

# LINCOLN MEMORIAL UNIVERSITY LAW REVIEW

---

VOLUME 6      SPRING 2019      ISSUE 2

---

## SILENCING “SEDITION”: HOW ABRAHAM LINCOLN AND JOHN ADAMS DESECRATED THE CONSTITUTION TO COMBAT PUBLIC REPRIMAND

*Jordan T. Newport*<sup>1</sup>

### I. INTRODUCTION

Throughout history, principally during actual or feared times of war, the United States government has seemingly interpreted the First Amendment to the United States Constitution as a mere suggestion and not as the “Supreme Law of the Land.” This has led to well-documented difficulties related to infringement upon individuals’ Constitutional rights. In this article, the governmental action taken to combat “sedition” in two distinct periods of American History will be

---

<sup>1</sup> B.S. University of Tennessee, Haslam College of Business; J.D. pending, Lincoln Memorial University, Duncan School of Law. Special thanks to Geoffrey R. Stone, Esq., Edward H. Levi Distinguished Service Professor at the University of Chicago Law School. If not for his book and law review article, this article, in large part, would be devoid of facts. I am grateful for his diligence in researching these topics and allowing law school students, like myself, to receive assistance from this great resource. Special thanks to Stewart Harris, Esq., Visiting Associate Professor of Law at Lincoln Memorial University Duncan School of Law. Your feedback and comments on this article were indispensable. For that, I am very grateful. Lastly, thank you to my wonderful, retired English teacher aunt, Darleta Owen, who made my syntax fluid and grammatically sound.

addressed. I suggest that while people attack Lincoln for suspending habeas corpus, thus providing a gateway to Constitutional violations, this is just another act throughout the course of history in which the United States Government has violated Constitutional rights in favor of "national security."

## II. DUE TO ITS VIOLATION OF NUMEROUS INDIVIDUALS' FIRST AMENDMENT RIGHTS, THE SEDITION ACT OF 1798 WAS UNCONSTITUTIONAL.

In the years preceding the enactment of the Sedition Act of 1798, America was combating turmoil on two fronts. Not only enveloped with the fear of military engagement with the French, America was also experiencing feuding among its citizens; feuding that was befalling between the Federalists and the Democratic-Republicans. This scorn between parties stemmed from Federalist accusations against the Democratic-Republicans, or as Alexander Hamilton labeled them, the "Jeffersonians," arraiging them as pro-French supporters. Throwing smoke on the fire, Hamilton further characterized the Jeffersonians as "more Frenchmen than Americans" and further, claimed that they were prepared "to immolate the independence and welfare of their country at the shrine of France." With fear of a Jeffersonian aligned French spy infiltrating the country, the Federalist majority in Congress passed three new laws in June and July of 1798. These laws, with the primary purpose of punishing "sedition" against President John Adams or any Federalist politician alike, were titled the Alien and Sedition Acts.

### A. SETTING AND CIRCUMSTANCES FOR THE ENACTMENT OF THE SEDITION ACT OF 1798

Although veiled in a French colored cape, the Alien and Sedition Acts were a blatant power move by President Adams and his Federalist led Congress to silence the Jeffersonians.<sup>2</sup> Although fought with "vigorous Jeffersonian opposition," the Federalists passed these Alien and Sedition Acts. The Federalists asserted that these Acts were "necessary in order to

---

<sup>2</sup> See *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 155 (1961).

protect the security of the Nation [by giving] the President the broadest of powers over aliens and [making] substantial inroads upon the freedoms of speech, press and assembly."<sup>3</sup> These Alien and Sedition Acts consisted of three different statutes enacted in 1798: 1 Stat. 570; 1 Stat. 577; and 1 Stat. 596.<sup>4</sup> These statutes, and in pertinent part here, the Sedition Act, are some of the most embarrassing and most grandiose infringements of American freedom to date.<sup>5</sup> Some of the most abhorrent actions resulting from the Sedition Act include: publishers being jailed for writing their own views and for publishing the views of others<sup>6</sup>; federal prosecutors feverishly and maliciously attacking critics of the Federal Government or Federal officials<sup>7</sup>; the widespread formulation of rumors which tainted the name of good and bad men alike and sometimes "causing the social ostracism of people who loved their free country with a deathless devotion."<sup>8</sup>

Although citizens far and wide were negatively affected by the wrath of the Sedition Act, members of the Jeffersonian Party were largely targeted to serve as examples of what would happen to those who refused to "worship" President Adams, other federal officials, and their policies.<sup>9</sup> The Sedition Act did not discriminate among carpenters, preachers, lawyers, or teachers.<sup>10</sup> If one held a Jeffersonian political ideology or felt any sense of loyalty to the French, whether through family ties, heritage, etc., they immediately became targets of the Sedition Act and often times were punished under the guise of an "administration of justice."<sup>11</sup>

## B. THE LAW ITSELF, THE SEDITION ACT OF 1798

The Sedition Act can be read as:

---

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 127.

<sup>5</sup> *Id.* at 155.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 155-56.

<sup>10</sup> *Id.* at 156.

<sup>11</sup> *Id.*

That if any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States . . . or the President of the United States, with intent to defame the said government . . . or the said President, or to bring them . . . into contempt or disrepute; or to excite against them . . . the hatred of the good people of the United States . . . then such person . . . shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.<sup>12</sup>

The Sedition Act included two general classes of offenses against the United States. The first section of the Act made it a federal crime to conspire or counsel others to break the law or interfere with the lawful authority of the United States.<sup>13</sup> In a broad sense, this section targeted overt acts that approached a violation of the law or the breach of the peace. Yet more specifically, section one was related to criminal actions rather than political speech or press content.

Section two contains the more well-known prohibitions enacted by the Sedition Act, including the prohibition of certain publications. Section two essentially codified common law seditious libel, and further, granted jurisdiction to federal courts to hear trials brought under the Sedition Act.<sup>14</sup> Although sections one and two implicated different actions, they worked in harmony with one another, to prohibit activities tending to oppose or undermine lawful governmental authority.<sup>15</sup> Where section one prohibited criminal conspiracy or advocacy against federal laws, section two sought to punish individuals who published matters which had an indirect and general tendency to excite opposition to the government.<sup>16</sup> The last important

---

<sup>12</sup> An Act for the Punishment of Certain Crimes against the United States, 5th Cong., 2d Sess., Ch. 74 (1798); Ch. 74, 1 Stat. 496 (1798) (expired 1801).

