



Lincoln Lore

July, 1975

Bulletin of The Lincoln National Life Foundation...Mark E. Neely, Jr., Editor. Published each month by The Lincoln National Life Insurance Company, Fort Wayne, Indiana 46801.

Number 1649

A Philadelphia Lawyer Defends the President

"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." This one sentence is the sole mention of the writ of *habeas corpus* in the United States Constitution. Before the Civil War, it had figured only rarely and briefly in the country's seventy-odd years of constitutional disputes and controversies. In 1807, President Thomas Jefferson became sufficiently alarmed over the Burr conspiracy to ask Congress to suspend the privilege of the writ for a period of time. Behind closed doors, the Senate passed a bill to

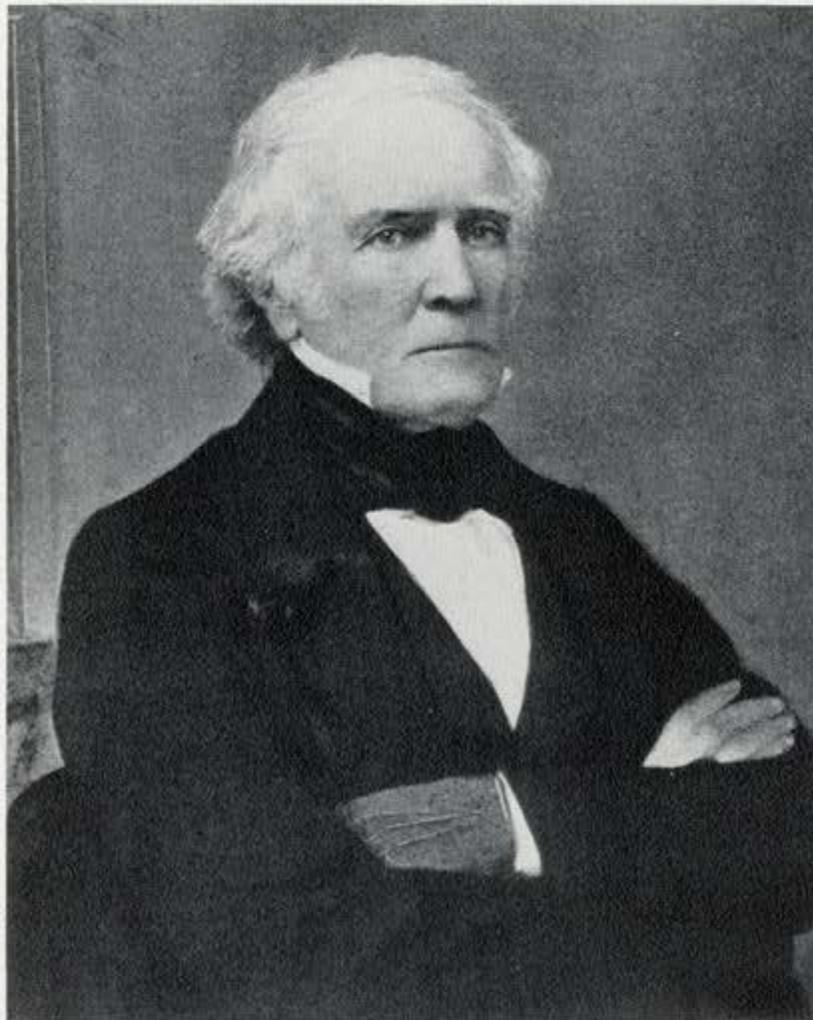
suspend for three months, but the House rejected the bill by a large majority. Chief Justice John Marshall, in a case which also stemmed from the arrest of an alleged member of the Burr conspiracy, *Ex parte Bollman*, said "that if at any time the public safety should require the suspension of the power" to issue the writ, "it is for the Legislature to say so. That question depends on political considerations, on which the Legislature are to decide." Finally, one of the great commentators on the United States Constitution, Judge Joseph Story, said rather tentatively, "It would seem, as the power is given to Congress to suspend the Writ of Habeas Corpus in case of Rebellion or Invasion, that the right to judge whether the exigency had arisen, must exclusively belong to that body."

