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*Lincoln, the Constitution of Necessity,
and the Necessity of Constitutions:
A Reply to Professor Paulsen*

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LINCOLN, THE CONSTITUTION OF NECESSITY, AND THE NECESSITY OF CONSTITUTIONS: A REPLY TO PROFESSOR PAULSEN

Michael Kent Curtis

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LINCOLN, THE CONSTITUTION OF NECESSITY, AND THE NECESSITY OF CONSTITUTIONS: A REPLY TO PROFESSOR PAULSEN

*Michael Kent Curtis**

“The accumulation of all powers legislative, executive, and judiciary in the same hands, whether of one, a few or many . . . may justly be pronounced the very definition of tyranny.”

THE FEDERALIST NO. 47 (James Madison)

“The concentrating these powers [legislative, executive, and judicial] in the same hands is precisely the definition of despotic government. . . . In December, 1776, our circumstances being much distressed, it was proposed in the House of Delegates to create a dictator, invested with every power, legislative, executive, and judiciary, civil and military, of life and death, over our persons and over our properties. . . . One who entered into this contest [the American Revolution] from a pure love of liberty, and a sense of injured rights . . . must stand confounded and dismayed when he is told, that a considerable portion [of the Virginia legislature] had mediated the surrender of [all powers of government] into a single hand, and in lieu of a limited monarchy, to deliver him over to a despotic one!”

Thomas Jefferson, NOTES ON THE STATE OF VIRGINIA (1781)

I. INTRODUCTION

The George W. Bush administration responded to the terrorist attacks of September 11th with far-reaching assertions of a vast commander-in-chief power that it has often insisted is substantially free of effective judicial or legislative checks. As Scott Shane wrote in the December 17, 2005 edition of the *New York Times*, “[f]rom the Government’s detention of [American citizens with no or severely limited access to courts, and none to attorneys, families, or friends] as [alleged] ‘enemy combatants’ to the just disclosed eavesdropping in the United States without court warrants, the administration has relied on an unusually expansive interpretation of the president’s authority.”¹ The *Times* article lists additional examples, including the plan to try those accused of terrorism (a plan eventually limited to non-citizens) before military

* Judge Donald L. Smith Professor of Constitutional and Public Law, Wake Forest University School of Law. © Michael Kent Curtis. I owe special thanks to Professors Ronald Wright, Miles Foy, Shannon Gilreath, and Robert Chesney, and to research assistants Malcolm Futhey, III, Matthew Breeding, Jessica Pyle, Samuel Harvey, and Saad Gul. Their valuable suggestions improved this piece. The mistakes and misconceptions are my own.

1. Scott Shane, *Behind Power, One Principle*, N.Y. TIMES, Dec. 17, 2005, at A1. The brackets are facts added by Michael Curtis. See also Eric Lichtblau & Scott Shane, *Bush is Pressed Over New Report on Surveillance*, N.Y. TIMES, May 12, 2006, at A18 (reporting that the National Security Agency has collected records of millions of domestic phone calls made by Americans).

tribunals and “the use of severe interrogation techniques, including some banned by international agreements, on [alleged] Al Qaeda figures.”²

Professor Michael Paulsen has been a particularly strong and articulate advocate of broad executive power. Professor Paulsen posits a presidential power that, in times of grave crisis, *constitutionally* suspends almost all of the other provisions of the Constitution.³ From the broad perspective of the struggle for Anglo-American liberty, his claims are a bit reminiscent of claims to absolute executive power made by the Stuart kings. The Stuart kings also claimed broad, unchecked executive power, including the power to incarcerate British citizens without effective access to the courts.⁴ The claim was repudiated in the Act of Habeas Corpus of 1679.⁵ Eighteenth century Americans saw the Stuart monarchs as tyrants.⁶

Of course, the Stuart kings—James I and Charles I—are not the model Professor Paulsen embraces. Instead he appeals to Abraham Lincoln, a revered American president. He throws Lincoln’s shawl around the claim for nearly absolute power and pastes his beard on it. Professor Paulsen has his reasons. Lincoln did exert executive and military power in extraordinary and unprecedented ways. When he thought it necessary, he ignored court orders and a law of Congress seeking to limit his power to incarcerate citizens without access to the courts in areas where the federal courts were functioning.⁷

This essay is an effort to explain why we should reject the clever and alluring argument that Lincoln’s example justifies largely unchecked executive power in times of crisis. It seeks to answer those, like Professor Michael Paulsen, who wrap claims such as those made on behalf of George W. Bush in the mantle of Abraham Lincoln’s appeal to vast “constitutional” power based on “necessity.”

In a very real sense, Professor Paulsen offers a solution in search of a problem. The problem is not that the courts and the Congress have been too unwilling to uphold executive power in times of real or supposed grave crisis. The typical problem has been excessive congressional and judicial acquiescence in executive actions that limit liberty.⁸

2. Eric Lichtblau & Scott Shane, *Bush is Pressed Over New Report on Surveillance*, N.Y. TIMES, May 12, 2006, at A18.

3. Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1257-58 (2004) [hereinafter, Paulsen, *Necessity*]; *id.* at 1292-6 (suggesting some checks); *id.* at 1296 (power of president to ignore court orders); Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U. CHI. L. REV. 691 (2004), (reviewing DANIEL FARBER, LINCOLN’S CONSTITUTION (2003)) [hereinafter Paulsen, *Interpretation*].

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

5. *Id.* at 409-10.

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

7. MICHAEL KENT CURTIS, FREE SPEECH, THE PEOPLE’S DARLING PRIVILEGE: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 306-07, 339 (2000); Paulsen, *Necessity*, *supra* note 3, at 1269-70. See also *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (rejecting a trial by a military commission of a civilian charged with attempted overthrow of the government).

8. See, *e.g.*, *United States v. Matthew Lyon*, 15 F. Cas. 1183 (C.C.D. Vt. 1798) (No. 8,646) (upholding conviction under the Sedition Act of 1798 of congressman for criticisms of President Adams); *Ex Parte*

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

One example of the Bush administration doctrine is the case of Yaser Hamdi. Hamdi, an American citizen, had gone to Afghanistan and was captured by the Northern Alliance, which transferred him to the American navy.⁹ The government claimed Hamdi was "affiliated" with the Taliban as a member of its armed forces for which he would fight "if necessary."¹⁰

The government's account was apparently based on information from the warlords of the Northern Alliance.¹¹ There are reasons to be skeptical that the Northern Alliance warlords consistently transmitted accurate information to the American military. According to a report in the *Boston Globe*,

Pakistani intelligence sources said Northern Alliance commanders could receive \$5,000 for each Taliban prisoner and [\$]20,000 for a[n Al] Qaeda fighter. As a result, bounty hunters rounded up any men who came near the battlegrounds and forced them to confess.¹²

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

The government physically restrained Hamdi, holding him virtually incommunicado for about two years. Until shortly before the Supreme Court reviewed his case, he was denied access to counsel and to his family. As a "matter of discretion" the government finally allowed Hamdi to have monitored meetings with counsel, but insisted that access to a lawyer was not legally required.¹³

Hamdi's version of events came to light only after the Bush administration, faced with a Supreme Court-mandated hearing on the merits of his detention, had released him on the condition that he renounce his American citizenship, go to Saudi Arabia, where he had held dual citizenship, and not return to the United States.¹⁴

Vallandigham, 68 U.S. (1 Wall.) 243 (1864) (denial of habeas corpus to former congressman convicted by a military tribunal for criticizing the Civil War and the Lincoln Administration); Schenck v. United States, 249 U.S. 47 (1919) (U.S. citizen convicted and imprisoned for circulating a leaflet urging draftees and others to petition Congress to repeal the draft and reject World War I); Korematsu v. United States, 323 U.S. 214 (1944) (upholding executive order ratified by Congress incarcerating in government camps persons of Japanese descent who lived on the West Coast).

9. Joel Brinkley & Eric Lichtblau, *U.S. Releases Saudi American It Had Captured in Afghanistan*, N.Y. TIMES, Oct. 12, 2004, at A15.

10. Joint Appendix at 148-150, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696).

11. See Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004); Brinkley & Lichtblau, *supra* note 9, at A15.

12. Jan McGirk, *Pakistani Writes of His U.S. Ordeal*, BOSTON GLOBE, Nov. 17, 2002, at A30.

13. Press Release, Dep't of Def., DOD Announces Detainee Allowed Access to Lawyer, (Dec. 2, 2003), available at <http://www.defenselink.mil/releases/release.aspx?releaseid=5831>. See also Hamdi, 542 U.S. at 511, 554, (Scalia, J., dissenting).