<sup>13</sup> David Jenkins, *The Sedition Act of 1798 & the Incorporation of Seditious Libel into First Amendment Jurisprudence*, 45 AM. J. LEGAL HIST. 154, 165 (2001).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

note about the Sedition Act was its date of termination, which just so happened to coincide with the final day of President Adams' tenure.<sup>17</sup>

### C. LANDMARK ARRESTS UNDER THE SEDITION ACT OF 1798 AND COMMON LAW SEDITIOUS LIBEL

At its first totaling, seventeen indictments were issued for seditious libel, with fourteen being issued under the Sedition Act and three being issued under common law seditious libel.<sup>18</sup> Not only were individuals' rights being violated, but Secretary of State Timothy Pickering prosecuted four of the five most influential Jeffersonian journals, as well as several Jeffersonian newspapers, which violated the entities Freedom of the Press.<sup>19</sup> In turn, several of these publications were forced to close, while others were forced to halt production when their editors were imprisoned.<sup>20</sup> Following the same trend of persecuting only Jeffersonian publications, not a single Federalist was arrested during this tumultuous, Constitution-defying era. Below, you will find some of the most notorious arrests stemming from the John Adams' administration's attempt at "silencing sedition."

1. HEY, SEDITION ACT OF 1798, WHO WAS YOUR FIRST?  
... I'LL NEVER FORGET HIM; HIS NAME WAS MATTHEW  
LYON.

One simple act was all it took; one simple act of opposition against the Sedition Act of 1798; a simple opinion such as that the Sedition Act of 1798 would force people to "hold their tongues and make toothpicks of their pens."<sup>21</sup> This was all that was needed to make Matthew Lyon the first person

---

<sup>17</sup> GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 51 (2004).

<sup>18</sup> GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 48 (2004). Approximately twenty-five "well-known" Jeffersonians were arrested, fifteen of which led to indictments. *Id.* at 63.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 20 (2004).

indicted and arrested under the Sedition Act of 1798.<sup>22</sup> Although this arrest sent shockwaves through America, this was no surprise to Mr. Lyon, as he often stated that arrest under the Sedition Act "very likely would be brought to bear on [him] the very first."<sup>23</sup>

Matthew Lyon was indicted by a grand jury on October 5, 1798.<sup>24</sup> Ultimately, the grand jury charged Mr. Lyon with "malicious" intent "to bring the President and government of the United States into contempt," and therefore, he had violated the Sedition Act of 1798.<sup>25</sup> The final straw and ultimate utterance that led to Mr. Lyon's arrest was for stating that under President Adams:

[E]very consideration of the public welfare [was] swallowed up in a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice.<sup>26</sup>

Although the previous statement was the dagger in the heart for Mr. Lyon, he was also quoted stating opinions such as "that Adams should be sent to a 'mad house' for the way he dealt with the French."<sup>27</sup> Due to his constant ridicule of the Federalists and statements such as these, Mr. Lyon was one of the most despised and hated Jeffersonians in the nation.<sup>28</sup> Most likely related to this hatred, Mr. Lyon was given a hefty fine, as well as jail time for his utterances. Specifically, Mr. Lyon's punishment consisted of a \$1,000.00 fine<sup>29</sup>, partnered with four months of jail time.<sup>30</sup> Although this was the stated jail time, Mr.

---

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 48.

<sup>24</sup> *Id.* at 50.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 20.

<sup>27</sup> *Id.* at 49.

<sup>28</sup> *Id.*

<sup>29</sup> Just to put this fine into today's dollar amount, a \$1,000 fine in 1798, is equal to a current day fine of approximately \$19,383.97. *\$1,000 in 1798 → 2018 | Inflation Calculator*. FinanceRef Inflation Calculator, Alioth Finance, 1 Apr. 2018, <http://www.in2013dollars.com/1798-dollars-in-2018?amount=1000>.

<sup>30</sup> GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 51 (2004).

Lyon was also informed that he would be imprisoned until the fine was paid in total, regardless of how long it took, as long as it was longer than the original four-month sentence. On top of the excessive fine and imprisonment, Mr. Lyon was not granted time to arrange his affairs or collect his papers, was imprisoned a two-day and forty-five-mile trip away from his home and the county where he was sentenced, and lastly, was kept in a fetid, algid cell.<sup>31</sup>

Justice Black summarized the above-mentioned atrocity very well in his dissent in *Communist Party of U.S. v. Subversive Activities Control Bd.* His dissent, in pertinent part, stated:

The enforcement of . . . the Sedition Act, constitutes one of the greatest blots on our country's record of freedom. Publishers were sent to jail for writing their own views and for publishing the views of others. The slightest criticism of Government or policies of government officials was enough to cause biased federal prosecutors to put the machinery of Government to work to crush and imprison the critic . . . . Members of the Jeffersonian Party were picked out as special targets so that they could be illustrious examples of what could happen to people who failed to sing paeans of praise for current federal officials and their policies. Matthew Lyon, a Congressman of the Jeffersonian Party [hailing from Vermont], was prosecuted, convicted and forced to serve a prison sentence in a disreputable jailhouse because of criticisms he made of governmental officials and their activities. This was a particularly egregious example of the repressive nature of the Sedition Act for Lyon's conviction could not possibly have been upheld under even the most niggardly interpretation of the First Amendment. Lyon was but one of many who

---

<sup>31</sup> *Id.*

had to go to jail, be fined, or otherwise be made to suffer for the expression of his public views.<sup>32</sup>

Although Mr. Lyon was arrested, fined, and imprisoned in these terrible conditions, he seemingly got the last laugh of the situation. Despite public outcry, President Adams refused to release Mr. Lyon. This only aroused the displeased even more. Due to his public rise to fame, as well as many supporting his cause, Mr. Lyon was reelected to Congress while serving his sentence in federal prison.<sup>33</sup>

## 2. ANOTHER VERMONT IN THE SLAMMER

As Matthew Lyon was the first to be indicted and arrested, it was bound to be that one's supporting his cause would follow suit. One of the more notable names that were arrested due to his support of Matthew Lyon was a man named Anthony Haswell. Mr. Haswell held several titles, with the one to note here being that of the editor of the *Vermont Gazette*.<sup>34</sup> The statement that put away Mr. Haswell was one that he published in support of raising funds for the egregious fine given to Mr. Lyon.<sup>35</sup> The statement read:

"Your representative . . . is holden by the oppressive hand of usurped power in a loathsome prison, suffering all the indignities which can be heaped upon him by a hard-hearted savage, who has, to the disgrace of Federalism, been elevated to a station where he can satiate his barbarity on the misery of his victims."<sup>36</sup>

---

<sup>32</sup> *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 155-59 (1961) (internal citations omitted).

<sup>33</sup> GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 52-53 (2004).

