Ex Parte Bollman, 8 U.S. 75 (1807)

Erick Bollman and Samuel Swartwout were confederates of Aaron Burr. In December 1806, they were arrested, detained, and charged with treason. The main evidence against them was certain coded letters in which Burr's plots may have been outlined. No evidence existed that either Bollman or Swartwout engaged in any military activity or violent acts. In January 1807, both men petitioned for a writ of habeas corpus. Bollman and Swartwout contended that the evidence against them, even if believed, did not constitute treason. Treason, they insisted, required the actual taking up of arms against the government. The Jefferson administration responded that federal courts had no statutory authority to issue writs of habeas corpus in this case. If statutory authority existed, administration officials contended, the evidence against Bollman and Swartwout was sufficient to establish a prima facie case for treason. Bollman and Swartwout maintained that Article I authorizes federal courts to issue habeas corpus without statutory authorization. In the alternative, they claimed that the Judiciary Act of 1789 authorized federal courts to issue the writ. The federal circuit court denied their request for habeas corpus by a 2–1 vote. The two Jeffersonian appointees voted against the Adams appointee. Bollman and Swartwout appealed that decision to the Supreme Court of the United States.

Chief Justice Marshall granted the writ of habeas corpus. The justices on the Supreme Court unanimously agreed that federal courts could not issue a writ of habeas corpus without statutory authorization. The judicial majority maintained that the Judiciary Act of 1789 authorized the court to issue the writ. Justice Johnson, in an opinion we have omitted, dissented from this interpretation of the Judiciary Act. A unanimous Supreme Court also agreed that mere conspiracy to commit treason did not constitute treason under the Constitution. Because the evidence at most demonstrated that Bollman and Swartwout had conspired to commit treason, but had not actually taken up arms against the government, the Supreme Court concluded they were illegally detained (at least on the charge of treason).

Marshall's opinion has historically stood for two important propositions. First, the Supreme Court may issue writs of habeas corpus only with statutory authorization. Suppose Congress failed to provide that authorization? Would that be a suspension of the writ under Article I? After Bollman*, what may federal courts do if Congress repeals all laws authorizing courts to issue writs of habeas corpus? Second, treason requires the actual taking up of arms against the United States. On what basis did Chief Justice Marshall reach the conclusion that a conspiracy to levy war is not treason? Do you agree? At one point, Marshall declared, "It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country." Does this sentence imply that Burr might have been guilty of treason, even if he did not actually lead an invasion of the west? How do you interpret this sentence? Keep your interpretation in mind when you read how Marshall interpreted this passage in the* Bollman *opinion during the Burr treason trial.*

CHIEF JUSTICE MARSHALL

[The Habeas Corpus Issue]

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Courts which originate in the common law possess a jurisdiction which must be regulated by their common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. . . . [F]or the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law.

. . .

The inquiry therefore on this motion will be, whether by any statute, compatible with the constitution of the United States, the power to award a writ of *habeas corpus*, in such a case as that of Erick Bollman and Samuel Swartwout, has been given to this court.

The 14th section of the judicial act . . . has been considered as containing a substantive grant of this power.

It is in these words: 'That all the before mentioned courts of the United States shall have power to issue writs of *scire facias, habeas corpus*, and all other writs, not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus*, for the purpose of an inquiry into the cause of commitment. . . .

. . .

It may be worthy of remark, that this act was passed by the first congress of the United States, sitting under a constitution which had declared 'that the privilege of the writ of *habeas corpus* should not be suspended, unless when, in cases of rebellion or invasion, the public safety might require it.'

Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give, to all the courts, the power of awarding writs of *habeas corpus*.

. . .

If the act of congress gives this court the power to award a writ of *habeas corpus* in the present case, it remains to inquire whether that act be compatible with the constitution.

In . . . *Marbury* v. *Madison*,. . . it was decided that this court would not exercise original jurisdiction except so far as that jurisdiction was given by the constitution. But so far as that case has distinguished between original and appellate jurisdiction, that which the court is now asked to exercise is clearly *appellate*. It is the revision of a decision of an inferior court, by which a citizen has been committed to jail.

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The decision that the individual shall be imprisoned must always precede the application for a writ of *habeas corpus*, and this writ must always be for the purpose of revising that decision, and therefore appellate in its nature.

[The Treason Issue]

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To constitute that specific crime for which the prisoners now before the court have been committed, war must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, [are] distinct offences. The first must be brought into operation by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed. . . . [T]he actual enlistment of men to serve against the government does not amount to levying war. It is true that in that case the soldiers enlisted were to serve without the realm, but they were enlisted within it, and if the enlistment for a treasonable purpose could amount to levying war, then war had been actually levied.

It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assembling of men for the treasonable purpose, to constitute a levying of war.

Crimes so atrocious as those which have for their object the subversion by violence of those laws and those institutions which have been ordained in order to secure the peace and happiness of society, are not to escape punishment because they have not ripened into treason. The wisdom of the legislature is competent to provide for the case; and the framers of our constitution, who not only defined and limited

the crime, but with jealous circumspection attempted to protect their limitation by providing that no person should be convicted of it, unless on the testimony of two witnesses to the same overt act, or on confession in open court, must have conceived it more safe that punishment in such cases should be ordained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they were to operate, than that it should be inflicted under the influence of those passions which the occasion seldom fails to excite, and which a flexible definition of the crime, or a construction which would render it flexible, might bring into operation. It is therefore more safe as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide.

To complete the crime of levying war against the United States, there must be an actual assemblage of men for the purpose of executing a treasonable design. In the case now before the court, a design to overturn the government of the United States in New Orleans by force, would have been unquestionably a design which, if carried into execution, would have been treason, and the assemblage of a body of men for the purpose of carrying it into execution would amount to levying of war against the United States; but no conspiracy for this object, no enlisting of men to effect it, would be an actual levying of war.

. . .

That the association, whatever may be its purpose, is not treason, has been already stated. That levying an army may or may not be treason, and that this depends on the intention with which it is levied, and on the point to which the parties have advanced, has been also stated. The mere enlisting of men, without assembling them, is not levying war. The question then is, whether this evidence proves Col. Burr to have advanced so far in levying an army as actually to have assembled them.

. . .

The travelling of individuals to the place of rendezvous would perhaps not be sufficient. This would be an equivocal act, and has no warlike appearance. The meeting of particular bodies of men, and their marching from places of partial to a place of general rendezvous, would be such an assemblage.

. . .

[I]f the army had then actually assembled, either together or in detachments, some evidence of such assembling would have been laid before the court.

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It is therefore the opinion of a majority of the court, that in the case of Samuel Swartwout there is not sufficient evidence of his levying war against the United States to justify his commitment on the charge of treason.

Against Erick Bollman there is still less testimony. . . .

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