



WHEN ALBANY CHALLENGED

The President

BY FRANK J. WILLIAMS

Lincoln is depicted as a phoenix rising from the ashes of the Constitution in this British cartoon.

The arrest of an Ohio Democratic congressman who opposed Lincoln's 1862 suspension of the writ of *habeus corpus* led Albany Democrats into an impassioned exchange of letters with the president. But it would take a century and a half for the U.S. Supreme Court to overrule this executive assertion of authority.

Congressman
Clement L.
Vallandigham



THE ARREST OF HON. C. L. VALLANDIGHAM.

Great Excitement at Dayton, Ohio—The Journal Building Gutted and Set on Fire—Part of the Phillips House Destroyed—The Telegraph Wires Cut—The Bridge at Xenia Destroyed—The Military from Columbus and Cincinnati Finally Put Down the Rioters, &c.

Cincinnati, May 6, 1862.
Great excitement existed at Dayton, Ohio, yesterday in regard to the arrest of Hon. Clement L. Vallandigham by order of the military authorities.

At dark a crowd of from five to six hundred proceeded to the Journal office, took possession of it, completely gutted the building, set it on fire and burned it to the ground.

The fire communicated to the adjoining buildings, and all the property from the south end of the Phillips House to the middle of the square was destroyed.

All the telegraph lines in the city were cut down and destroyed.

The bridge on the Xenia road is reported to be destroyed.

At ten o'clock at night federal troops from Cincinnati and Columbus succeeded in putting down the rioters, and at half-past eleven o'clock quiet was again restored.

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necessary to reunite the nation.

On September 24, 1862, responding to the grave political and military climate, Lincoln issued a proclamation declaring martial law and authorizing the use of military tribunals to try civilians within the United States who were believed to be "guilty of disloyal practice" or who "afford[ed] aid and comfort to Rebels."

This was only the beginning. The following March, Major General Ambrose Burnside assumed command of the Department of the Ohio. Burnside took command at his headquarters in Cincinnati, where wholesale criticism of the war was rampant. Agitated by such anti-administration speeches, General Burnside responded on April 13, 1863 by issuing General Order No. 38, which authorized imposition of the death penalty for those who aided the Confederacy and who "declared sympathies for the enemy."

A "Wily Agitator"

Among those who particularly irked General Burnside was former Ohio Democratic Congressman Clement L. Vallandigham, the best-known anti-war Copperhead of the Civil War and perhaps Lincoln's sharpest critic. Active in politics throughout most of his life, Vallandigham was elected to the House of Representatives from Ohio in 1856, 1858, and 1860. General Burnside knew him well from several speeches he

had given while in Congress that had gained considerable publicity. Vallandigham had charged Lincoln with the "wicked and hazardous experiment" of calling the people to arms without counsel and authority of Congress; with violating the Constitution by declaring a blockade of Southern ports; with "contemptuously" defying the Constitution by suspending the writ of *habeas corpus*; and with "coolly" coming before Congress and pleading that he was only "preserving and protecting" the Constitution while demanding and expecting the thanks of Congress and the country for his "usurpations of power."

Learning that Vallandigham was to speak again at a Democratic meeting in Mount Vernon, Ohio, Burnside dispatched two captains in civilian clothes to listen to Vallandigham's speech. As anticipated, Vallandigham lambasted President Lincoln, referred to him as a political tyrant, and called for his overthrow. Vallandigham proclaimed, among other things, that "the present war was a wicked, cruel, and unnecessary war, one not waged for the preservation of the Union, but for the purpose of crushing out liberty and to erect a despotism; a war for the freedom of the blacks and the enslavement of the whites."

With General Order No. 38 as justification and at General Burnside's direction, 150 Union

soldiers arrived at the Copperhead's home in Dayton at 2:40 a.m. on May 5, 1863. When Vallandigham refused to let the soldiers in, they broke down his front door and forced their way inside. They arrested him and escorted him to Kemper Barracks, a military prison in Cincinnati.

