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of law was reasonable. In *Yates v. United States*, Yates was charged with throwing undersized fish overboard to prevent the government from seizing them, falsely stating that all the undersized fish measured at sea were aboard and violating the Sarbanes-Oxley Act by destroying a "tangible object" with the intent to obstruct the investigation. Estrada said that the Supreme Court had tried to bury the case, and Justice Scalia asked if there were any adults at the Justice Department. Following the conference, on February 26, the Supreme Court reversed Yates' conviction, holding that fish were not "tangible objects" under Sarbanes-Oxley.

Katyal provided insight into two First Amendment cases undecided at the time. In *Elonis v. United States* an estranged husband was convicted of posting rap lyrics about killing his ex-wife and an FBI agent who had visited him at home. He was charged with transmission of a communication containing threats to injure a person, was convicted, and the Third Circuit affirmed, holding that 18 U.S.C. § 875(c) incorporates a "reasonable person" standard and does not require proof of subjective intent. *Reed v. Town of Gilbert* involves a town ordinance regulating signs. Petitioner The Good News Community Church's sign directing people to its church services violated the ordinance, and the question before the Court is whether the town's lack of discriminatory motive and content-neutral municipal sign ordinance comported with the First Amendment.

Estrada talked about *King v. Burwell*, the case challenging federal tax-credit subsidies for health insurance paid to individuals purchasing health care from exchanges established by the federal government. The language of the statute provides for the tax credit to be paid to individuals enrolled in an exchange established by a state. According to Estrada, the goal of the lawsuits is to bring down the Affordable Care Act. The primary issue is whether a federal exchange is an exchange set up by a state. Katyal described the case as a real fight between statutory purists and the policy people looking at the real purpose of the statute.

Finally, Katyal and Estrada examined the same sex marriage cases. Katyal noted that the issue has moved very fast and the Court will consider four cases from the Sixth Circuit. The Supreme Court and other courts have been moving steadily in one direction and now will have to decide whether, under the Fourteenth Amendment, states have to issue marriage licenses to two people of the same sex and whether the Fourth Amendment requires a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out of state. In connection with the refusal of the Court to stay the federal judge's order to Alabama to issue marriage licenses to same sex couples, Justice Clarence Thomas dissented and said that the Court had already made up its mind.

Legal History

The Trials of Clement Vallandigham

By C. Evan Stewart

Clement Vallandigham is a figure lost to history. Even to many American historians, he rates – at most – a footnote. But Vallandigham was an important political figure during the Civil War era (albeit not in a positive vein), and his trials during that time period provide us with important (and interesting) lessons.

His Early Political Career

Born and raised in Ohio, Vallandigham briefly practiced law in Dayton before being elected to the Ohio legislature in 1845. Losing races for a variety of elective posts thereafter, he tried again in 1856, running for Congress, but he was narrowly defeated. Claiming illegal voting, Vallandigham challenged the result before the House of Representatives and was successful (he was seated on the penultimate day of the congressional term). Vallandigham was re-elected in

both 1858 and 1860. In that latter year, the Ohio congressman also labored hard to elect Stephen Douglas to the presidency, believing that Douglas's doctrine of "popular sovereignty" was the only way out of the growing sectional conflict over the expansion of slavery. Indeed, he prophesied that if the Democratic Party could not unite behind and elect Douglas, "the result will be the disruption of the Union, and one of the bloodiest civil wars on record, the magnitude of which no man can estimate."

After Lincoln's election, Vallandigham made various attempts to find ways to prevent what he had prophesied. For example, he traveled to Richmond to urge Virginians not to follow South Carolina out of the Union. Later, in February 1861, he gave a speech in the House of Representatives entitled "The Great American Revolution"; in it he blamed the "belligerent" Republican Party for the sectional crisis and proposed three Constitutional amendments as a means to avoid civil war: a 13th amendment that would divide the country into four sections – North, South, West, and Pacific (a majority of the electorate from each section would be required to elect the President); a 14th amendment that would address the issue of secession (no state could secede unless all of the states in its geographical section approved); and a 15th amendment that would guarantee equal rights to all citizens in the territories (thereby authorizing popular sovereignty and enabling slave owners to bring their "property" anywhere they chose to do so). Those proposals garnered Vallandigham a lot of publicity, most of it highly negative (the proposals were "pure and simple treason"; he was "the biggest fool in America"; perhaps he believed "the hair of the dog would cure his bite"; etc.). With his (and others') proposals for compromise proving unworkable as the polarized debate became even more hardened, Lincoln was inaugurated as President on March 4, 1861.