14. Brinkley & Lichtblau, *supra* note 9, at A15.

Hamdi said he went to Afghanistan for religious studies and joined a camp where he received such instruction, together with training in small arms. When the war broke out, he attempted to leave, but was unable to do so because the border had been sealed.¹⁵ Hamdi further asserted that he had not been fighting or intending to, but had been captured by the Northern Alliance and sold to the Americans for \$20,000.¹⁶ Hamdi's father had discovered his plight and sought habeas corpus, including an evidentiary hearing at which the court would consider the accuracy of the government's assertions.¹⁷

At any rate, by the time his case was decided Hamdi had been imprisoned without charge, hearing, or trial in the Norfolk and Charleston naval jails for about two years. The administration justified his confinement based on the allegation that he was an enemy combatant who had been affiliated with the forces fighting against the United States in Afghanistan. Hamdi contended that the claim was false, that he was caught in the wrong place at the wrong time, and that he had never been a Taliban or Al Qaeda fighter. A central issue in his case was whether due process required a meaningful opportunity to contest the government's claims that Hamdi was in fact an enemy combatant.¹⁸

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

The Bush claim of power to imprison American citizens without a due process hearing raises the most fundamental issues of liberty under law. With Orwellian aplomb, the administration contended that Hamdi's incommunicado interrogation, conducted with no access to counsel, relatives, or friends, was a constitutionally adequate hearing.¹⁹ While Hamdi was captured in Afghanistan, the Bush administration's claim of power to incarcerate American citizens without a meaningful hearing to determine their status was not limited by the location where the *alleged* enemy combatant was seized.

The United States Supreme Court's decision in *Hamdi v. Rumsfeld*²⁰ involved the power of the president to imprison an American citizen for years without allowing him either a trial, meaningful access to the courts, or a meaningful due process hearing to determine his status. The imprisonment was based on the President's labeling Hamdi

15. *Id.*

16. Eric Lichblau, *U.S. Releases Saudi-American It had Captured in Afghanistan*, N.Y. TIMES, Oct. 12, 2004, at A15.

17. *E.g.*, *Hamdi*, 542 U.S. at 554 (Scalia, J., dissenting); *id.* at 511 (plurality opinion).

18. *See, e.g.*, *id.* at 524-25 (plurality opinion).

19. *See id.* at 537. Writing for a plurality of the Court, Justice O'Connor explained:

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

Id.

20. *Id.*

an enemy combatant. The power to detain foreign soldiers who are fighting against the United States and who are captured in an armed conflict is uncontroversial.

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

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

Petitioners' challenge to the military's determination that Hamdi is an enemy combatant is . . . without merit. An enemy combatant who is a presumed citizen and who is detained in this country is entitled to judicial review of his detention by way of habeas corpus. In such a proceeding, a habeas petitioner may raise legal challenges to the individual's detention, such as petitioners' arguments that the Commander in Chief does not have the authority to detain a captured enemy combatant who is an American citizen, or that such a detention is barred by 18 U.S.C. 4001(a). However, the scope of judicial review that is available concerning the military's determination that an individual is an enemy combatant is necessarily limited by the fundamental separation-of-powers concerns raised by a court's review or second-guessing of such a core military judgment in wartime.²¹

So while the Bush administration conceded that American citizens seized as enemy combatants had access to habeas corpus, the concession was of little significance. The citizen could be held incommunicado and denied access to a lawyer. If a relative discovered his fate and brought a petition for habeas corpus, according to the administration, the court should dismiss the writ on the bald assertion by the executive that the person was an enemy combatant. By the administration's view of the law, upheld by five members of the Court, it had the power to detain American citizens who were enemy combatants. The Bush administration also denied that any real process was required to determine if the person really was an enemy combatant. But if the Court held against it on that point (which it did), the administration contended a hearsay affidavit was conclusive and that the detained citizen had no right to a hearing to challenge its accuracy.

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

As Justice O'Connor's plurality opinion noted, the government contended "in light of the extraordinary constitutional interests at stake," that "respect for separation of

21. Brief of Respondent-Appellee at 9-10, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696).

powers” ought to “eliminate entirely any individual process. . . . Under this review, a court would assume the accuracy of the Government’s articulated basis for Hamdi’s detention and assess only whether that articulated basis was a legitimate one.”²²

The government’s fall back position was that the only question for the courts was whether there was “some evidence” to support the assertion that Hamdi was an enemy combatant.²³ In short, by the fall back position, the Court should accept without question the government’s hearsay affidavit, and decide only whether the government’s untested version of the facts justified Hamdi’s incarceration.

The Court rejected the government’s due process contentions, though the amount of process required by the controlling plurality opinion was limited—allowing for the possibility of a military hearing, shifting the burden of proof to Hamdi, and allowing hearsay evidence.²⁴ Justices Scalia and Stevens dissented.²⁵ They said that, for citizens, the Constitution required release or a criminal trial with full due process protections, unless the *Congress* suspended the writ of habeas corpus.²⁶ Justices Souter and Ginsberg dissented as well, arguing that the congressional Act authorizing the President to use all necessary force did not authorize detention of American citizens without judicial process, and that the detention violated an act of Congress.²⁷

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

The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in

22. *Hamdi*, 542 U.S. at 527.

23. *Id.* at 527-28.

24. *Id.* at 533-34.

25. *Id.* at 554-79, (Scalia, J., dissenting).

26. *Id.* at 554, 573-75 (Scalia, J., dissenting).

27. *Id.* at 541-42 (Souter & Ginsberg, JJ., concurring in part and dissenting in part).

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

Id.

achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks.²⁸

The declaration should be read in light of the administration's earlier, and partially withdrawn, memo setting out an extraordinarily limited definition of what amounted to torture. That memo announced that congressional laws seeking to limit the coercive methods the president chose to employ would be unconstitutional. It would be "unconstitutional" to "seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks on the United States."²⁹

The Bush administration has justified its claim to largely unchecked presidential power based on emergency and necessity. The claim is as extreme as any asserted in American history. Indeed, the claim is more extreme because it is not limited to a comparatively brief emergency. The Civil War and World War II, for example, involved extraordinary assertions of power.³⁰ But, in each of those episodes, the wartime crisis involved an enemy state which could be defeated by capture of its territory. As a result, the war could be and was of limited duration. Lincoln used the expected temporary nature of the Civil War to justify his extraordinary assertions of power—analagizing his measures to medicine to be prescribed during illness.³¹ In contrast, the problem of terrorism is likely to last for many years—perhaps for hundreds of years. So the Bush administration asserted unchecked presidential power for the foreseeable future.

The claims of the Bush administration are in serious tension with traditional ideas of liberty. As Justice Scalia noted in dissent in *Hamdi*, "[t]he very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive."³² Alexander Hamilton thought habeas corpus was a crucial and preeminent guarantee of liberty because "the practice of arbitrary imprisonments [has] been, in all ages, the favorite and most formidable instruments of tyranny."³³

The Framers recognized circumstances, such as invasion or rebellion, in which the writ might be suspended. They placed limits on the power to suspend in Article I,

28. President's Statement on Signing the Department of Defense Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918 (Dec. 30, 2005). See also Charlie Savage, *Hearing Vowed on Bush's Powers; Senator Questions Bypassing of Laws*, BOSTON GLOBE, May 3, 2006, at A1; Elizabeth Drew, *Power Grab*, N.Y. REVIEW OF BOOKS, May 24, 2006, at 1-15.

29. Memorandum from Jay S. Bybee, Assistant Attorney General, U.S. Department of Justice, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) at 39. The earlier torture memorandum was superseded by a December 30, 2004 Memorandum Opinion for the Deputy Attorney General. While the torture discussion was withdrawn the new memo did not repudiate the claims of unchecked executive power. Memorandum from Daniel Levin, Acting Assistant Attorney General, U.S. Department of Justice, to the Deputy Attorney General (Dec. 30, 2004) (available at <http://www.usdoj.gov/olc/18usc23402340a2.htm>).

30. See, e.g., the discussion of the *Vallandigham* case, *infra*, Part IV; *Korematsu v. United States*, 323 U.S. 214 (1944) (incarceration of Americans of Japanese descent).

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

32. *Hamdi*, 542 U.S. at 554-55 (2004) (Scalia, J., dissenting).

33. THE FEDERALIST NO. 84, at 548 (Alexander Hamilton) (Robert Scigliano, ed., 2000).

section 9.³⁴ Since Article I generally deals with the powers of Congress, the placement seems designed to ensure that the executive would not have the unilateral power to deprive citizens of liberty.

Of course, the requirement that Congress may suspend the writ in cases of invasion or rebellion is imperfect. Congress may be too willing to acquiesce in invasions of liberty. Notably, during the Civil War, Congress did attempt to put substantial limits on the president's power to imprison without trial.³⁵ In any case, the requirement of congressional action is a substantial limit on unilateral, unchecked executive power to imprison American citizens. As a safeguard to liberty, it is certainly an improvement over putting the power in the hands of a single person.

Courts and Congress can (and often do) fail to protect liberty in times of grave crisis.³⁶ But, as Justice Brandeis noted, separation of powers is one important device "to preclude the exercise of arbitrary power . . . [and] to save the people from autocracy."³⁷

According to Professor Paulsen, the Constitution contains a doctrine of necessity that trumps almost all of its other provisions—at least in cases of extraordinary necessity.³⁸ Paulsen advances forceful arguments to support his conclusion—to the extent that logic is the test.

The Constitution is not a suicide pact; and, consequently, its provisions should not be construed to make it one The Constitution should be construed to avoid constitutional implosion; it should not lightly be given a disabling, self-destructive interpretation [P]riority [must] be given to the preservation of the nation whose Constitution it is, for the sake of preserving constitutional government over the long haul, even at the expense of specific constitutional provisions.³⁹

According to Paulsen, someone must decide on "necessity" and exercise the sweeping power this doctrine provides. That person is the president. The president is the primary, and typically the ultimate, judge of necessity.⁴⁰ His oath to preserve, protect, and defend the Constitution gives him the duty and power, in cases of necessity, to ignore its "other" provisions for the sake of the greater good.⁴¹ The "preserve, protect, and defend" command "must take priority over practically any other constitutional rule set forth in the document."⁴² In effect, the Constitution contains a provision, hidden in the president's oath, that gives him sweeping emergency powers, including freedom to disregard court orders.⁴³ Paulsen cites an authority to justify his expansive claims of executive power. His authority is Abraham Lincoln.

