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HORACE BINNEY AND THE WRIT OF HABEAS CORPUS: A NEW VIEW

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ABSTRACT

The constitutionality of President Abraham Lincoln's suspension the writ of habeas corpus during the American Civil War has been widely discussed and debated throughout Civil War history. In this history, the defense of Lincoln's actions by one prominent Philadelphia lawyer, Horace Binney, usually gets only a brief mention. Somewhere in their quick overviews of Horace Binney's habeas corpus argument, however, historians have ignored important information. For one thing, Binney's political and personal background, which has not been widely discussed, lays a noteworthy foundation for his habeas corpus argument. Additionally, Binney's argument was provoking enough that it elicited dozens of responses from his political opponents, Democratic lawyers. These Democratic responses have been more or less neglected in historiography. This project aims not only to delve deeper into why Binney argued in defense of the president the way that he did, but also to analyze the responses from his Democratic critics. Did these lawyers write in order to promote his broader political agenda? Was Horace Binney advocating for the suspension of the writ of habeas corpus as an authoritarian move as some historians have suggested? Is it fair to place all of the Democratic critics of Binney into one overarching, conservative, strict constitutionalist category? By examining and analyzing Binney's argument along with the responses of his critics with party alignment in mind, a new perspective on the habeas corpus debate, and on constitutional debates of the Civil War in general, emerges.

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INTRODUCTION: The Constitution During War

President Abraham Lincoln's relationship to and use of the United States Constitution during the American Civil War have been widely discussed in American history. Lincoln is known to have made a number of controversial constitutional decisions throughout his time in office including the implementation of conscription, the suspension of the writ of habeas corpus, the Emancipation Proclamation, and the passing of the Thirteenth Amendment. Lincoln justified each of these actions either by explaining that a broad view of the Constitution showed that they were legal, or that in the name of protecting the union, they were necessary. In considering these arguments, the question arises of how the Constitution should be viewed during war. Is it as the famous Latin phrase "*inter arma silent leges*" suggests, that in times of war, the law falls silent? Or must the Constitution be upheld no matter the cost?

In examining the constitutional debates surrounding Lincoln's decisions during the Civil War, it is compelling to attempt to categorize thinkers into one side of the argument or the other. Historian Brian Dirck describes the two sides of the debate by using the terms "brittle" and "elastic." "Those Americans who approached the war from the perspective of a James Buchanan or a Roger Taney saw the Constitution as a strong but brittle instrument. Bend its words too far by reading into their meaning powers never intended by the Framers, and their Constitution would break." On the other hand, Dirck uses elasticity to describe the way Lincoln and his supporters often viewed and used the Constitution. "To find the legal means necessary for defending ... the Union, Lincoln needed a Constitution that was adjustable to the rapidly changing circumstances of a

massive civil war. He needed elasticity.”¹ Deciding whether a person had a brittle constitutional view or an elastic constitutional view, however, is not always so black and white. There is a lot of gray area in between. This paper aims to highlight the idea that the distinction is not always so clear-cut by focusing on the early debate surrounding Lincoln’s suspension of the writ of habeas corpus.

¹ Brian R. Dirck, *Lincoln and the Constitution* (Carbondale and Edwardsville: Southern Illinois University Press, 2012) 72-73.

CHAPTER 1: Suspension of the Writ of Habeas Corpus and Horace Binney

Habeas corpus is a writ requiring a person under arrest to be brought before a judge in order to secure his release, unless lawful grounds are shown for his detention. The United States Constitution mentions the writ of habeas corpus one time in Article one, section nine, where it is written that: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

In April of 1861, during the American Civil War, Republican President Abraham Lincoln suspended the writ of habeas corpus in Maryland, as pro-southern mobs increasingly threatened the nation's capital and cut off its reinforcement with raids. The suspension of the writ of habeas corpus meant that if arrested, a prisoner could be held without knowing the reason for his detainment, and without being afforded a trial. Once the public got wind of this controversial decision, debates about its constitutionality erupted. Though it had been widely assumed that the power to suspend the writ of habeas corpus belonged to Congress, and not the President, the article in the Constitution that contained the writ did not unambiguously delegate the power. In 1863 Congress passed the Habeas Corpus Suspension Act authorizing the president to suspend the writ of habeas corpus; however, this act did not slow the debate about the constitutionality of the suspension.

The Chief Justice of the United States Supreme Court at the time that Lincoln first suspended the writ, Roger B. Taney, was a southern sympathizer and a known Lincoln opponent. When the chance arose for Taney to hear a case regarding the suspension of

the writ of habeas corpus he readily jumped at the opportunity. The case materialized when John Merryman, who was allegedly participating in rebel activity, was arrested and held at Fort McHenry in Baltimore, Maryland. Merryman's lawyers appealed to Taney at once to issue a writ of habeas corpus. Taney issued the writ but General George Cadwallader, Union commander of the fort, declined to respond, asserting that he was authorized by the President to suspend the writ of habeas corpus for public safety. When Taney heard this response, he sent a marshal to bring Cadwallader to court, but the marshal was denied entry to the fort.²

Though the case was heard in the circuit court of Maryland before one justice, and not in the United States Supreme Court, *Ex parte Merryman* provided Taney with the opportunity to write an opinion on Lincoln's suspension of the writ of habeas corpus. That opinion ardently denounced Lincoln's suspension of the writ of habeas corpus as unconstitutional. Taney's argument, put simply, was that the Constitution intended the suspension of the writ of habeas corpus to be a legislative power, and that Lincoln, by taking it upon himself to suspend the writ and order military officials to carry out arrests, was abusing the powers afforded to him by the Constitution.

Taney's argument in his Merryman opinion was composed of four major points. The first was that the wording and placement of the habeas corpus clause in Article one of the Constitution, under legislative restrictions, made suspension a legislative power. Next, Taney argued that the Framers of the Constitution clearly meant for the executive branch of government to be weak, and therefore would not have granted the president such an important power as the power to suspend the writ of habeas corpus. Third, Taney

² J. G. Randall, *Constitutional Problems Under Lincoln* (Gloucester: Peter Smith, 1963) 161.

referred to what he called the “English Analogy,” where he maintained that the American Constitution was derived from British law, in which parliament, English legislature, held the power to suspend the writ. The Framers of the Constitution, according to Taney, would not have given the president more powers than the English king. Finally, Taney used opinions and statements from prominent American and British politicians, lawyers, and judges to prove that the power to suspend the writ of habeas corpus lay with the legislative branch of government.³

Taney’s *Ex parte Merryman* opinion left the Lincoln administration to justify the validity of President Lincoln’s decision to suspend the writ of habeas corpus. Attorney General Edward Bates developed arguments on behalf of the executive power. Francis Lieber, a political scientist with whom the Attorney General had conferred, deemed these arguments, along with Lincoln’s own defense of the policy in his message to the special session of Congress on July 4, 1861, to be inadequate.⁴

Lincoln’s defense of his suspension of the writ of habeas corpus in 1861 was extremely brief. The President first addressed those who were questioning the “legality and propriety” of what was being done under the suspension of the writ. To these people Lincoln explained that every law was being resisted in the south. The Confederate States had broken off from the Union and taken up arms against it, breaking countless laws. “Are all the laws but one to go unexecuted, and the Government itself go to pieces lest that one be violated?” Lincoln asked rhetorically. “Even in such a case, would not the official oath [of the president] be broken if the Government should be overthrown when it

³ Roger B. Taney, *Ex parte Merryman*, 17 Fed. Cas. 144, 1861

⁴ Frank Freidel, *Union Pamphlets of the Civil War* (Cambridge: Belknap Press of Harvard University Press, 1967) 199.

was believed that disregarding the single law would tend to preserve it?" In other words, if what was being done under the suspension of the writ of habeas corpus *was* illegal, was it not worth it to break that single law to ensure that the rest of the laws were being followed and the government maintained? However, this was not the case, because according to Lincoln, no laws had been violated. Lincoln felt that because the Constitution allowed for the suspension of the writ in cases of rebellion or invasion, and the Union was, in fact, facing a case of rebellion, the suspension of the writ was fully legal.

Next, Lincoln addressed those who believed that the power to suspend the writ of habeas corpus belonged with Congress and not the president. To these skeptics, Lincoln offered only one sentence in defense of the executive:

The Constitution itself is silent as to which or who is to exercise the power; and as the provision was plainly made for a dangerous emergency, it can not be believed the framers of the instrument intended that in every case the danger should run its course until Congress could be called together, the very assembling of which might be prevented, as was intended in this case, by the rebellion.⁵

According to Lincoln, the Framers of the Constitution never could have intended a provision that was to be used in emergency situations, such as the suspension of the writ, to be put in place by a body that is not in session for months at a time and which takes much time and effort to gather.

There are a couple of reasons why political scientist Francis Lieber would have deemed Lincoln's arguments to be inadequate. First, in the time Lincoln expended discussing the suspension of the writ of habeas corpus in this message to Congress, the bulk of the message was spent on presenting a hypothetical situation: If, hypothetically,

⁵ Abraham Lincoln, *Message to Special Session of Congress*, July 4, 1861.

what was being done under the suspension were illegal, would it not be worth it to break one law in order to save the Union? Lincoln posed this question before explaining that it was, however, not illegal, so it did not matter. After this long-winded explanation of a theoretical situation, Lincoln took a mere one sentence to explain why the president, and not the legislature, held the power to suspend the writ of habeas corpus. One of the most widely debated topics at the time was whether Congress or the president had the power to suspend the writ and Lincoln made his argument for the executive in one sentence and without reference to the United States Constitution. According to Lieber, this would not do. Thus, Lieber reached out to Horace Binney, a Philadelphia lawyer with an outstanding reputation.⁶

Horace Binney

In order to understand Horace Binney's defense of the President, it is important to understand his background and political ideals. Horace Binney is most noted in the Civil War historical context for his pamphlets, *The Privilege of the Writ of Habeas Corpus Under the Constitution* parts one two and three, defending the executive power to suspend the privilege of the writ of habeas corpus. Part one of *The Privilege of the Writ of Habeas Corpus Under the Constitution* was published in January of 1862. Whether it was because of the argument's relevance in contemporary political controversy, or because of the way Binney structured it, his pamphlet opened the floodgates of Democratic responses. As response after response piled in, Binney felt the need to reply to his critics.

⁶ Freidel, *Union Pamphlets*, 199.

In turn, he released parts two and three of *The Privilege of the Writ of Habeas Corpus Under the Constitution* in April of 1862 and March of 1865 respectively.

