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Politics at Play:
Civilians, Disloyal Speech, and the Military Commissions in the American Civil War

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On 6 May 1863, Clement L. Vallandigham, a former Democratic congressman from Ohio and candidate for governor, stood in front of a military commission to represent himself against the charge of expressing disloyal sentiments intended to undermine the power of the Union.[2] The charge pertained to an anti-war speech he had given on 1 May 1863 at a political rally attended by military agents dressed as civilians. They had been directed to monitor the speech by General Burnside, who had issued General Order No. 38 a month prior that permitted the arrest of civilians "declaring sympathies for the enemy."[3] Despite arguing that he was entitled to a public trial in a civil court with a civilian jury, Vallandigham's jurisdictional challenge was rejected. He was found guilty on 16 May 1863.[4] In response, Vallandigham petitioned the Supreme Court to review the military commission's proceedings. However, the Court denied the *writ of certiorari*, ruling that it lacked jurisdiction over military commissions.[5]

The arrest and trial of Vallandigham produced what one scholar has called a "tidal wave of criticism" from Democrats and even some Republicans who questioned the government's power to criminalize anti-Union speech and the legitimacy of the military's ability to try civilians in areas outside of the immediate conflict where civilian courts were operating.[6] The latter question was answered in 1866 by the only other case concerning the use of military commissions reviewed by the Supreme Court during the Civil War, *Ex Parte Milligan*. In that decision, the Court declared it unconstitutional to try civilians by military commissions in areas where civilian courts were operational.[7] Well before *Milligan*, the Vallandigham trial became the focus of Lincoln critics, who

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[2] Michael Kent Curtis, "Lincoln, Vallandigham, and Anti-War Speech in the Civil War," *William & Mary Bill of Rights Journal* 105, no. 7 (1998), p. 121.

[3] Anthony F. Renzo, "Making a Burlesque of the Constitution: Military Trials of Civilians in the War Against Terrorism," *Vermont Law Review* 31, No. 10-21 (December 1, 2009), p. 478.

[4] Renzo, "Burlesque of the Constitution," p. 479.

[5] David W. Glazier, "Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission," *Virginia Law Review*, 89, No. 8 (December 2003), p. 2038.

[6] Curtis, "Anti-War Speech" 108; the term "civil courts" and "civilian courts" are used interchangeably in the literature. I will primarily describe the non-military courts traditionally used to try civilians in times of peace as civilian courts.

[7] Mark E. Neely, *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (New York: Oxford University Press, 1991), p. 35.

pointed to the trial as an example of the administration's partisan use of the military commissions to undermine free speech and stifle opposition from its Democratic rivals.[8] While historian Mark E. Neely found that cases involving political speech represented a fraction of the total cases tried in military commissions, their infrequency does not prevent them from offering insight into the political nature of the commissions and how they shaped the treatment of civilians—including their rights of speech—in Unionist areas during the Civil War.[9]

By comparing speech cases in which the defendant hailed from states loyal to the Union (including "Border states," in which Confederate sympathy was high and slavery was still legal, but the states had not seceded) with those in which the defendant came from seceded Southern states, I will argue that civilians within the Union tried by Northern and Border state commissions were essentially treated the same as Confederates tried by Southern commissions convened in occupied territories. Using the same legal system to try civilians in ostensibly loyal states as was used in disloyal states, the Lincoln administration blurred the lines between assumed loyalty and disloyalty. As a result, the government stigmatized civilian defendants from the Union, equating them with Southern secessionists. The stigma could be especially powerful when the sentences handed down treated the defendants as actual Confederates, as was the case with Vallandigham. These disloyal speech cases provide a window into the steps the Lincoln administration took in responding to its critics during a moment of national crisis and disunity, defining what was acceptable and impermissible speech and handing down punishments to defendants accordingly. As an analysis of these cases reveals, the practice—regardless of its infrequency—of arresting civilians in loyal areas for disloyal speech and trying them in military commissions when civilian courts were functioning was a political act, one that illuminates the political nature of the commissions themselves.