34. U.S. CONST. art. I, § 9, cl. 2.

35. CURTIS, *supra* note 7, at 306-07.

36. *See, e.g.*, cases cited *supra* note 8.

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

38. Paulsen, *Necessity*, *supra* note 3, at 1257-58.

39. *Id.*

40. *Id.* at 1258.

41. *Id.* at 1258-59.

42. *Id.* at 1283.

43. *See id.* at 1292-96. On the right to ignore court orders enforcing constitutional limits, see *id.* at 1296.

Curiously, Paulsen embraces a couple of potential checks on presidential power. These include the provision for periodic elections and impeachment as well as the power of Congress over expenditures. He fails to explain why these checks need not bow to the inexorable logic of necessity. At any rate, the checks are likely to be anemic when one party controls both the presidency and the Congress. Paulsen offers other reassurances as well. The power, he insists, is not unchecked. The courts could decide whether it really was necessary to ignore guarantees of liberty in the Constitution, though under the doctrine of necessity the president could constitutionally ignore their orders.⁴⁴ Paulsen also says Congress could check the president, though the check would apparently be largely political. The invocation of the Lincoln example further undermines the “checks,” since Lincoln also ignored an act of Congress designed to limit his power.⁴⁵ Of course, temporary action may be required from the president because there may not be time for other branches to act. But the Paulsen thesis goes far beyond that.

In spite of its appeal and apparent logical force, the doctrine is dangerous. I do not deny that presidents have sometimes (even often) ignored constitutional and legal limitations in pursuit of what they saw as a greater good, a concept they easily confused with partisan advantage.⁴⁶ Nor do I deny that this has happened in times of crisis. It is one thing to recognize that, in exceedingly rare situations, presidents may act outside of the Constitution and still be judged as having acted reasonably, if not constitutionally. It is quite another to believe that the Constitution itself allows the president to ignore its provisions in cases of emergency, in effect in cases the president says he considers an emergency.

It is obvious, of course, that the emergency power proposed by Professor Paulsen under the necessity doctrine is currently of great practical importance. Today the nation faces a grave threat, a “war” with terrorists. But this “war” is different—the enemy has no state, capturing leading terrorists does not end the threat, and technology has vastly increased the potential for destruction. As in past wars and incidents of terrorism, we face serious questions of personal liberty and the scope of free speech.⁴⁷

As noted above, President George W. Bush had claimed that the war power justifies suspension of basic civil liberties—such as habeas corpus, right to counsel, and jury trial—in the cases of those American citizens the president designates as unlawful combatants. The Supreme Court has established some limits on the exercise of executive power, but the controversy is likely to continue.⁴⁸

44. *Id.* at 1283-84, n.54.

45. CURTIS, *supra* note 7, at 306-07, 339. For Paulsen on the congressional check, see Paulsen, *Necessity*, *supra* note 3, at 1292-93, 1296. What Paulsen says with reference to the courts seems also to apply to Congress: “If the duty conferred by the Presidential Oath Clause is truly an independent, personal, and nonabdicable one, not exercised in subordination to others, then the President cannot be bound by the decisions of the courts, in the sense that he *must* defer . . .” *Id.* at 1296.

46. *See generally* STANLEY I. KUTLER, *THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON* (1990); J. ANTHONY LUKAS, *NIGHTMARE: THE UNDERSIDE OF THE NIXON YEARS* (1976).

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

48. *See, e.g., Hamdi*, 542 U.S. 507. After public criticism of the apparent plan to try alleged terrorists including U.S. citizens before military tribunals, the administration’s plan for military tribunals was limited to non-citizens. *See also* Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833. The administration claimed

At present, a broad unilateral executive “emergency” power to disregard constitutional limitations is an anomaly—viewed with deep suspicion. To transform it into a constitutional power similar, but superior, to other constitutional powers (which, unlike this one, are subject to limits in the interest of liberty) makes such emergency decree power more likely to be used and more defensible. Since this alleged “power” has been abused with some regularity, full acceptance of the necessity doctrine will likely make things even worse. To his credit Paulsen discusses dangers and the potential for abuse.⁴⁹

To support his “Constitution of Necessity,” Paulsen repeatedly cites President Abraham Lincoln. “[I]f I am mistaken in all this,” he concludes, “so was President Lincoln.”⁵⁰

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

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

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

Second, Paulsen concedes that Lincoln’s *application* of the doctrine of necessity may sometimes have been mistaken.⁵¹ If Lincoln was seriously mistaken in his application of the doctrine of necessity, it shows Lincoln was quite capable of making gross mistakes in connection with the very doctrine at issue. If so, the invocation of Lincoln as authority on the subject should be viewed with caution. If Abraham Lincoln misunderstood or abused the doctrine, how safe is it in other hands? Paulsen has a powerful answer. All powers may be abused and that is no reason to deny a power.⁵² Still, if abuses have quite often or even typically accompanied the exercise of the alleged power, that should give one pause before giving it a more respectable pedigree.

Third, in the end, Lincoln rejected the claim that the necessity of preserving the Union justified overriding all other constitutional norms and provisions.⁵³ Specifically,

broad power to simply hold citizens alleged to be terrorists without meaningful hearing and certainly without trial. Some terrorism prosecutions in the court have involved free speech issues. In at least one case, a jury trial produced results quite different from those to be expected from unilateral and largely unchecked administrative action. *See also Computer Student on Trial Over Muslim Web Site Work*, N.Y. TIMES, April 27, 2004, at A16; *No Conviction for Student in Terror Case*, N.Y. TIMES, June 11, 2004, at A14 (describing failed prosecution of student webmaster).

49. Paulsen, *Necessity*, *supra* note 3, at 1259.

50. *Id.* at 1297.

51. *Id.* at 1281.

52. *Id.* at 1289.

53. LINCOLN, SPEECHES, *supra* note 31, at 641 (citing elections).

as I discuss in Part VII, he rejected the idea that the necessity of preserving the Union could justify suspending elections.⁵⁴ Citation of Lincoln to support the logic of the doctrine of necessity needs to come to grips with his refusal to follow his logic to its conclusion. If elections are (as Paulsen concedes)⁵⁵ an exception to the doctrine of necessity, there is much less to the sweeping logical case for the necessity claim than meets the eye.

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

I will look briefly at Lincoln's first announcement of the necessity doctrine and then focus primarily on the *Vallandigham* case—where a Democratic politician was arrested for making an anti-war speech. Professor Paulsen has also discussed the case.⁵⁶

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

Faced with the grave secession crisis and rebel guerilla warfare in Maryland and elsewhere, Lincoln suspended the writ of habeas corpus.⁵⁷ Lincoln said that all laws were being disregarded. He asked: must all laws be allowed to fail to protect a single law from being violated?⁵⁸ If he followed that course, “would not the official oath be broken”?⁵⁹

Still, Lincoln did not think the habeas provision of the Constitution had been violated—because the Constitution itself provided for suspension of the writ in cases of rebellion or invasion when the public safety required it.⁶⁰ So while Lincoln first invoked the doctrine of necessity, he then suggested that its invocation was unnecessary, since the Constitution explicitly provided for the suspension.⁶¹

What the Constitution did not explicitly do was invest the president with the power to suspend the writ. Indeed, the power to suspend in cases of rebellion or invasion was placed in Article I, together with other limits on the powers of

54. *Id.*

55. Paulsen, *Necessity*, *supra* note 3, at 1283-84 n. 54.

56. Paulsen, *Interpretation*, *supra* note 3, at 698-701; Paulsen, *Necessity*, *supra* note 3, at 1280-81.

57. CURTIS, *supra* note 7, at 305.

58. *Id.*

59. *Id.*; Paulsen, *Necessity*, *supra* note 3, at 1265.

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

61. CURTIS, *supra* note 7, at 305.

Congress.⁶² Congress was not in session, the situation was dire, and Lincoln acted—and disregarded a writ of habeas corpus issued by Chief Justice Taney.⁶³

But Lincoln went well beyond suspending the writ until Congress could act. The Constitution did not provide that the president (even with the consent of Congress) could go beyond postponing a trial under Article III and instead subject civilians far from the combat zone to military trials, convictions, and punishments for violating military orders. That, however, is what Lincoln sometimes did, and he did so in the face of contrary congressional legislation.⁶⁴

After Lincoln's suspension, Congress met and ratified, but limited, the suspension of the writ. It placed strong limits on the use of such arrests. Specifically, Congress provided that a list of those arrested should be provided to the courts. If the courts were open and functioning, civilians arrested should be either indicted or released by the end of the court term.⁶⁵ The Lincoln administration ignored the congressional limits in the case of civilians arrested by the military.⁶⁶

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

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

III. THE CASE OF CLEMENT VALLANDIGHAM

Clement Vallandigham was a racist, anti-war Democrat. In 1863, after being gerrymandered and then defeated for Congress, Vallandigham hoped to run for Governor of Ohio. On May 1, 1863, Vallandigham made a speech to a large Democratic meeting in Ohio.⁶⁷ The speech and the reaction of the Lincoln administration to it assured Vallandigham a place in the history books.

