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FRIDAY, FEBRUARY 27, 1807.

SUPREME COURT OF THE U. STATES.

February Term, 1807.

Ex parte } Erick Bollman and Samuel Swartwout.

On motion for a *Habeas Corpus ad subjiciendum.*

MARSHALL, Chief Justice, delivered the opinion of the court as follows:

As preliminary to any investigation of the merits of the motion, this court deems it proper to declare that it disclaims all jurisdiction not given by the constitution, or by the laws of the United States.

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 a written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. It is unnecessary to state the reasoning on which this opinion is founded, because it has been repeatedly given by this court; and with the decisions heretofore rendered on this point, no member of that bench has, even for an instant, been dissatisfied. The reasoning from the bar, in relation to it, may be answered by a single observation, that for the meaning of the terms *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 to a written law.

This opinion is not to be considered as abridging the power of courts over their own officers, or to protect themselves, and their members, from being disturbed in the exercise of their functions. It extends only to the power of taking cognizance of any question between individuals, or between the government and individuals.

To enable the court to decide on such question, the power to determine it must be given by written law.

The enquiry 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 U. States shall have power to issue writs of *scire facias, Habeas Corpus*, and all other writs, not especially 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 enquiry into the cause of commitment. *Provided*, that writs of *Habeas Corpus* shall in no case extend to prisoners in goal unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

The only doubt of which this section can be susceptible is, whether the restrictive words of the first sentence limit the power to the award of such writs of *Habeas Corpus* as are necessary to enable the courts of the United States to exercise their respective jurisdictions in some cause which they are capable of finally deciding.

It has been urged that in strict grammatical construction these words refer to the last antecedent, which is, "all other writs not specially provided for by statute."

This criticism may be correct, and is not entirely without its influence; but the sound construction, which the court thinks it safer to adopt, is, that the true sense of the words is to be determined by the nature of the provision and by the context.

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*.

It has been truly said that this is a generic term and includes every species of that writ. To this it may be added that when used singly—when we say *the writ of Habeas Corpus*, without addition—we most generally mean that great writ which is now applied for: and in that sense it is used in the constitution.

The section proceeds to say 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 pur-"pose of an enquiry into the cause of commit-"ment."

It has been argued that Congress could never intend to give a power of this kind, to one of the judges of this court which is refused to all of them when assembled.

There is certainly much force in this argument, and it receives additional strength from the consideration that if the power be denied to this court, it is denied to every other court in the U. S. the right to grant this important writ is given, in this sentence, to every judge of the circuit, or district court, but can neither be decided by the circuit nor district court. It would be strange if the judge, sitting on the bench, should be unable to hear the motion for this writ where it might be openly made, and openly discussed, and might yet retire to his chamber & in private receive & decide upon the motion. This is not consistent with the genius of our legislation, nor with the course of our judicial proceedings. It would be much more consonant with both, that the power of the judge at his chambers should be suspended during his term, than that it should be exercised only in secret.

Whatever motives might induce the legislature to withhold from the Supreme Court the power to award the great writ of *Habeas Corpus*, there could be none which would induce them to withhold it from every court in the United States; and as it is granted to all in the same sentence and by the same words, the sound construction would seem to be, that the first sentence vests this power in the courts of the United States, but as those courts are not always in session, the second sentence vests it in every justice or judge of the United States.

The doubt which has been raised on this subject may be further explained by examining the character of the various writs of *Habeas Corpus*, and selecting those to which this general grant of power must be restricted, if taken in the limited sense of being merely used to enable the court to exercise its jurisdiction in causes which it is enabled to decide finally.

The various writs of *Habeas Corpus* as stated and accurately defined by judge Blackstone, (*3 Bl. Com. 129*) are 1st. The writ of *Habeas Corpus ad respondendum*, when a man hath a cause "of action against one who is confined by the "process of some inferior court; in order to "remove the prisoner and charge him with this "new action in the court above."