The Origins of the American Military Commissions

Military tribunals, a precursor to the military commissions, were established by the newly created United States to investigate suspected spies during the Revolution. The first military tribunal can be traced to 1778 with the court of inquiry investigation of the American soldier and suspected spy, Thomas Shanks.[10] General George Washington ordered his execution following the Board of General Officers' determination that Shanks had spied for the British.[11] A similar case followed two years later when the Board of General Officers recommended the death penalty in the case of British Major John André, who was captured by American forces while wearing civilian clothing and possessing

[8] Neely, *Fate of Liberty*, p. xii.
[9] Neely, *Fate of Liberty*, p. 137.
[10] "Military Commissions History," Office of Military Commissions, Department of Defense, accessed December 18, 2021, https://www.mc.mil/ABOUTUS/MilitaryCommissionsHistory.aspx.
[11] Office of Military Commissions, "Military Commissions History."

intelligence on West Point.[12] However, as David Glazier points out, "the board was an advisory panel, not a 'court' that legally determined guilt or innocence" despite being called a tribunal, a term commonly associated with a court of justice.[13] The tribunal collected evidence and offered recommendations, but it was Washington, not the board, that sentenced Shanks and André to death.

Only later, during the Mexican-American War of 1846-48, did military commissions of the sort used during the Civil War first convene. These commissions issued judgements and sentences that were legally binding, not merely advisory. General Winfield Scott created the commissions to try crimes committed against Mexican civilians in territory outside of the United States.[14] In particular, the commissions sought to punish those guilty of the most heinous offenses outside the theater of war, such as rape, murder, and desecration of churches.[15] While these commissions were designed to try Mexicans and Americans, Scott's primary intention in forming them was to try U.S. soldiers who strayed outside the understood laws of war. In this way, he sought to impose discipline on the U.S. Army.[16] Despite concerns from the Attorney General and Secretary of War, both of whom saw the establishment of commissions and martial law in a foreign country as potentially incendiary, Scott believed that the commissions and their ability to establish order within U.S. forces was central to victory.[17]

Military Commissions during the Civil War

The Civil War saw the widespread and unprecedented use of military commissions as a means of restoring order and imposing government authority on civilians within loyal and disloyal territories alike and, unlike the tribunals of the Mexican War, they were aimed at civilians as much as soldiers. The renewed use of the military commissions emerged during a time of significant crisis—the secession of the Southern states and the outbreak of war presented a challenge for the Lincoln administration which found itself battling resistance inside and outside the Union. The loyalty of the Border states—Missouri, Maryland, Delaware, Kentucky—slave states that did not secede from the Union, was especially precarious as many of their inhabitants held sympathy for the Confederacy.[18] Additionally, officials from the administration saw signs of disloyalty within loyal states farther North. Secretary of War Edwin Stanton noted, "even in the portions of the country which were most loyal,

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[12] Michael O. Lacey, "Military Commissions: A Historical Survey," *The Army Lawyer*, Department of the Army Pamphlet 27-50-350 (March 2002), p. 42, and Office of Military Commissions, "Military Commissions History."
[13] David W. Glazier, "Precedents Lost: The Neglected History of the Military Commission," *Virginia Journal of International Law* 46, No. 1 (Fall 2005), p. 14.
[14] Neely, *Fate of Liberty*, p. 40.
[15] Neely, *Fate of Liberty*, p. 40.
[16] Glazier, "Kangaroo Court," p. 2029.
[17] Neely, *Fate of Liberty*, pp. 40-41.
[18] Curtis, "Anti-War Speech," p. 115.

political combinations and secret society were found furthering the work of disunion."[19] All existing forms of government, from Congress to municipal authorities, were unprepared to handle the sheer number of defectors and sympathizers within Union territories, Stanton posited, adding that "the judicial machinery seemed as if it had been designated not to sustain the Government, but to embarrass and betray it."[20] Beyond the inadequacies of the judicial system in Union territories to hold civilians accountable, the government faced the issue of ensuring legal order within the occupied South. As the Articles of War did not apply to disloyal persons committing offenses against Union soldiers in the territories captured by the Union, U.S. officers began to increasingly look at military commissions as a solution that would provide them with the legal means to enforce military order, discourage resistance, and punish transgressions committed by civilians, including those in ostensibly loyal areas. [21]

John C. Frémont, the commander of the Western Department, was one such general who used the military commissions. Early in the war, Frémont was in command of the highly volatile state of Missouri, the site of popular dissension and armed conflict between Union forces and guerrilla fighters.[22] Frémont issued a proclamation, without presidential approval, on 30 August 1861 declaring martial law, establishing military commissions to try civilian defendants, and signaling his intention to execute disloyal Missourians and emancipate those enslaved by Missouri rebels.[23] Lincoln eventually revoked the emancipation provision out of fear that it would alienate slaveholders in Kentucky. Still, he permitted the declaration of martial law, the creation of the military commissions, and the execution of civilian prisoners, constraining the latter only by insisting that he have the ability to review the cases beforehand.[24] Within a month of Frémont's proclamation, military commissions were operating in Missouri,[25] and within a year Lincoln would issue his own proclamation authorizing the use of military commissions to try civilians "discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice."[26]

