

ABRAHAM LINCOLN AND CIVIL LIBERTIES: THEN & NOW—THE SOUTHERN REBELLION AND SEPTEMBER 11†

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Recent acts of terrorism have yet again raised tensions between American security and civil liberty. The forces of both Al Qaeda and Saddam Hussein have created a heightened awareness of, and increased desire for, national security. This is not the first time. President George W. Bush is treading the same waters as Abraham Lincoln, and both have been accused of forsaking civil liberties. Many times in this nation's history, our leaders have been criticized for taking extra-constitutional measures, and upon close examination of the situation that faced Abraham Lincoln, many parallels can be drawn to the current atmosphere in this country. If Lincoln failed to uphold all the provisions of the Constitution, he faced possible condemnation regardless of his actions, assailed not only by those who genuinely valued civil liberty, but also by enemies and opponents whose motive was criticism itself. Whatever criticism Lincoln faced for pushing his power to the limits of the Constitu-

† Adapted from a speech given before the Lincoln Group of New York, April 12, 2003.

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tion, far harsher would have been his denunciation if the whole experiment of the democratic American Union failed, as seemed possible given the circumstances. If such a disaster occurred, what benefit would have been gained by adhering to a fallen Constitution? It was a classic example of the age-old conflict: do the ends justify the means? In the end, the verdict of history is that Lincoln's use of power did not constitute abuse. Many surveys of historians rank Lincoln as number one among the great presidents.¹

Nearly one hundred and fifty years later, President Bush is facing a need to take extra-constitutional measures in the face of the first serious threat to our country in at least fifty years. Like the criticism Lincoln faced, there is enormous opposition to his post-September 11 policies and his decision to engage Iraq in war.

I.

CIVIL LIBERTIES DURING CIVIL WAR

A. *Extra-constitutional Measures and the Corning Letter*

In June 1863, Abraham Lincoln composed a justly famous reply to Albany, New York, Democrats who had accused him of forsaking civil liberties. This "reply to Erastus Corning and others" was widely reprinted at the time and has been frequently cited by historians since—usually as an example of Lincoln's deft handling of critics.² The less-often cited letter that inspired the response, and the rebuttal to Lincoln's reply, make clear that the upstate New York Democrats believed deeply that Lincoln had gone too far in denying constitutional guarantees and that the opposition animus was hardly limited to New York. Anti-war Democrats from around the nation shared these concerns.

Lincoln's critics were inspired by a variety of extra-constitutional decisions. In facing emergencies during the Civil War, Abraham Lincoln found himself in a difficult political position. In the words of historian James G. Randall: "No president has carried the power of presidential edict and executive order (independently of Congress) so far as he did It would not be easy to state what Lincoln conceived to be the limit of his powers."³ It has been noted

1. See, e.g., Arthur M. Schlesinger, Jr., *The Ultimate Approval Rating*, N.Y. TIMES MAGAZINE, Dec. 15, 1996, at 48. Lincoln did well, too, in a survey of influential, if not magnanimous, people in the second millennium. He ranks 32nd behind Gutenberg (1st) and Hitler (20th). AGNES HOOPER GOTTLIEB ET AL., 1,000 YEARS, 10,000 PEOPLE: RANKING THE MEN AND WOMEN WHO SHAPED THE MILLENNIUM (1998).

2. See, e.g., N.Y. TRIB., June 15, 1863.

3. J.G. RANDALL, LINCOLN: THE LIBERAL STATESMAN 123 (1947).

how, in the eighty days from the April 1861 call for troops to the convening of Congress in special session on July 4, 1861, Lincoln performed a whole series of important acts by sheer assumption of presidential power. He proclaimed not “civil war” in those words, but the existence of “combinations too powerful to be suppressed by the ordinary course of judicial proceedings.”⁴ He called forth the militia to “suppress said combinations,”⁵ which he ordered “to disperse, and retire peacefully”⁶ to their homes. Congress is constitutionally empowered to declare war, but suppression of rebellion has been recognized as an executive function, for which the prerogative of setting aside civil procedures has been placed in the President’s hands.⁷

For over a year and a half, our country has been involved in a war in Iraq. The war has not been formally declared. While Lincoln’s acts were placed within the power of the executive by declaring them a suppression of rebellion, President Bush has couched the war-like effort in Iraq as a movement to liberate Iraqis from their dictator. But, however war-like Bush’s executive actions are in Iraq, Lincoln did more.

To suppress the “rebellion,” he proclaimed a blockade, suspended *habeas corpus* rights, increased the size of the regular army, and authorized the expenditure of government money without congressional appropriation. He made far-reaching decisions and commitments while Congress was not in session, and all without public polls.

By the time of his inauguration on March 4, 1861, seven Southern states had already seceded from the Union. But Lincoln played a waiting game and made no preparation for the use of force until he sent provisions to Fort Sumter in Charleston Harbor a month later, which precipitated its bombardment by the rebels.

Then began Lincoln’s period of executive decision. Congress would not meet until the special session of July 4, and it was basic to the Whig-Republican theory of government that Congress was vested with the ultimate power—a theory with which Lincoln, as both Whig and Republican, had long agreed. As a former member of Congress, four-term legislator, and for twenty-four years a lawyer, Lincoln respected the traditional separation of powers. But by

4. 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 332 (Roy P. Basler et al. eds., 1953) [hereinafter 4 COLL. WORKS].

5. *See id.*

6. *See id.*

7. *See* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 428–29 (Kermit L. Hall et al. eds., 1992).

then, Lincoln could “not bring [himself] to believe that the framers of [the Constitution] intended, that in every case, the danger should run its course, until Congress could be called together.”⁸

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

The border state of Maryland was, by 1861, seething with secessionist views that were at times more violent than those in some Southern states that did secede. Events in Maryland ultimately provoked Lincoln’s suspension of the writ of *habeas corpus*. The writ of *habeas corpus* is a procedural device by which a prisoner can request an appropriate court to review his imprisonment. If the imprisonment is found not to conform to law, the individual is entitled to immediate release. With suspension of the writ, this immediate judicial review of the imprisonment becomes unavailable. This suspension triggered the most heated and serious constitutional disputes of the Lincoln Administration.