<sup>34</sup> GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 63 (2004).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

Mr. Haswell then summarized by saying that help was needed to “bring liberty to the defender of your right.”<sup>37</sup> This publication was enough to get Mr. Haswell charged under the Sedition Act. The circumstances of his arrest followed closely to the cruelty exhibited to Mr. Lyon. Mr. Haswell, a feeble man, was physically dragged out of his house in the earliest hours of the morning, forced to ride sixty miles in the rain to prison, and then after having arrived, was thrown into a filthy, cold prison cell while still in his sopping wet clothing. On top of all of this, when offered a sum of money to post bail, Jabez Finch (the same man that arrested Matthew Lyon) refused to accept it or let Mr. Haswell go. Although less punitive than the measures assigned to Mr. Lyon, after Mr. Haswell was convicted, he was punished with the terms of a \$200.00 fine and a two-month sentence to jail.

### 3. THE SCORNED ENGLISHMAN

Thomas Cooper was a doctor and lawyer that immigrated to America in 1794.<sup>38</sup> After impliedly being rejected for a government position within the Adams’ administration, Mr. Cooper went on to publish in a local Pennsylvania *Gazette* that Adams was a “power-mad despot,” as well as “an enemy ‘of the rights of man.’”<sup>39</sup> After several anonymous responses by President Adams attacking the credibility of Mr. Cooper, Mr. Cooper responded by publishing a handbill that stated:

Nor do I see any impropriety in making this request [the application for a government appointment] of Mr. Adams. At this time he had just entered office; he was hardly in the infancy of political mistake; even those who doubted his capacity thought well of his intentions. Nor were we yet saddled with the expense of a permanent navy, or threatened, under his auspices, with the existence of a standing army. Our credit was not

---

<sup>37</sup> *Id.*

<sup>38</sup> GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 54 (2004).

<sup>39</sup> *Id.*

yet reduced so low as to borrow money at eight per cent. in time of peace. . . .<sup>40</sup>

This statement was enough to get Mr. Cooper charged under the Sedition Act of 1798 "with having published a false, scandalous and malicious attack on the character of the President of the United States, with an intent to excite the hatred and contempt of the people of this country against the man of their choice."<sup>41</sup>

Mr. Cooper feared of many Constitutional violations that would occur at trial, violations that would still stand against his Constitutional rights today. The most obvious, and the forefront of this article, was the violation of his First Amendment right to the freedom of speech. There is no such thing as a false opinion, nor can one be charged for exposing facts. Here, all that Mr. Cooper expressed was a mere opinion with facts scattered throughout. Further, Mr. Cooper expressed that he felt that there was no way he could receive an unbiased trial. This is a violation of his Due Process bestowed to citizens through the Fifth Amendment of the United States Constitution.<sup>42</sup>

Although all these violations occurred, the prejudiced judicial system of early-America failed Mr. Cooper and allowed him to be prosecuted. Ultimately, Mr. Cooper was punished with a fine of \$400.00 and sentenced to a six-month stint in jail.<sup>43</sup> After sentencing, President Adams attempted to pardon Mr. Cooper.<sup>44</sup> Mr. Cooper's only contingency to accepting the pardon was that President Adams acknowledge his own breach of good faith in leaking the circumstances of Cooper's job application, which President Adams vigorously refused to do.<sup>45</sup> That being said, Mr. Cooper was forced to serve his full sentence in prison.

---

<sup>40</sup> *Id.* at 55.

<sup>41</sup> *Id.*

<sup>42</sup> This violation was due to the bipartisan nature of the United States at the time, as well as due to the actions taken by Justice Samuel Chase, which will be discussed *infra*. See *id.* at 56.

<sup>43</sup> *Id.* at 60.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

#### 4. THE "SEDITIONOUS" SCOTSMAN

James Callender was not the picturesque model citizen. Mr. Callender was a drunk that had been exiled from England, kicked off of the floor of Congress, and was often disassociated due to his constant state of being covered in grime and filth.<sup>46</sup> That being said, even before the Sedition Act, he was despised by Federalists.<sup>47</sup> Mr. Callender appeared on the Federalists' map after publishing a pamphlet titled, *The Prospect Before Us*.<sup>48</sup> The pamphlet contained phrases such as President Adams "has never opened his lips, or lifted his pen without threatening and scolding; the grand object of his administration has been to exasperate the rage of contending parties, to calumniate and destroy every man who differs from his opinions"; accused President Adams of contriving "a French war, an American navy, a large standing army, an additional load of taxes, and all the other symptoms and consequences of debt and despotism"; and lastly, that citizens had to "[t]ake [their] choice . . . between Adams, war and beggary, and Jefferson, peace and competency." After a vastly biased trial that will be discussed infra, Callender was found guilty and in violation of the Sedition Act of 1798.<sup>49</sup> The punishment bestowed upon him by Justice Chase was nine months imprisonment, partnered with a \$200.00 fine.<sup>50</sup>

#### 5. LESS PUBLICITY EQUALS MORE HARSH PUNISHMENT

David Brown was a wanderer, a politically charged, Federalist hating wanderer.<sup>51</sup> Although not by his own doing, a group of locals, after hearing his anti-Federalist propaganda, constructed a "liberty pole" sporting signage that read, "No Stamp Act, No Sedition Act, No Alien Bills, No Land Tax, downfall to the Tyrants of America; peace and retirement to the

---

<sup>46</sup> GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 61 (2004).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 62.

<sup>50</sup> *Id.*

<sup>51</sup> GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 64 (2004).

President; Long Live the Vice-President."<sup>52</sup> Even though this liberty pole was generally harmless, one of the most prominent Federalist was domiciled in the town in which it was erected, therefore leading to a manhunt for the man whose words influenced its erection.<sup>53</sup> Mr. Brown was arrested, indicted and given a trial in June of 1799, with the "Sedition Pole" being the underlying charge.<sup>54</sup> Just like two instances discussed supra, Justice Chase flocked to preside over the trial against the "wandering apostle of sedition."<sup>55</sup> After all was said and done, Justice Chase enforced the most severe punishment in the history of the Sedition Act against Mr. Brown, a fine of \$450.00 and a sentence of eighteen months in prison.<sup>56</sup>

Although Mr. Brown received the longest imprisonment under the Sedition Act, William Duane, arguably, received the worst treatment under the Sedition Act of 1798. As acting editor of the Philadelphia *Aurora*, Mr. Duane was one of the most well-regarded critics of the Adams administration.<sup>57</sup> Due to his constant criticism of President Adams, Mr. Duane was subjected to an attempted tar and feathering, was arrested for sedition (and was successfully acquitted) and was dragged from his office and severely beaten and whipped until he was rendered unconscious.<sup>58</sup> Mere months later, Mr. Duane was again tried for sedition, this time under the Sedition Act. During this retrial, the prosecution was stopped by an order from the president.<sup>59</sup> Although Mr. Duane was never formally convicted, he still suffered major bodily harm due to the stigma surrounding him and his "seditious" view of the Adams' Administration.

