

Lincoln, the Constitution of Necessity, and the Necessity of Constitutions

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I. INTRODUCTION

The George W. Bush administration responded to the terrorist attacks of September 11th with far-reaching assertions of unilateral executive power, power it insisted was substantially free of judicial or legislative checks. As Scott Shane wrote in the December 17, 2005 *New York Times*, “[f]rom the Government’s detention of [American citizens with severely limited access to courts, and none to attorney, families, or friends] as [alleged] ‘enemy combatants’ to the just disclosed eavesdropping in the United States without court warrants, the administration has relied on an unusually expansive interpretation of the president’s authority.”¹ The *Times* article lists additional examples including the plan to try those accused of terrorism before military tribunals and “the use of severe interrogation techniques, including some banned by international agreements, on [alleged] Al Qaeda figures.”²

From the broad perspective of the struggle for Anglo-American liberty, the claim of George W. Bush is reminiscent of claims to absolute executive power made by the Stuart kings. The Stuart kings also claimed broad unchecked executive power, including the power to incarcerate British citizens without effective access to the courts.³ The claim was repudiated in the Act of Habeas Corpus of 1679.⁴ Eighteenth century

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¹ Scott Shane, *Behind Power, One Principle*, NEW YORK TIMES, Dec. 17, 2005 at A-1. The brackets are facts added by Michael Curtis.

² *Id.* at A-18.

³ *E.g.*, COLIN RHYS LOVELL, ENGLISH CONSTITUTIONAL AND LEGAL HISTORY, 304-05, 313 (1962).

⁴ *Id.* at 409-10.

Americans saw the Stuart monarchs as tyrants.⁵

Of course, the Stuart kings – James, I and Charles I– are not the model apologists for unchecked presidential power embrace. Instead they appeal to Abraham Lincoln, a revered American president . They throw Lincoln’s shawl around new claims for absolute power and paste his beard on it. Lincoln did exert executive and military power in extraordinary and unprecedented ways. This essay is an effort to explain why we should reject the clever and alluring argument that Lincoln’s example justifies arbitrary executive power in times of crisis. It seeks to answer those, like Professor Michael Paulsen, who wrap claims such as those made by George W. Bush in the mantel of Abraham Lincoln.

Over the next century or so, some American presidents may not be as trustworthy as Abraham Lincoln. But the problem with the invocation of Lincoln’s conduct is deeper. Some of the actions Lincoln took are utterly unacceptable for a democratic society. Furthermore, Lincoln himself was unwilling to carry his necessity argument to its logical conclusion. A closer look at a few of the policies embraced by the Bush administration gives a better idea of the policies Lincoln is being used to defend. After briefly looking at some of these policies, I will consider Professor Michael Paulsen’s invocation of Lincoln to support sweeping executive power.

One example of the Bush administration doctrine is the case of Yaser Hamdi. Yaser Hamdi, an American citizen, had gone to Afghanistan, been captured by the Northern Alliance, and transferred to the American army. The government claimed Hamdi was “affiliated” with the Taliban as a member of its armed forces for which he would fight “if necessary.”⁶

The government’s account was apparently based on information from the warlords of the Northern Alliance. There are reasons to be skeptical that the Northern Alliance warlords consistently transmitted accurate information to the American military. According to a report in the *Boston Globe*,

⁵ See, e.g., the argument of James Otis in the Writs of Assistance Case, reprinted in STEPHEN B. PRESSER AND JAMIL S. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN LEGAL HISTORY 62 (3d. ed. 1995)(referring to the execution of Charles I and the dispossession of James II) . Cf. *id.* at 45 (Zenger’s attorney referring to the “arbitrary and destructive” judgements of the Court of the Star Chamber.

⁶ Hamdi v. Rumsfeld, Joint Appendix at 148-150.

Pakistani intelligence sources said Northern Alliance commanders could receive \$5,000 for each Taliban prisoner and [\$]20,000 for a[n AI] Qaeda fighter. As a result bounty hunters rounded up any men who came near the battlegrounds and forced them to confess.⁷

Of course, there are also reasons to be skeptical of Hamdi's account.

The government physically restrained Hamdi, holding him virtually incommunicado for about two years. Until shortly before the Supreme Court reviewed his case he was denied access to counsel and his family. As a "matter of discretion" the government finally allowed Hamdi to have monitored meetings with counsel, but insisted that access to a lawyer was not legally required.⁸

Hamdi's version came to light only after the Bush administration (faced with a Supreme Court mandated hearing on the merits of his detention) had released him on condition that he renounce his American citizenship, go to Saudi Arabia, where he had held dual citizenship, and not return to the United States.

Hamdi said he had gone to Afghanistan for religious studies and joined a camp where he received such instruction, together with training in small arms. When the war broke out, he attempted to leave, but was unable to do so because the border had been sealed. Hamdi further asserted that he had not been fighting or intending to, but had been captured by the Northern Alliance and sold to the Americans for \$20,000.⁹ Hamdi's father had discovered his plight and sought habeas corpus, including an evidentiary hearing at which the court would consider the accuracy of the government's assertions.

At any rate, by the time his case was decided Hamdi had been imprisoned without charge, hearing, or trial in the Norfolk and Charleston Naval jails for about two years, on the allegation that he was an enemy combatant who had been affiliated with the forces fighting against the United States in Afghanistan. Hamdi contended that the claim was false,

⁷ Jan McGirk, *Pakistani Writes of His US Ordeal*, BOSTON GLOBE, Nov. 17, 2002, at A-30.

⁸ Department of Defense, DOD Announces Detainee Allowed Access to Lawyer, Press Release, Dec. 2, 2003, available at 2003/nr20031202-0717.html.

⁹ Eric Lichblau, *U.S. Releases Saudi-American It had Captured in Afghanistan*, NEW YORK TIMES, Oct. 12, 2004 at A-5.

that he was caught in the wrong place at the wrong time, and that he had never been a Taliban or Al Qaeda fighter. A central issue in his case was whether due process required a meaningful opportunity to contest the government's claims that Hamid was in fact an enemy combatant.

At the least, if Hamdi was not an "enemy combatant" and if traditional notions of liberty were followed, he should have been released or charged with a crime and given the criminal procedure guarantees of the Bill of Rights. So whether Hamdi was an "enemy combatant" was a crucial question.

The Bush claim of power to imprison American citizens without a due process hearing raised (and raises) the most fundamental issues of liberty under law. (With Orwellian aplomb, the administration contended that Hamdi's incommunicado interrogation, conducted with no access to counsel, relatives, or friends, was a constitutionally adequate hearing.)¹⁰ While Hamdi was captured in Afghanistan, the Bush administration's claim of power to incarcerate American citizens without a meaningful hearing to determine status was not limited by the location where the *alleged* enemy combatant was seized.

The United States Supreme Court's decision in *Hamdi v. Rumsfeld*¹¹ involved the power of the president to imprison an American citizen for years without allowing him either a trial, meaningful access to the courts, or a meaningful due process hearing to determine his status. The imprisonment was based on the president's labeling Hamdi an enemy combatant. The power to detain foreign soldiers captured in an armed conflict who are fighting against the United States is uncontroversial.

According to the administration, the court review was limited to whether the administration asserted that Hamdi was an enemy combatant (it did) and whether the Constitution and the laws permitted a citizen the

¹⁰ See, *Hamdi v. Rumsfeld*, 542 U.S. 507, 537:

Aside from unspecified "screening" processes, Brief for Respondents 3-4, and military interrogations in which the Government suggests Hamdi could have contested his classification, Tr. of Oral Arg. 40, 42, Hamdi has received no process. An interrogation by one's captor, however effective an intelligence-gathering tool, hardly constitutes a constitutionally adequate fact finding before a neutral decision maker.

¹¹ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

government *claimed* to be an enemy combatant to be held as Hamdi was. (The administration insisted it did). By the Bush administration view, the Constitution and laws allowed this procedure and the courts lacked power to go behind the government's assertions in order to decide whether a person really was an enemy combatant.

In time of war, the President, as Commander in Chief, has the authority to capture and detain enemy combatants for the duration of hostilities. That includes enemy combatants presumed to be United States citizens. ...

Petitioners' challenge to the military's determination that Hamdi is an enemy combatant is ... without merit. An enemy combatant who is a presumed citizen and who is detained in this country is entitled to judicial review of his detention by way of habeas corpus. In such a proceeding, a habeas petitioner may raise legal challenges to the individual's detention, such as petitioners' arguments that the Commander in Chief does not have the authority to detain a captured enemy combatant who is an American citizen, or that such a detention is barred by 18 U.S.C. 4001(a). However, the scope of judicial review that is available concerning the military's determination that an individual is an enemy combatant is necessarily limited by the fundamental separation-of-powers concerns raised by a court's review or second-guessing of such a core military judgment in wartime.¹²

So while the Bush administration conceded that American citizens seized as enemy combatants had access to habeas corpus, the concession was of little significance. The citizen could be held incommunicado and denied access to a lawyer. If a relative discovered his fate and brought a petition for habeas corpus, according to the administration, the court should dismiss the writ on the bald assertion by the executive that the person was an enemy combatant. By the administration's view of the law, upheld by five members of the Court, it had the power to detain American citizens who were enemy combatants. The Bush administration also denied that any real process was required to determine if the person really was an enemy combatant. But if the Court held against it on that point (which it

¹² Brief for the United States, 2004 WL 724020.

did), the administration contended a hearsay affidavit was conclusive and that the detained citizen had no right to a hearing to challenge its accuracy.

The Bush administration's concession of a right to habeas corpus was disingenuous. It envisioned a judicial habeas process in which a court would not hear from the prisoner on a crucial issue in his case—whether the facts justified holding him without the safeguards required in a criminal trial. Indeed, it envisioned a habeas proceeding in which the court would never see the imprisoned citizen, and the citizen would never see a lawyer.