There was nothing in the history of the use and interpretation of the *habeas corpus* clause in the Constitution to prepare the country for President Abraham Lincoln's suspension of the privilege of the writ of *habeas corpus*, which

occurred as early as April 27, 1861. The issue was brought to public attention by the case of one John Merryman, who lived near Baltimore and was arrested on suspicion of being the officer in charge of a pro-secession Maryland military unit, of being a party to destroying railroad tracks and bridges to prevent loyal troops from reaching Washington, and of obstructing the United States mails. The Chief Justice of the United States Supreme Court, Roger B. Taney, also sat as a circuit judge in the Maryland federal court, and he issued a writ of *habeas corpus*. The military officer who had arrested Merry-

man refused to present Merryman to the court on the grounds that the President had suspended the privilege of the writ. Taney then wrote an opinion—as a circuit judge, not as the Supreme Court's Chief Justice—which claimed that President Lincoln could not suspend the privilege because Congress, like Parliament in England, alone possessed that power. Lincoln and Attorney General Bates ignored the opinion.

Most of the authorities in print to that date and the Chief Justice of the Supreme Court thus argued that Lincoln could not do, constitutionally, what he had done. The President badly needed some legal opinion supporting his position. The Attorney General supplied one, but most authorities, then and ever since, agree that it was sloppily done and poorly argued. Joel Parker, Royall Professor of Law in the Harvard Law School, supported the President in an article for the prestigious *North American Review* entitled "Habeas Corpus and Martial Law." Parker, who would become a foe of the President after he issued the Emancipa-



From the Lincoln National Life Foundation
FIGURE 1. This portrait of Horace Binney, copied from a photograph, pictures him as he must have looked about the time he wrote *The Privilege of the Writ of Habeas Corpus under the Constitution*. The portrait appears in Charles Chauncey Binney, *The Life of Horace Binney with Selections from His Letters* (Philadelphia: J.B. Lippincott, 1903).

tion Proclamation, argued broadly that in time of "paramount military obligation . . . the military law must be held to supercede the civil." Parker's argument was broader than it needed to be, for suspending the *habeas corpus* privilege subjects the party only to arbitrary arrest and confinement; it does not subject him to martial law and thus to trial by military tribunal rather than by jury in a civil court. President Lincoln was still in need of a persuasive defender who could sift the constitutional authorities and, in a rigorous way, supply a logical constitutional argument for the Executive's power to suspend the writ of *habeas corpus*.

1. A Conservative Admirer of Lincoln

The argument Lincoln needed came from an odd source, a conservative octogenarian lawyer from Philadelphia named Horace Binney, a man who had largely avoided political disputes for some thirty years. The President did not seek him out, but Francis Lieber, a German immigrant who became America's greatest early student of politics and probably her first professional political scientist, did. Lieber, who himself wrote many pamphlets encouraging loyalty during the Civil War, urged Binney to publish a pamphlet on the subject of the *habeas corpus*. Binney was interested in the question because he doubted the validity of the arguments he had seen, because he believed heartily in the Union cause, and because he was an admirer of President Lincoln.

Horace Binney was a rather unlikely Lincoln admirer. Born in 1780, he was a generation older than Lincoln. He attended Harvard College and graduated with high honors in 1797. He studied law with Jared Ingersoll in his home town, Philadelphia, and gained admittance to the Philadelphia bar in 1800. He served one term as a legislator elected on a fusion ticket of Federalists and Independent Democrats. Thereafter his law practice amidst the burgeoning commerce of Philadelphia became very lucrative. He became a director of the first United States Bank. In 1832, he ran successfully for Congress, this time as an anti-Jackson candidate (and with the understanding that he would not have to support Pennsylvania's pet interest, the protective tariff, that a vote for him should be considered only a vote against Andrew Jackson; and that he would not be bound to act with any party in Congress). There he became rather embittered against party politics; "the spirit of party," he said, "is a more deadly foe to free institutions than the spirit of despotism." He retired for the most part from active court work twenty-four years before the Civil War began, and, although he wrote several eulogies and an historical piece on the authorship of Washington's Farewell Address, he was little involved in political questions until the war broke out.

