AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 6: The Civil War and Reconstruction—Democratic Rights/Free Speech

The Trial of Clement Vallandigham (1863) (expanded)[1]

Clement Vallandigham (1820–71) was a three-term member of the House of Representatives (1856–62) and the most prominent northern defender of secession. His speeches caustically denounced Lincoln, Lincoln's war policies, and all policies aimed at freeing slaves. On April 13, 1863, General Ambrose Burnside, the Union general assigned to Ohio, issued a general order decreeing that all persons "declaring sympathies for the enemy" be tried as "spies or traitors" by a military court. Undeterred, Vallandigham on May 1 gave a public speech that depicted the Civil War as "a war for the purpose of crushing out liberty and erecting despotism" and "a war for the freedom of the blacks and the enslavement of the whites." Four days later, Vallandigham was arrested. A military court found him guilty. Abraham Lincoln ordered that he be exiled to the Confederacy. Vallandigham sought a writ of habeas corpus. His claim was rejected by the local circuit court of the United States. The Supreme Court in 1864 claimed to not have jurisdiction to hear an appeal from that decision. Vallandigham escaped to Canada. While Vallindigham was abroad, Ohio Democrats nominated him to be the party candidate for governor.

The following excerpts are from Vallandigham's military trial and his habeas corpus appeal. Consider the following questions when reading these materials. Was Vallandigham arrested because his speech was disloyal or because his speech had a tendency to depress northern morale? Suppose Vallandigham claimed that many northern generals were incompetent.[2] Would he have been arrested? Did George Pugh's argument for Vallandigham accept any government power to restrict speech in wartime? Few people have heard of Pugh's constitutional defense of free speech. Is that obscurity best explained by Pugh's client or the quality of Pugh's defense?

General Order No. 38.

The Commanding General publishes, for the information of all concerned, that hereafter all persons found within our lines who commit acts for the benefit of the enemies of our country will be tried as spies or traitors, and, if convicted, will suffer death. This order includes the following class of persons:

. . .

All persons within our lines who harbor, protect, conceal, feed, clothe, or in any way aid the enemies of our country.

The habit of declaring sympathies for the enemy will not be allowed in this Department. Persons committing such offenses will be at once arrested, with a view to being tried as above stated, or sent beyond our lines into the lines of their friends.

It must be distinctly understood that treason, expressed or implied, will not be tolerated in this Department.

All officers and soldiers are strictly charged with the execution of this order.

By command of Major-General Burnside.

[1] Excerpt taken from *The Trial of Hon. Clement Vallandigham* (Cincinnati, OH: Bickey and Carroll, 1863).

[2] A claim that could be made of General Burnside.

Charge and Specification

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 in its efforts to suppress an unlawful rebellion.

In this, that the said Clement L. Vallandigham, a citizen of the State of Ohio, on or about the first day of May, 1863, at Mount Vernon, Knox County, Ohio, did publicly address a large meeting of citizens, and did utter sentiments in words, or in effect, as follows, declaring the present war "a wicked, cruel, and unnecessary war;" "a war not being waged for the preservation of the Union;" "a war for the purpose of crushing out liberty and erecting a despotism;" "a war for the freedom of the blacks and the enslavement of the whites;" stating " that if the Administration had so wished, the war could have been honorably terminated months ago;" that "peace might have been honorably obtained by listening to the proposed intermediation of France;" that "propositions by which the Northern States could be won back, and the South guaranteed their rights under the Constitution, had been rejected the day before the late battle of Fredericksburg, by Lincoln and his minions," meaning thereby the President of the United States, and those under him in authority; charging "that the Government of the United States was about to appoint military marshals in every district, to restrain the people of their liberties, to deprive them of their rights and privileges;" characterizing General Orders No. 38, from Head-quarters Department of the Ohio, as "a base usurpation of arbitrary authority," inviting his hearers to resist the same, by saying, the sooner the people inform the minions of usurped power that they will not submit to such restrictions upon their liberties, the better;" declaring "that he was at all times, and upon all occasions, resolved to do what he could to defeat the attempts now being made to build up a monarchy upon the ruins of our free government;" asserting "that he firmly believed, as he said six months ago, that the men in power are attempting to establish a despotism in this country, more cruel and more oppressive than ever existed before."