## 6. THE SILENCING SUPREME COURT JUSTICE

After a lustrous career as a lawyer and politician, Samuel Chase was appointed to the Supreme Court of the

---

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Brown ended up spending twenty months in jail due to failure to pay his fee by the time his eighteen-month sentence elapsed. *Id.*

<sup>57</sup> *Id.* at 65.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

United States in 1796 by President George Washington.<sup>60</sup> Of note in this paper are his actions within the sedition trials in which he sat.

During the trial of Thomas Cooper, Justice Chase blocked every defense that Mr. Cooper tried to make. This included denying a vast majority of the evidence that Mr. Cooper tried to enter to defend himself, as well as denying a motion for a continuance to be able to authenticate the evidence that the Justice had previously denied.<sup>61</sup> But the most damaging and unconstitutional action that he took was his blatant prejudicing of the jury in these cases.<sup>62</sup> Not only did he give very damning jury instructions, he would also go through each line of the alleged illegal statement and tell the jury how he thought each provision violated the Sedition Act of 1798.<sup>63</sup> Additionally, he deliberately went on the record stating that Mr. Cooper knew that everything that he (Mr. Cooper) published was untrue and placed a very strict burden on Mr. Cooper to prove otherwise.<sup>64</sup>

The next groundbreaking trial that Justice Chase sat for was the trial of James Callendar. In this matter, Justice Chase personally received the pamphlet in question and found that Mr. Callender had violated the Sedition Act of 1798.<sup>65</sup> Further, Justice Chase treated the Callender trial the same exact way as he did Mr. Cooper's, denying motions for continuance and not allowing Mr. Callender's counsel to call their witnesses.<sup>66</sup> On top of the prejudice when ruling on the motions by counsel, Justice Chase was "intemperate, rude, partial, and contemptuous" to Mr. Callender's attorneys.<sup>67</sup> Justice Chase was so abusive to Mr. Callender's counsel that they eventually withdrew to spare themselves the castigation.<sup>68</sup> Following the guilty verdict, Justice Chase chastised Mr. Callender in regard to "the evils of sowing 'discord among the people' and asserted

---

<sup>60</sup> GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 58 (2004).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 58-59.

<sup>63</sup> *Id.* at 59.

<sup>64</sup> *Id.* at 60.

<sup>65</sup> *Id.* at 62.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

that Callender's attack on Adams was 'an attack upon the people themselves.'"<sup>69</sup> Many called for impeachment after seeing Justice Chase's true colors during the Callender trial.

#### D. HOW THE SEDITION ACT OF 1798 WAS UNCONSTITUTIONAL

"I regret exceedingly regret, that I feel impelled to recount this history of the Federalist Sedition Act because, in all truth, it must be pointed out that this law-which has since been almost universally condemned as unconstitutional . . ."<sup>70</sup> Just as it was difficult for Justice Holmes in that 1961 dissent, it is difficult to fathom and address all of the Constitution-defying atrocities that took place during the Sedition Act of 1798 era. As discussed *supra*, some of the landmark arrests under the Sedition Act and/or common law sedition violated a plethora of Constitutional rights, including, but not limited to the freedom of the press<sup>71</sup>, the freedom of speech, due process<sup>72</sup>, as well as other less prevalent violations such as the right to counsel<sup>73</sup>, the right to an impartial jury, and the right to not have excessive fines imposed, nor cruel and unusual punishments inflicted.

Federalists argued that codifying seditious libel was necessary and proper under Article I, Section 8<sup>74</sup> of the

---

<sup>69</sup> *Id.*

<sup>70</sup> *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 159 (1961) (Justice Holmes dissenting).

<sup>71</sup> This occurred either by shutting down whole publishing entities, or by arresting the editors of these publishing companies, therefore eliminating the possibility for publications to be made.

<sup>72</sup> The bias and partiality present in the presiding judges, especially Justice Chase, would be enough to show that these victims would not have been served under due process of the law.

<sup>73</sup> Some of the victims represented themselves in these matters, yet as an indictment against the Sedition Act of 1798 is a criminal matter, they were entitled to having counsel appointed to them.

<sup>74</sup> Article I, Section 8 enumerates the powers of Congress, including its authority to make "all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. ART I, § 8.

Constitution to protect the survival of the state.<sup>75</sup> Conversely, the Jeffersonians argued, and I agree, that Article III, Section 2, extending the judicial power to all cases in law and equity arising under the Constitution, applied only to controversies regarding the interpretation or application of constitutional provisions; it did not authorize common-law jurisdiction in the federal courts.<sup>76</sup> Therefore, the national government did not have an inherent right to prosecute seditious libel at common law or pass a sedition statute.<sup>77</sup> Furthermore, the necessary and proper clause only permits legislation that affects the expressly delegated powers of Congress, which did not allow a sedition law.<sup>78</sup> Albert Gallatin, a prominent Jeffersonian, argued that allowing the Sedition Act to be constitutional would greatly expand federal power and ran contrary to the First Amendment.<sup>79</sup> Gallatin further reasoned that the only way that this type of legislation may be permissible was if it was passed at a time of dire need and was necessary to save the country. This was not the case during the enactment of the Sedition Act of 1798, even though the Federalists cloaked the passing of the Act as a response to pending war with the French, in reality, it was merely a “war” against the Jeffersonians. That being said, the war powers, or any related national security power, should not apply and therefore, the passing of the Sedition Act of 1798 was unconstitutional. Another argument can be and was made, that all of the statements above were mere opinions. Furthermore, it was argued that there is no such thing as a false opinion, and therefore, it could not be attacked under the Sedition Act of 1798.<sup>80</sup>

---

<sup>75</sup> Jenkins, *supra* note 13, at 179.

<sup>76</sup> *Id.* at 180-81.

<sup>77</sup> *Id.* at 181.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 54 (2004).

### III. DUE TO ITS VIOLATION OF INDIVIDUALS' FIRST AMENDMENT RIGHTS, THE GENERAL ORDERS AND ACTS THAT FOLLOWED PRESIDENT LINCOLN'S SUSPENSION OF HABEAS CORPUS WERE UNCONSTITUTIONAL.

During the sixty-five years between the respective reigns of President Adams and President Lincoln, the "sedition" front was relatively quiet. Although sedition most certainly occurred during this time, the lack of edginess due to the proximity of war kept the sedition enforcement civil. This all changed after the memorable storm of Fort Sumter. The Civil War brought back sedition and its enforcement with a vengeance. As were the circumstances at the time of the Sedition Act of 1798, the nation at the outset of the Civil War was highly factional, with a split between Democrats and Republicans. Due to this, there were two hard-set opinions regarding several monumentally important issues, such as slavery and succession. That being said, individuals that held opinions opposite of the Republican federal government often found themselves being labeled as "seditious" and to some, borderline treasonous. This led to the course of action described *infra*.

