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THE POWER TO SUSPEND HABEAS CORPUS: AN ANSWER FROM THE ARGUMENTS SURROUNDING *EX PARTE MERRYMAN*

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My lord, I can touch a bell on my right and order the imprisonment of a citizen in Ohio; I can touch a bell again and order the arrest of a citizen of New York; and no power on earth except that of the President can release them. Can the Queen of England do so much?
——*William H. Seward*[1]

We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.
——*Hamdi v. Rumsfeld*[2]

INTRODUCTION

The question of which political branch has the power to suspend the privilege of the writ of habeas corpus is a classic constitutional separation of powers question with important consequences for civil liberties. This "Great Writ of Liberty" that allows courts to inquire into the legality of a citizen's detention by government forces has been recognized as an important weapon against tyranny.[3] The Constitution's Suspension Clause provides 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."[4] While this language appears to allow for the suspension of the privilege of the writ in dire emergency, it does not answer a critical question: Which branch of the government has the power to suspend? The only case to squarely address the issue, *Ex parte Merryman*,[5] is often presented as a conflict of personal wills, rather than as a correct legal analysis of the

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1. Statement allegedly made by William H. Seward, President Abraham Lincoln's Secretary of State, to Lord Lyons, British Minister to America. ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 58-59 (1973).
2. 124 S. Ct. 2633, 2650 (2004).
3. *See* ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 1, 9 (2001).
4. U.S. CONST. art. VI.
5. 17 F. Cas. 144, 147 (C.C.D. Md. 1861) (No. 9,487).

Suspension Clause.[6] The basic facts surrounding *Merryman* are well-known: the arrest of John Merryman for suspected rebel activity in the opening days of the Civil War, United States Supreme Court Chief Justice Roger Brooke Taney's issuance of a writ of habeas corpus demanding either an explanation of his confinement or his release, and President Lincoln's refusal to obey the writ.

Cursory examinations of the case give the impression that the conflict was simply one of wills: Taney's Southern sympathies against Lincoln's determination to save the Union by any means necessary.[7] History tends to credit Taney with the correct legal conclusion, while crediting Lincoln with making the correct pragmatic one.[8] Under this traditional assessment, it would seem to matter little whether the President has the power under the Constitution to suspend the privilege of the writ of habeas corpus; instead, it matters only that the President *believes* he or she has the power to do so if necessary.[9]

This assessment is too simplistic, and the lesson that it teaches is misleading. It is questionable whether Lincoln's suspension of habeas corpus in the spring and summer of 1861 was necessary, or even contributed, to the safety of the Union.[10] Further, Taney's opinion stands as the legal word on the subject largely because it was never appealed, not because it is necessarily persuasive.[11] The question of which branch of government has the power under the Constitution to suspend the privilege of the writ of habeas corpus remains unanswered.[12] Instead, the power to suspend habeas corpus has resided in what Justice Robert Jackson referred to as the "zone of twilight": an area where the distribution of power between Congress and the President is uncertain.[13]

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6. *See, e.g.,* CLINTON ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 25-26 (1951).
7. *See id.* at 25.
8. *See, e.g., id.* at 24-25.
9. *Id.* Rossiter is skeptical that this distinction matters. *See infra* note 297 and accompanying text.
10. *See* MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 8 (1991) (noting that the worst of the danger of invasion of Washington, D.C. had passed by the time Lincoln first authorized the suspension of habeas corpus).
11. In fact, a fair number of influential legal scholars at the time criticized the opinion. *See infra* note 77 and accompanying text. Chief Justice William Rehnquist more recently noted that Taney's original determination that the President had no power to suspend habeas corpus was rendered without the benefit of argument by counsel on the subject. *See* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 40-41 (1998).
12. A number of cases have addressed the Suspension Clause in some detail. Not one, however, has definitively passed on the question, although they are of value in answering it. *See infra* notes 122-200 and accompanying text.
13. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). Jackson stated that, within this zone, "congressional inertia, indifference or quiescence may sometimes, at least as a practical

The answer to the question is of vital importance in this post-9/11 era. The current "War on Terror" has already raised numerous legal issues regarding the power of the President as commander-in-chief to detain without trial suspected terrorists, including American citizens, or to subject them to military tribunals.[14] Further, it appears that the initial draft of the U.S.A. Patriot Act, submitted by the Department of Justice, included a proposal to suspend the writ of habeas corpus for an undefined period.[15] Given the importance of the writ and the uncharted legal territory in which the country finds itself, the question of the authority to suspend the writ should not be left in a grey area. If the constitutional rights of American citizens are to be protected, an answer to this question is essential.

This article examines the question of which branch has the power to suspend the writ. It analyzes *Ex parte Merryman* and the legal arguments concerning the suspension power put forth by the most prominent legal scholars at the time of that case.[16]

The use of these particular arguments provides several advantages. First, *Ex parte Merryman* provides the prime example of a separation of powers conflict with regard to the power to suspend. That is, it involves a President claiming the inherent power to suspend habeas corpus, without even the tacit approval of Congress, and thus directly addresses the issue. This is a rarity in our legal history, as more recent Presidential actions with regard to civil liberties have come with at least some support of Congress.[17] Second, because *Merryman* is the only case to directly address the issue of the power to suspend habeas corpus, and was such an important case in its time, the legal arguments surrounding the case provide the most comprehensive discussion of the power to suspend habeas corpus that exists. Further, these

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matter, enable, if not invite, measures on independent presidential responsibility." *Id.*

14. *See, e.g.*, Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004); Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004); Rasul v. Bush, 124 S. Ct. 2686 (2004). In these three cases, the United States Supreme Court delivered a sharp check on the President's assertion of unilateral power to declare persons as "enemy combatants" and to hold them without access to the legal system. *See infra* notes 151-75 and accompanying text.

15. *See* STEVEN BRILL, AFTER: HOW AMERICA CONFRONTED THE SEPTEMBER 12 ERA 73-74 (2003). Brill obtained this information from interviews with Representative James Sensenbrenner, Chairman of the House Judiciary Committee, as well as White House officials who stated that they saw the draft. Attorney General John Ashcroft stated that he "could not 'reconstruct with any accuracy' whether the suspension of habeas corpus was proposed." *Id.* at 74. Brill relates that, after Sensenbrenner told Ashcroft the suspension of habeas corpus was a "nonstarter," the provision was deleted from the official proposal of the bill. *Id.*

16. *See infra* Parts I-III.

17. *See* REHNQUIST, *supra* note 11, at 219 (noting the differences between the executive branch's conduct in the Civil War and that during the twentieth century).

arguments were made at a time much closer to that of the Framers than our own, and thus provide a perhaps keener insight into the original intent of the Framers regarding the power to suspend habeas corpus.

Part I of the article is devoted to examining the facts surrounding *Ex parte Merryman*, as well as responses to the opinion. Part II provides an analysis of the Constitution in an effort to determine which branch of government possesses the power to suspend the privilege of the writ of habeas corpus. Part III discusses whether, even if, as Taney believed, Congress is the branch with the power to suspend, the President still has a concurrent power to suspend in certain circumstances. Part IV then examines the relevance of the answer today.

I. THE FACTUAL SITUATION OF *EX PARTE MERRYMAN*

In order to examine *Ex parte Merryman* in the proper context, one must understand the situation Lincoln faced in April and May of 1861. Fort Sumter fell on April 14.[18] On April 17 and 18, Virginia's convention adopted an ordinance of secession, and the state militia seized the federal armory at Harper's Ferry and Gosport Navy Yard.[19] Maryland was also unfriendly to Lincoln, and it appeared that it might secede as well, leaving Washington, D.C. surrounded by hostile territory.[20]

The precarious situation in Maryland got worse on April 19, when the Sixth Massachusetts Regiment entered Baltimore on its way to reinforce Washington.[21] As the troops marched between railway stations, they were attacked by an angry mob.[22] The resulting altercation left four soldiers and twelve civilians dead, with many others wounded.[23] In response to the riot, Baltimore's mayor and the chief

18. JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 273-74 (1988).

19. *Id.* at 278-79. Virginia's secession ordinance was finally ratified on May 23, 1861. *Id.* at 280.

20. *See id.* at 284-85; NEELY, *supra* note 10, at 4. In the 1860 election, Lincoln received only 2,000 of the approximately 93,000 votes cast in Maryland for president. U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITES STATES: COLONIAL TIMES TO 1970 1074, 1080 (1975). Democratic candidate Stephen Douglas received approximately 6,000 votes, while Southern-Rights Democratic candidate John C. Breckenridge of Kentucky, and Constitutional Unionist candidate John Bell of Tennessee, each received approximately 42,000 votes. *Id.* McPherson notes that, while northern and western Maryland were unionist, southern and eastern Maryland were secessionist, and the legislature was controlled by Southern-Rights Democrats. MCPHERSON, *supra* note 18, at 285.

21. MCPHERSON, *supra* note 18, at 285.

22. *Id.*

23. *Id.*

of police ordered the destruction of railroad bridges into the city from Pennsylvania.[24]

In the midst of this frenzied activity was a man named John Merryman. Merryman was a wealthy landowner, the president of the Maryland Agricultural Society, and an officer in the state militia.[25] An ardent secessionist, Merryman was known for speaking vigorously against the Union, and had recruited a company of soldiers with the intent to join the Confederate Army.[26] Merryman participated in the burning of bridges and tearing down of telegraph wires in response to the Baltimore riot.[27]

On April 26, Governor Hicks called a special session of the Maryland legislature into session.[28] This gathering, and the fear that the legislature would soon pass an ordinance of secession, caused Lincoln to first consider the idea of suspending habeas corpus.[29] General-in-Chief Winfield Scott urged Lincoln to arrest secessionist-minded legislators to prevent the legislature from passing a secession ordinance, but Lincoln decided against it.[30] Lincoln wrote to Scott, however, that if the legislature decided on secession and armed conflict with the Union he was "to adopt the most prompt and efficient means to counteract, even, if necessary, to the bombardment of their cities, and, in the extremest necessity, the suspension of the writ of *habeas corpus*."[31] Fortunately for Lincoln, the Maryland legislature ultimately refused to consider an ordinance of secession.[32]

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24. *Id.* *See also* NEELY, *supra* note 10, at 5 (explaining that Baltimore officials justified the burning of the bridges as resulting from fear that other Union troops would enter the city and take revenge for the riot, but pointing out that it also had the effect of cutting Washington off from the rest of the Union).
25. *See* WALKER LEWIS, WITHOUT FEAR OR FAVOR: A BIOGRAPHY OF CHIEF JUSTICE ROGER BROOKE TANEY 447 (1965); MCPHERSON, *supra* note 18, at 287.
26. Sherrill Halbert, *The Suspension of the Writ of Habeas Corpus by President Lincoln*, 2 AM. J. LEGAL HIST. 95, 99 (1958).
27. *See* MCPHERSON, *supra* note 18, at 287.
28. NEELY, *supra* note 10, at 6.
29. *Id.* at 6-7.
30. *Id.*
31. 6 COMPLETE WORKS OF ABRAHAM LINCOLN 255-56 (John G. Nicolay & John Hay eds., n.p. 1894). Some commentators have cited this letter as proof of the reluctance with which Lincoln looked on the suspension of habeas corpus, in that he considered it a step to be taken only in the "extremest necessity" and more drastic than ordering the bombardment of cities. *See, e.g.*, J.G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 121 (1963). However, as Neely notes, such an assertion probably gives too much credit to Lincoln's commitment to civil liberties. *See* NEELY, *supra* note 10, at 7. In the original copy of the letter, Lincoln wrote, "if necessary, to the bombardment of their cities—and of course the suspension of the writ of habeas corpus." *Id.* However, Lincoln disliked the casual use of the phrase "of course," and struck it out, inserting "in the extremest necessity" instead. *Id.*
32. MCPHERSON, *supra* note 18, at 287. Instead, the legislature adopted a "neutral position," although the lower house did denounce "the war which 'the Federal Government had declared on the Confederate States.'" *Id.*

The situation in Washington improved somewhat with the arrival of additional troops after April 24.[33] However, Lincoln and General Scott remained worried about the safety of the capital.[34] As a result, on April 27, Lincoln wrote the following order for General Scott:

> You are engaged in suppressing an insurrection against the laws of the United States. If at any point on or in the vicinity of any military line which is now or which shall be used between the city of Philadelphia and the city of Washington you find resistance which renders it necessary to suspend the writ of *habeas corpus* for the public safety, you personally, or through the officer in command at the point at which resistance occurs, are authorized to suspend that writ.[35]

On May 25, at approximately 2 a.m., soldiers acting under the order of General William H. Keim arrested Merryman at his home outside Baltimore on suspicion of drilling troops in order to take them south to join the Confederacy, aiding and abetting the burning of railroads and bridges in order to prevent troops from reaching Washington, and obstructing the United States mail.[36] Merryman was imprisoned in Fort McHenry.[37] Surprisingly, however, he was allowed contact with his family attorney.[38] Later that day, Merryman's attorney went to the fort, but General George Cadwalader, the commanding officer,

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33. *See id.* at 286. The Seventh New York regiment entered Washington on April 25, after repairing the rail line from Annapolis. *Id.* Other regiments soon followed. *Id.*

34. *See* NEELY, *supra* note 10, at 8. General Winfield Scott drafted an order on April 26 warning that "numerous hostile bodies of troops" had assembled near the city, and that "an attack upon it may be expected at any moment." Letter from Winfield Scott to Abraham Lincoln (Apr. 26, 1861) (on file with the Library of Congress), *available at* http://memory.loc.gov/ammem/alhtml/malhome.html. *See also* NEELY, *supra* note 10, at 8.

35. COMPLETE WORKS OF ABRAHAM LINCOLN, *supra* note 31, at 258. Neely points out that this order was actually a second draft, with the first order authorizing suspension only in the vicinity of the railway line from Philadelphia to Washington through Annapolis. NEELY, *supra* note 10, at 8.