Although he was a United States citizen who would ordinarily be tried in the civilian court system, Vallandigham was brought before a military tribunal a day after his arrest. Vallandigham, an attorney, represented himself before the military officers who presided over his case and protested that the commission had no authority to try him. His protestations fell on deaf ears, however, as the case before the tribunal proceeded. Vallandigham was found guilty of violating General Order No. 38 and sentenced to imprisonment for the duration of the war.

Vallandigham then applied to the United States Circuit Court sitting at Cincinnati for a writ of *habeas corpus*—a procedural method by which one who is imprisoned can seek to have his imprisonment reviewed—but the writ was denied. He later sought a writ of *certiorari* (an order by a higher court directing a lower court to send the record in a given case for review) from the United States Supreme Court, which was likewise denied, on grounds that the court was without jurisdiction to review the military tribunal's proceedings.

Threatening the Constitution?

Vallandigham's arrest, military trial, conviction, and sentence aroused excitement throughout the country. The "wily agitator," as Lincoln later obliquely described him, found many supporters for his views in New York—particularly in heavily Democratic Albany.

Sentiment in Albany held that Vallandigham's arrest was arbitrary and constituted an effort to exert military censorship of public discourse. One newspaper reported that the arrest was an experiment conducted by the Lincoln Administration to test how much the public would tolerate. Many New Yorkers felt that Vallandigham's arrest was a very real possibility for them, too. The *Albany Atlas and Argus*, an anti-administration Democratic newspaper, reported those fears: "[T]he blow that falls upon a citizen of Ohio to-day, may be directed at a Democrat of New York to-morrow. The blow, therefore, is a threat at every Democrat." Days later, the paper drove home this sentiment: "[T]he State of New York, and every citizen of the State, is equally threatened[.] We must make common cause with the citizens of other States, or we, too, are lost."

Democratic New Yorkers, incensed by Vallandigham's arrest, then organized what the *Atlas and Argus* described as "[o]ne of the largest and most respectable meetings ever held at the Capitol" to

protest the case, which they believed was a "crime against the Constitution." People arrived in droves, and by 8 p.m. on May 18 the broad walk leading to the Capitol steps and the adjacent grounds was packed with citizens.

Although unable to attend the public meeting, New York's Democratic Governor Horatio Seymour forwarded a letter that was read aloud to the spirited crowd of 3,000. Like many New Yorkers, Seymour was outraged at what he believed was a depredation of civil liberties. He wrote:

The transaction involved a series of offences against our most sacred rights. It interfered with the freedom of speech; it violated our rights to be secure in our homes against unreasonable searches and seizures; it pronounced sentence without a trial, save one which was a mockery, which insulted as well as wronged. The perpetrators now seek to impose punishment, not for an offence against the law but for a disregard of an invalid order, put forth in an utter disregard of principles of civil liberty.

Fiery speeches criticized General Burnside for his action against Vallandigham. Among those who spoke were Judge Amasa J. Parker, United States Congressman Francis Kernan, and the Honorable John W. Murphy. Orator after orator expressed

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Major General
Ambrose Burnside



Lincoln wrote a twenty-page response to Albany Democrats defending his suspension of the writ of habeas corpus. The photo was taken on August 9, 1863.

outrage against the allegedly arbitrary actions of the administration. But not everyone in attendance criticized those actions. Several soldiers who had just returned from the battlefield displayed great dissatisfaction with the rally's purpose by breaking chairs into pieces and hurling them into the crowd. The *New York Times* reported that at one point, it appeared as though the soldiers might seize control of the meeting. Their efforts were eventually thwarted, however, and the meeting returned to order.