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

Protest of MR. VALLANDIGHAM

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[T]he alleged "offense" is not known to the Constitution of the United States, nor to any law thereof. It is words spoken to the people of Ohio in an open and public political meeting, lawfully and peaceably assembled, under the Constitution and upon full notice. It is words of criticism of the public policy of the public servants of the people, by which policy it was alleged that the welfare of the country was not promoted. It was an appeal to the people to change that policy, not by force, but by free elections and the ballot-box. It is not pretended that I counseled disobedience to the Constitution, or resistance to laws and lawful authority. I never have. . . .

Finding and Sentence

The Commission, after mature deliberation on the evidence adduced, and the statement of the accused, find the accused, Clement L. Vallandigham, a citizen of the State of Ohio, as follows:

Of the specification (except the words, "That propositions by which the Northern States could be won back, and the South guaranteed their rights under the Constitution, had been rejected the day before the battle of Fredericksburg, by Lincoln and his minions," meaning thereby the President of the United States, and those under him in authority, and the words, " asserting that he firmly believed, as he asserted six months ago, that the men in power are attempting to establish a despotism in this country, more cruel and more oppressive than ever existed before,") "Guilty."

And as to these words, "Not Guilty."

Of the charge, "Guilty."

And the Commission do, therefore, sentence him, the said Clement L. Vallandigham, a citizen of the State of Ohio, to be placed in close confinement in some fortress of the United States, to be designated by the commanding officer of this Department, there to be kept during the continuance of the war.

Order of the President

Commanding Department of the Ohio : SIR—The President directs that, without delay, you send C. L. Vallandigham, under secure guard, to the Head-quarters of General Rosecrans, to be put by him beyond our military lines, and that in case of his return within our lines he be arrested and kept in close custody for the term specified in his sentence.

Application for Habeas Corpus: Statement of MAJOR GENERAL BURNSIDE

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If I were to indulge in wholesale criticisms of the policy of the Government, it would demoralize the army under my command, and every friend of his country would call me a traitor. If the officers or soldiers were to indulge in such criticisms, it would weaken the army to the extent of their influence; and if this criticism were universal in the army, it would cause it to be broken to pieces, the Government to be divided, our homes to be invaded, and anarchy to reign. My duty to my Government forbids me to indulge in such criticisms; officers and soldiers are not allowed so to indulge, and this course will be sustained by all honest men.

. . . If it is my duty and the duty of the troops to avoid saying anything that would weaken the army, by preventing a single recruit from joining the ranks, by bringing the laws of Congress into disrepute, or by causing dissatisfaction in the ranks, it is equally the duty of every citizen in the Department to avoid the same evil. If it is my duty to prevent the propagation of this evil in the army, or in a portion of my Department, it is equally my duty in all portions of it; and it is my duty to use all the force in my power to stop it.

If I were to find a man from the enemy's country distributing in my camps speeches of their public men that tended to demoralize the troops or to destroy their confidence in the constituted authorities of the Government, I would have him tried, and hung if found guilty, and all the rules of modern warfare would sustain me. Why should such speeches from our own public men be allowed?

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

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It is said that the speeches which are condemned have been made in the presence of large bodies of citizens, who, if they thought them wrong, would have then and there condemned them. That is no argument. These citizens do not realize the effect upon the army of our country, who are its defenders. They have never been in the field; never faced the enemies of their country; never undergone the privations of our soldiers in the field; and, besides, they have been in the habit of hearing their public men speak, and, as a general thing, of approving of what they say; therefore, the greater responsibility rests upon the public men and upon the public press, and it behooves them to be careful as to what they say. They must not use license and plead that they are exercising liberty. In this Department it cannot be done. I shall use all the power I have to break down such license, and I am sure I will be sustained in this course by all honest men. At all events, I will have the consciousness, before God, of having done my

duty to my country, and when I am swerved from the performance of that duty by any pressure, public or private, or by any prejudice, I will no longer be a man or a patriot.