In his speech, Vallandigham denounced the Civil War as “wicked, cruel, and unnecessary.” It was a war “for the purpose of crushing out liberty and erecting a despotism” and “for the freedom of the blacks and the enslavement of the whites.”⁶⁸

62. U.S. CONST. art. I, § 9, cl. 2.

63. Paulsen, *Necessity*, *supra* note 3, at 1264-65, 1269-70.

64. CURTIS, *supra* note 7, at 305-06, 339; *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

65. CURTIS, *supra* note 7, at 306-07, 339.

66. *Id.* at 339.

67. *Id.* at 300.

68. THE TRIAL OF CLEMENT L. VALLANDIGHAM BY A MILITARY COMMISSION (Cincinnati, Rickey & Carrol 1863) 11-12 [*hereinafter*, VALLANDIGHAM TRIAL]; CURTIS, *supra* note 7, at 310.

Vallandigham did not “counsel resistance to military or civil law.”⁶⁹ Instead, he urged his listeners to resist at the ballot box and throw “King Lincoln” from his “throne.”⁷⁰ That is what Vallandigham said, *according to witnesses for the prosecution*.

Vallandigham does not seem to have violated any federal or state law. He certainly was not charged with such a violation. Instead, he was charged with violating an *order* enacted by General Ambrose Burnside.⁷¹ The order forbade “declaring sympathies for the enemy” and “treason, express or implied.”⁷² The charge against Vallandigham was “publicly expressing, in violation of General orders No. 38 . . . , sympathy for those in arms against the Government of the United States, and declaring disloyal sentiments and opinions, with the object and purpose of weakening the power of the Government.”⁷³ The charge was supported by a specification of the words cited above. It was also supported by Vallandigham’s assertion that Order 38 was a “base usurpation of arbitrary authority” and that the people should tell “the minions of usurped power” that they would not submit to such limits on their liberties.⁷⁴ Vallandigham also said that his right to speak came from General Order No. 1, the Constitution, not from General Order 38.⁷⁵ The evidence at Vallandigham’s “trial” established that he coupled his harsh criticism of the war policy of the Lincoln administration with a call for electoral action.⁷⁶

For his speech, Vallandigham was seized by soldiers at his home, placed on a sealed train, and sped away to face a military trial before a military “court” appointed by the general who ordered his arrest. Vallandigham sought a writ of habeas corpus, but Federal Judge Humphrey H. Leavitt, an Andrew Jackson appointee, denied the writ.⁷⁷ His opinion embraced the doctrine of necessity. The judge said that the Constitution must be understood to recognize power to adapt to circumstances as “necessary to meet a great emergency and save the nation from hopeless ruin. Self preservation is a paramount law.”⁷⁸ Here again we see the doctrine of necessity invoked—and abused.

Instead of ingeniously finding the power to disregard constitutional limitations in the requirement of the oath, supporters of Lincoln’s actions cited the war power and the power of the president as commander-in-chief. Still, this version of the doctrine of necessity had an effect similar to that for which Paulsen contends. The war power, a writer in the Chicago Tribune announced, was “tremendous,” but “strictly constitutional.” It broke “down every barrier so anxiously erected for the protection of liberty.” The war required a dangerous concentration of power in the hands of the

69. CURTIS, *supra* note 7, at 311.

70. VALLANDIGHAM TRIAL, *supra* note 68, at 22-23; CURTIS, *supra* note 7, at 312.

71. CURTIS, *supra* note 7, at 310.

72. VALLANDIGHAM TRIAL, *supra* note 68, at 7; CURTIS, *supra* note 7, at 307-08.

73. CURTIS, *supra* note 7, at 310; VALLANDIGHAM TRIAL, *supra* note 68, at 11.

74. CURTIS, *supra* note 7, at 312.

75. *Id.*; VALLANDIGHAM TRIAL, *supra* note 68, at 14-15.

76. VALLANDIGHAM TRIAL, *supra* note 68, at 22-24 (testimony of Captain John Means for the prosecution); *id.* at 27 (testimony of Congressman S. S. Cox for the defense). *See also* “Vallandigham’s Followers, . . . ,” CINCINNATI COMMERCIAL, May 6, 1863, at 1 (news article from a Republican paper reporting a Vallandigham speech); CURTIS, *supra* note 7, at 312-13.

77. CURTIS, *supra* note 7, at 311.

78. VALLANDIGHAM TRIAL, *supra* note 68, at 262-64.

executive, but the nation faced a choice of evils and this was the lesser evil.⁷⁹ Similarly, William Whiting, solicitor for the War Department said the war power was constitutional, but not limited.⁸⁰ Military crimes included “all acts of hostility to the country, the government, or any department or officer thereof” if the act had the “effect” of “even interfering with” the military or of “encouraging” the enemy.⁸¹ Civilians who committed these military “crimes” were subject to military arrest and trial. Several supporters of the doctrine of necessity—including Ralph Waldo Emerson—announced that it invested the president with the powers of a “dictator.”⁸²

The arrest of Vallandigham produced massive protests.⁸³ Critics generally called for peaceful resistance to what they saw as a gross invasion of constitutional rights.⁸⁴ George V. N. Lothrop, a former attorney general of Michigan who “unreservedly” supported the war, insisted that the arrest violated freedom of speech.⁸⁵ His understanding of free speech was simple and powerful: a man could not be arrested “for any quality of opinions on public affairs” because “without free discussion there can be no free government.”⁸⁶ As a result, “Vallandigham had the full right to approve, criticize or denounce the war and all acts and measures of the administration at his pleasure. As a citizen he might form any opinion on these subjects and freely express them.”⁸⁷ Freedom of speech implied “that men will honestly differ, and that the privilege of expression is to be equal to all. The right of expression shall not depend upon . . . the quality of the opinions in the judgment of another. The guaranty means this or it means nothing.”⁸⁸

The free speech-democracy argument was repeated again and again. “If freedom of speech is surrendered,” said the *Detroit Free Press*, “it will no longer be pretended, we presume, that the ballot box can represent the views and wishes of the majority of the people . . . Without freedom of speech, the ballot box is a farce.”⁸⁹ By the same logic, the paper noted, the president could dispense with elections. If it was disloyal to speak against the war, it was doubly disloyal to vote for those who opposed it.⁹⁰

Others recalled arguments made against the Sedition Act of 1798.⁹¹ Critics of the Sedition Act had insisted that in the American government, the people were the principal and elected officials were merely their agents. As a result, the people must retain the right to criticize the acts and policies of their agents and to discuss replacing

79. *Military and Civil Law*, CHI. TRIB., June 12, 1863; *Military and Civil Law—No. 3*, CHI. TRIB., June 18, 1863, at 3; CURTIS, *supra* note 7, at 336-37.

80. CURTIS, *supra* note 7, at 337.

81. *Id.* at 337 (quoting WILLIAM WHITING, *WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES* 168-69 (Boston, Lee & Shepard, 1871)).

82. *Id.* at 337; Ralph Waldo Emerson, *American Civilization*, 9 ATLANTIC MONTHLY 508-09 (1862).

83. *See* CURTIS, *supra* note 7, at 301, 320-28.

84. *Id.*

85. *Id.* at 322-23.

86. *Id.* (quoting *Speech of Hon. Geo. V. N. Lothrop*, DETROIT FREE PRESS, June 7, 1862, at 2).

87. *Id.* at 322 (quoting *Speech of Hon. Geo. V. N. Lothrop*, DETROIT FREE PRESS, June 7, 1862, at 2).

88. *Id.* at 323 (quoting *Speech of Hon. Geo. V. N. Lothrop*, DETROIT FREE PRESS, June 7, 1862, at 2).

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

90. *Id.*

91. CURTIS, *supra* note 7, at 325.

them.⁹² A number of Republicans and abolitionists joined pro- and anti-war Democrats in criticizing Vallandigham's arrest and other acts of suppression.⁹³

Critics of Vallandigham's trial also complained about the violation of other constitutional rights—including trial by jury and grand jury indictment.⁹⁴ They insisted that a military trial of civilians was not permitted far from the scene of battle where the civilian courts were functioning.⁹⁵ At most, they insisted the power to suspend the writ of habeas corpus allowed imprisonment until a constitutional trial could be held, not a trial by a military tribunal.⁹⁶

Lincoln responded to his critics. He rejected the claim that Vallandigham, as a person not in the military and not in the theater of war, was entitled to a civilian trial with all Bill of Rights guarantees. Lincoln insisted that the Civil War was a rebellion that allowed suspension of the writ of habeas corpus and that the suspension allowed military trials. Such arrests were preventative, made not because of what had been done, but “for what probably would be done.”⁹⁷ Those to be arrested, according to Lincoln, included the “man who stands by and says nothing when the peril of his country is discussed” and he who “talks ambiguously—talks for his country with ‘buts’ and ‘ifs’ and ‘ands.’”⁹⁸

In spite of the charge against Vallandigham and evidence offered at his “trial,” Lincoln insisted that Vallandigham was not merely arrested for “no other reason than words addressed to a public meeting, in criticism of the course of the Administration and in condemnation of the Military orders of the General.”⁹⁹ If that were the case, Lincoln said, the arrest was wrong. Instead, Vallandigham was arrested because he was “laboring, with some effect, to prevent the raising of troops; to encourage desertions. . . .”¹⁰⁰ When challenged on this point, Lincoln responded defensively. He admitted that “I certainly do not know that Mr. V. has specifically, and by direct language, advised against enlistments, and in favor of desertions, and resistance to drafting.”¹⁰¹ That was the effect of what he said, however, and Lincoln said (mistakenly) that “Mr. V.” had not coupled his criticisms with a call to obey the law.¹⁰² “Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair on the head of a wily agitator who induces him to desert?”¹⁰³

Critics of the arrest found Lincoln's defense outrageous. The *Detroit Free Press* complained that Vallandigham was not charged with encouraging desertions. The paper asked, if that was the offense, *why was he not charged with it?*¹⁰⁴

92. *Id.*

93. *Id.* at 326-29.

