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Chief Judge William Cranch's Dissent in *U. S. v. Bollman*: A Noble Beginning for the D.C. Circuit Court

By R. Kent Newmyer*

The federal Circuit Court for the District of Columbia had been in operation for a mere six years in 1807 when it heard *U.S. v. Bollman et al*--a case that turned out to be the opening salvo in the famous treason trial of Vice President Aaron Burr. The framers of the February 27, 1801 statute that created the new court did not envisage such sudden notoriety for their creation. Most certainly, they did not foresee the fact that the new court would in time become the premier federal circuit court with a stately jurisdiction that made it the main forum for cases involving the branches of the federal government and federal administrative agencies.

Rather, the new three-judge court was part of a plan to provide a local court system for the District of Columbia, which, beginning in 1801, was the new and unstructured abode of the federal government. The Circuit Court heard appeals from the federal District Court for the Circuit, and since it was also vested with a general state jurisdiction, it heard a wide range of local matters of both a civil and criminal nature. Since the District included two counties, one in Maryland and the other in Virginia, cases appealed to the Court were to be decided according to the laws and legal procedures of the state wherein the case originated. Because slavery was common to the District, as well as to Maryland and Virginia, numerous cases

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involving the "peculiar institution" appeared on the docket. Not much promise of greatness here, and lots of work for the judges who had to be familiar with the local law of two jurisdictions.

President Jefferson's treatment of the new court, at least until the Bollman litigation, suggests that he did not consider it of great importance. While Jefferson and his Party set out to humble the Supreme Court of John Marshall and to dismantle the Federalist's Judiciary Act of 1801, with its sixteen new circuit court justices, no effort was made to eliminate the D.C. Circuit Court. And while the President sought to roll back Adams's midnight appointments--an effort that led to *Marbury v. Madison*--his appointments to the D.C. Circuit Court were admirably and surprisingly non-partisan. True, two of Jefferson's appointments to the court were Republicans, but the third went to twenty-seven year old William Cranch, who was not only a Federalist but also the nephew of ex-president John Adams with whom Jefferson was now at war. More remarkable still, Jefferson made Cranch Chief Judge in 1806.

The illusion that the new court was beyond politics ended dramatically in 1807, when Dr. Erick Bollman and Samuel Swartwout appeared before Judge Cranch and his colleagues, charged with treason for levying war against the United States. What brought them there was their association with Aaron Burr and his "conspiracy." To understand their presence in Cranch's court--and the connection of the court's decision to the subsequent Burr treason trial in Richmond, Virginia--we need first to trace the improbable career of Aaron Burr and his falling out with Thomas Jefferson, the man he helped elect president in 1800.

The relationship between Jefferson and Burr began in the overheated electoral politics of the 1790s, and in the fact that both men were interested for their own reasons in driving the Adams Federalists from power. Whether Jefferson and Madison talked politics with Burr in 1791 on their famed botanical trip to New

York is not clear. What did become clear in the course of the decade, however, was that Burr was the savvy politician who could deliver New York's electoral votes in the presidential election of 1800. For his pivotal role in forging the New York-Virginia political axis, Burr won a place on the ballot with Jefferson. When New York's electoral votes carried the Democratic Republican party to victory in 1800, Burr deserved a real share of the credit.

Whether he also deserved to be president of the United States was another matter. This was a real possibility when it was discovered that Burr and Jefferson were tied for votes in the electoral college, which meant, in pre-12th Amendment days, that the matter would be settled by a vote in the House of Representatives with each state casting one ballot. The man who came in second would be vice president.

The problem was that Burr did not publically withdraw in favor of Jefferson who, as senior in age and reputation, believed understandably that he had a right to the office. Jefferson also believed that Burr was secretly campaigning for Federalist votes in the House, which was not true. The dispute was settled in favor of Jefferson—but only after 35 ballots and a permanent rift between Burr and Jefferson.

Burr served as Jefferson's vice president from 1801 to 1805 and by all accounts did so with distinction. But the President viewed Burr's refusal to step aside as a breach of personal honor and proof positive of his inordinate ambition. While Jefferson never declared open war on his vice president, it was clear when the spoils of victory were being distributed that Burr had no future in the Democratic Republican party. When he killed Hamilton in the duel at Weehawken in the summer of 1804, he became persona non-grata among leading Federalists and indeed in polite society in general. To recoup his honor and his fortune—and to fulfill his self-perceived destiny as a leader of men that he felt had been denied

him in the election of 1800—Burr went west where in 1805-06 he appeared to be involved in a military expedition to liberate Mexico from Spanish rule (if one believed Burr) or to separate the western states from the federal Union (if one believed President Jefferson).

