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Is 'Military Necessity' Enough? Lincoln's Conception of Executive Power in Suspending Habeas Corpus in 1861

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**Lincoln's Conception of Executive Power in Suspending Habeas Corpus in
1861**

**by
Evan McLaughlin**

Submitted in partial fulfillment of the requirements for the degree

Masters in History

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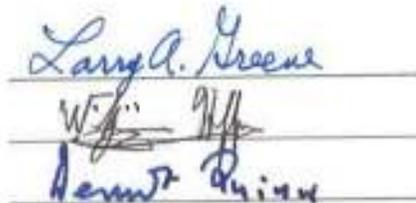
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Abstract

In May 1861, President Abraham Lincoln's decision to suspend habeas corpus in Baltimore following an attack on Federal troops as they marched through Baltimore on April 19th to answer Lincoln's call to defend the Capitol. To complicate matters further, Congress was still in recess, so they could not legislate a solution to the growing insurgency. In order to check these actions, Abraham Lincoln authorized General Scott to suspend Habeas Corpus between Baltimore and Philadelphia. When John Merryman was arrested, detained, and denied habeas corpus, Chief Justice Roger B. Taney issued an in-chambers decision, *Ex Parte Merryman*, to voice his belief that Lincoln's actions violated the Constitution. Conversely, Lincoln answered this critique in his *July 4 Address to Congress* as he explained that the dire situation in Baltimore required the suspension in order to restore order and "faithfully execute" the laws of the United States. In other words, "military necessity" empowered Lincoln to authorize the suspension of habeas corpus.

The historiography regarding Lincoln's decision to suspend habeas corpus revealed many interpretations regarding how Lincoln understood executive power and how this understanding influenced his decision to suspend habeas corpus. Currently, both Lincoln biographers including David Donald, Doris Kearns Goodwin, and Phillip Paludan, as well as works of legal historians including Laura Edwards and William Duker reached consensus regarding one significant reason motivating Lincoln's decision: military necessity. The sources may not all use the same terminology; however, they each cited the complex and threatening situation in 1861 Maryland as the key factor that motivated Lincoln's suspension of habeas corpus. Interestingly, many of the works in this segment of the Lincoln canon referenced Lincoln's understanding of the

Constitution in a general sense. They did not offer a nuanced and balanced legal analysis of Lincoln's Constitutional understanding with regard to the suspension of habeas corpus.

This thesis synthesizes mainstream history's biographical perspective on Lincoln's presidency and legal history's emphasis on habeas corpus jurisprudence to better understand how Lincoln understood his actions in light of the executive powers granted in the Constitution. Additionally, my work utilized 3 key primary sources that hadn't been fully considered and integrated in previous works. These sources include a letter sent from John Hamilton to Lincoln explaining the Framers' intent regarding executive power and the government's Constitutional ability to coerce compliance, Congress's forgiveness of Andrew Jackson's fine following his declaration of martial law in the defense of New Orleans, and a letter from Lincoln to Matthew Birchard in which Lincoln recognizes the executive's ability to suspend habeas corpus: yet his power is checked by the American people.

President Lincoln was indeed Constitutionally empowered to suspend habeas corpus via the doctrine of military necessity. Furthermore, this power stems from the Framers' intent regarding the powers of executive under the Constitution they created.

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Chapter 1: Section 1- Historiography

In the early months of the Civil War, Abraham Lincoln flexed the executive office's powers while Congress was still on recess. Washington, D.C. was precariously surrounded on three sides by Maryland- a state that whose allegiance to the Federal government was suspect at best. Indeed, in response to Lincoln's call for military protection of Washington, D.C., rowdy mobs assaulted Federal troops as they attempted to cross the city on April 19th. Additionally, secessionist minded Marylanders eagerly awaited a meeting of the Maryland legislature in which they hoped to garner enough votes and join the Confederacy. John Merryman and other similarly minded secessionists cut telegraph wires and burned bridges to isolate Baltimore against further Federal intervention. Because Congress was not in session, Lincoln could not turn to Congress for help. In response to these pressures, Abraham Lincoln suspended habeas corpus on April 27, 1861. He empowered General Winfield Scott to make arrests without offering a writ of habeas corpus in Baltimore and along the corridor connecting Annapolis and Washington, D.C. By suspending habeas corpus, the military was enabled to arrest and detain suspects without bringing them before a judge to weigh the evidence against them. When the accused was provided a habeas corpus hearing, if the evidence was deemed insufficient, the accused could be freed. John Merryman was arrested on May 25th for his role in destroying key bridges. His petition for habeas corpus was denied and the resulting legal battle was termed *Ex parte Merryman*.¹ This paper will analyze Lincoln's understanding of the President's executive powers and his ability to suspend habeas corpus in light of the Constitution's stipulations regarding the suspension of this right against unlawful imprisonment.

¹ *Ex Parte Merryman*, 17 Fed. Cas. 144 (May 28, 1861).

Understanding how Lincoln interpreted the Constitution and the Framers' intent regarding the suspension of habeas corpus and executive powers was critically important and demonstrated through primary source analysis of Lincoln's statements to his secretaries and General Winfield Scott. A letter that Lincoln received from John Hamilton was an important source to assess Lincoln's understanding of the Framers' intent regarding the role of the executive when facing dire threats. Moreover, this paper will analyze Chief Justice Roger B. Taney's *Ex Parte Merryman* as well as the conditions that led to Lincoln's suspension of habeas corpus. As demonstrated by *Ex Parte Merryman*, Taney believed that Lincoln overstepped his Constitutional bounds when he authorized the suspension of habeas corpus between Baltimore and Philadelphia. Instead of Lincoln, Taney believed that only Congress could determine if habeas corpus could be suspended and that both branches needed to respect the sovereignty of the Judicial Branch.

In contrast, Lincoln believed that the Nation was faced with a dangerous threat and that the executive must act decisively by suspending habeas corpus in order to effectively and efficiently stop the insurrection's progress. This paper explains how Lincoln arrived at his decision to suspend habeas corpus gradually in response to insurgency challenging Baltimore and Washington, DC. According to Lincoln, the situation in Baltimore necessitated habeas corpus's suspension. Furthermore, the President was empowered to suspend the Writ. Lincoln's views were best described by his July 4 *Address to Congress*.

The Supreme Court never officially declared a ruling on President Abraham Lincoln's proclamation to suspend the privilege of the writ of habeas corpus in Baltimore in April 1861. Likewise, the Supreme Court did not complement nor condemn Lincoln's decision to detain John Merryman and deny his petition for habeas corpus. Instead, an incensed Chief Justice Roger B.

Taney pronounced and published his critique of Lincoln's actions on an in-chambers basis. Taney's objection to Lincoln's suspension as the Justice believed Lincoln overstepped his bounds in suspending habeas corpus- a provision the Constitution intended for Congress. Taney's statement touched off a firestorm of public commentary in the newspapers as well as among legal officials. In Lincoln's July 4, 1861, *Message to Congress*, he defended his actions and explained his reasoning. His chief argument was, "'Are all the laws, *but* one [the right to suspend habeas corpus], to go unexecuted and the government itself go to pieces, lest that one be violated?'"² In this statement, Lincoln problematically establishes his suspension as potentially "violating" a law; yet, this decision was necessary in order to save the government.

The historiography regarding Lincoln's decision to suspend habeas corpus revealed many interpretations regarding how Lincoln understood executive power and how this understanding influenced his decision to suspend habeas corpus. Currently, both Lincoln biographers including David Donald, Doris Kearns Goodwin, and Phillip Paludan as well as works of legal historians including Laura Edwards and William Duker reached consensus regarding one significant reason motivating Lincoln's decision: military necessity. The sources may not all use the same terminology; however, they each cited the complex and threatening situation in 1861 Maryland as the key factor that motivated Lincoln's suspension of habeas corpus. Interestingly, many of the works in this segment of the Lincoln canon referenced Lincoln's understanding of the Constitution in a general sense. They did not offer a nuanced and balanced legal analysis of Lincoln's Constitutional understanding with regard to the suspension of habeas corpus.

² James McPherson, *Battle Cry of Freedom: The Civil War Era*, (New York: Oxford University Press, 1988), 289 quoted in *Lincoln's Collected Works*, vol. IV, 430.

James McPherson's *Battle Cry of Freedom* remained one of the most important contributions to Civil War Era studies. He discussed Lincoln's decision to suspend habeas corpus. However, he only briefly discussed the Constitutional issues associated with the suspension and he did not explicitly comment on Lincoln's understanding of the Framers' conceptualization of habeas corpus. According to McPherson, one of the greatest legal challenges to Lincoln's decision was the location of habeas corpus suspension provision in the Constitution. Most of the President's powers were located in Article II; whereas, the provision to suspend habeas corpus is placed in Article I: Section 9- the article that mostly concerned the Legislative Branch's powers. McPherson explained that Lincoln believed the provision's placement was irrelevant when the Country was faced with an emergency. He was especially empowered when he was the only Government official who could adequately address the emergency when Congress was on recess.³ McPherson's summation referenced the pressures of the situation as the chief motivation for Lincoln's suspension of habeas corpus. Interestingly, McPherson believed that Lincoln did not consider the placement of the habeas corpus provision as the critical challenge to his decision. This analysis will investigate how Lincoln conceptualized his powers in light of Constitution.

McPherson summarized Lincoln's goal behind suspending habeas corpus as a means to stamp out treason and its harmful potential impact on his ability to defend Washington, D.C. McPherson said, "The whole purpose of suspending the writ, said these legal scholars, was to enable army officers to arrest and detail without trial suspected traitors when civil authorities and courts were potentially sympathetic with treason, as in Baltimore."⁴ While McPherson

³ McPherson, *Battle Cry*, 288.

⁴ McPherson, *Battle Cry*, 288.

references “legal scholars,” he did not cite any specific scholar. Additionally, McPherson introduced how Constitutional scholars reinforced Lincoln’s decision. McPherson said, “Several prominent constitutional lawyers rushed into print to uphold the legality of Lincoln’s position.”⁵ However, McPherson did not cite or reference any particular legal scholar.

In general, biographic works such as, Doris Kearns Goodwin’s *Team of Rivals*, focused on the tensions leading up to Lincoln’s decision and Lincoln’s ultimate order to suspend habeas corpus. *Team of Rivals* did a commendable job at explaining the debates and conversations Lincoln had with his cabinet and key political figures in Baltimore. However, *Team of Rivals* did not adequately consider Lincoln’s cabinet nor his own understanding of the Framer’s intent regarding the suspension of habeas corpus. Instead, Goodwin explained how Lincoln met with mayor of Baltimore as well as a delegation from Baltimore regarding the transportation of Federal troops through their city and how to do so with the least amount of public disorder. After initial violence aimed against the troops, Lincoln was amenable to moving troops around Baltimore. However, once the delegation demanded that no troops pass through Maryland, Lincoln halted the discussion and reaffirmed his power to move troops through the country he led. Goodwin included the perspective from some of Lincoln’s cabinet and secretaries such as John Hay. Hay noted the crushing stress that haunted Lincoln.⁶ After reading the dramatic stress the situation exerted on Lincoln, it was clearly a motivation for the suspension of habeas corpus. While Goodwin did not comment upon Lincoln’s Constitutional perspective, she included a remark from Gideon Welles regarding the impact of Lincoln’s decision on the expansion of executive (and Federal) power. As a result of Lincoln’s suspension of habeas corpus, Welles

⁵ McPherson, *Battle Cry*, 288.

⁶ Dorris Kearns Goodwin, *Team of Rivals*, (New York: Simon & Schuster, 2005), 354.

predicted, that “government will, doubtless, be stronger after the conflict is over than it ever has been, and there will be less liberty.”⁷ This perspective and others were helpful to determine the projected impact of Lincoln’s decision. In conclusion, Goodwin’s contribution was helpful because it explained the stress exerted by the situation in Maryland as a motivation for Lincoln’s decision. However, she did not explicitly delineate Lincoln’s perception of his decision in light of the Constitution nor did she indicate if the cabinet discussions leading up to Lincoln’s decision included reference to the Framers’ intent in the Constitution or the Constitution’s role in Lincoln’s conceptual framework. This omission constituted the focus of this investigation.

Works of legal history also considered some form of necessity as the chief motivational factor for Lincoln’s decision to suspend habeas corpus. Like Goodwin, Brian McGinty noted the considerable stress Lincoln felt leading up to his decision to suspend habeas corpus. Also, Brian McGinty’s *Lincoln & the Court* provided interesting details that raise additional questions regarding Lincoln’s legal framework justifying his decision. According to McGinty, Lincoln considered bombarding US cities instead of simply suspending habeas corpus to make arrests.⁸ If Lincoln considered such a drastic step alongside the suspension of habeas corpus, perhaps Lincoln’s legal understanding considered habeas corpus as the ultimate last resort- even behind military action against a US city. This investigation will uncover how Lincoln conceptualized his powers under the Constitution to suspend habeas corpus. McGinty also introduced two key Constitutional scholars, Horace Binney and Justice Benjamin Curtis. However, he did not fully describe their understanding of the President’s power to suspend habeas corpus nor their

⁷Goodwin, *Rivals*, 355.

⁸ Brian McGinty, *Lincoln & the Court*. (Massachusetts: Harvard University Press, 2008), 66.

conceptualization of the Framers' intent.⁹ Similar to the other sources, McGinty cited the "rule of necessity" as the driving force behind Lincoln's suspension of habeas corpus.¹⁰

McGinty included a modern legal scholar, Mark E. Steiner's, belief that "...when Lincoln was 'pressed by necessity, he was a sophisticated user of the available sources of legal information."¹¹ McGinty included an example of a modern scholar explaining that the doctrine of necessity informed Lincoln's legal understanding of the Constitution. However, he did not explain specifically how Lincoln's understanding was informed. Additionally, McGinty included Attorney General Edward Bates' statement supporting Lincoln's decision to suspend habeas corpus. McGinty believed, "His words were serious and his conclusion—that the president had ample constitutional power to suspend the privilege of the writ of habeas corpus—was emphatic."¹² However, McGinty did not include the legal understanding that led Bates to his conclusion.

McGinty's work was unique, because he introduces some critiques of the "necessity" motivation. He considered Harold Hyman's critique of the "doctrine of necessity." He said, "Lincoln never believed that the Constitution was unworkable, and so never needed to descend to the argument of necessity."¹³ McGinty also included the perspective of David Donald a famous Lincoln biographer. Donald believed that Lincoln, "saw the emergency powers he assumed during the war years as a fulfillment, not an abandonment, of the rule of law."¹⁴ Lincoln considered emergency powers as a fulfillment in accordance with the rule of law, not an

⁹ McGinty, *Lincoln & the Court*, 68.

¹⁰ McGinty, *Lincoln & the Court*, 81.

¹¹ McGinty, *Lincoln & the Court*, 82.

¹² McGinty, *Lincoln & the Court*, 83.

¹³ McGinty, *Lincoln & the Court*, 81.

¹⁴ McGinty, *Lincoln & the Court*, 81.

action brought forth via necessity. Thus, McGinty included one of Lincoln’s contemporaries and a modern perspective that challenged necessity as the chief motivation and understanding of Lincoln’s decision to suspend habeas corpus.