After the firing upon Fort Sumter, Douglas pledged his support to his long term rival, Lincoln, and urged Northern Democrats to follow his lead: "There are but two parties, the party of patriots and the party of traitors. We belong to the first." Shortly thereafter, Douglas was felled by

Engraved portrait of Clement Vallandigham by Henry Howe, courtesy of the Ohio History Connection.

typhoid and he died on June 3, 1861. Vallandigham did not wait for his political patron to die, however, before parting ways.

From his home in Dayton (Congress was not in session), Vallandigham publicly blamed the war on Lincoln and opposed the North's attempting to coerce the seceding states to rejoin the Union by military force: "It is too late for anything except peaceful separation." These well circulated sentiments were quickly branded as "dastardly treason," and Vallandigham was soon the most hated member of Congress. Not dissuaded, when Congress was back in session by the summer of 1861, Vallandigham introduced seven resolutions in the House, seeking to censure Lincoln for a host of "unconstitutional acts." They went nowhere. Another resolution, seeking a "Convention of the States" at which "all controversies" would be addressed, also went nowhere. By now, many subscribed to the view of one of Vallandigham's former, close friends: "He is more than a Judas; he is a damned traitor!"

Vallandigham, however, thought he was right and refused to budge. And when the second session of the 37th Congress convened in December 1861, he put his foot down on the pedal.

Initially, he tried to make political hay by criticizing Lincoln's defusing of a foreign policy crisis with England (done to discourage England from recognizing the Confederacy as a legitimate nation state under international law). Then, he proposed legislation to arrest and imprison Lincoln if the President were to continue to arbitrarily arrest people considered to be hurting the war effort. Warning that "[w]e are in the throes of revolution," Vallandigham also fought various efforts aimed at the emancipation of slaves and the abolition of slavery.

Leader of the Copperheads

Although viciously attacked by many in Congress (around this time the term "Copperhead" came into the political lexicon; it was used against Vallandigham and his fellow peace Democrats; it is not only a snake in the grass, but a poisonous one to boot), Dayton's congressman lined up 35 fellow Democratic representatives behind his pro-peace, anti-administration screed and he wrote to ex-President Franklin Pierce that he believed his efforts would pay off at the polls in 1862.

Unfortunately for Vallandigham two things made his own prospects for re-election in that year not optimal. First, the Ohio legislature (dominated by Republicans) re-drew his district, adding a large swatch of Republican votes (and he had won in 1860 by only 134 votes). Second, his Republican opponent was Robert Schenck, a Union general wounded at Second Bull Run whom Lincoln himself had personally recruited to run against the hated Copperhead. The incumbent fought as best he could, whipping up a virulent, race-baiting vision: "The Constitution as it is, the Union as it was, and the N[***] where they are." But it was not enough. In an election year where the Democratic Party made strong gains across the North, Vallandigham went down to defeat by more than 600 votes.

The Republicans, with little else to boast, rejoiced in his electoral downfall:

> ... that pimp of Jeff. Davis and standing disgrace to his State, Clem Vallandigham, is laid out cold and stark in the embrace of political death.... He is dead, dead, dead – and a loyal people will bury him so deep in the mire of his own infamy, that the stench from his putrid carcass will never offend the nostrils of good men, nor the recollection of his treason and perfidy tarnish the fair name of the State he has long misrepresented and dishonored.

But Vallandigham, believing it was only gerrymandering that defeated him, was unbowed. In fact, he was emboldened by the Democrats' general electoral successes, and undertook something of a victory lap of speaking engagements before Northern, war-weary audiences. This experience would soon lead him to a constitutional confrontation that ultimately the U.S. Supreme Court would have to pass on.

