



Horace Binney, "The Privilege of the Writ of Habeas Corpus under the Constitution."
Printed by C. Sherman & Son, Phila, 1862, 2nd edition from General George Cadwalader
Papers, Collection 1454, Box 510: Printed Matter: Legal, Folder 8,

p. 10-11 Suspending the *privilege* of the Writ, is not an English law expression. It was first introduced into the Constitution of the United States. The privilege is personal and individual, not local, but subsists in remedy. The right of being exempt from arbitrary imprisonment is a natural right, and is predicable by the Common Law of every freeman; and to hang up, defer, delay, deny for a season, the privilege which a statute gives, or is expected to give, in relief of imprisonment, is to *suspend* it in the sense of this clause of the Constitution. Freedom is right, either absolute or qualified. The remedy is the privilege.

This, then, is the whole meaning of the clause in our Constitution, - the privilege of being bailed, tried, or discharged from imprisonment without delay, shall not be discretionally denied, or hung up or deferred, unless, when in cases of rebellion or invasion, the public safety may require it; and then, or in those circumstances, it may be denied or deferred for a season, or temporarily.

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

p. 35-36 In the United States it is the joint effect of the Constitution and of the arrest and detention by the department, which is competent to order it.

If the clause in the Constitution has said of the WRIT of Habeas Corpus, or of a Habeas Corpus Act, enacted or to be enacted, what it says of the PRIVILEGE of the Writ, there would have been some ground for the Argument, that a Writ . . . being the work of the Legislature, the suspension of the Writ or Act should be made by the Legislature also. But the *privilege*, the personal privilege being alone spoken of, an act of arrest and detention by the department which is competent to ascertain the conditions of the exception, together with the effect imparted by the Constitution, is sufficient, and no legislative Act is necessary.

The *gist* of the question seems then to be this, whether it requires an Act of the Legislature, to declare that Rebellion or Invasion exists in the Country, and that the public safety requires the suspension of the privilege, If it does, then Congress alone has the power to pass such an Act: if it does not, then the power of enforcing the execution falls necessarily to the Executive. The judicial department cannot be the body to interpose, because its functions are not directly pointed to any of the facts, either Rebellion or Invasion, or the demands of the public safety on such occasions.

p. 52-53 But be the danger that it may, the safety with which such a power is placed with the President, to be exercised upon his own responsibility, is greater than if it were lodged with Congress, and greater than if it were devolved by Congress upon the President. Congress are irresponsible. Congress, in sympathy, with the President by the grant, lessen the President's responsibility. The President, directly and personally responsible for his own

judgement and acts, makes the guarantee more complete than any other provision. The Executive is confessedly the weakest department in the government, weaker than is known in any national government. . . . As a theorem of republican polity, a most dangerous power, if this be most dangerous, should be lodged in the feeblest hands. In suspending the privilege of the Writ of Habeas Corpus upon his own judgement, the President can have no support but from his integrity and his patriotism; and he stands directly before accusers and judges who have had no part in his acts.