In the brief mentions of Binney's habeas corpus argument in Civil War historiography his background, political beliefs, and constitutional views have been, for the most part, left out. For quite an important and influential man in the Philadelphia scholarly and political circles in the Civil War era, Horace Binney has been essentially overlooked. It is true that important Civil War historians George M. Fredrickson and J. G. Randall did not ignore Binney entirely. However, Fredrickson mentions Binney in a few sentences, depicting him as a dangerously authoritarian Lincoln supporter, and Randall gives a three-page summary of Binney's habeas corpus argument but does not touch upon his political beliefs, his background, or his motivations. Fredrickson's depiction of Horace Binney is somewhat misleading, while Randall's does not quite do Binney's character justice.

Charles Chauncey Binney, Horace Binney's grandson, has been the only person to attempt to write a somewhat biographical work on Binney. *The Life of Horace Binney with Selections from his Letters* was written in 1903 and was mostly comprised of selections from a "partial autobiography" written for Binney's children, along with Binney's personal letters.⁷ Charles Binney paints a picture of his grandfather as an intelligent, scholarly, lawyer who loved his country and his family above anything else. But a deeper analysis of Binney's letters and pamphlets makes it clear that there is more to Binney than has been presented by his grandson or historians.

⁷ Charles Chauncey Binney, *The Life of Horace Binney* (Philadelphia: J. B. Lippincott Company, 1903) vi.

The Life of Horace Binney with Selections from his Letters gives its readers a chronological view of Horace Binney's life. He was born in Philadelphia in 1780 to parents who were devoted to the cause of the American Revolution. As a boy, he studied at a demanding boarding school where he became learned in the Greek classics, and in 1793, at the age of 13, Binney entered Harvard College. At Harvard, Binney was extremely successful as he dedicated most of his time to studying. The class of 1797, of which Binney was a part, was a small class at Harvard composed of some distinguished figures who would go on to become professors, Congressmen, judges, and more.

After graduating second in his Harvard class, Binney moved back to Philadelphia where he studied law under Jared Ingersoll. As a young apprentice, Binney spent much of his time studying as well as attending court, where he claimed to have learned the most valuable information. Through the acquaintances he met during his years studying under Ingersoll, Binney began to solidify his political ideals, and in time he became a prominent member of the Philadelphia bar. After much urging from his lawyer friends, Binney ran for a seat in Congress in 1833. He served only a brief stint in Congress, and according to Charles Chauncey Binney, it is "unlikely that any Congressman ever disliked his life in Washington more heartily than did Mr. Binney."⁸ Later in life, Binney would overlook this chapter of his life completely, claiming that he had never been a politician.⁹

Although during his time in Congress Binney served as a Whig, he regularly made it a point to mention that he was not affiliated with any party. In fact, in a letter to the Union League of Philadelphia in 1863, Binney denounced party spirit altogether. He blamed party for creating a distinction between administration and government that was

⁸ Ibid., 105.

⁹ Ibid., 351.

“disloyal to the Union, the Constitution, and the government.”¹⁰ In other words, by supporting certain administrations and opposing others based on their party affiliation, the public’s attention was being drawn from what they should truly be supporting, which was the government in general.

Though Binney preached loyalty to the Union, the Constitution, and the government, rather than loyalty to a party, he still identified with a specific group of political thinkers. “...I do not assume the name of any living party,” Binney reminded readers in part three of *The Privilege of the Writ of Habeas Corpus*, “but that of the country...”¹¹ The party of the country, in Binney’s eyes, was the Federalist Party. Binney claimed that he was, and always had been a Federalist.¹² “The Federal party was, in his judgment, the one party that was thoroughly faithful to, and conservative of, the Constitution, upholding it in the spirit in which it had been framed and adopted...”¹³

In his brief but important treatment of Horace Binney in his book *The Inner Civil War: Northern Intellectuals and the Crisis of the Union*, historian George M. Fredrickson depicts Binney as a “die-hard Federalist.”¹⁴ While Fredrickson was correct that Binney was a Federalist through and through, the connotation was a negative one. Fredrickson’s mention of Binney appears, appropriately, in the section of the book discussing Lincoln’s suspension of the writ of habeas corpus in 1861. Fredrickson’s interpretation of Binney’s

¹⁰ Horace Binney to the Union League of Philadelphia, Philadelphia, 25 June 1863, in *The Life of Horace Binney*, Charles Chauncey Binney (Philadelphia: J. B. Lippincott Company, 1903), 370–71.

¹¹ Horace Binney, *Part Three of The Privilege of the Writ of Habeas Corpus Under the Constitution* (Philadelphia: C. Sherman & Son, 1865) 59.

¹² C. Binney, *Life of Horace Binney*, 10.

¹³ *Ibid.*, 50.

¹⁴ George M. Fredrickson, *The Inner Civil War: Northern Intellectuals and the Crisis of the Union* (New York: Harper & Row, 1965) 114.

pamphlets defending the President's power to suspend the writ was that "the time of the Alien and Sedition Acts had returned, [and] for Binney it was an occasion for rejoicing."¹⁵ The Alien and Sedition Acts were passed in 1798 under Federalist President John Adams. These acts were used to repress speech critical of the government and authorized the president to imprison or deport aliens considered dangerous to the country in order to "protect" the government.

Fredrickson's understanding of Binney as a celebrator of these repressive acts was misleading. While Binney did sympathize with John Adams, the president who signed the 1798 Alien and Sedition Acts, nothing in his writing suggested that Binney was a supporter of the suppression of free speech or unwarranted arrests and deportations under the Acts. In fact, Binney wrote that Adams was both "weak and dangerous" as president, and often blamed him for the demise of the Federalist Party.¹⁶

Additionally, Fredrickson's assumption that Binney drew any kind of parallel between Adams' Alien and Sedition Acts and the suspension of the writ of habeas corpus by President Lincoln also misrepresented Binney's ideas. Binney did not see the suspension of the writ of habeas corpus as an opportunity for the president to repress any freedoms unnecessarily. In fact, when Lincoln and his administration began to use the suspension of the writ in ways that Binney did not see as within limits of the Constitution, he became fearful of the power.¹⁷ Binney saw the suspension of the writ of habeas corpus as a legitimate power delegated to the president by the Constitution.

¹⁵ Ibid., 77.

¹⁶ C. Binney, *Life of Horace Binney*, 51-53.

¹⁷ Binney, *Part Three of the Privilege of the Writ*, 37.

A question that Fredrickson's review of Binney forces one to consider is whether the Constitution exists to protect personal liberty or to enhance governmental authority, and under which of these two categories did Binney fall? While Binney did uphold a conservative, Federalist view of the Constitution, he was not so much on the side of authority as Fredrickson would have one think. In part two of his habeas corpus pamphlets, Binney stated that "[t]he scope of the Constitution is to protect, defend, and secure the blessings of liberty, universally, and without exception, unless an exception is declared in the instrument."¹⁸ The latter part of this statement, "unless an exception is declared in the instrument," illustrates Binney's strict view of the Constitution. Binney believed that the purpose of the Constitution was to protect liberty *as long as* the words of the Constitution, and the Constitution alone, allowed it. The first part of this statement, however, that "the scope of the Constitution is to protect, defend, and secure the blessings of liberty, universally, and without exception..." demonstrates clearly that Binney felt that the job of the Constitution was to protect liberty. He defended the president's right to suspend the writ of habeas corpus because it was, in his eyes, what was constitutionally correct, not because it was an authoritarian move as Fredrickson's portrayal makes it out to be.

In an 1862 letter to an English correspondent, Sir J.T. Coleridge, Binney wrote:

The limitation of the legislative power under the Constitution (nothing being vested in Congress but what therein granted), the principles asserted in the Declaration of Independence and in the Bills of Rights in the States, the character of the Articles of Confederation, and the Preamble to the Constitution, shew to the *American* mind that Congress would have had no authority from its granted

¹⁸ Horace Binney, *Part Two of The Privilege of the Writ of Habeas Corpus Under the Constitution* (Philadelphia: C. Sherman & Son, 1862) 23.

powers to impair personal liberty discretionally, or its securities by the common law, or by the fundamental principle of every free government, except by *this clause*; and that to leave it out was to leave the government without a power of suspending the privilege of habeas corpus in rebellion or invasion, whatever the public safety might require.¹⁹

If Binney's aim were to heighten the government's authority by defending the president's power to suspend the writ of habeas corpus as Fredrickson suggested, he would not point to the Declaration of Independence – perhaps the principal document for defending personal liberty – in making his case. Additionally, Binney's employment of documents outside of the Constitution in his argument strayed from his usual strict view of the Constitution. This goes to show that Binney was, despite Fredrickson's depiction, capable of some rather liberal views of the Constitution.

Keeping in mind Binney's few tendencies toward viewing the Constitution liberally in terms of its overall purpose, he still maintained the conservative idea that the Constitution alone offered the means to find the Framers' intentions. This was a theme that he employed in his second pamphlet on suspending the writ of habeas corpus. Binney's argument that the president held the power to suspend the writ of habeas corpus relied heavily on the specific words of the Constitution. When his critics suggested that one could look to the state bills of rights and debates in the ratifying conventions to find that the legislative branch of government should hold the power to suspend the writ of habeas corpus, Binney asserted that one need not look at any sources outside the Constitution. It did not matter what had been debated in the state conventions, Binney asserted, it only mattered what the founders wrote and that those words had been ratified. "...[U]ndoubtedly," he explained, "the safer and better course is to derive the

¹⁹ C. Binney, *Life of Horace Binney*, 349.

interpretation from the [habeas corpus] clause itself, which contains the means of its own construction, in connection with the entire body of the Constitution.”²⁰ Binney believed that the Constitution alone held the answers to what the Framers intended not only in terms of the clause containing the writ of habeas corpus, but also of every other clause within the Constitution.

With this understanding of Binney’s view of the United States Constitution as the ultimate authority but also as a protector of liberty, one may begin to grasp just how highly he regarded the document. Binney undoubtedly held the word of the United States Constitution far above that of any other important documents, including state constitutions. It may very well have been this sentiment that led to his deep-seated repugnance for the states rights, pro-slavery, Democratic Party. For a person who claimed no party connection, and who preached loyalty to an administration regardless of its party affiliation, Binney showed an extreme loathing toward the Democrats.²¹

Binney demonstrated his aversion towards the Democrats perhaps most evidently in his words about Democratic Chief Justice Roger Taney. Preceding the suspension of the writ of habeas corpus, *Ex parte Merryman*, or even the Civil War, Binney expressed his thoughts on the Dred Scott decision made by Taney in 1857. In *Dred Scott v. Sandford*, Taney held that African Americans were not American citizens and therefore had no standing to sue in federal court. He denied the power of Congress to prohibit slavery from the western territories, and he affirmed the right of slave owners to bring

²⁰ Ibid., 40.