With his congressional career over, Vallandigham turned his sights on the Ohio governor's seat. Facing opposition from within his party, he devised a somewhat unusual strategy: to

become a martyr to the war effort. Major General Ambrose Burnside, the War Department's commander of the Department of Ohio, had issued General Orders, No. 38, on April 13, 1863; that document (with a supplemental order issued a week later) boldly declared that anyone "declaring sympathies for the enemy" would be arrested, tried as a spy or traitor by a military tribunal, and if convicted put to death. On May 1, 1863, Vallandigham, speaking for almost two hours before a large audience assembled to celebrate the democracy of Knox County (and knowing Burnside's agents were present and taking detailed notes), not only directly attacked Burnside and his attempts to stifle free speech, but also decried "King Lincoln" and urged his listeners to use the "ballot box" to dethrone him. Four days later, at two a.m., Vallandigham was arrested (forcibly) at his Dayton home, leaving behind his "sobbing, hysterical wife."

A Military Trial

To his supporters, Vallandigham was indeed a martyr, falsely "kidnapped" by "cowardly, scoundrelly abolitionists." And a number of them rioted and burned down the *Dayton Journal*, which was the local Republican paper. Nonetheless, Burnside went ahead with a military trial on May 7 before eight Union officers. With Vallandigham protesting the authority of the tribunal and declining to have counsel represent him, the trial went forward and the specific charges were laid out against him; they included:

- he had called the conflict "a wicked, cruel, and unnecessary war";
- he had called the conflict "a war not being waged for the preservation of the Union";
- he had called the conflict "a war for the purpose of crushing out liberty and erecting a despotism";
- he had called the conflict "a war for the freedom of the blacks, and the enslavement of the whites";
- he had called General Orders, No. 38 "a base usurpation of arbitrary authority," urging his listeners to disobey the directive;
- he had vowed "to do what he could to defeat the attempts now being made to build up a monarchy upon the ruins of our free government."

Asked how he pleaded to these charges, Vallandigham tried to filibuster; the presiding officer cut him off and entered a "Not Guilty" plea.

After a brisk two day trial, the inevitable guilty verdict was rendered. But what to do with the treasonous, former congressman? Rejecting execution, the penalty was determined that he be "placed in dire confinement in some fortress of the United States, … there to be kept during the [duration] of the war."

On May 11, former Ohio Senator George Pugh moved for a writ of *habeas corpus* on Vallandigham's behalf in the U.S. District Court for the Southern District of Ohio. Judge Humphrey Leavitt denied the motion; basically ignoring Chief Justice Taney's decision in *Ex Parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (sitting as a federal circuit judge, Taney held that only Congress could suspend *habeas corpus*), Leavitt ruled that the arrest and trial were validly conducted pursuant to the President's authority as commander-in-chief.

Exile

Although Burnside swiftly chose a suitable prison (Fort Warren) for Vallandigham, the political heat this brou-ha-ha generated caused Lincoln to intervene. The President, who considered the Copperhead leader to be a "wily agitator" (but, who also, in the words of his Secretary of the Navy, "regret[ted] what ha[d] been done" by Burnside), came up with an inspired thought: he ordered Vallandigham out of the Union and (with safe passage) deported him into the hands of the Confederate army.

Not surprisingly, the Southern states did not want Vallandigham (he publicly declared himself "a prisoner of war"); and after he bounced back and forth between a number of Dixie states, the Copperhead was allowed to board a ship that evaded the Union blockade and made its way to Bermuda. From there, Vallandigham was able to get to

Canada.

While on his odyssey, Vallandigham's machinations seem to pay off. On June 11, the delegates to the Ohio Democratic State Convention voted 411 to 11 to nominate the former congressman to run for governor. Once he reached Canada, Vallandigham formally accepted his party's nomination. He campaigned *in abstentia*, with prominent Ohio Democrats trekking instead to visit the candidate in Canada.