. . . If the people do not approve th[e] [policy of the Lincoln Administration], they can change the constitutional authorities of that Government, at the proper time and by the proper method. Let them freely discuss the policy in a proper tone; but my duty requires me to stop license and intemperate discussion, which tends to weaken the authority of the Government and army: whilst the latter is in the presence of the enemy, it is cowardly so to weaken it. This license could not be used in our camps—the man would be torn in pieces who would attempt it. There is no fear of the people losing their liberties; we all know that to be the cry of demagogues, and none but the ignorant will listen to it; all intelligent men know that our people are too far advanced in the scale of religion, civilization, education, and freedom, to allow any power on earth to interfere with their liberties; but this same advancement in these great characteristics of our people teaches them to make all necessary sacrifices for their country when an emergency requires. They will support the constituted authorities of the Government, whether they agree with them or not. Indeed, the army itself is a part of the people, and is so thoroughly educated in the love of civil liberty, which is the best guarantee for the permanence of our republican institutions, that it would itself be the first to oppose any attempt to continue the exercise of military authority after the establishment of peace by the overthrow of the rebellion. No man on earth can lead our citizen soldiery to the establishment of a military despotism, and no man living would have the folly to attempt it. To do so would be to seal his own doom. On this point there can be no ground for apprehension on the part of the people.

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I beg to call upon the fathers, mothers, brothers, sisters, sons, daughters, relatives, friends, and neighbors of the soldiers in the field to aid me in stopping this license and intemperate discussion, which is discouraging our armies, weakening the hands of the Government, and thereby strengthening the enemy. If we use our honest efforts, God will bless us with a glorious peace and a united country. Men of every shade of opinion have the same vital interest in the suppression of this rebellion; for, should we fail in the task, the dread horrors of a ruined and distracted nation will fall alike on all, whether patriots or traitors.

Opening Argument of the Honorable GEORGE E. PUGH

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General Burnside appears to think, because he cannot behave with contempt or disrespect toward the president of the United States, that a similar restraint applies to every citizen. He forgets, possibly, that the president, as commander-in-chief of the army, is his superior in military rank; at all events, that is the reason governing his case. . . .

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. . . But neither as a statutory regulation, nor as a matter of contract, are citizens of the United States, other than those engaged in the military or the naval service, excluded from the privilege of speaking ever so disrespectfully, or contemptuously, of men in public station. It is, with them, entirely a matter of taste, or of individual discretion. . . .

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. . . [T]he right of the American people to deliberate upon and freely to speak of what General Burnside calls the "Policy of the Government" at all times—whether of peace or of war, of safety or of peril, of ease or of difficulty—is a right supreme, and absolute, and unquestionable. They can exhort each other to impeach the President or any executive officer; to impeach any magistrate of judicial authority; to condemn Congressmen and legislators of every description. They can, at pleasure, indulge in criticism, by "wholesale" or otherwise, not only upon "the policy" adopted or proposed by their servants, military as well as civil, but upon the conduct of those servants in each and every particular, upon their actions, their words, their probable motives, their public characters. And, in speaking of such subjects, any citizen addressing his fellow-citizens, by their consent, in a peaceable assembly, may use invective, or sarcasm,

or ridicule, or passionate apostrophe or appeal, or—what is, ordinarily, much better—plain, solid, unostentatious argument. There is no style of rhetoric to be prescribed for the people. They are the masters of every style, and of every art and form of utterance. General Burnside suggests that "the press and public men, in a great emergency like the present, should avoid the use of party epithets and bitter invectives." I esteem that as excellent advice on all occasions; but, unfortunately, the General and I must both succumb, with what grace we can, to the choice or fancy of the people. They will render his advice or my advice effectual, if they approve it, by not reading such papers and not listening to such orators as habitually violate or trifle with decorum. There is no other way; there can be no censorship, civil or military, in this regard. That would inevitably, and at once, destroy the liberty of speech and of the press: that presupposes an incapacity of the people to distinguish right from wrong, truth from falsehood, reason from intemperance, or decency from outrage. And, if we cannot confide in the good sense of the people as to these things, how can we confide in them at all?

I know that much is written and spoken every day, and in the most public manner, at which honorable men feel indignant, or, at least, annoyed. But does it really affect the people at large? Does it alienate them from the Government under which they live? Does it induce them to think less dearly of their kinsmen, their friends, their neighbors, in military service; or to be unmindful of the toils of any soldier in camp, or on the march, or of his sufferings in the awful day of battle? Does it palsy the ministering hand? Does it prevent the sympathizing tear? . . . General Burnside errs, and errs greatly, in supposing that our people are often excited by some false or foul word; but, by and by, assertion meets contradiction, violence encounters violence; and so, at length, slowly perhaps, but certainly, will justice achieve her victory, and conclude the contest.