The creation of military commissions during the Civil War represented a significant expansion of the martial authority vested in the original courts created by General Winfield Scott. The Civil War military commissions, which conducted at least 4,271 trials, were created principally to restrain civilian rather than military action, a reversal of the primary intention of the Mexican-American War

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[19] Edwin M. Stanton, "Executive Order No. 1—Relating to Political Prisoners," February 14, 1862, online by Gerhard Peters and John T. Woolley, The American Presidency Project, https://www.presidency.ucsb.edu/node/202458.
[20] Stanton, "Executive Order No. 1—Relating to Political Prisoners."
[21] Lacey, "A Historical Survey," p. 3.
[22] Neely, *Fate of Liberty*, pp. 32-34.
[23] Neely, *Fate of Liberty*, p. 34; Frémont used the phrase "court-martial" instead of military commission to refer to the creation of civilian tribunals in the proclamation. These terms were used interchangeably at the time.
[24] Neely, *Fate of Liberty*, p. 35.
[25] Neely, *Fate of Liberty*, p. 35.
[26] Curtis, "Anti-War Speech," 117; issued September 24, 1862.

commissions. [27] Additionally, while Scott's commissions established a means of trying foreign civilians in areas where U.S. law did not apply, some of the military commissions of the Civil War operated in loyal Northern and Border states, trying civilians in areas where U.S. law applied and civilian courts were operating.[28] As such, the Civil War military commissions enlarged the bounds of U.S. military legal authority over occupied enemy territory alongside loyal areas within its domestic borders.

The military arrests and trials of civilians in Northern and Border states outside of the direct areas of conflict were criticized by prominent political figures. Some said that they threatened civil liberties; others charged that they were counterproductive to ensuring order and national security. Within Lincoln's home state of Illinois, both U.S. Senators objected to the policy. Orville H. Browning described the arrests of civilians as "illegal" and harmful to the Union.[29] Lyman Trumbull concurred, saying that the military commissions were "unwarrantable" and, if continued unchecked, would "completely subordinate" civilian courts to military authority, which was tantamount to "the government overthrown."[30] The Union's controversial decision to prosecute civilians in military commissions was put into even starker relief when compared to the Confederacy's decision to try civilians for treason in civilian courts rather than military courts.[31] Among the greatest criticisms of the Lincoln administration's use of the military commissions to judge civilians, both at the time and in historical analysis conducted since, was that these tribunals were utilized politically to suppress Democrat opposition and anti-Union sentiments in a significant and intentional attack on civil liberties and free speech.[32] While the historian Mark Neely came to the conclusion that such concerns were unnecessarily inflated, after finding that cases involving freedom of speech and political freedom were in the minority of the cases tried by the military commissions, the impact of these speech cases should not be underestimated.[33] The civilian cases concerning disloyal speech in the Civil War military commissions, despite their relative infrequency, marked the commissions as inherently political bodies.

The transformative quality of trying political speech cases in the commissions during the Civil War is best illustrated in the work of historian William A. Blair. Blair's account of treason trials during the war explores the "doctrine of implied treason" that permitted the arrests of civilians for disloyalty

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[27] Neely, *Fate of Liberty*, p. 168.
[28] Neely, *Fate of Liberty*, p. 41.
[29] Curtis, "Anti-War Speech," p. 115.
[30] Curtis, "Anti-War Speech," p. 115.
[31] Martin S. Lederman, "Of Spies, Saboteurs, and Enemy Accomplices: History's Lessons for the Constitutionality of Wartime Military Tribunals," Georgetown Law Faculty Publications and Other Works 105 (2017): 1634, https://scholarship.law.georgetown.edu/facpub/1800.
[32] Neely, *Fate of Liberty*, p. Xii, p. 137.
[33] Neely, *Fate of Liberty*, p. 168; Neely counts at least 4,271 military commission trials, 55.5% of which occurred in the Border states of Missouri, Kentucky, and Maryland. Missouri counted the largest number of military commissions with 1,940 trials. 5.5% of all military commission trials were in occupied territories within the Confederacy and 5% of trials occurred in the North.

for behavior such as cheering for Jefferson Davis.[34] "Treasonous behavior" became an umbrella expression that could be used to punish the actions of "suspicious individuals" without concern for following the law.[35] Under the cover of treason, civilians were detained without trial, and authorities that could not normally arrest a person for the contents of their words could imprison a civilian for speech deemed to be in opposition to the government.[36]