As Justice O'Connor's plurality opinion noted, the government contended "in light of the extraordinary constitutional interests at stake," that "respect for separation of powers" ought to "eliminate entirely any individual process.... Under this review, a court would assume the accuracy of the Government's articulated basis for Hamdi's detention and assess only whether that articulated basis was a legitimate one."¹³

The government's fall back position was that the only question for the courts was whether there was "some evidence" to support the assertion that Hamdi was an enemy combatant.¹⁴ In short, by the fall back position, the court should accept without question the government's hearsay affidavit, and decide only whether the government's untested version of the facts justified Hamdi's incarceration.

The Court rejected the government's due process contentions, though the amount of process required by the controlling plurality opinion was limited—allowing for the possibility of a military hearing, shifting the burden of proof to Hamdi, and allowing hearsay evidence.¹⁵ Justices Scalia and Stevens dissented. They said that, for citizens, the Constitution required release or a criminal trial with full due process protections, unless the *Congress* suspended the writ of habeas corpus.¹⁶ Justices Souter and Ginsberg dissented as well, arguing that the congressional act authorizing the president to use all necessary force did not authorize detention of American citizens without judicial process and that the

¹³ Hamdi v. Rumsfeld, 542 U.S. 507, 527 (2004) (O'Connor plurality opinion.)

¹⁴ *Id.* at 527-28.

¹⁵ *Id.* at 533-34.

¹⁶ 542 U.S. at 554, 573-75 (Scalia, J. and Stevens, J., dissenting)

detention violated an act of Congress.¹⁷

Another example of President Bush's remarkable assertions of executive power came when he signed the McCain bill outlawing torture. In his signing declaration, the President seemed to reserve the legal right to ignore the provisions of the law.

The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks.¹⁸

The declaration should be read in light of the administration's earlier (and partially withdrawn) memo setting out an extraordinarily limited definition of what amounted to torture. That memo announced that congressional laws seeking to limit the coercive methods the president chose to employ would be unconstitutional. It would be

¹⁷ 542 U.s. 507, 541-42 (Souter and Ginsberg, concurring in part and dissenting in part).

The Government's first response to Hamdi's claim that holding him violates [§ 4001\(a\)](#), prohibiting detention of citizens "except pursuant to an Act of Congress," is that the statute does not even apply to military wartime detentions, being beyond the sphere of domestic criminal law. Next, the Government says that even if that statute does apply, two Acts of Congress provide the authority [§ 4001\(a\)](#) demands: a general authorization to the Department of Defense to pay for detaining "prisoners of war" and "similar" persons, [10 U.S.C. § 956\(5\)](#), and the Force Resolution, passed after the attacks of 2001. At the same time, the Government argues that in detaining Hamdi in the manner described, the President is in any event acting as Commander in Chief under Article II of the Constitution, which brings with it the right to invoke authority under the accepted customary rules for waging war. On the record in front of us, the Government has not made out a case on any theory.

¹⁸ Declaration of George W. Bush on signing the McCain bill banning torture.

“unconstitutional” to “seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks on the United States.”¹⁹

The Bush administration has justified its claim to largely unchecked presidential power based on emergency and necessity. The claim is as extreme as any ever asserted in American history. Indeed, the claim is more extreme because it is not limited to a comparatively brief emergency. The Civil War and World War II, for example, involved extraordinary assertions of power.²⁰ But, in each of those episodes, the wartime crisis involved an enemy state which could be defeated by capture of its territory. As a result, the war could be and was of limited duration. Lincoln used the expected temporary nature of the Civil War to justify his extraordinary assertions of power—analagizing his measures to medicine to be prescribed during illness.²¹ In contrast, the problem of terrorism is likely to last for many, many years—perhaps for hundreds of years. So the Bush administration is asserting unilateral and unchecked presidential power for the foreseeable future.

The claims of the Bush administration are in serious tension with traditional ideas of liberty. As Justice Scalia noted in dissent in *Hamdi v. Rumsfeld*, “The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive.”²² Alexander Hamilton thought habeas corpus was a crucial and preeminent guarantee of liberty because “the practice of arbitrary imprisonments [has] been, in all ages, the favorite and most formidable instruments of tyranny.”²³

¹⁹ U.S. Department of Justice, Office of Legal Counsel, Memorandum for Alberto R. Gonzales, Counsel to the President, August 1, 2002 at 39(available at <http://findlaw.com/hdocs/docs/doj/bybee80102/ltr.html>)(visited 2/6/06). The earlier torture memorandum was superceded by a Dec. 30, 2004 Memorandum Opinion for the Deputy Attorney General. While the torture discussion was withdrawn the new memo did not repudiate the claims of unchecked executive power. <http://www.usdoj.gov/olc/18usc23402340a2.htm>, visited Jan. 27, 2006 at 4: 44 p.m.

²⁰ See, e.g., the discussion of the Vallandigham case set out below and *Korematsu v. United States*, 323 U.S. 214 (1944)(incarceration of Americans of Japanese descent).

²¹ Cf. Abraham Lincoln, *Reply to the Ohio Democrats*, in ABRAHAM LINCOLN, SPEECHES AND WRITINGS, 1859-65, at 460 (Library of America, 1989)[*hereafter*, LINCOLN, SPEECHES].

²² 547 U.S. 507, (2004)(Scalia, J., dissenting).

²³ Alexander Hamilton, *The Federalist* 84.

The framers recognized circumstances (invasion or rebellion) in which the writ might be suspended. They placed the power to suspend in Article I, section 9. The grant of power to Congress was designed to ensure that the executive would not have the unilateral power to deprive citizens of liberty.

Of course, the requirement that Congress may suspend the writ in cases of invasion or rebellion is imperfect. Congress may be too willing to acquiesce in invasions of liberty. (During the Civil War Congress did attempt to put substantial limits on the president's power to imprison without trial.)²⁴ In any case, the requirement of congressional action is a substantial limit on unilateral, substantially unchecked executive power to imprison American citizens. As a safeguard to liberty, it is certainly a substantial improvement over putting the power in the hands of a single person.

Similarly, courts can also fail to protect liberty and often have. But, as Justice Brandeis noted, separation of powers is one important device "to preclude the exercise of arbitrary power...and to save the people from autocracy."²⁵

According to Professor Paulsen, the Constitution contains a doctrine of necessity that trumps almost all of its other provisions—at least in cases of extraordinary necessity. Paulsen advances forceful arguments to support his conclusion—to the extent that logic is the test.

The Constitution is not a suicide pact; and, consequently, its provisions should not be construed to make it one.... The Constitution should be construed to avoid constitutional implosion; it should not lightly be given a disabling, self-destructive interpretation. ... [P]riority [must] be given to the preservation of the nation whose Constitution it is, for the sake of preserving constitutional government over the long haul, even at the expense of specific constitutional provisions.²⁶

According to Paulsen, someone must decide on "necessity" and

²⁴ MICHAEL KENT CURTIS, FREE SPEECH: "THE PEOPLE'S DARLING PRIVILEGE:" STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY, 306-07 (2000) [*hereafter*, CURTIS, FREE SPEECH].

²⁵ *Myers v. United States*, 272 U.S. 52,293 (1926)(Brandeis, J., *dissenting*).

²⁶ Michael Stokes Paulsen, The Constitution of Necessity, 79 *Notre Dame L. Rev.* 1257, 1257-58 (2003-2004) [*hereafter*, Paulsen, Necessity].

exercise the sweeping power this doctrine provides. That person is the president. The president is the primary, and typically the ultimate, judge of necessity.²⁷ His oath to preserve, protect, and defend the Constitution gives him the power, in cases of necessity, to ignore its “other” provisions for the sake of the greater good.²⁸ The “preserve, protect, and defend” command “must take priority over practically any other constitutional rule set forth in the document.”²⁹ In effect, the Constitution contains a provision, hidden in the president’s oath, that gives him sweeping emergency powers, including freedom to disregard court orders.³⁰ Paulsen cites an authority to justify his expansive claims of executive power. His authority is Abraham Lincoln.

Curiously, Paulsen embraces a couple of potential checks on presidential power. These include the provision for periodic elections and impeachment.³¹ He fails to explain why these checks need not bow to the inexorable logic of necessity. At any rate, the checks are likely to be anemic when one party controls both the presidency and the Congress.

Of course, temporary action may be required from the president because there may not be time for other branches to act. But the Paulsen thesis goes far beyond that.

In spite of its appeal and apparent logical force, I find the doctrine dangerous. I don’t deny that presidents have sometimes (even often) ignored constitutional and legal limitations in pursuit of what they saw as a greater good, a concept they easily confused with partisan advantage.³² Nor do I deny that this has happened in times of crisis. It is one thing to recognize that, in exceedingly rare situations, presidents may act outside of the Constitution and still be judged as having acted reasonably, if not constitutionally. It is quite another to believe that the Constitution itself allows the president to ignore its provisions in cases of emergency, in effect in cases the president says he considers an emergency.

It is obvious, of course, that the emergency power proposed by

²⁷ *Id.* at 1291

²⁸ *Id.* at 1238-39

²⁹ *Id.* at 1283.

³⁰ *Id.* at 1296.

³¹ *Id.* at 1283-84, note 54.

³² For well documented instances in one administration, see generally, STANLEY I. KUTLER, *THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON* (1990) and J. ANTHONY LUKAS, *NIGHTMARE: THE UNDERSIDE OF THE NIXON YEARS* (1976).

Professor Paulsen under the necessity doctrine is currently of great practical importance. Today the nation faces a grave threat, a “war” with terrorists. But this “war” is different. The enemy has no state; capturing leading terrorists does not end the threat; and technology has vastly increased the potential for destruction. As in past wars and incidents of terrorism,³³ we face serious questions of personal liberty and the scope of free speech.

