Lincoln Lore

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A Philadelphia Lawyer Defends the President (Cont.)

First, he addressed the language of the Constitution itself. Here, and here alone, Binney had to use "the broad constitutional and natural argument" rather than "the merely legal and artificial." The narrow legal argument would say that the clause in the Constitution does not say explicitly who can suspend, but "suspend" means by customary English usage—and it is from English law that ours derives—passing a law to countervail the writ which is instituted by law. Only Congress can make law, and thus Lincoln had no power to suspend the writ. Binney argued that such reasoning did not apply in this case because there is a peculiar American science of politics stemming from the fact that the Constitution is superior to all political power and itself makes things legal which Congress, unlike the British Parliament, cannot make legal or illegal. "Suspending the *privilege* of the Writ," he argued, "is not an English law expression. It was first introduced into the Constitution of the United States." The true reading, therefore, was this:

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FIGURE 1. In this detail from a ghoulish anti-Lincoln cartoon, President Lincoln, Secretary of the Treasury Salmon P. Chase, and Secretary of the Navy Gideon Welles watch as Horace Greeley and Senator Charles Sumner lower a coffin labeled "CONSTITUTION" into a grave. Other coffins are labeled "FREE SPEECH & FREE PRESS," "HABEAS CORPUS," and "UNION." The cartoon is entitled "The Grave of the Union. Or Major Jack Downing's Dream, Drawn By Zeke." It was published in 1864 by Bromley and Company in New York City. The cartoons were available at 25¢ per copy, five for a dollar, fifty for nine dollars, and one hundred for sixteen dollars. Although the constitutional argument as outlined by Horace Binney, Roger B. Taney, and Attorney General Edward Bates was dry and complex, the issue of suspending the privilege of the writ was a popular issue exploited by the Democrats in cartoons and campaign literature.

> The Constitution of the United States *authorizes* this [suspension of the privilege] to be done, under the conditions that there be rebellion or invasion at the time, and that the public safety requires it. The Constitution does not *authorize* any department of the government to *authorize* it. The Constitution itself authorizes it. By whom it is to be *done*, that is to say, by what department of the government this privilege is to be denied or deferred for a season under the conditions stated, the Constitution does not expressly say; and that is the question of the day.

To answer "the question of the day" was now easy. All Binney had to do was to determine which department of the government customarily exercised power over the sorts of questions mentioned in the *habeas corpus* clause. The executive is clearly the power which must cope with rebellion and invasion and declare when the public safety has been endangered by them. As a result of the Whiskey Rebellion of 1794 (Binney called it the Western Insurrection), a law of 1795 clearly enacted "that when the United States shall be invaded or be in imminent danger of invasion" and "whenever the laws of the United States shall be opposed, or the execution thereof be obstructed in any State, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshal by this Act, it shall be lawful for the President of the United States to call forth the militia of such State, or of any other State or States, *as may be necessary to suppress* such combinations, and to cause the laws to be duly executed." A Supreme Court decision, *Van Martin* v. *Mott* laid it down that the President's judgment was conclusive; he could decide the point at which there was rebellion. In fact, President Lincoln called forth the militia in 1861 by authority of that 1795 act.

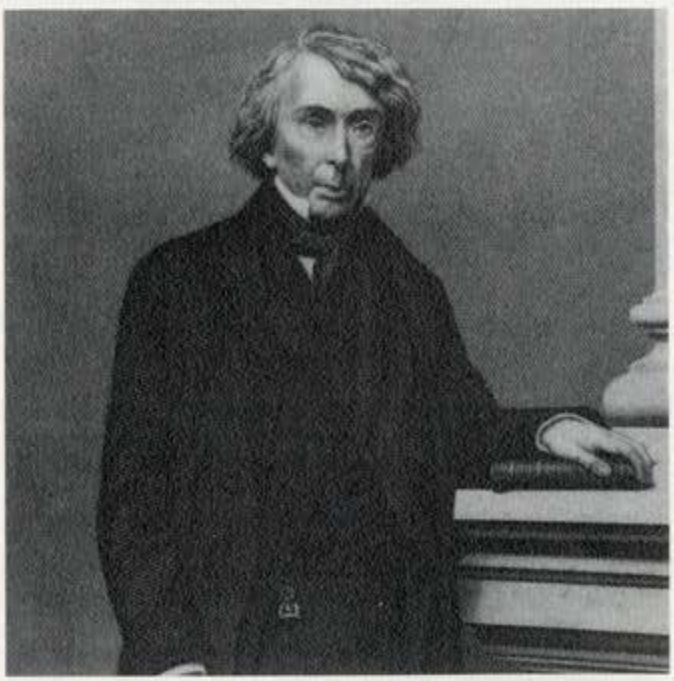
The second and most important aspect of Binney's argument was its rejection of the applicability of British example by analogy. Sydney George Fisher wrote what remains the outstanding treatment of the subject of "The Suspension of Habeas Corpus During the War of the Rebellion" for the *Political Science Quarterly* as long ago as 1888, and his summary of Binney's case in this regard merits quotation at length:

> It is true, he went on, that in England Parliament alone may suspend. But this English analogy is misleading. The American and English constitutions are very different. By the English constitution, Parliament, being omnipotent, may suspend the privilege of *habeas corpus* at any time, even in time of profound peace, and has in our own day suspended it during labor riots. The American constitution confines the suspension to rebellion or invasion. The unlimited power of suspension allowed in England would undoubtedly be dangerous in the hands of one man, but not so the qualified power of our constitution. Again, it must be observed that in England the privilege of *habeas corpus* is given, without qualification or exception, by an act of Parliament, and nothing but a subsequent act of Parliament can suspend or abridge it. But in America a single clause of the constitution recognizes the privilege and at the same time allows its suspension on certain occasions. The suspending clause in the American constitution stands in place of both the enabling and the suspending act of the English Parliament. In other words, America has a written constitution which cannot be changed by Congress, and England has an unwritten constitution which can be changed at the pleasure of Parliament. . . . Our *habeas corpus* clause is entirely un-English because it restrains the legislative power as well as all other power, and it is thoroughly American because it is conservative of personal freedom and also of the public safety in the day of danger.
>
> There is still another particular in which we must guard against analogy. The motive of the English people in putting the *habeas corpus* power entirely within the control of Parliament was their jealousy of the Crown. . . . But the framers of our constitution had no such fears of the President. The powers of his office had been substantially settled before the *habeas corpus* clause was proposed, and there was nothing in those powers to excite alarm.

Having explicated the language in the Constitution itself and having disposed of the argument by analogy with English precedent, Binney then proceeded to examine the intent of the framers of the Constitution, insofar as there was evidence in their writings or in the records of the secret Constitutional Convention of 1787. Charles Pinckney of South Carolina originally contemplated a suspension by Congress only in times of invasion or rebellion. Later, he suggested suspension by Congress on vaguer grounds ("upon the most urgent and pressing occasions") and for a limited time period stated in the Constitution itself. Gouverneur Morris of New York suggested the final language a few days later. According to Binney, the convention rejected Pinckney's English view (suspension by the legislature when it deemed it necessary) for a uniquely American view. Originally, the clause was placed in the article pertaining to the judiciary, but the committee on style placed it in the first article because that section was restrictive throughout, not because most of the section places restraints on Congress.

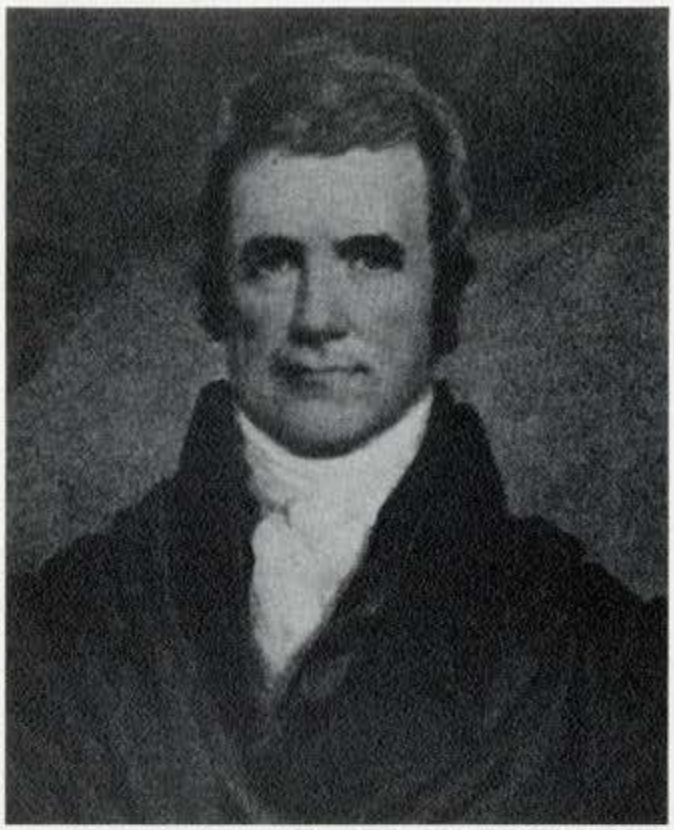
Binney then addressed the rather meagre judicial history of the clause. Taney's recent decision in the Merryman case had no authority because it did not come from the Supreme Court but from a circuit court. John Marshall's language in *Ex parte Bollman* had no bearing on the case, because there was no invasion or rebellion at the time, and neither President nor Congress had suspended. It was strictly an *obiter dictum*, not bearing on the nature of the case he had before him. Finally, Joseph Story's opinion was of little weight because it was the opinion of a *commentator* and not of a judge actually deciding a case or precedent.