Jefferson never doubted that his vice president was guilty of treason for levying war against the United States. Indeed, on January 22, 1807 he announced to Congress and the entire nation that Burr was guilty of treason--this without a grand jury indictment or a jury trial. In taking this precipitous action, Jefferson relied mainly on the testimony of General James Wilkinson, whose character and reliability both Jefferson and his Cabinet knew to be doubtful. It was Bollman's and Swartwout's connection with Wilkinson and Wilkinson's connection with Burr and then with Jefferson that brought them as prisoners to the bar of Cranch's Court.

It was widely suspected at the time--and in fact it was true--that Wilkinson and Burr were initially partners in the "conspiracy." Most historians now agree that Burr did not intend a treasonable separation of the Western states from the Union, but rather was planning a filibustering attack against the Spanish colonial authority in Mexico. In either case, as the commanding General of the U.S. Army and Governor of the Louisiana Territory, Wilkinson was essential to success. What caused him to desert Burr's enterprise were the widespread rumors at the time that Burr aimed to attack American territory in New Orleans as the first step in a plan to revolutionize the West. To save himself from what now appeared to be a doomed enterprise, indeed to make himself a hero, Wilkinson set out to expose Burr as a traitor. To accomplish this, the General had to establish his credibility with President Jefferson--which brings us to Dr. Erick Bollman and Samuel Swartwout and the mysterious cipher letter.

Twenty-one-year-old Swartwout joined Burr's enterprise in 1804, and during the hard times following Burr's treason trial, he remained one of Burr's most

devoted friends. Bollman, a recent immigrant from Hanover, was something of a hero in America for his daring effort to rescue General Lafayette from an Austrian prison. In 1805, Jefferson rewarded him for his valor by appointing him Indian agent at Natchitoches, where he met Burr and agreed to recruit men for what he assumed would be a coming war with Spain. At Burr's trial, both Bollman and Swartwout would testify that Burr's plan was to free Mexico from Spanish colonial rule and not to separate western states from the Union.

In Marshall's Richmond Circuit Court in the summer of 1807, Bollman and Swartwout were witnesses in Burr's defense; in Cranch's Circuit Court in January of that year, they stood charged with treason.¹ That charge emanated from their connection with the cipher letter that Wilkinson used to convince President Jefferson of Burr's treachery. The letter, written in code, we know now was from Burr's co-conspirator Jonathan Dayton to Wilkinson, urging the general not to abandon the enterprise. To keep Wilkinson on board, the letter stated in dramatic language that a sizeable military force was already on the move down the Ohio River, and that naval arrangements with England (to oppose possible Spanish opposition) were already in place.

Rather than encouraging Wilkinson to continue his involvement, the letter convinced him of the urgent necessity to distance himself from a dangerous project that had no hope of success. To this end, he altered Dayton's letter so as to attribute it to Burr rather than Dayton, and to remove all references in the letter implicating him in the conspiracy. Wilkinson then sent the altered and decoded letter (but not

¹ A Supreme Court justice, with the district judge of the state, formed the bench of the circuit court of each state, but the Circuit Court for the District of Columbia was established under a different federal statute that allowed the president to appoint three judges specifically to that circuit court. All circuit courts at this time were courts of original as well as appellate jurisdiction, so trials often began at the circuit court level.

the original) to President Jefferson by special courier. It was largely on the basis of Wilkinson's story backed by the cipher letter that Jefferson proclaimed Burr's guilt to the nation on January 22, 1807.

Swartwout was selected to deliver the original cipher letter to Wilkinson at Natchez in the Louisiana Territory; to assure its arrival, Bollman was to travel upriver from New Orleans with a copy of the letter. When Swartwout delivered the letter, Wilkinson pretended to befriend him and then pumped him for information that could be used against Burr. On Wilkinson's order Swartwout was then arrested as a traitor; Bollman was apprehended on the same charge in New Orleans before he could deliver his copy of the letter.