As noted above, President George W. Bush claims that the war power justifies suspension of basic civil liberties—such as habeas corpus, right to counsel, and jury trial—in the cases of those American citizens the president designates as unlawful combatants. The Supreme Court has established some limits on the exercise of executive power, but controversy is likely to continue.³⁴

At present, a broad unilateral “emergency” power to disregard constitutional limitations is an anomaly—viewed with deep suspicion. To transform it to a constitutional power similar but superior to other constitutional powers (which, unlike this one, are subject to limits in the interest of liberty) makes such emergency decree power more likely to be used and more defensible. Since these alleged “powers” have been abused with some regularity, full acceptance of the necessity doctrine will likely make things even worse. To his credit Paulsen discusses dangers and the potential of abuse.³⁵

To support his Constitution of Necessity, Paulsen repeatedly cites

³³ On prior incidents of terrorism, see generally, BARBARA W. TUCHMAN, *THE PROUD TOWER: A PORTRAIT OF THE WORLD BEFORE THE WAR (1890-1914)* (1962).

³⁴ See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507(2004). After public criticism of the apparent plan to try alleged terrorists including U. S. citizens before military tribunals, the administration’s plan for military tribunals was limited to non-citizens. George W. Bush, Military Order: Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, *Wkly Compilation of Presidential Documents* 1665, 2001 WL 1435652, 66 FR 57833. The administration claimed broad power to simply hold citizens alleged to be terrorists without meaningful hearing and certainly without trial. Some terrorism prosecutions in the court have involved free speech issues. In at least one case, a jury trial produced results quite different from those to be expected from unilateral and largely unchecked administrative action. See, *Computer Student on Trial Over Muslim Web Site Work*, *NEW YORK TIMES*, April 27, 2004 at A 16. *No Conviction for Student in Terror Case*, *NEW YORK TIMES*, June 11, 2004 at A-14 (describing failed prosecution of student webmaster).

³⁵ Paulsen, *Necessity*, *supra* note 26 at 1259.

President Abraham Lincoln. “[I]f I am mistaken in all this,” he concludes, “so was President Lincoln.”³⁶

Here I will critique Professor Paulsen’s use of Lincoln to support the case for necessity. I will focus on the case of Clement Vallandigham. Paulsen obviously has mixed feelings about Lincoln’s handling of the case. While he ultimately decides Lincoln was mistaken, he still mounts a limited (and mistaken) defense of Lincoln’s Vallandigham analysis, if not his result.

Lincoln says the things about necessity trumping other constitutional provisions that Paulsen attributes to him. And Paulsen goes a long way toward defending, or mitigating, Lincoln’s extraordinarily repressive actions in the Vallandigham case. I see three problems with citing Lincoln as authority for the necessity doctrine.

First: Lincoln assumed that he was exercising a brief, temporary authority and one that was safe because he expected the necessity for it to end soon. It is far from clear that Lincoln would have advocated abandoning constitutional limitations for the foreseeable future.

Second: Paulsen concedes that Lincoln’s *application* of the doctrine of necessity may sometimes have been mistaken. If Lincoln was seriously mistaken in his application of the doctrine of necessity, it shows Lincoln was quite capable of making gross mistakes in connection with the very doctrine at issue. If so, the invocation of Lincoln as authority on the subject should be viewed with caution. If Abraham Lincoln misunderstood or abused the doctrine, how safe is it in other hands? Paulsen has a powerful answer. All powers may be abused and that is no reason to deny a power.³⁷ Still, if abuses have quite often or even typically accompanied the exercise of the alleged power, that should give one pause before giving it a more respectable pedigree.

Third: In the end, Lincoln rejected the claim that the necessity of preserving the Union justified overriding all other constitutional norms and provisions. Specifically, as I discuss in Part VII, he rejected the idea that the necessity of preserving the Union could justify suspending elections. Citation of Lincoln to support the logic of the doctrine of necessity needs to come to grips with his refusal to follow his logic to its conclusion. If elections are (as Paulsen concedes) an exception to the

³⁶ *Id.* at 1297.

³⁷ *Id.* at 1289.

doctrine of necessity, there is much less to the sweeping logical case for the necessity claim than meets the eye.

Elections are supported by a larger system of political liberty. A president who can imprison citizens without charge, access to a lawyer, and the right to a jury trial can undermine an effective electoral system. Surveillance of all political activity can substantially undermine an electoral system, particularly if citizens know that the president can whisk them away to solitary confinement, without access to courts, lawyers, family or friends. And finally, of course, a very robust system of freedom of speech is crucial to meaningful elections. In short, the election exception entails protection of much more than an empty right to vote.

I will look briefly at Lincoln's first announcement of the necessity doctrine and then focus primarily on the Vallandigham case—the case of the arrest of a Democratic politician for making an anti-war speech. Professor Paulsen has also discussed the case.³⁸

II. LINCOLN'S EARLY EXERCISE AND INVOCATION OF THE DOCTRINE OF NECESSITY.

Faced with the grave secession crisis and rebel guerilla warfare in Maryland and elsewhere, Lincoln suspended the writ of habeas corpus. Lincoln says that all laws were being disregarded. Must all laws be allowed to fail to protect a single law from being violated? If he followed that course, asks Lincoln, “would not the official oath be broken?”³⁹

Still, Lincoln did not think the habeas provision of the Constitution had been violated—because the Constitution itself provided for suspension of the writ in cases of rebellion or invasion when the public safety required it.⁴⁰ So while Lincoln first invoked the doctrine of necessity, he then suggested that its invocation was unnecessary, since the Constitution explicitly provided for the suspension. What the

³⁸ Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U. CHI. L. REV. 698-701, (2004), a review of DANIEL FARBER, LINCOLN'S CONSTITUTION [hereinafter Paulsen, Interpretation]; Paulsen, Necessity, *supra* note 26 at 1280-81.

³⁹ *Id.* at 1265.

⁴⁰ CURTIS, FREE SPEECH, *supra* note 24 at 305(2000) (quoting Lincoln). For extended treatment of the Lincoln Vallandigham controversy see CURTIS, FREE SPEECH, *supra* and Michael Kent Curtis, *Lincoln, Vallandigham, and Anti-War Speech During the Civil War*, 7 WM. & MARY BILL OF RTS. J. 105 (1998).

Constitution did not explicitly do was invest the president with that power. Indeed, the power to suspend in cases of rebellion or invasion was placed in Article I, together with other limits on the powers of Congress. Congress was not in session, the situation was dire, and Lincoln acted—and disregarded a writ of habeas corpus issued by Chief Justice Taney.⁴¹

The Constitution certainly did not explicitly allow the president to go beyond imprisoning without trial during invasion or rebellion: it did not seem to allow him to subject civilians far from the combat zone to military trials and convictions for violating military orders. That, however, is what Lincoln sometimes did.

After Lincoln's suspension, Congress met, and it ratified, but limited, the suspension of the writ. It placed strong limits on the use of such arrests. Specifically, Congress provided that a list of those arrested should be provided to the courts. If the courts were open and functioning, civilians arrested should be either indicted or released by the end of the court term.⁴² The Lincoln administration ignored the congressional limits in the case of civilians arrested by the military.⁴³

Lincoln's first urgent suspension in the face of rebel activity in Maryland and elsewhere is the most defensible in constitutional terms. There was a rebellion and in such cases the Constitution did provide for suspension of the writ. Congress was not in session and not immediately available. In this situation there is a plausible argument that Lincoln's actions were in accordance with the Constitution, even absent a necessity gloss.

As to his decision to ignore the congressional limitations on his suspension of habeas corpus for civilians arrested by the military outside the theater of conflict, Lincoln actually needed the necessity doctrine. But here his decision to ignore the law was not justified. Lincoln's decision to ignore congressional limits on the suspension of habeas corpus can perhaps be justified by an appeal to an authority higher than the law. It should not be justified by the claim that he acted constitutionally. Of course, the Republicans in Congress did not impeach their president.

⁴¹ Paulsen, Necessity, *supra* note 26 at 1264-65 and 1269-70.

⁴² CURTIS, FREE SPEECH, *supra* note 24 at 310.

⁴³ *Id.* at 339.

III. THE CASE OF CLEMENT VALLANDIGHAM

Clement Vallandigham was a racist, anti-war Democrat. In 1863, after being gerrymandered and then defeated for Congress, Vallandigham hoped to run for Governor of Ohio. On May 1, 1863 Clement Vallandigham made a speech to a large Democratic meeting in Ohio. The speech and the reaction of the Lincoln administration assured Vallandigham a place in the history books.

In his speech, Vallandigham denounced the Civil War as “wicked, cruel, and unnecessary.” It was a war “for the purpose of crushing out liberty and erecting a despotism;” “a war for the freedom of the blacks and the enslavement of the whites.”⁴⁴ Vallandigham did not “counsel resistance to military or civil law.” Instead, he urged his listeners to resist at the ballot box and throw “King Lincoln” from his throne.⁴⁵ That is what Vallandigham said, according to witnesses for the prosecution.

Vallandigham does not seem to have violated any federal or state law. He certainly was not charged with such a violation. Instead, he was charged with violating an *Order* enacted by General Ambrose Burnside. The order forbade “declaring sympathies for the enemy” and “treason, express or implied.”⁴⁶ The charge against Vallandigham was “publicly 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.”⁴⁷ The charge was supported by a specification of the words cited above. It was also supported by Vallandigham’s assertion that Order 38 was a “base usurpation of arbitrary authority” and that the people should tell “the minions of usurped power” that they would not submit to such limits on their liberties. (Vallandigham also said that his right to speak came from General Order No. 1, The Constitution, not from General Order 38.)⁴⁸ The evidence at Vallandigham’s “trial” was that he coupled his harsh criticism of the war

⁴⁴ THE TRIAL OF CLEMENT L. VALLANDIGHAM BY A MILITARY COMMISSION (Cincinnati, Rickey and Carrol 1863) 11-12 [*hereafter*, VALLANDIGHAM TRIAL].*Id.* at 310.