94. *Id.* at 337-39.

95. *Id.* at 338-39.

96. *Id.* at 342.

97. LINCOLN, SPEECHES, *supra* note 31, at 458.

98. *Id.*

99. *Id.* at 459.

100. *Id.*

101. *Id.* at 468.

102. *See id.* at 469 (“[I]f it can be shown that [Vallandigham] has ever uttered a word of rebuke, or counsel against [forceful resistance to the law], it will be a fact greatly in his favor with me . . .”).

103. *Id.* at 460.

104. *The President's Claim of Power*, DETROIT FREE PRESS, June 16, 1863, at 2; CURTIS, *supra* note 7, at 341.

IV. PROFESSOR PAULSEN ON LINCOLN'S CONSTITUTIONAL PRINCIPLES

Professor Paulsen considers the *Vallandigham* case in detail. He praises Lincoln's *legal analysis* in the *Vallandigham* case (as distinct from his conclusion) in a beautifully written book review that is also an engaging and important analysis of Lincoln as a constitutional actor.¹⁰⁵ Professor Paulsen recognizes that most people today would see some of Lincoln's actions "as violations of the freedom of speech and the due process rights to trial by civilian courts and by jury."¹⁰⁶ He doubts, however, that it is "really so easy to conclude that Lincoln's actions were unconstitutional, even in these instances. . . ."¹⁰⁷ His most recent article may suggest that he is beginning to find it easier.¹⁰⁸

Constitutionality turns on necessity, so if Lincoln were wrong about necessity, his actions could also be wrong. Still, Paulsen notes, Lincoln was the final judge of necessity.¹⁰⁹

Paulsen says that the proper evaluation of Lincoln's approach turns on whether it was consistent with the Constitution, not whether it was consistent with later judicial doctrine.¹¹⁰ But to a remarkable extent, Paulsen insists that Lincoln anticipated later free speech doctrine. He tells us Lincoln "spotted all the issues and wrestled thoughtfully with their implications."¹¹¹ Paulsen sees four related constitutional principles in Lincoln's declarations in the *Vallandigham* case. I will set out the principles Paulsen finds and then discuss them.

A. *Lincoln as Anticipating Speech Plus Action Analysis*

Paulsen sees Lincoln as distinguishing between "government action . . . [that] targets speech directly or targets *conduct*, producing an incidental restriction of speech that is mixed together with such conduct."¹¹² Paulsen finds this distinction in Lincoln's statement that the *Vallandigham* arrest would be wrong if based merely on words in a public speech criticizing the "course of the Administration" and the "orders of a General."¹¹³ But Paulsen notes that Lincoln *said* more was involved—*Vallandigham's* "laboring with some effect to prevent the raising of troops" and "to encourage desertions from the army."¹¹⁴

B. *Lincoln as Anticipating the Clear and Present Danger Test*

Paulsen says, "Lincoln . . . [defended] . . . the less-harsh consequence of the arrest when compared with alternative approaches and their attendant harms (over fifty years

105. Paulsen, *Interpretation*, *supra* note 3, at 691.

106. *Id.* at 725.

107. *Id.*

108. Paulsen, *Necessity*, *supra* note 3, at 1281.

109. Paulsen, *Interpretation*, *supra* note 3, at 701 n.23.

110. *Id.* at 699-700.

111. *Id.* at 700-01 n.23.

112. *Id.* at 701 n.23.

113. LINCOLN, SPEECHES, *supra* note 31, at 459.

114. Paulsen, *Interpretation*, *supra* note 3, at 701 n.23.

before Learned Hand's . . . opinion employed a similar calculus . . .)."¹¹⁵ This suggests that Paulsen finds Lincoln employing something quite like Hand's version of the "clear and present danger" test.¹¹⁶ While Paulsen concedes that one can doubt the wisdom of Lincoln's application of these principles, he finds that Lincoln understood the nature of the constitutional problem and formulated principles similar to those later courts used. Paulsen suggests that all modern, more speech protective, judicial decisions are as debatable as Lincoln's principles.¹¹⁷

C. *Lincoln as Anticipating and Applying the Compelling State Interest Test*

Paulsen also finds a strong resemblance to a compelling state interest test in Lincoln's references to what is required when confronting a rebellion. Paulsen notes that in modern doctrine a compelling state interest can justify suppression of what would otherwise be protected speech.¹¹⁸ He suggests that the modern compelling state interest test supports Lincoln's analysis in the *Vallandigham* case—if not his application.¹¹⁹ After all, the need to preserve the Union was compelling. Professor Paulsen sees Lincoln following an overarching, guiding principle, one related to compelling state interest and clear and present danger.

D. *The Anything Needed to Win Principle*

For Paulsen, Lincoln correctly thought that his duty "to preserve, protect, and defend the Union . . . required him—constitutionally required him—to do what was necessary to win, even if it meant the temporary sacrifice, during wartime, of other constitutional values. . . . The need to preserve the constitutional order . . . operates as a rule of construction for other constitutional provisions."¹²⁰ By Lincoln's theory, the president, as commander-in-chief, was the sole judge of necessity.

V. REFLECTIONS ON THE PAULSEN ANALYSIS

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

A. *Speech-Action*

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

115. *Id.*

116. *See id.* I think the reference to less-harsh consequences is intended as a reference to Hand's *Dennis* opinion, not to *Masses*. *See also*, Part V. B.

117. Paulsen, *Interpretation*, *supra* note 3, at 701 n.23.

118. *Id.*

119. *Id.*

120. *Id.* at 722.

The General's order that Vallandigham was accused of violating targeted both conduct (spying) and words ("disloyal sentiments"). Vallandigham was charged only with uttering words. The *Vallandigham* case is not usefully seen as a speech-conduct problem because the charge and evidence against Vallandigham were based exclusively on his words in a speech. Lincoln also referred to Vallandigham's speeches, and he did not specify any other action unrelated to speeches. The laboring to prevent the raising of troops that Lincoln refers to seems to refer only to Vallandigham's speeches. The speeches were the basis of the charge against Vallandigham and the sole evidence upon which he was convicted.

Speech-conduct cases involve expressive actions that create harm independent of the expression. In such cases, the actions also have an expressive effect, such as a public burning of a draft card.¹²¹ As a result, when the regulation targets the harm from the action, as opposed to the harm from the expression, speech-conduct cases allow much greater leeway for government suppression.

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

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

Finally, Paulsen notes that Lincoln believed that some constitutional actor must make the ultimate judgment of the degree of necessity.¹²² In time of war, the president was that actor.¹²³

B. Clear and Present Danger

There are some resemblances between what Lincoln said to justify punishment of Vallandigham and the *Dennis*¹²⁴ plurality's weakened version of the "clear and present danger" test—a version largely superceded by the *Brandenburg*¹²⁵ test. It is true that Lincoln was grappling with problems that recur and weighing costs and benefits. How should we treat wartime speech that has a tendency to harm the—perhaps misguided—

121. *United States v. O'Brien*, 391 U.S. 367, 369, 386 (1968) (upholding a conviction for burning a draft card in protest against the Vietnam War).

122. Paulsen, *Interpretation*, *supra* note 3, at 700 n.23.

123. *Id.* at 701, n.23.

124. *Dennis v. United States*, 341 U.S. 494, 517 (1951) (upholding convictions of leaders of the Communist Party U.S.A. for teaching the necessity of violent overthrow of the government as soon as possible).

125. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (reversing conviction of Ku Klux Klan speaker who suggested violence might be needed if the Supreme Court and others continued to oppress the white race).

war effort? In modern cases, the clear and present danger doctrine has been applied to advocacy of *unlawful* action.¹²⁶

In understanding Judge Hand's "clear and present danger test" to which Paulsen refers,¹²⁷ the context is important. That context in *Dennis* was a case against defendants who were officers of the Communist Party of the United States.¹²⁸ The trial court had found that they had advocated revolution—albeit in the future.¹²⁹

The requirement of advocacy of lawbreaking as part of clear and present danger is highlighted by Judge Hand's earlier *Masses Publishing Co. v. Patten*¹³⁰ opinion. Scholars have seen the *Masses* opinion as the source of the advocacy requirement in the modern clear and present danger doctrine. In *Masses*, Judge Hand considered dissenting speech in wartime.¹³¹ The Postmaster General had denied mailing privileges to *The Masses*, a magazine that had harshly criticized the First World War.¹³² Because mailing is crucial to the survival of most magazines, the decision was a death sentence for the magazine.