The Disloyal Speech Cases

Not only were civilians from loyal Northern and Border states tried in the same legal forum as civilians from occupied Confederate territories, but they also were treated nearly identically in commission trials concerning speech, both in the charges brought and the sentences handed down. Civilians who had declared anti-war sentiment, or support for the Confederacy, or had spoken ill of the Lincoln administration were charged with offenses such as "sedition" or "disloyalty."[37] In October 1864, Richard H. Stevenson from St. Louis, Missouri, was arrested for disloyalty, having raised a glass in honor of Jefferson Davis, President of the Confederacy, and Sterling Price, a former governor and senior officer in the Confederate Army.[38] Thomas Gillock from Alexandria, Virginia, was likewise charged two months later for toasting Jefferson Davis.[39] Civilians from Union and Confederate states faced not only similar charges but also nearly identical sentences for similar offenses regardless of the location of the military commission where they were prosecuted. Hamilton M. Joseph, a St. Louis actor, declared in May 1864 that he was a Southern sympathizer and, as a result, was tried in the St. Louis military commissions.[40] A month later, in Arkansas, Ephraim R. Fulbright, a fifty-five-year-old enslaver from Alabama, also declared his support for the Confederacy, saying, "I am and always have been in favor of the success of the Southern Confederacy."[41] Both men were sentenced to hard labor during the war by their respective commissions.

While the above examples concern cases tried by commissions in Border states and Confederate states, in which the majority of trials regarding disloyal speech were held, cases in loyal Northern states

[34] William A. Blair, *With Malice Toward Some : Treason and Loyalty in the Civil War Era*, (Chapel Hill: University of North Carolina Press, 2014), pp. 36-38.

[35] Blair, *With Malice Toward Some*, p. 36-38.

[36] Blair, *With Malice Toward Some*, p. 39.

[37] For the cases used in this paper, I rely heavily on the database described here: Thomas P. Lowry, "Research Note: New Access to a Civil War Resource," *Civil War History*, 49 (March 2003), pp. 52-63. Both terms, "sedition" and "disloyalty," are commonly entered as charges in the database. *U.S. v. Bradley Francis*, folder ll2436, Record Group 153: Records of the Office of the Judge Advocate General (Army), National Archives, Washington, DC (henceforth cited as RG 153)., is an example of a sedition charge and *U.S. v. Thomas O'Neill*, folder ll2753, RG 153, is an example of a disloyalty charge.

[38] *U.S. v. Richard H. Stevenson*, folder nn2783, RG3356.

[39] *U.S. v. Thomas Gillock*, folder nn3711, RG 3651.

[40] *U.S. v. Hamilton M. Joseph*, folder nn2060, RG 3091.

[41] *U.S. v. Ephraim R. Fulbright*, folder nn1966, RG 3082.

such as Illinois and Ohio and those in Washington, D.C. also populate the records. [42] Nathan Barnard was sentenced to six months in prison by a military commission in Jersey County, Illinois, after having said he would prefer fighting on behalf of Jefferson Davis and the Confederacy than Abraham Lincoln.[43] Jacob Brisbine was also tried by a military commission in Illinois for "disloyal and seditious language."[44] In Ohio, a military commission was convened three weeks after the Vallandigham conviction to try Indiana State Senator Alexander J. Douglas for using "inflammatory language" in a speech he gave at a Democratic rally criticizing the Lincoln administration and Vallandigham's arrest.[45] While the commission characterized Douglas's language as more incendiary than Vallandigham's, he was nonetheless found not guilty due to the intervention of Indiana's Governor Oliver P. Morton, who feared a guilty verdict would result in insurrection in Indiana, a prospect that Lincoln, too, feared.[46] And in the District of Columbia, James H. Veitch and Frank Reading were both sentenced to five years of hard labor after having been convicted of treasonous speech made as the Confederate army advanced on the Capital during the Battle of Fort Stevens. [47] The military commissions thus reached well beyond the Confederacy and the rest of the theater of war.