⁴⁵ *Id.* at 22-23.

⁴⁶ *Id.* at 7.

⁴⁷ *Id.* at 11.

⁴⁸ *Id.* at 14-15.

policy of the Lincoln administration with a call for electoral action.⁴⁹

For his speech, Vallandigham was seized by soldiers at his home, placed on a sealed train, and sped away to face a military trial before a “court” appointed by the general who ordered his arrest. Vallandigham sought a writ of habeas corpus, but federal Judge Humphrey H. Leavitt (an Andrew Jackson appointee) denied the writ. His opinion embraced the necessity doctrine. The judge said that the Constitution must be understood to recognize power to adapt to circumstances as “necessary to meet a great emergency and save the nation from hopeless ruin. Self preservation is a paramount law.”⁵⁰ Here again we see the necessity doctrine invoked and abused.

Instead of ingeniously finding the power to disregard constitutional limitations in the requirement of the oath, supporters of Lincoln’s actions cited the war power and the power of the president as commander-in-chief. Still, this version of the necessity doctrine had an effect similar to that for which Paulsen contends. The war power, a writer in the Chicago Tribune announced, was “tremendous,” but “strictly constitutional.” It broke “down every barrier so anxiously erected for the protection of liberty.” The war required a dangerous concentration of power in the hands of the executive, but the nation faced a choice of evils and this was the lesser evil.⁵¹ Similarly, William Whiting, solicitor for the War Department said the war power was constitutional, but not limited. Military crimes included all acts of hostility to the country, the government, or any department or officer thereof” if the act had the “effect” of “even interfering with” the military or of “encouraging” the enemy. Civilians who committed these military crimes were subject to military arrest and trial.⁵² Several supporters of the necessity doctrine (including Ralph Waldo Emerson) announced that it invested the

⁴⁹ *Id.* at 22-24 (testimony of Captain John Means for the prosecution); 27 (testimony of Congressman S. S. Cox for the defense). See also “Vallandigham’s Followers, ...,” CINCINNATI COMMERCIAL, May 6, 1863, at 1 (news article from a Republican paper reporting a Vallandigham speech) and CURTIS, FREE SPEECH, *supra* note 24 at 312-13 .

⁵⁰ Vallandigham Trial, *supra* note 44 at 262-64.

⁵¹ *Military and Civil Law*, CHICAGO TRIBUNE, June 12, 1863 and *Military and Civil Law –No. 3*, CHICAGO TRIBUNE, June 18, 1863 at 3. Curtis, Free Speech, *supra* note 24 at 336-37.

⁵² CURTIS, FREE SPEECH, *supra* note 24 at 337.

president with the powers of a “dictator.”⁵³

The arrest of Vallandigham produced massive protests. Critics generally called for peaceful resistance to what they saw as a gross invasion of constitutional rights. George V. N. Lothrop, a former attorney general of Michigan who “unreservedly” supported the war, insisted that the arrest violated freedom of speech. His understanding of free speech was simple and powerful: a man could not be arrested “for any quality of opinions on public affairs” because “without free discussion there can be no free government.” As a result, Vallandigham had the “full right to approve, criticize or denounce the war and all acts and measures of the administration at his pleasure. As a citizen he might form any opinion on these subjects and freely express them.”⁵⁴ Freedom of speech implied “that men will honestly differ, and that the privilege of expression is to be equal to all. The right of expression shall not depend upon...the quality of the opinions in the judgment of another. The guaranty means this or it means nothing.”⁵⁵

The free speech-democracy argument was repeated again and again. “If freedom of speech is surrendered,” said the *Detroit Free Press*, “it will no longer be pretended, we presume, that the ballot box can represent the views and wishes of the majority of the people...Without freedom of speech, the ballot box is a farce.”⁵⁶ By the same logic, the paper noted, the president could dispense with elections. If it was disloyal to speak against the war, it was doubly disloyal to vote for those who opposed it.⁵⁷

Others harkened back to arguments made against the Sedition Act of 1798. In the American government, the people were the principal and elected officials were merely their agents. As a result, the people must retain the right to criticize the acts and policies of their agents and to discuss replacing them.⁵⁸ A number of Republicans and abolitionists joined pro and anti-war Democrats in criticizing Vallandigham’s arrest

⁵³ *Id.* at 337.

⁵⁴ *Speech of Hon. Geo. V. N. Lothrop*, DETROIT FREE PRESS, June 7, 1862 at 2..

⁵⁵ *Id.*

⁵⁶ *Will the People Be Allowed to Vote*, DETROIT FREE PRESS, June 5, 1863, at 2.

⁵⁷ *Id.*

⁵⁸ CURTIS, FREE SPEECH, *supra* note 24 at 325.

and other acts of suppression.⁵⁹

Critics of Vallandigham's trial also complained about the violation of other constitutional rights—including trial by jury and grand jury indictment. They insisted that a military trial of civilians was not permitted far from the scene of battle where the civilian courts were functioning. At most, they insisted the power to suspend the writ of habeas corpus allowed imprisonment until a constitutional trial could be held, not a trial by a military tribunal.⁶⁰

Lincoln responded to his critics. He rejected the claim that Vallandigham, as a person not in the military and not in the theater of war, was entitled to a civilian trial with all Bill of Rights guarantees. Lincoln insisted that the Civil War was a rebellion that allowed suspension of the writ of habeas corpus, and that the suspension allowed military trials. Such arrests were preventative, made not because of what had been done, but “for what probably would be done.” Those to be arrested, according to Lincoln, included the “man who stands by and says nothing when the peril of his country is discussed” and he who “talks ambiguously—talks for his country with ‘buts’ and ‘ifs’ and ‘ands.’”⁶¹

In spite of the charge against Vallandigham and evidence offered at his “trial,” Lincoln insisted that Vallandigham was not merely arrested 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.” If that were the case, Lincoln said, the arrest was wrong. Instead, Vallandigham was arrested because he was “laboring with some effect, to prevent the raising of troops; to encourage desertions....”⁶² When challenged on this point, Lincoln responded defensively. He admitted that “I certainly do not know that Mr. V. has specifically, and by direct language, advised against enlistments, and in favor of desertions, and resistance to drafting.”⁶³ But that was the effect of what he said, and Lincoln said (mistakenly) that “Mr. V.” had not coupled his criticisms with a call to obey the law. “Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair on the head

⁵⁹ *Id.* at 326-29

⁶⁰ *Id.* at 342.

⁶¹ LINCOLN, SPEECHES, *supra* note 21 at 458.

⁶² *Id.* at 459.

⁶³ *Id.* at 468 (Reply to Ohio Democrats)

of a wily agitator who induces him to desert?”⁶⁴

Critics of the arrest found the defense outrageous. The *Detroit Free Press* complained that Vallandigham was not charged with encouraging desertions. The paper asked, if that was the offense, *why was he not charged with it?*⁶⁵

IV. PROFESSOR PAULSEN ON LINCOLN’S CONSTITUTIONAL PRINCIPLES

Professor Paulsen considers the Vallandigham case in detail. He praises Lincoln’s *legal analysis* in the Vallandigham case (as distinct from his conclusion) in a beautifully written book review that is also an engaging and important analysis of Lincoln as a constitutional actor.⁶⁶ Professor Paulsen recognizes that most today would see some of Lincoln’s actions “as violations of the freedom of speech and the due process rights to trial by civilian courts and by jury.”⁶⁷ But he doubts that it is “really so easy to conclude that Lincoln’s actions were unconstitutional, even in these instances...”⁶⁸ (His most recent article may suggest that he is beginning to find it easier.)⁶⁹

Constitutionality turns on necessity, so if Lincoln were wrong about necessity, his actions could also be wrong. Still, Paulsen notes, Lincoln was the sole judge of necessity.⁷⁰

Paulsen says that the proper evaluation of Lincoln’s approach turns on whether it was consistent with the Constitution, not whether it was consistent with later judicial doctrine.⁷¹ But to a remarkable extent Paulsen insists that Lincoln anticipated later free speech doctrine. He tells us Lincoln “spotted all the issues and wrestled thoughtfully with their implications.”⁷² Paulsen sees four related constitutional principles in Lincoln’s declarations in the Vallandigham case. I will set out the

⁶⁴ *Id.* at 460.

⁶⁵ *The President’s Claim of Power*, DETROIT FREE PRESS, June 16, 1863, at 2.; CURTIS, FREE SPEECH, *supra* note 24 at 341.

⁶⁶ Paulsen, Interpretation, *supra* note 38 at 691.

⁶⁷ *Id.* at 725.

⁶⁸ *Id.*

⁶⁹ Paulsen, Necessity, *supra* note 26 at 1281.

⁷⁰ Paulsen, Interpretation, *supra* note 38 at 701, n. 23 (cont.).

⁷¹ *Id.* at 699-700.

⁷² *Id.* at 700-701 n. 23.

principles Paulsen finds and then discuss them.