As commanding general, Wilkinson put New Orleans under martial law and prepared it for the invasion of Burr's army, which he knew was non-existent. The general's strategy at this point was to silence anyone who could testify as to his former involvement with Burr. To this end, he placed Bollman and Swartwout under military arrest, denied them the right to counsel, and ignored the writ of habeas corpus issued for their release by the Orleans territorial court. Bollman and Swartwout were then sent under military guard to Baltimore and then to the Marine barracks in Washington, where they awaited President Jefferson's decision as to their fate.

Rather than repudiate Wilkinson's unlawful activities in New Orleans and his flagrant mistreatment of the prisoners, the President immediately picked up where his general left off. On January 23, 1807, shortly after Bollman's confinement in the Marine Barracks in Washington, Jefferson agreed to meet privately with him. Bollman was under the impression that the president wanted objective information about Burr's operation. In fact, Jefferson planned to use Bollman's account to implicate Burr in an attempt to sever the Union. To this end, he brought Secretary of State James Madison along to take notes.

When the interview was over, Jefferson asked Bollman to put his account in writing, assuring him “on his word of honour” that his remarks would “never be used against himself”—indeed, that his account would “never go out of his [Jefferson’s] hand.” The President did not keep his promise, but in any case, what Bollman said in his private interview was not entirely what Jefferson hoped to hear. According to Bollman, Burr’s only objective was to lead an attack on Mexico in case of a war with Spain and if that did not transpire, then to settle his men on a large grant of land, the so-called Bastrop grant, on the Washita River in the Louisiana Territory. Bollman even advised Jefferson that a war with Spain to free Mexico would be a great service to the nation.

Bollman’s account made a liar out of Wilkinson. Along with the other information in Jefferson’s possession linking Burr and Wilkinson, it should have raised serious doubts about having denounced Burr on the basis of the general’s communications. In fact, it was not at this point too late for the president to reevaluate and possibly modify the charge of treason against Bollman and Swartwout and Burr as well.

Instead of slowing down the juggernaut against Bollman and his companion, however, Jefferson now took personal charge of it. On January 30, 1807, four days before proffering advice to Wilkinson about how to handle the mess he had created in New Orleans, the president personally delivered Wilkinson’s affidavit regarding Bollman and Swartwout to Walter Jones, Jr., federal attorney for the District of Columbia, and ordered him to request Cranch’s court to issue a bench warrant for Bollman’s and Swartwout’s arrest on the charge of treason.

The proceedings in *U.S. v. Bollman*, 24 Fed. Cas. 1189 (1807), were unique in several respects. It was the first major case to be decided by the new court and it was the first time in the nation’s brief history that the judges in a federal court would split along strict party lines. It was also the first and perhaps the only time

in American history that a president of the United States would take personal charge of a court case--a feat that would be duplicated on a much larger scale by Jefferson in the Burr treason trial in Richmond.

As the first round in the "greatest criminal trial in American history," the Bollman litigation dealt with habeas corpus law, the constitutional rights of criminal defendants, and the constitutional meaning of treason. What the lawyers argued, what the judges decided would in many ways prefigure the proceedings in *Ex parte Bollman* and *Ex parte Swartwout*, 8 U.S. 75 (1807), before the Supreme Court on appeal from Cranch's Court, and Chief Justice Marshall's decision in *U.S. v. Burr* in Burr's treason trial in Richmond. The case was also the first time that Chief Judge Cranch stepped forward to demonstrate those attributes of independence and legal craftsmanship that would distinguish his long and commanding tenure on the D.C. Circuit Court.

Jones's request for a bench warrant launched the controversy, since a warrant was usually issued only if the prisoners in question had already been indicted or if the evidence against them was beyond dispute, neither of which was true in this case. The fact that the president of the United States hand-carried Wilkinson's affidavit to Jones was also unusual and advertised the fact that Jefferson had taken charge of the prosecution. Jones followed orders, but he went out of his way in his opening statement to the court to make it clear that his motion for a bench warrant was "in obedience to instructions received from the president of the United States. ..." In making this statement, it is unclear whether Jones wanted to disassociate himself from the president's aggressive maneuver, or whether he wanted to inform the two Republicans on the court, Nicholas Fitzhugh and Allen Duckett, of the president's wishes.