The punishments doled out to civilians expressing sympathy for the Confederacy emanated from a belief that any form of criticism could undermine the power and stability of the Union. As one writer explained in the *Cincinnati Commercial*, "to disaffect the people is to paralyze the Government."[48] As such, it followed that "all denunciation of the President, his measures and his motives" were "fatal" to the Republic as they risked "destroy(ing) public confidence in the Government" and, in so doing, offered "direct countenance, aid and comfort to treason and traitors."[49] Even if the principle expressed in the *Cincinnati Commercial* were to be accepted, it would not necessarily result in the conclusion that prosecutions by military commissions were the required solution. Indeed, the natural assumption might have been that civilian courts would conduct prosecutions of defendants if the accused were not enemies or residents of an enemy territory. By prosecuting Missourians in the commissions, Lincoln's government alienated these civilians from

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[42] Neely, *Fate of Liberty*, p. 168. See footnote 40.
[43] *U.S. v. Nathan Barnard*, folder nn126, RG 2523.
[44] *U.S. v. Jacob Brisbine, folder* ll449, RG 707.
[45] Stephen E. Towne, "Worse than Vallandigham: Governor Oliver P. Morton, Lambdin P. Milligan, and the Military Arrest and Trial of Indiana State Senator Alexander J. Douglas During the Civil War," *Indiana Magazine of History* 106, no. 1 (2010), 32, and *U.S. v. Alexander J. Douglas*, folder 11449, RG 705.
[46] Towne, "Worse than Vallandigham," p. 32.
[47] *U.S. v. James H. Veitch*, folder nn2216, RG 3176, *U.S. v. Frank Reading*, folders nn2277 and nn2273, RG 3193, and Fritz Hahn, "When the Civil War came to Washington: Reliving the Battle of Fort Stevens," *The Washington Post*, July 10, 2014, https://www.washingtonpost.com/goingoutguide/when-the-civil-war-came-to-washington-reliving-the-battle-of-fort-stevens/2014/07/10/86aa5b94-02f1-11e4-8fd0-3a663dfa68ac_story.html.
[48] Curtis, "Anti-War Speech," p. 119
[49] Curtis, "Anti-War Speech," p. 119.

procedural rights granted to them by the Bill of Rights, instead placing them alongside the likes of secessionists.

The right to a civilian jury trial was nonexistent in a military commission. In the place of a jury of one's peers, comprising local citizenry, a panel in a military commission consisted of officers from anywhere in the U.S.[50] Additionally, military commissions did not abide by the unanimous verdict requirement for conviction in civilian courts; instead, military commissions could convict with a majority vote in non-death penalty cases and with a two-thirds majority for capital cases.[51] While the denial of procedural rights associated with civilian courts stood on firmer ground in the trials of Southern secessionists, given the lack of alternative legal forums in occupied territories which abided by the historical principle set in the Mexican-American War, no such restrictions applied in Union territories in which civilian courts were functioning. This issue would later be addressed and deemed unconstitutional in the 1866 *Milligan* ruling. However, for the duration of the Civil War, civilians tried by military commissions in loyal states were treated the same as civilians from disloyal states. With all criticism of the government deemed treasonous, the very act of being tried for disloyal speech equated civilians in states loyal to the Union with Southern secessionists. At the very least, this could ruin an individual's reputation, and, in the worst-case scenarios, when defendants were found guilty, it could lead to extraordinarily severe punishments.

While the process of trying civilians from states loyal to the Union deprived them of ordinary procedural rights, placing them on similar ground as Southern secessionists, the commissions' use of exile as a punishment for disloyal speech marked, in certain cases, a literal removal of those convicted from the Union. This fate befell Henry Clark, who made a public speech at a courthouse in Rolla, Missouri, declaring that the Confederacy should be established in Missouri and cursing Abraham Lincoln.[52] Bettie Jackson, one of the few convicted women to appear in the commissions trial records, was also sentenced to banishment from Missouri after declaring that the bushwhackers, pro-Confederate guerillas, were her friends and she would happily feed them.[53] Banishment to the Confederacy not only occurred from loyal states but also from Union-occupied territories, as seen in the case of Charles H. Foster, who was exiled from North Carolina in April 1863 after proclaiming he would be "the ruin of General (John G.) Foster," the commander of the Department of North Carolina.[54] Not only would speech made at a political rally place an individual in danger of being arrested and banished by a military commission, as was the case with Vallandigham and Douglas, but

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[50] William Rehnquist, "Civil Liberty and the Civil War: The Indianapolis Treason Trials," *Indiana Law Journal* 72, Issue 4 , no. 1 (1997), p. 931.
[51] Rehnquist, "Civil Liberty and the Civil War," p. 931.
[52] *U.S. v. Henry Clark*, folder nn1916, RG 3034.
[53] *U.S. v. Bettie Jackson*, folders ll1229 and ll1228, RG 3815.
[54] *U.S. v. Charles H. Foster*, folder kk859, RG 190.