The attendees ultimately adopted a series of resolutions and ordered that a copy of them be transmitted to the

president "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." The resolutions drove home the point that those who attended the meeting regarded Vallandigham's arrest and imprisonment as illegal and unconstitutional. In the Albany Democrats' opinion,

[the] assumption of power by a military tribunal, if successfully asserted, not only abrogates the right of the people to assemble and discuss the affairs of Government, the liberty of speech and of the press, the right of trial by jury, the law of evidence, and the privileges of *Habeas Corpus*, but it strikes a fatal blow at the supremacy of law, and the authority of the State and Federal Constitutions.

On May 19, only a day after this extraordinary meeting, Albany's former Democratic mayor (and former U.S. Congressman) Erastus Corning, who had been elected president of the assemblage, addressed the resolutions to Republican President Lincoln. Corning also enclosed a brief note signed by himself as assemblage president and by its vice presidents and secretaries.

In the days and weeks that followed, similar meetings were held throughout the state in protest of what organizers insisted was the

administration's infringement of the "most sacred rights of American freemen." Mass meetings occurred in Utica, Troy, and Waterloo, while in Brooklyn a subcommittee of the Democratic General Committee was appointed to "consider the subject of the recent arbitrary arrests by the Government, and draft resolutions expressive of the sense of the Union Democratic General Committee."

These meetings were challenged, however, by those loyal to the Union and the Republican administration. In Albany, hundreds assembled on May 20, 1863 "to give expression to their patriotic loyalty, and to vindicate the Capital of the State of New York from the imputation of indifference to the results of the war and to the integrity of the Nation." The pro-administration *Albany Evening Journal* described the previous assemblage of Albany Democrats as "a meeting to justify a bad man, and to denounce those who sought to punish him...to approve what a man, who is at heart a traitor, has said and done, rather than what its responsible managers will wish it to be deemed, viz.: a meeting to maintain the supremacy of the civil law."

A Letter from the President

On June 12, 1863, Lincoln replied to the Albany Democrats with a long, lawyerly, closely reasoned document that sprawled over twenty handwritten pages.

He justified the administration's actions in the arrest, trial, imprisonment, and banishment of Vallandigham, and elaborated on his view that certain proceedings were 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." More extraordinarily, Lincoln made sure that copies of the letter went not only to Erastus Corning but also to friendly newspapers like the *New York Tribune*.

In Lincoln's opinion, the framers of the Constitution had been wise to include a provision allowing for the suspension of the writ of *habeas corpus*, which was necessary to prevent "sudden and extensive uprisings against the government." Lincoln explained to the Albany Democrats that Vallandigham's arrest was not, as they mistakenly believed, premised on his criticism of the administration. The Democrats had charged the administration with arresting Vallandigham in an effort to silence him, and the *Atlas and Argus* had opined that "[t]he arrest is a threat against every public man who refuses to advocate the extreme measures of the Abolition Cabinet"; but Lincoln declared that Vallandigham had been arrested for his avowed hostility to the Union's war efforts, his laboring to prevent the raising of troops, and his

encouragement of desertions from the army.

Furthermore, Vallandigham's efforts, aimed at damaging the army and leaving the Union without an adequate military force to suppress the rebellion, were intolerable to the administration and antithetical to the Union's attempt to preserve the nation. Lincoln explained that experience showed that armies could not be maintained unless those who deserted were punished by death. He believed that Vallandigham's efforts to encourage desertions were equally detrimental to the nation and should likewise be punished by death. Then came the most-remembered passage of Lincoln's reply: "Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wily agitator who induces him to desert?...I think that in such a case, to silence the agitator, and save the boy, is not only constitutional, but, withal, a great mercy."