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. . . [B]ut the effect on the soldiers. Well, sir, let us inquire into that. The soldiers have been citizens; they have been in the habit of attending public meetings, and of listening to public speakers. They are not children, but grown men—stalwart, sensible, and gallant men—with their hearts in the right place, and with arms ready to strike whenever and wherever the cause of their country demands. The General assures us of more, even, than this: "No man on earth," he says, "can lead our citizen-soldiery to the establishment of a military despotism." And are these the men to be discouraged, and, especially, to feel weary in heart or limb—unable to cope with an enemy in the field—because Mr. Vallandigham, or any other public speaker, may have said something, at Mount Vernon or elsewhere, with which they do not agree? The soldiers have not chosen me for their eulogist; but I will say, of my own accord, that they are no such tender plants as General Burnside imagines. They know, exactly, for what they went into the field; they are not alarmed, nor dissatisfied, nor discouraged, because their fellow citizens, at home, attend public meetings, and listen to public speeches, as heretofore; they have no serious misgiving as to the estimation in which they are holden by the people of the Northern and Northwestern States, without any distinction of sects, parties, or factions.

Let the officers, and especially those of highest degree, observe their military duties; let them see to it, as General Burnside has well said, and as, I doubt not, he has well done, so far as his authority extends, that the soldiers are "fed, clad, and armed," and kept "in the best possible condition" for service. Allow them to vote as they please; allow them to read whatever newspapers they like; cease any attempt to use them for a partisan advantage. . . .

One more commentary on the statement of General Burnside, and it shall be as brief as possible. Undoubtedly, as he observes, a great responsibility attaches to public men and to the conductors of the public press; but their responsibility is toward the people, and not toward him. "They must not," he declares, "they must not use license, and plead that they are exercising liberty." But every definition of "liberty" excludes the idea of his censorship; so that the distinction which he has attempted neither expresses nor admits of any imaginable difference.

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Mr. Vallandigham said, furthermore, as the Judge-Advocate assures us, "that, if the Administration had so wished, the war could have been honorably terminated months ago." That allegation may be true; I have no means, except from what is alleged subsequently, of deciding whether it be true or false. Nor do I find myself much enlightened by the next sentence imputed to Mr.

Vallandigham: that "peace might have been honorably obtained by listening to the proposed intermediation of France." I do not know what terms, if any, the Emperor of the French suggested; but they would have to be very advantageous, as well as unmistakably honorable, before I would consent to his interference, or the interference of any other monarch, with the affairs of our distracted republic. And yet, if Mr. Vallandigham thinks otherwise, he has the same right to declare and to maintain his opinion as I have to maintain or to declare mine. But he made another accusation, and of much more serious importance: he said "that propositions by which the Southern States could be won back, and the South be guaranteed their rights under the Constitution, had been rejected, the day before the late battle at Fredericksburg, by Lincoln and his minions"—"meaning thereby," as the Judge-Advocate kindly informs us, "the President of the United States and those under him in authority." I never heard that it was actionable, at common law, to say of one man, orally, that he was the minion of another; and, far less, that it could be a matter of State prosecution. As to the rest, the accusation is one of fact—positive, distinct, with addition of time and circumstances. Is it true, or is it false? Sir, I do not know; but I do know that *that* is a vital question to the American people. Was it for making such an accusation that Mr. Vallandigham has been arrested; and is it by imprisoning him, or otherwise stopping his mouth, that Mr. Lincoln would answer to such an accusation in the face of his countrymen, of the civilized world, of the tribunal of God and of history? As to General Burnside, whose personal sincerity in these proceedings, as well as at the battle of Fredericksburg, I do not intend to question, what living man is more interested to have the truth, or the falsehood, of that accusation publicly ascertained?

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These are obviously conclusions of the speaker—correctly or incorrectly drawn—from premises of which little, very little indeed, is narrated by the specification. I do not undertake to say, and I cannot say, at present, whether such conclusions are correct or incorrect; but what are they—and, in asking this question, I would lay my hand, if possible, upon the heart of every freeman—what are they but the impassioned appeals of a sincere, conscientious, honorable, and, if you please, over-vigilant citizen? Granted—if you will have it so—that he is in error, and greatly in error: I do not ask you to approve his conclusions, or in any manner to accept his opinions; but I do ask you, in all truthfulness, whether these words bear any taint of treason or disloyalty? They were intended, most evidently, to arouse the people to a sense of the vast peril in which all of us now stand; and, although they are startling, and seem very bitter, should we not err upon the side of jealousy rather than upon the side of laxity and too much confidence in our rulers, at a time when, month by month, day by day, the Union of our fathers, the Constitution by which that Union was ordained, and the Liberty of which the Constitution and the Union were intended as perpetual guarantees, are fading into a dim, a broken, and a most sorrowful vision?