1. Lincoln as Anticipating Speech Plus Action Analysis

Paulsen sees Lincoln as distinguishing between “government action ... [that] targets speech directly or targets *conduct*, producing an incidental restriction of speech that is mixed together with such conduct.”⁷³ Paulsen finds this distinction in Lincoln’s statement that the Vallandigham arrest would be wrong if based merely on words in a public speech criticizing the “course of the Administration” and the “orders of a General.” But Paulsen notes that Lincoln *said* more was involved—Vallandigham’s “laboring with some effect to prevent the raising of troops” and “to encourage desertions from the army.”⁷⁴

2. Lincoln As Anticipating the Clear and Present Danger Test

Paulsen says, “Lincoln [defended] the less-harsh consequence of the arrest when compared with alternative approaches and their attendant harms (over fifty years before Learned Hand’s ... opinion employed a similar calculus....)”⁷⁵ This suggests that Paulsen finds Lincoln employing something quite like Hand’s version of the “clear and present danger” test.⁷⁶ While Paulsen concedes that one can doubt the wisdom of Lincoln’s application of these principles, he finds that Lincoln understood the nature of the constitutional problem and formulated principles similar to those later courts used. All the modern, more speech protective judicial decisions, Paulsen suggests, are as debatable as Lincoln’s principles.⁷⁷

3. Lincoln as Anticipating and Applying the Compelling State Interest Test

Paulsen also finds a strong resemblance to a compelling state interest test in Lincoln’s references to what is required when confronting

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 701, n. 23 (cont.).

⁷⁶ See, *id.* at 701, n. 23 (cont.). I think the reference to less harsh consequences is intended as a reference to Hand’s *Dennis* opinion, not to *Masses*.

⁷⁷ *Id.*

a rebellion. Paulsen notes that in modern doctrine a compelling state interest can justify suppression of what would otherwise be protected speech.⁷⁸ He suggests that the modern compelling state interest test supports Lincoln's analysis in the *Vallandigham* case (if not his application).⁷⁹ After all, the need to preserve the Union was compelling. Professor Paulsen sees Lincoln following an overarching, guiding principle, one related to compelling state interest and clear and present danger.

4. The Anything Needed to Win Principle

For Paulsen, Lincoln correctly thought that his duty “to preserve, protect, and defend the Union...required him—*constitutionally* required him—to do what was necessary to win, even if it meant the temporary sacrifice, during wartime, of other constitutional values. ... The need to preserve the constitutional order... operates as a rule of construction for other constitutional provisions.”⁸⁰ By Lincoln's theory, the president, as Commander-in-Chief, was the sole judge of necessity.

V. REFLECTIONS ON THE PAULSEN ANALYSIS

The suggestion that Lincoln anticipated modern judicial doctrine makes his analysis seem less threatening. After all, if Lincoln is simply applying modern principles, what is the fuss? I think that modern judicial free speech principles are really quite different from anything Lincoln suggested.

1. Speech-Action

In the *Vallandigham* case Lincoln was not dealing with what we now see as a speech-action problem. In his discussion of the *Vallandigham* case, all of Lincoln's specific references are to speeches, not to communicative actions.

The general's order that *Vallandigham* was accused of violating targeted both conduct (spying) and words—(“disloyal sentiments”).

⁷⁸ Paulsen, Interpretation *supra* note 38 at 701 n. 23.

⁷⁹ *Id.*

⁸⁰ *Id.*, at 722.

Vallandigham was charged only with uttering words. The Vallandigham case is not usefully seen as a speech-conduct problem because the charge and evidence against Vallandigham were based exclusively on his words. Lincoln also referred to Vallandigham's speeches, and he did not specify any other action unrelated to speeches. The laboring to prevent the raising of troops that Lincoln refers to seems to refer only to Vallandigham's speeches. The speeches were the basis of the charge against Vallandigham and the sole evidence on which he was convicted.

Speech-conduct cases involve expressive actions that create harms independent of the expression. In such cases the actions also have an expressive effect, such as a public burning of a draft card.⁸¹ As a result, when the regulation targets the harm from the action (as opposed to the harm from the expression), speech-conduct cases allow much greater leeway for government suppression.

The speech-conduct approach is not usefully applied to the long term persuasive effect of political speech on the minds of those who hear it. The government must have the power to suppress much conduct that is also expressive. Blowing up buildings to send a message is not protected. The case for suppression of political speech because it may have a "bad tendency" to give people the wrong political ideas is subversive of the democratic right to speak critically on matters of public concern.

The ambiguity in Lincoln's analysis is not about conduct other than speech. It is his distinction between: (1) what Vallandigham said in his speech (or speeches) and (2) merely criticizing the course of the administration and the action of a general. Did Lincoln think one could criticize the way the administration was conducting the war for the Union, but not the war itself? From his remarks, it is impossible to say.

Finally, Paulsen notes that Lincoln believed that some constitutional actor must make the ultimate judgment of the degree of necessity; in time of war, the president was that actor.⁸²

2. Clear and Present Danger

There are some resemblances between what Lincoln said to justify

⁸¹ *United States v. O'Brien*, 391 U.S. 367 (1968) (Conviction for burning draft card—a protest against the Vietnam War—upheld).

⁸² Paulsen, *Interpretation*, *supra* note 38, at 701, n. 23 (cont.).

punishment of Vallandigham and the *Dennis*⁸³ plurality's weakened version of the "clear and present danger" test—a version largely superseded by the *Brandenburg*⁸⁴ test. It is true that Lincoln was grappling with problems that recur and weighing costs and benefits. How should we treat wartime speech that has a tendency to harm the (perhaps misguided) war effort? In modern cases, the clear and present danger doctrine has been applied to advocacy of unlawful action.

In understanding Judge Hand's "clear and present danger test" to which Paulsen refers,⁸⁵ the context is important. That context in *Dennis* was a case against defendants who were officers of the Communist Party of the United States. The trial court had found that they had advocated revolution—albeit in the future.

This requirement of advocacy of lawbreaking as part of clear and present danger is highlighted by Judge Hand's earlier *Masses*⁸⁶ opinion. Scholars have seen the *Masses* opinion as the source of the advocacy requirement in the modern clear and present danger doctrine. In *Masses*, Judge Hand considered dissenting speech in wartime. The Postmaster General had denied mailing privileges to *The Masses*, a magazine that had harshly criticized the First World War. Because mailing is crucial to the survival of most magazines, the decision was a death sentence for the magazine.

Publications could be denied mailing privileges if they violated the 1917 Espionage Act, which made it a crime to cause or attempt to cause insubordination in the military or naval forces or to obstruct recruiting or enlistment. Though technically Hand was construing the statute, in fact his decision was strongly influenced by what he considered the correct constitutional principle.

Judge Hand frankly recognized that harsh criticism of the war

⁸³ *Dennis v. United States*, 391 U.S. 494, 510 (1951) (Upholding convictions of leaders of the Communist Party U.S.A. for teaching the necessity of violent overthrow of the government as soon as possible).

⁸⁴ *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (reversing conviction of KKK speaker who suggested violence might be needed if the Supreme Court and others continued to oppress the white race).

⁸⁵ *Cf.*, Paulsen, Interpretation, *supra* note 38 at 701. Again I think the Hand calculus referred to comes from *Dennis*, not *Masses*. See text accompanying notes 65 and 66 to this article, *supra*.

⁸⁶ *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917) *reversed*, 246 F. 24 (2d Cir. 1917).

could, and in some cases would, interfere with recruiting and enlistment. But he rejected the conclusion that the bad tendency justified suppression of political speech.

Political agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to the violation of the law. Detestation of existing policies is easily transformed into forcible resistance of the authority which puts them into execution, and it would be folly to disregard the causal relation between the two. Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom.... If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation. If that be not the test, I can see no escape from the conclusion that under this section every political agitation which can be shown to be apt to create a seditious temper is illegal.⁸⁷

Hand was unwilling to punish political agitation that falls short of urging people to resist the law. The speech for which Vollandigham was punished did not urge people to violate the law. So Vollandigham's speech would have been protected by the Hand principle in *Masses*, as opposed to the Lincoln principle. Though Lincoln seems to have been unaware of the fact, Vollandigham went further than the Hand rule would have required. He explicitly urged his hearers to obey the law and to seek redress at the polls.⁸⁸

Later, in the Communist Party case of *United States v. Dennis*,⁸⁹ Judge Hand crafted a watered down version of the clear and present danger test.⁹⁰ The new test was based on the gravity of the evil discounted by its improbability, and it was embraced by a plurality of the Supreme

⁸⁷ *Masses Publishing Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917), reversed 246 F. 24 (2d. Cir. 1917).

⁸⁸ CURTIS, FREE SPEECH, *supra* note 24 at 312.

⁸⁹ *United States v. Dennis*, 183 F.2d 201 (2d Cir., 1950).

⁹⁰ *Id.* at 212.

Court.⁹¹ Hand found the evil of a Communist revolution (or attempted revolution) was quite great, so not much probability of revolution being attempted was required. Still, advocacy of lawless action survived as an element of the *Dennis* test. The trial court submitted the issue to the jury, and the *Dennis* jury found that the defendants had organized the Party to teach and had taught the duty and necessity of overthrowing the government as soon as circumstances would permit.⁹² The finding, which was contrary to the claims of the defendants, was sustained by the Court of Appeals.

Read in light of the full opinion, the principle of Hand's *Dennis* opinion and the principle of the *Dennis* plurality in the Supreme Court is again quite different from the principle Lincoln espoused. The gravity of the evil discounted by its improbability was a test to be applied to *advocacy of illegal action*. It was applied where the court found that defendants had organized the Party to advocate illegal action—albeit in the future.⁹³ *Dennis* sharply distinguished advocacy of change through the political process from advocacy of revolution.⁹⁴ The distinction is crucial, however dubious *Dennis* is as a standard applied to teaching the ultimate need for revolution as opposed to a conspiracy to revolt, bomb, etc.

As we have seen, Vallandigham did not explicitly advocate illegal action. Lincoln virtually conceded as much in his second letter on the

⁹¹ *Dennis v. United States*, 341 U.S. 494, 510-11 (1951) (plurality opinion).

⁹² “In the instant case the trial judge charged the jury that they could not convict unless they found that petitioners intended to overthrow the Government ‘as speedily as circumstances would permit.’” *Dennis v. United States*, 341 U.S. 494, 509-10 (1950) Again the *Dennis* plurality noted that “Petitioners intended to overthrow the Government of the United States as speedily as the circumstances would permit. Their conspiracy to organize the Communist Party and *to teach and advocate the overthrow of the Government* of the United States by force and violence created a ‘clear and present danger’ of an attempt to overthrow the Government by force and violence.” *Id.* at 516-17 (Emphasis added).