Lincoln’s defenders argued that “events” had forced his decision. On April 19, the Sixth Massachusetts militia arrived in Washington after having literally fought its way through hostile Baltimore. On April 20, Marylanders severed railroad communications with the North, almost isolating Washington, D.C., from that part of the nation for which it remained the capital. Lincoln was apoplectic. He had no information about the whereabouts of the other troops promised him by Northern governors, and Lincoln told Massachusetts volunteers on April 24, “I don’t believe there is any North. The Seventh Regiment is a myth. Rhode Island is not known in our geography any longer. *You* are the only Northern realities.”⁹ On April 25, the Seventh New York militia finally reached Washington after struggling through Maryland. The right of *habeas corpus* was so important that the President actually considered the bombardment of Maryland cities as a preferable alternative to suspension of the writ; he authorized General Winfield Scott, Commander of the Army, to bombard the cities if “necessary,” but only “in the extremest necessity”¹⁰ was Scott to suspend the writ of *habeas corpus*.

In Maryland, there was at this time a dissatisfied American named John Merryman. Merryman’s dissent from Lincoln’s chartered course was expressed in both word and deed. He spoke

8. 4 COLL. WORKS, *supra* note 4, at 431.

9. LINCOLN AND THE CIVIL WAR IN THE DIARIES AND LETTERS OF JOHN HAY 11 (Tyler Dennett ed., 1939).

10. 4 COLL. WORKS, *supra* note 4, at 344.

out vigorously against the Union and in favor of the South. He recruited a company of soldiers for the Confederate Army and became their Lieutenant Drillmaster. Thus, he not only exercised his constitutional right to disagree with what the government was doing, but engaged in raising an armed group to attack and attempt to destroy the government. This young man's actions precipitated legal conflict between the President and Chief Justice of the United States, Roger B. Taney. On May 25, 1861, Merryman was arrested by the military and lodged in Fort McHenry, Baltimore, for various alleged acts of treason. Shortly after Merryman's arrest, his counsel sought a writ of *habeas corpus* from Chief Justice Taney, alleging that Merryman was being illegally held at Fort McHenry. Taney, already infamous for the *Dred Scott* decision,¹¹ took jurisdiction as a Circuit Judge. On Sunday, May 26, 1861, Taney issued a writ to fort commander George Cadwalader, directing him to produce Merryman before the Court the next day at 11:00 a.m. Cadwalader respectfully refused on the ground that President Lincoln had authorized the suspension of the writ of *habeas corpus*. To Taney this was constitutional blasphemy. He immediately issued an attachment for Cadwalader for contempt. The marshal could not enter the Fort to serve the attachment, so the old Justice, recognizing the impossibility of enforcing his order, settled back and produced the now famous opinion, *Ex parte Merryman*.¹²

Notwithstanding the fact that he was in his eighty-fifth year, the Chief Justice vigorously defended the power of Congress alone to suspend the writ of *habeas corpus*. The Chief took this position in part because permissible suspension was in Article I, section 9, of the Constitution, the section describing congressional duties.¹³ He ignored the fact that it was placed there by the Committee on Drafting at the Constitutional Convention in 1787 as a matter of form, not substance. Nowhere did he acknowledge that a rebellion was in progress, and that the fate of the nation was, in fact, at stake. Taney missed the crucial point made in the draft of Lincoln's report to Congress on July 4:

The whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear, that by the use of the means necessary to their execution, some single law, made in such extreme tenderness of the citizen's liberty, that practi-

11. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

12. *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487).

13. U.S. CONST. art. I, § 9, c. 2.

cally, it relieves more of the guilty, than of the innocent, should, to a very limited extent, be violated? To state the question more directly, are all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?¹⁴

By addressing Congress, Lincoln had ignored Taney. Nothing more was done about Merryman at the time. Merryman was subsequently released from custody and disappeared into oblivion. Two years later, Congress resolved the ambiguity in the Constitution and permitted the President the right to suspend the writ while the rebellion continued.¹⁵ Lincoln's handling of Merryman could be said to have been out of "the extremest necessity," and may have saved our country from destruction, yet imagine the reaction of our fellow American citizens today if a militant anti-war demonstrator was treated as Merryman was in 1861.

Nevertheless, five years later (after the Union victory and with a Lincoln appointee—Salmon P. Chase—now serving as Chief Justice) the Supreme Court reached essentially the same conclusion as Taney in a case called *Ex parte Milligan*: "The Constitution of the United States is a law for rulers and people, equally in war and in peace [T]he government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence."¹⁶ *Habeas corpus* could be suspended, but only by Congress; and even then, the majority said civilians could not be held by the Army for trial before a military tribunal, not even if the charge was fomenting an armed uprising in a time of civil war.

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

14. 4 COLL. WORKS, *supra* note 4, at 430.

15. *Habeas Corpus* Act, ch. 80, 12 Stat. 755 (1863).

16. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120–21 (1866).

17. 4 COLL. WORKS, *supra* note 4, at 429.

C. The Supreme Court Sustains the President in the Prize Cases

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

It was argued in the *Prize Cases* that Congress alone had the power to declare war, that the President had no right to institute a blockade until after such a declaration, that war did not lawfully exist when the seizures were made, and that judgments against the ships in lower federal courts were invalid. Had the high court in 1863 decided according to such arguments, it would have been declaring invalid the basic governmental acts by which the war was waged in its early months, as well as the whole legal procedure by which the government at Washington had met the 1861 emergency. The matter went even further and some believed a decision adverse to the President’s excessive power would have overthrown, or cast into doubt, the legality of the whole war.

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

Given these circumstances, the Lincoln Administration was enormously relieved when the Court sustained the acts of the President, including the blockade. A civil war, the Court held, does not legally originate because it is declared by Congress. It simply occurs. The “party in rebellion” breaks allegiance, “organizes armies, and commences hostilities.” In such a case, it is the duty of the President to resist force by force, to meet the war as he finds it

18. *Prize Cases*, 67 U.S. (2 Black) 635 (1862).

19. J.G. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* 52 n.5 (Univ. Ill. Press 1951) (1926) (*quoting* 3 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 104 (1922)).

“without waiting for Congress to baptize it with a name.” As to the weighty question whether the struggle was an “insurrection,” or a “war” in the full sense (as if between independent nations), the Court decided that it was both.²⁰

The Court then held Lincoln’s acts valid. The blockade was upheld, and the condemnation of the ships sustained. But it was a narrow victory. The decision, handed down on March 10, 1863, was five to four, with Chief Justice Taney among the dissenters. Again, Lincoln was not Don Quixote: he could count judicial votes as well as congressional and popular votes. He had stacked the Court in his favor and his appointments cast the deciding votes. The three Lincoln appointees—Noah H. Swayne, Samuel F. Miller, and David Davis—joined Justice Robert C. Grier, who wrote the majority opinion, as did the loyal Justice James M. Wayne of Georgia.