Binney disliked democracy, whether with a small or a large "d," and he opposed the provision of the Pennsylvania Constitution of 1838, which made the tenure of the state's judges a period of years rather than during good behavior. He was a rather crusty Federalist as long as that party existed. He always hated the Democratic party, but he had his reservations about the Whigs as well, especially insofar as their leaders, Henry Clay and Daniel Webster, practiced the political arts to gain the Presidency. Writing, appropriately enough, to Alexander Hamilton's son, J.C. Hamilton, in 1864, Binney accused Clay and Webster of caring "nothing about true fame" and of wanting "only . . . to get on the top of the pillar, like Simeon Stylites, to be looked at with upturned eyes by the people, and to be fanned with the *aura popularis* from all quarters of the heavens." He concluded:

These aspirations for the President's office are to me a wonder and an astonishment, and I sometimes think that the most decisive argument against a republic is that it fools and dwarfs the best minds in the country, by directing their hearts towards the vain, ephemeral show of the first office in it, to be obtained by popular arts and intrigues; and the saving feature of a monarchy is its permanent, though personally insignificant, head, which compels men of great minds from thinking of the pinnacle, and drives them to work for their own fame in the elevation and consolidation of their country. . . .

Thus Binney was a true old Federalist who never quite adjusted himself to the age of the common man which flowered with Jacksonian democracy. His biographer, Charles Chaun-

cey Binney, noted perceptively that it was Binney's dislike of democracy that made him the enemy of the Democrats without really being the friend of the Whigs.

Mr. Binney's opposition to the Democratic party was due to its having made democracy its fundamental principle from the start, but he was well aware that after the passing of Federalism, the democratic spirit affected all political parties. Writing about 1840, he said, "The Whigs are at this day more democratic in their devices and principles than the Democrats were in the days of Jefferson. There are few or no sacrifices of constitutional principle that the Whigs will not make to gain power, as readily as the Democrats. . . . they have entered into full partnership with those who trade upon the principle that the people are all in all, that their voice is *vox Dei*, that the masses are always right, and that nothing else is fundamental in government but this. What the Whig affix means, I think it is difficult to say. . . . The only question is how to obtain most of the sweet voices and emoluments of government, and this is as much a Whig object as a Democrat object, and there is no obvious or characteristic difference in the nature of their respective bids."

Binney explained his political philosophy, as opposed to his party principles, to his British friend J.T. Coleridge in 1863, "I have a horror of democracy as the radical principle of a government, . . . while I am as firm a friend of free government as any man that lives." He reconciled the two seemingly divergent beliefs by invoking the age-old idea that representatives were responsible to God, though chosen by the people:

That the people are the final cause and the Constitutional origin of all power among us is true. . . . But the moral source of all power, which is also the source of the people, has respect to the ends and purposes, the sure establishment of freedom as well as its diffusion, [and] the people as people are not the true source of it, but God above, and the moral qualities with which His grace imbues some and not all men. Virtue, reason, love for mankind, which come from the eternal source of all power, have better right to exercise it than man simply. . . . His moral qualities are his true title; and therefore, while I admit him to be the final cause of political power with us, I do not admit him to be the efficient cause of power in government.

He recognized equality of opportunity for political distinction but not equality of capacity and therefore required "siftings, distinctions, and qualifications, in all preparations for the exercise of political power. . . ."

Despite the dominant anti-democratic theme in his long life, Binney found much to admire in the railsplitter whose skillful practice of the political arts brought him to the Presidency in 1861. He apparently knew little or nothing about Lincoln before he assumed the office, and he therefore judged the President by his acts. Binney liked what he saw. In March of 1861, he discussed Lincoln's Inaugural Address with Coleridge:

. . . I hope you will agree with me that it is a plain, sensible paper, expressing right doctrines as to the perpetuity of the Constitution, the unlawfulness of *secession*, and the duty of enforcing the laws; and in a kind temper, tho' with all requi-

FIGURE 2 (facing page 2). Horace Binney's pamphlet appears in the upper left hand corner. Judge S.S. Nicholas of Louisville, J.C. Bullitt* of Philadelphia, George M. Wharton* of Philadelphia (in two pamphlets), Tatlow Jackson,* Edward Ingersoll of Philadelphia, John T. Montgomery* of Philadelphia, C.T. Gross, William M. Kennedy, Isaac Myers,* and James F. Johnson* answered it. Sydney George Fisher's "Suspension of Habeas Corpus During the War of the Rebellion" identifies the author of the pamphlet shown in the lower left-hand corner as David Boyer Brown; previous owners have identified it on the cover as Frank Taylor's pamphlet. Wharton's and Montgomery's answers are also pictured. Asterisks (*) indicate pamphlets in the Lincoln National Life Foundation collection.

