who are proved to be guilty of defined crime; and its suspension is allowed by the constitution on purpose that, men may be arrested and held, who can not be proved to be guilty of defined crime, "when, in cases of Rebellion or Invasion the public Safety may require it." This is precisely our present case—a case of Rebellion, wherein the public Safety does require the suspension. Indeed, arrests by process of courts, and arrests in cases of rebellion, do not proceed altogether upon the same basis. The former is directed at the small per centage of ordinary and continuous perpetration of crime; while the latter is directed at sudden and extensive uprisings against the government, which, at most, will suc-

ceed or fail, in no great length of time. In the latter case, arrests are made, not so much for what has been done, as for what probably would be done. The latter is more for the preventive, and less for the vindictive, than the former. In such cases the purposes of men are much more easily understood, than in cases of ordinary crime. The man who stands by and says nothing, when the peril of his government is discussed, can not be misunderstood. If not hindered, he is sure to help the enemy. Much more, if he talks ambiguously—talks for his country with "buts" and "ifs" and "ands." Of how little value the constitutional provision I have quoted will be rendered, if arrests shall never be made until defined crimes shall have been committed, may be illustrated by a few notable examples. Gen. John C. Breckenridge, Gen. Robert E. Lee, Gen. Joseph E. Johnston, Gen. John B. Magruder, Gen. William B. Preston, Gen. Simon B. Buckner, and Comodore [Franklin] Buchanan, now occupying the very highest places in the rebel war service, were all within the power of the government since the rebellion began, and were nearly as well known to be traitors then as now. Unquestionably if we had seized and held them, the insurgent cause would be much weaker. But no one of them had then committed any crime defined in the law. Every one of them if arrested would have been discharged on Habeas Corpus, were the writ allowed to operate. In view of these and similar cases, I think the time not unlikely to come when I shall be blamed for having made too few arrests rather than too many.

By the third resolution the meeting indicate their opinion that military arrests may be constitutional in localities where rebellion actually exists; but that such arrests are unconstitutional in localities where rebellion, or insurrection, does not actually exist. They insist that such arrests shall not be made "outside of the lines of necessary military occupation, and the scenes of insurrection." In asmuch, however, as the constitution itself makes no such distinction, I am unable to believe that there is any such constitutional distinction. I concede that the class of arrests complained of, can be constitutional only when, in cases of Rebellion or Invasion, the public Safety may require them; and I insist that in such cases, they are constitutional *wherever* the public safety does require them—as well in places to which they may prevent the rebellion extending, as in those where it may be already prevailing—as well where they may restrain mischievous interference with the raising and supplying of armies, to sup-

press the rebellion, as where the rebellion may actually be—as well where they may restrain the enticing men out of the army, as where they would prevent mutiny in the army—equally constitutional at all places where they will conduce to the public Safety, as against the dangers of Rebellion or Invasion.

Take the particular case mentioned by the meeting. They assert in substance that Mr. Vallandigham was by a military commander, seized and tried "for no other reason than words addressed to a public meeting, in criticism of the course of the administration, and in condemnation of the military orders of that general." Now, if there be no mistake about this—if this assertion is the truth and the whole truth—if there was no other reason for the arrest, then I concede that the arrest was wrong. But the arrest, as I understand, was made for a very different reason. Mr. Vallandigham avows his hostility to the war on the part of the Union; and his arrest was made because he was laboring, with some effect, to prevent the raising of troops, to encourage desertions from the army, and to leave the rebellion without an adequate military force to suppress it. 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.

I understand the meeting, whose resolutions I am considering, to be in favor of suppressing the rebellion by military force—by armies. Long experience has shown that armies can not be maintained unless desertion shall be punished by the severe penalty of death. The case requires, and the law and the constitution, sanction this punishment. Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wiley 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 feelings, till he is persuaded to write the soldier boy, that he is fighting in a bad cause, for a wicked administration of a contemptable 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.

If I be wrong on this question of constitutional power, my error lies in believing 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—in other words, that the constitution is not in it's application in all respects the same, in cases of Rebellion or invasion, involving the public Safety, as it is in times of profound peace and public security. The constitution itself makes the distinction; and I can no more be persuaded that the government can constitutionally take no strong measure 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 to not be good food for a well one. Nor am I able to appreciate the danger, apprehended by the meeting, that the American people will, by means of military arrests during the rebellion, lose the right of public discussion, the liberty of speech and the press, the law of evidence, trial by jury, and Habeas corpus, 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 through the remainder of his healthful life.