D. Emancipation as a Military Measure

Another illustration of Lincoln’s legal and political astuteness with constitutional issues relates to emancipation. The problem was prodigious. Nothing in the Constitution authorized the Congress *or* the President to confiscate property without compensation. When the preliminary Emancipation Proclamation, issued on September 22, 1862, declared slaves in the states still in rebellion to be free on January 1, the legal basis for this action seemed obscure. Lincoln cited two acts of Congress for justification.²¹ Although reference to the two acts occupied much of the proclamation, they actually had little to do with the subject, indicating that Lincoln had not really settled in his own mind the extent of his power and on what authority to issue the Proclamation. But, by the time of the final Emancipation Proclamation on January 1, 1863, Lincoln had concluded his act to be a war measure taken by the Commander-in-Chief to weaken the enemy.

Now, therefore I, Abraham Lincoln, President of the United States, by virtue of the power in me vested as Commander-in-Chief, of the Army and Navy of the United States in time of actual armed rebellion against authority and government of the United States, and as a fit and necessary war measure for suppressing said rebellion, do . . . order and declare that all

20. *See* Prize Cases, 67 U.S. at 669.

21. 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN 434–45 (Roy P. Basler et al. eds., 1953) (“An Act to Make an Additional Article of War,” Mar. 13, 1862, and “An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate Property of Rebels and for other purposes,” July 17, 1862).

persons held as slaves within said designated States, and parts of States, are, and henceforward shall be free²²

The Proclamation may have had all “the moral grandeur of a bill of lading,” as historian Richard Hofstadter later charged,²³ but the basic legal argument for the validity of Lincoln’s action could be understood by everyone. African-Americans in the North and Union-occupied South reacted with exhilaration when the proclamation was signed on January 1, 1863, and more than 180,000 went to serve in the Union forces.²⁴ And the time was ripe. To a critic, James Conkling, the President wrote:

You dislike the Emancipation Proclamation; and, perhaps, would have it retracted. You say it is unconstitutional—I think differently. I think the constitution invests its commander-in-chief, with the law of war, in time of war. The most that can be said, if so much, is, that slaves are property. Is there—has there ever been—any question that by the law of war, property, both of enemies and friends, may be taken when needed? And is it not needed whenever taking it, helps us, or hurts the enemy?²⁵

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

22. 6 THE COLLECTED WORKS OF ABRAHAM LINCOLN 29–30 (Roy P. Basler et al. eds., 1953) [hereinafter 6 COLL. WORKS].

23. RICHARD HOFSTADER, THE AMERICAN POLITICAL TRADITION 169 (Vintage Books 1974) (1948).

24. See Edna Greene Medford, “Beckoning Them to the Dreamed Promise of Freedom”: African-Americans and Lincoln’s Proclamations of Emancipation, in The Lincoln Forum: Abraham Lincoln, Gettysburg and the Civil War 51, 58 (John Y. Simon et al. eds., 1999).

25. 6 COLL. WORKS, *supra* note 22, at 407–08.

E. Vallandigham and the Corning Letter

Clement Laird Vallandigham, the best known anti-war Copperhead²⁶ of the Civil War, was perhaps President Lincoln's sharpest critic. An Ohioan, this "wily agitator,"²⁷ as Lincoln once obliquely described him, found many supporters for his views in New York State. Active in politics throughout most of his life, he was elected to Congress from Ohio in 1856, 1858 and 1860. Before he was defeated for the 38th Congress in 1862, he returned to Ohio to seek the Democratic nomination for Governor. While in Congress he made a bitter political speech on July 10, 1861, criticizing Lincoln's inaugural address and the President's message on the national loan bill. He charged Lincoln with the "wicked and hazardous experiment" of calling the people to arms without counsel and authority of Congress, with violating the Constitution in declaring a blockade of Southern ports, with "contemptuously" setting at defiance the Constitution in suspending the writ of *habeas corpus* and with "coolly" coming before the Congress and pleading that he was only "preserving and protecting" the Constitution and demanding and expecting the thanks of Congress and the country for his "usurpations of power."²⁸

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

Neither, sir, can you abolish slavery by argument The South is resolved to maintain it at every hazard and by every sacrifice; and if "this Union cannot endure part slave and part free," then it is already and finally dissolved But I deny the doctrine. It is full of disunion and civil war. It is disunion itself. Whoever first taught it ought to be dealt with as not only as hostile to the Union, but an enemy of the human race. Sir, the fundamental idea of the Constitution is the perfect and eternal compatibility of a union of States "part slave and part free;" In my deliberate judgment, a confederacy made up

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

27. 6 COLL. WORKS, *supra* note 22, at 266.

28. CONG. GLOBE, 37th Cong., 1st Sess. 57-59 (1861); *see generally* FRANK L. KLEMENT, *THE LIMITS OF DISSENT* (Fordham Univ. Press 1998) (1970).

of a slaveholding and non-slaveholding States is, in the nature of things, the strongest of all popular governments.²⁹

Later that year, on March 25, 1863, Union General Ambrose E. Burnside took command of the Department of the Ohio with headquarters at Cincinnati. Burnside, who earlier had succeeded George G. McClellan in the command of the Army of the Potomac, had failed miserably before Lee at Fredericksburg. Smarting from his defeat, he was eager to repair his military reputation. The seat of the Copperhead movement was located within the area of his new command. Wholesale criticism of the war was rampant there and this particularly irked Burnside. On March 21, the week after Vallandigham's return from Washington and four days before Burnside took command of the Department of the Ohio, Vallandigham had made one of his typical anti-Administration speeches at Hamilton, Ohio. On April 13, General Burnside, without consultation with his superiors, issued his famous General Order No. 38 in which he announced that all persons found within the Union lines committing acts for the benefit of the enemies of the country would be tried as spies or traitors, and, if convicted, would suffer death.³⁰ The Order enumerated the various classes of persons falling within its scope and stated that the habit of declaring sympathy for the enemy would not be allowed in the Department and that persons committing such offenses would be at once arrested with a view to being tried or banished from the Union lines.³¹

Learning that Vallandigham was to speak at a Democratic mass meeting at Mt. Vernon, Ohio, on May 1, Burnside dispatched from his staff two captains in civilian clothes to listen to Vallandigham's speech. One of the captains leaned against the speaker's platform and took notes while the other stood a few feet from the platform among the audience. Vallandigham concluded his speech with a call to "hurl 'King Lincoln' from his throne."³² As a result of the captains' reports, Vallandigham was arrested in his home at Dayton, on Burnside's orders, early after midnight on May 5 and escorted to Kemper Barracks, the military prison in Cincinnati. On May 6 and 7, he was tried by a military commission convened by General Burnside, found guilty of violation of General Order No. 38, and sentenced to imprisonment for the duration of the war.³³

29. CONG. GLOBE, 37th Cong., 3rd Sess. app. at 52-60 (1863).

30. *See Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243, 243-44 (1864).