Binney wrote before the era of the "sociological brief," and he did not address the question whether, in the abstract, it was better for the American people that Congress or the President have the power of suspension. He eschewed the argument from utility and confined himself to the customary lawyerly grounds for deciding a constitutional case: the language of the Constitution itself, the argument by analogy with English experience, the intent of the framers of the Constitution, the precedents in previous judicial decisions, and the opinions of learned commentators on the American Constitution. His argument was a dazzling courtroom-style performance, tightly woven on strictly constitutional and legal grounds. It astonished everybody, for, as Sydney George Fisher said



From the Lincoln National Life Foundation

FIGURE 2. Roger B. Taney



From the Lincoln National Life Foundation

FIGURE 3. John Marshall

twenty-seven years later, Americans "had supposed that the question was a settled one," and "up to the time of the rebellion it was the general opinion that Congress alone had the right to suspend." Though it prompted many outraged replies, Binney's argument also convinced a goodly number of authorities on the Constitution. Our view of Lincoln's construction of the powers of the Presidency would be much different today had this capable Philadelphia lawyer not taken time in his eighty-first year to defend the President.

3. Horace Binney and Slavery, an Epilogue

Charles Chauncey Binney carefully points out in his excellent *Life of Horace Binney* that the famed Philadelphia pamphleteer "by no means approved every act of the administration during the war, but he held that at such a time loyal men should refrain from all public criticism. He had his own opinions and he expressed them in private, but during the whole war no word fell from him which could have added the smallest feather's weight to the burden of those who were charged with the weighty task of government." By the autumn of 1862, Binney began to find fault, privately, with some of Lincoln's policies.

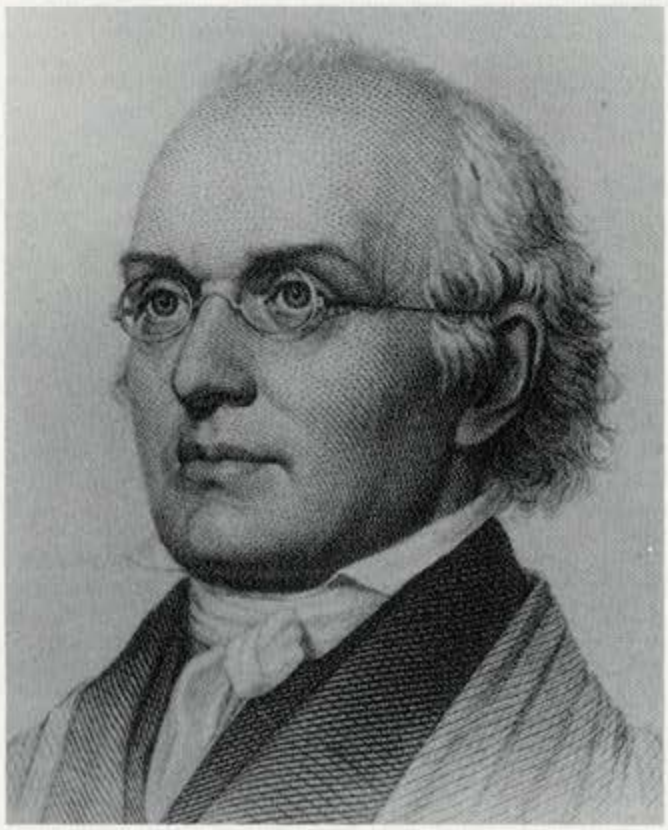
The first sign of misgiving came in an area one would deem surprising if one took Federalism to mean a form of undiluted conservatism. On August 5, 1862, almost two months before the issuance of the Preliminary Emancipation Proclamation, Binney wrote Francis Lieber a long letter about slavery, part of the contents of which follows:

> I have been much struck by the pointed and decisive answer the North is now giving to the pretence of the ambitious bad men of the South, who have poisoned their country with the belief that the North meant to uproot the institution of slavery, and therefore that it was impossible to avoid making war against us. The absence of any such Northern feeling generally, or even to a dangerous extent, is now the cause of our most dangerous and weakening divisions. Even in the midst of a war which is entirely defensive, and in the presence of imminent danger, it is the great impediment to the use of even military power to weaken the South by interfering in any way with their slaves.
>
> God knows I disapprove of the institution of slavery every way,—for its effect upon the slaves, still more for its effect upon the masters, most of all for its incompatibility, growing and incurable incompatibility, with such a government, black slavery pre-eminently. . . . I do not wish to be quoted to the President, or any of the Departments, or to anybody; but while I am not and never have been an abolitionist, in the imputed sense, I have no idea of protecting the slaves of the South in such a war, or of letting them interfere with the full use of our military means, with them or against them, to subdue the enemy. Unless this result is reached and the slaves are made to be *adstricti* [confined] to their own States, I do not see how we are to live hereafter, either united or divided.

Thus this Philadelphia conservative arrived at the position which urged some form of tampering with slave property out of military necessity before President Lincoln felt he could touch the South's peculiar institution.

When Lincoln did attack slavery, Binney expressed his first note of dismay with the President's policies. Binney's reasons were ones of constitutionality, and, by and large, he thought the President should have gone farther. Thus he wrote J.C. Hamilton on October 8, 1862:

> . . . the plans which have been adopted in the application in our immense force and resources I have sometimes disapproved when I thought I understood them, and much more frequently I have not understood them when our rulers have explained them. I go for the support of the government, as *per se* my duty, until mere obstruction shall be obviously better than what government is proposing to do; and that condition is not likely to occur. I say this in special reference to the President's Emancipation Proclamation, which is now the uppermost thing in the country. I do not understand the law of it. And do not believe there is any law for it, unless it be the law of force in war; and if it relies on that (which the Proclamation does not say, as I read it) it would, I think, have been much less disturbing to the country, and even more effectual, to have said it by way of conslusion



From the Dictionary of American Portraits, *Dover Publications, Inc., 1967*

FIGURE 4. Joseph Story

than of premises. . . . I still think the President is sincere and honest; but does the confidence of even his friends increase in his general competency?

In December, he wrote Lieber again. Binney had just read George Livermore's *Historical Research,* which the President was also reading or about to read (see *Lincoln Lore,* Number 1621). "I have travelled alongside of the muse of this history for more than sixty years," wrote Binney, "and all is written in my memory as Mr. Livermore records." He also asked Lieber what he thought of the President's recent Message to Congress. For his own part, he thought it

like his other messages, honest, sincere, and frank; and some of its *short* logic is good enough, but he does not excel, I think, in *long* logic, and I remain quite at a loss to reconcile his proclamation with his *projet* of emancipation, except by supposing that the emancipation shall apply only to those slave States which shall be represented in Congress on the 1st Jany., and to whom the proclamation seems to promise that they shall keep their slaves in slavery as they now are! I shall be glad, however, if he gets through the matter in any way, zigzag or otherwise. There is, I fear, no straight line of passage through it but force, if this people would consent to it.

By January of 1865, Binney had, despite his constant conservatism in the matter of democracy, moved along with the times (or rather ahead of them) sufficiently to write Lieber the following remarkable letter:

As to the universal suffrage of free blacks, my judgment is suspended. I have no repugnance to it. Fifty years ago, as a judge of election, I ruled that a free black native of Pennsylvania, who had paid his tax, was entitled to vote; and there was no dissent. Our Democrats, to accommodate the South, changed our [Pennsylvania] Constitution in 1838 (amended it, they said) by confining the elections to white freemen. But I have always questioned, and almost repudiated, the quietism of the Federal Constitution in turning over to the States the qualification for representatives in Congress.

Since 1903, Horace Binney has been remembered only for his pamphlet on the *habeas corpus.* Almost nothing exists in print on this remarkable man. To know him only by his pamphlet is to dismiss him as a facile conservative who was also an artful pleader of special causes. But we know today that the Federalist party, after the disappearance of which Binney never found a comfortable political home, comprehended an interesting variety of opinions. Some Federalists became politically adaptable in the declining years of their party; this was not, apparently, the case with Binney, who could never really get the hang of party politics. Some Federalists held attitudes towards slavery which were closely akin to those of later Republicans but were held back from any moral crusade by their being accustomed to an orderly hierarchical society which condemned political passion and individual self-assertion as the ultimate political sins. Binney was more at home with the America of 1861-1865 than of 1828-1856, and not merely because he could convert the Civil War to the cause of defending the authority of the national state, but because the times more nearly fit his moralistic vision of a political order. Parties were not gloried in in the 1860's, and slavery was clearly on the way out.