36. Sydney G. Fisher, *The Suspension of Habeas Corpus During the War of the Rebellion*, 3 POLI. SCI. Q. 454, 456 (1888). Fisher got the information regarding the charges directly from Merryman's attorney, George M. Gill. *Id.* at 456 n.1. *See also* BERNARD C. STEINER, LIFE OF ROGER BROOKE TANEY 491 (1922) (noting that Taney later stated that "Merryman appeared to have been 'arrested upon general charges of treason and rebellion' without giving the names of the witnesses"); Mark E. Neely, Jr. et al., *The Impeachment Trial of President Abraham Lincoln*, 40 ARIZ. L. REV. 351, 359 (1998) (describing testimony given during Lincoln's impeachment trial regarding the reasons for Merryman's arrest).

37. STEINER, *supra* note 36, at 491.

38. *See id. See also* HAROLD M. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION 82 (1975). Hyman conjectures that this allowance was due to Merryman's status in society and the novelty of the process at that point. *Id.*

refused to show him the paper under which Merryman was kept in custody.[39]

Merryman's attorney then went to Washington, where he presented a petition for writ of habeas corpus to Chief Justice Taney in chambers at the Supreme Court.[40] The next day, Sunday, Taney issued a writ directing that Merryman be brought before him in Baltimore on Monday.[41] On Monday, General Cadwalader sent a representative to the Court with his answer.[42] Cadwalader refused to produce Merryman,

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39. STEINER, *supra* note 36, at 491. There is some question as to whether the soldiers arresting Merryman actually got the right person. Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 97-98 (1993). The order General Keim sent apparently authorized the arrest of a captain of a secessionist company in Maryland, rather than Lieutenant Merryman. *Id.*

40. HYMAN, *supra* note 38, at 82-83. Merryman's attorney apparently went to the Chief Justice of the Supreme Court because a major at Fort McHenry had already disregarded District Judge William F. Giles' order in a previous case involving a minor who had enlisted without the consent of his parents. *See* ROSSITER, *supra* note 6, at 21; 5 CARL B. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD 1836-64, 843 (1972). Furthermore, Merryman's father and Taney had attended Dickinson College at the same time. *Id.* at 845.

41. STEINER, *supra* note 36, at 491. The fact that Taney made the writ returnable in Baltimore, *id.*, along with the fact that *Ex parte Merryman* was published in the circuit court reporter, RANDALL, *supra* note 31, at 131, has led to the general assumption that he issued the writ in his capacity as a circuit court judge. *See* MCPHERSON, *supra* note 18, at 287-88; William H. Rehnquist, *Civil Liberty and the Civil War, in* 6 GAUER DISTINGUISHED LECTURE IN LAW AND PUBLIC POLICY 12 (1997); Halbert, *supra* note 26, at 99. It was customary at the time for one of the Supreme Court Justices to also sit as the presiding judge in each term of the circuit court in his circuit. STEINER, *supra* note 36, at 451. Taney had been sitting with the Circuit Court of the United States for the District of Maryland in Baltimore since April 8, 1836. *Id.* However, it is not at all clear that this characterization of Taney acting as a circuit court judge is correct. *See* ROSSITER, *supra* note 6, at 20 (arguing that Taney acted as Chief Justice of the United States throughout the proceedings). The petition for the writ of habeas corpus was addressed to Taney in his capacity as Chief Justice of the Supreme Court, and was presented to him in chambers in Washington. *See Ex parte Merryman*, 17 F. Cas. 144, 147 (C.C.D. Md. 1861)(No. 9,487). Furthermore, at the hearing regarding the return of the writ, Taney announced that he was sitting as "Chief Justice of the United States." *See* David L. Martin, *When Lincoln Suspended Habeas Corpus*, 60 A.B.A. J. 99, 100 (1974); *see also* HYMAN, *supra* note 38, at 83 ("[Taney] issued a writ at once, taking care first to strike the designation of himself as a circuit jurist from the petition."). Walker Lewis, in his biography of Taney, states that Taney considered issuing the writ returnable in Washington, but felt that the situation could better be handled in Baltimore. LEWIS, *supra* note 25, at 450-51. In his opinion in *Merryman*, Taney stated that he chose to bring the matter to Baltimore so as not to withdraw General Cadwalader from the limits of his military command. 17 F. Cas at 147. Under the 1789 Judiciary Act, Supreme Court Justices, as well as other federal judges, had original jurisdiction to grant writs of habeas corpus for prisoners held under the authority of the United States. *See* Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 82.

42. SWISHER, *supra* note 40, at 845.

stating that the President had authorized him to suspend the writ of habeas corpus.[43] He asked Taney to postpone further action until Cadwalader had the opportunity to confer with Lincoln on the matter.[44]

Taney denied Cadwalader's request and immediately issued a writ of attachment for contempt against Cadwalader, directing him to appear on Tuesday.[45] On Tuesday, however, the marshal who had been directed to serve the attachment reported that he had been denied entry into Fort McHenry.[46] Taney commented that, although he could have ordered the marshal to summon a *posse comitatus* to deliver the attachment, it would have been futile due to the overwhelming force at Fort McHenry.[47] He promised instead to file a written opinion that would be given to Lincoln "so that that high Officer may perform his Constitutional duty of seeing that the laws are enforced."[48]

On Friday, June 1, Taney filed his opinion in *Ex parte Merryman*.[49] Taney began by noting his surprise that Lincoln could believe the President had the power to declare a suspension of habeas corpus, and could delegate such power to a military officer.[50] Taney stated that he had "supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands, that the privilege of the writ could not be suspended, except by act of congress."[51] Taney noted that the clause prohibiting the suspension of habeas corpus, except in cases of rebellion or invasion when the public safety may require it, was found among the enumerated powers of Congress in Article I, rather than the Article II powers of the President.[52] He then observed that, even if Congress were to authorize a suspension of the writ, a party imprisoned by regular judicial process could not be detained in prison or tried by military tribunal because the Constitution guaranteed the right to a speedy and public trial.[53] Taney rejected the idea that the President had any independent powers under the constitutional provision giving him the duty to "take care that the laws shall be faithfully executed"; rather, he stated that the President's duty to do so was subordinate to judicial power.[54]

43. *See Merryman*, 17 F. Cas. at 147. Cadwalader was under order to decline to produce prisoners in response to writs of habeas corpus, no matter by what authority issued. RANDALL, *supra* note 31, at 161.
44. SWISHER, *supra* note 40, at 846.
45. STEINER, *supra* note 36, at 492.
46. *Id.*
47. *Id.* at 492-93.
48. *Id.* at 493-94 n.8.
49. LEWIS, *supra* note 25, at 452.
50. *Ex parte* Merryman, 17 F. Cas. 148 (C.C.D. Md. 1861) (No. 9,487).
51. *Id.*
52. *Id.* at 148-49.
53. *Id.* at 149 (citing U.S. CONST. amend. VI).
54. *Id.* (quoting U.S. CONST. art. II, § 3).

In further support of his position that the President had no power to suspend the writ of habeas corpus, Taney cited English law, which granted the power to suspend habeas corpus to Parliament, while denying it to the Crown.[55] He also cited Justice Story's *Commentaries on the Constitution*, which assumed that Congress was the proper branch to suspend habeas corpus,[56] as well as the statement of Chief Justice Marshall in *Ex parte Bollman*:[57] "If at any time, the public safety should require [the suspension of the writ of habeas corpus], it is for the legislature to say so."[58]

Taney further chastised the military authorities for not only suspending the privilege of the writ of habeas corpus, but also for having "by force of arms, thrust aside the judicial authorities and officers to whom the constitution has confided the power and duty of interpreting and administering the laws, and substitut[ing] a military government in its place, to be administered and executed by military officers."[59] He concluded by stating:

> In such a case, my duty was too plain to be mistaken. I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome. It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions, and exceeded the authority intended to be given him; I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the circuit court of the United States for the district of Maryland, and direct the clerk to transmit a copy, under seal, to the president of the United States. It will then remain for that high officer, in fulfilment of his constitutional obligation to 'take care that the laws be faithfully executed,' to determine what measures he will take to cause the civil process of the United States to be respected and enforced.[60]

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55. *Id.* at 150-51. In summation of this recitation, Taney stated:
> If the president of the United States may suspend the writ, then the constitution of the United States has conferred upon him a more regal and absolute power over the liberty of the citizen, than the people of England have thought it safe to entrust to the crown; a power which the queen of England cannot exercise at this day, and which could not have been lawfully exercised by the sovereign even in the reign of Charles the First.

Id. at 151.

56. *Id.* at 151-52.

57. 8 U.S. (4 Cranch) 75 (1807).

58. *Merryman*, 17 F. Cas. at 152 (quoting 8 U.S. (4 Cranch) 75, 101 (1807) (dictum)).

59. *Id.*

60. *Id.* at 153.

Taney's opinion was widely published throughout both the Union and the Confederacy.[61] Results were predictable, with the northern Democratic press labeling Lincoln a "despot," and the Republican press denouncing the opinion as one that was only to be expected from the pro-slavery justice who had authored *Dred Scott*.[62]

Upon being informed of Taney's opinion, Lincoln directed his attorney general, Edward Bates, to consult with noted Unionist lawyer Reverdy Johnson in order to present an argument for his power to suspend habeas corpus.[63] In the meantime, on July 4, 1861, Lincoln himself addressed the *Merryman* case in his message to the special session of Congress.[64] In his message, Lincoln stated:

> Soon after the first call for militia, it was considered a duty to authorize the commanding general, in proper cases, according to his discretion, to suspend the privilege of the writ of habeas corpus, or, in other words, to arrest and detain, without resort to the ordinary processes and forms of law, such individuals as he might deem dangerous to the public safety.[65]

He further asserted that "[t]his authority has purposely been exercised but very sparingly."[66]

Addressing Taney's criticism that the person charged with the duty to take care that the laws be faithfully executed not break them, Lincoln stated that "some consideration was given to the questions of power, and propriety, before this matter was acted upon."[67] He then noted that the Confederacy was resisting "the whole of the laws," and

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61. *See* NEELY, *supra* note 10, at 10; SWISHER, *supra* note 40, at 850.
62. *See* NEELY, *supra* note 10, at 10; SWISHER, *supra* note 40, at 850-51. Swisher quotes a *Baltimore Sun* article which stated that:
> Long after this terrible conflict shall have been brought to an end . . . [the] influence of this document from the mind of Roger B. Taney will live, at once a vindication of the principles of the republic, and of the fundamental rights of the people, and an overwhelming protest against the action of those who have so rudely assailed them.

Id. at 851. Swisher also quotes an article by the *New York Tribune*, which stated: "No Judge whose heart was loyal to the Constitution would have given such aid and comfort to public enemies." *Id.* Taney was also the author of the controversial opinion in *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), in which the Supreme Court declared that Dred Scott, a slave, was not a "citizen" within the meaning of the Constitution. *Id.* at 405-06.
63. NEELY, *supra* note 10, at 10-11. Reverdy Johnson, a Maryland lawyer, had represented the defense in the *Dred Scott* case and served as President Taylor's attorney general. 10 DICTIONARY OF AMERICAN BIOGRAPHY 112-13 (Dumas Malone ed., 1933). Bernard Steiner referred to Johnson as "the leading American lawyer" of his time. BERNARD STEINER, LIFE OF REVERDY JOHNSON iii (1914) [hereinafter STEINER, LIFE OF JOHNSON].
64. MCPHERSON, *supra* note 18, at 288.
65. *U.S. Senate Journal*, 37th Cong., 1st Sess., July 4, 1861, 12-13.
66. *Id.* at 13.
67. *Id.*

asked, "are all the laws *but one* to go unexecuted, and the government itself go to pieces, lest that one be violated?"[68]

However, Lincoln went on to make it clear that he did not feel that his suspension violated the Constitution.[69] He stated that the Constitution explicitly permits the suspension of the privilege of the writ of habeas corpus when, in case of rebellion, the public safety requires it.[70] He then noted that the Constitution was silent as to who may suspend the privilege, and, because suspension is intended only in cases of 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."[71] Finally, Lincoln asserted that Attorney General Bates would offer a more extended argument for his position, and, in the meantime, Congress was free to pass legislation on the subject.[72]

Bates's written opinion, although presented to Lincoln the next day, was not given to Congress until July 12.[73] In this opinion, Bates argued that the Constitution was vague as to which branch should exercise the power to suspend, and, as the head of a coordinate and coequal branch, the President had the power to interpret the Constitution and was not bound by the judicial branch's interpretation.[74] He argued that the President had a "peculiar duty" above the other branches to preserve the Constitution and execute the laws, and that this duty required the President to use whatever means he deemed necessary to put down the rebellion.[75] Bates also contended that the rebellion was purely political in nature, and that courts had no power to interfere with the President's political decisions.[76]

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68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. NEELY, *supra* note 10, at 14. The House of Representatives passed a resolution on that date that requested the opinion. *Id.*
74. *See generally* 10 Op. Att'y Gen. 74 (1861), *reprinted in* Rehnquist, *supra* note 41, at 51-65. Professor Paulsen notes that Bates's argument with regard to what he terms "autonomous executive branch interpretation" is in some ways a continuation of the position taken by Lincoln in his opposition to the *Dred Scott* opinion. Paulsen, *supra* note 39, at 88. As a Senate candidate in 1858, Lincoln stated that he opposed the *Dred Scott* decision as a political rule. *Id.* (citing Abraham Lincoln, Speech at Sixth Joint Debate with Stephen A. Douglas (Oct. 13, 1858), *in* 3 COLLECTED WORKS OF ABRAHAM LINCOLN 255 (Roy P. Basler ed., 1953)). At his inaugural, Lincoln went farther, stating that "if the policy of the government . . . is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers . . . ." Paulsen, *supra* note 39, at 88 (quoting Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *reprinted in* 4 COLLECTED WORKS OF ABRAHAM LINCOLN 268 (Roy P. Basler ed., 1953)).
75. Rehnquist, *supra* note 41, at 57.
76. *Id.* at 60.