THE PRIVILEGE
 OF
 WRIT OF HABEAS CORPUS
 UNDER
 THE CONSTITUTION.

THE
 WRIT OF HABEAS CORPUS,
 AS APPLIED TO
 MR. BINNEY.

BY JOHN C. WHARTON.
 PHILADELPHIA:
 JOHN CAMPBELL, BOOKSELLER,
 117 CHESTNUT STREET.
 1862.

REPLY TO HORACE BINNEY
Order of the Court
June 5 5 o'clock
 THE PRIVILEGE
 OF
 WRIT OF HABEAS CORPUS
 UNDER
 THE CONSTITUTION.

A MEMORIAL OF THE PHILADELPHIA BAR.
 PHILADELPHIA:
 LEWIS KELLEN, SON, PUBLISHER,
 117 CHESTNUT STREET.
 1862.

REMARKS
 ON
 MR. BINNEY'S TREATISE
 ON
 WRIT OF HABEAS CORPUS.
 BY
 G. M. WHARTON.

PHILADELPHIA:
 JOHN CAMPBELL, BOOKSELLER,
 117 CHESTNUT STREET.
 1862.

site firmness, declaring his purpose to administer his office with fidelity, and with effect as far as the country shall supply the means. I should think, and this is the common opinion, that the paper has been written by himself; and that it is a proof of a plain, sound mind, free from any disposition to press what he thinks right with much rigour, or what he thinks wrong or plainly expedient, from mere fidelity to party; the best temper, perhaps, for our country. His reasoning upon disputed points, where I have examined it with attention, appears to be accurate, and his heart kind. He is generally regarded as a cordial man, not highly educated, but of good reasoning powers, and both calm and brave. On the whole, I like his *début*. The *people* will understand him; and that is a great point with us.

Nine months later, Binney was still describing the President in radiant hues for his English correspondent, though with the customary reservations about Lincoln's physical appearance.

The character of this President has come to be received by nearly all among us (the free North and West) as very frank, unaffected, and honest. I recollect no President, who was so little known when he came into office, who so soon, and in times of vast difficulty and very general self-seeking, as well as of great devotion to public service, has acquired a very full confidence of the people for these qualities. He seems to be an entirely sincere and honest man. He does not appear to think much of himself, but is disposed to give all he has, and is, to the country; and to shew himself always in his own clothes. Perhaps he might get handsomer; but we have been so much annoyed by pretensions in some of our Presidents, that we are not sorry to see a little more of the undress or natural style.

In March of 1862, after the Trent Affair, Binney favorably explained the President's role to Coleridge, who was naturally interested in the strained relations between the United States and Great Britain.

We feel, I think, more kindly towards England since the settlement of the Trent affair; and perhaps Mr. Seward—I ought to say the President, for he is not thought to be a cipher in such matters—did well in not announcing too promptly his purpose or inclination to the people. He gains daily upon all of us, in the great attributes of integrity, a