McGinty also included Lincoln’s defense of his own actions. According to McGinty, Lincoln believed that as commander in chief of the armed forces of the United States, he was the only federal official who charged with a constitutional duty to “preserve, protect, and defend the Constitution,” who was available to remedy the situation. Additionally, “he was fully empowered by the Constitution as Congress was, to decide if and when the “public safety” required a suspension of habeas corpus.”¹⁵ However, McGinty did not explain how Lincoln arrived at this conceptualization. This investigation uncovered how Lincoln’s understanding of the Constitution and the Framers’ intent led him to that conclusion.

Jonathan White’s *Abraham Lincoln and Treason in the Civil War: The Trials of John Merryman*, included many key understandings regarding Lincoln’s decision to suspend habeas corpus. In addition to citing the “necessity” argument, White quickly explained Lincoln’s Constitutional understanding regarding the suspension of habeas corpus. White said,

Throughout the Civil War, Lincoln maintained that the Constitution was silent as to who could suspend the writ of habeas corpus. In a time of rebellion—when swift action was needed—Lincoln claimed that that power could be exercised by the president. While the record of the debate at the Constitutional Convention does not settle the question conclusively, it does give some evidence in support of Lincoln’s construction of the Constitution.¹⁶

This type of analysis set the stage for this thesis. This essay analyzes how Lincoln understood the Framers’ intent in light of his decision to suspend habeas corpus. White included a very helpful footnote on page 23 that briefly explained how the habeas corpus suspension clause’s

¹⁵ McGinty, *Lincoln & the Court*, 82.

¹⁶ Jonathan W. White, *Abraham Lincoln and Treason in the Civil War: The Trials of John Merryman*, (Baton Rouge: LSU Press, 2011), 23. [Hereafter: White, *Abraham Lincoln and Treason*].

location changed during the Constitutional Debates. This research paper considers this debate as well to determine what the Framers' intended regarding the suspension of habeas corpus.

George Fletcher's *Our Secret Constitution*, described Lincoln's attitude toward the Framers in less than glowing terms. Regarding Lincoln's decision to suspend habeas corpus, Fletcher said, "Lincoln's posture toward the 1787 Constitution was less than reverent. He treated the founding charter of the government more as a guideline to action than as a set of absolute restrictions on his actions."¹⁷ He added that this understanding enabled Lincoln to assert "extraconstitutional executive power."¹⁸ This characterization reflected the expansion of executive power manifested through the Jefferson administration including the Louisiana Purchase. Unfortunately, Fletcher did not include any footnotes to reference his characterization. Similar to Fletcher, this thesis characterizes Lincoln's conceptualization of the Framers' and their views on the suspension of habeas corpus.

Certainly, Lincoln would object to Fletcher's assessment. As quoted in the first volume of G. Edward White's *Law in American History*, Lincoln did not believe that he violated the Constitution when he suspended habeas corpus. His July 4th 1861 *Message to Congress* reinforced that characterization. In his statement, Lincoln said, "Of course some consideration was given to the questions of power and propriety before this matter what acted upon."¹⁹ This investigation explains how Lincoln conceptualized his executive powers and how this cognitive framework enabled him to justify his suspension of habeas corpus. For example in his July 4, *Address to Congress*, Lincoln said,

¹⁷ George Fletcher, *Our Secret Constitution*, (New York: Oxford University Press, 2001), 37.

¹⁸ Fletcher, *Secret Constitution*, 37.

¹⁹ Lincoln, *Collected Works*, 4: 421-441.

...that [the privilege of the writ of habeas corpus] may be suspended when, in cases of rebellion or invasion, the public safety *does* require it. It was decided that we have a case of rebellion, and that the public safety does require the qualified suspension of the privilege of the writ which was authorized to be made...²⁰

This statement was a key foundation in the “necessity” argument in favor of Lincoln’s suspension of habeas corpus. This thesis investigated how Lincoln squared this doctrine with his understanding of the Framers’ intent and a more formal Constitutional rubric. Furthermore, Lincoln considered the Framers in his statement as well. He said, “It cannot be believed the framers [of the Constitution] intended, that in every case, the danger should run its course, until Congress called together.”²¹ This statement clearly identified that Lincoln had a conceptualization of the Framers and their intent regarding executive power. This investigation uncovered the sources of Lincoln’s conceptualization.

White also included a statement from Attorney General Bates. In his effort to support Lincoln, he said, The Constitution, “...did not vest the power to suspend the privilege of the writ of habeas corpus in any one branch of government.”²² In this statement, Bates clearly referenced the Constitution and made an assessment. While White’s book was a tremendous resource to find primary source coverage of this topic, he did not offer much in terms of analysis or commenting on the genesis of Lincoln’s Constitutional understandings.

Laura Edward’s, *A Legal History of the Civil War and Reconstruction*, similarly characterized the “necessity” doctrine as the driving factor behind Lincoln’s decision. However, she also included some interesting critique of Lincoln’s decision. She qualified Bates’ support of Lincoln’s decision rather than overstating his support. She said, “Attorney General Bates

²⁰ G. Edward White, *Law in American History*, vol. 1, (New York: Oxford University Press, 2012), 446.

²¹ White, *Law in American History*, 446.

²² White, *Law in American History*, 447.

affirmed Lincoln's position, although he backed off Lincoln's broad rendering of the issue by casting it in terms of the president's ability to override writs of *habeas corpus* (rather than suspending the writ altogether).²³ Thus, if Bates qualified his support for Lincoln, this thesis investigated how his conceptualization of the Framers' intent behind the suspension of habeas corpus informed his decision. Additionally, Edwards's analysis was more concerned with the legal ramifications of Lincoln's decision. She noted, "In theory he [Lincoln] did not alter the nature of federal authority. In practice, however, his reliance on those powers extended the legal authority of the federal government into areas of law that had been controlled by states and localities."²⁴ Thus, her study focused on the impact of Lincoln's suspension of habeas corpus on the relationship between Federal and State laws and when Lincoln believed the Federal government could assert supremacy. Regarding Federalism, Edwards demonstrated that Lincoln's administration decidedly shifted the balance of power not only toward the Federal government and, more specifically, the executive branch. This insight was useful to determine how Lincoln considered the extent of the Federal government's legal abilities and how this understanding impacted his decision to suspend habeas corpus.

Frank Williams commented on Lincoln's suspension of habeas corpus in an article for the *Organization of American Historians*. In "A Popular Demand, a Public Necessity: Lincoln and Civil Liberties," he described Lincoln's experience with suspending habeas corpus as context for former President George W. Bush's decisions regarding habeas corpus and detaining enemy combatants during the War on Terror. Interestingly, Williams stated that Lincoln used

²³ Laura Edwards, *A Legal History of the Civil War and Reconstruction*, (New York: Cambridge University Press, 2015,) 22.

²⁴ Edwards, *Legal History*, 22.

“...extraconstitutional measures...”²⁵ This word choice could be interpreted as an instance that Lincoln went beyond the stated Constitutional provisions in order to wage the Civil War. However, the word “extraconstitutional” was not synonymous with illegal. Indeed, Lincoln assumed powers that were not previously exercised by the President. That fact alone did not condemn Lincoln’s suspension as illegal. Until defined by an official Supreme Court ruling, Lincoln’s decision to suspend Habeas Corpus could not be characterized as utterly illegal. Yet, Williams also offered an explanation for Lincoln’s actions that put them within the purview of Constitutional powers. Williams said, “It is widely known that only Congress is constitutionally empowered to declare war, but suppression of rebellion has been recognized as an executive function, for which the prerogative of setting aside civil procedures has been placed in the President’s hands.”²⁶ Lincoln did not publicly consider the actions of those Baltimore citizens as the formal efforts of contracted Confederate soldiers. Instead, these Baltimore rioters were citizens organizing and executing a rebellion that aided the Confederate cause. According to Williams’s assessment, the dominant Constitutional understanding vested the executive [Lincoln] with the power to suppress a rebellion.

In an observation similar to one made by Jon White, Williams noted that Taney’s critique of Lincoln is chiefly rooted in the location of habeas corpus’s suspension in Article 1 of the Constitution. Yet Williams noted that Taney, “...ignored the fact that it [the power to suspend habeas corpus] was placed there by the Committee on Drafting at the Constitutional Convention in 1787 as a master of form, not substance.”²⁷ Williams’ article considered additional events in

²⁵ Frank J., Williams. "A Popular Demand, and a Public Necessity": Lincoln and Civil Liberties." *OAH Magazine of History* no. 1 (2007): 24. JSTOR Journals, EBSCOhost (accessed May 8, 2017), 24. [Hereafter: Williams, *A Popular Demand*]

²⁶ Williams, *A Popular Demand*, 25.

²⁷ Williams, *A Popular Demand*, 25.

the Civil War after Baltimore's riots as well- but its coverage of Lincoln's suspension would benefit from additional consideration of his address to Congress on July 4. This thesis considered this speech in detail.

Robert O. Faith researched many Civil War arrests where a writ of habeas corpus was denied. His article, "Public Necessity or Military Convenience?: Reevaluating Lincoln's Suspensions of the writ of habeas corpus during the Civil War" concluded, "When measured against Lincoln's practical argument for suspension, the circumstances and judicial opinions of these highly visible cases suggest that the Union government often failed the litmus test of meeting "public necessity" in arresting northern citizens far behind the battlefield."²⁸ Faith demonstrated that after the Merryman decision, the Union government far overreached the threshold of "public necessity" as it arrested northern citizens. Faith's article covered the same ground as many historians regarding the Merryman case, but he expanded his research much further in covering arrests across the northern states. He concluded that instead of addressing "public necessity," "these cases reveal how military arrests under Lincoln's suspension policy occurred as a matter of routine military convenience."²⁹ However, because Faith focused on many cases throughout the northern states, his coverage of Merryman could be more detailed. Indeed, Faith utilized the Merryman arrest as a gateway to introduce his study of arrests throughout the North. While he mentioned the backroom court preparation, his analysis would benefit from considering Lincoln's conceptualization of executive power in greater detail.

James A. Dueholm's "Lincoln's Suspension of the Writ of habeas corpus: An Historical and Constitutional Analysis," provided a very illustrative study of Lincoln's decision to suspend

²⁸ Robert O. Faith "Public Necessity or Military Convenience?." *Civil War History* 62, no. 3 (September 2016): 284-320. *America: History & Life*, EBSCOhost (accessed August 5, 2017), 320. [Hereafter: Faith, *Public Necessity*].

²⁹Faith, *Public Necessity*, 320.

habeas corpus. He studied both Taney and Lincoln's arguments for or against the suspension of habeas corpus. Dueholm encapsulated Lincoln's belief that, "...he, and he alone, had the constitutional power to suspend the writ of habeas corpus."³⁰ Lincoln's strongly believed in his ability to suspend the writ and make arrests. Additionally, Lincoln believed he could ignore Taney's assessment that Article II provided few executive powers; certainly, the right to suspend habeas corpus certainly was not one of them. Dueholm also considered Lincoln's conceptualization of his executive power. He quoted a letter Lincoln wrote to Matthew Birchard in which Lincoln argued, "By necessary implication, when rebellion or invasion comes, the decision is to be made, from time to time; and I think the man whom, for the time, the people have, under the constitution, made the commander-in-chief, of their Army and Navy, is the man who holds the power..."³¹ Lincoln did not mention Congress's recent passage of a habeas corpus act; instead, he clearly considered himself the necessary arbiter when suspending habeas corpus. With the passage of such an influential act, one would expect the President to comment upon it and how it impacted his executive action. Lincoln ignoring that context and boldly asserting his ability to suspend habeas corpus was an important statement. Researching this source was very important to determine Lincoln's conception of executive power.

While this article contains strong and detailed Constitutional analysis, it would benefit from additional consideration of the realities on the ground in 1861 Baltimore to better understand how those conditions could have influenced Lincoln's decision. This thesis will

³⁰ Lincoln to Birchard (*Collected Works*, 6: 260) quoted in James A., Dueholm. "Lincoln's Suspension of the Writ of Habeas corpus: An Historical and Constitutional Analysis." *Journal Of The Abraham Lincoln Association* no. 2 (2008): 47. JSTOR Journals, EBSCOhost (accessed January 13, 2017), 2. [Hereafter: Dueholm, *Lincoln's Suspension*].

³¹ *Collected Works*, 6: 260.

build on Dueholm's work and try to find out how Lincoln conceived of his powers as President and how that conceptualization was impacted by the reality in Baltimore.

Mark Neely's *Lincoln and the Triumph of the Nation*, provided the most sustained and detailed analysis of Lincoln's suspension of habeas corpus. While he covered similar ground with regard to the conditions in Baltimore that prompted Lincoln's decision, the *Ex parte Merryman* case, Lincoln's defense of his own actions, his most useful contribution was his discussion of Lincoln's contemporaries. While he did not include the opinions from Lincoln's cabinet, he discussed the perspectives of Lincoln's contemporaries. Neely identified Joel Parker, Horace Binney, and William Whiting as Lincoln's supporters; while Justice Roger Taney, Benjamin Curtis, and Sidney George Fisher offered the harshest critique of Lincoln's decision. This research thesis included the opinions Lincoln's two most trusted secretaries in order to determine how Lincoln was motivated by the conditions of the time period to suspend habeas corpus as well as Lincoln's understanding of his capabilities as the executive. In summary, Neely's book provided a tremendous foundation as it identified the major protagonists in the habeas corpus debates and cited their publications as well.

Both biographies and works of legal history explained the concept of necessity and how it applies to Lincoln's decision to suspend habeas corpus. If the sources considered the Framers' intent behind habeas corpus, they only did so in a footnote or short summary as in White's *Abraham Lincoln and Treason in the Civil War: The Trials of John Merryman*. Indeed, their coverage was light in comparison to the amount of analysis devoted to explaining military necessity as Lincoln's motivation. In its totality, the historiography of Lincoln's suspension of habeas corpus lacked a complete and balanced analysis with regard to Executive power under the Constitution. This discussion was assisted and enlightened by an analysis of how Lincoln's

cabinet as well as his contemporaries understood his decision in light of their conceptualization of Executive power.

Chapter 1: Section 2- A Short Introduction to habeas corpus in the British and American Legal Systems Prior to 1861

Habeas corpus was one of the most sacred rights in both the British and American legal systems. According to *The Oxford Companion to American Law*, habeas corpus was "...a judicial remedy available to litigants challenging the legality of their confinement. It was usually used as a post-conviction remedy by criminal defendants to challenge the sufficiency of the procedures used to convict..."³² In practice, the accused applied for writs of habeas corpus which prompted the courts to "have/produce the body" before a judge so the accused could hear the evidence against them. If the evidence justifying imprisonment was insufficient, the prisoner will be liberated from confinement. The statute was intended to defend citizens against unjust imprisonment. During America's colonial history and previously in British history, civilians were sometimes imprisoned at the will of a capricious and overzealous ruler. This behavior typified the ancien regime's response to threats as they defined them. As a testament to Americans desire to curtail unjust imprisonment, every State Constitution contained a provision for habeas corpus.