Bates's opinion was not to be the last word on the subject. Legal scholars rushed to enter the fray on both sides of the issue.[77] The contributors to this debate included some of the finest legal minds of the period.[78]

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77. *See* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 149 (1980); *see also* HORACE BINNEY, THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS UNDER THE CONSTITUTION (Philadelphia, C. Sherman & Son, 2d ed. 1862); ROBERT L. BRECK, THE HABEAS CORPUS AND MARTIAL LAW (Cincinnati, Richard H. Collins 1862); DAVID BOYER BROWN, REPLY TO HORACE BINNEY ON THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS UNDER THE CONSTITUTION (Philadelphia, James Challen & Son 1862); J.C. BULLITT, A REVIEW OF MR. BINNEY'S PAMPHLET ON "THE PRIVILEGE OF HABEAS CORPUS UNDER THE CONSTITUTION" (Philadelphia, John Campbell 1862); C.H. GROSS, A REPLY TO HORACE BINNEY'S PAMPHLET ON THE HABEAS CORPUS (n.p. 1862); CHARLES INGERSOLL, AN UNDELIVERED SPEECH ON EXECUTIVE ARRESTS (n.p. 1862); TATLOW JACKSON, AUTHORITIES CITED ANTAGONISTIC TO HORACE BINNEY'S CONCLUSIONS ON THE WRIT OF HABEAS CORPUS (Philadelphia, John Campbell 1862); JAMES F. JOHNSTON, THE SUSPENDING POWER AND THE WRIT OF HABEAS CORPUS (Philadelphia, John Campbell 1862); STEINER, LIFE OF JOHNSON, *supra* note 63, 51-52 (detailing noted Unionist lawyer Reverdy Johnson's defense of Lincoln's position); WILLIAM KENNEDY, THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS UNDER THE CONSTITUTION OF THE UNITED STATES (n.p. 1862); JOHN T. MONTGOMERY, THE WRIT OF HABEAS CORPUS, AND MR. BINNEY (Philadelphia, John Campbell, 2d ed. 1862); ISAAC MYER, PRESIDENTIAL POWER OVER PERSONAL LIBERTY: A REVIEW OF HORACE BINNEY'S ESSAY ON THE WRIT OF HABEAS CORPUS (n.p. 1862); S.S. NICHOLAS, HABEAS CORPUS: A RESPONSE TO MR. BINNEY (Louisville, Bradley & Gilbert 1862); JOEL PARKER, HABEAS CORPUS AND MARTIAL LAW: A REVIEW OF THE OPINION OF CHIEF JUSTICE TANEY, IN THE CASE OF JOHN MERRYMAN (Cambridge, Welch, Bigelow, & Company 1861); EDWARD MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE GREAT REBELLION 1860-1865 162 (Da Capo Press, 2d ed. 1972) (1864) (citing an article in the *Boston Daily Advertiser* on June 5, 1861 that summarized a lecture by Theophilus Parsons); G. M. WHARTON, REMARKS ON MR. BINNEY'S TREATISE ON THE WRIT OF HABEAS CORPUS (Philadelphia, John Campbell, 2d ed. 1862). Binney, Johnson, Kennedy, and Parsons were generally of the opinion that the President could suspend the writ, or at least was not required to obey a writ that was issued. BINNEY, *supra*, at 40, 58; STEINER, LIFE OF JOHNSON, *supra* note 55, at 51-52; KENNEDY, *supra*, at 14; MCPHERSON, *supra*, at 162. Breck, Brown, Bullitt, Gross, Ingersoll, Jackson, Johnston, Montgomery, Myer, Nicholas, and Wharton were of the opinion that the President alone was without power to suspend the writ. BRECK, *supra*, at 37-39; BROWN, *supra*, at 30-31; BULLITT, *supra*, at 53; GROSS, *supra*, at 37, 40; INGERSOLL, *supra*, at 5; JACKSON, *supra*, at 2, 8; JOHNSTON, *supra*, at 47-48; MONTGOMERY, *supra*, at 23-26; MYER, *supra*, at 94; NICHOLAS, *supra*, at 20; WHATRON, *supra*, at 17.

78. For example, Philadelphia lawyer Horace Binney was acknowledged as one of the best lawyers in the country, and was the author of the six-volume *Reports of Cases Adjudged in the Supreme Court of Pennsylvania.* 2 DICTIONARY OF AMERICAN BIOGRAPHY 280 (Allen Johnson ed., 1929). The credentials of Reverdy Johnson have been set forth at *supra* note 63. Joel Parker and Theophilus Parsons were distinguished professors at Harvard Law School. 14 DICTIONARY OF AMERICAN BIOGRAPHY 230, 273 (Dumas Malone ed., 1934). Judge Samuel Smith Nicholas of Kentucky was a prominent Democratic Party theoretician, a states' rights activist, and the author of a treatise on

Ultimately, the legal question of whether Lincoln's suspension of habeas corpus was constitutional remained unresolved. Rather than appeal the *Merryman* decision and risk the chance of loss, Lincoln decided that the best course of action was simply to ignore the issue.[79] The other members of the Supreme Court were also content to let the matter go unexamined, a stance which would become a pattern during the war.[80] John Merryman had been released from confinement on July 12, the same day that Bates's opinion justifying Lincoln's suspension reached Congress.[81] He was indicted for treason, but was never prosecuted.[82]

Although Lincoln had put the propriety of his suspension of the privilege of the writ of habeas corpus before the 37th Congress in the emergency session of 1861, Congress debated the matter without taking any action.[83] The second wartime session of Congress convened on December 2, 1861, and Congress again took no action.[84] A third session convened on December 1, 1862, and finally, on March 3, 1863, Congress passed legislation authorizing Lincoln to suspend the privilege of the writ of habeas corpus.[85] As a result of Lincoln's suspension

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martial law. *See* HYMAN, *supra* note 38, at 143; S.S. NICHOLAS, MARTIAL LAW 23 (1842).

79. *See* RANDALL, *supra* note 31, at 132; *supra* note 65 and accompanying text. The administration was afraid to put its theories of presidential power to the test, for fear of an adverse ruling in the courts. *See id.*

80. *See* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 65 (Sanford Levison ed., 3d ed. 2000). McCloskey notes that the Court as a whole was not willing to challenge Presidential action in wartime, finding reasons to decline jurisdiction on issues that might provoke a conflict. *See id. See also* BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 130 (1993) (noting that, during Lincoln's assault on civil rights, "the Court remained in the state of recession which its *Dred Scott* decision had induced").

81. *See* LEWIS, *supra* note 25, at 453. Merryman was transferred to civil authorities and then released on $40,000.00 bail. SWISHER, *supra* note 40, at 853.

82. LEWIS, *supra* note 25, at 453. According to Lewis, Chief Justice Taney was largely responsible for the fact that Merryman and approximately sixty others held on similar charges in Maryland were not prosecuted. *Id.* Taney was concerned that those being held would not get a fair trial, and so instructed District Judge Giles not to try their cases by himself. *Id.* Because Taney was the only other federal district judge designated to sit at Baltimore, this meant that none of the trials could occur in his absence. *Id.* For over a year, Taney's ill health made it impossible for him to sit with the circuit court. *Id.* John Merryman went on to become State Treasurer of Maryland from 1870-72. *See* ARCHIVES OF MARYLAND (BIOGRAPHICAL SERIES) MSA SC 3520-1543, *available at* http://www.mdarchives.state.md.us/msa/speccol/sc3500/sc3520/001500/001543/html/msa01543.html.

83. *See* CONG. GLOBE, 37th Cong., 1st Sess. 1 (1861); Halbert, *supra* note 30, at 111.

84. *Id.* at 111-12.

85. *Id.* at 112-13. The Habeas Corpus Act of 1863 stated that "during the present rebellion, the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United

of habeas corpus, thousands of American citizens were arrested and held in prison.[86]

As can be seen above, the factual situation presented in *Ex parte Merryman* provided an exceptionally clear opportunity for the various arguments regarding the power to suspend habeas corpus. This resulted in the most comprehensive legal analysis of the question in American history.[87] The arguments raised by the various supporters and detractors of both Taney's and Lincoln's positions still pertain today, and serve as a useful road map in an analysis of the question.

II. THE LEGAL ANALYSIS OF THE POWER TO SUSPEND THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS

Prior to analyzing the question of who has the constitutional power to suspend habeas corpus, it is helpful to precisely define what such suspension entails. The general consensus, even prior to the Civil War, was that suspension did not mean that habeas corpus itself was suspended, but rather that the privilege guarded by the writ was suspended.[88] The Supreme Court later confirmed this belief in *Ex parte Milligan*,[89] wherein it stated: "The suspension of the privilege of the writ of *habeas corpus* does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it."[90]

Also, the fact that the privilege of the writ was suspended did not serve to immunize the official from later liability for an illegal arrest.[91] Thus, while a person who had been illegally arrested and detained while the suspension was in place was precluded from procuring his liberty, he could later bring a civil case for damages against his ar-

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States, or any part thereof." The Habeas Corpus Act of 1863, ch. 81, 13 Stat. 755.

86. *See* NEELY, *supra* note 10, at 113-15. Neely points out that the number of persons arrested is difficult to determine. *See id. The American Annual Cyclopedia and Register of Important Events of the Year* 1865 put the figure at 38,000. NEELY, *supra* note 10, at 113. Neely notes that the generally accepted number among historians is 13,353, a number compiled in 1897 from a file search performed by Colonel F.C. Ainsworth, Chief of the Record and Pension Office of the War Department, at the behest of historian James Ford Rhodes. *Id.* at 115. Neely also provides an in-depth analysis of the different figures used by historians, as well as the problems inherent in attempting to obtain a precise count of arrests. *Id.* at 113-38. He ultimately contends that, while it is clear that there were more than 13,353 citizens arrested, the significance for civil liberties was small, since many of those arrested were in fact citizens of the Confederacy. *Id.* at 137-38.

87. *See supra* notes 77-78.

88. *See* WILLIAM S. CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS 42 (Gaunt Inc. 1997) (1863).

89. 71 U.S. (4 Wall.) 2 (1866).

90. *Id.* at 130-31.

91. *See* CHURCH, *supra* note 88, at 42-43.

rester.[92] In recognition of this fact, the English legal tradition was for the suspension of the writ to be followed by the passage of a law indemnifying the government officials who acted during the suspension.[93] The United States government followed this tradition in passing the Indemnity Act of 1863, which stated that an order of the President should be considered a defense to any civil or criminal claim against a government official for illegal arrest or imprisonment.[94]

With these principles in mind, the analysis now turns to the arguments presented regarding Lincoln's power to suspend the privilege of the writ of habeas corpus.

A. Bates's Argument for the President's Power to Interpret the Constitution

Attorney General Bates provided the first defense of President Lincoln's suspension of habeas corpus, arguing that the President has the power to interpret the Constitution and is not bound by the judicial branch's interpretation.[95] According to Bates, the President is the head of a co-equal and coordinate branch of the government, and as such cannot be made subordinate to the rulings of another branch.[96]

Bates's argument raises an interesting point. If his argument is correct, then it does not matter what Justice Taney, or we today, believe is the correct interpretation of the Constitution with regard to the power to suspend the privilege of the writ of habeas corpus. Instead, it matters only what the President believes is the correct interpretation.

It must be admitted that this argument runs counter to what we generally think of as the power of the courts to be the final arbiters of the Constitution. The general consensus today is that the President is subordinate to the Supreme Court's interpretation of the Constitution.[97] However, the idea that the executive branch has independent power to interpret the Constitution in a different manner than, and even in opposition of, the judicial branch has at least some historical basis in the writings of James Madison.[98] In *The Federalist No. 49*, Madison denied that a frequent reference to constitutional conventions would be able to keep the different branches within their respective bounds, and suggested that a coordinacy existed among the three branches such that "neither of them, it is evident, can pretend to an

92. *See id.*
93. *See id.* at 385.
94. Indemnity Act of 1863, ch. 81, § 4, 12 Stat. 756. Randall notes that, in spite of this Act, there were as many as three thousand suits pending against federal officials by September of 1865, as parties sought to exploit loopholes in the Act. RANDALL, *supra* note 31, at 193-94.
95. *See* Rehnquist, *supra* note 41, at 52-53.
96. *Id.*
97. *See* Paulsen, *supra* note 39, at 82.
98. *See id.* at 84-85.

exclusive or superior right of settling the boundaries between their respective powers."[99] In his writings, Madison advanced the idea that the tension between the branches and the Constitution's system of checks and balances would help to keep each branch within its boundaries.[100]

Whatever Madison or the other Framers might have believed, the issue of branch coordinacy in interpreting the Constitution was settled in *Marbury v. Madison*,[101] with Chief Justice Marshall's statement that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[102] A close reading of *Marbury*, however, casts doubt on this assertion. Marshall's statement in *Marbury* was made in the context of declaring that an act of the legislature interpreting the Constitution could not bind the courts because courts have a duty to interpret the Constitution for themselves.[103] *Marbury* suggests nothing about whether this interpretation would be binding on other branches of government or state governments.[104]

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99. THE FEDERALIST NO. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961). *See* Paulsen, *supra* note 39, at 84-85 (noting Madison's idea of branch coordinacy).
100. Paulsen, *supra* note 39, at 85. *See also* THE FEDERALIST No. 51 (James Madison).
101. 5 U.S. (1 Cranch) 137 (1803).
102. *See id.* at 177. The Supreme Court has often espoused this view. *See* United States v. Nixon, 418 U.S. 683, 704-05 (1973) (reaffirming that, while each branch must initially interpret the Constitution in the performance of its duties, *Marbury* established that the judiciary is vested with the ultimate power to interpret the Constitution); Powell v. McCormack, 395 U.S. 486, 549 (1969) (stating that "[o]ur system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch"); Baker v. Carr, 369 U.S. 186, 211 (1962) (stating that:

> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution);

Cooper v. Aaron, 358 U.S. 1, 18 (1958) (stating that *Marbury* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system"). This view has been especially prevalent in decisions by the Rehnquist Court. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 616 n.7 (2000) (stating that "[n]o doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text"). For a discussion of the Rehnquist Court's views on constitutional interpretation, see generally Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4 (2001).
103. *Marbury*, 5 U.S. (1 Cranch) at 177-78.
104. *See* Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 51 (1993); William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 37 (1969).