Things went badly from the outset, especially when Cranch questioned whether the president's message to Congress of January 22, 1807, which Jones

dutifully read, “did in fact announce a levying of war, and whether the court could proceed in any manner upon such information,” without violating that part of the Fourth Amendment to the Constitution “which declares that no warrants shall issue but upon probable cause supported by an oath or affirmation.” Obviously flummoxed by the question, Jones could only repeat what Jefferson had announced on the basis of Wilkinson’s affidavit: that an assemblage of one hundred to three hundred men was descending the river “towards the place of their destination.”

Jones dug himself in deeper by arguing with glaring circularity that this expedition must have been treasonous, since the president had called out the militia to suppress it, which he could not have done except in case of actual invasion or insurrection. Jones’s final point was that Jefferson’s message to Congress upon which the bench warrant depended, “was not offered as evidence upon the trial, but merely as a matter of public notoriety, of which the court might take notice, and prima facie presume that existence of such a state of things for the preliminary purpose of issuing a warrant or other process initiative to a prosecution by indictment.”

In short, Jones asked the court to believe that the report to Congress of January 22, “given by the president, in the discharge of his official duty” amounted to an oath within the meaning of the Fourth Amendment. The court had to answer that question before it could reach the main issue, which was whether Wilkinson’s affidavit justified a bench warrant on the treason charge. On January 24, while the judges were still pondering that issue, a Mr. Caldwell of the District bar petitioned the court for a writ of habeas corpus on behalf of the prisoners, stating that they had been imprisoned “without just and legal cause, and deprived of the benefit of counsel, or being confronted with the accusers, or of being informed of the nature of their offence; or of the cause of their commitment.”

The President now had a major civil rights case on his hands, one that according to John Quincy Adams concerned “*the operation of our institutions,*” indeed, “the future prospects of this *Country.*” The issue grew in scope and urgency on January 23, 1807 when Senator William Giles, Jefferson’s staunch ally and confidant, introduced a bill in the Senate to suspend the writ of habeas corpus for three months in cases of treason. The bill, along with a special message to the House of Representatives urging it to rush passage of the Senate bill, passed with only James Bayard of Delaware voting against it. There is no written evidence that Jefferson explicitly requested Giles to move his bill, but there can be no doubt that he endorsed it, just as he approved of Wilkinson’s action in New Orleans in defiance of the great writ.

The House, with representatives from Virginia leading the charge, defeated the bill 113 to 19. Among those most outraged at the assault on habeas corpus was John Randolph, Jefferson’s former Speaker of the House, and Jefferson’s son-in-law, John W. Eppes. The heated debate over the bill educated the Washington community, if not the entire nation, about Wilkinson’s tyrannous action in New Orleans and about Jefferson’s support of his general. New York Federalist Rufus King probably spoke for many when he observed that the defeat of the bill in the House has “atoned for much imbecility and folly that had before been exhibited.” Had the habeas corpus bill passed, the Supreme Court would have been denied the opportunity to review the decision of Cranch's circuit court.

That decision came down on January 30, 1807. Duckett and Fitzhugh, hewing the party line, bought the arguments of the prosecution on every point and voted to commit the prisoners on the basis of Wilkinson’s affidavit as vouched for by Jefferson. Both judges, however, appeared uneasy with their stance. Fitzhugh opened his opinion by noting, “My extreme indisposition has prevented me from preparing any remarks in support of the opinion which I am called on to give”

But he gave them anyhow. Duckett began by professing his “scrupulous attachment to the right of personal liberty in the citizens of our country,” and asked to be judged in this regard by “the whole tenor of his conduct through life” (and presumably not by the opinion he was about to deliver). For good measure, he protested that “no reasons of state, no political motive” had influenced his opinion.

The one point on which both judges agreed—the one that came closest to justifying their decision and the president’s as well—was that the hearing was for probable cause only, meaning that there was enough evidence to think that a grand jury might indict the prisoners. Neither judge felt obliged to grapple fully with the question of evidence, however, although both gave their reasons for believing Wilkinson’s affidavit. As Duckett stated in his “short view of the evidence,” “the depositions of General Wilkinson prove, unquestionably, the connection of the prisoners with Colonel Burr,” and if Burr was “probably” guilty of treason as the president had announced, then so were Bollman and Swartwout: not because they had actually levied war against the United States but because since they knew of Burr’s intent, they could be presumed to have been willing to join him in the actual levying of war should that have come to pass.

