The Law of Treason in United States v. Burr (C.C.Va. , 1807)

The prosecution in the Burr trial called several witnesses who described what happened on Blennerhasset Island on December 9, 1806. This testimony was crucial. The indictment charged Burr with assembling men in that spot for the purpose of levying war against the United States. Burr's lawyers insisted that this testimony was inadmissible. Burr could not constitutionally be found guilty of treason, they declared, because no witness saw Burr on Blennerhasset Island on December 9, 1806, and no witness could testify that any military force was used at that time and place. The prosecution agreed that no witness placed Burr on Blennerhasset Island and that no military force was used at that time and place. Nevertheless, prosecuting attorneys contended the evidence was relevant because the men assembled on Blennerhasset Island were part of a conspiracy to wage war against the United States. Treason, in their view, could be committed without Burr's actual presence or an actual demonstration of military force.

Chief Justice Marshall ruled inadmissible the evidence of what happened on Blennerhasset Island. He insisted that the constitutional definition of treason required the prosecution to prove an actual use or show of military force. If the men on Blennerhasset Island were merely planning an attack, they might be guilty of conspiracy, but not treason. What reasons did Marshall give for concluding that a conspiracy to commit treason is not treason? Marshall maintained that the opinions in Burr *and* Ex parte Bollman *are consistent. In* Bollman*, Marshall ruled that a person not present when the treasonous act occurred could be constitutionally prosecuted for treason. Is this consistent with his* Burr *opinion?*

CHIEF JUSTICE MARSHALL

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On the first division of the subject two points are made: 1st. That, conformably to the constitution of the United States, no man can be convicted of treason who was not present when the war was levied. 2d. That if this construction be erroneous, no testimony can be received to charge one man with the overt acts of others until those overt acts as laid in the indictment be proved to the satisfaction of the court. The question which arises on the construction of the constitution, in every point of view in which it can be contemplated, is of infinite moment to the people of this country and to their government, and requires the most temperate and the most deliberate consideration. 'Treason against the United States shall consist only in levying war against them.' What is the natural import of the words 'levying war?' and who may be said to levy it? Had their first application to treason been made by our constitution they would certainly have admitted of some latitude of construction. . . .

But the term is not for the first time applied to treason by the constitution of the United States. It is a technical term. It is used in a very old statute of that country whose language is our language, and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our constitution in the sense which had been affixed to it by those from whom we borrowed it. . . . It is, therefore, reasonable to suppose, unless it be incompatible with other expressions of the constitution, that the term 'levying war' is used in that instrument in the same sense in which it was understood in England. . . .

. . . Murder is the single act of killing with malice aforethought. But war is a complex operation, composed of many parts, co-operating with each other. No one man or body of men can perform them all if the war be of any continuance. Although, then, in correct and in law language, he alone is said to have murdered another who has perpetrated the fact of killing, or has been present aiding that fact, it does not follow that he alone can have levied war who has borne arms. All those who perform the various and essential military parts of prosecuting the war, which must be assigned to different persons, may with correctness and accuracy be said to levy war. Taking this view of the subject, it appears to the court that those who perform a part in the prosecution of the war may correctly be said to levy war and to commit treason under the constitution. . . .

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2d. The second point involves the character of the overt act which has been given in evidence, and calls upon the court to declare whether that act can amount to levying war. . .

. . . [W]e should probably all concur in the declaration that war could not be levied without the employment and exhibition of force. War is an appeal from reason to the sword; and he who makes the appeal evidences the fact by the use of the means. His intention to go to war may be proved by words; but the actual going to war is a fact which is to be proved by open deed. The end is to be effected by force; and it would seem that in cases where no declaration is to be made, the state of actual war could only be created by the employment of force, or being in a condition to employ it. But the term, having been adopted by our constitution, must be understood in that sense in which it was universally received in this country when the constitution was framed. The sense in which it was received is to be collected from the most approved authorities of that nation from which we have borrowed the term. Lord Coke says that levying war against the king was treason at the common law. 'A compassing or conspiracy to levy war, he adds, is no treason, for there must be a levying of war in fact.' . . .

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But it is said all these authorities have been overruled by the decision of the supreme court in the case of *[Ex parte Bollman*]. . . . In the case of the *United States against Bollman and Swartwout*, there was no evidence that even two men had ever met for the purpose of executing the plan in which those persons were charged with having participated. It was, therefore, sufficient for the court to say that unless men were assembled, war could not be levied. That case was decided by this declaration. The court might indeed have defined the species of assemblage which would amount to levying of war; but, as this opinion was not a treatise on treason, but a decision of a particular case, expressions of doubtful import should be construed in reference of the case itself, and the mere omission to state that a particular circumstance was necessary to the consummation of the crime ought not to be construed into a declaration that the circumstance was unimportant. General expressions ought not to be considered as overruling settled principles, without a direct declaration to that effect. After these preliminary observations, the court will proceed to examine the opinion which has occasioned them.