²¹ Horace Binney to the Union League of Philadelphia, 25 June 1863, in *The Life of Horace Binney*, Charles Chauncey Binney 370–71.

their slaves into the territories, thus refuting the idea of popular sovereignty.²² Binney said that this decision was “a political or party result.”²³ He felt that Taney had made the decision to allow slaves into free territories while still being held as slaves, solely based on his desire to expand the reaches of slavery and southern power.

Prior to the Civil War, Binney said that Taney’s Dred Scott decision would divide the country into “irreconcilable sections,” and in a letter to Francis Lieber in 1862, Binney went so far as to blame the entire Civil War on Taney and his decision in the Dred Scott case.²⁴ Binney’s hatred for Taney and the Democratic Party as a whole undoubtedly played a role in his *Privilege of the Writ of Habeas Corpus Under the Constitution* pamphlets, as part one was originally written in response to Taney’s *Ex parte Merryman* opinion on suspending the writ of habeas corpus.

Not only did Binney’s animosity towards Taney and the Democrats most likely lead him to write his habeas corpus pamphlets, but also it is probable that Binney’s anti-Democratic feelings solidified his anti-slavery views. Besides the fact that Binney already viewed slavery as a moral evil,²⁵ he also saw it as the Democrats’ main driving force in all that they did – including seceding from the Union. Binney felt that the Democrats’ states rights views stemmed from their desire to protect and spread slavery. In his opinion, the Democratic Party had already begun a war with Mexico, seceded from the Union, and entered a war with its own country, all in the name of slavery.²⁶

²² Dred Scott v. Sandford, 60 U.S. 393, 1857.

²³ C. Binney, *Life of Horace Binney*, 299.

²⁴ Ibid.

²⁵ Ibid., 82.

²⁶ Ibid., 363.

Despite Binney's ill feelings toward the Democrats and his anti-slavery sentiments, he showed apparent indifference when it came to Lincoln's Emancipation Proclamation. It seems curious that a man who so passionately defended Lincoln's controversial decision to suspend of the writ of habeas corpus would be so quick to dismiss the Emancipation Proclamation, another one of the President's highly contested decisions. Binney seems to have truly felt that close examination of the words of the Constitution showed that the power to suspend the writ of habeas corpus was an executive power. He did not feel that he needed to justify Lincoln's actions because he saw them as completely constitutional. However, this was not the case with the Emancipation Proclamation.

Incidentally, when the Republicans first suggested emancipation, it did not take them very long to realize the implications it would have politically. Before emancipation, under the three-fifths compromise, three-fifths of the slave population was counted for purposes of apportionment of seats in the House of Representatives. If the slaves were freed, and were to be counted as individuals, the population base in the South would increase significantly, creating a substantial Southern, and therefore Democratic, majority in Congress. This dread was eventually offset in 1868 with the passing of the fourteenth amendment to the Constitution, which granted recently freed slaves their citizenship and expanded civil rights. The initial fear of a Democratic majority, however, was not lost on Binney. In a letter to Francis Lieber in 1865 about African American suffrage, Binney explained that giving the vote to the newly freed slaves meant an immense increase in the population that would be considered for the number of Congressional representatives in

each state.²⁷ It can be supposed, then, that Binney realized what kind of political implications emancipation would have.

In addition to his political apprehension, Binney also questioned the legality of the Emancipation Proclamation. “I do not understand the law of it,” he said about the proclamation, “and do not believe that there is any law for it ...”²⁸ So why did Binney not speak out more vehemently against emancipation? In his letter to the Union League Club in 1863, Binney wrote that “[party] reduces loyalty to the degraded rank of personal favour to personal actors in the government...”²⁹ To Binney, what was important was not supporting the person or party whom one favored most, but supporting the national government in general. In pamphlet three of *The Privilege of the Writ of Habeas Corpus* he quoted this Latin phrase from Dante’s inferno: “Non ragioniam di lor; ma guarda e passa,” which, roughly translated, means, “let us not speak about them, look and pass on.”³⁰ Thus, Binney explained that what he believed to be the appropriate attitude when one did not agree with a decision of the government was essentially to grin and bear it.

So despite Binney’s blatant hesitation about the legality and political implications of the means of the Emancipation Proclamation he kept quiet on the topic because he agreed with the end. In 1826 Binney wrote that the institution of slavery “ought to be regarded as both an evil and a sin...”³¹ Emancipation may not have been completely constitutional, in Binney’s opinion, but more important to him was freedom for all. Clearly, despite his rather strict view of the Constitution, Binney did not have the same

²⁷ Ibid., 383.

²⁸ C. Binney, *Life of Horace Binney*, 362.

²⁹ Ibid., 371.

³⁰ Binney, *Part Three of the Privilege of the Writ*, 59.

³¹ Ibid., 82.

kind of “dogged tenacity”³² as the so-called brittle constitutionalists. Binney was willing to stretch the Constitution slightly in order to ensure liberty.

Looking back now, one must question Fredrickson’s depiction of Binney in *The Inner Civil War* as a “die-hard Federalist,” and a celebrator of the repressive Alien and Sedition Acts. Being a conservative, strict constitutionalist did not confine Binney to an authoritarian view of the Constitution as Fredrickson suggested, rather Binney held quite a liberal view of the Constitution as a whole. In historian Brian Dirck’s book, *Lincoln and the Constitution*, Dirck quotes Lincoln, speaking about emancipation, as saying:

I claim not to have controlled events, but confess plainly that events have controlled me...I was, in my best judgment, driven to the alternative of either surrendering the Union, and with it, the Constitution, or of laying strong hand upon the colored element. I chose the latter.³³

In other words, the pressure that Lincoln felt from the events of the war led him to interpret the Constitution in a way that allowed him to implement the Emancipation Proclamation and suspend the writ of habeas corpus. Lincoln needed the Constitution to be elastic in order to win the war and save the Union, and so that was how he viewed it. Along the same lines, though Binney held somewhat more of a brittle view than an elastic view of the Constitution, his ultimate desire to put an end to slavery kept him from speaking out against Lincoln’s Emancipation Proclamation, and his words about the purpose of the Constitution highlighted his desire to safeguard liberty. All things considered, Binney presents an ideal case to demonstrate just how complicated it can be to try to categorize a person completely into the brittle or elastic side of the constitutional

³² Brian R. Dirck, *Lincoln and the Constitution* (Carbondale and Edwardsville: Southern Illinois University Press, 2012) 73.

³³ Dirck, *Lincoln and the Constitution*, 109.

debates during the Civil War. Here was a man who advocated a somewhat brittle reading of the Constitution, but who allowed for some elasticity when it came to protecting liberty, placing him somewhere in the gray area between these two specific groups.

CHAPTER 2: Binney's Pamphlets: The Privilege of the Writ of Habeas Corpus Under the Constitution

After establishing an understanding of Binney's beliefs, background, and constitutional views, one can better understand his position when writing his three pamphlets, *The Privilege of the Writ of Habeas Corpus Under the Constitution* parts one, two, and three. Binney's anti-Democratic sentiments and his strict, yet liberal, view of the Constitution certainly played a role in the tone and themes of all three of his pamphlets. While Binney never abandoned the main points of his original argument in part one of the pamphlet, his tone certainly seemed to change over the course of his writing.

Part one was Binney's response to Taney's *Ex parte Merryman*, in which Binney offered his constitutional argument for suspending the writ of habeas corpus as an executive power. Binney did not specifically mention Lincoln in his argument, but did justify Lincoln's actions by attempting to prove the constitutionality of a president's suspension of the writ. In his part two of *The Privilege of the Writ of Habeas Corpus*, Binney began to address his critics' arguments, shining some light on his Federalist political and Constitutional views. Part three was also a response pamphlet, and while he still maintained his initial argument, Binney essentially admitted in this part of the pamphlet that he had never considered what the power to suspend the writ of habeas corpus actually entailed. This pamphlet was published after Binney and the rest of the Union had seen two years of cases of the suspension of the writ under the Lincoln administration. It seems that in 1862 when Binney wrote parts one and two of *The Privilege of the Writ of Habeas Corpus Under the Constitution*, he considered which branch of government held the power to suspend the writ of habeas corpus, and it was not until part three that he began to consider what the implementation of suspension might

actually entail. In part three, Binney began to unpack what the power to suspend the privilege of the writ of habeas corpus really means. A careful reading of this pamphlet uncovers Binney's somewhat negative view of the way Lincoln and his administration were using the power.

The Constitution states the following about the writ of habeas corpus: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." The Constitution does not elaborate on which branch holds this express power to suspend the writ, though suspension of the writ is listed in article one, where a majority of legislative restrictions are recorded. In part one his pamphlet, *The Privilege of the Writ of Habeas Corpus Under the Constitution* Binney made four major points in defense of the executive holding the power. The first point of Binney's argument was that as the Commander in Chief, the president's duty is to make wartime decisions including whether or not the writ should be suspended. Next, Binney dismissed Taney's "English Analogy." Although in British law the power to suspend the writ was legislative, Binney contested that the Founding Fathers wanted a fresh start and did not necessarily base the American Constitution on English law. Third, Binney explained that because the Framers of the Constitution gave the executive so few powers, they would have felt it safe to delegate to the president this one important one. Finally, Binney discussed the history, wording and location of the clause containing the writ of habeas corpus in order to justify his position.

The first and broadest of Binney's points is essentially this:

The power to suspend the privilege of the Writ, is...inseparably connected with rebellion or invasion – with internal war. The direction of such a war is necessarily with the Executive... It is the duty of the office, in both its military

and civil aspects, to suppress insurrection, and to repel invasion. The power to suspend the privilege, is supplementary to the military power to suppress or repel.³⁴

In other words, the President, as commander in chief, is in command of any war, whether it is a foreign war or a war of rebellion or invasion. The suspension of the writ is a mechanism for repelling rebellion or invasion, and therefore the power to suspend the writ must lie with the president. Further Binney says, “All the conditions of the exercise of the power described in the Habeas Corpus clause, are of executive cognizance, that is to say, rebellion or invasion.”³⁵ In other words, the president is the one who is cognizant, or aware, if the conditions for suspending the writ – those conditions being rebellion or invasion – exist, and therefore he should be the one with the power to suspend it.