⁹³ *Id.*

⁹⁴ “The obvious purpose of the statute is to protect existing Government, not from change by peaceable, lawful and constitutional means, but from change by violence, revolution and terrorism. That it is within the power of the Congress to protect the Government of the United States from armed rebellion is a proposition which requires little discussion. Whatever theoretical merit there may be to the argument that there is a ‘right’ to rebellion against dictatorial governments is without force where the existing structure of the government provides for peaceful and orderly change.” 341 U.S. 494, 501.

case. In fact, Vallandigham urged obedience to the law.⁹⁵ So even under the *Dennis* test, Vallandigham's speech should have been protected. The principle embraced by the plurality during the Cold War was significantly more speech protective than Lincoln's.

Although Vallandigham explicitly advocated obedience to the law and lawful political action, his speeches may have produced illegal action. However, as Judge Hand observed in *Masses*, any criticism of a war may have that result. If the necessity principle allows suppression of all criticism of the war, it suspends the democratic process and the right of "we the people" to consult together about the wisest course—a right especially important in wartime.

3. The Compelling State Interest Test

Paulsen implies that Lincoln was simply balancing the right of dissent against the evils it would produce, and he says that this is quite similar to the compelling state interest test.⁹⁶ The principle seems to be that otherwise protected speech advocating political change by peaceful means may be suppressed to advance a compelling state interest. This approach is not compatible with the idea that the people, not the officers of the government, are sovereign, and therefore must be allowed to hear dissenting speech so they can participate in charting the nation's course. Recent cases do not support silencing mere political speech that harshly criticizes public measures and people in public life and calls for political change. If the president alone makes the decision that there is a compelling interest justifying suppression of political speech, the principle is especially troubling, even if the test is limited to wartime.

If not limited to wartime, silencing political speech advocating peaceful political change for "compelling" reasons could have silenced much dissenting speech in American history. For example, the approach would have justified the suppression of anti-slavery speech based on fears of slave revolts and of sectional strife leading to disunion and civil war.⁹⁷

The argument from necessity is the same in both cases. Slave revolts and civil war were very great evils. It is, in fact, hard to

⁹⁵ CURTIS FREE SPEECH, *supra* note 24 at 312.

⁹⁶ Paulsen, Interpretation, *supra* note 38 at 701, n. 23 (cont.).

⁹⁷ CURTIS, FREE SPEECH, *supra* note 24 at 133-36 (discussing the case for suppressing the abolitionists).

distinguish this type of compelling interest test from a bad tendency test. Since the 1930s, the principle has not been applied to political speech that did not advocate violation of the law. Such speech has been protected, even in wartime. Julian Bond, for example, was protected in endorsing criticisms of the Vietnam war that were at least as harsh and likely to cause draft resistance as those Vallandigham made of the Civil War.⁹⁸

4. The Anything Needed to Win Principle

Closely related to the compelling state interest argument is another claim: Lincoln's guiding constitutional principle during the Civil War was that the government had all necessary power to do anything needed to preserve the Union. Lincoln claimed that since some constitutional actor should decide these questions, the decision should rest with the Commander-in-Chief.

The "anything needed to win" principle for time of war seems clear. The executive branch can try a citizen for a political speech if the citizen violates a rule enacted by the president or one of his generals. Advocacy of peaceful change can be punished. No statute passed by Congress is required. The citizen can be "tried" by a military commission staffed by decision makers chosen by the general who enacted the rule and initiated the prosecution. And all this can be done in places where no battle rages. The executive legislates, adjudicates, punishes, and reviews. There is a principle here—that the executive's claim of necessity in practice trumps the free speech right to advocate political change at the ballot box if that advocacy is coupled with harsh criticism of the administration. But it is a principle to be avoided. Indeed, Professor Paulsen seems to be backing even further away from it.

Since we are debating it, the question is of course "debatable." But are the merits of the pro and con arguments equivalent? As we will see, in one of his most thoughtful moments, Lincoln rejected "anything necessary to win" as the ultimate constitutional principle.

VI. Dealing With the Lincoln "Precedent."

⁹⁸ *Bond v. Floyd*, 385 U.S. 116 (1966) (Reversing Georgia legislature's exclusion of a state legislator who had expressed admiration for those who resisted the draft during the Vietnam War).

In this section I consider problems with treating Lincoln as a model to justify vast, largely unchecked, unilateral presidential power—power that suspends other constitutional rights and liberties. These reflections are divided into two parts. Part A focuses on Lincoln and his actions. First, I argue that Lincoln’s actions in the Vallandigham case should not be treated as a precedent, because they are a clear abuse of power. Second, I examine the Lincoln precedent in the Vallandigham case and suggest ways to undermine it. Third, I point out that concessions made by Lincoln himself seriously undermine the apparently compelling logical argument that necessity supercedes other constitutional limitations.

Part B reflects further on crisis and broad power. One serious danger is the exploitation of crises for partisan political purposes. In addition, I respond to the idea that we need not worry about suspension of civil liberties in times of emergency because the suspensions are brief and produce no long term effects.

The conclusion looks further at the dangers of unilateral unchecked presidential power and the serious dangers posed by acceptance of the argument that such power is, in times of crisis at least, entirely legal and constitutional.

A. A Closer Look at the Vallandigham Precedent

1. Lincoln’s Vallandigham Actions Were a Clear Abuse of Power. His Justifications Were Specious.

Unless one accepts suspension of freedom of speech in wartime, Lincoln actions cannot be justified. The suspension of free speech implies that an elite should decide whether the war is wise, should be continued, and is worth the harm it inflicts. These would be matters that ordinary citizens must not discuss. They could serve in battle, sacrifice sons and daughters, pay taxes, and suffer all the costs and benefits of war. But they could not discuss its wisdom. That approach is inconsistent with the basic idea of popular sovereignty.

In spite of Lincoln’s claims, the facts of Vallandigham’s case are clear. He was prosecuted for words he uttered in a political speech. Vallandigham was tried on specific charges and evidence was offered at the trial. The charge recited the words of his speech; the evidence was also based only on his words. It showed that he had not counseled draft

resistance or illegal conduct. If one accepts application of the basic due process idea that people can only be convicted of crimes with which they are charged and for which evidence is produced, then the Vallandigham verdict cannot be justified. It cannot be justified, that is, under any principle more protective than one allowing suppression of political speech in wartime because it may cause future harm. Since Lincoln upheld the conviction, his action cannot be justified either—if free speech or due process applies outside the zone of battle while the nation is at war. Of course, if one accepts the “necessity principle,” applies the logic fully, and leaves that issue to the president, then the game is over.

Another approach is to suggest that whatever his words, Vallandigham’s intent was treasonous. The problem with this approach is that almost any anti-war speech could be silenced by the same assumption of treasonous intent. Basically, this approach accepts the idea that during war time any speech with a bad tendency—that may cause problems for national unity and the war effort—can be suppressed. Some of Lincoln’s rhetoric in the Vallandigham case can be cited to support the bad tendency approach.

Lincoln’s made a politically powerful rejoinder to critics of the Vallandigham arrest: he asserted Vallandigham’s bad intent. It was Lincoln’s “wily agitator” defense:

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 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.⁹⁹

As noted above, an anti-war speech that does not advocate breaking the law may cause a father, brother, or friend to write a soldier with the sentiments Lincoln condemns. Basically, the wily agitator justification presumes a criminal intent on the part of the agitator. The

⁹⁹ LINCOLN, SPEECHES, *supra* note 21 at 460.

presumption is hard to refute and subject to abuse. The fact that the “agitator” does not advocate violating the law simply shows how “wily” he is. Does the agitator urge people to obey the law and seek redress at the polls? That could be taken as proof that he is even “wilier.” Even specific denunciation of illegal acts (a factor Lincoln says would weigh strongly in Vallandigham’s favor if it had occurred—which it did) could be interpreted simply as proof that the agitator is extremely “wily.”

Professor Geoffrey Stone, a leading expert on free speech law, notes another problem with Lincoln’s “simple-minded soldier boy” argument. We cannot protect democratic discourse if the test is to be the effect of speeches on the “simple-minded” or the most susceptible members of the audience.¹⁰⁰ Just as it is inappropriate to reduce adults to reading material fit for children, it is inappropriate to reduce voters to hearing only things not likely to mislead the simple minded.

There are few mistakes for which one cannot find a precedent. Before the Civil War, Southern states such as North Carolina banned anti-slavery speech that had a tendency to produce discontent in slaves. The North Carolina Supreme Court interpreted the statute to prohibit giving Hinton Helper’s anti-slavery book to whites.¹⁰¹ The effect of the decision was to reduce white voters to reading material fit for slaves.

2. Further Undermining the Vallandigham Precedent

Though not a judicial decision, Lincoln’s action in Vallandigham’s case is a precedent. There are, however, reasons to treat the Vallandigham precedent as a very weak one that should make us suspicious of invocation of “necessity.” Of course, we have Lincoln’s public justifications of the Vallandigham arrest and verdict. But we now also have the historical record. It shows that while Lincoln and his cabinet defended the arrest publicly, in private cabinet members doubted its wisdom, lawfulness, or necessity.¹⁰² Second, also in private dispatches,

¹⁰⁰ GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME, FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 106 (2004) [*hereafter* STONE, PERILOUS TIMES].

¹⁰¹ CURTIS, FREE SPEECH, *supra* note 24, at 293-96. *See generally id.* at Chapters 12 and 13.

¹⁰² *Id.* at 315-16. I am indebted to Malcolm Futhey who urged me to list reasons why the Vallandigham precedent should be viewed with suspicion.