#### A. SETTING AND CIRCUMSTANCES FOR THE SUSPENSION OF HABEAS CORPUS AND INSTITUTION OF GENERAL ORDER 38

The United States was no longer united. Brothers were fighting brothers; fathers were killing sons. The worst sin at the time was to support the Confederacy, or even simpler, not supporting the Union effort in the war. With that being said, we live in a sinful world, and there were often "dissenters" who spoke against the war, the Union, and/or the abolishment of slavery. This opposition infuriated President Lincoln, but he was calculated in his steps to combat this "sedition." President Lincoln absolutely refused to enact a new Sedition Act; he did not want to give more ammunition for his critics to label him as a "tyrant" even further.<sup>81</sup> In addition, he also did not want to come off as a hypocrite due to his stance on the Mexican War.

---

<sup>81</sup> Phrases such as "Caesar," "usurper," "demagogue," "tyrant," and "dictator" were being used to describe President Lincoln.

So, President Lincoln found a middle ground.<sup>82</sup> He found this middle ground in the suspension of the writ of habeas corpus.

On September 24, 1862, President Lincoln issued an order suspending the writ of habeas corpus.<sup>83</sup> A little-known fact is that President Lincoln actually suspended the writ of habeas corpus three separate times during the war.<sup>84</sup> Directly resulting from these suspensions were the arrests of roughly 13,535 citizens.<sup>85</sup> The combination of the arrests and the loss of rights caused riots to ignite during summer of 1863.<sup>86</sup> Mobs killed several enrollment officers, as well as anti-draft, anti-black violence having erupted in many northern cities.<sup>87</sup> One example can be seen in New York, where four days of rioting left one-hundred and five people dead.<sup>88</sup> At its time, this was the worst riot in American history.<sup>89</sup>

On top of all of the rioting, General Ambrose Burnside noted that “newspapers were full of treasonable expressions” and that “large public meetings were held, at which our Government authorities and our gallant soldiers in the field were openly and loudly denounced for their efforts to suppress the rebellion.”<sup>90</sup> In response to this, General Burnside declared martial law and issued General Order No. 38, which will be detailed *infra*.<sup>91</sup>

According to Chief Justice Rehnquist:

Whatever the theory of martial law might be, its consequences . . . during the Civil War were quite apparent. Statements critical of the government, whether appearing in the press or

---

<sup>82</sup> Or more appropriately, his version of a middle ground, as this act was deemed radical by some, even in 1862.

<sup>83</sup> Geoffrey R. Stone, *Abraham Lincoln's First Amendment*, 78 N.Y.U. L. REV. 1, 3 (2003).

<sup>84</sup> Kevin Goldberg, *A Review of Silencing the Opposition: Gov't Strategies of Suppression of Freedom of Expression*, by Craig R. Smith, Ed., 5 COMM.LAW CONSPECTUS 245, 246 (1997).

<sup>85</sup> *Id.*

<sup>86</sup> Stone, *supra* note 83, at 3-4.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 5.

<sup>91</sup> *Id.*

made in the course of political oratory, were punished by fine and imprisonment. Homes of suspects could be broken into without warrants. And none of this was in accordance with laws enacted by any legislature or city council. Martial law was the voice of whichever general was in command.<sup>92</sup>

That being said, Burnside's issuance of General Order No. 38 was the catalyst for what turned out to be the Civil War's most notorious arrest and prosecution for "sedition," as will be discussed in detail *infra*.<sup>93</sup>

#### B. THE LAW ITSELF, THE SUSPENSION OF HABEAS CORPUS AND GENERAL ORDER NO. 38

When President Lincoln finally took action regarding the "seditious" acts taking place in the country, he acted by issuing a proclamation suspending the writ of habeas corpus and further, declaring martial law in all of these areas for "all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice . . . affording aid and comfort to Rebels."<sup>94</sup> Following this proclamation, on April 19, 1863, General Burnside, commander of the "Department of the Ohio," declared martial law and issued General Order No. 38, which announced, among other things, that "[t]he habit of declaring sympathies for the enemy will not be allowed in this Department."<sup>95</sup>

#### C. LANDMARK ARRESTS UNDER THE SUSPENSION OF HABEAS CORPUS AND GENERAL ORDER NO. 38

On May 1, 1863, Clement L. Vallandigham, a prominent "Copperhead,"<sup>96</sup> and former Ohioan Congressman, made a speech in Mount Vernon, Ohio, a speech for which he was

---

<sup>92</sup> *Id.* at 5 n. 27.

<sup>93</sup> *Id.* at 6.

<sup>94</sup> *Id.* at 3.

<sup>95</sup> *Id.* at 5; JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 175-76 (1926).

<sup>96</sup> The "Copperheads" were a faction of anti-war Democrats during the Civil War era.

ultimately arrested for under General Burnside's General Order No. 38.<sup>97</sup> This speech was to a rather large crowd that amassed roughly 20,000 individuals and spanned roughly two hours in time.<sup>98</sup> In response to receiving information about this speech, on May 5, 1863, without consulting President Lincoln, General Burnside ordered Union soldiers to arrest Vallandigham.<sup>99</sup> At roughly 2:30 in the morning, hordes of men arrived at Mr. Vallandigham's home, knocked down his door, seized him from his bed, and escorted him to a prison in Cincinnati.<sup>100</sup> Vallandigham was then brought before the specially convened five-member military commission and further, charged with "publicly expressing, in violation of General [Order] No. 38 . . . his sympathies for those in arms against the . . . United States, declaring disloyal . . . opinions with the object . . . of weakening the power of the Government . . . to suppress an unlawful rebellion."<sup>101</sup> Other accounts state that during this speech, it is actually "where [Vallandigham] defended the right of people to assemble at any time to hear the policy of the current administration debated."<sup>102</sup> Further, Vallandigham asserted that he had a "right to speak and criticize . . . based upon 'General [Order] No. 1,' the Constitution of the United States."<sup>103</sup> Vallandigham also called the war "wicked, cruel, and unnecessary," declared that it was a "war for the freedom of blacks and the enslavement of the whites" and asserted that General Order No. 38 was a "base usurpation of arbitrary

---

<sup>97</sup> JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 176 (1926).

<sup>98</sup> Stone, *supra* note 83, at 9; GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 101 (2004).

<sup>99</sup> Not surprisingly, the arrest took place in a very similar fashion to the apprehension of Matthew Lyon and Anthony Haswell as mentioned *supra*. Geoffrey R. Stone, *Abraham Lincoln's First Amendment*, 78 N.Y.U. L. REV. 1, 10 (2003); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 101 (2004).