The next point in Binney’s argument in part one of *The Privilege of the Writ of Habeas Corpus Under the Constitution* was a critique of the English analogy. In *Ex parte Merryman* Taney referred to the fact that in English law, the power to suspend the writ of habeas corpus lies with Parliament, which struggled to wrestle the power from the monarch for years. Why, Taney questioned, would a people trying to break free from an oppressive king give their new executive such a powerful tool as the suspension of the writ of habeas corpus, that even the king of England did not possess? According to Binney, the provision in the American Constitution including the writ of habeas corpus:

Is unlike any provision of the Constitution of England, or of the Common Law. The bearing of the Constitution of England upon the Writ of Habeas Corpus, and upon the executive power of the King to suspend the personal privilege of a

³⁴ Horace Binney, *Part One of The Privilege of the Writ of Habeas Corpus Under the Constitution* (Philadelphia: C. Sherman & Son, 1862) 8.

³⁵ *Ibid.*, 7.

subject, supplies a very defective and a very deceptive analogy for the interpretation of the Constitution of the United States...³⁶

Binney supported his view on the matter by arguing that the English Constitution did not include any “exception or qualification on account of rebellion or invasion” for suspending the writ of habeas corpus.³⁷ Without the qualifications provided in the American Constitution the power to suspend the writ would undoubtedly be dangerous in the hands of one person, Binney admitted. Unlike the English Constitution, however, which gives parliament unlimited power over the suspension of the writ, the American Constitution limits the time when the writ can be suspended to that of rebellion or invasion. The American Constitution does not, therefore, allow for the suspension of the writ as an unlimited power, and so Binney felt that the Framers would not have seen it as a dangerous power to grant the executive.

Relating closely to his argument against the English analogy, Binney continued by making a case that there was an English jealousy of the king that did not exist in the United States in the case of the president. Binney explained that the king’s very exclusive rights and powers “make the King’s hereditary office... a source of apprehension to the Commons of England, and justify their jealousy in maintaining the guards of the Habeas Corpus Act...”³⁸ Unlike the king of England, however, the American executive power is extremely weak, Binney argued. He quotes “an eminent English statesman and man of letters” as saying “that our Constitution of government exhibits ‘the feeblest Executive, perhaps ever known in a civilized community.’”³⁹ Binney did not feel that granting the

³⁶ Ibid., 12.

³⁷ Ibid., 13.

³⁸ Ibid., 17.

³⁹ Ibid., 23.

feeble executive office the power to suspend the writ of habeas corpus was dangerous. Binney explained this further by establishing that, before the writ of habeas corpus clause was adopted into the Constitution at the Constitutional Convention in 1787, the President held no powers that would make him markedly authoritative.

...In regard to the power of the President, as the draft of the Constitution had substantially settled it by major consent before the Habeas Corpus clause was proposed, there was absolutely nothing in the powers of the office which could justly excite jealousy, that he might abuse the power of suspending the Habeas Corpus privilege with a view to enlarge his other powers.⁴⁰

This, Binney felt, made it clear why the Framers would have felt comfortable affording the executive the power to suspend the privilege of the writ. The president held no powers that would “excite jealousy,” and therefore, there were no powers that the president could enlarge by suspending the writ of habeas corpus.

Finally, Binney discussed the history of the clause containing the writ of habeas corpus. As the Constitution stands, the clause is located in Article one, section nine. At the Constitutional Convention of 1787, Charles Pinckney of South Carolina was the first to mention the writ. He suggested that it be included in a list of distinct legislative restrictions. No decisions were made, and the writ did not come up again until two months later. Pinckney’s suggested wording for the clause the second time he brought it up was this: “The privileges and benefits of the writ of *habeas corpus* shall be enjoyed in this government in the most expeditious and ample manner; and shall not be suspended by the Legislature except upon the most urgent and pressing occasions, and for a limited time not exceeding —— months.”⁴¹ If either of Pinckney’s suggestions had been taken,

⁴⁰ Ibid., 22.

⁴¹ Ibid., 27.

Binney explained, the Constitution would have blatantly given the power to suspend the writ of habeas corpus to the legislature. However, the Framers rejected both of Pinckney's proposals and wrote the clause as it stands today. By not using Pinckney's wordings, "the reference to Congress became an incongruity, and was abandoned," making the power, in Binney's mind "perfectly definite, and limited by conditions of executive cognizance..."⁴² In other words, the power to suspend the writ was limited by conditions of rebellion or invasion – both being conditions of which the president was in command. So, the wording that the Framers ultimately chose denied Pinckney's intentions to give the legislature the power to suspend the writ of habeas corpus, and instead delegated the power to the president.

Still on the topic of the clause's history, Binney attempted to explain its location in article one, section nine, of the Constitution. Binney was most likely responding to Taney's argument that "this article [that contains the suspension of the writ] is devoted to the legislative department of the United States, and has not the slightest reference to the executive department."⁴³ Binney admitted, "[m]ost of these paragraphs [in article 1, section 9] restrain and disable Congress." However, Binney clarified, "[o]ne of them restrains the executive department; another of them restrains all persons who hold an office...in whatever department."⁴⁴ So while most of the clauses in article 1, section 9 of the Constitution *were* restraints on the legislature, two others, besides the clause including the suspension of the writ, did not specify that the restriction was on Congress. The clauses in article one were not necessarily all restrictions on the legislative branch,

⁴² Ibid., 28.

⁴³ Roger B. Taney, *Ex parte Merryman*, 17 Fed. Cas. 144, 1861

⁴⁴ Binney, *Part One of the Privilege of the Writ*, 33.

argued Binney, they were only restrictions in general. Thus, the power to suspend the privilege of the Writ of Habeas Corpus was placed in the ninth section of article one simply because it, like the rest of the clauses in that section, was a restriction of power.

Binney's work in part one received such an immediate outpouring of criticism that even before the year was out, he felt compelled to reply to his critics. Part two of Horace Binney's *The Privilege of the Writ of Habeas Corpus Under the Constitution* was published in April of 1862; only three months after part one. This part of the pamphlet was a direct response to those who had criticized Binney's initial argument – mostly Democratic lawyers. In it, Binney addressed five specific points that his critics made.

The first opposing argument was that the habeas corpus clause in the Constitution is “merely restrictive of powers given elsewhere in the Constitution,” not a specific grant of power. The next was that “the President has no authority under the Constitution to issue a warrant of arrest and imprisonment, and therefore, cannot decree the power of arrest and suspension without authority from Congress.” Binney also felt that he needed to respond to the argument that the debates that occurred in State Conventions during the ratification of the Constitution proved that the suspension of the writ is a legislative authority. The fourth argument was that the State Bills of Rights, which have similar habeas corpus clauses, prove that the legislature possessed the authority to suspend the writ. Finally, and similarly to the previous argument, Binney's critics said that the fact that State Bills of Rights declaring that the suspension of laws, except by the legislature, is illegal also prove legislative authority.⁴⁵ Binney's response to these arguments

⁴⁵ Horace Binney, *Part Two of The Privilege of the Writ of Habeas Corpus Under the Constitution* (Philadelphia: C. Sherman & Son, 1862) 5-6.

highlights his unwavering belief that from the words of the Constitution alone can one interpret the Constitution's intentions.

Binney found the first opposing argument to be “extravagant” and illogical.⁴⁶ This argument was that it was implied elsewhere, besides the habeas corpus clause, that Congress holds the power to suspend the privilege of the writ of habeas corpus, and so the clause located in article one, section nine is simply a restriction on that power. Considering that section nine of the first article of the Constitution is the only place that the writ of habeas corpus is ever expressly mentioned, Binney could not understand this argument. “[T]he Constitution of the United States” Binney reminds his critics, “is a Government of enumerated and specific powers, confined to the exercise of such powers and their necessary and proper means, all others being reserved to the States or to the people...”⁴⁷ If a power was not explicitly granted in the Constitution, Binney argued, then that power was reserved to the states or to the people. The power to suspend the writ of habeas corpus *was* expressly granted, Binney pushed his readers to acknowledge. It was granted in article one, section nine as an executive power.

The language Binney applied here comes directly from the Tenth Amendment of the Constitution, which states, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Binney’s application of the Tenth Amendment to his argument is about as brittle a view of the Constitution as they come. In fact, this was the argument that Binney’s Democratic, brittle constitutionalist opponents were most disposed to utilize. By

⁴⁶ Ibid., 21.

⁴⁷ Ibid.

employing the use of the Tenth Amendment in his habeas corpus argument, Binney seems to have been mocking the Democrats by using their own argument against them.

Binney dismissed the second argument, that the president cannot issue warrants of arrest or imprisonment and therefore cannot suspend the writ, as irrelevant. “If the clause intended to give [the president] the power of suspension,” Binney explains, “the means necessarily follow, if they did not exist previously.”⁴⁸ It did not matter to Binney whether or not the president is permitted to arrest a person. If the president is given the right to suspend the writ of habeas corpus, then he has the right to use the proper means to do so.

Binney’s Federalist view of the Constitution discussed in chapter one really surfaced in his reaction to his critics’ third argument. The case made in this argument was that by looking at the debates in the state constitutional conventions, one could establish what was meant by the habeas corpus clause. Binney’s critics use a quotation from James Madison to emphasize their point that debates within each state were solid proof:

But, after all, whatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as the oracular guide in expounding the Constitution. As the instrument came from them it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions. If we were to look, therefore, for the meaning of the instrument beyond the face of the instrument, we must look for it, not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution.⁴⁹

To Binney’s opposition, this quotation clearly explained that they should be looking to the debates about habeas corpus in state constitutional conventions in order to derive

⁴⁸ Ibid., 38.

⁴⁹ Ibid., 39.

meaning from the Constitution. However, Binney was quick to reject his critics' interpretation of Madison's words. Instead, Binney suggested, "Mr. Madison no doubt entertained the sound opinion that we were to look for the meaning of the instrument to its face, and not to what was said in any Convention concerning its meaning..."⁵⁰ In short, Madison meant that it was not important to look at the debates in *any* convention, Binney thought. The debates in the states or in the constitutional convention did not matter, what mattered was what was written in the actual document. Binney felt that Madison only referred to the state conventions because the conventions "breathed life and validity into the constitution" by ratifying it.