Duckett did not inquire why it was that Bollman and Swartwout should be tainted for delivering the cipher letter to Wilkinson and not Wilkinson as well for having received it, or how it was that the general communicated via a secret code with the alleged traitor. Fitzhugh did concede that the evidence against Burr was circumstantial, and that circumstantial evidence did not meet Article III evidentiary requirements for treason (i.e., two witnesses to the same overt act of levying war). But even so, Fitzhugh went on to declare that Burr’s guilt was “established.”

Not only did Fitzhugh give credence to Wilkinson’s evidence of Burr’s guilt (as vouched for by the president), but he also went on to argue that the prisoners could be held on the charge of treason because of their association with Burr—this

even though the judge acknowledged that the evidence against Bollman and Swartwout supported a charge of misprision (concealment) of treason and not treason itself. His point was that since “there is no intermediate class of offences of a treasonable nature between misprision and treason, it must be treason.”

Fitzhugh also accepted Wilkinson’s statement—obviously hearsay—that Swartwout, while being secretly interrogated at Natchez, admitted to a treasonable association with Burr. Swartwout denied Wilkinson’s account of the matter under oath before the Grand Jury at Richmond and according to John Randolph, who was foreman of the jury, his frank account impressed the jurors. As mentioned above, both Swartwout and Bollman testified that Burr’s scheme was not to sever the Union but was instead directed at Mexico and then only in case of a war with Spain, which Burr believed was imminent.

Like Duckett, Fitzhugh did not consider the possibility that because the cipher letter was sent by Burr (Dayton) to Wilkinson, the general himself must also have been in on the conspiracy. Nor did he ask why it was that Wilkinson waited so long after receiving the cipher letter to warn the president of the supposedly dire threat to the Union. In short, both judges took Wilkinson’s account of Burr, and Jefferson’s account of Wilkinson, at face value. Or less charitably, they believed Wilkinson because Jefferson vouched for his credibility and expected them to follow suite.

If Cranch’s colleagues believed Wilkinson because the president did so, Cranch doubted Wilkinson because he doubted the president. Cranch’s passionate dissent, 24 Fed. Cas. at 1192 (attached) moreover, carried unusual weight because of his connection with the Adams family and no less because of his undisputed ability and integrity. Cranch was a moderate Federalist like his uncle John Adams, but he was also a judge deeply committed to the rule of law. What he discerned in the Bollman proceedings--what others were beginning to suspect and would come

to believe during the trial in Richmond--was that the President of the United States was carrying on a personal vendetta against Burr.

Cranch divulged his misgivings to his father shortly after the decision of his court in the Bollman case came down. "So anxious was the President to have this prosecution commenced," he wrote, "or, to use his own language, to deliver them to the civil authority, that he came to the Capitol on the day of their arrival and with his own hand delivered to the District Attorney, Mr. Jones, the affidavit of General Wilkinson, and instructed the attorney to demand of the court a warrant for the arrest of Bollman and Swartout [sic] on the charge of treason. When this circumstance is considered, and the attempt made in the Legislature to suspend the privilege of *habeas corpus* on the very day on which the motion was made for a warrant against Bollman and Swartout [sic], . . . you may form some idea of the anxiety which has attended my dissent from the majority of the Court."

Where the majority opinions of Duckett and Fitzhugh for the circuit court were hesitant and weakly reasoned, Cranch's dissent was powerful, persuasive, and prescient. "In times like these," he warned, "when the public mind is agitated, when wars, and rumors of wars, plots, conspiracies and treasons excite alarm, it is the duty of a court to be peculiarly watchful lest the public feeling should reach the seat of justice, and thereby precedents be established which may become the ready tools of faction in times more disastrous. The worst of precedents may be established from the best of motives."

Cranch had equally strong words for Jefferson, whom he feared was taking the law into his own hands. It did not matter, he reasoned, that the president acted "from the best of motives," or from a "zeal for the public interest," a benefit of the doubt Marshall did not extend to his cousin. What *did* matter was that the government—the president and his lawyers—trampled on freedoms guaranteed in the Bill of Rights, namely the right of persons to be secure against unreasonable

seizures, and that no warrants issue but upon probable cause, supported by oath or affirmation. To secure those rights the Constitution guaranteed the accused the right to the writ of habeas corpus, which Jefferson and Giles sought to subvert.