This case may occur when a party having a right to sue in this court, (as a state at the time of the passage of this act, or a foreign minister) wishes to institute a suit against a person who is already confined by the process of an inferior court. This confinement may be either by the process of a court of the *United States*, or of a *state* court. If it be in a court of the United States, this writ would be inapplicable, because perfectly useless, and consequently could not be contemplated by the legislature. It would not be required, in such a case, to bring the body of the defendant actually into court, and he would already be in the charge of the person who, under an original writ from this court would be directed to take him into custody, and would already be confined in the same jail in which he would be confined under the process of this court if he should be unable to give bail.

If the party should be confined by process from a state court, there are many additional reasons against the use of this writ in such a case.

The state courts are not, in any sense of the word, *inferior* courts, except in the particular cases in which an appeal lies from their judgement to this court; and in these cases the mode of proceeding is particularly prescribed, and is not by *Habeas Corpus*. They are not inferior courts because they emanate from a different authority, and are the creatures of a distinct government.

2d. The writ of *Habeas Corpus ad satisfaciendum* "when a prisoner hath had judgment "against him in an action, and the plaintiff is "desirous to bring him up to some superior court "to charge him with process of execution."

This case can never occur in the courts of the United States. One court never awards execution on the judgment of another. Our whole juridical system forbids it.

3d. *Ad prosequendum, testificandum, deliberandum*, &c. "which issue when it is necessary to re-"move a prisoner, in order to prosecute or bear "testimony, in any court, or to be tried in the "proper jurisdiction, wherein the fact was com-"mitted."

This writ might unquestionably be employed to bring up a prisoner to bear testimony in a court, consistently with the most limited construction of the words in the act of Congress; but the power to bring a person up that he may be tried in the proper jurisdiction is understood to be the very question now before the court.

4th and last. The common writ *ad faciendum et recipiendum*, "which issues out of any of "the courts of Westminster-hall, when a per-"son is sued in some inferior jurisdiction, & "is desirous to remove the action into the supe-"rior court commanding the inferior judges to "produce the body of the defendant, together "with the day and cause of his caption and "detainer (when the writ is frequently deno-"minated an *habeas corpus cum causa*) to *do and receive* whatever the king's court shall consi-"der in that behalf." This writ is grantable of "common right, without any motion in court, "and it instantly supercedes all proceedings in "the court below."

Can a solemn grant of power to a court to award a writ be considered as applicable to a case in which that writ, if issuable at all, issues by law without the leave of the court?

It would not be difficult to demonstrate that the writ of *Habeas Corpus cum causa* cannot be the particular writ contemplated by the legislature in the section under consideration; but it will be sufficient to observe generally that the same act prescribes a different mode for bringing into the courts of the U. S. suite brought in a state court against a person having a right to claim the jurisdiction of the courts of the U. States. He may, on his first appearance, file his petition and authenticate the fact, upon which the cause is *ipso facto* removed into the courts of the U. S.

The only power then, which on this limited construction would be granted by the section under consideration, would be that of issuing writs of *Habeas Corpus ad testificandum*. The section itself proves that this was not the intention of the legislature. It concludes with the following proviso, "That writs of *Habeas Corpus*, shall in no case extend to prisoners "in jail, unless where they are in custody un-"der or by color of the authority of the U. S. "or are committed for trial before some court "of the same, or are necessary to be brought "into court to testify."

This proviso extends to the whole section. It limits the powers previously granted in the courts, because it specifies a case in which it is particularly applicable to the use of the power of courts;—where the person is necessary to be brought into court to testify. That construction cannot be a fair one which would make the legislature except from the operation of a proviso, limiting the express grant of a power, the whole power intended to be granted.

From this review of the extent of the power of awarding writs of *Habeas Corpus*; if the section be constructed in its restricted sense; from a comparison of the nature of the writ which the courts of the United States would, on that view of the subject, be enabled to issue; from a comparison of the power, so granted, with the other parts of the section, it is apparent that this limited sense of the term cannot be that which was contemplated by the legislature.

But the 33d section throws much light upon this question. It contains these words "and upon arrests in criminal cases, bail shall be admitted, except where the punishment may be death; in which cases it shall not be admitted *but by the supreme* or a circuit court, or by a justice of the supreme court, or a judge of the district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and of the usages of law."