31. KLEMENT, *supra* note 28, at 149.

32. WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE* 65-66 (1998).

33. *See* KLEMENT, *supra* note 28, at 152-68.

On the first day of his imprisonment, Vallandigham smuggled out a message, "To the Democracy of Ohio," in which he protested that his arrest was illegal and triggered by no offense other than an expression of his "political opinion." He urged his fellow Democrats to "be firm" and assured them: "As for myself, I adhere to every principle, and will make good, through imprisonment and life itself, every pledge and declaration which I ever made, uttered or maintained from the beginning."³⁴ Vallandigham's counsel applied to the United States circuit court, sitting at Cincinnati, for a writ of *habeas corpus*, which was denied. This time, unlike *Merryman*, the circuit court agreed with the suspension.³⁵ An application was made later for a writ of *certiorari* to bring the proceedings of the military commission for review before the Supreme Court of the United States. This application was denied on the ground that the Supreme Court had no jurisdiction over a military tribunal.³⁶

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

Vallandigham was then conducted by way of Louisville, Kentucky, and Murfreesboro, Tennessee, into Confederate lines. He reached the headquarters of General Braxton Bragg on May 25.³⁸ But before the federal officers left him, Vallandigham announced defiantly: "I am a citizen of Ohio, and of the United States. I am here within your lines by force and against my will. I therefore surrender myself to you as a prisoner of war."³⁹ Vallandigham subsequently found his way to the Confederate capital of Richmond, where he was received indifferently by the Confederate authorities, although he maintained the fiction that he was a Confederate prisoner of war. Having resolved before leaving Cincinnati to endeavor to go to Canada, Vallandigham, without interference, took passage on June 17 on the blockade runner *Cornubia* of Wilmington bound for Bermuda, arriving on June 20. After ten days in Bermuda he traveled by steamer to Halifax, Canada, arriving there on July 5. He then found his way to Niagara Falls, Canada and then settled at

34. *See id.* at 163–64.

35. *See id.* at 171.

36. *See Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243, 248 (1868).

37. *See* KLEMENT, *supra* note 28, at 171, 177.

38. *See id.* at 201–2.

39. *See id.* at 200.

Windsor, opposite Detroit, where he remained until he returned to Ohio on June 15, 1864.⁴⁰

The arrest, military trial, conviction and sentence of Vallandigham aroused excitement throughout the country. The public roundly criticized Burnside for the issuance of General Order No. 38 and for its use against the Ohio Copperhead. President Lincoln also endured severe criticism for commuting instead of countermanding Vallandigham's sentence. The general dissatisfaction with the case was not confined to radical Copperheads. The outcome also disturbed many conservative Democrats who were otherwise loyal government supporters in the prosecution of the war. Many Republican newspapers joined in questioning the action, and public meetings of protest were organized in several cities. The Democrats of Albany hosted one of the most dignified and impressive protest meetings on Saturday evening, May 16, 1863, three days before Lincoln altered Burnside's sentence of imprisonment and ordered that Vallandigham be sent beyond federal lines. Staged in the park in front of the state capitol, it was presided over by Erastus Corning, a distinguished congressman from the city. Democratic Governor Horatio Seymour, though unable to attend, endorsed the meeting in a letter, which was also published by nearly every Democratic newspaper in the North.⁴¹ The question posed in that letter, and indeed on the minds of all Democrats in attendance was whether "the war was being waged to put down rebellion in the South or to destroy free institutions at the North."⁴²

At the rally, fiery speeches criticized Burnside for his action against Vallandigham. Orator after orator expressed outrage against the allegedly arbitrary action of the Administration in suppressing the liberty of speech and of the press, the right of trial by jury, the law of evidence and the right of *habeas corpus*, and, in general, its assertion of the supremacy of military over civil law. The attendees adopted a series of resolutions by acclamation and ordered that a copy of these resolutions be transmitted "to his Excellency the President of the United States, with the assurance of this meeting of their hearty and earnest desire to support the Government in every Constitutional and lawful measure to suppress the existing Rebellion." Three days later, Erastus Corning addressed the resolutions to the President and sent them along with a brief note signed by himself, as president of the assemblage, and by its vice-presidents and secretaries. Though couched in dignified and

40. See REHNQUIST, *supra* note 32, at 68.

41. See KLEMENT, *supra* note 28, at 181 n.19.

42. *Id.* at 180-81 (quoting Seymour).

respectful language, the resolutions clearly articulated the position of those attending the meeting—they regarded the arrest and imprisonment of Vallandigham illegal and unconstitutional, and deplored the alleged usurpation of personal rights by the Administration.⁴³

On May 28, 1863, the President acknowledged receipt of the resolutions in a note addressed to “Hon. Erastus Corning,” promising to “give the resolutions . . . consideration” and “to find time, and make a respectful response.”⁴⁴

There is no record that Lincoln was consulted by General Burnside in advance of the issuance of General Order No. 38, or over the arrest, trial and sentence of Vallandigham. Indeed, Lincoln knew of Vallandigham only what he read in the newspaper.⁴⁵ Lincoln was, of course, thoroughly familiar with Vallandigham as leader of the Copperhead critics of his Administration, but Vallandigham, after being rejected by Democratic party leaders in his 1863 bid for Ohio Governor, apparently decided to become “a martyr to the cause [and] have himself arrested.”⁴⁶ If left to his discretion alone, Lincoln would probably have counseled that Vallandigham be allowed to talk himself to death politically.

Yet on June 12, 1863, the President sent a studied reply to the Albany Democrats addressed to “Hon. Erastus Corning & others.”⁴⁷ In a closely reasoned document of more than 3,000 words, constructed in lawyer-like fashion, Lincoln justified the action of the Administration in the arrest, trial, imprisonment, and banishment of Vallandigham and elaborated on his view that certain proceedings are constitutional “when in cases of rebellion or invasion, the public Safety requires them, which would not be constitutional when, in [the] absence of rebellion or invasion, the public Safety does not require them.”⁴⁸ The President defended the action not on free speech grounds but on the effects of such speech.⁴⁹ The political instincts of the lawyer-President emerged in Lincoln’s reply when he said:

In giving the resolutions that earnest consideration which you request of me, I can not overlook the fact that the meeting speak as “Democrats.” Nor can I, with full respect for their

43. *See id.* at 181.