Nonetheless, the idea of judicial superiority in the interpretation of the Constitution had gained general acceptance in American legal circles by the time of *Merryman*.[105] For example, in his *Commentaries on the Constitution*, Justice Story stated that, with regard to the constitutionality of legislation:

> The decision then made, whether in favour, or against the constitutionality of the act, by the state, or by the national authority, by the legislature, or by the executive, being capable, in its own nature, of being brought to the test of the constitution, is subject to judicial revision. It is in such cases, as we conceive, that there is a final and common arbiter provided by the constitution itself, to whose decisions all others are subordinate; and that arbiter is the supreme judicial authority of the courts of the Union.[106]

In the end, Bates's argument is simply a diversion in our search for the correct interpretation of the power to suspend habeas corpus because it is not an argument of interpretation at all, but rather an argument about the interpreter.[107] The idea of autonomous executive branch interpretation of the Constitution was not persuasive even by the time of *Merryman*.[108] Given the Rehnquist Court's views on the supremacy of the Court in interpreting the Constitution, that idea is even less tenable today.[109] Nevertheless, it ultimately does not add to our understanding of what the Constitution provides on the subject.

B. The Question of Which Branch Has the Power to Suspend the Writ

Bates had little to say about what the language of the Constitution actually provides regarding the suspension of habeas corpus.[110] Instead, the main argument in the President's favor with regard to the

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105. *See* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 347 (Cambridge, Brown, Shattuck, & Co. 1833).
106. *Id.*
107. *See generally* HYMAN, *supra* note 38, at 92.
108. *See id.* at 89-92 (noting that even Bates admitted that "the weight of precedent" favored Congress, not the President, suspending the privilege).
109. *See supra* note 102. Any question as to whether the Court would be willing to defer completely to the President during war time was definitively answered in *Hamdi v. Rumsfeld*, wherein the majority opinion stated that "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." 124 S. Ct. 2633, 2650 (2004) (plurality opinion).
110. *See* Rehnquist, *supra* note 41. With regard to the Constitution's language concerning the writ, Bates remarked that "[v]ery learned persons have differed widely about the meaning of this short sentence, and I am by no means confident that I fully understand it myself." *Id.* at 61. Bates did briefly address the habeas corpus provision in the Constitution, albeit in a vague and confusing way, to argue that the provision itself was vague and confusing. *Id.* at 18-22.

interpretation of the Constitution came from noted Philadelphia lawyer Horace Binney.[111] Binney's general argument was that: (1) while the Constitution provides for the repeal of the privilege of the writ of habeas corpus, it does not say which branch is to exercise that power; therefore (2) it is necessary to determine which branch, under the structure of the Constitution, is the proper one to wield the power; and (3) because the action provided for by the Constitution is the repeal of the privilege of the writ rather than the writ itself, the proper branch is the President, given the nature of his duties as executive.[112] According to Binney, if the power was to repeal the writ itself, the matter would clearly be legislative, but because the power was merely to repeal the privilege of the writ, no legislation was necessary, and the matter was simply executive.[113]

Binney's argument was heavily criticized by other legal theorists of the time.[114] They argued instead that precedential and persuasive legal authorities, combined with the position of the habeas corpus clause in the Constitution, the traditional exercise of the writ in English law, the actions of the Framers during the Constitutional Convention, and remarks made during the state ratification conventions, all compelled the conclusion that the power to suspend the privilege of the writ of habeas corpus was exclusive to Congress.[115]

The first step in determining which of these positions is correct is to examine the Suspension Clause itself, which states: "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."[116] This simple statement raises several questions that are important to its interpretation. First, the Clause is restrictive in tone, in that it prohibits the suspension of the writ except in two circumstances, rebellion and invasion, and even then only when public safety requires it.[117] It does not explain, however, which person or branch is to exercise the authority to suspend the writ under those circumstances.[118] Further, it is unclear whether the Clause itself gives the power to suspend the writ under the enumerated circumstances, or whether the clause is

111. *See generally* BINNEY, *supra* note 77; HORACE BINNEY, THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS UNDER THE CONSTITUTION, SECOND PART (1862).

112. *See* BINNEY, *supra* note 77, at 4-6.

113. *Id.* at 37.

114. *See* BRECK, *supra* note 77; BULLITT, *supra* note 77; GROSS, *supra* note 77; JACKSON, *supra* note 77; JOHNSTON, *supra* note 77; MONTGOMERY, *supra* note 77; MYER, *supra* note 77; NICHOLAS, *supra* note 77; WHARTON, *supra* note 77.

115. See BULLITT, supra note 77, at 22; GROSS, supra note 77; JACKSON, supra note 77 at 2; JOHNSTON, supra note 77, at 48; MONTGOMERY, supra note 77, at 14; NICHOLOAS, supra note 77; WHARTON, supra note 77, at 19.

116. U.S. CONST. art. I, § 9, cl. 2.

117. *Id.*

118. *See id.*

simply a restriction on the power to suspend the writ, and the power to do so is granted in another place.[119]

Because the plain language of the Suspension Clause is of little help in clarifying the issue, the next step is to examine the legal authorities construing the Clause. With regard to case law, there are several Supreme Court opinions, although none conclusive, that have bearing on the Suspension Clause.[120] Of these cases, the most important in determining what the Framers intended are those which are temporally close to the framing, and can thus be inferred to more closely mirror the Framers' intentions.[121]

In his *Merryman* opinion, Taney expressed a belief that the Supreme Court's opinion in *Ex parte Bollman*[122] clearly established that Congress is the only branch entitled to suspend the writ.[123] *Bollman* was one of the cases arising out of the Aaron Burr conspiracy, and concerned the power of the Supreme Court to issue a writ of habeas corpus for the release of two alleged conspirators being held in federal custody.[124] The petitioners, Dr. Erich Bollman and Samuel Swarthout, minor players in the conspiracy, were imprisoned in Washington, D.C. by military authorities.[125] They petitioned the Supreme Court for a writ of habeas corpus securing their release.[126]

In his opinion, Chief Justice Marshall found that the Judiciary Act of 1789 empowered the Supreme Court to issue writs of habeas corpus.[127] Then, in dicta, he noted:

> 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.
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> That question depends on political considerations, on which the legislature is to decide. Until the legislative will be expressed, this court can only see its duty, and must obey the laws.[128]

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119. *See id.*
120. *See infra* notes 122-200 and accompanying text.
121. This inference becomes less likely as the time between the case and the Framing increases. Thus, more contemporary cases are of limited value in discerning the original intent of the Framers.
122. 8 U.S. (4 Cranch) 75 (1807).
123. *Ex parte* Merryman, 17 F. Cas. 144, 152 (C.C.D. Md. 1861) (No. 9,487).
124. 8 U.S. (4 Cranch) at 75-76. In 1805, Aaron Burr, former Vice President of the United States, hatched a secessionist scheme that would have created a new country in the American Southwest. *See* DAVID LOTH, CHIEF JUSTICE: JOHN MARSHALL AND THE GROWTH OF THE REPUBLIC 218-19 (1949). The plan never really got off the ground, although it raised trouble between the United States and Spain, which controlled Mexico. *See id.* at 221-23.
125. *See Bollman*, 8 U.S. (4 Cranch) at 75; LOTH, *supra* note 124, at 223. Swarthout and Bollman were involved in the passing of letters from Burr about the conspiracy. *Id.* at 221.
126. *Id.* at 223.
127. *Bollman*, 8 U.S. (4 Cranch) at 96-100.
128. *Id.* at 101.

Marshall's statement in *Bollman* has been seized upon by some as support for the theory that the power to suspend is given only to Congress.[129] A question exists, however, as to how much import to give Marshall's statement. First, as Horace Binney recognized, it was clearly dicta because it was not necessary to reach Marshall's holding that the Court had jurisdiction to issue the writ.[130] Further, the issue in *Bollman* was the Supreme Court's authority to issue the writ under the Judiciary Act of 1789, which authority was granted by Congress, not the Constitution.[131] It is undisputed that Congress could suspend the jurisdiction that it granted the Supreme Court under the Judiciary Act.[132]

In his book, *A Constitutional History of Habeas Corpus*, William F. Duker argues that *Bollman* is authoritative because, whatever the question presented, the thesis of Marshall's opinion assumed that the habeas clause imposed an obligation on Congress to pass some means of empowering federal courts with habeas jurisdiction.[133] Thus, according to Duker, because Congress was the only body empowered to pass legislation granting habeas jurisdiction, only Congress could suspend the writ.[134]

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129. *See, e.g.*, Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2665 (2004)(Scalia, J., dissenting).

130. *See* BINNEY, *supra* note 77, at 38-39; *see also* RANDALL, *supra* note 31, at 133; Halbert, *supra* note 26, at 109. Even some of those commentators who agreed with Taney's result grudgingly admitted that Marshall's statement might have been dictum. *See* BULLITT, *supra* note 77, at 20-23; MONTGOMERY, *supra* note 77, at 14; WHARTON, *supra* note 77, at 19. However, they were of the mind that, if the statement was dictum, it was at least highly persuasive dictum. *See, e.g.*, BULLITT, *supra* note 77, at 20 (stating: "It is worthy of consideration whether even an '*obiter*' of Chief Justice Marshall upon such a question would not be good authority. He spoke neither lightly nor loosely. A review of the case will show that he could not have spoken without reflection."); MONTGOMERY, *supra* note 77, at 14 (stating that "[i]f [Marshall's statement] is an obiter dictum, it has as few of the infirmities of a question collateral to the point in controversy, as any to be found in the books").

131. *Bollman*, 8 U.S. (4 Cranch) at 75. The only constitutional question presented was whether Congress could grant the Court power to issue a writ of habeas corpus under its power to control the appellate jurisdiction of the courts. *See id.* at 100-01.

132. *See* RANDALL, *supra* note 31, at 133-34; Halbert, *supra* note 26, at 109. Bates picked up on this point in his legal opinion, stating:

> I take it for certain that in the common course of legislation, Congress has power, at any time, to repeal the judiciary act of 1789 and the act of 1833, (which grants to the courts and to the judges the power to issue the writs) without waiting for a rebellion or invasion. . . . The Court does not speak of suspending the *privilege* of the writ, but of suspending the *powers vested in the court* by the act.

Rehnquist, *supra* note 41, at 62-63.

133. DUKER, *supra* note 77, at 172 n.126.

134. *Id.*

It is true that Marshall began his opinion in *Bollman* by noting that "the power to award the writ [of habeas corpus] by any of the courts of the United States, must be given by written law."[135] He also noted that, in passing the Judiciary Act, Congress must have been acting under the influence of the habeas corpus clause and that "they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted."[136] These comments, however, do not compel the conclusion that Marshall believed Congress had the power to suspend the writ and the President did not. At most, they provide an inference that Marshall believed Congress could have prevented federal courts from issuing the writ by failing to give them the authority to do so. This does not answer the question of whether Congress could, without running afoul of the Suspension Clause, take away the power of the federal courts to issue writs once they had been given that power.

Perhaps more importantly, Marshall's comments do not touch on the ability of Congress or the President to suspend the rights of a state court to issue a writ of habeas corpus. Although Justice Taney and the Supreme Court had earlier held in *Ableman v. Booth*[137] that state courts did not have the power to issue habeas corpus petitions for federal prisoners,[138] that decision was contrary to the generally accepted rule that state courts had concurrent jurisdiction over their citizens held under federal process.[139] Given the historical understanding that state courts could grant writs of habeas corpus for federal prisoners, it seems odd to argue that the power of suspension found in the Constitution was simply the power of Congress to take away the power of federal courts to grant writs of habeas corpus, yet

135. 8 U.S. (4 Cranch) at 94.

136. *Id.* at 95.

137. 62 U.S. (21 How.) 506 (1858).

138. *Id.* at 523.