4. Conclusion

Binney receives honorable mention in several notable books. James G. Randall's *Constitutional Problems Under Lincoln* showed considerable respect for Binney's pamphlet. Without expressing a strong opinion as to its merits, Randall did fault Binney for his wish that the language of the Constitution had been more precise in regard to the *habeas corpus.* Writing in the age of "legal realism," Randall rather admired constitutional vagueness for the flexibility it allowed. In this respect, Randall's successor as a student of constitutional problems under Lincoln, Professor Harold Hyman of Rice University, is very much like his predecessor. Quoting a letter from Binney to Lieber with which one edition of *The Privilege of the Writ of Habeas Corpus under the Constitution* was prefaced, Hyman notes with approval that Binney thought the question "a political rather than a legal question,—a mixed political and a legal question. . . . No one should be dogmatical, or very confident, in such a matter," Hyman sounds like Randall when he adds, "At least Binney's frank inconclusiveness hit closer to constitutional realities than Taney's negative certainty or Bates's responsive geometry."

In truth, Hyman's remark and Randall's point of view both fail to capture the spirit of Binney's enterprise. After reading an answer to his pamphlet written by Judge S.S. Nicholas of Kentucky, Binney complained to Lieber:

What is the use of logic? Would you believe that for all my pains I get an answer from Judge Nicholas, which amounts to this and no more: If Congress, without the Habeas Corpus clause had taken away or not given the Habeas Corpus, how could the judiciary have helped it? God save the poor man who wastes lamp-oil on such heads! He does not perceive that this reduces it to a question of force. If the President will imprison without law, how is Congress to help it?

"What is the use of *logic?"* he said. Binney demolished Taney with constitutional logic, that is, with the traditional tools of the constitutional lawyer. For Binney, the life of the law was logic and not experience (to turn Holmes's famous saying on its head). He was vitally interested in what the Constitution actually said, whether American law was like English law, what the framers said, and what other judges said. Even the words of someone no farther removed than an accepted commentator (Story) were suspect. There was little or nothing of legal realism in this; this was a logic-chopper's work. He published no enthusiastic defense of the Emancipation Proclamation, probably for the reason that he could "not understand the law of it." Binney in no way challenged the accepted platitudes of mid-century constitutional jurisprudence. He was no less wedded to the separation of powers, say, than Edward Bates was; he simply located the ability to suspend the privilege of the writ of *habeas corpus* in that power which by long legal precedent could recognize a state of rebellion. If anything, his argument was a detriment to the advent of "legal realism," for Binney stressed a peculiarly American constitutionalism unlike that of Britain's ever-changing unwritten constitution and dashed Taney's analogy to English Parliamenttary practice to pieces.

George Fredrickson's *Inner Civil War* seems off the mark as well in its casual dismissal of Binney as a reactionary old fogey. "For Binney," says Fredrickson, "as for [Wendell] Phillips, the time of the Alien and Sedition Acts had returned, but for Binney it was an occasion for rejoicing." Binney's argument was not, apparently, opportunistic. The President had other defenders, his Attorney General and Joel Parker, for example; Binney entered the fray simply because he thought their manner of defense was wrong. He wanted to make a correct constitutional point. Nor did he rejoice uncritically in the opportunity war afforded authoritarianism. He disliked Nicholas's argument because it reduced law to mere force, and, more importantly, as his biographer points out, Binney had his differences with the Executive. Some of these were on the score that Lincoln took too authoritarian ground.

. . . it should be noted [says Charles Chauncey Binney] that he strongly disapproved of so much of the President's proclamation of September 24, 1862, as extended martial law and suspension of the Habeas Corpus to military arrests for discouraging enlistments, or for other disloyal, but not legally treasonable, acts. This proclamation went far beyond anything that Mr. Binney's pamphlets had justified, but he refrained from any public expression of his views, as he thought it the duty of loyal citizens not to hamper the administration by protests, although it might make mistakes or even exceed its legal power.

President Lincoln was indeed fortunate in having Horace Binney as his unsolicited defender. Binney himself has not been as fortunate in finding students with a sympathetic understanding of his constitutional world.