The first expression in it bearing on the present question is, 'To constitute that specific crime for which the prisoner now before the court has been committed, war must be actually levied against the United States. However flagitious may be the crime of conspiracy 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.' Although it is not expressly stated that the assemblage of men for the purpose of carrying into operation the treasonable intent which will amount to levying war must be an assemblage in force, yet it is fairly to be inferred from the context; and nothing like dispensing with force appears in this paragraph. The expressions are, 'to constitute the crime, war must be actually levied.' A conspiracy to levy war is spoken of as 'a conspiracy to subvert by force the government of our country.' Speaking in general terms of an assemblage of men for this or for any other purpose, a person would naturally be understood as speaking of an assemblage in some degree adapted to the purpose. An assemblage to subvert by force the government of our country, and amounting to a levying of war, should be an assemblage in force. . . . 'A body of men actually assembled, in order to effect by force a treasonable purpose,' must be a body assembled with such appearance of force as would warrant the opinion that they were assembled for the particular purpose. An assemblage to constitute an actual levying of war should be an assemblage with such appearance of force as would justify the opinion that they met for the purpose. . . .

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That opinion [in *Ex parte* Bollman] is, that an individual may be guilty of treason 'who has not appeared in arms against his country; that if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable object, 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.' This opinion does not touch the case of a person who advises or procures an assemblage, and does nothing further. The advising, certainly, and perhaps the procuring, is more in the nature of a conspiracy to levy war than of the actual levying of war. According

to the opinion, it is not enough to be leagued in the conspiracy, and that war be levied, but it is also necessary to perform a part: that part is the act of levying war. That part, it is true, may be minute, it may not be the actual appearance in arms, and it may be remote from the scene of action, that is, from the place where the army is assembled; but it must be a part, and that part must be performed by a person who is leagued in the conspiracy. This part, however minute or remote, constitutes the overt act of which alone the person who performs it can be convicted. The opinion does not declare that the person who has performed this remote and minute part may be indicted for a part which was, in truth, performed by others, and convicted on their overt acts. It amounts to this and nothing more, that when war is actually levied, not only those who bear arms, but those also who are leagued in the conspiracy, and who perform the various distinct parts which are necessary for the prosecution of war, do, in the sense of the constitution, levy war. . . .

It is, then, the opinion of the court that this indictment can be supported only by testimony which proves the accused to have been actually or constructively present when the assemblage took place on Blennerhassett's Island; or by the admission of the doctrine that he who procures an act may be indicted as having performed that act.

It is further the opinion of the court that there is no testimony whatever which tends to prove that the accused was actually or constructively present when that assemblage did take place; indeed, the contrary is most apparent. . . .

. . . The present indictment charges the prisoner with levying war against the United States, and alleges an overt act of levying war. That overt act must be proved, according to the mandates of the constitution and of the act of congress, by two witnesses. It is not proved by a single witness. The presence of the accused has been stated to be an essential component part of the overt act in this indictment, unless the common law principle respecting accessories should render it unnecessary; and there is not only no witness who has proved his actual or legal presence, but the fact of his absence is not controverted. The counsel for the prosecution offer to give in evidence subsequent transactions at a different place and in a different state, in order to prove-what? The overt act laid in the indictment? That the prisoner was one of those who assembled at Blennerhassett's Island? No: that is not alleged. It is well known that such testimony is not competent to establish such a fact. The constitution and law require that the fact should be established by two witnesses; not by the establishment of other facts from which the jury might reason to this fact. The testimony, then, is not relevant.

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. . . No testimony relative to the conduct or declarations of the prisoner elsewhere, and subsequent to the transaction on Blennerhassett's Island, can be admitted; because such testimony, being in its nature merely corroborative and incompetent to prove the overt act in itself, is irrelevant until there be proof of the overt act by two witnesses. This opinion does not comprehend the proof by two witnesses that the meeting on Blennerhassett's Island was procured by the prisoner. On that point the court for the present withholds its opinion for reasons which have been already assigned; and as it is understood from the statements made on the part of the prosecution that no such testimony exists, if there be such let it be offered, and the court will decide upon it.