139. *See* ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS AND THE PRACTICE CONNECTED WITH IT: WITH A VIEW OF THE LAW OF EXTRADITION OF FUGITIVES 156 (Albany, W.C. Little & Co. 1876) (stating that "[i]t may be considered that state courts may grant the writ in all cases of illegal confinement under the authority of the United States"); *see also* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 187 (1975) (asserting that concurrent jurisdiction was the settled view). In fact, Taney's opinion in *Ableman*, which prevented state courts from issuing writs for runaway slaves under federal custody, was so reviled and provoked so much contention that the issue of jurisdiction was not finally settled until after the war. *Id.* In *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871), the Supreme Court conclusively held that state courts could not issue writs for federal prisoners. *Id.* at 411-12. *See also* COVER, *supra*, at 187.

leave state court power to do so untouched.[140] As a result, *Bollman* cannot be considered conclusive on the question of who may suspend the privilege of the writ of habeas corpus under the Constitution.[141]

Some legal historians have incorrectly assumed that the question surrounding the Suspension Clause was answered in Taney's favor by the United States Supreme Court in *Ex parte Milligan.*[142] However, *Milligan* did not address the President's unilateral suspension of the writ of habeas corpus, but addressed whether a civilian who was not in the theater of military operations could be tried by a military tribunal.[143] At the time of Milligan's arrest, Congress had given the President the ability to suspend the writ of habeas corpus in the Habeas Corpus Act of 1863.[144] *Milligan* did not address the power to suspend the writ of habeas corpus, although Justice David Davis, writing for the majority, did note that "[i]t is essential to the safety of every government that, in a great crisis, like the one we have just passed through, there should be a power somewhere of suspending the writ of habeas corpus."[145]

The one issue from *Merryman* that *Milligan* did address was whether a citizen could be tried by a military tribunal in areas where the courts were actually open and functioning.[146] In *Merryman,* Chief Justice Taney had stated that, even if properly held in custody, Merryman could not be tried by a military tribunal.[147] The Supreme Court in *Milligan* came to the same conclusion.[148] Only in this sense can *Milligan* be considered as validating Taney's *Merryman* decision.[149]

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140. *See* BULLITT, *supra* note 77, at 10 (stating that, if this were the case, "the power of suspension granted to Congress being limited to the Writs issued or to be issued by the Federal courts, and having no application to the State courts, the attempt to suspend the privilege could and probably would be rendered nugatory by the action of the latter").
141. *See supra* notes 122-36.
142. 71 U.S. (4 Wall.) 2 (1866). *See, e.g.,* MICHAEL LES BENEDICT, THE BLESSINGS OF LIBERTY: A CONCISE HISTORY OF THE CONSTITUTION OF THE UNITED STATES 190 (1996) (stating that, in *Milligan,* "all the justices . . . agreed that Lincoln's suspension of the writ [of habeas corpus] had been unconstitutional; the Constitution gave that power only to Congress").
143. *Milligan,* 71 U.S. (4 Wall.) at 108-09.
144. *See* 12 Stat. 755, ch. 81, § 1; *Milligan,* 71 U.S. (4 Wall.) at 115 (addressing the President's invocation of the power to suspend granted by this Act).
145. *See* 71 U.S. (4 Wall.) at 125.
146. *See id.* at 127-30.
147. *Ex parte* Merryman, 17 F. Cas. 144, 149 (C.C.D. Md. 1861) (No. 9,487).
148. *Milligan,* 71 U.S. (4 Wall.) at 130.
149. This part of the *Milligan* decision was later distinguished, and arguably modified, by the Supreme Court in *Ex parte* Quirin, 317 U.S. 1 (1942). *Quirin* concerned the trial by military tribunal of German saboteurs who were captured in the United States during World War II. *Id.* at 20-23. One of the saboteurs, Hans Haupt, argued that he could not be tried by a military tribunal because he was an American citizen, having lived as a child in the United States with his German parents, who were naturalized American citizens. *Id.* at 20. The Court distinguished *Milligan,* noting that Milligan had not been associated with the armed forces of the enemy, while Haupt pre-

More recently, the Supreme Court decided a trio of cases concerning the detention of "enemy combatants," which cast new light on the debate regarding the powers of Congress and the President.[150] Of these three decisions, one in particular, *Hamdi v. Rumsfeld*, has considerable implications for our analysis of the Suspension Clause.[151]

In *Hamdi*, the question at issue was whether the Executive has the authority to detain American citizens who qualify on the grounds that they are "enemy combatants."[152] The petitioner, Yaser Asim Hamdi, was born in Louisiana, but moved to Saudi Arabia with his parents.[153] During the fighting in Afghanistan in 2001, he was captured by the United States's Northern Alliance allies, and eventually turned over to the United States military.[154] Through his father, he filed a habeas corpus petition in the United States District Court for the Eastern District of Virginia, arguing that his detention was unlawful.[155] In other documents filed with the court, Hamdi asserted that he was not an "enemy combatant," but a relief worker trapped in Afghanistan once the fighting began.[156]

In response to this assertion, the Government filed a declaration from Michael Mobbs, which identified Mobbs as "Special Advisor to

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sumably was associated with the German armed forces. *Id.* at 45-46. Accordingly, the Court authorized the saboteurs to be tried by military commission. *Id.* at 48.

150. *See* Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (plurality opinion); Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004); Rasul v. Bush, 124 S. Ct. 2686 (2004).

151. 124 S. Ct. 2633. The other two cases, *Padilla* and *Rasul*, are both important, but their holdings were limited ones based on jurisdiction. *Padilla* concerned a question akin to that in *Merryman*: whether an American citizen not captured on the battlefield, but detained on suspicion of aiding the enemy, could be held indefinitely as an "enemy combatant." *See* 124 S. Ct. at 2715. The Court did not reach this issue, however, because Padilla's habeas petition had been filed in the wrong jurisdiction and named the wrong respondent. *Id.* at 2721-22, 2727. *Rasul* concerned the question of whether the federal habeas statute conferred the right to judicial review over the legality of executive detention of aliens in Guantanamo Bay, Cuba, a territory over which the United States does not exercise "ultimate sovereignty." 124 S. Ct. at 2693. The Court held that it did. *Id.* at 2699. While these cases do not directly bear on the suspension power question, they do provide insight into the Court's stance regarding the importance of habeas corpus. *Rasul* in particular reaffirms that "'[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.'" 124 S. Ct. at 2692 (quoting INS v. St. Cyr, 533 U.S. 289, 301 (2001)).

152. 124 S. Ct. at 2639.

153. *Id.* at 2635.

154. *Id.* at 2635-36. Hamdi was initially detained in Afghanistan and then transferred to Guantanamo Bay, Cuba. Upon learning that he was an American citizen, the Government transferred him to a naval brig in Norfolk, Virginia, and then a brig in Charleston, South Carolina. *Id.* at 2636.

155. *Id.*

156. *See id.*

the Under Secretary of Defense for Policy."[157] In his declaration, Mobbs stated that he was familiar with the circumstances surrounding Hamdi's capture, that Hamdi had been "affiliated with a Taliban military unit" during a time in which the Taliban were engaged in fighting with the Northern Alliance, and that Hamdi had surrendered both himself and a weapon to the Northern Alliance.[158]

Although the district court ordered that Hamdi be given access to counsel and "meaningful judicial review" of the legality of his detention, the United States Court of Appeals for the Fourth Circuit reversed.[159] In so doing, the Fourth Circuit stated that detention of enemy combatants served the "vital purposes" of preventing enemy combatants from rejoining the enemy, and of relieving "the burden on military commanders of litigating the circumstances of a capture halfway around the globe."[160] The Fourth Circuit held that these interests were "directly derived from the war powers of Articles I and II" and that the judiciary was "not at liberty to eviscerate" these interests.[161]

The Fourth Circuit also held that, to the extent that Hamdi's detention required congressional approval, Congress had given it in the post-9/11 Authorization for Use of Military Force, which "authorized the President 'to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks.'"[162] Accordingly, the Fourth Circuit determined that the district court's attempted vigorous inquiry into the circumstances surrounding Hamdi's capture "went far beyond the acceptable scope of review" and that "[a]ny effort to ascertain the facts concerning the petitioner's conduct while amongst the nation's enemies would entail an unacceptable risk of obstructing war efforts authorized by Congress and undertaken by the executive

157. *Id.* at 2636-37.

158. *Id.* at 2637.

159. *Id.* at 2637-38. The district court initially appointed counsel and ordered that counsel be given access to Hamdi. *Id.* at 2637. The Fourth Circuit reversed that order on the grounds that the district court had failed to conduct a "deferential inquiry into Hamdi's status." *See id.* at 2636. On remand, and following the Government's filing of Mobbs's declaration, the district court ordered the Government to produce numerous materials for *in camera* review. *See id.* at 2637. The Government sought to appeal the production order, and the district court certified the question to the Fourth Circuit of whether Mobbs's declaration was "sufficient as a matter of law to allow for meaningful judicial review. . . ." *Id.* at 2638. The Fourth Circuit then reversed the holding of the district court without squarely answering the certified question. *Id.*

160. Hamdi v. Rumsfeld, 316 F.3d 460, 465 (4th Cir. 2003), *vacated*, 124 S. Ct. 2633 (2004).

161. *Id.* at 466.

162. *Id.* at 467. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (codified at 50 U.S.C. § 1541 (Supp. I 2001)).

branch."[163] The Fourth Circuit therefore ordered the petition dismissed.[164]

The Supreme Court, in a plurality opinion authored by Justice O'Connor and joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, vacated the Fourth Circuit's decision.[165] Although agreeing with the Government that the congressional Authorization for Use of Military Force "clearly and unmistakably authorized" Hamdi's detention, the plurality stated that "there remains the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status."[166] In answering this question, the plurality made a number of sweeping statements regarding the importance of due process and the writ of habeas corpus.[167] For example, the plurality first noted that "[a]ll [parties] agree that, absent suspension, the writ of habeas corpus remains available to every individual detained within the United States."[168] Importantly, for our purposes, the plurality then went on to state that "[o]nly in the rarest of circumstances has *Congress* seen fit to suspend the writ" and that "[a]t all other times, it has remained a critical check on the Executive, ensuring that it does not detain individuals except in accordance with law."[169]

The plurality emphatically rejected the argument that Hamdi's status as an enemy combatant could be established merely by the Government's declaration that it is so; however, the plurality also determined that a full-blown factual review as envisioned by the district court was inappropriate.[170] The plurality held, rather, that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[171] It concluded that the process need not be accompanied by the "full protections" that would apply in other settings, but could be streamlined to include the use of hearsay evidence or a burden-shifting scheme that included a rebuttable presumption in favor of the Government's evidence.[172]

Finally, the plurality explicitly rejected the idea that the doctrine of separation of powers gave courts only a limited role.[173] The plurality

163. Hamdi v. Rumsfeld, 316 F.3d 450, 472-73, 474-75 (4th Cir. 2003), *vacated*, 124 S. Ct. 2633 (2004).
164. *Id.* at 477.
165. *Hamdi*, 124 S. Ct. at 2652.
166. *Id.* at 2641, 2643.
167. *See id.* at 2646-52.
168. *Id.* at 2644.
169. *Id.* (emphasis added).
170. *Id.* at 2644-48.
171. *Id.* at 2648.
172. *Id.* at 2649-50.
173. *Id.* at 2650.

stated that "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."[174] The plurality then stated that "[it has] made clear that, unless *Congress* acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions."[175]

In dissenting from the plurality's decision that Congress had authorized Hamdi's detention, Justice Scalia, joined by Justice Stevens, also stressed the historical importance of due process and the writ of habeas corpus, as well as the role of the Suspension Clause.[176] Noting that "[t]he very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive," and that such freedom has been historically secured by the right to habeas corpus, he opined that "Hamdi is entitled to . . . release unless (1) criminal proceedings are promptly brought, or (2) *Congress* has suspended the writ of habeas corpus."[177]

In support of his opinion, Scalia first engaged in an analysis of habeas corpus in English common law and its influence on the Framers.[178] He concluded that, at the time of the framing, it was understood that a right of due process protected against arbitrary imprisonment, and a writ of habeas corpus historically "vindicated" this right.[179] He contended that this general understanding influenced both the Due Process Clause and the Suspension Clause.[180]

Justice Scalia conceded that the allegations against Hamdi were "no ordinary accusations of criminal activity," but instead were allegations against a citizen who had been imprisoned for aiding the enemy in wartime.[181] However, he denied that this distinction made any difference where the rights of a citizen, as opposed to an alien combatant, were at issue.[182] He noted that while captured enemy aliens have traditionally been treated as prisoners of war subject to release at war's end, American citizens aiding the enemy have been treated as traitors who are subject to the criminal process.[183]

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174. *Id.*
175. *Id.* (emphasis added).
176. *Id.* at 2661-73 (Scalia, J., dissenting).
177. *Id.* at 2661, 2671 (emphasis added).
178. *Id.* at 2661.
179. *Id.* at 2662.
180. *Id.* at 2661.
181. *Id.* at 2663.
182. *Id.*
183. *Id.* Justice Scalia noted that the only citizen other than Hamdi imprisoned in connection with military hostilities in Afghanistan, John Walker Lindh, had been subjected to the criminal process for violation of the anti-terror-

Scalia also conceded that there may be times in which "military exigency renders resort to the traditional criminal process impracticable," but argued that these are the times for which the Suspension Clause was designed.[184] He characterized the Suspension Clause as a "safety valve," and noted its various usages throughout history.[185] More important for our purposes, he stated that "[a]lthough [the Suspension Clause] does not state that suspension must be effected by, or authorized by, a legislative act, it has been so understood, consistent with English practice and the Clause's placement in Article I."[186]

Scalia then went on to examine whether the government's only choices under the Constitution for dealing with citizens accused of aiding the enemy were suspension of the writ of habeas corpus or criminal prosecution.[187] Again, an examination of historical sources led him to conclude that they were.[188] He examined first the text of the English Habeas Corpus Act of 1679, which provided a remedy for those imprisoned for the offense of "High Treason."[189] Under the Act, those committed were to be released if they were not indicted and tried within a prescribed time.[190] Scalia also quoted from a letter of Thomas Jefferson, the House of Representatives debates regarding Jefferson's proposed suspension of the writ during Burr's conspiracy, three cases decided during the War of 1812, and the Court's decision in *Ex parte Milligan*.[191] Scalia deduced from these authorities that "[t]he proposition that the Executive lacks indefinite wartime deten-

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ism laws. *See id.* at 2664 (citing United States v. Lindh, 212 F. Supp. 2d 541 (E.D. Va. 2002)).

184. *Id.*

185. *Id.* at 2665.

186. *Id.*

187. *Id.* at 2666-70.

188. *See id.* at 2671-72.

189. *Id.* at 2666.