44. 6 COLL. WORKS, *supra* note 22, at 235.

45. *See* REHNQUIST, *supra* note 32, at 67.

46. *See id.* at 65.

47. *See* 6 COLL. WORKS, *supra* note 22, at 260–272.

48. *Id.*

49. *Id.*

known intelligence, and the fairly presumed deliberation with which they prepared their resolutions, be permitted to suppose that this occurred by accident, or in any way other than that they preferred to designate themselves “democrats” rather than “American citizens.” In this time of national peril I would have preferred to meet you upon a level one step higher than any party platform.⁵⁰

Erastus Corning referred Lincoln’s response to the committee that reported the resolutions while they were widely printed in pro-Lincoln newspapers throughout the country. On July 3, Corning forwarded to the President the rejoinder of the committee, another document of some 3,000 words. This rejoinder dwelt at length upon what it deemed “repeated and continued” invasions of constitutional liberty and private rights by the Administration and asked anew what the justification was “for the monstrous proceeding in the case of a citizen of Ohio.” The rejoinder, drawn mainly by an ex-justice of Ohio’s Court of Appeals, did not maintain the even-handed dignity of the original resolutions, charging Lincoln with “pretensions to more than regal authority,” and insisted that he had used “misty and cloudy forms of expression” in setting forth his pretensions. The committee was especially sensitive to Lincoln’s argument that the resolutions were presented by “Democrats” instead of by “American citizens” and sought to portray the President as a usurper of constitutional liberties. The President was too busy with countless other issues to engage in prolonged debate. He had his say in his reply to the initial resolutions, ignored the rebuttal and turned to other matters.⁵¹

Almost simultaneously, Lincoln found himself engaged in a similar encounter with Democrats in Ohio. The Ohio Democratic State Convention held at Columbus on June 11, 1863, nominated Vallandigham for Governor by acclamation while he was still within the Confederate lines. George E. Pugh, Vallandigham’s lawyer in the *habeas corpus* proceedings, was nominated for Lieutenant Governor. The convention passed a series of resolutions condemning the arrest, trial, imprisonment and banishment of Vallandigham and appointed a committee of nineteen members to communicate with the President and to request the return of Vallandigham to Ohio. Fifteen members of the Committee of Nineteen, twelve of them either congressmen or congressmen-elect, left for Washington on

50. *See id.* at 267.

51. *See* KLEMENT, *supra* note 28, at 189.

June 23 to address the President.⁵² The committee called on the President at the White House and filed with him its protest, including an abridged version of the resolutions adopted by the Ohio Democratic State Convention. Similar in import to those adopted by the Albany Democrats, the resolutions held that “the arrest, imprisonment, pretended trial, and actual banishment of Clement L. Vallandigham” was a “palpable” violation of the Constitution.⁵³ The committee went on to elaborate its view that the Constitution is no different in time of insurrection or invasion from what it is in time of peace and public security.⁵⁴

Re-employing the arguments he had used in his letter to the Albany Democrats, Lincoln promptly replied to the Ohio committee. He added “a word” to his Albany response:

You claim that men may, if they choose, embarrass those whose duty it is, to combat a giant rebellion, and then be dealt with in turn, only as if there was no rebellion. The constitution itself rejects this view. The military arrests and detentions, which have been made, including those of Mr. V. which are not different in principle from the others, have been for *prevention*, and not for *punishment*—as injunctions to stay injury, as proceedings to keep the peace. . . .⁵⁵

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

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

52. *See id.* at 187.

53. Letter from Matthew Birchard, et al., to Abraham Lincoln (June 26, 1863), available at http://memory.loc.gov/mss/mal/maltext/rtf_orig/mal054f.rtf.

54. *See* KLEMENT, *supra* note 28, at 188.

55. 6 COLL. WORKS, *supra* note 22, at 303.

while engaged in the effort to suppress the rebellion, paid, fed, clad, and otherwise well provided and supported.⁵⁶

Not surprisingly unconvinced, the Ohio committee spurned Lincoln's concluding proposals and demanded in its rejoinder the revocation of the order of banishment, not as a favor, but as a right, without sacrifice of dignity and self respect. Once again, Lincoln did not reply to the rejoinder of the Ohio committee.⁵⁷

Safe in his retreat in Canada, Vallandigham accepted the nomination for Governor of Ohio by the Democratic State Convention in an impassioned letter, "Address to the Democracy of Ohio." The name of Burnside, he declared, was infamous forever in the ears of all lovers of constitutional liberty and the President was guilty of "outrages upon liberty and the Constitution."⁵⁸ Vallandigham's "opinions and convictions as to war" and his faith "as to final results from sound policy and wise statesmanship" were not only "unchanged but confirmed and strengthened."⁵⁹

While the Democrats went on to conduct a vigorous campaign, the Republicans nominated John Brough, a former Democrat, to oppose Vallandigham.⁶⁰ The campaign that ensued polarized the state of Ohio. There was no middle ground in the campaign—partisanism intensified among Ohioans to the point of severed social and business relations, violence among both men and women, and even bloodshed.⁶¹ One Ohioan, expressing a sentiment perhaps shared today, condemned Ohioans "who permitted a convention in their midst, desecrating by its unhallowed breath the fair escutcheon of a noble state (and at a time too when thousands of her sons are writing the story of her glory in their blood)."⁶²

The tone and temper of the Democratic campaign was typified by a speech at St. Mary's, Ohio, on August 15, 1863, by George E. Pugh, the candidate for Lieutenant Governor, which was printed in full by the *Columbus Crisis* the following month. Pugh paid his "compliments" to Lincoln in language which outdid Vallandigham:

Beyond the limits and powers confided to him by the Constitution, he is a mere county Court lawyer, and not entitled to any obedience or respect, so help me God. [Cheers and cries of

56. *See id.* at 305.

57. KLEMENT, *supra* note 28, at 189.

58. JAMES LAIRD VALLANDIGHAM, A LIFE OF CLEMENT L. VALLANDIGHAM 320 (1872).

59. *Id.* at 321.

60. KLEMENT, *supra* note 28, at 186.

61. *Id.* at 229, 249–50.

62. *Id.* at 229–30.