The appropriate process of bringing up a prisoner, not committed by the court itself, to be bailed, is by the writ now applied for. Of consequence, a court possessing the power to bail prisoners committed by itself, may award a writ of *Habeas Corpus*, for the exercise of that power. The clause under consideration obviously proceeds on the supposition that this power was previously given, and is explanatory of the 14th section.

If by the sound construction of the act of Congress the power to award writs of *Habeas Corpus* in order to examine into the cause of the commitment is given to this court, it remains to enquire whether this be a case in which the writ ought to be granted.

The only objection is, that the commitment has been made by a court having power to commit and to bail.

Against this objection the argument from the bar has been so conclusive that nothing can be added to it.

If then this were *res integra*, the court would decide in favor of the motion. But the question is considered as long since decided. The case of Hamilton is expressly in point in all its parts; and although the question of jurisdiction was not made at bar, the case was several days under advisement, and this question could not have escaped the attention of the court. From that decision the court would not lightly depart.

(*U. S. v. Hamilton, 3 Dallas 17.*)

If the act of Congress gives this court the power to award a writ of *Habeas Corpus* in the present case, it remains to enquire whether that act be compatible with the constitution.

In the *mandamus* case † 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.

It has been demonstrated at the bar that the question brought forward on a *Habeas Corpus*, is always distinct from that which is involved in the cause itself. The question whether the individual shall be imprisoned is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and therefore these questions are separated, and may be decided in different courts.

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.

But this point also is decided in Hamilton's case and in Burford's case. ‡

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.

That question depends on political considerations, on which the legislature is to decide. Until the legislative will be expressed, this court can only see its duty, and must obey the laws.

The motion therefore, must be granted.

* *Laws U. S. Vol. 1. p 58.*

† *1 Cranch's reports, Marbury v. Madison.*

‡ *At Feb. term, 1806. in this court.*

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Taking of Curracoa.—The British squadron employed in the reduction of Curracoa, consisted of the Arethusa, 38 guns, capt. Brisbane; Latona, 38, Wood; Anson, 40, Lydiard; Fisguard, 38, Bolton.

The commodore of the squadron sailed into the port with the determination of storming the forts, before deemed impregnable. On the 1st of Jan. at dawn, the Arethusa led in with a strong breeze, the other ships following. After firing a few broadsides, the boats landed a number of officers and men, and before 8 o'clock the British flag was flying on all the outworks, the two forts Republic and Caraccas excepted. The Fisguard took possession of two batteries distinct from the main land. All private property is respected, and the troops are to be sent to Europe and exchanged. About 200 of the troops in the forts were killed—the loss of the British is trifling—6 killed, and 28 wounded.

We understand that there were upwards of 60 Spanish, French, and Dutch vessels, exclusive of 6 or 7 Americans, lying at Curracoa when that Island fell into British hands; some of them are stated to be of great value.

Six commissioners have been appointed to investigate prize concerns at Curracoa. Captain James Athol Wood, of the Latona frigate, is the President.

We shall, to-morrow, give a more particular account of this brilliant achievement.

From the Norfolk Ledger.

A commercial friend has communicated to us the following extract of a letter from Bordeaux, dated Dec. 14

"The state of our market has not varied materially since my last, but we look for important changes shortly, as some late events connected with the present system of warfare against England, are likely to produce a total revolution in the face of our commercial affairs. The high toned measures which have been adopted by this government, must make a serious impression in England, and they will doubtless affect the commerce of neutral powers, and yours particularly whose interests will necessarily become blended with those of the belligerents. *The interdiction of all commercial intercourse with the British dominions*, will be productive of infinite inconvenience and difficulties, in terminating operations undertaken by the American merchants to the ports of France and those of her allies, with a view of placing their funds in London to meet their valuations and engagements in that city.