<sup>100</sup> *Id.* (as to both sources).

<sup>101</sup> JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 176 (1926).

<sup>102</sup> GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 101 (2004).

<sup>103</sup> *Id.* (People had the constitutional right to debate the policies of the national administration.)

authority."<sup>104</sup> Lastly, of note, Vallandigham urged the crowd to get to the ballot box to "hurl 'King Lincoln' from his throne."<sup>105</sup>

Initially, Vallandigham refused to plead as he denied the jurisdiction of the court, but ultimately, the Judge Advocate entered a plea of "not guilty."<sup>106</sup> During the trial, Vallandigham was allowed counsel, was permitted to personally cross-examine witnesses, and was given the advantage of compulsory attendance of witnesses in his favor.<sup>107</sup> Vallandigham declared that he was not triable by a military commission, nor was any non-soldier American citizen, but was entitled to all the constitutional guarantees concerning due process of arrest, indictment, and jury trial. Further, Vallandigham pleaded that he was being persecuted for mere "words of criticism of the public policy, of the public servants of the people."<sup>108</sup> Additionally, Vallandigham explained his actions as follows:

If I were to find a man from the enemy's country distributing in my [camp's] 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? . . . If the people do not approve [the government's] policy, 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 . . . there is no fear of the people losing their

---

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 177 (1926).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*; GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 101 (2004).

liberties; we all know that to be the cry of demagogues, and none but the ignorant will listen.<sup>109</sup>

Not fond of Vallandigham's explanations, the military tribunal found Vallandigham "guilty as charged" and held that his speech at Mount Vernon "could but induce in his hearers a distrust of their own Government and sympathy for those in arms against it, and a disposition to resist the laws of the land."<sup>110</sup> With that being said, Vallandigham was sentenced to imprisonment at Fort Warren in the Boston Harbor for the duration of the war.<sup>111</sup>

Vallandigham immediately filed a petition for a writ of habeas corpus.<sup>112</sup> In that petition, Vallandigham argued several issues: that he had been denied due process of law; that he had the right to be tried on the indictment of a grand jury; that he had the right to a public trial by an impartial jury; that he had the right to confront the witnesses against him that he had and the right to have compulsory process for witnesses in his behalf.<sup>113</sup> He asserted that these were all guaranteed by the Bill of Rights.<sup>114</sup> Even though the writ of habeas corpus was still intact at this moment in time, Judge Humphrey H. Leavitt denied Vallandigham's petition. A very well-respected First Amendment scholar, Professor Geoffrey Stone, summarized Judge Leavitt's denial brilliantly:

Judge Leavitt reasoned that "[t]he court cannot shut its eyes to the grave fact that war exists, involving the most imminent public danger, and threatening the subversion and destruction of the constitution itself." "Self-preservation," he added "is a paramount law," and this is "not a time when anyone connected with the judicial department" should in any way "embarrass or

---

<sup>109</sup> Stone, *supra* note 83, at 10.

<sup>110</sup> GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 101 (2004).

<sup>111</sup> *Id.*

<sup>112</sup> At this point in time, President Lincoln did not have the ancient writ suspended. Stone, *supra* note 83, at 11.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

thwart the executive in his efforts to deliver the country from the dangers which press so heavily upon it." In the face of a rebellion, Leavitt argued, "the president . . . is invested with very high powers," and "in deciding what he may rightfully do" under these powers, "the president is guided solely by his own judgment and discretion and is only amenable for an abuse of his authority by impeachment."

\* \* \*

Turning to the specific circumstances at issue, Judge Leavitt observed that "[a]rtful men, disguising their latent treason under hollow pretensions of devotion to the Union," have been "striving to disseminate their pestilent heresies among the masses of the people." Because the "evil was one of alarming magnitude," General Burnside was reasonable in perceiving "the dangerous consequences of these disloyal efforts" and in resolving, "if possible, to suppress them." Noting that "there is too much of the pestilential leaven of disloyalty in the community," Judge Leavitt concluded that those who criticize the government in time of crisis "must learn that they cannot stab its vitals with impunity."<sup>115</sup>

Another noted scholar, James G. Randall, recounted the petition's hearing as follows:

The course pursued by Judge Leavitt was unusual. Taking the ground that he might refuse the writ if satisfied that the petitioner would not be discharged after a hearing, he notified General Burnside of the application and invited him to present a statement. The usual procedure would have been to issue the writ as "of right"

---

<sup>115</sup> GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 103 (2004).

and let the General's statement appear in his return thereto. Burnside justified his action on the ground that the country was in a "state of civil war," that in such a time great responsibility rests on public men not to "use license and plead that they are exercising liberty," and that his duty required him to stop intemperate discussion which tended to weaken the army. His statement was a sort of stump speech in justification of his "General Order No. 38" and his treatment of Vallandigham. Judge Leavitt refused the writ and the case was brought up to the Supreme Court of the United States on a motion for certiorari to review the sentence of the military commission. Vallandigham's attorney argued that a military commission has but a special and limited jurisdiction which does not extend to the trial of a citizen unconnected with the land or naval forces. The charge on which the prisoner was tried was unknown to the law, he contended, and the sentence was in excess of jurisdiction. General Burnside had no authority to enlarge the jurisdiction of a military commission; and as a remedy for such unwarranted excess of authority, the Supreme Court of the United States had the power to issue a writ of certiorari. Taking its opinion bodily from the argument of Judge Advocate General Hort[,] the Supreme Court refused to review the proceedings of the military commission. In stating the grounds of this refusal, the [C]ourt declared that its authority was derived from the Constitution and the legislation of Congress, its original jurisdiction being specified in the [C]onstitution islets, and its late jurisdiction being derived from the Judiciary Act of 1789. A military commission, it was said, is not a court within the meaning of that act, and the Supreme Court

"cannot . . . originate a writ of certiorari to review . . . the proceedings of a military commission."<sup>116</sup>

"I am here in a military bastille for no other offense than my political opinions."<sup>117</sup> Publications spanning the country were "quick to champion his basic right to freedom of speech, war or no war."<sup>118</sup> Just as the first time President Lincoln suspended the writ of habeas corpus, Vallandigham's order of imprisonment triggered a riot in almost every major northern city, including his hometown of Dayton, Ohio.<sup>119</sup>

Records show that President Lincoln was ashamed by Burnside's arrest of Vallandigham.<sup>120</sup> When he permitted General Order No. 38 to stand, President Lincoln intended for it to be targeted towards "deserters, draft dodgers, bridge-burners, and others who gave concrete aid to the secessionists," not Vallandigham, a high-powered Copperhead that was arrested for mere political speech.<sup>121</sup> President Lincoln's cabinet and closest confidants were skeptical as well. Gideon Welles, the Secretary of the Navy, stated that he felt that Vallandigham's imprisonment "was an error on the part of Burnside."<sup>122</sup> Other cabinet members questioned whether the arrest was necessary and were weary of the legitimacy of trying Vallandigham before a military commission.<sup>123</sup> According to John Nicolay and John Hay, President Lincoln's secretaries, if the president had "been consulted before any proceedings were initiated" he probably "would not have permitted them."<sup>124</sup> Even with disdain shrouding this arrest and conviction, President Lincoln, who generally allowed great leniency with

---

<sup>116</sup> JAMES G. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* 176-79 (1926).