Publications could be denied mailing privileges if they violated the 1917 Espionage Act, which made it a crime to cause or attempt to cause insubordination in the military or naval forces or to obstruct recruiting or enlistment.¹³³ Though technically Hand was construing the statute, in fact his decision was strongly influenced by what he considered the correct constitutional principle.¹³⁴

Judge Hand frankly recognized that harsh criticism of the war could, and in some cases would, interfere with recruiting and enlistment.¹³⁵ But he rejected the conclusion that the bad tendency justified suppression of political speech:

Political agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to violation of the law. Detestation of existing policies is easily transformed into forcible resistance of the authority which puts them in execution, and it would be folly to disregard the causal relation between the two. Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom. . . . If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation. If that be not the test, I can see no escape from the conclusion that under this section every political agitation which can be shown to be apt to create a seditious temper is illegal.¹³⁶

126. *E.g.*, *Bond v. Floyd*, 385 U.S. 116 (1966) (harsh criticisms of Vietnam war held protected speech); *Brandenburg*, 395 U.S. at 447.

127. Paulsen, *Interpretation*, *supra* note 3, at 701 n.23. Again I think the Hand calculus referred to comes from *Dennis*, not *Masses*. See also *supra* notes 115-16 and accompanying text.

128. *Dennis*, 341 U.S. at 497.

129. *Id.*

130. *Masses Publ'g Co. v. Patten*, 244 F. 535, 538 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917).

131. *Id.* at 540.

132. *Id.* at 536.

133. *Id.*

134. See *id.* at 538.

135. *Id.* at 540.

136. *Id.*

Hand was unwilling to punish political agitation that falls short of urging people to resist the law. The speech for which Vallandigham was punished did not urge people to violate the law. So Vallandigham's speech would have been protected by the Hand principle in *Masses*, as opposed to the Lincoln principle. Though Lincoln seems to have been unaware of the fact, Vallandigham went further than Hand's advocacy test would have required. Vallandigham explicitly urged his hearers to obey the law and to seek redress at the polls.¹³⁷

Later, in the Communist Party case of *United States v. Dennis*,¹³⁸ Judge Hand crafted a watered down version of the clear and present danger test.¹³⁹ The new test was based on the gravity of the evil discounted by its improbability, and it was embraced by a plurality of the Supreme Court.¹⁴⁰ Hand found the evil of a Communist revolution (or attempted revolution) was quite great, so not much probability of revolution being attempted was required. Still, advocacy of lawless action survived as an element of the *Dennis* test. The trial court submitted the issue to the jury, and the *Dennis* jury found that the defendants had organized the Party to teach the duty and necessity of overthrowing the government as soon as circumstances would permit.¹⁴¹ The finding, which was contrary to the claims of the defendants, was sustained by the court of appeals and the factual issue was not re-examined by the Supreme Court.¹⁴²

Read in light of the full opinion, the principle of Hand's *Dennis* opinion and the principle of the *Dennis* plurality in the Supreme Court is quite different from the principle Lincoln espoused. The gravity of the evil discounted by its improbability was a test to be applied to *advocacy of illegal action*. It was applied where the court found that defendants had organized the party to advocate illegal action—albeit in the future.¹⁴³ *Dennis* sharply distinguished advocacy of change through the political

137. CURTIS, *supra* note 7, at 312.

138. 183 F.2d 201 (2d Cir. 1950).

139. *Id.* at 212.

140. *Dennis*, 341 U.S. at 510-11 (plurality opinion).

141. "In the instant case the trial judge charged the jury that they could not convict unless they found that petitioners intended to overthrow the Government 'as speedily as circumstances would permit.'" *Id.* at 509-10. Again the *Dennis* plurality noted that:

Petitioners intended to overthrow the Government of the United States as speedily as the circumstances would permit. Their conspiracy to organize the Communist Party and *to teach and advocate the overthrow of the Government* of the United States by force and violence created a 'clear and present danger' of an attempt to overthrow the Government by force and violence.

Id. at 516-17 (emphasis added).

142. *Id.* at 497-98. The *Dennis* plurality explained:

Our limited grant of the writ of certiorari has removed from our consideration any question as to the sufficiency of the evidence to support the jury's determination that petitioners are guilty of the offense charged. Whether on this record petitioners did in fact advocate the overthrow of the Government by force and violence is not before us, and we must base any discussion of this point upon the conclusions stated in the opinion of the Court of Appeals, which treated the issue in great detail. That court held that the record in this case amply supports the necessary finding of the jury that petitioners, the leaders of the Communist Party in this country, were unwilling to work within our framework of democracy, but intended to initiate a violent revolution whenever the propitious occasion appeared.

Id.

143. *Id.*

process from advocacy of revolution.¹⁴⁴ The distinction is crucial, however dubious *Dennis* is as a standard applied to teaching the ultimate need for revolution as opposed to a conspiracy to revolt, bomb, etc.

As we have seen, Vallandigham did not explicitly advocate illegal action. Lincoln virtually conceded as much in his second letter on the case.¹⁴⁵ In fact, Vallandigham urged obedience to the law.¹⁴⁶ So even under the *Dennis* test, Vallandigham's speech should have been protected. The principle embraced by the plurality during the Cold War was significantly more speech-protective than Lincoln's.

Although Vallandigham explicitly advocated obedience to the law and lawful political action, his speeches may have produced illegal action. However, as Judge Hand observed in *Masses*, any criticism of a war may have that result.¹⁴⁷ If the necessity principle allows suppression of all criticism of the war, it suspends the democratic process and the right of "we the people" to consult together about the wisest course—a right especially important in wartime.

C. The Compelling State Interest Test

Paulsen implies that Lincoln was simply balancing the right of dissent against the evils it would produce, and he says that this is quite similar to the compelling state interest test.¹⁴⁸ The principle seems to be that otherwise protected speech advocating political change by peaceful means may be suppressed to advance a compelling state interest. This approach is not compatible with the idea that the people, not the officers of the government, are sovereign, and therefore must be allowed to hear dissenting speech so they can participate in charting the nation's course. Recent cases do not support silencing mere political speech that harshly criticizes public measures and people in public life and calls for political change.¹⁴⁹ If the president alone makes the decision that there is a compelling interest justifying suppression of political speech, the principle is especially troubling, even if the test is limited to wartime.

If not limited to wartime, silencing political speech advocating peaceful political change for "compelling" reasons could have silenced much dissenting speech in American history. For example, the approach would have justified the suppression of anti-slavery speech based on fears of slave revolts and of sectional strife leading to disunion and civil war.¹⁵⁰

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

Id. at 501.

145. LINCOLN, SPEECHES, *supra* note 31, at 468.

146. CURTIS, *supra* note 7, at 312.

147. See *supra* text accompanying note 136.

148. Paulsen, *Interpretation*, *supra* note 3, at 701 n.23.

149. *E.g.*, *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964); *Bond v. Floyd*, 385 U.S. 116 (1966).

150. See CURTIS, *supra* note 7, at 133-36 (discussing the case for suppressing the abolitionists).

The argument from necessity is the same in both cases. Slave revolts and civil war were very great evils. It is, in fact, hard to distinguish this type of compelling interest test from a bad tendency test. Since the 1930s, the principle has not been applied to political speech that did not advocate violation of the law. Such speech has been protected, even in wartime. Julian Bond, for example, was protected in endorsing criticisms of the Vietnam War that were at least as harsh and likely to cause draft resistance as those Vallandigham made of the Civil War.¹⁵¹

D. *The Anything Needed to Win Principle*

Closely related to the compelling state interest argument is another claim: Lincoln's guiding constitutional principle during the Civil War was that the government had all necessary power to do anything needed to preserve the Union.¹⁵² Lincoln claimed that since some constitutional actor should decide these questions, the decision should rest with the Commander-in-Chief.¹⁵³

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

Professor Paulsen seems to be backing away from such unilateral power with his invocation of "checks."¹⁵⁴ But a check which allows the president *as a constitutional matter* to disregard the decision of a checking Supreme Court (and presumably to disregard laws passed by Congress) is not much of a check. Since, as a matter of constitutional law, final decision of the issue of necessity would be for the president, it is at best doubtful that the courts should rule on the matter at all. Such a ruling would be an advisory opinion¹⁵⁵ on a political question.¹⁵⁶

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

151. See *Bond*, 385 U.S. 116 (reversing the Georgia Legislature's exclusion of a state legislator who had expressed admiration for those who resisted the draft during the Vietnam War).

152. Paulsen, *Necessity*, *supra* note 3, at 1265, 1283; Paulsen, *Interpretation*, *supra* note 3, at 722.

153. Paulsen, *Necessity*, *supra* note 3, at 1296.

154. *Id.* at 1291-97.

155. 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 488-89 (Johnson ed. 1891) (court refusing to give non-binding advisory opinion on construction of treaty with France).

156. *Nixon v. United States*, 506 U.S. 224 (1993) ("a controversy is nonjusticiable—i.e. involves a political question—where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department....'").

VI. DEALING WITH THE LINCOLN “PRECEDENT”

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

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

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

A. A Closer Look at the *Vallandigham* Precedent

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

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

In spite of Lincoln’s claims, the facts of *Vallandigham’s* case are clear. He was prosecuted for words he uttered in a political speech. *Vallandigham* was tried on specific charges and evidence was offered at the trial. The charge recited the words of his speech, which was the only evidence against him. It showed that he had not counseled draft resistance or illegal conduct. If one accepts application of the basic due process idea that people can only be convicted of crimes with which they are charged and for which evidence is produced, then the *Vallandigham* verdict cannot be justified. It cannot be justified, that is, under any principle more protective than one allowing suppression of political speech in wartime because it may cause future harm.