“Good.”] And when he attempts to compel obedience beyond the limits of the Constitution, by bayonets and by swords, I say that he is a base and despotic usurper, whom it is your duty to resist by every possible means, and, if necessary, by force of arms. [Cheers and cries, “That’s the talk.”] If I must have a despot, if I must be subject to the will of any one man, for God’s sake let him be a man who possesses some great civil or military virtues. Give me a man eminent in council, or eminent in the field, but, for God’s sake, don’t give me the miserable mountebank who at present exercises the office of President of the United States.⁶³

This extreme language may well have contributed to the result of the election. The total vote in Ohio was more than 432,000. Brough received a solid majority both at home and among the soldier votes collected in the field, winning 57% of the vote. Brough even carried Vallandigham’s home county by a slim margin.⁶⁴

One more formal effort was made in Vallandigham’s behalf. On February 29, 1864, Ohio Congressman George H. Pendleton (later that year to become the Democratic candidate for Vice President of the United States) offered the following resolution in the House of Representatives and moved the previous question for adoption:

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

The proposed resolution was killed by a vote of 77 to 47.⁶⁵

In developing his arguments for sustaining the government’s actions on Vallandigham, Lincoln turned above all to the doctrine of necessity. In his view, the civil courts were powerless to deal with the insurrectionary activities of individuals.⁶⁶ As Lincoln expressed the problem:

63. CRISIS (Columbus), Sept. 9, 1863.

64. KLEMENT, *supra* note 28, at 186 n.56.

65. H.R.J., 38th Cong., 1st Sess. 323 (1864).

66. LaWanda Cox called this “Limits of the Possible.” See LaWanda Cox, *Reflections on the Limits of the Possible*, in FREEDOM, RACISM & RECONSTRUCTION: COLLECTED WRITINGS OF LAWANDA COX 243–78 (Donald G. Nieman ed., 1997).

[H]e who dissuades one man from volunteering, or induces one soldier to desert, weakens the Union cause as much as he who kills a union soldier in battle. Yet this dissuasion, or inducement, may be so conducted as to be no defined crime of which any civil court would take cognizance.⁶⁷

He knew, as President, he had to act to counter such subtle, and not so subtle, treasons. In his most famous passage on the subject, contained in the Corning Letter, Lincoln stated eloquently:

[M]ust 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.⁶⁸

II. WAR OF SEPTEMBER 11 AND IRAQ: CIVIL WAR PARALLELS

In the “epilogue” to his book, *The Fate of Liberty*, historian Mark E. Neely, Jr., closes by admitting:

If a situation were to arise again in the United States when the writ of habeas corpus were suspended, government would probably be as ill-prepared to define the legal situation as it was in 1861. The clearest lesson is that there is no clear lesson in the Civil War—no neat precedents, no ground rules, no map. War and its effect on civil liberties remain a frightening unknown.⁶⁹

Neely’s point is well taken today: since September 11, 2001, many scholars and citizens have questioned what effect President Bush’s reactions and actions to the problems of national security and war will have on his legacy and on civil liberties. Currently, there is much dissension among Americans over the President’s motive in the war on Iraq. Surely, President Bush has not yet met the greatest challenges this war will present. Even though Lincoln

67. 6 COLL. WORKS, *supra* note 22, at 264.

68. *See id.* at 266–67.

69. MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 235 (1991).

improvised on civil liberties during the Civil War, he ultimately preserved the American system itself. After the Iraqi conflict ends, Bush must create a more democratic government, and reunite not only the American people, but as many countries as he can.

Today, “alerts and precautions concerning possible saboteurs” are a “prominent feature of life,”⁷⁰ but there were terrorists even in the time of Lincoln.⁷¹ In 1864, Southern agents devised a plan to use arson to spread panic throughout Northern cities. Security was heightened in and around Washington to protect against the arsonists’ plans. In New York, arsonists were successful and destroyed a lumberyard and some houses. While “it is encouraging to know that this nation has endured such troubles before and survived them,”⁷² terrorist measures regarded as severe in Lincoln’s time seem mild when compared to those of Osama Bin Laden or Saddam Hussein.

A. *War on Terrorism and Military Tribunals*

After Osama Bin Laden and his forces of Al Qaeda admitted to masterminding the destruction of the twin towers and the Pentagon on September 11, hundreds of suspected Al Qaeda associates were arrested and detained in Guantanamo Bay, Cuba. President Bush proposed the use of military tribunals to try foreigners charged with terrorism. With over 90 million cases in our justice system each year, proponents argued that these commissions were needed. Such commissions do not enforce national laws, but a body of international law that has evolved over the centuries.⁷³

Historically, military commissions during wartime began as traveling courts when there was a need to impose quick punishment. The use of military tribunals, rather than the usual justice system, was used not only during the Civil War but also during the Revolutionary War, Mexican War, and both World Wars. Abraham Lincoln declared martial law and authorized such forums to try guerillas or terrorists during the American Civil War because of the ability of the tribunals to act quickly, preserve and protect intelligence gathered through interrogation, and otherwise protect civilians who would have been jurors if tried in a United States district court. During the Civil War, the Union Army conducted at least

70. John Lockwood, *We Had Terrorists Even in the Time of Lincoln*, WASH. POST, Feb. 16, 2003, at B8.

71. *See id.*

72. *Id.*

73. This international law is known as the law of war. One of its fundamental axioms is that combatants cannot target civilians.

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4,271 trials by military commission, which reflected the disorder of the time.

Lincoln answered his critics with a reasoned, constitutional argument. A national crisis existed and in the interest of self-preservation he had to act. At the same time he realized Congress had the ultimate responsibility to pass judgment on the measures he had taken. He found the right of self-preservation in Article II, section 1, of the Constitution, whereby the chief executive is required “to preserve, protect and defend” it, and in section 3, that he “take care that the laws be faithfully executed.” All of the laws which were required to be “faithfully executed” were being resisted, and “failed of execution” in nearly one-third of the states.

Like Lincoln’s critics during the Civil War, many have expressed their concern about the modern use of military tribunals.⁷⁴ Some fear that “people around the world will view the outcome as a foregone conclusion.”⁷⁵ Others have questioned whether the proposed use of military tribunals would survive a court challenge, asserting that courts may not find that current circumstances justify use of the tribunals.⁷⁶

74. Ironically, the case of those tried for Lincoln’s assassination was heard by a military tribunal. Although the assassin, John Wilkes Booth, was already dead, eight defendants were put on trial. Among them was Dr. Samuel Mudd, the physician who set Booth’s broken leg and sent him on his way. Dr. Mudd was accused of abetting Booth’s escape. He escaped the death penalty and served four years of a life sentence. See James H. Johnston, *Swift and Terrible: A Military Tribunal Rushed to Convict after Lincoln’s Murder*, WASH. POST, Dec. 9, 2001, at F1. Interestingly, Dr. Mudd’s grandson brought the case before a federal appeals court in September 2002. *Mudd v. White*, 309 F.3d 819 (D.C. Cir. 2002). He sought to have the conviction overturned, arguing that his grandfather had only been doing his duty as a doctor. As Richard Willing stated in his article, “[o]n its face, the Mudd appeal turns on a fairly dry point of law—whether the army’s decision followed the standard of review called for by the federal Administrative Procedure Act. But underlying the dispute is a basic disagreement over how the legal system should function during wartime—during the Civil War and today.” Richard Willing, *Dr. Mudd Appeal to be Heard*, THE SURRETT COURIER, May 2002, at 3–4. Unfortunately for Dr. Mudd’s family, in November 8, 2002, the court dismissed the case. Judge Harry Edwards wrote that the law under which the Mudd family was seeking to have Samuel Mudd’s conspiracy conviction expunged applied only to records involving members of the military. Although Mudd was tried by a military tribunal, he was not a member of the military. *Mudd*, 309 F.3d at 824.