<sup>117</sup> I find this quote to be one of the most powerful, and telling, quotes of this altercation and era in history. *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 108.

<sup>121</sup> *Id.* at 108-09; Later in time, President Lincoln publically admitted "I do not know whether I would have ordered the arrest of Mr. Vallandigham." GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 108 (2004).

<sup>122</sup> *Id.* at 109.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

his generals, corresponded with Burnside and within that, told him that he could count on the Lincoln administration's support. Specifically, President Lincoln penned, "[a]ll the cabinet regretted the necessity of arresting . . . Vollandigham, some perhaps, doubting, that there was a real necessity for it - but being done, all were for seeing you through with it."<sup>125</sup> All factors being considered, Vollandigham's arrest forced President Lincoln to consider just how far he would allow the suppression of "sedition" or dissent.<sup>126</sup> In a last-ditch effort to soften the blow against himself and his administration, President Lincoln commuted Vollandigham's sentence, changing the terms from imprisonment in Boston at Fort Warren, to exile in the Confederacy.<sup>127</sup>

People all across the nation cried out against Vollandigham's arrest: "a crime has been committed against . . . the right to think, to speak, to live"; "Vollandigham was arrested for no crime known to law"; if not reversed "free speech dies, and with it our liberty, the constitution and our country."<sup>128</sup> In response to this discontent, a group of Democrats convened in Albany, New York, to discuss potential resolutions. At the end of the meeting, the participants settled upon, and put to paper, ten resolutions against the Lincoln administration.<sup>129</sup> The "Albany Resolves" demanded that "Lincoln honor the liberties of citizens, assailed the military's 'arbitrary' arrests and use of military commissions to try civilians, and charged that Vollandigham had been unconstitutionally convicted and exiled for criticizing the government."<sup>130</sup>

After receiving the resolutions, President Lincoln credited the authors of the "Albany Resolves" with being "eminently patriotic" in their "censure" of the actions of his administration but ultimately, President Lincoln contested the charges of the unconstitutionality of the arrest, conviction, and banishment of Vollandigham. Again, relying on the findings of

---

<sup>125</sup> *Id.* at 108.

<sup>126</sup> *Id.* at 109.

<sup>127</sup> *Id.* at 108.

<sup>128</sup> *Id.* at 110.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

Mr. Stone, Lincoln's vindictive words can be read in pertinent part stating:

It is asserted . . . that Mr. Vallandigham was, by a military commander, seized and tried "for no other reason than words addressed to a public meeting, in criticism of the course of the Administration, and in condemnation of the Military orders of the General." Now, if there be no mistake about this; if this assertion is the truth and the whole truth; if there was no other reason for the arrest, then I concede that the arrest was wrong. But the arrest, as I understand, was made for a very different reason. Mr. Vallandigham avows his hostility to the War on the part of the Union; and his arrest was made because he was laboring, with some effect, to prevent the raising of troops; to encourage desertions from the [A]rmy; and to leave the Rebellion without an adequate military force to suppress it. He was not arrested because he was damaging the political prospects of the Administration, or the personal interests of the Commanding General, but because he was damaging the Army, upon the existence and vigor of which the life of the Nation depends. He was warring upon the Military, and this gave the Military constitutional jurisdiction to lay hands upon him. If Mr. Vallandigham was not damaging the military power of the country, then his arrest was made on mistake of fact, which I would be glad to correct on reasonably satisfactory evidence.

\* \* \*

Long experience has shown that armies cannot be maintained unless desertions shall be punished by the severe penalty of death. . . . Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wily agitator who induces him to desert? This is none

the less injurious when effected by getting a father, or brother, or friend, into a public meeting, and there working upon his feeling 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.<sup>131</sup>

D. HOW THE SUSPENSION OF HABEAS CORPUS, AND  
MOREOVER, GENERAL ORDER NO. 38, WERE  
UNCONSTITUTIONAL

As a precursor, it is important to remember that in 1861, Chief Justice Tawny penned:

1. That the president, under the constitution of the United States, cannot suspend the privilege of the writ of habeas corpus, nor authorize a military officer to do it. 2. A military officer has no right to arrest and detain a person not subject to the rules and articles of war, for an offence against the laws of the United States, except in aid of the judicial authority, and subject to its control; and if the party be arrested by the military, it is the duty of the officer to deliver him over immediately to the civil authority, to be dealt with according to law.<sup>132</sup>

With the *Ex parte Merryman* decision in mind, the next thing one should look at is the pair of Supreme Court decisions known as *Ex parte Vallandigham*,<sup>133</sup> referencing the above-mentioned case, and *Ex parte Milligan*.<sup>134</sup>

In *Ex parte Vallandigham*, the Supreme Court tucked their tails and punted on ruling whether or not Mr.

---

<sup>131</sup> *Id.*

<sup>132</sup> *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861).

<sup>133</sup> *Ex parte Vallandigham*, 68 U.S. 243 (1863).

<sup>134</sup> *Ex parte Milligan*, 71 U.S. 2 (1866).

Vallandigham's constitutional rights had been violated. Without blatantly stating so, the Supreme Court essentially affirmed Judge Advocate General Leavitt's statement that during war the judiciary cannot "embarrass" or "thwart" the efforts of the president or the executive branch.<sup>135</sup> Furthermore, the Court implied that judges lack the capability and expertise of weighing constitutional liberties during wartime, and therefore, since Congress had not granted them an enumerated right to hear appeals from a military tribunal, the Court would not, and could not, start doing so now.<sup>136</sup> The Court then denied Mr. Vallandigham's writ of cert.

This ruling directly contrasts with the holding a mere three years later in *Ex parte Milligan*. Here, Justice Davis, speaking for the Court, held that trials of civilians by presidentially created military commissions are unconstitutional. He further stated that martial law cannot exist where the civil courts are operating. Additionally, Davis stated that the Constitution, "is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."<sup>137</sup> With this being said, the Supreme Court directly answered the question they punted when determining Mr. Vallandigham's fate, and moreover, found the exact actions that happened to Mr. Vallandigham and others throughout the Civil War were blatantly unconstitutional.