The English legal tradition could trace habeas corpus protections back to Magna Carta where the King was forbidden from suspending habeas corpus unilaterally. The protection against unlawful imprisonment was also included in the Petition of Right. However, during times of war and national emergency, Parliament entrusted the executive with greater latitude to suspend the writ and arrest/detain suspects. In his study of habeas corpus, legal historian R.J. Sharpe noted this trend as well in the late 1600s. In *The Law of habeas Corpus*, Sharpe noted

³² Daniel R. Krislov, *The Oxford Companion to American Law*, "Habeas corpus." New York: Oxford University Press, 2002.

that, when conflict in Ireland increased, the Parliament entrusted the King's Privy Council or one of the Secretaries of State to suspend habeas corpus and issue a warrant for someone suspected of treason.³³ While Parliament did not entrust the executive unilaterally, it did entrust the executive's office, the Privy Council, to suspend the Writ. Sharpe added, "Extreme powers were given to the executive, but powers nonetheless distinctly limited by law."³⁴ Thus, even though this context of English Law was not a perfect analog to the situation in 1861 Baltimore facing President Lincoln, there was some legal precedence supporting Lincoln's suspension of habeas corpus during emergency.

In the American legal context, the Framers were so concerned with protecting citizens against unlawful and unjust imprisonment that they enshrined the writ of habeas corpus in the text of the United States Constitution instead of adding it into the Bill of Rights. The debate regarding habeas corpus and provisions to suspend it did not focus on which branch of government was empowered to suspend the writ during times of emergency. Indeed, in Eric M. Freedman's study of habeas corpus, *habeas corpus: Rethinking the Great Writ of Liberty*, he chronicled the Framers' debates regarding habeas corpus and their universal concern that it should be protected. Freedman explained, "A fair conclusion is that the ratification debates had convinced all parties that the Clause as written would meet the aims they agreed they shared: to safeguard a critical mechanism for protecting the liberties of those who might fall afoul of the organs of power."³⁵ Agreement amongst the Framers was commendable given the contentious nature of drafting the Constitution as well as its ratification. Certainly, habeas corpus was a

³³ Richard J. Sharpe, *The Law of Habeas corpus*, (Oxford: Clarendon Press, 1976), 91-92. [Hereafter: Sharpe, *Law of Habeas corpus*.]

³⁴ Sharpe, *Law of Habeas corpus*, 92.

³⁵ Eric M. Freedman, *Habeas corpus: Rethinking the Great Writ of Liberty*, (New York: New York University Press, 2001,) 18. [Hereafter: Freedman, *Rethinking the Great Writ*].

central right in American law. However, there was still disagreement over which body of government could suspend the Writ. The conflict between President Lincoln and Chief Justice Taney demonstrated this disagreement.

After the Constitution's ratification, the trials of the Aaron Burr conspirators prompted the first requests to suspend habeas corpus. Specifically, in *Ex Parte Bollman*, Samuel Swartout and Dr. Erick Bollman objected to their arrest and requested writs of habeas corpus. Meanwhile, President Thomas Jefferson requested that Congress suspend the Writ of habeas corpus in order to arrest and prosecute suspected rebels in Burr's conspiracy to politically separate some western territories from the Federal government.³⁶ While these actions could certainly be construed as treasonous, they were not as widespread and violent as the conditions Lincoln faced in 1861 Baltimore. Congress denied Jefferson's request. In *Ex Parte Merryman*, Taney interpreted the executive's request to Congress as evidence that Congress was entrusted to suspend the Writ.

The second instance of a request to suspend habeas corpus stemmed from General Andrew Jackson's efforts to mount a defense of New Orleans during the War of 1812 against an impending British invasion. Specifically, the Supreme Court of Louisiana heard *Johnson v. Duncan*, in which it ruled Jackson's enactment of martial law and the resulting suspension of habeas corpus unlawful because Congress did not empower Jackson to declare martial law and suspend the Writ. In *A Constitutional History of habeas corpus*, William Duker noted how this case cited *Bollman*. Citing *Bollman*, "...declared that the Constitution had exclusively vested in Congress the right of suspending the privilege of the writ of habeas corpus, and that body was the sole judge of the necessity that called for the suspension."³⁷ Certainly, the Supreme Court

³⁶ Freedman, *Rethinking the Great Writ*, 20.

³⁷ William F. Duker, *A Constitutional History of Habeas corpus*, (Westport, Conn: Greenwood Press, 1980,) 142. [Hereafter: Duker, *Constitutional History of Habeas corpus*].

was influenced by this state level decision as they cited *Johnson v. Duncan* in *United States vs. Jackson* in which General (and eventual President) Andrew Jackson unlawfully suspended habeas corpus and was fined \$1,000.³⁸ While this evidence certainly supports the Constitutional interpretation of Congress's sole ability to suspend habeas corpus, in 1844, Congress issued an apology and refunded Jackson's fine. In the apology, they recognized Jackson's duty to defend New Orleans against British invasion. In order to successfully defend the city, Jackson needed to declare martial law. Perhaps Congress's apology demonstrated a willingness for the American Legal system to empower the Executive to suspend habeas corpus during times of emergency.

³⁸ "Article 4: Section 4," *The Founder's Constitution*, 2000, http://presspubs.uchicago.edu/founders/documents/a4_4s12.html.

Chapter 1: Section 3- Baltimore on Lincoln's Mind

The conditions in 1861 Baltimore, Maryland were a powerful influence on the habeas corpus drama exemplified by *Ex Parte Merryman*. Indeed, the stakes were high as the insurgency grew into a conflagration with the surrender of Fort Sumter on April 13th and the secession of Virginia on April 17th. Washington, DC is precariously located roughly 45 miles from Baltimore, Maryland- a Border State with dubious Union loyalty and certainly a significant amount of hostility toward the Federal government. At this time, Lincoln's call for troops was important as Washington needed defense against a growing insurgency. Kentucky and Missouri faced growing Confederate insurgencies of their own. Significantly, the railroads that would transport troops to defend the Nation's Capital pass through Baltimore. The stage was set for a showdown.

The importance of the middle states was obvious to politicians of the day. Barbara Jeanne Fields analyzed Maryland's divided loyalty and complex history of slavery in *Slavery and Freedom on the Middle Ground*. As she analyzed Maryland's divided legacy, she quoted the famous abolitionist and escaped slave, Frederick Douglass. He considered Maryland's geographic position and politics a 'mill-stone about the neck of Government.'³⁹ Sure enough, violent action manifested Maryland and Baltimore's status as a dire threat to the Federal government in the Civil War. Baltimore's precarious location was even more influential given Maryland's stark division between slave owners who favored the Confederacy and Maryland citizens heavily invested in transportation and finance who generally supported the Federal Government given their ties to Philadelphia and Washington, DC. Fields further explained how

³⁹ Barbara Jeanne Fields, *Slavery and Freedom on the Middle Ground* (New Haven: Yale University Press, 1985), 90. [Hereafter: Fields, *Slavery and Freedom*].

this divided loyalty extended beyond socioeconomics. She said, “The bonds that linked Baltimore to the slave economy, for example, were not those of political thralldom alone, but also the complex ones of friendship, family connection, mutual clientship, and joint endeavor.”⁴⁰ Thus, even though political and economic dependency on slavery influenced Baltimore’s affinity toward the South, the nuanced, complex social web that connected these citizens immeasurably strengthened this bond. A threat to the slavery held far more than simply economic consequences- threatening slavery challenged the very social fabric that links Baltimore citizens together. Certainly, these citizens would defend slavery given its central importance to their lives.

Moreover, separation wasn’t the simple answer to a threat to slavery. Slave owners depended on access to northern markets, especially those located in Maryland’s northern counties. Fields explained, “But the slave portion of Maryland could afford neither separation from the northern counties, where the state’s vitality largely resided, nor separate from the slave South, which offered support to the institutional basis of its society.”⁴¹ Thus, slavery required both protection as an economic, social, and political entity as well as links to Maryland’s northern counties. Slavery in Maryland and Baltimore existed in a complex web of dependency across the state. Maryland’s slave owning citizens were truly threatened by John Brown’s raid on Harper’s Ferry and became even more determined to protect the “peculiar institution.”

If there was any hope that perhaps as one travelled north, away from the intensity of proslavery support in Alabama and South Carolina, Maryland’s fanatical defense of slavery dashed these hopes. Despite central location between the North and South, when Maryland

⁴⁰ Fields, *Slavery and Freedom*, 22.

⁴¹ *Ibid.*

confronted the slavery question, it invited a violent reaction. According to Fields, “When they [Maryland citizens] eventually had to confront it face to face, they become as extremist and fire-eating as the most impassioned Confederate.”⁴² Lincoln’s election in 1860 guaranteed this confrontation. In spite of Lincoln’s promises not to touch slavery where it already existed, many Southerners didn’t trust his rhetoric. They also understood that Lincoln’s desire to keep slavery out of the territories would sound the death knell for slavery. As additional territories without slavery gained statehood, eventually the Electoral College and balance of power in Congress would swing toward the Free States where they could impose their demands on the slave owning South. Additionally, if slavery was denied expansion into the territories as Lincoln hoped, Southern planters would continue to farm similar crops over generations which would exhaust the soil and economically strangle the Southern way of life. Furthermore, slave owners feared that their discipline over their slaves would breakdown as Federal troops marched nearby their plantations.⁴³ Given the acute defense of slavery and hatred for Lincoln coupled with a credible assassination plot, Lincoln certainly was right to pass through Baltimore at night in anticipation of his inauguration. In spite of this reasonable response, he drew considerable criticism for this “gutless” transit.

However, Baltimore’s resistance to Lincoln and the Federal Government was not limited to support of slavery and the threat of violence. Indeed, Thomas G. Pratt and Enoch L. Lowe, two former Governors of Maryland, both sided with Confederacy. Additionally, Lowe used his son-in-law as a conduit to send militarily relevant information and encouraged Confederate forces to invade Maryland in April 1861. Furthermore, Democrats sympathetic toward the

⁴² Fields, *Slavery and Freedom*, 92.

⁴³ Fields, *Slavery and Freedom*, 94.

Confederacy controlled the state legislature. These politicians controlled the State legislature and selected the police board in Baltimore.⁴⁴ Certainly, the Federal government could not depend on Baltimore for support and execution of Federal law in the face of such hostility.

In his study of the violence in Baltimore and the resulting decision in *Ex Parte Merryman*, Brian McGinty's, *The Body of John Merryman: Abraham Lincoln and the Suspension of habeas corpus*, paid careful attention to the conditions in Maryland following Lincoln's accession to the Presidency and in the early months of the Civil War. McGinty commented, "In southern Charles County, the voters in Beantown (all white property owners) passed a resolution requesting anyone who had voted for Lincoln leave the county by January 1."⁴⁵ Clearly, there were extremely hostile citizens in both Baltimore and Maryland following Lincoln's election. However, Baltimore was not content with mere threats as seen in Beantown. On April 19th, Baltimore committed violent action to rid the city of Federal presence.

On April 19th, as troops changed one locomotive for a second in order to travel to the President Street Station on their way to answer Lincoln's call for militia and protect Washington DC, they were forced to travel through a hail of cobblestones, insults, and general disorder. Disloyal elements in Baltimore poured salt on the tracks and even towed an anchor to block the train's passage. Additional citizens in the roughly 10,000 person strong mob even pushed a car off of the tracks. When the train could no longer advance on the track, the troops disembarked and marched the remaining distance under the constant harassment of the crowd. Some in the crowd even fired on the passing Federal troops or rushed them and stole their weapons.⁴⁶ Four

⁴⁴ Fields, *Slavery and Freedom*, 93.

⁴⁵ Brian McGinty, *The Body of John Merryman: Abraham Lincoln and the Suspension of Habeas corpus*, (Cambridge, Massachusetts: Harvard University Press, 2011), 37. [Hereafter: McGinty, *Body of John Merryman*].

⁴⁶ McGinty, *Body of John Merryman*, 45.

Federal soldiers and 12 Baltimore citizens died while an additional 36 soldiers suffered injury. It was unclear how many additional Baltimore citizens were injured.⁴⁷

The role of the Maryland Police and State/Municipal level government in the Baltimore riots was troubling. Mayor George Brown had divided loyalties despite his reputation as an anti-slavery, pro-Union leader. His proclamation calling for citizens to “preserve peace and maintain inviolate the honor and integrity of Maryland”⁴⁸ was really not as complete as it appears given that he calls for Baltimore residents to “defend their honor.” The term “honor” was a 1800s code word that men at the time understood requires bold action- sometimes deadly force- to defend reputation. And defend they did as evidenced by the havoc caused on April 19th. For example, elements of the Police force in Baltimore aided the rioters. During John Ehrman’s (a Baltimore citizen) testimony to a federal grand jury, “One [man] asked a policeman why he did not arrest a rioter; he replied I will arrest *you*.”⁴⁹ However, the police’s dubious role was not summarized as merely neglecting to intervene. Some on the police force actively participated in the riot. According to Constable John Plummer’s testimony, the “Police rather encouraged the riot.”⁵⁰ Even the elected leaders of Baltimore and Maryland played a significant role in assisting the violence.

It appeared likely that both Mayor George Brown and Maryland Governor Thomas Hicks authorized the burning of railroad bridges and the severing of telegraph wires leading from Baltimore to Washington, DC. Even harbor buoys were destroyed to frustrate any Federal reinforcement effort by sea. Hicks and Brown intended these actions to dissuade the Federal

⁴⁷ McGinty, *Body of John Merryman*, 46.

⁴⁸ McGinty, *Body of John Merryman*, 43.

⁴⁹ White, *Abraham Lincoln and Treason*, 14.

⁵⁰ Ibid.

Government from sending additional troops through Baltimore and causing additional riots.⁵¹

Even the Police Chief undermined the Federal Government. Fields noted,

Though later denying that he had done so with traitorous intent, the chief of police [George P. Kane] telegraphed the secessionist state's attorney (and later Confederate general) Bradley T. Johnson at Frederick: 'Streets red with Maryland blood. Send expresses over the mountains of Maryland and Virginia for the riflemen to come, without delay. Fresh hordes will be down on us to-morrow. We will fight them and whip them or die.'⁵²

Thus, this riot constituted far more than a domestic disturbance or purposeless expression of anger. It was important to note that there is some difficulty in completely assigning blame to both Hicks and Brown. The historical record was unclear regarding the degree of affirmation both elected officials gave when "ordering" the destruction of telegraph wires and bridges. Brown recollected that Hicks responded "it seems to be necessary" when presented with the proposal for destruction.⁵³ Police Chief Kane relayed that when Hicks was approached with the destruction proposal, "He rolled and groaned. Brown insisted and declared he would not act without explicit orders from him. Hicks twisted the sheet over his head rolled over agst. [*sic*-abbreviation for 'against'] the wall and moaned rather than exclaimed 'Oh! Yes. Go and do it.'⁵⁴ Clearly, even if Hicks and Brown showed some hesitation and reluctance toward the proposal to burn bridges and cut telegraph wires, they did not act to stop it. They were complicit in treasonous destruction.

Additionally, immediately after the riot, Brown's brother issued a call for volunteers to defend Baltimore. 15,000 citizens enrolled into the unit led by Colonel Isaac R. Trimble. While they did not battle Federal forces in Baltimore, many joined the Confederate Army and waged

⁵¹ McGinty, *Body of John Merryman*, 49.

⁵² Fields, *Slavery and Freedom*, 93.

⁵³ White, *Abraham Lincoln and Treason*, 16.