190. *Id.*

191. *Id.* at 2666-67. Scalia noted that, in a letter written to James Madison, Jefferson questioned the need to suspend habeas corpus in times of rebellion, since the parties involved could be arrested and charged with a crime. *Id.* at 2666. In the House debate Scalia referenced, Representative Burwell argued that the suspension of the writ was unnecessary because the perpetrators could be charged with a crime and kept in prison prior to trial. *Id.* at 2666-67. In the first of the cases cited by Scalia, *In re* Stacy, 10 Johns. 328 (N.Y. Sup. Ct. 1813), a citizen taken into military custody on suspicion of aiding the enemy was ordered released by a New York court. *Hamdi*, 124 S. Ct. at 2667. In the two other cases, *Smith v. Shaw*, 12 Johns. 257 (N.Y. Sup. Ct. 1815), and *M'Connell v. Hampton*, 12 Johns. 234 (N.Y. Sup. Ct. 1815), courts upheld verdicts for false imprisonment against military officers who detained American citizens. *Hamdi*, 124 S. Ct. at 2667. With regard to *Milligan*, Scalia argued that, while the Court later purported to limit *Milligan's* application in *Ex parte Quirin*, such a limitation "cannot undermine its value as an indicator of original meaning." *Hamdi*, 124 S. Ct. at 2668 n.1. *See also supra* note 149 (discussing *Quirin's* impact on *Milligan*).

tion authority over citizens is consistent with the Founders' general mistrust of military power permanently at the Executive's disposal."[192]

Scalia stated that, because suspension or submission to the criminal process are the only acceptable alternatives, the plurality's argument that Hamdi's detention was justified under the congressional Authorization for Use of Military Force was an "evisceration" of the Suspension Clause.[193] He further decried the plurality's approach as an attempt to make up for the failure of Congress to suspend the writ.[194] He concluded that the Constitution provided a clear choice to either suspend the writ or follow traditional criminal process, and stated that "[b]ecause the Court has proceeded to meet the current emergency in a manner the Constitution does not envision, I respectfully dissent."[195]

Of what importance is the Court's decision in *Hamdi* to the examination of which branch has the power to suspend the writ of habeas corpus? In one respect, the *Hamdi* decision is of immense importance, in that it provides insight on the current views of the Court with regard to the power to suspend. Although the references to Congress's suspension of the writ of habeas corpus in the plurality opinion are clearly dicta, they at least raise an inference that the four members of the plurality would place the power to suspend squarely within the province of Congress.[196] Justice Scalia's unequivocal statement in dissent, that the power to suspend belongs to Congress, places him and Justice Stevens firmly in the camp of those who believe the power to suspend belongs to Congress.[197] Thus, if the question were presented today, a substantial majority of the Court would find that Congress has the power to suspend the writ of habeas corpus, and that the President lacks the power to do so.

Hamdi is of lesser value, however, on the actual legal question of which branch of government has the power to suspend. For all of its references to Congress holding the power to suspend the writ, the plurality provides no support for its statements.[198] While Justice Scalia's dissent does cite a few authorities, including *Merryman*, those

192. *Hamdi*, 124 S.Ct. at 2668. In pressing this point, Scalia noted that "[n]o fewer than 10 issues of the Federalist were devoted in whole or part to allaying fears of oppression from the proposed Constitution's authorization of standing armies in peacetime." *Id.*

193. *Id.* at 2671-72.

194. *Id.* at 2673. Scalia referred to the plurality's decision as coming from a "Mr. Fix-it Mentality" and a mission to "Make Everything Come Out Right." *Id.*

195. *Id.* at 2671, 2674.

196. *See id.* at 2644, 2650. These statements are dicta because, as the plurality explicitly notes, "All [of the parties] agree suspension of the writ has not occurred here." *Id.* at 2644.

197. *See id.* at 2665.

198. *See id.* at 2644, 2650.

authorities do not themselves compel the conclusion that the Suspension Clause places the suspension power with Congress.[199]

Ultimately, while the *Hamdi* decision provides valuable insight as to what the current Court might conclude is the final answer to the Suspension Clause question, it provides little insight into how the Court might reach that decision, and little justification for the conclusion. This should not be construed as a criticism of the *Hamdi* opinion; clearly, the question of suspension was not at issue in the case, and the Court's attention was not focused on the question.[200] However, it does mean that we must look elsewhere in our inquiry into which branch has the power to suspend.

One such place may be in early American legal treatises. As with case law, treatises from the late 1700s and early to mid 1800s lend insight into what the Framers believed the general state of the law to be, and, by inference, what they intended.[201] One prominent treatise, cited by Taney in the *Merryman* opinion,[202] was Justice Story's *Commentaries on the Constitution.*[203] In discussing the suspension of habeas corpus, Story remarked:

> 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 exigency had arisen, must exclusively belong to that body.[204]

Unfortunately, Story provided no authority from which he derived the opinion that the power to suspend habeas corpus is given to Congress. The persuasive value of his opinion is, therefore, limited.[205]

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199. *See id.* at 2665. As discussed above, *Bollman* concerns the authority of Congress under the Judiciary Act of 1789 rather than the Suspension Clause. *See supra* notes 122-36 and accompanying text. Further, as shall be seen, the citation to Story's treatise also has a weakness because the treatise itself provides no authority for its proposition. *See infra* notes 201-05 and accompanying text.

200. *See supra* note 152 and accompanying text.

201. As with case law, modern treatises are of less value. *See supra* note 121 and accompanying text.

202. 17 F. Cas. 144, 151-52 (C.C.D. Md. 1861) (No. 9,487).

203. *Id.*; JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Cambridge, Brown, Shattuck, & Co. 1833).

204. *Id.*

205. *See* BINNEY, *supra* note 77, at 39 (stating that the last sentence of the entry does "something more than to beg the question. It demands or extorts it."). As with the discussion of Justice Marshall's comments in *Bollman*, those commentators who agreed with Taney's results argued that, even though Story provided little authority for his position, his word was enough. *See* BULLITT, *supra* note 77, at 26 (stating that Story's opinion was one rendered by a "most distinguished Judge, given at a time when [he was] certainly free from any political bias"); WHARTON, *supra* note 81, at 19 (stating

Several other legal treatises of the time also placed the power of suspension in the hands of Congress.[206] However, only the treatise by Rollin C. Hurd contains any analysis of the issue.[207] Hurd placed the suspension power in Congress on the theory that "[r]ebellion and invasion are eminently matters of national concern; and charged as Congress is, with the duty of preserving the United States from both these evils, it is fit that it should possess the power to make effectual such measures as it may deem expedient to adopt for their suppression."[208]

Thus, although the legal authorities in existence at the time of *Merryman* may have some persuasive value, they ultimately do not grant a conclusive answer. Therefore, it is necessary to explore other methods of interpreting the Constitution, such as analyzing its structure and the intent of the Framers.

One clue resides in the structure of the Constitution. The Suspension Clause is contained in Article I, which concerns the powers of Congress, rather than Article II, which concerns the executive powers.[209] Some have argued that this placement is an indication that the power to suspend is reserved to Congress.[210]

Horace Binney contended, however, that the position of the Clause within the Constitution "is not of the least importance."[211] He argued that, if the position of a clause carries meaning, the original placement of the Suspension Clause in the Article concerning the powers of the judiciary would have made the suspension of the writ a judicial act, rather than a legislative one.[212] Binney argued that because such an assignment would not make sense, the placement of the Suspension Clause really had no meaning at all.[213]

A review of the history of the Suspension Clause demonstrates the force, and ultimately the limitations, of Binney's argument. The Suspension Clause was introduced at the Constitutional Convention as article six of a draft by Charles Pinckney of South Carolina.[214] Pinck-

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that it could be said of both Marshall and Story that "his opinion on a constitutional question is itself an argument").

206. *See* JOHNSTON, *supra* note 77, at 46-47 (citing treatises by William Rawle, Henry St. George Tucker, Theodore Sedgwick, George Ticknor Curtis, and Rollin C. Hurd).

207. *See id.* at 47.

208. HURD, *supra* note 139, at 116.

209. *See* U.S. CONST. art. I, § 9; U.S. CONST. art. II.

210. *See Ex parte* Merryman, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9,487) (noting that the article in which the Suspension Clause is located "is devoted to the legislative department of the United States, and has not the slightest reference to the executive department"); *see also* BULLITT, *supra* note 77, at 18-19; JACKSON, *supra* note 77, at 2.

211. BINNEY, *supra* note 77, at 32.

212. *Id.* at 32-33.

213. *Id.*

214. *See* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 595, 598-99 (Max Farrand ed., 1966).

ney's sixth article concerned powers of the legislature, and the language pertaining to habeas corpus was part of a clause providing:

> The United States shall not grant any title of Nobility – –The Legislature of the United States shall pass no Law on the subject of Religion, nor touching or abridging the Liberty of the Press nor shall the Privilege of the Writ of Habeas Corpus ever be suspended except in case of Rebellion or Invasion.[215]

Ultimately, however, resolutions derived from Edmund Randolph's "Virginia Plan," rather than Pinckney's proposal, were the suggestions sent by the Convention to the Committee of Detail for further work.[216] The draft of the Constitution that emerged from the Committee of Detail on August 6, 1787, contained no provision regarding the writ of habeas corpus.[217]

Pinckney again brought up the subject of habeas corpus on August 20, when he submitted a proposition that stated: "The privileges and benefit 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."[218] The proposal was referred to the Committee of Detail for consideration.[219] From this proposal, it is clear that Pinckney, at least, intended the power of the suspension of habeas corpus to be exercised by Congress.

On August 28, the Committee of Detail made its report.[220] The Committee proposed to add Pinckney's idea to the eleventh article of the Constitution, which concerned the powers of the judiciary, and further proposed that the language read: "The privilege of the writ of Habeas Corpus shall not be suspended; unless where in cases of rebellion or invasion the public safety may require it."[221] There was some

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215. *Id.* at 599.

216. *See* Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 678-79 (1972). The Committee of Detail was appointed to write a draft of the Constitution conforming to what the delegation had decided up to that point. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 97, 128 (Max Farrand ed., 1966) [hereinafter 2 FARRAND'S RECORDS]. The Virginia Plan, although submitted by Randolph, was based on a draft submitted by James Madison. ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 26 (1976). It would form the basis for much debate at the Convention. *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 59 (1996).

217. BULLITT, *supra* note 77, at 12.

218. 2 FARRAND'S RECORDS, *supra* note 216, at 340-41.

219. *Id.* Another committee was appointed to "revise the style of and arrange the articles" that were agreed to by the Convention. *Id.* at 547.

220. *Id.* at 434.

221. *Id.* at 435.

discussion over this provision.[222] Pinckney argued that, in order to secure the benefit of the writ "in the most ample manner," it should only be suspended "on the most urgent occasions," and even then for a time not to exceed twelve months.[223] John Rutlidge, also from South Carolina, argued that the writ should be inviolate and did not "conceive that a suspension could ever be necessary at the same time through all the States."[224] Governor Morris of Pennsylvania moved that the Committee's language be adopted.[225] James Wilson, also of Pennsylvania, doubted whether a suspension could ever be necessary, given the discretion of judges to keep persons in jail or to grant bail.[226] The first part of the proposal, which stated that "[t]he privilege . . . shall not be suspended," passed unanimously.[227] The second part, however, including the language "unless where in cases of rebellion or invasion the public safety may require it," was passed on a vote of seven to three, with North Carolina, South Carolina, and Georgia voting against it.[228]

At this point in the framing, the Suspension Clause was in the same form that it is in today.[229] However, it was found in a section concerning the power of the judiciary.[230] Binney seized upon this placement, and the fact that the Committee of Detail had removed Pinckney's language regarding the legislature, as support for his argument.[231] He contended that, by placing the Suspension Clause in the judiciary article, the Framers intended suspension to be a judicial act, and not one requiring an enactment of the legislature.[232] He further contended that Morris's proposal to adopt the Committee's language "struck out" Pinckney's language concerning the legislature, showing that the Framers did not intend for Congress to be the branch to wield the power of suspension.[233]

However, Binney's theory is problematic. First, while the Committee of Detail's version does not incorporate the language of Pinckney's proposal from August 20, it does closely track the language of Pinckney's original draft Constitution.[234] As shown by his later propo-

222. *Id.* at 438.
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.* Because the votes were recorded by state, it is impossible to determine whether Pinckney voted for or against the language in the second part. *Id.*
229. *See* U.S. CONST. art. I, § 9.
230. *See supra* note 221 and accompanying text.
231. BINNEY, *supra* note 77, at 26-27.
232. Id. at 26.
233. *Id.* at 27.
234. *See* text accompanying *supra* note 215; BULLITT, *supra* note 77, at 15. As noted by Bullitt, the only substantial change made to Pinckney's proposal

sal, Pinckney believed the legislature should be the branch to suspend the writ.[235]

Further, Binney's theory requires the assumption that Morris's intent was to change the branch that would exercise the suspension power by supporting language that did not include reference to the legislature. However, the final action on the Suspension Clause belies this assumption. On September 8, a Committee of Style was appointed to "revise the style of and arrange the articles agreed to" by the Convention.[236] Morris performed the majority of the work in that committee.[237] The Committee of Style presented a version of the Constitution with the Suspension Clause in its current position in Article I.[238] It seems highly unlikely that Morris attempted to strike out the term "legislature" in Pinckney's proposal in order to place the suspending power in the hands of the executive or the judiciary, only to then move the Suspension Clause into the article concerning the powers of Congress.[239] Binney posits that Morris might have included it there because it is a restrictive clause, as are the others in the ninth section of Article I.[240] A far more reasonable inference, however, is that the Framers all along intended for Congress to hold the suspension power.

Another indication exists in the text and structure of the Constitution that the Framers' intention was to vest the suspension power in Congress. While the Suspension Clause itself does not identify the branch which is to suspend, the first clause of section nine restricts Congress explicitly, stating: "The Migration or Importation of such

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was the addition of the restriction that public safety requires suspension. *Id.*

235. *See supra* note 218 and accompanying text.

236. *See* BINNEY, *supra* note 77, at 26; 2 FARRAND'S RECORDS, *supra* note 216, at 547.