Regardless of the meaning of Madison's words, Binney said, there is one "true rule" for how to determine intent in the Constitution, and it is explained in a quotation from Alexander Hamilton: "Whatever may have been the intention of the Framers of a Constitution or a law, that intention is to be sought for in the instrument itself, according to the usual and established rules of construction."⁵¹ In Binney's use of Hamilton's quotation his conservative side reveals itself. Essentially, with this argument, he is backing up his ideal that one need not look beyond the words of the Constitution itself when looking for the Framers' intentions. Additionally, Binney's decision to dismiss the words of Madison in favor of the words of Hamilton is telling. Madison is known as the "father of the Constitution," for being instrumental in the drafting of the document. While we know Binney was fond of Hamilton, the founder of the Federalist Party, disregarding the words of Madison demonstrates Binney's extreme confidence, and even possibly his arrogance.

⁵⁰ Ibid.

⁵¹ Ibid.

Finally, for Binney's critics' last arguments, that the power to suspend the writ of habeas corpus lies with the legislature in many states, demonstrating the true intentions of the habeas corpus clause, Binney says it is of no matter. The state constitutions pertain to those states only and have nothing to do with the national Constitution. Again, Binney explained that one must not look any further than the words of the clause itself when looking for the branch that was meant to hold the power to suspend the writ. Besides, Binney argued, "the Executive power in the States is generally more subordinate to the Legislature, than the Executive of the United States is to Congress."⁵² Almost like his argument against the British analogy, Binney argued that the governments of each individual state could not be compared to that of the national government.

Binney's arguments in part two revealed much about his constitutional interpretation. Between Binney's dismissal of Madison's quotation, and his disapproval of his critics' arguments about the relevance of state conventions and laws, Binney's strict view of the word of the Constitution really materialized. It is uncommon that a supposed defender of Lincoln, one of the most noted broad constructionists in American history, should have such a conservative view of the Constitution. As mentioned in the previous chapter, however, Binney seems to have been a bit more liberal than even he may have acknowledged. Cases of Binney's apparent liberalism will especially arise in part three of *The Privilege of the Writ of Habeas Corpus Under the Constitution*. The shift between parts two and three of Binney's pamphlets especially highlights the idea that Binney falls somewhere in the middle of the categories of a broad, or elastic, constitutionalism, and a strict, or brittle, constitutionalism.

⁵² Ibid., 41

After the publication of part two of *The Privilege of the Writ of Habeas Corpus Under the Constitution*, Democratic responses continued to materialize. In 1865 Horace Binney's third and final part of *The Privilege of the Writ of Habeas Corpus Under the Constitution* was published. In this paper Binney did not retract any of his earlier arguments. He did, however, admit that he had previously been so focused on proving that the president had the power to suspend the writ of habeas corpus that he had not addressed an extremely important part of the argument that had now come to light: the nature of the power.

As Binney began to express his view on what the power to suspend the writ of habeas corpus actually meant he relied heavily on the history of habeas corpus. Interestingly enough, he explained that under the English constitution the suspension of the writ was a proceeding consisting "of a Warrant of Arrest and Imprisonment for High Treason, suspicion of High Treason, or treasonable practices."⁵³ Binney highlighted the idea that the suspension of the writ of habeas corpus had always been a tool meant to prevent or punish treason or acts that would harm the nation. In his mind, treason was what necessitated suspension at all. It does seem rather curious that Binney, who had so vehemently denied the legitimacy of Taney's British analogy, invoked British history of the writ to make his point. It was not easy to discuss the history of the writ of habeas corpus, or any part of the United States Constitution, without referring to English law at all. This is why, despite Binney's aversion to the English analogy, he invoked British law to strengthen his argument when making his point that the suspension of the writ was meant to be used to suppress traitors.

⁵³ Horace Binney, *Part Three of The Privilege of the Writ of Habeas Corpus Under the Constitution* (Philadelphia: C. Sherman & Son, 1865) 16.

By understanding Binney's opinion on who the suspension of the writ was meant to be used to repress throughout history, one can begin to uncover Binney's dissatisfaction with the way Lincoln and his administration were utilizing the power to suspend the writ of habeas corpus. In Binney's opinion, the power to suspend the writ "is not a war power, a power to increase military strength or equipment, to assist a military draft or enlistment, or it would have been given *coextensively* with war. It is a *rebellion* and *invasion* power, to suppress treason and criminal disloyalty, when an enemy is within our own borders, dividing us by our interests and fears, and ensnaring us into treachery against the Government that protects us, and which we in return are bound to support and defend."⁵⁴

Why did Binney feel it was necessary to specify that the suspension of the writ of habeas corpus was intended to suppress treason and not to increase military strength? Was the Lincoln administration, and the military under Lincoln using the power to suspend the writ of habeas corpus as a "war power"? On September 24, 1862, after Horace Binney had already written the first two parts of his pamphlet, President Abraham Lincoln issued an official proclamation suspending the writ of habeas corpus. In Lincoln's proclamation he explained that any rebels or disloyal persons impairing the cause "shall be subject to martial law and liable to trial and punishment by Courts Martial or Military Commission." He said further that the Writ of Habeas Corpus would be suspended "in respect to all persons arrested, or . . . imprisoned in any . . . place of

⁵⁴ Ibid., 22.

confinement by any military authority or by the sentence or any Court Martial or Military Commission.”⁵⁵

In Binney’s opinion, martial law, or control by military rather than civil power, had nothing to do with the suspension of the writ of habeas corpus. Martial law and the suspension of the writ were separate powers, one being civil and one being military. The suspension of the writ, Binney thought, was not to be enforced by the military but by the civil powers of the United States. Binney did not feel that Lincoln’s administration and military officials were keeping the suspension of the writ and martial law separate. In fact, in part three of his pamphlets Binney explained just how the administration was using the power to suspend the writ:

If the military power holds an enlisted or drafted soldier, who denies, or whose parent, guardian or master denies, that he has been lawfully drafted or enrolled, as being under or above age, or as having been forced, drugged, or inveigled into the army, without, or against, his free will, or when he had no competency of will, I do not understand how it can be a constitutional exercise of the power of suspension, to suspend his privilege of the writ of Habeas Corpus, to leave him with the military power, and prevent his submitting to a competent court the question whether he was lawfully drafted or enlisted.⁵⁶

According to Binney, soldiers were being fraudulently drafted or enlisted, and the military was using the suspension of the privilege of the writ as a means for detaining them and making sure they could not bring their case to a court. In Binney’s eyes this was a clear, and dangerous, overlap of military power and civil power.

⁵⁵ Abraham Lincoln, *Proclamation 94 Suspending the Writ of Habeas Corpus*, 24 September, 1862.

⁵⁶ Binney, *Part Three of the Privilege of the Writ*, 61.

If the power to suspend the writ of habeas corpus allowed the president and the military to carry out their own dangerous agendas, Binney explained, then the Constitution “cannot have intended to give [the power] to anybody.” When Binney suggested in parts one and two of his pamphlet that “the President was intended by the Constitution to exercise the whole power that was given by the clause,” he had no idea “that the power was anything like this.”⁵⁷ Perhaps the power was not just dangerous in the hands of one man, as Binney’s critics had suggested, perhaps the power was dangerous in general.

Overall, it seems that the point that Binney was trying to make was this: the purpose of the power to suspend the writ of habeas corpus was to stop or to punish those who committed treason or whose actions were going to divide or damage the nation – not to benefit the military nor to help it grow. If that were the case, Binney thought, then the power would be dangerous in the hands of any branch of the government. This liberal sentiment hardly goes along with his strict interpretation of the Constitution. Here Binney outwardly admits that the suspension of the writ of habeas used to abuse personal liberty of those who had not committed treason was wrong. If, as Binney clearly suggested in part two, “[t]he scope of the Constitution is to protect, defend, and secure the blessings of liberty, universally, and without exception,” the way that the suspension of the writ was being used could not have been within the law of it.⁵⁸

As quite an important figure in the habeas corpus debate, Binney deserves a deeper analysis than historiography has afforded him thus far. By delving deeper into Binney’s background, letters, pamphlets, actions and inactions, a few things become clear

⁵⁷ Ibid., 37.

⁵⁸ Binney, *Part Two of The Privilege of the Writ of Habeas Corpus*, 23.

about this man that has been so widely overlooked. First and foremost, Binney's views on the Constitution, and on the habeas corpus clause, are not nearly as authoritarian as historian George Fredrickson suggested. It is clear from Binney's own words that he viewed the Constitution of the United States as the ultimate guardian of liberty. While Binney believed that the word of the Constitution was the absolute means for finding the Framers intentions, he did not possess the characteristics of the tenacious brittle constitutionalists, who "clung to strict constructionist, limited government principles, come what may."⁵⁹ Binney saw slavery as a moral evil and he stood for emancipation, even if he did not necessarily see the Emancipation Proclamation as legal. He defended the president's right to suspend the writ of habeas corpus, but questioned the clause about habeas corpus itself when he learned that that it was possibly being used to take away personal liberty. Though previous historiography does not suggest it, Binney was often able to push his strict constitutional views aside in order to defend liberty.

Additionally, Binney was much more party oriented than he himself probably would have ever admitted. While he may not have directly identified with a party of his time, his obvious antipathy toward the Democrats definitely drove many of his opinions. He most likely genuinely believed in his idea that one should have loyalty for the government, no matter the party in power; however, it is highly doubtful that, had a Democratic president been in office during the Civil War, Binney would have suppressed his opinions entirely. Despite his negative view on party, it would have been nearly impossible, at that juncture in history, for a person with such strong political beliefs to avoid supporting or opposing one party or another.

⁵⁹ Brian R. Dirck, *Lincoln and the Constitution* (Carbondale and Edwardsville: Southern Illinois University Press, 2012) 73.

Though it is tempting to classify Republican Lincoln supporters as broad constitutionalists and ultimate defenders of liberty, and Democratic Lincoln opponents as strict constitutionalists who would sacrifice the Union in order to save the Constitution, it is not always that clear-cut. In Binney's case alone one finds a man who outwardly seemed to be a Lincoln supporter who advocated the strict view that the word of the Constitution was the absolute means to finding the Framers' intentions, but who conceded to some elasticity if it meant protecting liberty. Binney did not fall into one specific category.

Interestingly enough, Binney was not the only one with complicated opinions that did not follow the black and white distinctions of the two sides of the constitutional debate. In a deeper analysis of Binney's critics on his habeas corpus pamphlets, one finds that even the purported relentlessly conservative Democrats had their varying opinions.