75. William Glaberson, *Closer Look at New Plan For Trying Terrorists*, N.Y. TIMES, Nov. 15, 2001, at B6.

76. “There certainly are precedents through history for military commissions, but that doesn’t mean the president has constitutional authority to use them whenever he says there’s an emergency.” *Id.* However, American courts have been reluctant to second-guess the chief executive as to when commissions are justified. *Id.*

It is not clear whether the 9/11 terrorists and detainees, whether apprehended in the United States or abroad, are protected under America's criminal justice system. Initially, President Bush proposed that those detained as enemy combatants be protected by neither the international law of war nor the four Geneva Conventions.⁷⁷ However, he reversed himself when many countries indicated that if detainees would not be entitled to the Geneva Convention protections, they would be hesitant to turn over any alleged terrorists in their custody.⁷⁸ Furthermore, our own Department of Defense indicated that if this country refused to apply the international law protections, Bush would be putting troops in Afghanistan, and now Iraq, at risk if they were captured.⁷⁹ Afghanistan and other unfriendly countries would likely refuse to apply such protections as well.

To address some of the confusion, the Pentagon issued regulations to govern tribunals. Under Military Commission Order No. 1, issued in March 2002, the Secretary of Defense was vested with the

77. Thom Shanker & Katharine Q. Seelye, *Behind-the-Scenes Clash Led Bush to Reverse Himself on Applying Geneva Conventions*, N.Y. TIMES, Feb. 22, 2002, at A12. Under the Geneva Conventions, protections are afforded to members of an organized command structure with someone responsible for their actions. In contrast, those being detained as enemy combatants do not wear military uniforms (enabling the other side to spare civilians without fear of counterattacks by disguised fighters), they do not carry arms openly and they do not respect the laws of war. Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4, T.I.A.S. 3364, 75 U.N.T.S. 135. Yoram Dinstein warns against American troops who fail to wear uniforms in combat relative to being entitled to protections under the Geneva Conventions:

The constraints of the conditions of lawful combatancy must not . . . be seen as binding on only one Party to the conflict As the hostilities progressed, it became all too evident . . . that some American combatants . . . were not wearing uniforms while in combat. It ought to be emphasized that observance by even 99 per cent of the armed forces to a Party . . . does not absolve the remaining 1 percent. Consequently, had any American combatants in civilian clothing been captured by the enemy, they would not have been entitled to prisoners of war status any more than Taliban and Al Qaeda fighters in a similar plight.

Dinstein, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 50 (2004). Dinstein also believes that "[s]ince unlawful combatants are not entitled to prisoners of war status, most criticisms against conditions of detention in Guantanamo are beside the point. However, detention (as a purely administrative measure) of those persons who are not charged with any crime in judicial proceedings cannot go beyond the termination of hostilities: hostilities in Afghanistan in connection with Taliban personnel; hostilities in which Al Qaeda is involved in the case of its incarcerated fighters." *Id.*

78. See Shanker & Seelye, *supra* note 77.

79. *Id.*

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power to “issue orders from time to time appointing one or more military commissions to try individuals subject to the President’s Military Order and appointing any other personnel necessary to facilitate such trials.”⁸⁰

The commissions are to be composed of military personnel or civilians who are commissioned sitting as both trier of fact and law. Any evidence may be admitted as long as, according to a reasonable person, it will have probative value. The defendant is entitled to a presumption of innocence and must be convicted beyond a reasonable doubt. Only two-thirds of the panel, however, is needed to convict. The sentence may be reviewed by the Department of Defense and the President.

Despite efforts to clearly regulate the parameters of these tribunals, criticism has remained. A *New York Times* editorial issued after the establishment of these regulations noted that despite the fact that the idea of military tribunals for suspected terrorists is less troubling than it was at inception, “there is still no practical or legal justification for having the tribunals. The United States has a criminal justice system that is a model for the rest of the world. There is no reason to scrap it in these cases.”⁸¹

The rebuttal to this argument has been that with over ninety million cases in our justice system each year, the federal courts may be ill-equipped to efficiently adjudicate terrorism cases. Unique issues like witness security, jury security, and preservation of intelligence have and will cause even more extraordinary delay.

So what is the best way to handle cases of those detained as enemy combatants? Who has jurisdiction over such matters—federal courts or military tribunals? Do United States citizens detained as enemy combatants warrant different protections than foreign detainees?

Legal experts have suggested that a combination of independent federal court review and military tribunal may be the answer. Harvey Rishikoff, former FBI legal counsel, suggests that, clearly, the federal court system as it now exists is ill-equipped to handle matters of domestic and international security.⁸² He suggests that “[a] specialized federal security court could accommodate the particular challenges of prosecuting terrorism cases without undermin-

80. Department of Defense, Military Commission Order No. 1, § 2 (Mar. 21, 2002), available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>.

81. *Refining Military Tribunals*, Editorial, N.Y. TIMES, Mar. 22, 2002, at A24.

82. Harvey Rishikoff, *A New Court For Terrorism*, N.Y. TIMES, June 8, 2002, at A15.

ing constitutional principles.”⁸³ The “New Court for Terrorism” could “craft procedures for secret evidence gathered by sources and methods that should not be disclosed. It would have jurisdiction over matters that involve citizens and noncitizens operating in a loose network for terrorist purposes”⁸⁴

B. *The Supreme Court Cases*

During the 2003-2004 term, the United States Supreme Court agreed to consider three cases in which jurisdiction and authority over enemy combatants were at issue.⁸⁵ The Supreme Court first considered the case of *Rasul v. Bush*, brought by foreign detainees captured abroad during the hostilities between the United States and the Taliban and detained at Guantanamo Bay, Cuba. The detainees challenged their detention by filing petitions in the District Court for the District of Columbia. The District Court determined that because the petitioners were held outside of the United States, it did not have jurisdiction to hear their petitions.⁸⁶ The Court of Appeals affirmed. The United States Supreme Court granted petitioners’ writ of certiorari. After hearing arguments, the Court opined that because petitioners were being held at an American Naval Base over which the United States exercises “complete jurisdiction and control,”⁸⁷ “aliens held at the base . . . are entitled to invoke the federal courts’ authority.”⁸⁸ The Supreme Court remanded the case to the district court, based on their finding that the district court did indeed have jurisdiction over challenges made

83. *Id.*

84. *Id.*

85. *Rasul v. Bush*, 124 S. Ct. 2686 (2004); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004); *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004).