237. *See* MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 181 (1913). In fact, there were strong suspicions that Morris used his position on the committee to subtly alter the meaning of some provisions in the Constitution under the guise of polishing them. *Id.* at 181-83. Such suspicions were no doubt aided by Morris himself. *See id.* at 182. In fact, in a letter to Timothy Pickering, Morris stated that "[the Constitution] was written by the fingers which write this letter." Letter of Gouverneur Morris to Timothy Pickering (Dec. 22, 1814), *in* 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 506, 507 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co., 2d ed. 1836) [hereinafter 1 ELLIOT'S DEBATES]. However, James Madison also credited Morris with "[t]he *finish* given to the style and arrangement of the Constitution." Letter of James Madison to Mr. Sparks (Apr. 8, 1831), *in* 1 ELLIOT'S DEBATES, *supra*, at 507. Other members of the Committee of Style were Madison, Alexander Hamilton, Rufus King, and William Johnson. 2 FARRAND'S RECORDS, *supra* note 216, at 547.

238. *Id.* at 596.

239. *See* BULLIT, *supra* note 77, at 17-18.

240. *See* BINNEY, *supra* note 77, at 33.

Persons . . . shall not be prohibited by the Congress."[241] The third clause implicitly references Congress, stating: "No Bill of Attainder or ex post facto Law shall be passed."[242] There is no question that the third clause refers to Congress, as it is the only body that passes laws. However, if the Suspension Clause was not intended to apply to Congress, then the third clause should contain an explicit reference to Congress, as does the first clause.[243] The same is true for the rest of the clauses in section nine, all of which, except for the eighth clause, restrict powers of Congress.[244] The eighth clause prohibits the "United States" from granting titles of nobility and prohibits any person holding office from accepting "any present, Emolument, Office, or Title" from "any King, Prince, or foreign State" without the consent of Congress.[245] The clause makes clear that it applies to officers other than those in Congress by stating that "[n]o title of Nobility shall be granted *by the United States.*"[246] The phrase "by the United States" would not be necessary unless the previous clauses referred only to the powers of Congress.[247]

There is one final structural argument that some have made regarding the Suspension Clause itself. Chief Justice Taney assumed in his *Merryman* opinion—and Binney asserted in his pamphlet—that the Suspension Clause is elliptical, in that its restriction on suspension of the privilege, except in certain circumstances, contains an implicit grant of authority to suspend in those circumstances.[248] Many other pro-Congress commentators argue, however, that the Suspension Clause is not elliptical, but merely restricts the power to suspend, which is given to Congress elsewhere in the Constitution.[249] Such a construction, if true, would seem to leave little doubt that the power

241. U.S. CONST. art. I, § 9, cl. 1.
242. U.S. CONST. art. I, § 9, cl. 3.
243. *See* BULLITT, *supra* note 81, at 18-19 (noting that the Suspension Clause is "wedged in between two clauses which hold it fast and control it" and that, "as [the third clause] is confessedly . . . a restriction upon Congress, but without again introducing the word Congress, it necessarily relates back to the first clause of the section and through the Habeas Corpus clause").
244. *See* U.S. CONST. art. I, § 9, cl. 4-8. The fourth clause of section nine prohibits direct taxes unless in proportion to the population; the fifth clause prohibits taxing of exports; the sixth clause prohibits favoritism of any state in commerce; and the seventh clause prohibits drawing money from the Treasury except by lawful appropriation. *Id.* None of these clauses explicitly refers to Congress. *Id.*
245. U.S. CONST. art. I, § 9, cl. 8.
246. *Id.* (emphasis added).
247. *See id.*
248. *See ex parte* Merryman, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9,487) (stating that "[t]he clause of the constitution, which authorizes the suspension of the privilege of the writ of habeas corpus, is in the 9th section of the first article"); BINNEY, *supra* note 77, at 11.
249. *See* BROWN, *supra* note 77 at 14-15; BULLITT, *supra* note 77, at 9-10; JACKSON, *supra* note 77, at 7; PARKER, *supra* note 77, at 26-27; WHARTON, *supra* note 77, at 16.

to suspend resides in Congress. However, these commentators are unable to agree as to where in the Constitution this power is vested.[250]

One possible place for Congress to obtain the power to suspend is through its power to regulate the federal courts.[251] Some evidence exists in favor of this theory, as one of the Constitutional Convention delegates, Edmund Randolph of Virginia, asserted this reasoning at the Virginia ratification convention.[252] In responding to a question as to how Congress could suspend habeas corpus when the Constitution did not explicitly reserve to Congress the power to do so, Randolph stated, "I contend that, by virtue of the power given to Congress to regulate courts, they could suspend the writ of *habeas corpus*."[253]

This theory, however, suffers from the same flaws as Chief Justice Taney's reliance on *Ex parte Bollman*.[254] While Congress has the ability to pass legislation restricting federal courts from granting writs of habeas corpus, such legislation would not prevent the state courts from granting writs, thus rendering the exercise ineffective.[255]

Other grants of power to Congress that might imply the power to suspend the privilege of the writ also present difficulties. Congress has the undisputed power to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."[256] However, even the most generous interpretation of this power gives Congress only the power to authorize war or other military action, while leaving to the President the authority to conduct the same as Commander in Chief.[257] The same problem occurs under Congress's power "[t]o provide for calling forth the Militia to execute

250. *See* BROWN, *supra* note 77 at 14-15; BULLITT, *supra* note 77, at 9-10; JACKSON, *supra* note 77, at 7; PARKER, *supra* note 77, at 26-27; WHARTON, *supra* note 77, at 16. Jackson and Nicholas believe that Congress has the power to suspend the privilege of the writ through the power to regulate the courts. NICHOLAS, *supra* note 77; JACKSON, *supra* note 77, at 7. Brown, Bullitt, and Wharton place the power to suspend in Congress's power "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." BROWN, *supra* note 77, at 13; BULLITT, *supra* note 77, at 9-10; WHARTON, *supra* note 77, at 16. Parker, however, believed that Congress had the authority to suspend the writ as the result of its war power. PARKER, *supra* note 77, at 27.

251. *See* JACKSON, *supra* note 77, at 7.

252. *See* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 464 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co., 2d ed. 1836).

253. *Id. See also* NICHOLAS, *supra* note 77.

254. *See supra* notes 122-36 and accompanying text.

255. *See* BULLITT, *supra* note 77, at 10. Binney also argues that Congress may not have the authority to withhold this power from the courts under the guise of regulating their jurisdiction. *See* BINNEY 2, *supra* note 111, at 9-15. For an explanation of the presumed power of state courts to grant writs for federal prisoners, see *supra* note 139 and accompanying text.

256. *See* U.S. CONST. art. I, § 8, cl. 11.

257. *See generally* JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 3-5 (1993) (advocating an extremely

the Laws of the Union, suppress Insurrections and repel Invasions."[258] While Congress may authorize the calling out of the militia, the President uses the militia to conduct the actual suppression.[259]

The records of the ratification debates cast little light on whether the Suspension Clause is elliptical. Very little was said regarding the Suspension Clause during the ratification debates, and what was said was conflicting.[260] In opposition to the argument that it was not elliptical, but rather an incidence of Congress's control over federal courts, Luther Martin, a Constitutional Convention delegate from Maryland, declared that the Suspension Clause gave to the "general government" the "power of suspending the *habeas corpus* act."[261]

Based on this sparse evidence, it cannot be definitively said whether the Suspension Clause is elliptical. It can be said that it is *possibly* elliptical, so the argument that the power to suspend habeas corpus is found in some other grant of authority to Congress is not, therefore, entirely persuasive.

No matter what the conclusion with regard to the elliptical character of the Suspension Clause, however, the overall weight of the evidence regarding the proper placement of the suspending power appears to be clear. From the structure of the Constitution and the history of the Suspension Clause, it appears that the Framers intended for Congress to be the body charged with suspending the privilege of the writ of habeas corpus.[262] This theory is further supported by the records of the state ratification debates.[263] While the debates do not make clear where the power to suspend the writ was placed, all of the

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broad interpretation of Congressional war powers, but recognizing that the President still commands the forces once authorized to do so).

258. *See* U.S. CONST. art. I, § 8, cl. 15.

259. *See* U.S. CONST. art. II, § 2, cl. 1 (providing that the President is "Commander in Chief . . . of the Militia of the several States, when called into the actual Service of the United States"). Reverdy Johnson also used this argument in his support of Lincoln's position. *See* STEINER, LIFE OF JOHNSON, *supra* note 63, at 51. Johnson essentially argued that, because the conduct of the war was entrusted to the President, the President was obliged to use every available means to suppress the rebellion, including the suspension of habeas corpus. *See id.*

260. *See, e.g.*, 1 ELLIOT'S DEBATES, *supra* note 237, at 375.

261. *Id.* Martin stated that his fear that the suspension power might be used as a tool of oppression convinced him to vote against the clause. *Id.*

262. *See supra* notes 110-261 and accompanying text.

263. *See* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 108 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co., 2d ed. 1836) (providing Judge Dana's statement to the Massachusetts Convention characterizing the Suspension Clause as a restriction on Congress); *see also id.* at 108-09 (Judge Sumner's statement to the same effect); 1 ELLIOT'S DEBATES, *supra* note 237, at 328 (discussing the New York Convention's declaration that "every person restrained of his liberty is entitled to an inquiry into the lawfulness of such restraint . . . except when, on account of public danger, the Congress shall suspend the privilege of the writ of *habeas corpus*").

available evidence suggests that it was widely assumed to be placed in Congress.[264]

Such an assertion is consistent with the practice existing in the federal government in the period after ratification, while the Framers were still alive. The practice at that time provides valuable inferential evidence because, if the government had strayed too far from the conceptions of the Framers, they would have been around to say so.[265] For example, in 1807, while many of the Framers were still alive, President Thomas Jefferson requested that Congress authorize the suspension of the writ of habeas corpus to prevent Bollman and his co-defendant from securing release.[266] Although a bill to do so passed the Senate, it was defeated in the House of Representatives.[267] Throughout the proceedings, there was no suggestion that the President had any authority to suspend the writ on his own, or that Congress was not the proper body to do so.[268]

Finally, a decision by the Framers to place the suspension power with Congress would have been consistent with English practice, as well as that of state constitutions at the time of the framing.[269] English law gave Parliament the power to suspend the writ of habeas corpus.[270] Similarly, state constitutions vested the suspension power in their legislatures rather than their executives.[271]

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264. *See supra* note 261.

265. *See* Powell v. McCormack, 395 U.S. 486, 547 (1969) (noting that "the precedential value of [early classifications of power] tends to increase in proportion to their proximity to the Convention in 1787"); ELY, *supra* note 257, at 9-10 (noting that the classification of powers by early Presidents and Congresses is helpful to courts).

266. DUKER, *supra* note 77, at 135.

267. *See id.* at 136-37. Meanwhile, Bollman and Swarthout secured a writ of habeas corpus. *Id.* at 137. Before the return of the writ, the Government moved to bring them before the circuit court. *Id.* The court issued a bench warrant and, after a hearing, found sufficient evidence to commit them. *Id.*

268. *See id.* at 135-37.

269. *See* GROSS, *supra* note 77, at 11-20 (noting conformity with English law); JACKSON, *supra* note 77, at 6 (noting conformity with state constitutions); WHARTON, *supra* note 81, at 6-8 (noting conformity with both English law and state constitutions).

270. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES 136 (stating that

> the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great as to render this measure expedient: for it is the parliament only, or legislative power, that, whenever it sees proper, can authorize the crown, by suspending the *habeas corpus* act for a short and limited time, to imprison suspected persons without giving any reason for so doing.

Taney quoted Blackstone in *ex parte Merryman*, 17 F. Cas. 144, 144 (C.C.D. Md. 1861) (No. 9,487).

271. *See, e.g.*, MD. CONST. of 1632, art. VII, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 1687 (Francis Newton Thorpe ed., 1909); N.C. CONST. OF 1776, art. V, *reprinted in*

In his supporting pamphlet, Binney attempted to minimize the importance of any analogy to English law.[272] He argued that the power granted under the Suspension Clause is different than that granted to Parliament, in that Parliament has unlimited power to suspend the writ whenever it wishes.[273] He further argued that the motive behind giving the power to Parliament in England was jealousy of the King's power, and contended that the Framers had no such reason to be jealous of the power of the President, as that office was given only limited powers.[274]

The first of Binney's arguments has some weight. The Framers evidenced intent to abandon English practices in some instances, including the division of powers.[275] However, there is no indication that the Framers intended to change the British system with regard to the suspension of the writ of habeas corpus, except insofar as they desired to limit the use of the power to suspend. Furthermore, Binney's statement that the Framers did not have the same jealousy towards the President as Parliament had towards the King because the President's powers were weak is almost nonsensical. The reason that the Framers made the President's powers weaker than those of the King of England appears to be precisely because of their jealousy of the President and fear of his having too much power.[276] The Framers likely did not intend to *increase* the President's power by granting him the ability to suspend the writ of habeas corpus.

From an examination of the structure and history of the Constitution, it clearly appears that the power to suspend the privilege of the writ of habeas corpus found in the Suspension Clause is vested in Congress.[277] This conclusion is buttressed by the statements of the Framers during Ratification, the actions of the government during the early years of the Constitution, and the opinions of legal theorists on the subject.[278] It is also consistent with the suspension of the writ in English law, and with the state constitutions in existence at the time of

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5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 2787 (Francis Newton Thorpe ed., 1909) [hereinafter 5 CONSTITUTIONS]; PA. CONST. of 1790, art. IX, § 12, *reprinted in* 5 CONSTITUTIONS, *supra*, at 3101; VT. CONST. of 1786, art. XVII, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3753 (Francis Newton Thorpe ed., 1909) (all providing that the suspension laws should not be exercised except by the legislature).

272. *See* BINNEY, *supra* note 77, at 19-23.

273. *Id.* at 19.

274. *Id.* at 19-20.

275. *See, e.g.*, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 65-66 (Max Farrand ed., 1966) (discussing the statement of James Wilson that, with regard to war, the powers of the British Monarch were not a proper guide for executive powers).

276. *See* GROSS, *supra* note 77, at 17-18 (noting that this jealousy of the President influenced many provisions in the Constitution).