Cranch might also have mentioned that Bollman and Swartwout—both held incommunicado under constant military guard since their military arrest in New Orleans--had been denied the right to counsel guaranteed by the 6th amendment. Strangely, Jefferson's lawyer Caesar Rodney, Attorney General of the United States, objected to the prisoners having access to counsel "on the grounds of humanity." To grant them that right, he argued "would excite a public prejudice against them, if they should be committed after being heard by counsel." Granting the prisoners the right of counsel at this stage of the proceedings, he added, would usurp "the province of the jury" at the trial stage. Little wonder Cranch was outraged.

Most pertinent for the forthcoming trial in Richmond, Cranch's dissent addressed the questions of evidence in treason trials raised by the prosecution lawyers, by the opinions of Duckett and Fitzhugh, and implicitly by Jefferson's public declaration of Burr's guilt. Cranch homed in on Article III, which stated that conviction for levying war required "two witnesses to the same overt act." The meaning of those words was critical to Bollman and Swartwout, because the president insisted on charging the prisoners with treason solely on the basis of the written testimony of Wilkinson and others. Although Jefferson had already pronounced Burr guilty on such evidence, both Jones and Rodney admitted in the bail hearing that the affidavits did "not show that war had been levied." That defect, they contended, was "supplied by the message [of the president], which, being an official message, was under oath, and proved the treasonable intent of seizing upon New Orleans--and thus that war had been levied." In sum, it was

enough that Bollman and Swartwout were, as Wilkinson's affidavit claimed, "confederates in treason" to charge them with treason.

With the help of Charles Lee's argument for the prisoners, Cranch exposed the weakness and dangers of the majority's position. "To a man of plain understanding," he said, "it would seem to be a matter of little difficulty to decide what was meant in the constitution by levying of war; but the subtleties of lawyers and judges, invented in times of heat and turbulence, have involved the question in some obscurity." He did not intend to undertake a full discussion of the matter, he said, but he knew for sure what should be avoided in a republic governed by a written constitution: "It is, however, to be hoped, that we shall never, in this country, adopt the long list of constructive treasons invented in England, by the worst of judges in the worst of times."

Nor did he believe that the President of the United States should undertake to do so. Cranch stood on solid constitutional ground when he declared: "I can never agree that executive communications not on oath or affirmation, can, under the words of our constitution, be received in a court of justice, to charge a man with treason, much less to commit him for trial." Cranch felt compelled to be "explicit" on this point because "such communications can not be evidence on the trial." For the court to give legitimacy to the president's "communications" at this stage of the proceedings would be to prejudge the question of guilt or innocence; to do so, he concluded, would be "deemed a dereliction of duty." Instead, it is "the duty of the judiciary calmly to poise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude." John Marshall could not have said it more eloquently.

Chief Justice Marshall vindicated Cranch on every point when the Supreme Court heard the Bollman case on appeal in *Ex parte Bollman* and *Ex parte Swartwout*. The two prisoners were freed on a habeas ruling, as Cranch argued

they should be, and Marshall's ruling on evidence, although more extensive, also tracked Cranch's dissent. Cranch's dissent also foreshadowed many of Marshall's holdings in the Richmond trial.

Cranch also gave Jefferson a solemn lecture on the dangers of presidential over-reach--of personalizing his office, of substituting his own moral judgment for the principles of due process as administered in the courts of law. Chief Justice Marshall would elaborate the same points later in the course of the Richmond trial, but Cranch anticipated the great chief in every respect and did so with memorable eloquence. Rarely has a federal judge spoken so frankly and personally to the President of the United States--and perhaps never to the president who appointed him to office. Cranch's unflinching commitment to judicial independence, judicial duty, and the rule of law boded well for the future of the court over which he would preside for the following half century. But there was something more: The wisdom of his dissent, the feature that should make it required reading for our own age, is that Cranch understood that an abuse of power in a democracy often comes not from evil and corruption but from "the best of motives"--from an over-zealous and unexamined pursuit of ideological purity.

U.S. v. Bollman et al., 24 Fed. Cas. 1189, 1192 (1807)

CRANCH, Chief Judge, delivered the following opinion:

It is the opinion of a majority of the judges that Erick Bollman and Samuel Swartwout should be committed for trial for the crime with which they are charged. It is also the opinion of a majority of the judges that they should not be admitted to bail at present.