86. *Rasul v. Bush*, 215 F. Supp. 2d 55, 72–73 (D.D.C. 2002). In coming to this conclusion, the district court relied on *Johnson v. Eisentrager*, which it interpreted as “broadly appl[ying] to prevent aliens detained outside the sovereign territory of the United States from invoking a petition for a writ of habeas corpus.” *Id.* (citing *Johnson v. Eisentrager*, 339 U.S. 763 (1950)). The U.S. Supreme Court distinguished *Rasul* from *Eisentrager*, stating that unlike the detainees in *Eisentrager*, the petitioners in *Rasul* were “not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.” *Rasul*, 124 S. Ct. at 2693 (2004).

87. *Rasul*, 124 S. Ct. at 2696 (citing Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418; Treaty Defining Relations with Cuba, May 29, 1934, U.S.-Cuba, art. III, 48 Stat. 1683).

88. *Id.*

by foreigners to their indefinite detention in a facility under United States control.

The Court next heard arguments in *Hamdi v. Rumsfeld*.⁸⁹ Unlike the petitioners in *Rasul*, Yassar Hamdi was an American citizen. He was fighting with the Taliban in Afghanistan in 2001 when his unit surrendered to the Northern Alliance, with which American forces were aligned. He was held at a military brig in Charleston, South Carolina for two years without being formally charged. In his appeal to the Supreme Court, Hamdi challenged the government's treatment of him as an "enemy combatant." The Supreme Court held that due process requires that United States citizens detained in the United States be given a meaningful opportunity to contest their detention before a "neutral decisionmaker."⁹⁰

The Court stated that the "neutral decisionmaker" could be either the federal judicial system or a military tribunal, provided such tribunal allows the detainee to challenge the factual basis for his detention.⁹¹ The burden is initially on the detainee. Hamdi had also asked the Supreme Court to find that the lower court erred by denying him immediate access to counsel after his detention and by disposing of the case without the benefit of counsel.⁹² The Justices found that because counsel had been appointed since their granting of certiorari, there was no need to decide the issue.⁹³

Finally, the Court was presented with *Rumsfeld v. Padilla*.⁹⁴ The petitioner, Jose Padilla, was a United States citizen detained as an enemy combatant in a military brig in Charleston, South Carolina. The threshold questions raised by the Padilla case were: (1) whether he properly filed his petition in the appropriate court and (2) whether the President possessed the authority to militarily detain him. Because the United States Supreme Court ruled that Padilla improperly named Donald Rumsfeld and filed his petition in the wrong jurisdiction, it did not reach the second issue regarding the President's authority over this United States citizen.⁹⁵

The decisions made by President Bush are increasingly coming under attack, and even after the Supreme Court's decisions in *Hamdi* and *Rasul*, the legal waters remain murky regarding the

89. *Hamdi*, 124 S. Ct. at 2633.

90. *Id.*

91. "Absent suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to this process." *Id.* at 2650-51.

92. *Id.* at 2652.

93. *Id.*

94. *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004).

95. *Id.* at 2711.

President's authority over citizens and non-citizens detained as enemy combatants. What is clear, however, is that our nation is engaged in another conflict that may be as difficult as it is different from the Civil War. It is a war waged against us by an almost unknown and indiscernible enemy.

Some urge us to proclaim the war over with a single victory in Afghanistan. Even our strongest allies and some of our fellow citizens cannot understand why President Bush should continue the war against terrorists by going after them rather than just being reactive. Shouldn't we be satisfied with one victory? they argue. Why must we identify other sources of danger and prepare to act against them?

III. CONCLUSION

The Corning episode suggests that the argument over Lincoln and civil liberties was as robust in his own time as in ours (ironic in itself since part of the historical argument is that Lincoln suppressed criticism), and deserves a careful reexamination by modern historians. That Lincoln emerges from the perennial controversy that afflicted his Administration over civil liberties with a reputation for statesmanship may be the most powerful argument for his judicious application of executive authority during a national emergency.

Whether President Bush will emerge similarly unscathed is yet to be determined. Approximately nine months after September 11, 2001, two-thirds of Americans supported President Bush's creation of a Homeland Security department, and his overall approval rating was seventy-seven percent.⁹⁶ But since attention has turned to Iraq, Bush has spent much of his time attempting to persuade the American public that a war against Iraq is necessary to suppress future September 11-scale terrorism. He proposes that a war can be waged with minimal effort, "[b]ut the gods of war have always demanded sacrifice."⁹⁷

When the government of a democratic nation imposes harsh methods to sustain itself, sincere protest and criticism will undoubtedly follow, along with slurs on democracy itself. This criticism

96. Gary Langer, *Terror v. Liberties: Poll: Americans Believe Stopping Terror Is More Important Than Privacy*, June 10, 2002, at http://abcnews.go.com/sections/us/DailyNews/terror_poll020610.html.

97. David M. Kennedy, *What is Patriotism Without Sacrifice?*, N.Y. TIMES, Feb. 16, 2003, at WK3.

secures the future of constitutional liberties if the nation survives; but suppose it does not survive? Suppose it fails because of internal division, dissension or treason? In such cases, there will be greater criticism, stressing the weakness and inadequacy alleged to be characteristics of a democratic nation in an emergency.

As historian Don E. Fehrenbacher has noted: "Although Lincoln, in a general sense, proved to be right, the history of the United States in the twentieth century suggests that he brushed aside too lightly the problem of the example that he might be setting for future presidents."⁹⁸ The full impact of Lincoln's legacy on President Bush is yet to be realized. In Lincoln's words, the United States was "the last best hope of earth," and it still is for survival of democracy in the world.⁹⁹

98. DON E. FEHRENBACHER, *LINCOLN IN TEXT AND CONTEXT: COLLECTED ESSAYS* 139 (1987).

99. Abraham Lincoln, *Annual Message to Congress* (Dec. 1, 1862), in *ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS* 688 (Roy P. Basler ed., 1946).