277. *See supra* notes 110-261 and accompanying text.

278. *See supra* notes 214-50 and accompanying text.

the framing.[279] Justice Taney appears to have been correct in this respect of his holding, although the matter is not as self-evident as he made it out to be.[280]

III. THE QUESTION OF CONCURRENT PRESIDENTIAL POWER TO SUSPEND THROUGH NECESSITY, EMERGENCY, AND PRACTICALITY

Some issues still exist that, although not addressed by Taney's opinion in *Merryman*, are important in determining whether Lincoln's actions in the matter were lawful. The first of these is whether, even if the Constitution vests the power to suspend in Congress, there are some situations where military officials are justified in refusing to obey a writ of habeas corpus. Harvard Law Professor Joel Parker raised this question in connection with *Merryman*.[281]

Parker agreed with Taney's conclusion that, under the Suspension Clause, the proper body to suspend the writ is Congress, and did not argue that the President had the power to suspend.[282] However, he contended that there are some circumstances that justify the failure of military officers to obey writs of habeas corpus granted by courts. According to Parker, "war brings with it its own rules," and the duties of military commanders must be interpreted in light of those rules.[283]

In stating his theory, Parker noted that

> [clearly,] the commander of a column, thus marching to battle against insurgents, is not bound to encamp his men, and, in obedience to the command of a writ of *habeas corpus*, to repair forthwith to the court-house, wherever that may be, or to a judge's chambers, if that be the place selected.[284]

He then addressed the question of how far this proposition could extend.[285] He arrived at the conclusion that a military officer may refuse to obey a writ of habeas corpus in cases where martial law is in effect, because martial law operates as a suspension of the writ.[286]

Parker then proceeded to the question of whether martial law was in operation at Fort McHenry, where Merryman was imprisoned.[287]

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279. *See supra* notes 269-76 and accompanying text.
280. *See ex parte* Merryman, 17 F. Cas. 144, 148-52 (C.C.D. Md. 1861) (No. 9,487).
281. *See* PARKER, *supra* note 77, at 25. More recently, Martin S. Sheffer revisited the question. *See* Martin S. Sheffer, *Presidential Power to Suspend Habeas Corpus: The Taney-Bates Dialogue and* Ex Parte Merryman, 11 OKLA. CITY U. L. REV. 1, 15 (1986).
282. *See* PARKER, *supra* note 77, at 25-26.
283. *Id.* at 10.
284. *Id.* at 22.
285. *Id.* at 23.
286. *Id.* at 28-29.
287. *Id.* at 346.

He concluded that, in time of war, troops are governed by martial law whether they:

> are in the face of the enemy, in battle array, or whether they are merely garrisoning a fort to aid thereby in suppressing a rebellion, or whether they are opening and holding the avenues by which the passage of other troops to the theatre of active war is to be facilitated.[288]

As a result, according to Parker, General Cadwalader was not obligated to obey Taney's writ.[289]

Parker's theory, however, is too inclusive. While it is true that an officer in the midst of or in preparation for battle would probably be justified in refusing to obey a writ of habeas corpus for a prisoner in his possession, such was not the situation at Fort McHenry. Rather, Fort McHenry was located in territory still, in a technical sense at least, loyal to the Union. The civil courts were still functioning, and there was no impediment to Merryman being brought before them and charged with treason, as he ultimately was.[290] Under Parker's theory, any place where a prisoner was incarcerated by military force would have been a place under martial law, and by extension, no military prisoner could ever be released by writ of habeas corpus. Such an exception would swallow the Suspension Clause.

A final issue to be addressed is whether, when Congress is not in session, the President may temporarily suspend habeas corpus in cases of rebellion or invasion. Lincoln himself brought up this issue in his address to the emergency session of Congress on July 5, 1861.[291] Legal historian William F. Duker has since refined this theory.[292] The theory, as stated by Duker, is based on an analogy to the exception to Congress's war powers, which allows the President to repel sudden attacks.[293] According to Duker, because the Framers realized that the President might be required to repel an attack without consulting Congress, and because the Framers granted the President the ability to exercise Congress's war powers in such a situation, the President should also be able to use Congress's power to suspend the privilege

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288. *Id.* at 40.
289. *See id.* at 39.
290. *See supra* note 37 and accompanying text.
291. *U.S. Senate Journal* 37th Cong., 1st Sess., July 5, 1861, 12-13.
292. *See generally* DUKER, *supra* note 77, at 143-45. Duker himself questions this theory, but believes that Taney should have at least considered it. *See id.* at 148.
293. *Id.* at 144. The original draft of the Constitution that emerged from the Committee of Detail gave Congress the power to "make" war. 2 FARRAND'S RECORDS, *supra* note 216, at 168. On the motion of James Madison and Elbridge Gerry, the Convention changed the word "make" to "declare" in order to give the President the ability to repel sudden attacks. *Id.* at 318-19.

of the writ of habeas corpus in the course of repelling such an attack.[294]

This analogy, however, is problematic. The power to repel sudden attacks is an implied power carved out of Congress's power to make war. In repelling sudden attacks, the President does not, therefore, use Congress's war power, but instead uses his own. No such power has been carved out of the Suspension Clause. Instead, the Suspension Clause seems to contemplate situations such as a sudden attack because it allows Congress to suspend the privilege of the writ only in the direst of situations: in cases of invasion or rebellion when the public safety requires it. If such situations are the same ones that would authorize the President to utilize the suspension power, then what good is vesting the power in Congress?[295] Therefore, to claim that the President has the power to suspend habeas corpus under the power to repel sudden attacks is incorrect.

Questions of practicality arise as a result of this constitutional analysis. The idea that the President may not constitutionally suspend habeas corpus in an emergency has been criticized as a flaw in the Constitution that creates a danger to the country.[296] Others have argued that constitutional analysis is futile as, in an emergency, the President will suspend the privilege of the writ if necessary, whether constitutionally authorized or not.[297]

Harvard Law Professor Theophilus Parsons, another legal theorist in the *Merryman* debate, suggested a practical answer to these questions.[298] Parsons argued that, although the power to suspend the privilege of the writ of habeas corpus was no doubt vested in Congress, this would not necessarily prohibit the President from using it in a sudden emergency.[299] However, the President does so at his own risk, and is liable to Congress in an impeachment action if Congress feels that he has misused the power.[300] Further, according to Parsons, the

294. DUKER, *supra* note 77, at 144-45.

295. In his treatise, Isaac Myer notes: "The Constitution of the United States was made for all time, and not as a creature of the moment; and the letters and writings of all contemporary statesmen show that rebellion and invasion were both contemplated, and that the Constitution was made for them, as well as for a state of tranquility and peace." MYER, *supra* note 77, at 30. *See also* Hamdi v. Rumsfeld, 124 S. Ct. 2663, 2674 (2004) (Scalia, J., dissenting) (stating that "[w]hatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it").

296. *See, e.g.*, Fisher, *supra* note 36, at 484 (stating that "[t]he *habeas corpus* clause as now understood stands in the way of the government's protecting itself").

297. *See, e.g.*, ROSSITER, *supra* note 6, at 25; Sheffer, *supra* note 281, at 29.

298. *See* MCPHERSON, *supra* note 77, at 162.

299. *Id.*

300. *Id.*

President is obliged to call Congress together as soon as might be appropriate, and to be governed by their actions.[301]

Parson's theory has some benefits. It recognizes that the ultimate power to suspend the privilege of the writ of habeas corpus is in Congress, but allows the President the power to suspend the writ in emergencies when Congress cannot be consulted. Attached to it is the proviso, however, that such a suspension is not constitutional and must be ratified by Congress.

The theory also has some problems. In allowing the President to make the first move in suspending the writ, it lessens the incentive for Congress to make a decision. Instead of actively determining whether to suspend the privilege as it is constitutionally required to do, Congress has an incentive to put off making a decision, and to authorize the President's actions if they ultimately prove to be popular, or pillory the President if they prove to be unpopular. Further, if the suspension is allowed to continue until Congress affirmatively acts to stop it, the whole focus of the power has changed to the detriment of individual rights.[302] It may be that Parson's theory is in line with actual practice, and that a determined President will exercise the power to suspend habeas corpus if necessary. However, such an exercise should not be legitimized as a correct interpretation of the Constitution.

IV. THE RELEVANCE OF THE SUSPENSION POWER IN A POST 9/11 WORLD

The ultimate legal conclusion with respect to the power to suspend the privilege of the writ of habeas corpus is that it is vested in Congress, rather than the President. Further, there does not appear to be any means by which the President may lawfully suspend habeas corpus on his own, even in an emergency. That said, does this analysis have any relevance today? Long before 9/11, at least one legal theorist expressed skepticism, stating:

> It would seem . . . futile to argue over the present location of [the power to suspend the privilege of the writ of habeas corpus], for it is a question on which fact and theory cannot be expected to concur. Today, as ninety years ago, the answer to it is not to be found in law but in circumstance. The

301. *Id.*

302. This is essentially what occurred during the Civil War. *See supra* notes 83-86 and accompanying text. Lincoln substantially followed Parsons's theory, in that he put the matter of suspension before the emergency session of Congress on July 5, 1861. *Supra* note 83 and accompanying text. However, Congress took no action until March 3, 1863. *See supra* notes 83-85 and accompanying text. Congress would certainly have been more active if it were debating the President's request to suspend in the face of war, rather than simply deciding whether to ratify a decision already made.

> one great precedent is what Lincoln did, not what Taney said.[303]

However, the reason that Lincoln's suspension of habeas corpus was successful was not because his argument was persuasive on the merits, or even because the general public thought it to be necessary. Rather, it succeeded in large part because of the failure or inability of the other branches to honor their constitutional obligations. Although Chief Justice Taney attempted to assert the power of the judicial branch, his attempt was undermined not only by his and the Supreme Court's loss of political capital following the *Dred Scott* decision, but also by the failure of the other members of the Court to support his ruling in *Merryman*.[304] More importantly, Congress acquiesced in Lincoln's suspension, first by making no attempt to either authorize or revoke it, and then by authorizing it almost two years after the fact.[305] Absent the capitulation of these two branches on the issue, Lincoln's suspension of habeas corpus might not have held up.

The lesson of *Merryman*, then, is less an affirmation of the power of the President to take whatever measures he deems necessary than it is an indictment of the inaction of Congress and the judiciary. The argument about which branch has the power to suspend habeas corpus sheds light on this "zone of twilight," and in doing so reminds each branch of its obligations and duties under the Constitution. Civil liberties must sometimes be curtailed in the face of a national emergency, and this fact is recognized and provided for by the Constitution. However, if in such times the privilege of the writ of habeas corpus is to be suspended, it must be done by Congress, not the President alone. Presidents must understand this as a limit to their power, and Congress must understand this as an obligation to ensure that it is the one to decide whether to suspend the privilege. Further, the relevance of the question of the power to suspend habeas corpus extends beyond the specific issue itself. In the time since the Civil War, habeas corpus has been suspended on only a few occasions in limited areas, and has always been based on authority delegated by Congress.[306] However, Presidents have claimed other far-reaching powers through the years under the guise of emergency that have endangered or caused grave damage to civil liberties.[307] In the recent

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303. ROSSITER, *supra* note 6, at 25.
304. *See supra* note 80 and accompanying text.
305. *See supra* notes 83-85 and accompanying text.
306. *See* DUKER, *supra* note 77, at 149. Duker notes that President Ulysses S. Grant suspended habeas corpus in nine counties in North Carolina in 1871 pursuant to Congressional delegation, and that President Theodore Roosevelt suspended habeas corpus in the Philippines in 1905 pursuant to Congressional statute. *Id.* at 149 n.190. Habeas corpus was also suspended in Hawaii during World War II pursuant to statute. *Id.*
307. *See, e.g.*, Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942) (authorizing the exclusion, and limiting the rights to leave, of persons in military

terror cases, the Bush Administration claimed that the President has the power to unilaterally designate American citizens as "enemy combatants," and to hold such citizens for the duration of the current amorphous "war on terror" without court review.[308] Such a power, had the Court determined it to exist, would have rendered the Suspension Clause unnecessary. Thus, the answer to the question of the power to suspend habeas corpus informs our understanding of the Constitution's provisions for times of emergency and the extent of the emergency powers that Congress and the President possess. The establishment of constitutional boundaries to these powers is vitally important if our rights as citizens are to be protected.

CONCLUSION

As the events of *Merryman* recede ever farther into the mists of time, and analysis of the case becomes more historical than legal, it is still important to remember that the power of the office of the President has its limits, and that the Congress and the judiciary must exercise their powers and obligations. It is by exploring those limits, powers, and obligations that the public gains knowledge of them, and the branches of government are reminded of them. Lincoln's suspension of habeas corpus succeeded because Congress, and to a lesser extent, the judiciary, abrogated its responsibilities. While there is an argument that the suspension of habeas corpus was necessary, the argument that the "ends justifies the means" is a dangerous one on which to rely. If our personal liberties are to remain intact, it is incumbent upon all of us to require that the Congress, the President, and the courts recognize and adhere to the constitutional limitations on their power, and not sacrifice liberty on the altar of fear and expediency. *Merryman* thus serves as an important reminder of this duty.

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areas). This order was used as justification for the internment of Japanese-Americans during World War II. *See* Korematsu v. United States, 323 U.S. 214, 216-17 (1944).

308. *See* Brief for Petitioner at 37-38, Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004) (No. 03-1027); Brief for Respondents at 25-26, Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (No. 03-6696). In *Padilla*, the Government argued that "The Commander in Chief . . . has authority to seize and detain enemy combatants wherever found." Brief for Petitioner at 38, *Padilla* (No. 03-1027). In *Hamdi*, the Government argued that the determination that an individual is an enemy combatant is a "core exercise of the Commander-in-Chief authority," and that court review should be limited to whether there is authority to detain rather than whether an individual is an enemy combatant. *See* Brief for Respondents at 25-26, *Hamdi* (No. 03-6696).