CHAPTER 3: Binney's Critics

While many scholars have been brief with their descriptions of Horace Binney and the background that shaped his beliefs, historians have almost completely overlooked the responses that Binney's pamphlets evoked, with the exception of Sydney G. Fisher. In 1888 Fisher examined Binney's pamphlets and the replies they received, and gave a substantial and clear analysis of the arguments that Binney's critics put forth. Fisher came to a conclusion at the close of his article that "events are stronger than the Constitution and stronger than Constitutional law."⁶⁰ It is important, however, to look further into these otherwise neglected documents because what Fisher did not include in his analysis of Binney's critics was the important detail of their party affiliation.

From the moment President Lincoln and Attorney General Bates attempted to prove the President's right to suspend the writ of habeas corpus, Democratic lawyers in Philadelphia jumped at the opportunity to reveal the inaccuracy and inadequacy of their arguments. With the emergence of an opinion from such a respected lawyer as Horace Binney, the number of responses immediately swelled. Some of Binney's critics were also prominent lawyers in Philadelphia with names recognizable to the public, while others seem to have emerged on the scene for this important debate and disappeared once again after making their mark on history. One attribute that all of these men had in common, however, was their party alignment. These were men of the party opposing the President: these were Democrats.

With the publishing of Binney's first pamphlet, *The Privilege of the Writ of Habeas Corpus Under the Constitution*, in 1862, Democratic lawyers felt instantly

⁶⁰ Sydney George Fisher, "The Suspension of Habeas Corpus During the War of the Rebellion," *Political Science Quarterly*, vol. 3, no. 3 (Sep., 1888), 454-488.

compelled to respond. While responses continued to appear after Binney's second and third parts of the pamphlet were published, his initial argument received the most criticism. Some of the important Democratic critics included George M. Wharton, John C. Bullitt, Isaac Myer, John T. Montgomery, and Tatlow Jackson from Philadelphia, and Samuel S. Nicholas from Kentucky. Though it is vital to first look at common themes within these writers' work, it will be crucial to eventually expose and analyze the differences in their arguments against the president's power to suspend the writ of habeas corpus. Because these men were all a part of the same Democratic Party, which was associated with an extreme strict constitutional view, the differences in their arguments will help to emphasize the idea that not everyone can be so easily categorized.

In reading the pamphlets that were produced in response to Binney, one emerges with the sense that Binney's opinion on the suspension of the writ of habeas corpus was something of an anomaly. According to Binney's critics, that the president could suspend the writ of habeas corpus had never even crossed the minds of most people. The Democratic writers seemed genuinely surprised that such an intelligent lawyer as Binney would be comfortable supporting the President's actions by making the arguments that he did. An important critic of Binney, Samuel Smith Nicholas, makes it clear in his pamphlet *Habeas Corpus, The Law Of War, and Confiscation* that suspension as a legislative power was considered obvious:

If the intention had been to confer on [the President] the suspending power, [the Framers] well knew the indispensable necessity for doing so by a plain unambiguous grant. Such grant would have been so contrary to popular opinion as to good government derived from English precedent, and to the whole theory of the Constitution, and it would have been such an anomaly in a government of separate departments, that the necessity must have occurred to every one for

making the grant in the plainest language. The absence of any such language is ample disproof of any such intention.⁶¹

While each of Binney's reviewers wrote because he felt he had something new to add to the argument, many similar themes can be extracted from their pamphlets. The first of those themes is the importance of the history of the writ of habeas corpus, and the "English Analogy." The second common theme is that the power to suspend the writ of habeas corpus is much too dangerous to be put in the hands of one man. Next, Binney's critics argued that the writ was not a grant of power, as Binney had seen it, but instead it was simply a restriction of legislative power. Finally, almost all of Binney's Democratic critics discussed prominent opinions on the suspension of the writ throughout history.

While Binney maintained that the Framers of the Constitution wanted to get away from English law, thus making the English Constitution and the American Constitution incomparable, his contenders believed just the opposite. As critic Isaac Myer put it, "...the normal condition of the English, and we their descendants, is freedom, subject to the law..."⁶² The American Constitution was derived directly from the laws of England, and the American people were direct descendants of the people of England, therefore, in the eyes of the Democratic lawyers, English law had to be considered. Why, writer G. M. Wharton asks, must we discard English analogy as Binney suggests, "when we are construing substantially the same words?"⁶³

⁶¹ Samuel Smith Nicholas, *Habeas Corpus, The Law of War, and Confiscation* (Louisville: Bradley & Gilbert, 1862) 3.

⁶² Isaac Myer, *Presidential Power Over Personal Liberty: a Review of Horace Binney's Essay on the Writ of Habeas Corpus* (Philadelphia, 1862) 93.

⁶³ George Mifflin Wharton, *Remarks on Mr. Binney's Treatise on the Writ of Habeas Corpus* (Philadelphia: John Campbell, 1862) 6.

The writ of habeas corpus has a long history that the Philadelphia writers trace back to Magna Carta, written in the 13th century. The writ changed and evolved over the years and through political reforms in England. When the English first colonized America, the colonists lived under English law in which parliament held the power to suspend the writ of habeas corpus, and the Constitution was derived from these laws. Binney's critics explained that the context in which the Framers wrote shaped their intentions, and in this context it was common knowledge that suspending the writ was a legislative power. The English did not want their executive, the king, to hold such a significant power as the ability to suspend the writ of habeas corpus, and the Framers – descendants of the English – would not have wanted their executive, the president, to hold that power either.

A second closely related argument appears in many of Binney's critics' pamphlets. The power to suspend the writ of habeas corpus, they contended, is much too strong a power to put in the hands of one man. "The framers of the Constitution" according to J.C. Bullitt, "were fresh from the struggle of the War of Independence. They had based their justification upon [the king's] illegal and despotic acts. It was Executive power which had oppressed their forefathers, and which had roused themselves to the highest pitch of desperation in resistance to its aggressions."⁶⁴ What the Framers feared, the Philadelphia writers explain, was a powerful executive, similar to the king, who could deprive the people of their liberty. A president with the power to decide when the writ can be suspended, and to whom the suspension should be applied, would have had just that kind of dangerous power.

⁶⁴ John Christian Bullitt, *A Review of Mr. Binney's Pamphlet on "The Privilege of the Writ of Habeas Corpus Under the Constitution"* (Philadelphia: John Campbell, 1862) 47.

What if, S. S. Nicholas asks, at the time of a rebellion or invasion the president sympathizes with those of the opposing side? “It might well happen that a President will be...in strong sympathy with a rebellion, and, therefore, not fit to be trusted with the powers necessary during a suspension.” Nicholas writes further, “To deprive Congress in such a state of case of all right to select any other as the recipient of the trust would be a suicidal emasculation of the Government.”⁶⁵ Additionally, if the president has the power to suspend the writ of habeas corpus, critic Montgomery remarks, “[i]t is only necessary that he should be in the opinion that there is a rebellion or invasion,” and he can have anyone arrested, even those who may be trying to impeach him.⁶⁶ Clearly, in the eyes of Binney’s critics, giving the president the power to suspend the writ of habeas corpus was one of the most precarious moves the Framers could have made.

Binney argued that the Framers would have felt comfortable giving the president the power to suspend the writ of habeas corpus because he is such a feeble executive with so little power. Binney’s reviewers counter this by saying that the Framers would never have given the president the power to suspend the writ. If the president *only* had the power to suspend the writ of habeas corpus and no other power whatsoever, still the “[p]resident [would become], not the feeblest, but the most powerful Executive ever known in a republican community.”⁶⁷

A third important argument that many of Binney’s critics focused on was the idea that the habeas corpus clause in the Constitution was not a grant of power, but a restriction of power. Nicholas argues that if the clause did not exist, Congress would have

⁶⁵ S. Nicholas, *Habeas Corpus. A Response to Mr. Binney* (Louisville: Bradley & Gilbert, 1862) 16.

⁶⁶ J. T. Montgomery, *The Writ of Habeas Corpus and Mr. Binney* (Philadelphia: 1862) 25.

⁶⁷ G. M. Wharton, *Remarks on Mr. Binney’s Treatise on the Writ of Habeas Corpus*, 7.

“untrammelled discretion over the writ. It could have created the writ or not at its pleasure; suspended or wholly repealed it out of existence whenever and as often as it thought proper.”⁶⁸ In other words, the purpose of the clause is to put a restriction on Congress as to *when* the writ can be suspended; without it, Congress could implement and suspend it at any time. According to Binney’s critics, by making the suspension of the writ conditional – only being able to be suspended in cases of rebellion or invasion when public safety may require it – the Framers were limiting this great power that Congress already had. The Framers of the Constitution intended to restrain the powers of each department of the government so that no one department could wield too much power. The habeas corpus clause, in the eyes of Binney’s critics, was simply one of these restrictions on the legislature.

Finally, most of the Democratic writers responding to Binney referred to opinions from prominent judges, lawyers, and political figures from their time and throughout history on the topic. Though there had never been an official Supreme Court ruling on which department held the right to suspend the writ of habeas corpus, throughout the history of America many key figures had revealed their opinions.

Extremely fresh in the minds of Binney’s critics was Chief Justice Taney’s Merryman opinion, as this was the opinion to which Binney had initially responded. Binney accused Taney’s Merryman decision of being politically biased. Binney wrote that Taney made his argument “by an elaborate depreciation of the President’s office” and that Taney’s entire opinion “has a tone...of disaffection to the President...”⁶⁹ As

⁶⁸ S. Nicholas, *Law of War, and Confiscation*, 2.

⁶⁹ Horace Binney, *Part One of The Privilege of the Writ of Habeas Corpus Under the Constitution* (Philadelphia: C. Sherman & Son, 1862) 36.

Taney is known to have been a devoted Democrat and Lincoln opponent, Binney may have been correct in assuming his partiality, but Binney's critics did not agree. "...[A] careful examination of the Chief Justice's opinion...will fail to discover any taint of political or personal bias in it," critic Montgomery argued.⁷⁰ According to Montgomery, the fact that no real court case existed which decided the branch of government to whom the suspending power belonged, Taney's decision should be considered authority.