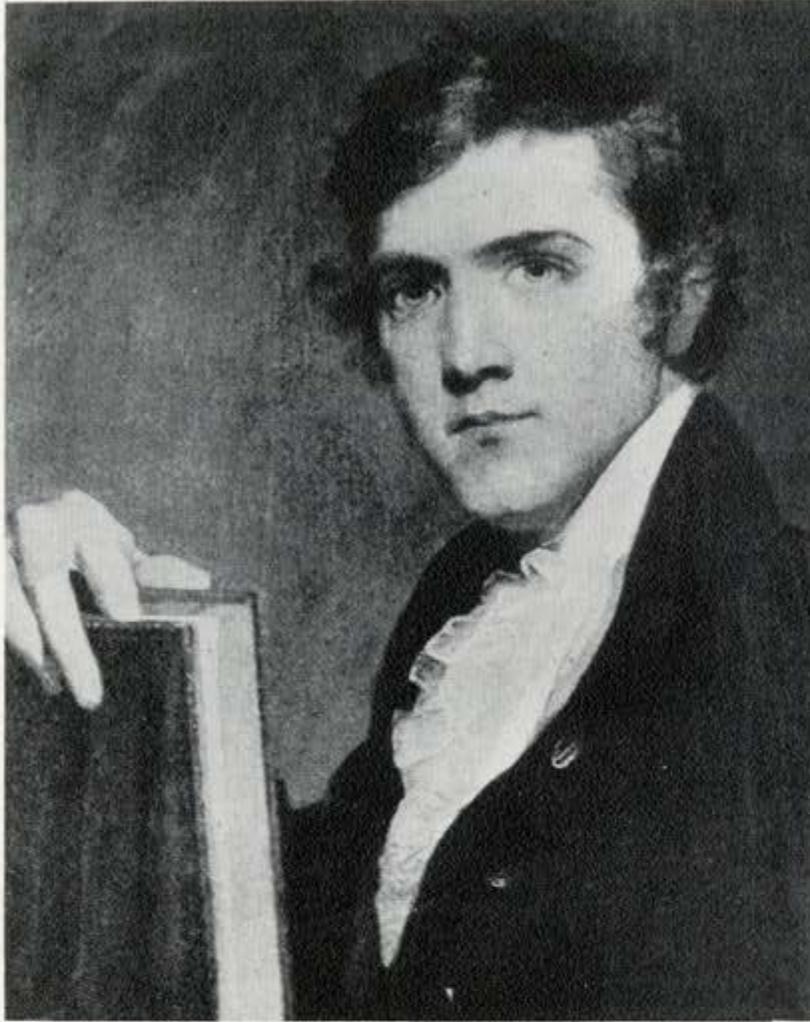


FIGURE 3. Proof that Horace Binney's career bridged two widely separated eras lies in comparing this portrait with the one on the cover. This portrait was painted by Gilbert Stuart in 1800. When the painter was told that he had put the buttons on Binney's coat on the wrong lapel, he said, "Have I? Well, thank God! I am no tailor." Then he changed the coat to a double-breasted model. The color (which is claret) Stuart made up because it went well with Binney's complexion; Binney never owned a coat that color. A reproduction of the portrait appears in Charles Chauncey Binney's *Life of Horace Binney*.

politicians, would have had a field day had the ancient Philadelphia lawyer voiced the sentiments in the pamphlet which he voiced in his private letters to Alexander Hamilton's son and to skeptical British conservatives. The Democrats were having trouble distinguishing themselves from the Republicans anyway. They supported the war for the Union as much as the Republicans did, and Lincoln had not yet provided them with an issue by turning it into a war for the freedom of the Negro. Their traditional appeals to the economically disaffected had little appeal in the midst of war-induced economic prosperity. All that was left to them was the issue of civil liberties, and this would have been powerful indeed had the President's defenders justified the suspension of the privilege of the writ of *habeas corpus* as suitable discipline for an unruly democracy. As it was, Democrats would attack the suspension and Binney's defense of it time and time again, but the nature of his argument often confined them to narrow constitutional grounds and denied them any *ad hominem* argument that only crusty old Federalists supported such things in the tradition of the Alien and Sedition Acts of John Adams.

Binney's argument was strictly, which is not to say narrowly, constitutional. There was little or nothing of political philosophy in it. He merely tested the suspension of the privilege of the writ of *habeas corpus* by the various forms of constitutional argument used in his day. (Continued in next issue)

love of justice, clear good sense, untiring industry, and patriotism. He also is thought to know the people, which is a great matter, as he came in without the reputation of being able to lead them by command.

2. *The Privilege of the Writ of Habeas Corpus under the Constitution*

Fortunately for President Lincoln, Horace Binney was at his lawyerly best when, in the autumn of 1861, he wrote *The Privilege of the Writ of Habeas Corpus under the Constitution*. This is not to say merely that the Philadelphia lawyer's argument was ingenious, though many constitutional students at the time and ever since have recognized it as such, but that he eschewed unnecessary *dicta* which might have sat poorly with his jury. The jury which judged Lincoln was the American people, and they would not have taken kindly to Binney's old Federalist beliefs, to his uneasiness with democracy, and to his desire for government by those who had been sifted from the common herd by educational distinctions and conservative moral qualifications.

Lincoln's prosecutors, the Democratic