In giving the resolutions that earnest consideration which you request of me, I can not 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 way other 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; because I am sure that from such more elevated position, we could do better battle for the country we all love, than we possibly can from those lower ones, where from the force of habit, the prejudices of the past, and selfish hopes of the future, we are sure to expend much of our ingenuity and strength, in finding fault with, and aiming blows at each other. But since you have denied me this, I will yet be thankful, for the country's sake, that not

all democrats have done so. He on whose discretionary judgment Mr. Vallandigham was arrested and tried, is a democrat, having no old party affinity with me; and the judge who rejected the constitutional view expressed in these resolutions, by refusing to discharge Mr. V. on Habeas Corpus, is a democrat of better days than these, having received his judicial mantle at the hands of President Jackson. And still more, of all those democrats who are nobly exposing their lives and shedding their blood on the battle-field, I have learned that many approve the course taken with Mr. V. while I have not heard of a single one condemning it. I can not assert that there are none such.

And the name of President Jackson recalls a bit of pertinent history. After the battle of New-Orleans, and while the fact that the treaty of peace had been concluded, was well known in the city, but before official knowledge of it had arrived, Gen. Jackson still maintained martial, or military law. Now, that it could be said the war was over, the clamor against martial law, which had existed from the first, grew more furious. Among other things a Mr. Louiallier published a denunciatory newspaper article. Gen. Jackson arrested him. A lawyer by the name of Morel procured the U.S. Judge Hall to order a writ of Habeas Corpus to release Mr. Louaillier. Gen. Jackson arrested both the lawyer and the judge. A Mr. Hollander ventured to say of some part of the matter that "it was a dirty trick." Gen. Jackson arrested him. When the officer undertook to serve the writ of Habeas Corpus, Gen. Jackson took it from him and sent him away with a copy. Holding the judge in custody a few days, the general sent him beyond the limits of his encampment, and set him at liberty, with an order to remain till the ratification of peace should be regularly announced, or until the British should have left the Southern coast. A day or two more elapsed, the ratification of the treaty of peace was regularly announced, and the judge and others were fully liberated. A few days more, and the judge called Gen. Jackson into court and fined him a thousand dollars, for having arrested him and the others named. The general paid the fine, and there the matter rested for nearly thirty years, when congress refunded principal and interest. The late Senator [Stephen A.] Douglas, then in the House of Representatives, took a leading part in the debate, in which the constitutional question was much discussed. I am not prepared to say whom the Journals would show to have voted for the measure.

It may be remarked: First, that we had the same constitution then,

as now. Secondly, that we then had a case of Invasion, and that now we have a case of Rebellion, and: Thirdly, that the permanent right of the people to public discussion, the liberty of speech and the press, the trial by jury, the law of evidence, and the Habeas Corpus, suffered no detriment whatever by that conduct of Gen. Jackson, or it's subsequent approval by the American congress.

And yet, let me say that in my own discretion, I do not know whether I would have ordered the arrest of Mr. V. While I can not shift the responsibility from myself, I hold that, as a general rule, the commander in the field is the better judge of the necessity in any particular case. Of course I must practice a general directory and revisory power in the matter.

One of the resolutions expresses the opinion of the meeting that arbitrary arrests will have the effect to divide and distract those who should be united in suppressing the rebellion; and I am specifically called on to discharge Mr. Vallandigham. I regard this as, at least, a fair appeal to me, on the expediency of exercising a constitutional power which I think exists. In response to such appeal I have to say it gave me pain when I learned that Mr. V. had been arrested,—that is, I was pained that there should have seemed to be a necessity for arresting him – and that it will afford me great pleasure to discharge him so soon as I can, by any means, believe the public safety will not suffer by it. I further say, that as the war progresses, it appears to me, opinion, and action, which were in great confusion at first, take shape, and fall into more regular channels; so that the necessity for arbitrary dealing with them gradually decreases. I have every reason to desire that it would cease altogether; and far from the least is my regard for the opinions and wishes of those who, like the meeting at Albany, declare their purpose to sustain the government in every constitutional and lawful measure to suppress the rebellion. Still, I must continue to do so much as may seem to be required by the public safety.

A. LINCOLN.