⁵⁴ White, *Abraham Lincoln and Treason*, 16.

war against the Federal Government.⁵⁵ Once the riot ended and General Ben Butler arrived in Baltimore, so many citizens streamed southward to join the Confederacy, he requested direction from General Scott wondering if he should move to stop them. Additionally, pro-Confederate elements in Baltimore seized freight cars destined to resupply Federal troops. These supplies were shipped post haste to Confederate forces.⁵⁶ The actions of these citizens, police commissioner, and elected officials all coalesced to frustrate Lincoln's effort to reinforce Washington, DC and move against the growing insurgency. Meanwhile, their actions certainly assisted the Confederacy's efforts against the Federal government.

Instead of emphatically acting to achieve peace and Union loyalty their cause, the Maryland officials instead petitioned Lincoln for compromise. On April 20, Baltimore's Mayor Brown sent Hugh L. Bond, George W. Dobbin, and John C. Brune with a letter to the President "...to explain fully the fearful condition of affairs in this city. The people are exasperated...by the passage of troops, and...are decided in the opinion that no more should be ordered to come."⁵⁷ Mayor Brown's request was significant as it is more than simply a favor not to send any more troops. In a more significant legal sense, Mayor Brown asked President Lincoln to subordinate the Federal Government's safety and security to assuage a State's request.

As if that request wasn't bold enough, the Maryland delegation continued, "It is my solemn duty to inform you that it is not possible for more soldiers to pass through Baltimore unless they fight their way at every step..."⁵⁸ While this assessment could be praised for its honesty in its recognition of the chaotic atmosphere in Baltimore, it was stunning for a State

⁵⁵ Maryland 92-93

⁵⁶ Fields, *Slavery and Freedom*, 96-97.

⁵⁷ Abraham Lincoln, *Collected Works*, Vol 4:340. [Hereafter: Lincoln, *Collected Works*].

⁵⁸ Lincoln, *Collected Works*, 4: 340.

Official to admit such a deterioration of conditions without proposing a remedy that improved the security for the Federal Government. The phrase "...unless they [Federal troops] fight their way at every step..." could be interpreted as a threat against Lincoln acting to move more troops into position to defend the Capital. On April 20, the delegation promised to preserve peace if no more troops were moved through Baltimore.⁵⁹ Similarly, on April 22, Governor Hicks protested landing Federal troops in Annapolis. He also requested that Lincoln use Lord Lyons, a British minister to mediate the differences between the Federal Government and insurgent states.⁶⁰ In reality, these compromises amounted to the Federal Government submitting to the preferences of a State. Hick's request came dangerously close to recognizing the rebelling states as a foreign country by having a mediator broker peace between the warring factions. Thus, the unruly reality on the streets of Baltimore and in the state/municipal government were significant factors attempting to submit Federal rule to State sovereignty.

Lincoln's April 22nd response was both measured and practical. Lincoln asserted the right of the Federal Government to defend itself in the face of extreme demands from the Baltimore delegation. In his response, Lincoln attempted to assuage fears of Federal attack. He said, "I have no desire to invade the South; but I must have troops to defend this Capital."⁶¹ Lincoln was trying to explain his motivation as clearly a defensive maneuver. Yet, he also condemned the Maryland delegation for failing to recognize the disloyal elements of Baltimore's citizens. Lincoln observed, "You gentleman, come here to me and ask for peace on any terms, and yet have no word of condemnation for those who are making war on us."⁶² By addressing the reality that the Baltimore delegation did not treat their own disloyal elements with

⁵⁹ Lincoln, *Collected Works*, 4: 340-341.

⁶⁰ Lincoln, *Collected Works*, 4:341.

⁶¹ Lincoln, *Collected Works*, 4:341.

⁶² Lincoln, *Collected Works*, 4:341.

objectivity, Lincoln demonstrated a pattern that he will repeat with his July 4, 1861 *Address to Congress*. Indeed, one of Lincoln's greatest rhetorical strengths was contextualizing his actions and his understandings in the reality of situation that demands his attention. To further demonstrate his understanding of the reality regarding troop movements through Baltimore, he said,

Geographically it [Washington, DC] lies surrounded by the soil of Maryland; and the necessity exists that they should come over her territory. Our men are not moles, and can't dig under the earth; they are not birds, and can't fly through the air. There is no way but to march across, and that they must do."⁶³

Clearly, Lincoln understood that in order to defend the Capital, he must move the necessary troops. Because Federal troops would be sent from loyal states in the North, they must use the available railroad system that cuts through Baltimore. Rather than admonish the commissioners further, Lincoln stated his case clearly and emphatically.

This response was also important, because it provided a glimpse of Lincoln's understanding of his executive power under the Constitution. In this letter, Lincoln reflected, "The rebels attack Fort Sumter, and your citizens attack troops sent to the defense of the Government, and the lives and property in Washington, and yet you would have me break my oath and surrender the Government without a blow."⁶⁴ While he did not directly quote the Constitution, Lincoln's phrasing reflects his Oath of Office, "...that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."⁶⁵ In addition, in Article II: Section 3, the President must "...take care that the laws be faithfully executed."⁶⁶ Thus, these two Constitutional

⁶³ Lincoln, *Collected Works*, 4: 341-342.

⁶⁴ Lincoln, *Collected Works*, 4: 341-342.

⁶⁵ United States Constitution: Article II: Section 1.

⁶⁶ United States Constitution: Article II: Section 3.

components required that the Executive take care that the laws of the country are faithfully executed. Certainly, defending the Capital against Rebel advanced to maintain the proper functioning of the Government qualified as Constitutionally justified rationale for Lincoln moving troops through Baltimore and later his suspension of habeas corpus in Baltimore on April 27.

This letter was also significant, because Lincoln reflected on the power of the executive branch in light of former President Andrew Jackson. After considering how the Baltimore delegation expected him to refrain from defending the Nation in spite of the attack at Fort Sumter and the Baltimore Riots, Lincoln stated “There is no Washington in that- no Jackson in that- no manhood nor honor in that.”⁶⁷ In order to state his case that he must defend the Capital and halt the insurrection, Lincoln turned to two of America’s most famous Presidents- Washington and Jackson. Both of those Presidents were remembered for vigorous action in taking care that the laws of the Country were “faithfully executed.” For example, Washington personally led a military excursion to Western Pennsylvania to put down the Whiskey Rebellion. Additionally, Andrew Jackson greatly expanded the role of the Executive through actions including Native American removal and shuttering the National Bank. Interestingly, Andrew Jackson also suspended habeas corpus during the battle of New Orleans during the War of 1812. Granted, he was a military commander and not a sitting President at the time. However, Congress ultimately vindicated his suspension of habeas corpus in 1844 when they refunded the fine levied upon him for unilaterally suspending habeas corpus.⁶⁸ On April 27th, Lincoln demonstrated strong

⁶⁷ Lincoln, *Collected Works*, 4: 341.

⁶⁸ McGinty, *Body of John Merryman*, 115.

executive action and emulated Jackson's example by enabling General Winfield Scott to suspend the Writ of habeas corpus.

The Congressional Record regarding the forgiveness of Andrew Jackson's fine was notable given its recognition of Jackson's motivation. After the war, Congress originally cited and fined Andrew Jackson for unilaterally suspending habeas corpus before the battle of New Orleans. With British invasion immanent, Jackson suspended habeas corpus in order to reduce the risk of British sympathizers sabotaging his efforts to defend the embattled city. Even so, Jackson gladly paid the fine. At this time, Congress operated under the assumption that only the legislative branch could suspend the Writ of habeas corpus.

In the *Congressional Globe* for February 13, 1844, Congress voted not only to reimburse Andrew Jackson, their rhetoric suggested that they considered the decision to fine Jackson had been a mistake. The *Congressional Globe* stated,

The bill in question proposes to restore to General Jackson a certain sum of money, with interest, which was a fine imposed on him by a judge of the district court of Louisiana many years since. The bill does not propose to give this money to General Jackson, but proposes to return the money, with interest; that is to say, for wrongs done him by the United States, in the detention of money which belonged to him.⁶⁹

The fact that Congress reimbursed Jackson may not seem groundbreaking given the volume and diversity of financial transactions that Congress oversaw. However, their diction corrected any misconception the reader may have regarding this transaction. For example, Congress did not want the public to believe that this money is "given" to Andrew Jackson. Instead, they included additional clarification to explain that his money is being "returned with interest."⁷⁰ This word choice suggested that Congress was not merely returning money in a purely financial transaction.

⁶⁹ *Congressional Globe*, 28th Congress, 1st Session. 273-274. (1844-0213) <https://congressional-proquest-com.ezproxy.shu.edu/congressional/docview/t19.d20.cg-1844-0213?accountid=13793>.

⁷⁰ *Ibid*.

Instead, they wanted to make it known that they were *returning* Andrew Jackson's money *with interest*, which underscored the belief that the fine was unjustly imposed and collected. The *Globe* explains, "The bill, on its face, by its necessary import, *ex vi termini*, implies that this fine was wrongfully imposed; that it was wrongfully taken from him; and that it has been wrongfully withheld from him by the United States."⁷¹ Thus, Congress believed the fine was incorrectly imposed, collected, and held. Moreover, Congress's reimbursement and proclamation potentially provided credibility to the belief that a leader can be empowered to unilaterally suspend habeas corpus.

Later in the report, Congress expressed a desire to absolve Jackson of any blame or censure implied through the levying of the fine. This desire was important because Jackson did not harbor any ill will toward Congress for the fine. In fact, according to Congressman Foster, Jackson replied that he would happily pay the fine if the \$1,000 was all the money he owned. Even when the grateful citizens of New Orleans raised the money to pay Jackson's fine, Jackson donated the money to charitable causes and paid the fine out of his own pocket.⁷² The report stipulated, "They [Congress] wished to place it to the ground which, whilst it would not, in the slightest degree, arraign, or in any manner imply, a censure on General Jackson, for the course which, from his high sense of duty, he deemed it necessary to take to preserve New Orleans..."⁷³ With this statement, Congress demonstrated forgiveness for Jackson's unilateral suspension of habeas corpus. Again, their word choice held important implications for understanding Lincoln's suspension of habeas corpus. Congress recognized that General Jackson needed to suspend habeas corpus, because "he deemed it necessary...to preserve New Orleans..." out a

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

“his sense of high duty.” Such word choice reflected Congress’s recognition that conditions in New Orleans necessitated Jackson’s unilateral suspension of habeas corpus. Lincoln’s suspension of habeas corpus could be interpreted in a similar framework. Later in the document, Congress even stated that they hoped this action would *not* “...imply impropriety of the conduct on General Jackson...”⁷⁴ If Congress could forgive a debt and action so completely, perhaps Lincoln believed that he could suspend habeas corpus out of “sense of duty” impelled by stark “necessity.” However, Lincoln was not prepared to suspend habeas corpus. Instead, he continued to dialogue with the Baltimore delegate- yet he would not yield to attacks on Federal troops.

Lincoln’s response to the Baltimore delegation was also important, because it demonstrated the potential for escalation. Lincoln requested that the delegation, “Go home and tell your people that if they will not attack us, we will not attack them; but if they do attack us, we will return it, and that severely.”⁷⁵ Lincoln slowly progressed toward the suspension of habeas corpus. Suspension was not his initial response to the situation in Baltimore. As evidenced by his communication with the Baltimore delegation, Lincoln first attempted to broker a diplomatic solution. Perhaps the Baltimore delegation would have been more conciliatory if they knew the types of drastic action Lincoln was willing to take in order to ensure the Government’s safety and vigorously put down the insurrection.

The April 22 recollections of Lincoln’s personal secretaries were enlightening as they expressed the dramatic decisions Lincoln was prepared to make regarding a forceful military response in Baltimore. Moreover, as his personal secretaries, John Nicolay and John Hay were

⁷⁴ Ibid.

⁷⁵ Lincoln, *Collected Works*, 4: 342.

well primed to record his most personal remarks and thoughts as they spent the greatest amount of time with him. Considering the degree of restraint that Lincoln showed in the April 22 letter sent to the Baltimore delegation, the passion and force of April 22nd's statements was striking. According to Hay and Nicolay, while considering the April 22 demands of the Baltimore delegation, Lincoln mused that “he must run the machine as he found it.”⁷⁶ In a reference to government function, Lincoln’s statement demonstrated his desire to run the government with the existing structures in place. At this time, he did not consider his actions as extra-legal or outside the norms of the American government. He also stated, “Now, sir, if you won’t hit me, I won’t hit you!”⁷⁷ In this short statement, Lincoln summarized his executive procedure. The actions he took were in response to the insurrectionists. At this point, he was not striking preemptively.

However, Lincoln’s anger did boil over in this conversation when considering his response if additional troops were sent through Baltimore and they were attacked. He stated, “But if those troops were forcibly resisted, ‘*I will lay Baltimore in ashes!*’”⁷⁸ According to Hay and Nicolay, “When told that 75,000 Marylanders would resist the passage of Union troops, he [Lincoln] promptly and decidedly “replied that he presumed that there was room enough on her soil to bury 75,000 men.”⁷⁹ In this statement, Lincoln demonstrated that he would consider shelling an American city prior to suspending habeas corpus. It was possible that Lincoln mentioned suspending habeas corpus earlier in April; however the historical record doesn’t indicate that this type of action was considered prior to this April 22nd conversation. Lincoln

⁷⁶ Michael Burlingame, John Hay, and John G. Nicolay. *Abraham Lincoln: the Observations of John G. Nicolay and John Hay*. (Carbondale: Southern Illinois University Press, 2007), 55. [Hereafter: Burlingame, *Observations of Nicolay and Hay*].

⁷⁷ Burlingame, *Observations of Nicolay and Hay*, 55.

⁷⁸ Burlingame, *Observations of Nicolay and Hay*, 55.

⁷⁹ Burlingame, *Observations of Nicolay and Hay*, 55.

also commented upon how he understood the pressures facing his Office. He expressed his thoughts in a story. He told Nicolay and Hay,

You have heard of the Irishman who, when a fellow was cutting his throat with a blunt razor, complained that he haggled it. Now, if I can't have troops directly through Maryland, and must have them all the way round by water, or marched across out-of-the-way territory, I shall be haggled.⁸⁰

In this statement, “haggled” most nearly meant to clumsily cut with a dull blade. Lincoln equated the pressures building against the Government to the increasing pain and ultimate demise resulting from being hacked with a dull blade. In order to rectify the situation, he believed that he must assert control over Baltimore and move troops into the Capital. The fact that Lincoln sent the ragged troops who survived the Baltimore Riots back to Pennsylvania was a testament to his restraint against using force that would ignite an already volatile and combustible situation further. Indeed, Lincoln was keenly aware of his actions could assuage or exacerbate the tenuous peace in Baltimore.

⁸⁰ Burlingame, *Observations of Nicolay and Hay*, 55.

Chapter 2: Section 1- Lincoln's Restraint and Suspension of habeas corpus

It appeared that the earliest date President Lincoln considered suspending habeas corpus is April 25th. After all of the violence in Baltimore, Lincoln acted with reservation as he did not order General Winfield Scott to break up a meeting of the Maryland legislature. It was widely known that the legislature was considering secession and could decide to arm its citizens against the Federal Government. Lincoln requested restraint for two reasons. First, "they clearly have the right to assemble...if we wait until they shall *have* acted, their arrest, or dispersion will not lessen the effect of their action."⁸¹ Secondly, "we *can* not [*sic*] permanently prevent their action. If we arrest them, we can not long hold them prisoner; and when liberated, they will immediately re-assemble, and take action."⁸² Thus, Lincoln showed his preference for a policy that awaits the actions of Baltimore citizens. He did not want to preemptively intervene. As evidenced by his two arguments, Lincoln did not want to arrest the delegates to the meeting before their illegal acts (if one occurs) are officially executed. He knew that if he acts too quickly, he would drive Baltimore into the secessionist camp and increase the insurgency.