Since Lincoln upheld the conviction, his actions cannot be justified either, if free speech or due process apply outside the zone of battle while the nation is at war. Of course, if one accepts the “necessity principle,” applies the logic fully, and leaves that issue to the president, the game is over.

Another approach is to suggest that whatever his words, *Vallandigham’s* intent was treasonous. The problem with this approach is that almost any anti-war speech could be silenced by the same assumption of treasonous intent. Basically, this approach accepts the idea that during war time any speech with a bad tendency—that

may cause problems for national unity and the war effort—can be suppressed. Some of Lincoln’s rhetoric in the *Vallandigham* case can be cited to support the bad tendency approach.

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

Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wily agitator who induces him to desert? This is none the less injurious when effected by getting a father, or brother, or friend, into a public meeting, and there working upon his feelings till he is persuaded to write the soldier boy that he is fighting in a bad cause, for a wicked Administration of a contemptible Government, too weak to arrest and punish him if he shall desert. I think that in such a case to silence the agitator, and save the boy is not only constitutional, but withal a great mercy.¹⁵⁷

As noted above, an anti-war speech that does not advocate breaking the law may cause a father, brother, or friend to write a soldier with the sentiments Lincoln condemns. Basically, the wily agitator justification presumes a criminal intent on the part of the agitator. The presumption is hard to refute and subject to abuse. The fact that the “agitator” does not advocate violating the law simply shows how “wily” he is. Does the agitator urge people to obey the law and seek redress at the polls? That could be taken as proof that he is even “wiler.” Even specific denunciation of illegal acts (a factor Lincoln says would weigh strongly in Vallandigham’s favor if it had occurred—which it did) could be interpreted simply as proof that the agitator is extremely “wily.”

Professor Geoffrey Stone, a leading expert on free speech law, notes another problem with Lincoln’s “simple-minded soldier boy” argument. We cannot protect democratic discourse if the test is to be the effect of speeches on the “simple-minded” or the most susceptible members of the audience.¹⁵⁸ Just as it is inappropriate to reduce adults to reading material fit for children, it is inappropriate to reduce voters to hearing only things not likely to mislead the simple-minded.

There are few mistakes for which one cannot find a precedent. Before the Civil War, southern states such as North Carolina banned anti-slavery speech that had a tendency to produce discontent in slaves. The North Carolina Supreme Court interpreted the statute to prohibit giving Hinton Helper’s anti-slavery book to whites.¹⁵⁹ The effect of the decision was to reduce white voters to reading material fit for slaves.

2. *Further Undermining the Vallandigham Precedent*

Though not a judicial decision, Lincoln’s action in Vallandigham’s case is a precedent. There are, however, reasons to treat the *Vallandigham* precedent as a very weak one that should make us suspicious of invoking “necessity” as a source of unlimited executive power. Of course, we have Lincoln’s public justifications of the Vallandigham arrest and verdict, but we now also have the historical record. It shows

157. LINCOLN, SPEECHES, *supra* note 31, at 460.

158. GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME, FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 117 (2004).

159. See CURTIS, *supra* note 7, at 293-96. See generally *id.* at 271-99.

that while Lincoln and his cabinet defended the arrest publicly, in private, cabinet members doubted its wisdom, lawfulness, or necessity.¹⁶⁰ Second, also in private dispatches, Lincoln reined in his generals, a clear indication that in his own mind the *Vallandigham* precedent was not one to be lightly repeated.¹⁶¹ Third, when Burnside struck again and banned publication of the *Chicago Times*, Lincoln countermanded the order.¹⁶²

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

Finally, and most significantly, in 1864 Lincoln strongly defended the need for free elections even in the midst of a civil war.¹⁶³ We cannot have free elections without free speech. A free election in wartime requires protection for speech that harshly criticizes the war. In the end, Lincoln's wise statements on the need for free elections undermine the force of his *Vallandigham* arguments. His statements also undermine the "anything to win" principle. He recognized democracy as a principle that should not be sacrificed even "temporarily" to "win."¹⁶⁴ That is so because Lincoln recognized that the election could spell disaster for the Union.

In late August 1864, with the presidential election looming, Lincoln wrote that "it seems exceedingly probable that this Administration will not be re-elected."¹⁶⁵ The new president "will have secured his election on such ground that he can not possibly save [the Union]" after he takes office.¹⁶⁶ The only hope would be to save it between the election and the inauguration of the new president.

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

Past history provided strong reasons for the apprehensions which brought these procedural amendments into being and attest the wisdom of their adoption. For fears of arbitrary court action sprang largely from the past use of courts in the imposition of criminal punishments to suppress speech, press, and religion. Hence the constitutional limits of courts' powers were, in the view of the Founders, essential supplements to the First Amendment, which was itself designed to protect the widest scope for all people to believe and express the most divergent political, religious, and other views.¹⁶⁷

While Justice Black refers to the powers of the courts, the argument applies with greater force to decisions by the executive to imprison people without any of the

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

161. *Id.* at 316.

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

163. LINCOLN, SPEECHES, *supra* note 31, at 641 (citing elections).

164. *Id.*

165. *Id.* at 624.

166. *Id.*

167. *Adamson v. California*, 332 U.S. 46, 70-71 (1946) (Black, J., dissenting).

safeguards of the Bill of Rights. Indeed, many of the early claims for the criminal procedure rights now in the Bill of Rights arose in the seventeenth century struggle for greater democracy and greater political and religious liberty. Supporters of parliamentary government and those who later supported greater democracy and religious toleration confronted first a king and then an oligarchic Parliament and Council of State determined to suppress their pamphlets, petitions, and political activity.¹⁶⁸ Those in power used arrests, searches, self-incriminating questions, and denial of habeas corpus. After the King was deposed, leaders of the new government used these methods to suppress these early democrats and advocates of religious toleration. Many of the basic rights now in our Bill of Rights were asserted by the Leveller John Lilburne in response to the repeated prosecutions he faced for his pro-democracy political activity. Juries refused to convict him, but in the end Cromwell simply arrested Lilburne and put him outside the reach of habeas corpus.¹⁶⁹ No doubt Cromwell found his decision to ignore basic legal rights justified by necessity.

The limited definition of treason in the Constitution comes from the Treasons Act of 1696. That Act was a response to the habit of the party in control of Parliament to use the courts to convict and execute their political opponents for treason.¹⁷⁰ The doctrine of necessity, with the ultimate power effectively with the executive, makes suppression much simpler.

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

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

There are additional reasons to be leery of treating the *Vallandigham* case and Lincoln's analysis as a precedent to be followed. Lincoln's precedent may not always be applied by a Lincoln—or even less by the Lincoln popular history has canonized. There is always the danger that politicians will use times of genuine crisis to advance narrow partisan agendas. In the case of the Sedition Act, for example, one Federalist leader wrote that the crisis with France would provide “a glorious opportunity to destroy faction”—by which he meant to destroy the Jeffersonian party.¹⁷¹ Genuine fears of slave revolts in the South were used by some as a pretext to silence those who advocated emancipation by the southern states.¹⁷² According to Geoffrey Stone, Republican politicians used the Cold War threat from the Soviet Union to charge that the Democratic Party was the party of Communism. The chairman of the Republican Party announced that the “Democratic [P]arty policy . . . bears a made-in-Moscow label.”¹⁷³ Richard Nixon described the Democratic Party as the “party of Communism”

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

169. *Id.* at 359, 386.

170. LOVELL, *supra* note 4, at 399; Alexander H. Shapiro, *Political Theory and the Growth of Defensive Safeguards in Criminal Procedure: The Origins of the Treason Trials Act of 1696*, 11 LAW & HIST. REV. 215, 219-21 (1993).

171. CURTIS, *supra* note 7, at 61 (quoting JAMES MORTON SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* 21 (1956)).

172. *Id.* at 277.

173. STONE, *supra* note 158, at 312.

and charged that President Truman and Democratic candidate Adlai Stevenson were “traitors.”¹⁷⁴ The recurring tendency to use crisis and necessity as a device to destroy one’s political opponents shows the grave danger in an unbridled “necessity trumps all rights” analysis. Rejection of the idea that the opposition is loyal subverts democratic government.

Though Lincoln was not motivated by narrow political advantage, some who attacked anti-war speech during the Civil War had mixed motives. In 1864, Republicans sought to expel an Ohio Congressman for a speech on the floor of the House in which he advocated peace and recognition of the Confederacy. At the same time Republicans were claiming the speech would undermine the military, they were reprinting copies for use as a campaign document.¹⁷⁵

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

The constitutional war power is important. But, as Justice Robert H. Jackson wrote in 1948, it is also “the most dangerous one . . . to free government in the whole catalogue of powers.”¹⁷⁶ He explained that this was because it is

usually . . . invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult. It is executed in a time of patriotic fervor that makes moderation unpopular. And, worst of all, it is interpreted by judges under the influence of the same passions and pressures. Always . . . the Government urges hasty decision to forestall some emergency . . . and pleads that paralysis will result if its claims to power are denied . . .¹⁷⁷

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

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

Many suppressions of civil liberty produced massive protest at the time. The protests limited repression and hastened the restoration of liberty. That was the case, for example, in the 1798 Sedition Act, which was passed during an undeclared naval war with France.¹⁷⁸ Again, from the 1830s to the Civil War, advocates of suppression

174. *Id.* at 339.