"The declaring all the British ports in a state of blockade, will expose your commerce to considerable danger, for we apprehend that *numerous privateers will be immediately* fitted out, for the express purpose of capturing yours and other neutral vessels bound to British dominions. It is true that this government has not yet expressed an intention to encourage such captures, yet as this declaration contains no mention of the usual consequences of a blockade, we may naturally infer that the French cruizers will be authorized to make them. If England, as may be expected, declares the ports of France blockaded, there is an end of neutral commerce. It appears to me that the crisis is too violent to be of long duration."

COMMUNICATION.

The Question between Wilkinson and Livingston further considered.

IN the communication under date of the 13th instant, Mr. Livingston's first ground of complaint against General Wilkinson has been discussed. It is supposed that an attempt not altogether without success has been made to prove, that [illegible] of Mr. L's [illegible] in the moment of trial, were not altogether unreasonable, and that it might with some degree of propriety have been considered as a duty in General W. to have [illegible] put the public on their guard. Of this [illegible], therefore, however [illegible] with wounded confidence, the extent [illegible] appear underrated, when [illegible] surprize that it is so great, we are led to enquire why it was not more; and in the consideration of the arrests which were really made, feel disposed to wonder why such an outcry should be raised on this account.

But Mr. L. has artfully contrived to blend these cases with his own, and [illegible] with justifying himself, although this [illegible] professed object in setting out, becomes the public and violent accuser of W. on [illegible] of the arrest and detention by military authority. The cunning which thus unites matters of high and general import with his own case is easily detected. To come forward as the asserter of constitutional right, and advocate of [illegible] privilege, would give a color to his own complaints, and he certainly [illegible] under the guise of a popular [illegible] to excite a [illegible] spirit of indignation, which would [illegible] to the labor of investigation, but [illegible] impression that one infraction of [illegible] had been committed, would at once bring in a verdict of guilty on all the charges.

But shall this device avail him, and is the public prepared to justify Mr. L. in his most ill-timed publication because he has contrived artfully to blend and confound matters totally distinct and independent [illegible] to bolster a weak and frivolous complaint by [illegible] as the champion of a popular creed? It is hoped that the good sense of the public will at once distinguish between the cry of faction and the voice of patriotism, the interested clamor intended to deaden inquiry and the steadfast assertion of innocence demanding an investigation of its own merits. The [illegible] cannot depend on the legality or illegality of the arrests of Bollman, Swartwout and Alexander, and whatever an inquiry [illegible] decide on the merits of those arrests, their necessity, or impolicy, the question between these parties, ought not to be confounded in the issue nor tried by the same test. *As to himself* Mr. L. cannot pretend to say any thing illegal has been committed unless it be illegal to express doubts of his patriotism, who never gave proofs of any, or to found a belief of guilt on circumstantial evidence.

Let it be now honestly asked whether his violent denunciation against the General is justifiable on behalf of those with whom he has makes common cause? and here a candid mind will naturally express regret, that the rule of right and wrong, of truth and error should depend so much on accident, and that the best and noblest exertions for our country, may derive their name from the ultimate issue, and according to circumstances not in human foresight to calculate with certainty, be applauded as patriotic or branded as tyrannical. The imperfection of our natures, at all times subject to false impressions, is in no instance so much to be deplored as in selecting the cases which admit of exceptions from general principles, and where from the want of an unerring rule of right, the same action according to the color of the mind, may be deemed a monstrous and horrid violation of law and liberty, or a generous and highly meritorious self-exposure to penalties and obloquy. The act of Charlotte Corday, now ranking amid the brightest efforts of patriotism, was by the deluded people of France regarded with horror and execration at the time of its commission, and the martyr of freedom perished on the scaffold. He who had been hailed as a deliverer, was afterwards for the same actions abhorred as a tyrant, and the bust of Marat reared with acclamation in the Pantheon, while the name of his assassin was branded with infamy, was soon after (such is the sudden revolution of popular opinion) ignominiously thrown out, and broken to pieces. Great minds, following their destiny, seize on the means of securing a great national object, although not in the regular course of things; and by nobly daring attain at their own dread sacrifice, what colder minds would lose in idle deliberation and weak scruples of the mode of execution.