However, Lincoln was acutely aware of his ability to coerce disloyal elements into compliance with the Federal Government. While the historical record was silent as to whether (or not) Lincoln read the Federalist Papers or the Debates on the US Constitution during this specific time period. However, on June 6, 1861, he received a letter from Alexander Hamilton's grandson John C. Hamilton. Hamilton and his Grandson championed a loose construction of the Constitution and Lincoln matched this interpretation as well. Lincoln received this letter as he was revising his July 4 *Address to Congress*. The very address he would use to justify his

⁸¹ Lincoln, *Collected Works*, 4: 344.

⁸² Lincoln, *Collected Works*, 4: 344.

actions- including the suspension of habeas corpus. In this letter, Hamilton explained to Lincoln how the Executive is indeed vested with tremendous power to coerce offending parties into compliance with Federal law. Hamilton cited political examples from both the Federalist and Anti-Federalist camps including James Madison, Alexander Hamilton, Thomas Jefferson, and George Washington.

Hamilton mused that the offending seceded states wrongly quoted Alexander Hamilton that the Federal Government is unable to coerce action from States. John Hamilton countered this assertion by arguing that a correct reading of Alexander Hamilton's ideals demonstrates, "Under such a polity, which is that whereof you are the head, it can be shown that he entertained no doubt of the right and duty of coercion, but actually proposed it."⁸³ Hamilton continued his argument by explaining how this coercive power existed in both the Confederation and the Constitution, which demonstrated coercive power's legal tradition stems far beyond the current crisis.⁸⁴ Next, John Hamilton quoted Madison's communication to Thomas Jefferson. Specifically, Hamilton illustrated how Madison impressed the importance of vesting Congress with coercive power. For example, Hamilton cited Madison's letter to Jefferson written on April 16th, 1781. Madison urged, "the necessity of arming Congress with coercive powers," and this merely to enforce requisitions of money, adds, "according to the nature even of alliances much less intimate, there is an implied right of coercion against the delinquent party. [James Hamilton's emphasis]"⁸⁵ Thus, while a cursory reading suggested that Madison was referring merely to financial concerns, the final clause (with Hamilton's emphasis) demonstrated that

⁸³John C. Hamilton to Abraham Lincoln, Thursday, June 06, 1861 (Right of coercion), Abraham Lincoln Papers at the Library of Congress. Transcribed and Annotated by the Lincoln Studies Center, Knox College, Galesburg, Illinois, https://memory.loc.gov/cgi-bin/query/P?mal:1./temp/~ammem_qa2X:: [Hereafter: Hamilton to Lincoln, 6 June 1861].

⁸⁴ Hamilton to Lincoln, 6 June 1861.

⁸⁵ Hamilton to Lincoln, 6 June 1861.

Madison believed that Congress should draw an implied right of coercion that applies to issues beyond finances. In one of the final paragraphs of this letter Hamilton described that “Mr. Madison went further than the opinion quoted would indicate, he actually proposed under the Confederation to coerce individuals.”⁸⁶ Even though he was an avowed Anti-Federalist and his support for the Bill of Rights demonstrated some amelioration of these views, Madison believed that Congress should be vested with coercive power. Hamilton also considered Jefferson and Washington’s commentary on coercive power as well.

According to Hamilton, Jefferson’s remarks on coercive power were more forceful and illustrative. Even though Jefferson’s remark concerned the powers of the government under the Articles of Confederation, his perspective certainly applied to the Congress under the Constitution as well. Specifically, Jefferson believed, “It was not necessary to give them power expressly, they have it by the law of nature [James Hamilton’s emphasis].”⁸⁷ Perhaps Hamilton applied Jefferson’s argument beyond the immediate context of this statement as Jefferson was referring to the ability to levy taxes in the wake of an ineffective government under the Articles of Confederation. However, it was interesting to note that at one time, Jefferson argued in favor of vigorous coercive powers stemming not from a charter- but from natural law. As an additional point of caution for Jefferson ascribing coercive power to the executive, it appeared that Jefferson was referring to the legislative branch. Furthermore, exactly which government rights were included in the “law of nature” was debatable and not immediately obvious. Constitutions list powers given to the government. When the Constitution was silent regarding certain powers and their expression, this silence presented an opportunity for adjudication and litigation. However, Jefferson’s track record as President demonstrated that he believed in a

⁸⁶ Hamilton to Lincoln, 6 June 1861.

⁸⁷ Ibid.

vigorous and powerful executive. Lastly, Hamilton considered the views of General George Washington.

George Washington was certainly familiar of the shortcomings and failures of the government formed under the Articles of Confederation. He believed that the government needed greater coercive powers. John Hamilton included George Washington's perspective on coercive power from a letter to James Madison. On May 31, 1787, Washington wrote,

I confess, however, that my opinion of public virtue is so far changed, that I have my doubts whether any system, without the means of coercion, in the Sovereign, will enforce, due obedience to the ordinances of a General government, without which every thing [*sic*] else fails [James Hamilton's emphasis].⁸⁸

In this statement, Washington clearly advocated for the government's leader to be armed with the power to enforce "obedience to the ordinances" of the government given that any effort to govern effectively will fail without the ability to coerce compliance. Washington's most emphatic belief in arming the government with greater coercive power was expressed through a rhetorical question. According to Hamilton, Washington believed,

When measures are systematically & pertinaciously pursued, which must eventually dissolve the Union or produce coercion, I say, when these things have become so obvious, ought characters who are best able to rescue their country from the pending evil to remain at home? [James Hamilton's emphasis]⁸⁹

Thus, when States blatantly disobeying Federal sovereignty and dissolving the Union, Washington believed that the government was charged with the "obvious" ability to coerce the States. Additionally, Washington characterized efforts to undermine the government as "evil." Furthermore, Lincoln's implemented a loose construction of the Constitution as he considered and implemented vigorous executive action to thwart the Secessionist threat in the Civil War.

⁸⁸ Hamilton to Lincoln, 6 June 1861.

⁸⁹ Hamilton to Lincoln, 6 June 1861.

Certainly, Lincoln drew on this belief as well as the influence of Madison, Jefferson, and Hamilton in his July 4 Address to Congress.

To conclude this message to Scott, Lincoln did authorize military action if it can be proven that the convention intends to arm its citizens against the Government. Significantly, Lincoln recommended this policy before he recommends suspending habeas corpus, saying that Scott should, "...adopt the most prompt, and efficient means to counteract, even, if necessary, to the bombardment of their cities—and in extremist necessity, the suspension of the writ of habeas corpus."⁹⁰ Given the pressure on Lincoln to put down the rebellion and the vicious actions in Baltimore, it was remarkable that he held the suspension of the writ of habeas corpus in reserve *after* the potential of bombarding Baltimore. His unilateral action was even more significant when considering that Congress was on recess and was unable to assess the situation in Baltimore and authorize a habeas corpus suspension.

As further evidence of Lincoln's restraint, even when he ordered Scott to suspend habeas corpus on April 27th, Lincoln specified that it can only be suspended along the "military line" between Philadelphia and Annapolis Junction.⁹¹ Furthermore, Scott was only authorized to suspend the writ of habeas corpus if he "...find[s] resistance which renders it necessary...for the public safety..."⁹² By contextualizing this act within terms of "public safety" and "military line" Lincoln used Constitutional arguments to support his decision. The "public safety" reference alluded to the phrasing found in Article 1: Section 9: "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."⁹³ Additionally, Lincoln's usage of the phrase "military line" reflected his

⁹⁰ Lincoln, *Collected Works*, 4: 344.

⁹¹ Lincoln, *Collected Works*, 4: 346.

⁹² Lincoln, *Collected Works*, 4: 346.

⁹³ United States Constitution, Article I: Section 9.

Constitutional charge as the Commander in Chief of military forces.⁹⁴ Thus, Lincoln rested his decision on the Constitutional need to maintain public safety and he drew additional legal agency from his status as the Commander in Chief. Furthermore, his decision to authorize (he didn't actually suspend the writ itself) the suspension of the writ along the military line shows additional restraint. Similar to his Emancipation Proclamation that exempted areas that were already controlled by Union forces, Lincoln exempted the majority of the country except for the line between Philadelphia and Annapolis as that was the location of severe resistance to Federal action.⁹⁵ Thus, Lincoln conceived of his decision to authorize the suspension of the writ of habeas corpus as a legal action empowered by the Constitution and by his understanding of executive power.

John Merryman became the test case in this Constitutional controversy for his actions as a member of the Home Guards- a Maryland based militia. Specifically, Merryman was arrested for assisting in the effort to cut telegraph wires and burn bridges connecting Baltimore and Washington, DC. His request for a petition of habeas corpus was denied in accordance with Lincoln's authorization sent to General Scott. The Baltimore-based Supreme Court Justice Roger B. Taney was incensed by this action and wrote a scathing critique of Lincoln's action.

⁹⁴ United States Constitution, Article II: Section 2.

⁹⁵ Eventually, Lincoln felt empowered to suspend Habeas corpus across the United States.

Chapter 2: Section 2- Analysis of Ex Parte Merryman- Justice Roger B. Taney's Perspective

Supreme Court Justice Roger B. Taney was a vocal proponent of States Rights and an avowed enemy of President Abraham Lincoln. Taney owned slaves and he possessed a sympathy toward the seceding states. Walker Lewis's biography of Taney analyzed some of the biases he likely held as a result of his personal context- a former slave owner living in Maryland, a state with strong ties to the Confederacy. In *Without Fear or Favor*, Lewis said, "His greatest congeniality was with those who, like himself, were products of the landed aristocracy. It was their traditions that he treasured, their qualities he most admired—their emphasis on courtesy, their regard for the dignity of the individual, and their tolerance."⁹⁶ These rights were being squeezed out in both the North and Deep South. Lewis also noticed that Taney and others living in the Border States, "What they wanted to preserve was their accustomed way of life and the right to control their own affairs."⁹⁷ Perhaps this desire to defend individual rights influenced Taney's jurisprudence to follow suit as he staunchly defended the rights of John Merryman.

Taney was also famous for his ruling in *Dred Scott v. Sandford*. Declaring for the majority that slaves were to be considered property- not humans. Thus, slaves could be transported wherever slave owners wished. This decision upended the Missouri Compromise which established a geographic division between slave states and free states centralized at the 36 degree 30 minute line of latitude. As evidenced by his statements in the Lincoln-Douglas debates,

⁹⁶ Walker Lewis, *Without Fear or Favor*, (Boston: Houghton Mifflin Company, 1965), 441 [Hereafter: Lewis, *Without Fear or Favor*].

⁹⁷ Lewis, *Without Fear or Favor*, 441.

Lincoln was influenced by this decision to rejoin the Nation's political scene to halt slavery's expansion.

With regard to Taney's opinion in *Ex Parte Merryman*, supporters praised Taney's strict adherence to applying the rule of law. Lewis included the assessment of William L. Marbury, a keynote speaker celebrating the 100th anniversary of the case. Marbury noted that Taney's decision "'symbolizes the deepest aspirations of our times. All of us must surely entertain the hope that rule of law will ultimately replace the use of naked power.'"⁹⁸ Thus, in spite of the media firestorm sparked by *Ex Parte Merryman*, the concurring opinions still complimented Taney's support for the rule of law protecting individual liberty.

Justice Roger B. Taney certainly let his feelings be known regarding Lincoln's suspension of habeas corpus. His decision, *Ex Parte Merryman*, was issued as a sole Justice- not a ruling of the Supreme Court. On May 25, John Merryman, a Confederate sympathizer, was arrested for destroying railroad bridges and cutting telegraph wires. On May 26th, Merryman's lawyers sought a writ of habeas corpus from Justice Roger B. Taney in his capacity as a circuit court judge. In this time period, Supreme Court Justices also served as circuit court judges. He quickly issued the writ and ordered General George Cadwalader to release Merryman. The General cited Scott's suspension after Lincoln approved the measure. At Fort McHenry (where Merryman was held), the writ was denied and Merryman remained incarcerated. Realizing that Merryman would not be released, Taney issued an opinion in chambers as a single Justice of the Supreme Court. His critique of Lincoln's decision became the focus of *Ex Parte Merryman*.

⁹⁸ Lewis, *Without Fear or Favor*, 453.

At times, his tone lost strict, legal objectivity as he admonished Lincoln's actions. For example, when describing how the case came to his attention, Taney remarked that he, "certainly listened to it with some surprise, for I 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."⁹⁹ Certainly, as a Supreme Court Justice, Taney knew that there were many interpretations of the Constitution- yet he exaggerated when he stated that *everyone* agreed on the issue of suspending habeas corpus.

Taney's decision could be distilled to two major objections to Lincoln's suspension. First, by virtue of placing the suspension of habeas corpus in Article I: Section 9, the Framers intended the President would derive his power from Article II and be precluded from suspending the Writ. Second, the Judiciary branch retained supremacy to determine whether (or not) the Writ must be suspended- even if the Legislature assessed the conditions that prompt a suspension. For example, Taney argued, "The 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. This article is devoted to the legislative department of the United States, and has not the slightest reference to the executive department."¹⁰⁰ According to Taney, the location of the clause in the Constitution held particular influence. Yet habeas corpus's suspension was moved there by the committee on Argument and Style. If Taney hoped to tap into the Framer's intent via the placement of the clause in the Constitution- his decision did not reflect the committee on detail's decision. Originally, Article IX, which pertained to the Judiciary, contained the suspension clause. On August 28th, the Constitutional Convention voted to include the suspension clause.

⁹⁹ *Ex Parte Merryman*, 17 Fed. Cas. 144, 147 (May 28, 1861).

¹⁰⁰ *Ex Parte Merryman*, 17 Fed. Cas. 144, 147 (May 28, 1861).

Pinckney's original proposal entrusted the legislature to suspend the writ. The historical record was silent as to the motivation for moving the clause into Article I and changing Pinckney's proposal by eliminating a specific charge to the legislature to suspend the Writ.¹⁰¹ Lincoln utilized the lack of a specific reference to address the riot in Baltimore as the Executive.

While Taney recognized the ability for Congress to suspend the Writ of habeas corpus due to a threat to public safety, he doesn't entirely trust that branch. While he considered Congress's judgement "conclusive,"¹⁰² he believed in judicial supremacy to determine whether (or not) conditions exist to suspend the Writ. Additionally, Taney certainly did not entrust the President to suspend the Writ as the President only draws his powers from Article II. After reminding Lincoln of his responsibilities under Article II, Taney stated, "The only power, therefore, which the president possesses, where the "life, liberty or property" of a private citizen is concerned, is the power and duty prescribed in the third section of the second article, which requires "that he shall take care that the laws shall be faithfully executed."¹⁰³ However, Taney's argument advocated an even more narrow reading of the Constitution with regard to executive power.

Taney argued in favor of judicial supremacy over the executive. According to Taney, the executive is bound by the Constitution "...to take care that they be faithfully carried into execution, as they are expounded and adjudged by the co-ordinate branch of the government."¹⁰⁴ Thus, the President only had the ability to act insofar as the judiciary allows. Taney said, "...he [the president] acts in subordination to judicial authority, assisting it to execute its process and

¹⁰¹ White, *Abraham Lincoln and Treason*, 129. Also found in *Notes of the Debates in the Federal Convention of 1787 Reported by James Madison*, (Ohio: Ohio State University Press, 1985,) 540-541.