Lincoln reined in his generals, a clear indication that in his own mind the Vallandigham precedent was not one to be lightly repeated.¹⁰³ Third, when Burnside struck again and banned publication of the *Chicago Times*, Lincoln countermanded the order.¹⁰⁴

3. Lincoln's Statement on Elections Undermines His Necessity Argument

Finally, and most significantly, in 1864 Lincoln strongly defended the need for free elections even in the midst of a civil war. We cannot have free elections without free speech. So in the end, Lincoln's wise statements on the need for free elections undermines the force of his Vallandigham arguments. His statements also undermine the "anything to win" principle. He recognized democracy as a principle that should not be sacrificed even "temporarily" to "win."

The damage Lincoln's concession inflicts on the "anything to win" approach goes far beyond the need to allow elections. Meaningful elections require free speech. Elections and free speech are part of the larger ecology of political freedom, but only part. Justice Black understood this point well. He wrote in his *Adamson* dissent about the ecological effect of the criminal procedure guarantees of the Bill of Rights:

Past history provided strong reasons for the apprehensions which brought these procedural amendments into being and attest the wisdom of their adoption. For fears of arbitrary court action sprang largely from the past use of courts in the imposition of criminal punishments to suppress speech, press, and religion. Hence the constitutional limits of courts' powers were, in the view of the Founders, essential supplements to the First Amendment, which was itself designed to protect the widest scope for all people to believe and express the most divergent political, religious, and other views....¹⁰⁵

While Justice Black refers to the powers of the courts, the

¹⁰³ *Id.* at 316.

¹⁰⁴ *Id.* at 314-17 (suppression of the *Chicago Times* and Lincoln's revocation of the order).

¹⁰⁵ *Adamson v. California*, 332 U.S. 46, 70-71 (Black, J., dissenting).

argument applies with greater force to decisions by the executive to imprison people without any of the safeguards of the Bill of Rights. Indeed, many of the early claims for the criminal procedure rights now in the Bill of Rights arose in the 17th Century struggle for greater democracy and greater political and religious liberty. Supporters of greater democracy and religious toleration confronted an oligarchic Parliament and Council of State determined to suppress their pamphlets, petitions, and political activity.¹⁰⁶ Those in power used arrests, searches, self-incriminating questions, and denial of habeas corpus to suppress these early democrats and advocates of religious toleration. Many of the basic rights now in our Bill of Rights were asserted by the Leveller John Lilburne in response to the repeated prosecutions he faced for his pro-democracy political activity. Juries refused to convict him, but in the end Cromwell simply arrested Lilburne and put him outside the reach of habeas corpus.¹⁰⁷ No doubt Cromwell found his decision to ignore basic legal rights justified by necessity.

The limited definition of treason in the Constitution comes from the Treasons Trials Act of 1696. That act was a response to the habit of the party in control of Parliament to use the courts to convict and execute their political opponents for treason.¹⁰⁸ The doctrine of necessity, with the ultimate power effectively with the executive, makes suppression much simpler.

B. Reasons to Worry About Using Precedents Such as the Vallandigham One to Support Broad and Unchecked Executive Power

1. The Grave Danger of Use of Crisis for Abusive Political Purposes

There are additional reasons to be leery of treating the Vallandigham case as a precedent to be followed. Lincoln's precedent

¹⁰⁶ See generally, Michael Kent Curtis, *In Pursuit of Liberty: The Levellers and the American Bill of Rights*, 8 CONST. COMM. 359 (1991).

¹⁰⁷ *Id.* at 381-86.

¹⁰⁸ COLIN RHYS LOVELL, ENGLISH CONSTITUTIONAL AND LEGAL HISTORY: A SURVEY 412-13 (1962); Alexander H. Shapiro, *Political Theory and Growth of Defensive Safeguards in Criminal Procedure: The Origins of the Treason Trials Act of 1696*, 11 LAW AND HISTORY REVIEW 215 (1993).

may not always be applied either by a Lincoln or by the Lincoln popular history has canonized. There is always the danger that politicians will use times of genuine crisis to advance narrow partisan agendas. In the case of the Sedition Act, for example, one Federalist senator wrote that the crisis with France would provide a glorious opportunity to destroy “faction”—by which he meant to destroy the Jeffersonian party.¹⁰⁹ Genuine fears of slave revolts in the South were used by some as a pretext to silence those who advocated emancipation by the Southern states.¹¹⁰ According to Geoffrey Stone, Republican politicians used the Cold War threat from the Soviet Union to charge that the Democratic Party was the party of Communism. The chairman of the Republican Party announced that the “Democratic party policy...bears a made-in-Moscow label.”¹¹¹ Richard Nixon described the Democratic Party as the “party of Communism” and charged that President Truman and Democratic candidate Adlai Stevenson were “traitors.”¹¹² The recurring tendency to use crisis and necessity as a device to destroy one’s political opponents shows the grave danger in an unbridled “necessity trumps all rights” analysis. Rejection of the idea that the opposition is loyal is deeply subversive to democratic government.

Though Lincoln was not motivated by narrow political advantage, some who attacked anti-war speech during the Civil War had mixed motives. In 1864, Republicans sought to expel an Ohio Congressman for a speech on the floor of the House in which he advocated peace and recognition of the Confederacy. At the same time Republicans were claiming the speech would undermine the military, they were reprinting copies for use as a campaign document.¹¹³

2. A Fallacy: “Don’t Worry: As the Lincoln Case Shows We Suppress in Times of Crisis and Spring Back.”

The constitutional war power is important. But, as Justice Robert H. Jackson wrote in 1948, it is also “the most dangerous to free

¹⁰⁹ CURTIS, *FREE SPEECH*, *supra* note 24 at 61.

¹¹⁰ *Id.* at 279.

¹¹¹ STONE, *PERILOUS TIMES*, *supra* note 100 at 312.

¹¹² *Id.* at 329.

¹¹³ CURTIS, *FREE SPEECH*, *supra* note 24, at 343-47.

government in the whole catalogue of powers.”¹¹⁴ He explained that this was because it is “usually invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult. It is executed at a time of patriotic fervor that makes moderation unpopular. And, worst of all, it is interpreted by the Judges under the influence of the same passions and pressures. Always...the Government urges hasty decision to forestall some emergency...and pleads that paralysis will result if its claims to power are denied....”¹¹⁵

Some give a tranquilizing answer to people who have seen alarming dangers to civil liberty in the response to our present crisis. In the long run, they assure us, we need not worry: We suppress civil liberty in crisis times. A few years later when the crisis is over, we spring back. Those concerned with long term effects might infer that there is little need to protest even serious “temporary” incursions on civil liberties. This comforting analysis leaves out too much of the story and too many of the hazards of repression.

By the temporary emergency analysis, most of our wars and crises have lasted only a few years. There is another way to look at it. Since World War II, we have had a succession of “wars,” that have lasted almost without interruption—the Cold War, the Korean War, the War in Vietnam, and now the war in Iraq. In any case, the current war on terrorism has no clear end. But there are deeper reasons to be dubious of tranquilizing reassurances.

Many suppressions of civil liberty produced massive protest at the time. The protests limited repression and hastened the restoration of liberty. That was the case, for example, in the 1798 Sedition Act (passed during an undeclared naval war with France).¹¹⁶ Again, from the 1830s to the Civil War, advocates of suppression used mobs and attempted to pass laws to silence abolitionists in the North. The attacks on free speech produced strong public protest that helped defeat attempts to suppress Northern criticism of slavery.¹¹⁷ Public protest also limited repression during the Civil War. Criticism of repression in World War I was limited and repression was widespread. Still, critics helped to produce a stronger

¹¹⁴ *Woods v. Miller Co.*, 333 U.S. 138, 146 (1948) (Jackson, J. concurring).

¹¹⁵ *Id.*

¹¹⁶ CURTIS, *FREE SPEECH*, *supra* note 24 at 63-77, 83-84.

¹¹⁷ *E.g., id.* at 144, 241-43 (reaction to the killing of Elijah Lovejoy).

protection for free speech and civil liberty in later years.¹¹⁸ Where protest was muted, however, repression thrived.

The long term negative effects of acquiescence in repression can be seen in the history of the American South. The South from 1830 to the Civil War was gripped by fear of slave revolts. Southern laws silenced critics of slavery, eventually including members of Lincoln's Republican party. Criticism of slavery was treated as a crime—even if the recipient of the criticism was another white person. Mobs often made resort to law unnecessary.¹¹⁹ The denial of civil liberty produced little protest in the South, and repression continued until the end of the Civil War.¹²⁰

But it did not end even then. Earlier support for repression helped grease the skids for Klan terrorism aimed at the multi-racial Southern Republican party. In the end, with remarkably little protest, the nation accepted suppression of civil liberty and racist laws that deprived black people in the South of the right to vote. All told, the repression lasted over 130 years. There was comparatively little protest against the incarceration of Americans of Japanese descent during World War II. It took the nation nearly half a century to begin to make amends.

There is still another reason to doubt the “we always recover so no harm is done” analysis. The Lincoln precedent probably made later abuses seem more acceptable.

Of course, there is also a silver lining in the cloud of censorship. Public commitment of many citizens to broad free speech rights helped to limit repression.¹²¹ Democratic protests (and those of many Republicans) limited repression and forced Lincoln to disclaim any attempt to interfere with elections.¹²² Still, the Lincoln administration's departure from free speech principles had both short and long-term negative consequences.

Lincoln's defense of Vallandigham's trial created a precedent to

¹¹⁸ *Id.* at 392-95 (scholarly criticism of the World War I era decisions).