signaling support for politicians who had criticized the Union could also lead to exile. Sterling King, a civilian in Cincinnati, was charged with disloyalty and sentenced to six months of hard labor followed by banishment to the South for speaking about the Vallandigham trial.[55]

The most famous arrest and trial of a civilian during the Civil War,[56] that of Clement L. Vallandigham, elucidates the extent to which the military commissions operated as political bodies rather than impartial legal forums when hearing speech cases. Vallandigham's trial in an Ohio military commission for charges connected to a speech he gave at a Democrat political rally finished the day after it began. The charges were as follows:

> Publicly expressing, in violation of General Orders No. 38, from Headquarters Department of the Ohio, sympathy for those in arms against the Government of the United States, and declaring disloyal sentiments and opinions, with the object and purpose of weakening the power of the Government in its efforts to suppress an unlawful rebellion.[57]

The commission reviewed evidence to support the charge, citing statements from Vallandigham describing the war as "a war for the purpose of crushing out liberty and erecting a despotism," an attempt to secure the "freedom of the blacks and the enslavement of the whites," and that "peace might have been honorably obtained by listening to the proposed intermediation of France."[58] As one judge who came to defend Vallandigham wrote, while these were inflammatory comments, Vallandigham did not encourage unlawful resistance or "aid, comfort, and encourage those in arms against the Government," as the charges against him stated.[59] Rather, as was noted by Captain John A. Means, a witness for the prosecution, Vallandigham entreated his listeners to defeat the Lincoln administration at the ballot box, concluding that "resistance to military or civil law ... was not needed."[60] Newspaper accounts of Vallandigham's speech from the Republican *Cincinnati Commercial* support this characterization of events, noting that he "stopped short" of encouraging rebellion and instead "talked about 'obeying the laws' and 'peaceable remedies.'"[61] Vallandigham was assuredly an anti-war critic of the Lincoln administration. However, as the trial records reveal, even during the speech that resulted in his arrest, Vallandigham expressly encouraged his listeners to use political means within the bounds of legal action, such as voting, to achieve their objectives and win power. He did not encourage insurrection or signal support for the Confederacy. It is hard, given these facts, to conclude that he sought the defeat of the Union. In fact, as his decision to run for Governor

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[55] *U.S. v. Sterling King*, folder nn 3, RG 2497.
[56] Neely, *Fate of Liberty*, p. 65.
[57] Curtis, "Anti-War Speech," p. 121.
[58] Curtis, "Anti-War Speech," p. 122.
[59] Curtis, "Anti-War Speech," p. 122.
[60] Curtis, "Anti-War Speech," p. 123.
[61] Curtis, "Anti-War Speech," p. 124.

and the contents of his speech reveal, Vallandigham believed in pursuing change through political means within the Union rather than resistance outside the Union as a supporter of the Confederacy. However, by arresting him for disloyal speech and trying him in a military commission, the government had already begun to treat him legally like a Southern secessionist merely based on his oratory, not his actions. That fact would be clarified in the commission's sentence.

Vallandigham was initially sentenced by the military commissions on 16 May 1863 to confinement until the end of the war before Lincoln changed his punishment.[62] While the arrest was supported by Lincoln at first, with the President wiring General Burnside to convey as much after reading about it in the newspaper, Lincoln changed his position after the arrest turned Vallandigham into a "hero" for Lincoln's Democrat critics.[63] Out of fear that Vallandigham would become a martyr, Lincoln ordered Vallandigham be sent beyond U.S. lines and banished to the Confederacy.[64] This was not a novel punishment but one already used for those deemed traitors. Banishment formalized their separation from the Union, initiated by their arrests, and legally established through the commissions' process. From an arrest emanating from a speech given at a political rally to a sentence altered by the political influence of the President, Vallandigham's case is one of several instances where the commissions treated speech criticizing the government as an act of betrayal in which an individual could be potentially subject to removal to the Confederacy. These cases, regardless of their infrequency, illuminate how politics shaped the Civil War commissions and their determinations and were themselves political.

[62] Clement L. Vallandigham, "Military Commissions Database," case mm151, R1529.
[63] Curtis, "Anti-War Speech," p. 122, for Lincoln's wire to General Burnside, and Towne, "Worse than Vallandigham," p. 22, for a discussion about the impact of the arrest on Vallandigham's support among Lincoln critics.
[64] Curtis, "Anti-War Speech," p. 131.