¹⁰² *Ex Parte Merryman*, 17 Fed. Cas. 144, 147 (May 28, 1861).

¹⁰³ *Ex Parte Merryman*, 17 Fed. Cas. 144, 147 (May 28, 1861).

¹⁰⁴ *Ibid.*

enforce its judgments.”¹⁰⁵ Taney believed that Lincoln usurped the judicial and legislative roles of government by suspending habeas corpus, arguing that “He [Lincoln] certainly does not faithfully execute the laws, if he takes upon himself legislative power, by suspending the writ of habeas corpus, and the judicial power also, by arresting and imprisoning a person without due process of law.”¹⁰⁶ In addition to firmly asserting judicial supremacy over executive action, he eviscerated the doctrine of necessity as a defense for suspending habeas corpus.

Taney asserted that the executive could not suspend habeas corpus without direction from the other branches of government. Taney said,

With such provisions in the constitution, expressed in language too clear to be misunderstood by any one, I can see no ground whatever for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of habeas corpus, or the arrest of a citizen, except in aid of the judicial power.¹⁰⁷

Again, Taney asserted judicial supremacy and a firm belief that the President could not suspend habeas corpus in the event of national emergency. Taney’s bold proclamation critiqued Lincoln’s belief that conditions in Baltimore as the motivation to suspend habeas corpus. However, Taney’s argument further asserted that even if the Nation were threatened, the President cannot suspend habeas corpus. Taney said, “Nor can any argument be drawn from the nature of sovereignty, or the necessity of government, for self-defense in times of tumult and danger.”¹⁰⁸ Taney so ardently believed in limited powers that even when the Nation was threatened, the President could not suspend habeas corpus. Also in that statement, Taney condemned “...the nature of sovereignty...” as a potential argument explaining Lincoln’s action. After this statement, Taney reiterated that, “The government of the United States is one of

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ *Ex Parte Merryman*, 17 Fed. Cas. 144, 147 (May 28, 1861).

¹⁰⁸ *Ex Parte Merryman*, 17 Fed. Cas. 144, 147 (May 28, 1861).

delegated and limited powers; it derives its existence and authority altogether from the constitution, and neither of its branches, executive, legislative or judicial, can exercise any of the powers of government beyond those specified and granted.”¹⁰⁹ Even in cases of emergency, Taney believed that the Government must act in strict adherence to the enumerated powers that are “specified and granted” by the Constitution.

In addition to the Constitution, Taney cited Chief Justice John Marshall’s decision in *Ex Parte Bollman* and *Ex Parte Swartwout*, Justice Joseph Story’s *Commentaries on the Constitution of the United States*, Sir William Blackstone’s *Commentaries on the laws of England*, Henry Hallam’s *Constitutional History*. Taney selected Marshall’s decisions as he believed they had they set the strongest precedence in terms of case law for *Ex Parte Merryman*. *Ex Parte Bollman* and *Swartwout* both concern the treason trial of the Aaron Burr conspiracy. President Thomas Jefferson requested that Congress suspend the writ of habeas corpus. Congress denied the request. However, in the resulting legal fallout, Marshall ruled, "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.”¹¹⁰ Clearly, Taney included Marshall’s position because it reinforced his opinion that the President may not suspend habeas corpus unilaterally. Instead, Congress must suspend the writ in accordance with the stipulations of Article I: Section 9.

Additionally, with regard to the treason trial for Aaron Burr, Taney cited Jefferson’s behavior as evidence that President could not suspend habeas corpus. Because Jefferson requested Congress to suspend habeas corpus, this action demonstrated an assumption that

¹⁰⁹ *Ex Parte Merryman*, 17 Fed. Cas. 144, 147 (May 28, 1861).

¹¹⁰ *Ex Parte Merryman*, 17 Fed. Cas. 144, 147 (May 28, 1861).

Executive could not suspend habeas corpus and the legislature was the branch empowered for such decisions.¹¹¹ Taney remarked, “And in the debate which took place upon the subject, no one suggested that Mr. Jefferson might exercise the power himself, if, in his opinion, the public safety demanded it.”¹¹² Thus, Taney cited Jefferson’s actions as evidence in favor of Taney’s critique of Lincoln actions. However, the Aaron Burr conspiracy was not a perfect analog for the situation facing President Lincoln. The level of destruction and threat to national security did not achieve even a remote sense of parity, leading legal historian James Dueholm to conclude,

Jefferson sought congressional authority to suspend the writ in order to detain the Burr conspirators, whose conduct was neither the rebellion nor the invasion required by the suspension clause. Under those circumstances, Jefferson’s request for congressional authority was an attempt to round up a gang for an assault on the Constitution, not a blow to superior constitutional authority.¹¹³

As illustrated by Dueholm, the situation facing Jefferson was far different from the conditions in Baltimore facing Lincoln. Taney’s application and interpretation of Jefferson’s actions did not recognize the reality Lincoln faced in 1861.

Taney included legal commentary from Blackstone, Story, and Hallam even though their statements were not expressed in case law. Thus, these statements contained less jurisprudential weight when compared to the precedence established by a case. Specifically, Blackstone’s commentary was useful as it shows interpretations of British Common Law, yet because America’s legal system was not the British system its application is suggestive rather than dispositive. Taney included Blackstone’s statement,

But 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. It is the Parliament only or legislative power that, whenever it sees proper, can authorize the

¹¹¹ *Ex Parte Merryman*, 17 Fed. Cas. 144, 147 (May 28, 1861).

¹¹² *Ex Parte Merryman*, 17 Fed. Cas. 144, 147 (May 28, 1861).

¹¹³ Dueholm, *Lincoln’s Suspension*, 9.

Crown, by suspending the *habeas corpus* for a short and limited time, to imprison suspected persons without giving any reason for so doing.”¹¹⁴

Clearly, Taney cited this passage because it denied the executive’s ability to suspend habeas corpus and empowered the legislature. Likewise, Taney cited Hallam’s *Commentaries* because they describe the circumstances in Britain that led to the signing of the *Magna Charta*.

Specifically, one of the principle concerns of that document was limiting the King’s ability to arbitrarily imprison his subjects.¹¹⁵ Hallam observed the King’s power was restrained, “but to cut off the abuses by which the Government’s lust of power and servile subtlety of Crown lawyers had impaired so fundamental a privilege.”¹¹⁶ Hallam and Taney both believed that the American legal tradition drew on this experience and must limit the executive’s authority in a similar fashion. Furthermore, Taney included Justice Story’s *Commentaries* to reinforce his position against Lincoln’s suspension of habeas corpus.

Story’s *Commentaries* follow a similar trajectory to Hallam and Blackstone with regard to checking executive power when suspending habeas corpus due to fear of oppression at the hands of an overzealous executive. Moreover, Story added, “It would seem, as the power is given to Congress to suspend the writ of *habeas corpus* in cases of rebellion or invasion, that the right to judge whether the exigency had arisen must exclusively belong to that body.”¹¹⁷ Story entrusted the power to suspend habeas corpus to the legislature along with the power to assess a situation to determine if a suspension was necessary. However, Story also remarked that habeas corpus had not been formally suspended in America’s Constitutional history and his conclusion slightly hedged. Instead of completely entrusting Congress, Story said, “it would seem” that

¹¹⁴ *Ex Parte Merryman*, 17 Fed. Cas. 144, 147 (May 28, 1861).

¹¹⁵ *Ex Parte Merryman*, 17 Fed. Cas. 144, 147 (May 28, 1861).

¹¹⁶ *Ex Parte Merryman*, 17 Fed. Cas. 144, 147 (May 28, 1861).

¹¹⁷ *Ex Parte Merryman*, 17 Fed. Cas. 144, 147 (May 28, 1861).

Congress was so empowered. Perhaps his world choice demonstrated some hesitation to give Congress the absolute ability to judge the conditions necessary to suspend habeas corpus. Nonetheless, Taney cited this passage because Lincoln unilaterally suspended habeas corpus in a manner contrary to Story's position.

Taney would have preferred that the police and military in Baltimore arrested Merryman by following proper procedure. According to Taney, the district judge of Maryland, the congressionally appointed commissioner, district attorney, and marshal all lived within a miles of Merryman's home. Certainly, they should have combined efforts to issue a warrant and assess Merryman's alleged deeds by using evidence to file a motion that would travel up the chain of command and determine whether a warrant should be granted. Taney argued that in Baltimore, "Up to that time [of Merryman's arrest], there had never been the slightest resistance or obstruction to the process of any court or judicial officer of the United States, in Maryland, except by the military authority."¹¹⁸ Perhaps Taney was unaware of the statements of Hicks, Brown, and Police Marshal Kane as they were certainly not the most trustworthy conduits for an investigation of a conspirator who shared their objection of the movement of Federal Troops through Baltimore. However, Taney's statement was significant, because it displayed his belief in following the chain of command and respecting the stipulations in the letter of the law as he understood them. There was plausible legal ambiguity that Lincoln utilized to justify his suspension; while Taney condemned him for it.

Taney's concluding remarks also stated the important implications for Lincoln's suspension of habeas corpus and the resulting arrest of John Merryman. Taney believed that

¹¹⁸ *Ex Parte Merryman*, 17 Fed. Cas. 144, 147 (May 28, 1861).

Lincoln usurped the Judiciary's power via military force. Thus, "...the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found."¹¹⁹ Specifically, Taney believed that Lincoln "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 substituted a military government in its place, to be administered and executed by military officers."¹²⁰ Thus, Lincoln's action signified far more than merely suspending the Writ of habeas corpus- Lincoln's order characterized the President as a tyrannical dictator. Even though Lincoln's suspension was measured and limited, Taney believed that once the Writ was unilaterally suspended, every citizen's life, liberty, and property is held at the whim of military power. Ironically, as the insurgency mounted, these efforts threatened citizens' life, liberty, and property as well.

In spite of his passionate feelings as well as his assertion of judicial supremacy, Justice Taney did not order Merryman's release. *Ex Parte Merryman* was the opinion of one Supreme Court Justice so it did not carry the same weight of a Supreme Court case in which all members weigh in and assess an action or legislation's constitutionality. Instead, he ordered, "...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."¹²¹ For such a labored statement that require hours of research, the ending was anticlimactic. Taney's final sentence passive aggressively took Lincoln to task by "observing" that in order for the President to fulfil his Constitution obligation to "take

¹¹⁹ *Ex Parte Merryman*, 17 Fed. Cas. 144, 147 (May 28, 1861).

¹²⁰ *Ex Parte Merryman*, 17 Fed. Cas. 144, 147 (May 28, 1861).

¹²¹ *Ex Parte Merryman*, 17 Fed. Cas. 144, 147 (May 28, 1861).

care that the laws be faithfully executed,"¹²² Lincoln must "...determine what measures he will take to cause the civil process of the United States to be respected and enforced."¹²³ Taney's statement assumed that Lincoln was not faithfully executing and protecting the civil laws/processes. Instead, he must alter his actions in order to concord with Taney's decision. As lengthy and verbose as *Ex Parte Merryman* was, this statement did not once refer to the reality of the situation in Baltimore. Perhaps Taney desired that his decision would be interpreted outside of the influences of politics and considered with respect to the objective stipulations of laws and the Constitution. If Taney included reference to the troubled situation in Baltimore, perhaps he could be critiqued for allowing circumstances rather than the law to motivate his ruling.

Taney was well aware of the impact his ruling could have regarding the National ability to fight off the insurrection and survive whole and intact. In response to a letter written by former President Franklin Pierce, Taney explained that the country had descended into a,

"...paroxysm of passion into which the country that suddenly been thrown appears to me to amount to almost delirium. I hope that it is too violent to last long, and that calmer and more sober thoughts will soon take its place: and that the North as well as the South, will see that a peaceful separation, with free institutions in each section, is far better than the union of all the present states under a military government, and a reign of terror preceded too by a civil war with all its horrors, and which end as it may will prove ruinous to the victors as well as the vanquished"¹²⁴

Taney noticed how the Country was being torn apart; yet, he hoped for a peaceful separation of North and South. In this sense, he made *Ex Parte Merryman* a Constitutional case to end the Constitutional union. Certainly, his diction of "free institutions" was a veiled reference to saving slavery. As a testament to his ironclad belief in states' rights and individual rights, he would

¹²² *Ex Parte Merryman*, 17 Fed. Cas. 144, 147 (May 28, 1861).

¹²³ *Ex Parte Merryman*, 17 Fed. Cas. 144, 147 (May 28, 1861).

¹²⁴ Carol Brent Swisher, *Roger B. Taney*, (Connecticut: Archon Books, 1961), 554. [Hereafter: Swisher, *Taney*]

rather see the Nation destroyed than infringe on individual liberty. He compared Lincoln's executive actions to establishing a military government similar to France's during the French Revolution's Reign of Terror. Taney lamented the destructive impact on both the North and the South. Taney's highly partisan opinion appeared to prefer disunity and the end of the nation to Lincoln's attempt to stamp out the insurrection and reunify the country.

Taney biographer, Carol Brent Swisher believed that Taney "...felt so differently, however, as to prefer the death of the union to the medicine which the President prescribed necessary to save it."¹²⁵ Perhaps Taney was too appalled by the cost of war to stomach the cost of keeping Nation together. Swisher estimated that Taney could not face the possibility of the South's destruction. She said, "Yet no one familiar with the destructiveness of the war and with the subsequent decay of the finer aspects of the culture of the old South will deny the greatness of the cost, or wonder that Taney, farseeing as he was appalled by it."¹²⁶ Perhaps Taney was indeed impacted by his context and his ruling in *Ex Parte Merryman* was his attempt to save his way of life. Certainly, Taney disdained the eroding status of the Supreme Court as a result of Lincoln's policies. In 1862, Taney noted, "...that the court will now be [very different] from the court as I have heretofore known it. Nor do I see any ground for the hope that it will ever against be restored to the authority and rank which the Constitution intended to confer upon it."¹²⁷ Indeed, Taney attempted to salvage the Court's authority in his *Ex Parte Merryman* decision; however, Lincoln's exercise of the President's expanded powers was no match for Taney's intentions. Perhaps Taney got the "last laugh" as even once the government organized

¹²⁵ Swisher, *Taney*, 556.

¹²⁶ Swisher, *Taney*, 555.

¹²⁷ Swisher, *Taney*, 572-573.

the evidence necessary to prosecute offenders like Merryman, Taney used stall tactics to ensure that they were never tried.¹²⁸

Certainly, the stakes were high as rebels accused in a fashion similar to Merryman considered Taney's opinion in their defense against Federal prosecution. Additionally, Nicholas Kemp, a draft resister in Wisconsin cited *Ex Parte Merryman* in his defense as well.¹²⁹ Lincoln needed a forceful response to answer Taney's charges in order to prosecute the war efficiently against a growing insurrection. Lincoln did not directly respond to Taney. However, Lincoln vociferously defended his actions in his July 4, 1861, *Address to Congress*.

¹²⁸ James F. Simon, *Lincoln and Chief Justice Taney: Slavery, Secession, and the President's War Powers*. (New York: Simon & Schuster, 2006,) 198.

¹²⁹ Lewis, *Without Fear or Favor*, 454.