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Since, what time, I would inquire, has it become an offense of such magnitude for any citizen to propose the cessation of a war which he believes to be unnecessary and injudicious[?] . . .

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Argument of the Honorable AARON F. PERRY

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The power and wants of the insurrection are not all nor chiefly military. It needs not only food, clothing, arms, medicine, but it needs hope and sympathy. It needs moral aid to sustain it against reactionary tendencies. It needs argument to represent its origin and claims to respect favorably before the world. It needs information concerning the strength, disposition, and movements of government force. It needs help to paralyze and divide opinions among those who sustain the government, and needs help to hinder and embarrass its councils. It needs that troops should be withheld from government, and its financial credit shaken. It needs that government should lack confidence in itself, and become discouraged. It needs that an opinion should prevail in the world that the government is incapable of success, and unworthy of sympathy. Who can help it in either particular I have named, can help it as effectually as by bearing arms for it. Wherever in the United States a wish is entertained to give such

help, and such wish is carried to its appropriate act, there is the place of the insurrection. Since all these helps combine to make up the strength of the insurrection, war is necessarily made upon them all, when made upon the insurrection. Since each one of the insurrectionary forces holds in check or neutralizes a corresponding government force, and since government is in such extremity as not safely to allow any part of its forces to withdraw from the struggle, it has no recourse but to strike at whatever part of the insurrection it shall find exposed. All this is implied in war, and in this war with especial cogency. . . .

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I have listened with interest and attention to the comments and criticisms of the eloquent advocate for Mr. Vallandigham, on this paper. Considering his zeal, his ingenuity, and his duty as an advocate, I am gratified to see how little he found to complain of. We are entitled, since it has passed this ordeal, to rest upon it as not only substantially unobjectionable, but in form and language prudent. It was, of course, the duty of the advocate to imply, in his criticism, if he did not state, that liberty of speech is chiefly in danger from the Generals who fight to uphold it, and not from the politicians who seek to render the services of the Generals ineffectual. It was properly within the arts of advocacy to drop out of sight the fact that liberty of speech, with other sacred and indispensable rights, have no adequate guarantee or defense except in the safety of the government ordained to establish justice and secure the blessings of liberty to ourselves and our posterity. It was not in the line of his duty to remind us that the only way now to save liberty of speech is to save the government which was made to protect it. Let us imagine that at the large meeting addressed by Mr. Vallandigham, and during the delivery of his speech, an individual had risen from the audience and commenced there a harangue in favor of the liberty of speech. Who, then, would be the defender of free speech, the man who raised for it an untimely clamor, or the constable who should seize him and suppress the disturbance? The right of free speech is only one of the rights secured by civil liberty, and, like other rights, is subjected to some limitations necessary for the safety of all. Civil liberty is defined to be, "the liberty of men in a state of society, or natural liberty, so far only abridged and restrained as is necessary and expedient for the safety and interest of the society, state, or nation."

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It appears from this that [Vallandigham] publicly addressed a large meeting of citizens. He was not expressing in secrecy and seclusion his private feelings or misgivings, but seeking publicity and influence. The occasion and circumstances show the purpose to have been to produce an effect on the public mind, to mold public feeling, to shape public action. In what direction? The charge says, by expressing his sympathies for those in arms against the Government of the United States, by declaring disloyal sentiments and opinions. He declared the war to be wicked and cruel, and unnecessary, and a war not waged for the preservation of the Union: a war for crushing out liberty and erecting a despotism. What is this but saying that those who fight against the United States are in the right, and that it would be cowardly and dishonorable not to fight against the United States? In what more plain or cogent language could he urge his audience themselves to take up arms against their government? If those who heard him could not be incited to fight against a government by persuading them it was making an unjust and cruel war to crush out liberty, how also could he expect to incite them? If he did not hope to persuade them to join their sympathies and efforts with the enemies of the United States, by convincing them that these enemies are in the right, fighting and suffering to prevent the overthrow of liberty, standing up against wickedness and cruelty, what must he have thought of his audience? What else but the legitimate result of his argument can we impute fairly as the object of his hopes? To whatever extent they believe him, they must be poor, dumb dogs not to rally, and rally at once, for the overthrow of their own government, and for the support of those who make war upon it. But he did not leave it to be inferred. He declared it to be a war for the enslavement of the whites and *the freedom of the blacks.* Which of the two was, in his opinion, the greater outrage, he does not appear to have stated. It is one of the unmistakable marks of the insurrection, by which it can always be identified, that its declarations for liberty are for a selfish and brutal liberty, which includes the liberty of injuring or disregarding others. If his white audience were not willing to be enslaved, that is to say, not willing to endure the last and most degrading outrage possible to be inflicted on human nature, they must, so far as they believed him, resist their own government. If he himself believed what he said, he must take up arms to resist the government, or stand a confessed