¹¹⁹ *E.g., id.* at 260-63, 290-92 (expulsion of Professor Hedrick from North Carolina for supporting John C. Fremont for president); 282 (Lincoln and Douglas agree that Republicans cannot campaign in the South); 283 (another expulsion for supporting Fremont); Chapter 13 (prosecution of Daniel Worth in North Carolina for circulating a book that was used as a Republican campaign document).

¹²⁰ *Id.* at Chapters 11-13.

¹²¹ CURTIS, *FREE SPEECH*, *supra* note 24, at 352, 355.

¹²² MARK E. NEELY, JR., *THE FATE OF LIBERTY, ABRAHAM LINCOLN AND CIVIL LIBERTIES* 209 (1991).

be relied on expressly or implicitly by future decision makers. For example, Lincoln's idea that rebellion justified suppressing Vallandigham's anti-war speech probably had a considerable influence on the justices during World War I, including Oliver Wendell Holmes, Jr. In 1919, Holmes, writing for the Court, upheld the jailing of one man for sending a leaflet to draftees that called for political action against the draft.¹²³ He also wrote the opinion that upheld the jailing of Eugene Debs, the Socialist politician and labor leader, for making an anti-war speech.¹²⁴

Other anti-war advocates met a similar fate.¹²⁵ "When a nation is at war," Justice Holmes wrote in *Schenck v. United States*, "many things that might be said in times of peace will not be endured...."¹²⁶ One could oppose the war before it began and after it was over. The principle Lincoln invoked for "rebellion" slid easily into a principle for wartime generally. It should come as no surprise. Supporters of the Lincoln Administration often invoked a virtually unlimited war power.

Punishment of anti-war speech by the Lincoln administration was the first federal criminal prosecution of political speech since the nation repudiated the Sedition Act. Military suppression of reactionary anti-war speech during the Civil War may well have paved the way for civil suppression of socialist and other anti-war speech during World War I.

The World War I story is not an edifying one. During this period of hysteria, many were convicted of crimes who should not have been. The victims included a man who told women knitting socks for soldiers that no soldier would see them, a man who refused to kiss the flag, and a movie producer whose film suggested atrocities by the British during the American Revolution.¹²⁷ At least in these cases, people were charged with violating a law passed by Congress or a state legislature and the trials were held before civilian judges and juries. Still, most see these as precedents showing what should be avoided, and they are right.

Mistakes are more likely in times of great peril and fear. Franklin

¹²³ *Schenck v. United States*, 249 U.S. 47 (1919).

¹²⁴ *Debs v. United States*, 249 U.S. 211 (1919).

¹²⁵ *Gilbert v. Minnesota*, 254 U.S. 325 (1920); *Schenck v. United States*, 249 U.S. 47 (1919).

¹²⁶ 249 U.S. 47 (1919). For a comparison of civil liberties during the Civil War and World War I. See, William A. Dunning, *Disloyalty in Two Wars*, 24 AMERICAN HISTORICAL REVIEW 625 (1919).

¹²⁷ CURTIS, FREE SPEECH, *supra* note 24 at 392; see generally 385-395.

Roosevelt, listening to his generals after the bombing of Pearl Harbor, approved a military plan to incarcerate Americans of Japanese descent. The war power theory generated to support suppression of speech by the Lincoln administration supports the constitutionality of the Japanese internment.¹²⁸ One could respond that the internment of the Japanese was not necessary and therefore was not constitutional. Similarly, the arrest of Vallandigham could be rejected as unnecessary. But if the president is in effect the judge of necessity the distinction suggested for the incarceration of the Japanese does not amount to much. Of course, all branches of government can fail, as happened in the case of the Japanese internment. Still, liberty is better protected by more rather than fewer checks. Redundant safety devices are generally a good idea, as the failure to have an adequate number of life boats on the Titanic shows.

The question raised by Lincoln's actions in the Vallandigham case is not whether the war power provides vast sources of power which would otherwise not exist. It is whether this vast power may be used to suspend free speech and the democratic process in areas outside the theater of war.

VII. CONCLUSION: REFLECTIONS ON UNCHECKED PRESIDENTIAL POWER TO SUSPEND CIVIL LIBERTIES

The "anything to win principle" (with the President as the judge) quickly slides into an "anything that might be necessary to win" principle. Why take a chance? From there it easily becomes (as it seems to have in Vallandigham's case and even more clearly in the case of the Sedition Act) an "anything that can be defended as necessary to win" principle. In "application," the principle can produce paradoxical results, undermining the legitimacy of the cause of those who invoke it.¹²⁹ When application shows a principle so liable to produce abuse and disaster, it is reasonable to doubt the wisdom of the principle.

One problem with the Paulsen approach and his use of the Lincoln analogy is that it confuses political with legal analysis. It seeks to make actions outside the law and the Constitution into lawful and constitutional

¹²⁸ *Id.*, at 355.

¹²⁹ For a somewhat related issue *see, e.g.*, Anthony Lewis, *Making Torture Legal*, THE NEW YORK REVIEW OF BOOKS 4 (July 15, 2004) and Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates Deaths*, NEW YORK TIMES, May 20, 2005 at A-1 (describing the torture killing of an apparently innocent Afghan taxi driver)..

actions. The effect of this is to make violating the law and the Constitution too easy and too acceptable and to obscure the difficult moral and political choices involved.¹³⁰

If torture is prohibited by law, a faithful legal adviser would tell a president that torture is illegal. He would not announce that it is legal because it is necessary or legal provided the subject of torture is not killed or subjected to the pain of the sort involved in the slowest and most painful death. The president would then be faced with a decision as to whether to violate the law. Knowing that he was violating the law would give the president pause, as well it should. He might still decide that necessity was so overwhelming that action outside the law is required. Maintaining the distinction between what is constitutional and lawful on one hand and what is “necessary” matters. The distinction helps the president focus on whether the unlawful or unconstitutional action is not just useful, but so clearly and urgently necessary that the law must be broken.

Civil disobedience is a useful analogy. Those who engage in civil disobedience do not claim that their action is lawful. They claim instead that a higher authority justifies breaking the law. Obviously, if a finding that law violation would be “useful” or “convenient” or “necessary” made law breaking lawful, the law would lose much of its force. In contrast to civil disobedience, the president has substantial protection even if he engages in unlawful conduct. In *Nixon v. Fitzgerald*, the Court held the president absolutely immune from damages even for intentional violations of clearly established law.¹³¹

There is, of course, a second problem. The Lincoln-necessity analogy puts essentially unchecked power in the hand of one person, and does so for the foreseeable future. To accept this elimination of checks on power, one needs to go beyond unquestioning trust in George W. Bush. One needs to trust that the power will not be seriously abused by any of his successors for the next hundred years or more that the problem of terrorism continues.

Recent ghastly experiences have led judges and scholars to express deep concern about claims of unilateral presidential power. The

¹³⁰ My discussion in this and the following two paragraphs is indebted to Professor Miles Foy.

¹³¹ 457 U.S. 731(1982)(president held absolutely immune for acts taken within the outer perimeter of his official duties).

Court addressed the power of the president in time of war in *Youngstown Sheet and Tube v. Sawyer*. Justice Jackson, in particular, recalled the slide of Germany into tyranny. During the Korean War President Truman claimed power to seize the steel mills. He acted as Commander-in-Chief in time war with the announced goal of preventing disruption of the supply of steel from a pending strike. As Chief Justice Vinson wrote in his dissent, Truman immediately informed Congress of his action and “clearly stated his intent to abide by the legislative will.”¹³² Still the majority of the Court found the President had violated the Constitution.

As Justice Robert Jackson noted in his concurring opinion in *Youngstown*:

Germany after the First World War, framed the Weimar Constitution, designed to secure her liberties in the Western tradition. However, the President of the Republic, without concurrence of the Reichstag, was empowered temporarily to suspend any or all individual rights if public safety and order were seriously disturbed or endangered. This proved a temptation to every government, whatever its shade of opinion, and in 13 years suspension of rights was invoked on more than 250 occasions. Finally, Hitler persuaded President Von Hindenburg to suspend all such rights, and they were never restored.¹³³

The Court’s concern and that of Justice Jackson was not that the “kindly” Harry Truman was or would become a Hitler. It was that the precedent of unilateral power would be abused by later, less trustworthy leaders. Those who express such concerns know that unilateral, unchecked executive power will not always and inevitably progress to despotism. But in light of history, they fear the risk is simply too great.

Professor J. G. Merrills and A. H. Roberson, in their book, *Human Rights in Europe* say that the Council of Europe committed itself to the declaration and protection of human rights because of the

grim experience through which Europe had passed during the

¹³² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 710(1952)(Vinson, C.J., dissenting).

¹³³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 651(1952)(Jackson, J., concurring).

years immediately preceding the [1949] creation of the Council. ... [T]hey were aware that the first steps towards dictatorship are the gradual suppression of individual rights—infringement of the freedom of the Press, prohibition of public meetings, and trials behind closed doors, for example—and that once this process has started it becomes increasingly difficult to stop.¹³⁴

They quote M. Pierre-Henri Tietgen speaking to the issue in 1949. “Democracies do not become Nazi countries in one day. Evil progresses cunningly, with a minority operating, as it were, to remove the levers of control. One by one, freedoms are suppressed...”¹³⁵

The Vallandigham case and the protest it produced helped to produce Lincoln’s eventual statements that suspending elections would not be justified—*not even if it was necessary to win the Civil War*. For in the end Lincoln recognized that there is more than one way to lose the Constitution. Lincoln concluded that suspending elections and democratic government because the wrong side might win would itself be a mortal blow aimed to the Constitution. To his great credit, Abraham Lincoln rejected the logical application of the necessity and “anything to win” principles he had done so much to craft.

¹³⁴ J. G. MERRILS AND A. H. ROBERSTON, HUMAN RIGHTS IN EUROPE: A STUDY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 3 (4th ed. 2001).

¹³⁵ *Id.* At 4.