Article 1, Section 9 of the United States Constitution states, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."<sup>138</sup> Even though the circumstances were met to enact this clause of the Constitution, it was not enacted by the proper person, or body of people, that is. President Lincoln took it upon himself to

---

<sup>135</sup> See *Ex parte Vallandigham* 68 U.S. at 249-53.

<sup>136</sup> Contrary to this, in *United States v. Klein*, 80 U.S. 128 (1871), the Supreme Court held that the Constitution vests judicial power in the judicial branch, and that neither the legislative nor the executive branch may interfere with the functioning of the judiciary. Therefore, all this Court did was try to please the likes of President Lincoln and avoid controversy.

<sup>137</sup> DANIEL FARBER, *LINCOLN'S CONSTITUTION* 165 (2003).

<sup>138</sup> U.S. CONST. ART I, § 9.

suspend the writ of habeas corpus; a cause of action that, constitutionally, is only permitted to be done by Congress. Congress having moved to suspend the writ in order to pass constitutional muster, after the fact, is simply not enough. Constitutional rights are exactly that, rights, and unless the government follows their powers how they have been enumerated or implied, they are violating the Constitution and their citizens' constitutional rights.

Some argue that the Constitution, essentially, does not apply during times of war. I argue the complete opposite. When is the structure and rigidity of the Constitution needed more than in a time of chaos? While the country was awry, the people needed to know that the one thing they could count on was their constitutional rights.<sup>139</sup> People such as Clement Vallandigham did not get this privilege. Instead, he got imprisoned and exiled, failed to receive due process, and was made an outcast all for a mere opinion, an opinion that the president himself said that he felt was not enough for arrest, let alone imprisonment and exile.

With this being said, Professor Stone pieced together Lincoln's likely analysis that he used to determine Vallandigham's fate. He stated, "We can infer that Lincoln would uphold such a restriction if three conditions are satisfied: (1) the speaker specifically intends to cause unlawful conduct; (2) the speech will seriously interfere with the activities of the military; and (3) the speaker does not expressly discourage unlawful conduct."<sup>140</sup> It is further stated that they likely would have needed to show a "palpable injury" resulting from the alleged "sedition."<sup>141</sup> With this being said, as stated *supra*, President Lincoln conceded that if Vallandigham had been convicted for "no other reason" than his criticism of the presidential administration, then his "arrest was wrong."<sup>142</sup> Due to his course of actions, President Lincoln "must have

---

<sup>139</sup> Some argue that it was fundamental for Americans during Civil War "to admit that the Constitution is binding during war . . . ." Stone, *supra* note 83, at 29.

<sup>140</sup> GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 117 (2004).

<sup>141</sup> DANIEL FARBER, *LINCOLN'S CONSTITUTION* 172 (2003).

<sup>142</sup> GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 113 (2004).

believed that Vallandigham expressly advocated for unlawful conduct such as desertion . . . ."<sup>143</sup> Regardless of the result, this concession is vital to note, in that "it states unequivocally that, even in wartime, the government cannot constitutionally punish a speaker for criticizing the policies, programs, or actions of the government, regardless of their potential to interfere with the activities of the military."<sup>144</sup> Although we can only imply that that is what Lincoln personally thought, records show that "people closest to Vallandigham state that his speeches never insisted on people resisting or breaking the law."<sup>145</sup> With these facts and the "Stone factors," mentioned *supra*, being considered, it is likely that the circumstances surrounding Vallandigham were not enough to accuse his speech as being seditious, and further to punish him for it. It is worth noting that even "many Republicans . . . stood up to protect" the violated rights of Vallandigham and others, "believing that assaults on the tradition [of free expression] ultimately threatened the liberty of all."<sup>146 147</sup>

#### IV. ADAMS AND LINCOLN COMPARED: A SUMMARY AND CONCLUSION

President Adams and President Lincoln, respectfully, are two of the most notorious "silencers" in history. Although President Adams followed procedure in passing his right-infringing Sedition Act, while President Lincoln, dictatorially, instituted the suspension of writs and initiated a state of martial law at his own will, both violated the Constitutional rights of several citizens. In a straight comparison, I would have to say that President Adams was the more infringing of the two. With that being said, neither party's actions were acceptable.

---

<sup>143</sup> *Id.* at 115.

<sup>144</sup> Stone, *supra* note 83, at 22.

<sup>145</sup> GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 115 (2004).

<sup>146</sup> Stone, *supra* note 83, at 23.

<sup>147</sup> Although the content of this article mainly focuses on individuals' rights being violated, other instances, such as President Lincoln's attack on the *New York World* were even more blatant attacks on "sedition" and further, violations of the Constitution. DANIEL FARBER, *LINCOLN'S CONSTITUTION* 173 (2003).

In both cases, the “sedition” was very similar. Lyon, Haswell, and Cooper all labeled President Adams as synonyms related to “power-hungry” and “idiot,” while Vallandigham favored words more similar to “tyrant” and “dictator.” Both circumstances significantly violated the individuals’ due process right, as well as their First Amendment rights, while other rights were definitively violated in the Adams era<sup>148</sup>, as well as in the Lincoln era.<sup>149 150</sup>

In both circumstances, documents were drafted in response to the Constitutional violations. In response to the Sedition Act of 1798 were the Kentucky and Virginia Resolutions, while the riposte to the actions against Mr. Vallandigham was the Albany Resolves. Although both were originally largely ignored or rebutted, their contents later became the law after all was said and done.

As far as post-imprisonment, the main players’ paths were both similar and different. Matthew Lyon ran for, and won, a seat in Congress while in prison. After serving his term, he temporarily retired from politics, but ultimately returned. He often displayed his scorn for President Adams. Vallandigham was exiled to the Confederacy, but eventually made his way to Canada before returning to Ohio. He also ran for a political office, seeking the title of governor of Ohio. This election went handedly against him. After a few more attempts at various office positions, Vallandigham helped form a new faction of Democrats, as well as resuming his practice of law, which ultimately led to his death.<sup>151</sup>

In conclusion, after an analysis of the facts considered in this article, it is obvious to see how President Adams and President Lincoln both violated several Constitutional rights in

---

<sup>148</sup> Right to counsel, etc.

<sup>149</sup> Right to a jury trial, etc.

<sup>150</sup> As stated before, this is strictly related to individual rights. Both presidents violated the Constitution in regard to restrictions of the press, by either completely condemning publications for what they had already stated or by closing them to prophylactically keep them from stating anything they disagreed with.

<sup>151</sup> While performing trial preparation, Vallandigham accidentally shot himself with a weapon while trying to figure out how to demonstrate to a jury that the victim could have easily accidentally shot himself with this weapon. Irony at its finest. GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 120 (2004).

favor of "national security," as recourse of public reprimand, and in an attempt to "silence sedition."