poltroon. A public man, who believes that his government is guilty of the crimes he imputed, and will not take up arms against it, is guilty of unspeakable baseness. If his audience believed what he told them, they must have looked upon advice not to take up arms as insincere or contemptible. No public man, no private man, can make such charges and decently claim not to mean war. All insurrections have their pretexts. The man who furnishes these is more guilty than the man who believes them and acts on them. If the statements of Vallandigham were true, the pretexts were ample, not merely as pretexts, but as justification of insurrection. They were more: they were incitements which it would be disgraceful to resist, and which human nature generally has no power to resist. The place where such things are done is the place of insurrection, or there is not and can not be a place of insurrection anywhere. If these laboratories of treason are to be kept in full blast, they will manufacture traitors faster than our armies can kill them. This cruel process finds no shelter under the plea of political discussion. Whatever might be said about ballots and elections, the legal inference is that it is intended to produce the results which would naturally flow from it. If the President, with all the army and navy, and his "minions," is at work to overthrow liberty and enslave the whites, every good man must fear to see that army victorious, and hail its disasters with joy. Every good man must strike to save himself from slavery now while he can. The elections are far off, and may be too late. It can not be claimed that the motive was to influence elections, because the argument does not fit that motive. It fits to insurrection, and that only. He pronounced General Orders No. 38 to be a base usurpation, and invited his hearers to resist it. How resist it? How could they resist it, unless by doing what the order forbade to be done?

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. . . If we suppose the Constitution was intended to authorize two such incompatible and mutually destructive lines of action at the same time, we impute an incredible absurdity. If it authorizes the drafting of one part of the population, the organizing of armies, and marching to battle to suppress insurrection, it cannot at the same time authorize the other part of the population to thwart, defeat, and annul their efforts. On the other hand, if it authorizes a portion of the people to attack, and resist, and discredit the government, it cannot require the other portion to make war to defeat them. If the object of the Constitution was to provide for its own destruction and protect its enemies, the arrest of Vallandigham was a mistake: Burnside was the man. But if the object was to provide for the safety of the Constitution, and protect its friends, no mistake has been made. Vallandigham is the man to be arrested. It never could have been intended to allow them both to take the field at the same time.

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The proposition is that the right to personal liberty, freedom of speech, etc., are absolute, inalienable rights, guaranteed inflexibly by the Constitution, and not to be suspended in any emergency, nor made to yield to any public necessity. I repeat that the question argued by counsel on the other side is not a question under what circumstances these rights may be abridged, but he denies the legal possibility of such abridgment. These rights extend to all citizens—to persons subject to military duty as well as the rest. Yet the same Constitution which guarantees these inalienable rights, authorizes the making of war and the calling out of the militia. . . .

The conclusion is inevitable. These rights, so carefully enumerated in the Constitution, and so often referred to by learned counsel, are liable to be abridged under particular circumstances. The Constitution contemplates and provides for such abridgment. This abridgment is especially provided for in time of war. And since no limits are fixed to the means to be used in war, every thing may be done which the necessities of war require. The laws of war are, for the time, as much a part of the Constitution as the laws of civil procedure are in time of peace.

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Argument of the Honorable FLAMEN BALL

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General Burnside saw that, to a considerable degree, his earnest efforts to perform the trust reposed in him in his Department were seriously impeded, not only by the presence of spies, recruiting

officers, and writers of letters, and the carrying of secret mails to the rebels, but by the promulgation of disloyal sentiments and opinions, and the expression of sympathy for the rebels within his lines. He saw that the expression of such sentiments and opinions had a tendency to bring the constitutional government of the country into contempt, and consequently to weaken his authority and abridge his usefulness, and to that extent sustain and encourage the enemy and protract the war. He had no alternative but either to act as he did, or to abandon his Department. He needed no written law to direct him in his course, for the law of self-preservation, which is the law of nature, is higher than any written law, or written constitution. Clothed as he was with power commensurate with the great duties he was called upon to perform in this extraordinary exigency of the nation, whatsoever in the conduct of any person seriously impeded him in the performance of that duty, it was his right, nay, it was his high duty, to remove. . . .