Chapter 3: Section 1- Analysis of President Lincoln's July 4, 1861 Address

Lincoln's July 4, 1861, *Message to Congress* summarized the dangers facing the Government as well as his rationale for the executive actions he took to counteract the Confederate insurgency. These actions included calling for militia to defend the capitol, enacting a blockade of Southern ports, and suspending habeas corpus. Lincoln's address was significant because he cited the challenges facing the Federal Government as the prerequisite conditions that prompted his execution of war powers. While the final revisions to his address appear to be made as late as July 3rd, Lincoln's understanding of executive power and the nature of the conflict facing his administration began much earlier.

Stemming from his career as a lawyer and a frontier politician, Lincoln was a talented public speaker who knew how to craft statements to garner the greatest support. Lincoln relied heavily upon this strength as he faced the crisis in Baltimore and drafted his statement to Congress. In June and July 1861, the Nation's very existence was threatened and he need to galvanize as much support as possible while refraining from further offending or alienating Washington's delicate political balance. Lincoln needed to execute bold, decisive action to keep the capital from falling. If the Nation's capital fell, Peace Democrats resistance to Lincoln would increase. Peace Democrats believed that the South should be allowed to secede rather than risk bloody, costly civil war. On the opposing side, staunch Unionists believed that the President must take strong, decisive action to end the rebellion and reverse the secession movement. This type of action would inspire unionists in the South to apply political pressure and rejoin the Union.

Moreover, Radical Abolitionists believed that it would be better to let the South secede. Allowing the South to leave the United States ameliorated the moral stain of slavery and avoided

the bloodshed of war. Finally, common citizens in the North looked to Lincoln to save the capital- such a loss could irrevocably damage their morale while strengthening the secessionist's resolve. Lincoln's statement to Congress needed to transcend this volatile situation and buoy Union support for his efforts to save Washington, DC.

As early as May 1861, Lincoln clearly expressed his understanding of executive power and his role as the leader of Union forces against the growing insurgency. In a fragment "Random 6" which he eventually included in his famous July 4, 1861, *Address to Congress*, Lincoln mused,

A right result will be worth more to the world than ten times the men, and ten times the money-- The evidence reaching us from the people leaves no doubt that the material for the work is abundant; and that it needs only the hand of legislation to give it legal sanction, and the hand of the Executive to give it practical shape and efficiency...¹³⁰

Lincoln stated his belief in the importance of ending the insurgency, worth more than ten times the War Department's 1861 expenditures. Even in this early fragment to his July Address, he expressed his understanding of the Executive's role in the conflict. Specifically, the executive gave the legislature's policy "shape and efficiency." Importantly, Lincoln recognized the role of the legislative branch in providing "legal sanction" for his actions. Thus, Lincoln recognized the important role played by the legislature and the executive- but he tasked the executive branch with the vital duty to hone legislative initiatives and implement them. In the final draft of this Address, Lincoln kept this phrase intact, in his view, both branches act cooperatively. However, the executive was vested with the responsibility to enact efficient policies to achieve success- in

¹³⁰ Abraham Lincoln Papers at the Library of Congress. Transcribed and Annotated by the Lincoln Studies Center, Knox College. Galesburg, Illinois. Abraham Lincoln, [May? 1861] (Draft Fragment, Message to Congress, July 4, 1861).

this case checking the growing insurgency. Importantly, Lincoln did not claim to act outside of Congress's purview. This belief was featured in the final version of his *Address* as well.

In the final version, Lincoln devoted considerable energy to explain his disagreement with the Confederate belief in constitutionally protected secession. The section pertaining to suspending habeas corpus was very short- only two paragraphs long. The relatively brief commentary on habeas corpus did not reflect Lincoln's ambivalence toward his suspension of habeas corpus. Instead, Lincoln's remarks reflected a consistency regarding his great restraint in the suspension as well as his belief that his actions were indeed legal and reinforced by the Constitution.

Lincoln began his *Address to Congress* by explaining the "extraordinary" circumstances facing the Federal Government. Lincoln explained to Congress that he called their attention, "...to any ordinary subject of legislation."¹³¹ Thus, even as early as the second sentence of his *Address*, he primed Congress to be aware that extraordinary circumstances challenged the Government and this statement implied that vigorous action would be necessary. From a sovereignty perspective, Lincoln recognized that the Federal Government could not function in the South and many segments throughout the Country. The act of secession effectively blunted the Federal Government's ability to rule in those areas.

Lincoln considered his duty to keep the Union from destruction. He stated, "...a choice of means to that end became indispensable. This choice was made; and was declared in the Inaugural address. The policy chosen looked to the exhaustion of all peaceful measures, before a resort to any stronger ones."¹³² With this statement, Lincoln demonstrated his consistency from the beginning of his term as President as well as his belief that he applied only necessary actions

¹³¹ Lincoln, *Collected Works*, 4: 421-441.

¹³² Lincoln, *Collected Works*, 4: 421-441.

to achieve the government's goals. His policy toward the secessionists began with diplomatic, peaceful efforts before he resorted to strong, military intervention. Lincoln included, "No compromise, by public servants, could, in this case, be a cure..."¹³³ Compromise and diplomatic solutions could not stem the tide of the insurrection. The situation required stronger action. He additionally believed that the Constitution protected his actions. Regarding his actions, Lincoln said, "Of all that which a president might constitutionally, and justifiably, do in such a case, everything was foreborne, without which, it was believed possible to keep the government on foot."¹³⁴ Thus, Lincoln considered his actions necessary components to keep the government as functional as possible.

It appeared that Lincoln may have expressed some hesitation regarding his actions as *wholly* legal. When considering his actions he mused, "These measures, whether strictly legal or not, were ventured upon, under what appeared to be a popular demand, and a public necessity; trusting, then as now, that Congress would readily ratify them. It is believed that nothing has been done beyond the constitutional competency of Congress."¹³⁵ Clearly, Lincoln recognized that his actions may have stretched the legal bounds of the President's powers as they were presently understood. However, given the unprecedented challenge facing his Government, Lincoln knew vigorous action was required.

Moreover, in spite of this apparent hesitation, Lincoln entrusted Congress to ratify his actions that were brought on by necessity leveraged against his charge to execute government policy. He did not believe that his actions violated the Constitution. Certainly, Taney found fault with this assessment; but Lincoln strongly believed that his executive actions were

¹³³ Lincoln, *Collected Works*, 4: 421-441.

¹³⁴ Lincoln, *Collected Works*, 4: 421-441.

¹³⁵ Lincoln, *Collected Works*, 4: 421-441.

necessary to counteract the counter insurgency's threat to the Federal Government. Specifically, the Final Draft said,

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. This authority has purposely been exercised but very sparingly.¹³⁶

In this statement, Lincoln explained how it was “considered a duty” to empowered his Commanding General to suspend habeas corpus “according to his discretion.” By removing the subject from the sentence, Lincoln distanced himself from suspending habeas corpus. He also implicated the Commanding General by stating his role outright. Perhaps this phrasing reflected hesitation or even doubt regarding the degree to which Lincoln perceived the law's ability to support his action. Lincoln appeared to minimize his role further by explaining how the authority had been exercised “very sparingly.” However, the next paragraph demonstrated a more emphatic statement of Lincoln's belief that his actions were legally protected and concurred with his powers under the Constitution.

While never mentioning Taney explicitly, Lincoln acknowledged, “Nevertheless, the legality and propriety of what has been done [executive actions like suspending habeas corpus] under it [claiming public necessity], are questioned; and the attention of the country has been called to the proposition that one who is sworn to “take care that the laws be faithfully executed,” should not himself violate them.”¹³⁷ Lincoln found fault with this assertion, because he interpreted the “take care” clause to empower his ability to enforce and effect Federal

¹³⁶ Lincoln, *Collected Works*, 4: 421-441.

¹³⁷ Lincoln, *Collected Works*, 4: 421-441.

sovereignty throughout the Nation. Lincoln continued to explain how he carefully considered the issues before acting. Lincoln called Congress to recognize, “The whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States.”¹³⁸ Importantly, Lincoln included the words “execute” and “execution” as subtle reference to his duty as President.

However, Lincoln included rhetorical questions to demonstrate his thinking regarding suspending habeas corpus and they appeared to exemplify Lincoln’s belief that perhaps his actions were extralegal. Lincoln’s actions represented an unprecedented expansion of Executive power beyond previous Presidential action; yet, his actions were located in an ambiguous legal setting. The Constitution said that habeas corpus could be suspended, it did not specify by whom. With regard to his suspension of habeas corpus, Lincoln recognized that his actions could be considered illegal. However, to counter that assertion, he asked, “To state the question more directly, are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?”¹³⁹ This question was subjunctive mood- not indicative. Lincoln did not concede that any laws had been violated. Moreover, this rhetorical question was undoubtedly a clear and ringing endorsement of the doctrine of necessity. Lincoln believed that suspending habeas corpus was necessary to keep the government from falling into “pieces.” However, the characterization of following all the rules “but one” was certainly troubling when considering the legality of Lincoln’s actions. Lincoln’s next statement attempted to reduce such doubt.

¹³⁸ Lincoln, *Collected Works*, 4: 421-441.

¹³⁹ Lincoln, *Collected Works*, 4: 421-441.

Lincoln's next statement referenced his official oath as President as well as his belief that the law was not violated. Lincoln believed that if he allowed the Government to fall without acting, "...would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it? But it was not believed that this question was presented. It was not believed that any law was violated."¹⁴⁰ Clearly, Lincoln believed that his actions and his suspension of habeas corpus were necessary to answer the charges in his Presidential Oath and his responsibility to "take care" that the laws are faithfully executed. While perhaps there was hesitation and an effort against characterizing his actions as unilateral, Lincoln believed that "no laws were violated."

When considering the Constitution's commentary on habeas corpus' suspension, Lincoln remarked that the document did not explicitly vest one branch with the power for suspension to counter Taney's claim that the Congress was vested with this power given the suspension's placement in Article I. Lincoln said, "But the Constitution itself, is silent as to which, or who, is to exercise the power; and as the provision was plainly made for a dangerous emergency..."¹⁴¹ Thus, Lincoln's statement provided a context with which his actions concord with the Constitution. Since the document did not state which branch was charged with suspension, perhaps the executive could. The Constitution clearly stated that there were preconditions that must be met in order for the writ to be suspended- a "dangerous emergency." Lincoln explained,

The provision of the Constitution 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," is equivalent to a provision—is a provision—that such privilege may be suspended when, in cases of rebellion, or invasion, the public safety does require it.¹⁴²

¹⁴⁰ Lincoln, *Collected Works*, 4: 421-441.

¹⁴¹ Lincoln, *Collected Works*, 4: 421-441.

¹⁴² Lincoln, *Collected Works*, 4: 421-441.

Lincoln cloaked his action in the Constitution. He further explained, “It was decided that we have a case of rebellion, and that the public safety does require the qualified suspension of the privilege of the writ which was authorized to be made.”¹⁴³ While he did not name who specifically defined the situation facing the government as a “rebellion,” Lincoln’s point was clear. A rebellion existed, public safety was in peril, and Lincoln acted to rectify the situation stemming from a violent and growing insurgency in accordance with his duty as the Executive.

Furthermore, Lincoln contextualized his actions with regard to the views of the Framers. Specifically, Lincoln said, “...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.”¹⁴⁴

Lincoln explained how his understanding of executive power must be in concord with the Framers’ intent. Surely, the government’s constitutional architects would empower the executive to rectify a perilous situation instead of “waiting for the danger to run its course.” Lincoln could not consider Congress because they were still at recess and even if he called them back to the capitol, their ability to meet could have been hampered by the destruction to the rails and bridges surrounding Baltimore. In this very practical statement, Lincoln assumed the Framers’ vested the Executive with the ability to protect the Federal Government’s sovereignty and answer any threat to the Government’s ability to effectively function.

As clear as Lincoln’s statements were, he still recognized a role for the Legislature. Lincoln concluded, “No more extended argument is now offered; as an opinion, at some length,

¹⁴³ Lincoln, *Collected Works*, 4: 421-441.

¹⁴⁴ Lincoln, *Collected Works*, 4: 421-441.

will probably be presented by the Attorney General. Whether there shall be any legislation upon the subject, and if any, what, is submitted entirely to the better judgment of Congress.”¹⁴⁵

Lincoln explained that the Attorney General would explain how the President’s actions concurred with the Constitution. Additionally, instead of claiming and reinforcing any understanding of a supremely powerful executive, Lincoln recognized and encouraged Congress’s “better judgement” to determine if legislation was needed regarding the suspension of habeas corpus. Ultimately, Congress did pass a law regarding suspending habeas corpus in 1863.

To conclude this address, Lincoln referred Congress to consider the Government’s purpose in a larger sense. Lincoln recognized that the insurgency’s effort really amounted to a direct challenge to representative government in America. If Lincoln allowed the Confederacy to thrive, they were effectively subverting the results of the Election of 1860. Elections were the hallmark of representative government. Failure to defend the National government gives, “...up the main point, upon which the people gave the election.”¹⁴⁶ Thus, the insurrection struck at the “main point” of representative government- responding to the will of the electorate as expressed through the ballot.

Moreover, Lincoln believed that the conflict, “...presents to the whole family of man, the question, whether a constitutional republic, or a democracy—a government of the people, by the same people—can, or cannot, maintain its territorial integrity, against its own domestic foes.”¹⁴⁷

In Lincoln’s view, Government had an implied right to existence and perpetuity. He believed

¹⁴⁵ Lincoln, *Collected Works*, 4: 421-441.

¹⁴⁶ Lincoln, *Collected Works*, 4: 421-441.

¹⁴⁷ Lincoln, *Collected Works*, 4: 421-441.

that in order to guarantee its existence, Lincoln needed act vigorously to halt in the insurrection. Given the challenges in Baltimore and throughout the South, Lincoln explained, “So viewing the issue, no choice was left but to call out the war power of the Government; and so to resist force, employed for its destruction, by force, for its preservation.”¹⁴⁸ Failure to act would have doomed the Government; thus, Lincoln utilized the war powers and resist the forces conspiring to destroy the Nation.

Lincoln also considered the balance of the citizen’s rights against the Government’s actions. The President recognized that the government’s role in stopping the rebellion encroaches on the liberties of its people. The nature of the Civil War, “... forces us to ask: ‘Is there, in all republics, this inherent, and fatal weakness?’ ‘Must a government, of necessity, be too strong for the liberties of its own people, or too weak to maintain its own existence?’”¹⁴⁹ Lincoln’s actions clearly demonstrated that the Government was empowered to act in order to save its existence. In addition to a failure to act constituting a “betrayal of so vast, and so sacred a trust,”¹⁵⁰ Lincoln remarked that he would personally consider a failure to act as “shrinking” from moral responsibility.¹⁵¹ Thus, Lincoln concluded the *Address*, “It was with the deepest regret that the Executive found the duty of employing the war-power, in defence [*sic*] of the government, forced upon him. He could but perform this duty, or surrender the existence of the government.”¹⁵² Lincoln believed that he was forced to either act or surrender the government and he chose vigorous action. In spite of hesitation or doubt historians read into Lincoln’s

¹⁴⁸ Lincoln, *Collected Works*, 4: 426.

¹⁴⁹ Lincoln, *Collected Works*, 4: 426.

¹⁵⁰ Lincoln, *Collected Works*, 4: 421-441.