A second common precedent referred to in the habeas corpus pamphlets was the Aaron Burr Conspiracy. In the early 19th century, former Vice President Aaron Burr allegedly led a treasonous plot to acquire territory in the American Southwest. According to historian Sydney Fisher, "when Aaron Burr and his conspiracy became so formidable as to suggest the suspension of habeas corpus, Jefferson, who was then President, submitted the whole matter to Congress, claiming no right for himself, and in the discussion which followed no one suggested that the President might exercise the power."⁷¹

Therefore, the power to suspend had already been widely accepted as congressional. Additionally, when two of Burr's alleged coconspirators were brought to trial in the Supreme Court in *Ex parte Bollman and Swartwout*, Chief Justice John Marshall's decision assumed legislative power over suspension of the writ. "If at any time the public safety should require the suspension of the powers vested by this act in the Courts of the United States, it is for the Legislature to say so," Marshall says in his *Ex*

⁷⁰ Montgomery, *The Writ of Habeas Corpus and Mr. Binney*, 18.

⁷¹ S. G. Fisher, "The Suspension of Habeas Corpus During the War of the Rebellion," *Political Science Quarterly* 3, no. 3 (1888): 5.

Parte Bollman and Swartwout decision.⁷² Though the question of whether the power of suspending the writ of habeas corpus is constitutionally an executive or legislative power was not technically the question before the court, Binney's critics asserted the power behind Marshall's words. Marshall was a venerated judge who identified as a Federalist, just like Binney.

Binney's critics also pointed to quotations from revered Supreme Court Justice, Joseph Story. James Madison appointed Story Supreme Court Justice in 1811. In 1833 Story published his *Commentaries on the Constitution of the United States*, which is still referenced today in order to learn more about the early efforts to define the Constitution. In *Commentaries on the Constitution of the United States*, Story writes, "...Hitherto no suspension of the Writ has ever been authorized by Congress since the establishment of the Constitution. It would seem, as the power is given to Congress to suspend the Writ of Habeas Corpus in cases of rebellion or invasion, that the right to judge whether the exigency had arisen must exclusively belong to that body."⁷³ Although the question of which branch has the power to suspend the writ of habeas corpus is not the main topic here, Story clearly assumed that the power to suspend the writ belonged to Congress. Judge Story's assumption of legislative authority to suspend the writ was a definite standard for the Democratic lawyers, and they did not understand how there could be any further doubt.

Despite these precedents, however, Binney asserted that because there had never been an official court decision on the actual meaning of the habeas corpus clause, the question must be reconsidered. This did not sit well with his Democratic critics. "Mr.

⁷² Roger B. Taney, *Ex parte Merryman*, 17 F. Cas. 144, 1861

⁷³ *Ibid.*

Binney supposes that the question has never been authoritatively decided,” Wharton states, “[t]he venerable names of Marshall, Story, and Taney rise up instinctively to the mind of the reader, as [Binney] lights upon this opinion—but they are brushed away with the remark, that the points they are supposed to have decided, were never sufficiently considered. . . .”⁷⁴ In Wharton’s mind, just because there had not been an official decision, did not mean that one could simply discard the opinions of revered men like Marshall, Story, and Taney.

Binney’s Critics: Responses to Necessity

Just as important as pinpointing Binney’s motives for writing his pamphlets is uncovering the forces that drove the Democratic reviewers to write theirs. As was previously mentioned, these Democratic lawyers wrote their responses to Binney, despite the large number of opinions that were emerging, because each man felt he had something different or new to say. While many points were repetitive, there were others that stood out for their originality. As is necessary in reading any historical document, a reader of these pamphlets must first determine if the author wrote with an ulterior agenda by analyzing his specific points. The Democratic lawyers obviously wanted, first and foremost, to prove legislative power to suspend the writ of habeas corpus, but it is important for a reader to keep in mind the context in which these pamphlets were being written. The United States was at war. The nation was divided into north and south, and in some respects into Republicans and Democrats. Lincoln was a Republican president claiming necessity for carrying out actions that Democrats saw as constitutionally

⁷⁴ G. M. Wharton, *Remarks on Mr. Binney’s Treatise*, 19.

questionable, and the Democrats were well known for promoting a weaker national government and stronger state governments. Depending on the individual writer's views on how to read the Constitution, each had a different opinion on Lincoln's argument of necessity.⁷⁵

A critical argument used by Lincoln, his administration, and supporters was that the President's suspension of the writ, in addition to how the suspension was being used, was out of necessity to protect the greater good of the Union. Lincoln would apply the necessity argument much more avidly to other decisions including the Emancipation Proclamation, the Thirteenth Amendment, and more. Lincoln's supporters viewed the fact that Lincoln would do whatever was necessary to preserve the Union as extremely commendable and brave. According to historian David Donald, " 'Necessity knows no law,' [Lincoln] thought; consequently it was obligatory for him in this crisis to take strong measures, 'some of which,' he admitted, 'were without any authority of law,' in order to save the government."⁷⁶

Lincoln's Union-over-everything position did not resonate well with the Democrats, and in fact, it stirred fear in many of his political opponents. One of Binney's critics in particular, S. S. Nicholas, viewed the Constitution as an extremely brittle

⁷⁵ In Lincoln's message to the special session of Congress on July 4th, 1861, Lincoln did claim necessity for implementing what he called the "war power of government." As for the suspension of the writ of habeas corpus, Lincoln simply said that "the Constitution itself, is silent as to which, or who, is to exercise the power; and as the provision was plainly made for a dangerous emergency, it cannot be believed the Framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion." He did not claim necessity, but believed in the legality of his actions.

⁷⁶ Donald, *Lincoln Reconsidered: Essays on the Civil War Era* (New York: Alfred A. Knopf, 1966) 201.

document; in his eyes, the laws were set, and with any attempt to bend or stretch them, the Constitution would break. The idea that “necessity knows no law” went against the very fibers of Nicholas’ beliefs. Nicholas commented on the argument of necessity in his *Law of War and Confiscation* pamphlet by quoting a “talented and leading Republican Senator”:

I do not place the power on the ground assumed in some quarters, that in times of war or rebellion the military is superior to the civil power; or that, in such times, what persons may choose to call necessity is higher and above the Constitution. Necessity is the plea of tyrants, and if our Constitution ceases to operate the moment a person charged with its observance thinks there is necessity for its violation, it is of little value...I want no other authority for putting down this gigantic rebellion than such as may be properly derived from the Constitution...We are fighting to maintain the Constitution.... *How are we better than the rebels, if both alike set at naught the Constitution?* I warn my countrymen who stand ready to tolerate almost any act done in good faith for the suppression of the rebellion, not to sanction usurpations of power which may hereafter become precedents for the destruction of constitutional liberty.⁷⁷

In Nicholas’ eyes, taking actions that were deemed “necessary,” by unconstitutional means, was a violation of personal liberty and would result in the demise of the Constitution. Lincoln and his supporters did not just see his suspension of the writ as necessary, but also as constitutional. Nicholas, a true brittle constitutionalist, on the other hand, did not. He contended that preservation of the Union was important; however, much more important than even the Union was that the laws of the Constitution be upheld. Contrary to Lincoln’s Union-over-everything view, Nicholas maintained that the

⁷⁷ S. Nicholas, *Law of War, and Confiscation*, 25.

laws of the Constitution should be held above all else, and should be maintained no matter the situation.

Like Nicholas, reviewers Tatlow Jackson, J.C. Bullitt, and Isaac Myer felt that the law of the Constitution must be upheld. These three men, however, had a slightly more elastic view of the Constitution, and made some concessions to necessity. In their habeas corpus pamphlets, Jackson, Bullitt, and Myer all cite the case of Andrew Jackson in Louisiana in the War of 1812.

After the battle of New Orleans in 1815, despite the unofficial word that a treaty of peace had been signed, General Jackson maintained martial, or military, law, which he had implemented in the city. Jackson was waiting for official information about a treaty to arrive before lifting martial law. State senator Louis Louaillier published a newspaper article denouncing Jackson's actions, and Jackson had him arrested. Attorney Pierre Louis Morel requested the U.S. Judge Hall to order a writ of Habeas Corpus to release Louaillier. General Jackson arrested both the lawyer and the judge. Additionally, when a civilian, James Hollander expressed his opinion on the matter, saying that it was "a dirty trick," Jackson had him arrested as well. A few days elapsed and the peace treaty was officially announced. Jackson lifted martial law, and the judge and the others were free to go. After being liberated, Judge Hall called Jackson into court and fined him one thousand dollars for contempt of court.⁷⁸ General Jackson paid the fine dutifully, and responded by saying:

I have during the invasion exerted every one of my faculties for the defense and preservation of the constitution and the laws. On this day I have been called on to submit to their operation under circumstances which many persons might have

⁷⁸ Lincoln to Erastus Corning, Washington, DC, 12 June, 1863.

thought sufficient to justify resistance. Considering obedience to the laws, even when we think them unjustly applied, as the first duty of the citizen, I did not hesitate to comply with the sentence you have heard, and I entreat you to remember the example I have given you of respectful submission to the administration of justice.⁷⁹

Thus, though General Jackson believed that what he had done had been necessary in order to uphold the laws of the Constitution, he accepted the retributions for his actions and paid the price when it was all over. Jackson maintained that just because he was a general, a man of power, did not mean that he was not subject to the law.

Binney's critics Tatlow Jackson, J.C. Bullitt, and Isaac Myer, felt that there were certain occasions that might arise where the president, or another department of the federal government, might have to take action out of necessity as General Jackson had. Following the completion of the "necessary" action, Tatlow Jackson explained, the president should be ready, like General Jackson, to accept any repercussions that may follow. Additionally, according to Tatlow Jackson, the laws of the Constitution were to remain intact. He felt that what Binney was doing by defending Lincoln's suspension was tampering with the laws of the Constitution in order to justify the President's actions.

Initially Tatlow Jackson echoed Nicholas' Constitution-over-everything sentiments: "[I]et the Federal Government do all it can to secure success in the present awful crisis," Jackson said, "but for the sake of what is infinitely more dear than Union – liberty – let all acts emanate from the proper department." Jackson knew that if the public safety required it, the writ of habeas corpus must be suspended. However, he argued, constitutionally, Congress must be the branch to do it. The suspension of the writ by the

⁷⁹ John Spencer Bassett, *The Life of Andrew Jackson* (Garden City, N.Y.: Doubleday, Page & Co., 1911) 230.

president would threaten the liberty that the Constitution protects, which to Jackson was much more important than even the preservation of the Union.