175. CURTIS, *supra* note 7, at 343-47.

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

177. *Id.*

178. CURTIS, *supra* note 7, at 63-77, 83-84.

used mobs and attempted to pass laws to silence abolitionists in the North. The attacks on free speech produced strong public protest that helped defeat attempts to suppress Northern criticism of slavery.¹⁷⁹ Public protest also limited repression during the Civil War. Criticism of repression in World War I was limited and repression was widespread. Still, critics helped to produce a stronger protection for free speech and civil liberty in later years.¹⁸⁰ Where protest was muted, however, repression thrived. Of course, the doctrine of necessity trumps all guarantees of liberty and makes unilateral executive action denying historic liberties entirely constitutional. The effect is to undermine the legitimacy of protest.

The long-term negative effects of acquiescence in repression can be seen in the history of the American South. From 1830 to the Civil War, the South was gripped by fear of slave revolts. Southern laws silenced critics of slavery, eventually including members of Lincoln's Republican party. Criticism of slavery was treated as a crime—even if the recipient of the criticism was another white person.¹⁸¹ Mobs often made resort to law unnecessary.¹⁸² The denial of civil liberty produced little protest in the South, and repression continued until the end of the Civil War.¹⁸³

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

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

Of course, there is also a silver lining in the cloud of censorship. The public commitment of many citizens to broad free speech rights helped to limit repression.¹⁸⁴ Democratic protests (and those of many Republicans) limited repression and forced Lincoln to disclaim any attempt to interfere with elections.¹⁸⁵ Still, the Lincoln administration's departure from free speech principles had both short and long-term negative consequences.

Lincoln's defense of Vallandigham's trial created a precedent to be relied on expressly or implicitly by future decision makers. For example, Lincoln's idea that rebellion justified suppressing Vallandigham's anti-war speech probably had a considerable influence on the justices during World War I, including Oliver Wendell Holmes, Jr. In 1919, Holmes, writing for the Court, upheld the jailing of one man for

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

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

181. *State v. Worth*, 52 N.C. 488, 492 (1860). For a discussion of the case and the law on which it was based, see CURTIS, *supra* note 7, at 289-99.

182. *E.g., CURTIS, supra* note 7, at 290-92 (expulsion of Professor Hedrick from North Carolina for supporting John C. Fremont for president); *id.* at 282 (Lincoln and Douglas agree that Republicans cannot campaign in the South); *id.* at 283 (another expulsion for supporting Fremont).

183. *See generally id.* at 241-300.

184. *Id.* at 352, 355.

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

sending a leaflet to draftees that called for political action against the draft.¹⁸⁶ He also wrote the opinion that upheld the jailing of Eugene Debs, the Socialist politician and labor leader, for making an anti-war speech.¹⁸⁷

Other anti-war advocates met a similar fate.¹⁸⁸ “When a nation is at war,” Justice Holmes wrote in *Schenck v. United States*, “many things that might be said in times of peace . . . will not be endured . . .”¹⁸⁹ One could oppose the war before it began and after it was over. The principle Lincoln invoked for “rebellion” slid easily into a principle for wartime generally. It should come as no surprise. Supporters of the Lincoln administration often invoked a virtually unlimited war power.

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

The World War I story is not an edifying one. During this period of hysteria, many who should not have been, were convicted of crimes. The victims included a man who told women knitting socks for soldiers that no soldier would see them, a man who refused to kiss the flag, and a movie producer whose film suggested atrocities by the British during the American Revolution.¹⁹⁰ At least in these cases, people were charged with violating a law passed by Congress or a state legislature and the trials were held before civilian judges and juries. Still, most see these as precedents showing what should be avoided, and they are right.

Mistakes are more likely in times of great peril and fear. “Franklin Roosevelt . . . listening to his generals after the bombing of Pearl Harbor, approved a military plan to incarcerate Americans of Japanese descent. The war power theory generated to support suppression of speech by the Lincoln administration supports the constitutionality of the Japanese internment.”¹⁹¹ One could respond that the internment of the Japanese was not necessary and therefore was not constitutional. Similarly, the arrest of Vallandigham could be rejected as unnecessary. But if the president is in effect the judge of necessity and is not obligated to follow court decisions, the distinction suggested for the incarceration of the Japanese does not amount to much. Of course, all branches of government can fail, as happened in the case of the Japanese internment. Still, liberty is better protected by more, rather than fewer, checks. Redundant safety devices are generally a good idea, as the failure to have an adequate number of life boats on the Titanic shows.

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

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

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

188. See, e.g., *Gilbert v. Minnesota*, 254 U.S. 325 (1920).

189. 249 U.S. 47, 52 (1919). For a comparison of civil liberties during the Civil War and World War I, see, William A. Dunning, *Disloyalty in Two Wars*, 24 AM. HIST. REV. 625 (1919).

190. CURTIS, *supra* note 7, at 385-95.

191. *Id.* at 355.

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

The “anything to win principle”—with the president as the judge—quickly slides into an “anything that might be necessary to win” principle. Why take a chance? From there it easily becomes—as it seems to have in Vallandigham’s case and even more clearly in the case of the Sedition Act—an “anything that can be defended as necessary to win” principle. In application, the principle can produce paradoxical results, undermining the legitimacy of the cause of those who invoke it.¹⁹² When application shows a principle so liable to produce abuse and disaster, it is reasonable to doubt the wisdom of the principle.

One problem with the Paulsen approach and his use of the Lincoln analogy is that it confuses political with legal analysis. It seeks to make actions outside the law and the Constitution into lawful and constitutional actions. The effect of this is to make violating the law and the Constitution too easy and too acceptable and to obscure the difficult moral and political choices involved.¹⁹³

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

Civil disobedience is a useful analogy. Those who engage in civil disobedience do not claim that their actions are lawful. They claim instead that a higher authority justifies breaking the law. Obviously, if a finding that law violation would be “useful,” “convenient,” or “necessary” made law-breaking lawful, the law would lose much of its force. In contrast to civil disobedience, the president has substantial protection even if he engages in unlawful conduct. In *Nixon v. Fitzgerald*,¹⁹⁴ the Court held the president absolutely immune from damages even for intentional violations of clearly established law.¹⁹⁵

There is, of course, a second problem. The Lincoln-necessity analogy puts essentially unchecked power in the hand of one person, and does so for the foreseeable future. To accept this elimination of checks on power, one needs to go beyond

192. For a somewhat related issue, see Anthony Lewis, *Making Torture Legal*, THE NEW YORK REVIEW OF BOOKS 4, July 15, 2004, and Tim Golden et al., *In U.S. Report, Brutal Details of 2 Afghan Inmates’ Deaths*, N.Y. TIMES, May 20, 2005, at A1 (describing the torture killing of an apparently innocent Afghan taxi driver).

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

194. 457 U.S. 731 (1982).

195. *Id.* at 748-49 (holding president absolutely immune for acts taken within the outer perimeter of his official duties).

unquestioning trust in George W. Bush. One needs to trust that the power will not be seriously abused by any of his successors for the next hundred years or more that the problem of terrorism continues.

Recent ghastly experiences have led judges and scholars to express deep concern about claims of unilateral presidential power. The Court addressed the power of the president in time of war in *Youngstown Sheet & Tube v. Sawyer*.¹⁹⁶ Justice Jackson, in particular, recalled the slide of Germany into tyranny. During the Korean War, President Truman claimed power to seize the steel mills. He acted as Commander-in-Chief in time of war with the announced goal of preventing disruption of the supply of steel from a pending strike. As Chief Justice Vinson wrote in his dissent—in stark contrast to the Bush administration—Truman “immediately informed Congress of his action and clearly stated his intent to abide by the legislative will.”¹⁹⁷ Still, the majority of the Court found the President had violated the Constitution.¹⁹⁸

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

Germany, after the First World War, framed the Weimar Constitution, designed to secure her liberties in the Western tradition. However, the President of the Republic, without concurrence of the Reichstag, was empowered temporarily to suspend any or all individual rights if public safety and order were seriously disturbed or endangered. This proved a temptation to every government, whatever its shade of opinion, and in 13 years suspension of rights was invoked on more than 250 occasions. Finally, Hitler persuaded President Von Hindenburg to suspend all such rights, and they were never restored.¹⁹⁹

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

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

grim experience through which Europe had passed during the years immediately preceding the [1949] creation of the Council. . . . [T]hey were aware that the first steps towards dictatorship are the gradual suppression of individual rights—infringement of the freedom of the Press, prohibition of public meetings, and trials behind closed doors, for example—and that once this process has started it becomes increasingly difficult to stop.²⁰⁰

They quote M. Pierre-Henri Tietgen speaking to the issue in 1949. “Democracies do not become Nazi countries in one day. Evil progresses cunningly, with a minority

196. 343 U.S. 579 (1952).

197. *Id.* at 710 (Vinson, C.J., dissenting).

198. *Id.* at 589.

199. *Id.* at 651 (Jackson, J., concurring).

200. J. G. MERRILLS & A. H. ROBERTSON, *HUMAN RIGHTS IN EUROPE: A STUDY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 3 (4th ed. 2001).

operating, as it were, to remove the levers of control. One by one, freedoms are suppressed. . . .”²⁰¹

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

201. *Id.* at 4.