Lincoln emphasized his belief that it was absolutely necessary to try insurrectionists such as Vallandigham before a military tribunal. In his opinion, the civilian court system was properly suited for trying individuals for crimes that were well defined in the law, but was woefully inadequate to try those charged with insurrection. He wrote that "a jury too frequently have [sic] at least one member, more ready to hang the panel than to hang

the traitor." Driving home the point, Lincoln explained,

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

On July 3, 1863, Corning replied to the president. Showing no sign of backing down, Corning wrote that the committee charged Lincoln with "pretensions to more than regal authority" and insisted that he had used "misty and cloudy forms of expression" in setting forth those pretensions. The committee also took issue with Lincoln's description of them as Democrats; despite the fact that they used this description in their own resolutions, they believed that the president should have described them as American citizens. To this, Lincoln, the equally "wily" politician and astute lawyer, did not respond.

An Executive Precedent

Lincoln's perceptiveness in recognizing the need to try insurrectionists before a military tribunal rather than in the civilian court system would help the Union win the Civil War. John Yoo, former legal counsel for the United States Department of Justice, has stated that without the

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Erastus Corning

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ability to suspend the writ of *habeas corpus*, "the Union could not have fought the Civil War, because the courts would have ordered Abraham Lincoln to release thousands of Confederate POWs and spies." Likewise, as Lincoln recognized, without the power to punish deserters or those who encouraged others to desert, the Union would have been unable to maintain its force in numbers, certainly inhibiting its success, since the civil court system was wholly unable to prevent or punish such desertion. Others similarly attribute the Union's success to these factors—but for an altogether different reason. Historian Phillip Shaw Paludan has surmised that "Lincoln kept the constitutional debate going throughout the war and thus propagandized to persuade the people that their constitutional system was adequate to survive and prosecute a war." Lincoln surely recognized the power of public sentiment, since he remarked during his famous debates with Stephen A. Douglas that "public sentiment is everything." In the end, Lincoln's army won, leaving future generations with a singular, and not plural, United States—and one that, as historian James McPherson has put it, "is" and not "are"—or were.

Ultimately, Lincoln set a controversial precedent that would prove irresistible to his successors in two later wars. At the height of World War II, President Franklin D. Roosevelt

was faced with the momentous decision of how to try detainees. With Lincoln's Civil War decision as precedent, Roosevelt denied enemy captives access to United States courts and authorized trials by military tribunals. The Supreme Court affirmed Roosevelt's decision in the 1942 case *Ex parte Quirin*, holding that unlawful combatants (in this instance, German saboteurs) could indeed be tried and punished by military tribunals.

As history would have it, that would not be the last time the government relied on Lincoln's precedent-making views. In the aftermath of September 11, 2001, the Bush Administration determined that military trials were the way to handle the prosecution of *jihadists* who threatened the safety and security of the country. Although the government faced numerous legal challenges to its decision, it articulated precisely the same justifications that Lincoln offered in his artful letter to the Albany Democrats. At the time of this writing, it is unclear whether those detained as enemy combatants in the war on terror will indeed be so treated, although in June 2008 the United States Supreme Court decided *Boumediene v. Bush*, a case in which unlawful enemy combatants challenged the legality of their detention without the right to petition the federal courts for immediate *habeas* relief. In the 5–4 decision, the

Supreme Court concluded that these unlawful enemy combatants have the constitutional right to *habeas corpus*. While the ultimate results of the Military Commissions Act remain unknown, the government has vowed that it will continue to try those detained at Guantanamo by military tribunal for the very same reasons that Lincoln articulated at the height of the Civil War. Proud point of disclosure: should the tribunals convene, this writer will be one of the judges who reviews their decisions.

Lincoln in his wisdom provided every future wartime president with an invaluable tool: a brilliantly crafted, highly accessible, tightly reasoned legal argument justifying the trial of insurrectionists or other enemy combatants. It was a masterpiece crafted by the greatest writer among American leaders, inspired by an unlikely group of Democrats in the City of Albany. ■

An annotated version of this article appears at www.nysarchivestrust.org

For an excerpt from Lincoln's open letter to the Albany Democrats, see "Lincoln to New York State: A Legacy in Words" on page 8.

For details of Democratic Albany in 1861, when Lincoln first visited the city, see "Lincoln in the Improbable City of Albany" on page 13.