Upon the motion heretofore made to this court, by the attorney of the United States, for a warrant to arrest Dr. Bollman and Mr. Swartwout upon the charge of treason against the United States, I thought myself bound to dissent from the opinion of my brethren on the bench, because I did not think that the facts before us, supported by oath or affirmation, showed probable cause to believe that either of the prisoners had levied war against the United States. After further deliberation, and a more mature examination, both of the evidence and the law, my doubts are very much confirmed.

In times like these, when the public mind is agitated, when wars, and rumors of wars, plots, conspiracies and treasons excite alarm, it is the duty of a court to be peculiarly watchful lest the public feeling should reach the seat of justice, and thereby precedents be established which may become the ready tools of faction in times more disastrous. The worst of precedents may be established from the best of motives. We ought to be upon our guard lest our zeal for the public interest lead us to overstep the bounds of the law and the constitution; for although we may thereby bring one criminal to punishment, we may furnish the means by which an hundred innocent persons may suffer. The constitution was made for times of commotion. In the calm of peace and prosperity there is seldom great injustice. Dangerous precedents occur in dangerous times. It then becomes the duty of the judiciary calmly to poise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude. Whenever an application is made to us in our judicial character, we are bound, not only by the nature of our office, but by our solemn oaths, to administer justice, according to the laws and constitution of the United States. No political motives, no reasons of state, can justify a disregard of that solemn injunction. In cases of emergency it is for the executive department of the government to act upon its own responsibility, and to rely upon the necessity of the case for its justification; but this court is bound by the law and the constitution in all events. When, therefore, the constitution declares that 'the right of the people to be secure in their persons' 'against unreasonable seizures,' 'shall not be violated,' and that 'no warrants shall issue but upon probable cause, supported by oath or affirmation,' this court is as much bound as any individual magistrate to obey its command.

The cause of issuing a warrant of arrest, is a crime committed by the person charged. Probable cause, therefore, is a probability that the crime has been committed by that person. Of this probability the court or magistrate issuing the warrant must be satisfied, by facts supported by oath or affirmation. The facts therefore, which are stated upon oath, must induce a reasonable probability that all the acts have been done which constitute the offence charged. The question whether a crime has been committed is a question partly of law and partly of fact. What acts constitute the crime, is a question of law. Whether those acts have been done, is a question of fact. The crime charged, in the present case, is treason against the United States.

The question of law is, what acts constitute that crime? The third section of the third article of the constitution of the United States, says, that ‘treason against the United States shall consist only in levying war against them, or, in adhering to their enemies, giving them aid and comfort.’ As it is not contended that the prisoners are guilty under the second clause of the definition, if guilty at all, it must be of treason in levying war against the United States. To a man of *1193 plain understanding it would seem to be a matter of little difficulty to decide what was meant in the constitution by levying of war; but the subtleties of lawyers and judges, invented in times of heat and turbulence, have involved the question in some obscurity. It is not my intention, at this time, to say how far the expression ought to be limited, nor how far it has been extended. It is, however, to be hoped, that we shall never, in this country, adopt the long list of constructive treasons invented in England, by the worst of judges in the worst of times. It is sufficient to say that the most comprehensive definition of levying war against the king, or against the United States, which I have seen, requires an assemblage of men, ready to act, and with an intent to do some treasonable act, and armed in warlike manner, or else assembled in such numbers, as to supersede the necessity of arms. The advocates for the prosecution have not, as I understand, contended for a more unlimited definition than this.

It is unnecessary, and perhaps would be improper, for me, at this time, to say more on the question of fact, than that, in my opinion, there is no probable cause, supported by oath or affirmation, within the meaning of the constitution, to charge either Dr. Bollman or Mr. Swartwout with treason, by levying war against the United States. From some of the doctrines urged on the part of the prosecution, I must, most explicitly, declare my dissent. I can never agree that executive communications not on oath or affirmation, can, under the words of our constitution, be received as sufficient evidence in a court of justice, to charge a man with treason, much less to commit him for trial. If such doctrines can be supported, there is no necessity of a suspension of the privilege of the writ of habeas corpus, by the authority of the legislature. As it is admitted that such communications can not be evidence on the trial, and as an opinion on that point, therefore, cannot be considered as prejudging any question which can occur in a subsequent stage of the prosecution, I have thought proper to be thus explicit on that point. To have said less, I should have deemed a dereliction of duty.