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The natural right to acquire and possess property, to pursue or not to pursue a particular vocation, to bear or not to bear arms, to speak and write freely our sentiments and opinions upon all subjects, must give way whenever the exercise of those rights by the individual endangers the public safety, and conflicts with the paramount right of national self-preservation.

The nation can well afford to suspend the enjoyment by the individual of these rights, for a season, in order that, by preserving its own existence, it may secure them unabridged to the whole people forever.

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The eloquent advocate of Mr. Vallandigham, controverting the assertion of General Burnside, that "there is no fear of the people losing their liberties," has expressed the fear that our liberties cannot survive a patient submission to arbitrary power. Certainly not, when, in a time of profound peace, when all the civil machinery of the government is everywhere in perfect and harmonious operation, unchecked and undisturbed by the discordant action of armed rebellion and of civil war, then a tame and continued submission to the encroachments of any arbitrary power must inevitably lead to the overthrow of the liberties of the people, and to the establishment of a despotism. But the case is entirely different in a time of war, and of such a war, the like of which neither this nor any other country has ever witnessed. Now, no temporary sacrifice ought to be too great, in order to preserve the unity of the nation; but, when the blessings of peace shall return, and the national life shall be no longer threatened, all the power of the country will be devoted to the suppression of every attempt, let it come from whatsoever quarter it may, to invade the liberty of any, even the meanest citizen.

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Opinion of the Court by the Honorable H.H. LEAVITT

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. . . In Ohio, Indiana, and Illinois, a class of mischievous politicians had succeeded in poisoning the minds of a portion of the community with the rankest feelings of disloyalty. Artful men, disguising their latent treason under hollow pretensions of devotion to the Union, were striving to disseminate their pestilent heresies among the . . . people. The evil was one of alarming magnitude threatened seriously to impede the military operations of the government, and greatly to protract the suppression of the rebellion. General Burnside was not slow to perceive the dangerous consequences of these disloyal efforts, and resolved, if possible, to suppress them. In the exercise of his discretion, he issued the order—No. 38—which has been brought to the notice of the Court. . . . He has done this under his responsibility as the commanding General of this department, and in accordance with what he supposed to be the power vested in him by the appointment of the President. It was virtually the act of the executive department under the power vested in the President by the Constitution; and I am unable to perceive on what principle a judicial tribunal can be invoked to annul or reverse it. In the judgment of the commanding General, the emergency required it, and whether he acted wisely or discreetly is not properly a subject for judicial review.

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And here, without subjecting myself to the charge of trenching upon the domain of political discussion, I may be indulged in the remark, that there is too much of the pestilential leaven of disloyalty in the community. There is a class of men in the loyal States who seem to have no just appreciation of the deep criminality of those who are in arms, avowedly for the overthrow of the government, and the establishment of a Southern Confederacy. They have not, I fear, risen to any right estimate of their duties and obligations, as American citizens, to a government which has strewn its blessings with a profuse hand, and is felt only in the benefits it bestows. . . . Men should know, and lay the truth to heart, that there is a course of conduct not involving overt treason, or any offense technically defined by statute, and not, therefore, subject to punishment as such, which, nevertheless, implies moral guilt and a gross offense against their country. Those who live under the protection and enjoy the blessings of our benignant government, must learn that they cannot stab its vitals with impunity. If they cherish hatred and hostility to it, and desire its subversion, let them withdraw from its jurisdiction, and seek the fellowship and protection of those with whom they are in sympathy. If they remain *with* us, while they are not *of* us, they must be subject to such a course of dealing as the great law of self-preservation prescribes and will enforce. And let them not complain, if the stringent doctrine of military necessity should find them to be the legitimate subjects of its action. I have no fears that the recognition of this doctrine will lead to an arbitrary invasion of the personal security or personal liberty of the citizen. It is rare, indeed, that a charge of disloyalty will be made upon insufficient grounds. But if there should be an occasional mistake, such an occurrence is not to be put in competition with the preservation of the life of the nation. And I confess I am but little moved by the eloquent appeals of those who, while they indignantly denounce violations of personal liberty, look with no horror upon a despotism as unmitigated as the world has ever witnessed.