On October 13, 1863, the citizens of Ohio went to the polls. Vallandigham's opponent was John Brough, a pro-war Democrat who ran on the Republican sponsored Union ticket. Vallandigham lost by a landslide – 288,374 to 187,492. In his diary, Secretary of the Navy Gideon Welles reported on Lincoln's reaction the following day:

> I stopped in to see and congratulate the President, who is in good spirits and greatly relieved from the depression of yesterday. He told me he had more anxiety in regards to the election results of yesterday than he had in 1860 when he was chosen. He could not, he said, have believed four years ago, that one genuine American would, or could be induced to vote for such a man as Vallandigham, yet he has been made the candidate of a large party – their representative man, and has received a vote that is a discredit to the country. The President showed a great deal of emotion as he dwelt on this subject, and his regrets were sincere.

One important lesson Lincoln and his Republican Party operatives learned from this experience for 1864 was the importance of the soldier vote, which broke approximately 95 percent for Brough. The governor-elect subsequently visited Lincoln at the White House and expressed regret he had not won by a greater margin. Lincoln later remarked that he was reminded of a "man who had been greatly annoyed by an ugly dog [and] took a club and knocked the dog on the head and killed him; but he still continued to whack the animal, when a passer-by cried out to him, 'Why, what are you about, man? Don't you see the dog is dead? Where is the use of beating him now?' 'Yes,' replied the man, whacking away at the dog, 'I know he is dead, but I wanted to teach the mean dog that there is *punishment after death*.' Poor Val was dead before the election, but Brough wanted to keep on whacking him, as the man did the dog, after death."

Photo of Clement Vallandigham attributed to Mathew B. Brady. Collection of the U.S. House of Representatives.

In the meantime, Vallandigham's legal challenge to his prosecution continued, with ex-senator Pugh applying for a writ of certiorari to the U.S. Supreme Court. On January 22, 1864, the Court heard argument on the application (although Chief Justice Taney was too ill to attend). Less than a month later, on February 15, 1864, a unanimous Court (per Justice James Wayne) re-

jected the arguments put forward by Vallandigham's counsel (*Ex Parte Vallandigham*, 68 U.S. (1 Wal.) 243 (1864)). The Court determined that it did not have the power to "originate a writ of certiorari to review ... the proceedings of a military commission." Because it ruled on jurisdictional grounds, the Court took no position on whether Vallandigham's arrest, trial, and sentence were illegal. No mention was made of Chief Justice Taney's prior *Merryman* decision; in fact, Taney was listed as being in favor of the outcome (although he confided to friends that he was despondent over the future of the Court and the Constitution). Public opinion on the Court's ruling was predictably mixed: the Republicans were pleased, the Copperheads were not.

The 1864 Election

Undeterred, Vallandigham was determined to play a key role in the 1864 presidential race, hoping to defeat Lincoln and put in his place a successor committed to peace. To assist him, his Ohio friends snuck him across the border and back into Ohio, where he attended the Third District Democracy's Convention on June 15, 1864; he was chosen as a delegate to the party's National Convention in Chicago. The Lincoln Administration learned of the Copperhead's return to the United States and his growing political visibility. Concerned that any action by the government would only help to promote Vallandigham's popularity, Lincoln decided to do nothing. That hands-off policy allowed Vallandigham to travel to Chicago in August and play a critical role in the drafting and adoption of a "peace plank" in his party's platform; it proclaimed that the war was a failure and "immediate efforts [must] be made for a cessation of hostilities, with a view to an ultimate convention of the States, or other peaceable means, to the end that, at the earliest practicable moment." When the party's nominee, General George McClellan formally accepted the nomination, however, he repudiated the "peace plank": "I could not look in the face of my gallant comrades of the army and navy, who have survived so many bloody battles, and tell them that their labors and the sacrifices of so many of our slain and wounded brethren had been in vain; that we had abandoned that Union for which we have so often periled our lives."

This exposed schism between the two wings of the Democratic Party, together with an improving economy and a surge in Union victories on the battlefield (*e.g.*, Atlanta), took away any chance of McClellan prevailing. In November, Lincoln won re-election easily.