¹⁵¹ Lincoln, *Collected Works*, 4: 421-441.

¹⁵² Lincoln, *Collected Works*, 4: 421-441.

Address, Lincoln held onto a strong conviction in the legality of his actions- even beyond the scope of the conflict. Indeed, Lincoln believed that once the war was over,

it will be his purpose then, as ever, to be guided by the Constitution, and the laws; and that he probably will have no different understanding of the powers, and duties of the Federal government, relatively to the rights of the States, and the people, under the Constitution, than that expressed in the inaugural address.¹⁵³

With this statement, Lincoln clearly believed in the consistency of his views from his inauguration through the struggles in Baltimore. Lincoln imagined that even once the insurrection was defeated, his actions would still be considered constitutional.

¹⁵³ Lincoln, *Collected Works*, 4: 439.

Chapter 3: Section 2- Lincoln's Conception of Executive Power

It was important to note that while Lincoln dramatically expanded the powers of the Executive, he did not always believe in this sweeping power. Specifically, in an 1844 letter to his associate and law partner, William Herndon, Lincoln argued *against* broad executive power to commit troops to defend against invasion. Herndon believed that the President alone could determine whether emergency necessitated a unilateral response to respond to invasion. Lincoln responded that giving the executive the ability to set the terms and conditions that necessitated invasion resulted in unlimited power. Lincoln explained,

Allow the President to invade a neighboring nation, whenever *he* shall deem it necessary to repel an invasion, and you allow him to do so, *whenever he may choose to say* he deems it necessary for such purpose---and you allow him to make war at pleasure. Study to see if you can fix *any limit* to his power in this respect, after you have given him so much as you propose.¹⁵⁴

Clearly, Lincoln admonished the view that the President was the sole entity that can determine the conditions that necessitate war. Lincoln went on to explain how he believed that only Congress had the ability to declare war. He said,

The provision of the Constitution giving the war-making power to Congress, was dictated, as I understand it, by the following reasons. Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This, our Convention understood to be the most oppressive of all Kingly oppressions; and they resolved to so frame the Constitution that *no one man* should hold the power of bringing this oppression upon us. But your view destroys the whole matter, and places our President where kings have always stood.¹⁵⁵

Lincoln explained how allowing the executive to determine the conditions that necessitate war parallels the unjust power of British monarchs to wage war under the guise of defending the public interest. In fact the Framers intended to vest Congress with this power to keep it away

¹⁵⁴ Lincoln to Herndon, 15 February 1848, *Collected Works of Abraham Lincoln*, 1: 452.

¹⁵⁵ Lincoln to Herndon, 15 February 1848, *Collected Works of Abraham Lincoln*, 1: 452.

from the Executive. Ironically, Lincoln criticized Herndon with points that were later aimed at Lincoln's suspension of habeas corpus. However, by placing this letter in context, Lincoln affirmed his belief in the doctrine of necessity well before his decision to suspend habeas corpus.

The critical component to Lincoln's disagreement with the executive's ability to declare the necessity that brings on war to repel invasion was his stance on the Mexican American War. Lincoln was famous for his disagreement with President James Polk's decision to invade Mexico. Lincoln knew that the Mexicans did not invade the United States' territory. Instead, Polk *said* this invasion occurred when in reality, Americans agitated and goaded the Mexicans into a response. In this letter to Herndon, Lincoln explained that, "That soil was not ours; and Congress did not annex or attempt to annex it."¹⁵⁶ Thus, because the invasion did not occur on US soil, the President should not be empowered to unilaterally declare necessity and declare war. However, Lincoln's critique of Polk demonstrated that there is indeed room for the law of necessity. If the invasion had occurred on US soil, Lincoln most likely would have reacted affirmatively given the President's duty to repel invasion and defend the Country against foreign and domestic enemies. In the following example, the President would not be making war "at his pleasure." Instead, the President would be invoking necessity in the face of a real threat as the territorial boundaries of the nation were violated. Thus, this letter illustrating Lincoln's views in 1858 cannot be grafted onto Lincoln in 1861.

In 1861, Lincoln was indeed the President charged with the Executive duties including National defense and enforcing Federal law throughout the Country where nearly 1/3 of it was in open rebellion and sympathetic elements to the Confederacy spread throughout the existing

¹⁵⁶ Lincoln to Herndon, 15 February 1848, *Collected Works of Abraham Lincoln*, 1: 452.

Union. During the time of the riots in Baltimore, Congress was not in session and Washington, DC was threatened. Polk did not face a crisis nearly as remote as Lincoln in April 1861. Thus, Lincoln's views on Executive power needed to respect and adjust to the reality his office faced.

There was no doubt that Lincoln dramatically expanded Executive power not only with regard to the suspension of habeas corpus; but in other areas as well including conscription and emancipation. In his study of *Ex Parte Merryman*, Johnathan White concluded that Lincoln's expansion of executive power included interpreting the Constitution as well. White argued, "In short, Lincoln believed the president was a final arbiter on the meaning of the Constitution; as commander-in-chief, he would interpret that document as he best understood it and best saw fit."¹⁵⁷ Importantly, the President's actions reflected his belief that he could arbitrate the Constitution's meaning in light of his own understanding; but also in response to the real challenges he addressed.

While some historians including White, McGinty, and Duker turned to Lincoln's letter to Roscoe Conking as a reference for his conception of executive power justifying suspending habeas corpus, James Dueholm referenced a less well-known source. Lincoln's June 29, 1863, letter to Matthew Bircharad was a very influential and helpful document to better understand the degree to which Lincoln believed his actions were empowered by the Constitution. In Lincoln's letter to Bircharad, he stated, "By necessary implication, when rebellion or invasion comes, the decision is to be made, from time to time; and I think the man whom, for the time, the people have, under the constitution, made the commander-in-chief, of their Army and Navy, is the man who holds the power..."¹⁵⁸ Lincoln clearly believed that the executive's ability to assess the

¹⁵⁷ White, *Treason and the Civil War*, 88-89.

¹⁵⁸ Lincoln, *Collected Works*, 6: 260.

challenge facing the Nation and then decide whether or not to suspend habeas corpus was indeed constitutional. While Dueholm cut his recording of the quotation at “power,” the next sentence was important as well.

Lincoln believed that the President is empowered to suspend habeas corpus, the President “...bears the responsibility of making it--. If he uses the power justly, the same people will probably justify him; if he abuses it, he is in their hands, to be dealt with by all the modes they have reserved to themselves in the Constitution.”¹⁵⁹ Thus, stopping the transcription at Dueholm’s mark could leave the interpretation that Lincoln’s understanding of Executive power had no boundary. However, by reading the next sentence, it was clear that Lincoln was bound by the Constitution and the Democratic process. If the executive abused his power, the people were empowered to act and stop the President through constitutionally appropriate means.

Lincoln’s ability to interpret the Constitution in light of his understanding and the real obstacles he faces constituted the “departmental” theory of executive power. In their book *The Unitary Executive*, Steven G. Calabresi and Christopher S. Yoo devoted a chapter to chronicled Lincoln’s conception and execution of Presidential power. According to Calabresi and Yoo, Lincoln ascribed to a theory of departmentalism in which the President and Congress have “...coequal power with the courts to engage in Constitutional review.”¹⁶⁰ This view was particularly helpful to understand why Lincoln spoke to Congress in his famous July 4 *Address to Congress*. Yoo and Calabresi argue that Lincoln ignored Taney’s decision and, “...appealed directly to the American people and to Congress...”¹⁶¹ These two authors quote Paludan’s

¹⁵⁹ Lincoln, *Collected Works*, 6: 260.

¹⁶⁰ Steven G. Calabresi and Christopher S. Yoo. "Abraham Lincoln." In *The Unitary Executive: Presidential Power from Washington to Bush*, 165-73. (Yale University Press, 2008. <http://www.jstor.org.ezproxy.shu.edu/stable/j.ctt1nq9nc.26>.) 168. [Hereafter: Calabresi, *The Unitary Executive*].

¹⁶¹ Calabresi, *The Unitary Executive*, 168.

assertion that, "...the president could define the meaning of the Constitution and that the people themselves in electing the president, also made constitutional law. There was too much at stake to leave the meaning of the constitution and the policy it helped develop to nine justices."¹⁶²

Certainly, this view would distress John Marshall and Roger Taney as this view asserted that the President and Congress shared the ability to interpret the Constitution- a duty traditionally left to the judicial branch.

Indeed, Lincoln derived his ability to issue such unilateral actions by combining two components of the Constitution. Calabresi and Yoo asserted, "Lincoln defended his unilateral actions to repel the Southern attack and execute federal law in the South by arguing that the Commander in Chief Clause, when read in conjunction with Article II's "Take Care Clause," conveyed upon him the "war power," which enabled him to take the sweeping actions that he did."¹⁶³ Thus, Lincoln's ability to authorize the suspension of habeas corpus, issue a military draft, emancipate slaves, etc. was not overtly stated in the Constitution. Instead, Lincoln's actions were derived from a combination of two clauses. Because it was unclear exactly which powers resulted from combining these two clauses, Lincoln could leverage this undefined legal arena and legally execute policy to meet the dynamic challenges of a serious insurgency. However, Lincoln's combination of two clauses reflected an even broader interpretation of executive power under the Constitution.

Lincoln believed that his status as the Executive charged him with the ability to employ any means necessary to defend the Constitution and dutifully enforce Federal law. Calabresi and Yoo explained that "Lincoln took it for granted that his duty to defend the Constitution and

¹⁶² Paludan, *supra* note I, at 77 in Calabresi, *The Unitary Executive*, 168.

¹⁶³ Calabresi, *The Unitary Executive*, 167.

faithfully execute the laws implicitly authorized him to take whatever steps were necessary to preserve the Republic, even if those steps were not specifically authorized by any particular constitutional provision.”¹⁶⁴ In this somewhat contradictory statement, Lincoln believed that the realities of fighting a growing insurgency could challenge him to take actions that were not specifically authorized by the Constitution. However, Lincoln believed that his charge to preserve the Republic could authorize his wartime measures to salvage the Government.

Calabresi and Yoo quote Phillip Paludan’s research into the Lincoln Presidency and Lincoln’s expansive interpretation of executive power as well. Even though the context of this quotation referred to Lincoln’s government recognizing West Virginia’s statehood, the line of reasoning holds true for the suspension of habeas corpus as well. Lincoln’s unilateral decisions early in 1861 including suspending habeas corpus, calling for volunteers, ordering a blockade, etc. demonstrated that, “An increasingly independent presidency was emerging, however, and the circumstances of war were validating it... There could be no such thing as a ‘plural executive.’”¹⁶⁵ Thus, Lincoln’s combination of the “take care” clause within the purview of the responsibilities of the “Commander in Chief” clause resulted not only in unilateral action; but with a recalibration of a much more empowered Executive.

However, perhaps Calabresi and Yoo argued beyond the scope of evidence to characterize Lincoln as this particularly aggressive unitary executive. Certainly, Lincoln expanded the powers of the Presidency and acted vigorously to defend the Capitol against invasion as well as counteract the growing Confederate insurgency. Importantly, Lincoln was bound by the conditions of the country- especially those in Baltimore. His statement to General

¹⁶⁴ Calabresi, *The Unitary Executive*, 167.

¹⁶⁵ Paludan, *supra* note I, at 203 in Calabresi, *The Unitary Executive*, 170.

Scott regarding the possibility of breaking up meeting of the Baltimore Legislature and arresting those present as they considered the possibility of secession demonstrated his restraint and careful consideration. Additionally, the fact that he considered bombarding Baltimore prior to suspending habeas corpus illustrates the great respect he had for the Great Writ. Lincoln was faced with a tremendous list of challenges including the destruction of railroad bridges and telegraph wires, Federal troops assaulted and murdered while in transit to defend the capitol. Yet, he was also charged with enforcing Federal Laws and maintaining the existence of the Union. He could not consult with Congress as the threat on the ground was imminent and Congress could not be assembled, create an effective response, and place that plan into motion with enough time to adequately respond to these threats. Thus, the emergent conditions in Baltimore and Maryland certainly enabled Lincoln to invoke the doctrine of necessity and suspend habeas corpus.

Chapter 3: Section 3- Points of Synthesis: Same Document, Same Section, Different

Conclusion

It was not particularly surprising to learn that both Lincoln and Taney referenced the Constitution in defense of their perspectives. However, it is particularly striking how President Abraham Lincoln's suspension of habeas corpus and Justice Roger B. Taney's scathing critique actually reference similar Constitutional principles.

Both Lincoln and Taney cite the "take care clause" from the US Constitution. Taney believed that Lincoln overstepped his bounds by unilaterally suspending habeas corpus. He needed to enact Congress's legislation- not enact his own organic policy. However, Lincoln used the same section of the Constitution to argue that since his Constitutional duty was to "take care" that the laws were faithfully executed, he needed to bring the disloyal elements into the fold in order to ensure that the Federal government could exist *and* enforce policy.

William Duker explained the context necessary to understand Lincoln's suspension of habeas corpus as constitutional. According to his analysis, the Framers may have foreseen that a sudden attack may compel the President to suspend the writ in order to effectively defend the nation. "Since the word 'attack' is broad enough to cover both cases of insurrection and invasion, the president would have power identical to that of Congress when faced with a sudden attack."¹⁶⁶ Thus, with Congress at recess, was empowered to assess the situation in Baltimore and acting as the Commander in Chief, to suspend habeas corpus and move decisively against the rebellion. Duker also referenced two of Hamilton's contributions to the *Federalist Papers* (Federalist 69 and 70) to reinforce the interpretation that Lincoln could suspend habeas corpus

¹⁶⁶ Duker, *Constitutional History of Habeas corpus*, 144-145.

given the dire conditions in Baltimore. Specifically, he explained, "...the President as 'First General'¹⁶⁷ had the duty to repel such attack and if in the exercise of that authority it was 'absolutely and indispensably necessary' to exercise the power of suspension, there was authority for such a claim."¹⁶⁸ Additionally in Federalist 70, Hamilton plainly expressed his view that an energetic and strong executive was, "...essential to protect the community against foreign attacks."¹⁶⁹ Even though the rioters in Baltimore were not from another country, their support for the Confederate cause could be interpreted as aiding, abetting, and even fighting for a power hostile to the Federal Government.

Perhaps the most fitting remark to understand Lincoln's suspension belongs to Mark Neely. In *The Fate of Liberty: Abraham Lincoln and Civil Liberties*, he said, "The clearest lesson is that there is no clear lesson in the Civil War—no neat precedents, no ground rules, no map. War and its effects on civil liberties remain a frightening unknown."¹⁷⁰ Thus, Lincoln and the Nation stood on untested ground as the Civil War commenced. The previous cases in *Ex Parte Bollman* and in Jackson's defense of New Orleans regarding habeas corpus did not translate to the reality in 1861 Baltimore. When Lincoln suspended habeas corpus, he arrived at that conclusion gradually. The charge to "faithfully execute" the laws of the land and defend the Nation's sovereignty as the Commander in Chief empowered Lincoln to suspend habeas corpus.

¹⁶⁷ Federalist 69.

¹⁶⁸ Duker, *Constitutional History of Habeas corpus*, 144.

¹⁶⁹ Federalist 70.

¹⁷⁰ Mark E. Neely, *The Fate of Liberty: Abraham Lincoln and Civil Liberties*. (Oxford: Oxford University Press, 1991), 235.

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