Tatow Jackson's slightly less brittle view began to emerge, however, and his argument differed significantly from that of Nicholas with the following statement: "...when imperious necessity commands, let the department usurping do as did General Jackson at New Orleans – take the responsibility; and hope that in the attainment of the end, the people will pardon or justify the means. But leave intact the Constitution as our fathers construed and adopted it."⁸⁰ Here Jackson admits that the case may arise where the president must take immediate action. Like General Jackson in New Orleans, however, the president must take responsibility following his actions. This concession to necessity is significantly more elastic than Nicholas' view, distinguishing Jackson's *somewhat* brittle opinion from Nicholas' *extremely* brittle opinion.

Likewise, J. C. Bullitt felt that "there are occasions which seem to call for extreme measures; when the Executive department may be strongly pressed to go to the utmost verge of doubtful power," but, Bullitt continues, "[a]ll that can be said when that power is transcended is, that what is then done should be viewed with reference to the surrounding circumstances, and if they demonstrate the necessity and propriety of the course of the President, his acts should receive kind and generous consideration at the hands of those whose rights and interest he intended to guard and protect." Like Jackson, Bullitt acknowledged necessity, and added that the president should hope that whoever considered his actions after the fact would also view them as necessary. "But because an act was done of necessity before Congress could be called together," Bullitt persisted,

⁸⁰ Tatlow Jackson, *Authorities Cited Antagonistic to Horace Binney's Conclusions on the Writ of Habeas Corpus* (Philadelphia: John Campbell, 1862) 7.

“...does not prove that it should be continued after Congress has been...in session: nor does it engraft any new principle on the constitution.”⁸¹ Bullitt agreed that perhaps Lincoln did need to suspend the writ of habeas corpus out of necessity, but he felt that as soon as Congress was back in session, there should have been a return to what he viewed as the proper execution of the laws.

Similar to Jackson and Bullitt, Isaac Myer argued,

If the supporters of the President had been willing that, like General Jackson, he should take the legal responsibility, the writer would have been satisfied, believing that the disease would work its own cure; but if so great an encroachment upon all the principles of Liberty is to be allowed as legal and right in more ambitious hands, our liberties will fade as a flower...⁸²

In other words, if Lincoln had suspended the writ and made a number of necessary arrests, but afterwards admitted that it was probably not in his realm of power to do so, Myer would have been satisfied. However, Myer felt that by attempting to justify Lincoln's actions as legal, Lincoln and his supporters were putting the Constitution in jeopardy.

Nicholas and the Southern Democratic Interests

Jackson, Bullitt, and Myer's differing constitutional interpretation from Nicholas' is incredibly interesting for a few reasons. First and foremost, as with the characterization of Binney, there is a tendency in looking at Civil War era history to make sweeping generalizations about the way the two major parties interpreted the Constitution.

Generally it is thought that Lincoln and the Republicans viewed the Constitution as

⁸¹ J. C. Bullitt, *A Review of Mr. Binney's Pamphlet*, 50.

⁸² Myer, *Presidential Power over Personal Liberty*, 2.

elastic, meaning that laws could be bent and stretched in order to work in a way that was necessary in given circumstances, while the Democrats are usually assumed to have seen the Constitution as brittle – exceptionally strong, but with any attempt to bend the laws, it would break. The differing opinions within this group of Democratic lawyers alone demonstrate how misleading these assumptions can be. There were plenty of interpretations that fell in between these two extremes. The different backgrounds of these men were likely the most important factors in shaping the way in which they viewed the Constitution. Of all of the Democratic lawyers who responded to Binney, Nicholas was the only one from the south.

S. S. Nicholas' brittle interpretation of the Constitution almost certainly stemmed from his conservative southern background. Nicholas was from Louisville, Kentucky, where he studied and practiced law. He was appointed judge of the court of appeals in 1831, was later elected a representative in the state legislature, and had a part in revising the code of Kentucky.⁸³ Nicholas came from a line of southern attorneys, judges, and politicians. In 1863 Nicholas accumulated a number of essays and pamphlets, and put together a book that included his thoughts on the power of a state convention, disunion, secession, the war, martial law, habeas corpus, and more. The title of this book was *Conservative Essays: Legal and Political*.

One important essay for the purpose of examining Nicholas' constitutional interpretations was one written on martial law that Nicholas had published in 1842 under the signature of "A Kentuckian." In this essay Nicholas condemned a certain "class" of

⁸³ Rossiter Johnson and John Howard Brown, *The Twentieth Century Biographical Dictionary of Notable Americans* v. 7 (Boston: The Biographical Society, 1904) 79.

politicians as doubters of the great American experiment because of their haste to implement martial law:

There is a class of politicians in this country who have long been suspected of having no great love...of our republican institutions, viewing them as a useless experiment, and therefore as rather impatient for the advent of some bold great man sufficiently powerful to do away with the idle trumpery of a constitution, and relieve us from the trouble of governing ourselves.⁸⁴

In this class of politicians Nicholas included Andrew Jackson, John Quincy Adams, James Buchanan, John Berrien, and the 1842 Rhode Island Legislature – all of whom had at one time implemented or defended the implementation of martial law. Martial law suspends ordinary, civil law, and imposes military power. Nicholas felt that martial law was a usurpation of power over the Constitution, and that this group of politicians wanted one man to use it ascend to power like a monarch. As was already noted, Nicholas held the Constitution above anything else, and therefore no action –whether it is the suspension of the writ of habeas corpus by the president, or the implementation of martial law—which usurped power over the Constitution, was acceptable or necessary. “There has been no instance of martial law in England for the last hundred and fifty years, and none in this country since the Declaration of Independence, but that given by General Jackson at New Orleans,” Nicholas explained. He continued:

Washington carried the country successfully through the seven years’ war of the Revolution, amidst spies and traitors, without finding a necessity, or feeling himself authorized to resort to such means.... All history proves that the patriotism and public spirit of a republic are more effective in calling forth in the

⁸⁴ Samuel Smith Nicholas, *Martial Law: Part of a pamphlet first published in 1842, over the signature of a Kentuckian* (Philadelphia: John Campbell, 1862), 5.

hour of need the utmost energies of a State, than all the coercive powers of the most absolute despotism.⁸⁵

Here, before the Civil War was even an idea, and before Lincoln even stepped onto the national political scene, Nicholas condemned the use of necessity as an argument for overriding the Constitution. Nicholas called for strict constitutionalism and public spirit to defend the country rather than the seizure of power by one domineering authority.

In Lincoln's 1863 proclamation on suspending the writ of habeas corpus he said, "[the writ of habeas corpus] shall now be suspended throughout the United States in the cases where, by the authority of the President of the United States, military, naval, and civil officers of the United States... hold persons under their command or in their custody..." Some of Lincoln's opponents took these words to mean that these prisoners of war, deserters, and even enlisted soldiers, were being held under martial law. Nicholas surely considered Lincoln as a part of the same category as Adams, Jackson, Buchanan, and the others in the "class of politicians" who he felt did not have faith in the Constitution of the United States. Even twenty years prior to Nicholas' response to Binney, Nicholas demonstrated a brittle view of the Constitution and harshly criticized those with any different view. The similarities in Nicholas' arguments in his 1862 response to Horace Binney to those in his 1842 martial law pamphlet reveal just how closely he stuck to his beliefs.

Why did Nicholas cling so tightly to his brittle constitutional interpretation, unlike his Philadelphia counterparts who conceded some level of necessity? Most likely it had to do with his southern background. Of all of Binney's critics, Nicholas was the only prominent one from a slave state. Nicholas' native Kentucky was a Border State in the

⁸⁵ Ibid., 2

war, but a slave state nonetheless. It is known, from Nicholas' essay *Emancipation, White and Black*, that he was a supporter of the institution of slavery and commonly cited its importance to Kentucky's economy.⁸⁶

While Lincoln was at first cautious in expressing any explicit abolition or emancipation sentiments so as to keep Kentucky and the other Border States satisfied, many Democrats depicted him as an abolitionist regardless. It was well known to the southerners and the Democrats that the President was not a friend of the institution of slavery. Nicholas mistrusted presidential or centralized power, he feared Lincoln's propensity to stretch the laws of the Constitution, and he knew Lincoln had anti-slavery feelings. Nicholas even wrote that Lincoln's actions, and Binney's subsequent argument in his defense, were parts of "a powerful conspiracy going on for accumulating all power into the hands of the President."⁸⁷ It is possible that what Nicholas feared most was that the trend of more centralized power resulting from Lincoln's elastic view of the Constitution would mean less power for State Governments, and therefore the strong likelihood of the abolition of the very institution that kept his state alive—slavery.

A brittle view of the Constitution, states' rights, and slavery can be seen as going hand in hand for many of the southern Democrats in the Civil War Era. The tenth amendment of the Bill of Rights states that, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Strict Constitutionalists took this very literally to mean that any powers that were not explicitly granted to the national government should be

⁸⁶ Samuel Smith Nicholas, *Conservative Essays: Legal and Political* (Philadelphia: J. P. Lippincott, 1865).

⁸⁷ S. Nicholas, *Law of War, and Confiscation*, 4.

dealt with by the states. Thus, the decision of whether or not slavery could remain in a certain state would be the decision of the government of that state. For Nicholas, and others like him who wanted to defend their state's livelihood, slavery, any Constitutional view but a brittle one was unacceptable. If Lincoln's tendency to bend, stretch, or even ignore the laws of the Constitution were justified, states' rights and the institution of slavery would be in grave danger.

The all-important question that this interpretation of constitutional history brings up is whether history shapes the Constitution or whether the Constitution shapes history. In other words, either existing situations shape how the Constitution is interpreted, or the Constitution dictates the way situations will turn out. With the differing opinions of Binney's critics alone, it is clear that the former is true. The Democratic writers from Philadelphia had a strict view of the Constitution, but without the passion to maintain slavery, they did not have the same fervent attitude as Nicholas and the southern Democrats. This explains why the Philadelphia writers were comfortable yielding slightly to necessity and a less brittle constitutional view. Each man's personal situation dictated his view on the Constitution, and these views dictated their responses to Horace Binney's pamphlet and to Lincoln's suspension of the writ of habeas corpus.

Most importantly, it is clear that constitutional history of the United States cannot be simply broken down into strict and broad constructionists, or into those who saw the Constitution as a brittle document, and those who saw it as elastic enough for any situation. Strict and broad construction views appeared in both parties and on both sides of the Civil War's constitutional controversies. Even within individual comments on the constitution, variations in strict and broad views can be found. In the case of

constitutional history of the United States, sweeping categorizations will not suffice; only close examination of constitutional arguments will work.

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