After the War

With the North victorious six months later, one would think that Vallandigham would have finally packed it in and retreated from public life with dispatch. But he did not. He publicly (and repeatedly) advocated an easy peace with the South, with no vindictive acts to be taken against individuals; he also argued against the emancipated peoples receiving full political and social rights. In addition, Vallandigham, with visions of political rehabilitation, plotted to become one of Ohio's U.S. Senators; but those efforts did not work out as he had hoped. He was drafted in 1868 to run against Robert Schenck again for his old congressional seat. "Waving the bloody shirt," the Republicans made the contest a choice between patriotism and treason. Patriotism won, although Vallandigham did run ahead of the national ticket.

He still had politics in his veins and had not given up hope of someday getting to the Senate, but Vallandigham had to earn a living. In December 1869, he started a law firm with Daniel Haynes, a prominent local jurist. In short order, the firm prospered.

In 1871, Vallandigham took over the defense of a man charged with murder. He was attempting to prove that the victim had in fact accidentally shot himself, and during a break in the trial Vallandigham showed his colleagues how he would demonstrate this before the jury. Unfortunately, he chose to pick up a loaded pistol. Pressing it close to his body and pulling the trigger, Vallandigham cried out: "My God, I've shot myself!" Twelve hours later, he died; he was 50 years old.

Postscript

The definitive biography of Vallandigham is by Frank L. Kle-

ment, *The Limits of Dissent: Clement Vallandigham and the Civil War* (Kentucky 1970). The best single volume biography of Lincoln is David H. Donald's *Lincoln* (Simon & Schuster 1995); the best multi-volume biography of Lincoln is Michael Burlingame's *Abraham Lincoln: A Life* (John Hopkins 2008). The seminal work on the Democratic Party during this period in American History is by Joel H. Silbey, *A Respectable Minority: The Democratic Party in the Civil War Era, 1860-1868* (W.W. Norton 1977).

Trademark Law

U.S. Supreme Court's Trademark Trial and Appeal Board Ruling

By Jason Jones

The U.S. Supreme Court recently held in *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 135 S. Ct. 1293 (2015), that a decision of the Trademark Trial and Appeal Board of the U.S. Patent and Trademark Office ("TTAB") on the issue of likelihood of confusion may preclude a federal court from reaching a contrary conclusion on the issue in a subsequent infringement action. But the key word in the previous sentence is *may* – not must – and the Supreme Court went out of its way to explain that "for a great many registration decisions" from the TTAB, "issue preclusion obviously will not apply."

Although the decision has set the trademark bar abuzz, it should not be news to practitioners in the Second Circuit, since the Second Circuit has long recognized that in certain circumstances a decision by the TTAB could have preclusive effect in later federal court litigation.

The Case

The facts of the *B&B Hardware* case are relatively straightforward. The plaintiff, B&B Hardware, owned a federal registration for the mark SEALTIGHT for metal fasteners used in the aerospace industry. Meanwhile, the defendant, Hargis Industries, used the mark SEALTITE for metal fasteners in the construction industry and applied for federal registration of SEALTITE. B&B opposed registration of SEALTITE in the TTAB and, after trial, the TTAB concluded that SEALTITE was confusingly similar to SEALTIGHT and could not be registered. Hargis did not exercise its statutory right to appeal the TTAB's decision to the U.S. Court of Appeals for the Federal Circuit or a federal district court.

B&B also sued Hargis for infringement in federal district court, claiming that Hargis' use of SEALTITE infringed B&B's rights in SEALTIGHT. In light of the TTAB's finding of a likelihood of confusion, B&B argued to the district court that the TTAB's decision precluded Hargis from arguing there was no likelihood of confusion. The district court, however, refused to give preclusive effect to the TTAB's determination and, ultimately, a jury sided with Hargis, finding no likelihood of confusion.

B&B appealed to the Eighth Circuit, but it affirmed, holding that because the TTAB looks to different factors than do federal courts in making likelihood of confusion determinations, a federal court should never give preclusive effect to a TTAB decision on the likelihood of confusion issue. The Supreme Court granted *certiorari* and reversed.

The Court's Decision

The Supreme Court analyzed whether the TTAB actually applies the same likelihood of confusion standard as district courts since the TTAB "typically analyzes the marks, goods and channels of trade only as set forth in the application and the opposer's registration, regardless of whether the actual usage of the marks by the parties differs." This was a closely watched facet of the case, as it is well-established that the TTAB does not typically look to