The most violent [illegible] for the inviolability of [illegible] must be driven to the acknowledgment, that cases may occur, where the application of the principle would tend to its overthrow, and the only mode of securing its general and quiet enjoyment is by its temporary infraction. Such an infraction of the law is in these instances committed under a direction paramount to its obligations, and necessity becomes justice. This sentiment is recognized by writers on government of unquestionable philanthropy, and undoubted authority. A great Whig Historian,* whose labors reflect credit on the age, makes use of the following striking remarks on this subject:—"General principles "of liberty are valuable only because they are "generally beneficial; necessity may enforce, "and then it will justify a deviation in particu-"lar cases from those general principles; if "real it is the plea of the patriot, if pretended "of the tyrant." In all instances where necessity is thus made the plea for any departure from the general principle, the emergency must be such as to justify the departure—it should be—

"Nodus vindice dignus."

It is not every trifling ground of alarm or source of danger that can make the deviation [illegible]. It is a violent remedy which ought to be sparingly administered, least it grow into precedent, and that which in the first instance was the "plea" of the "patriot" be artfully converted into that of the "tyrant."

Upon this ground, and subject to these limitations, rests the justification of Wilkinson. His apologist neither resorts to legal distinctions nor the quibbles of the bar in his defence—he relies not on principles of jurisprudence to show that a military officer as well as any other citizen has a right to seize on the persons of the guilty; he acknowledges that it was a violation of the law, to retain by power citizens thus seized upon by force, and that alarming indeed is the precedent of hurrying citizens of the United States to a distance from the place of their abode, or permanent or temporary, upon proof or suspicion of crime. Such is the present case, and well it is that it is no worse—that no selfish end was to be attained, no conclusive authority was exerted, that his views were for his country, and his great aim to support government; that he did feel no private [illegible] which attach man to his fellow; that no wife could deplore a violent separation from her husband, nor children the absence of their parent and protector, are considerations which may soften the storm of declamation, and perhaps tend to chase the feelings of pity. Those who have suffered have suffered *alone*, and except in a single instance, consist of *strangers* who had in New Orleans no ostensible employment or apparent connection, whose business was a mystery to all the world, but to those to whom was divulged the business of treason.

But that they were *guilty* would not of itself be a sufficient justification. The rights of a criminal [illegible] as those of the most innocent, the outrage is the same whether a party is punished against law, or without a [illegible] of the forms and mode of trial which the law prescribes, and either execution would [illegible] because exerted solely on the guilty. The [illegible] and equitable provisions of the law, which form the strong, and it is hoped impregnable barrier of innocence against power, of universal application and [illegible] be violated or infringed, [illegible] with upon that beautiful system of social order, which under *Providence* I trust will be imperishable. The guilt of the accused, whatever may be the ultimate decision of the law, is contrary to its benevolent presumption, and therefore forms no part of the excuse of him who violates right in his zeal to overtake the criminal.

It is therefore indifferent to the present reasoning whether any *legal* guilt could be proved, or any punishment inflicted on those who have been implicated by General W. and as criminals arrested and sent on to Washington. They are† or will be in the hands of the laws, and it is not for me to anticipate its decision. True it is that if convicted, the general censure will fall with less weight on him who went the justification of necessity [illegible] over a principle of law in their prosecution, as the censure will be more deep, if this violence be practised on those guilty of no offence. But this is an error in reasoning into which none will fall who reflect that the justification is founded not on legal guilt, but political necessity. A crime in mere contemplation, is no crime in law, and the question is at once reduced into this naked fact; did circumstances exist which imposed on an American officer the imperious duty of preventing a project which could not be punished until executed?

This inquiry is reduced into a narrow compass. What in the apprehension of General W. was the real object of the enterprize? Take the answer from the lips of Swartwout. He says "that the territory of Orleans *would be revolutionized*; where the people *were ready to join them*," that "there would be some seizing at New-Orleans; that the money of the banks in that place was to be borrowed;" "that the people of the Western Country were zealous in favor of the enterprize." But is this project to be executed with such a force, and at so short a notice as to produce a most alarming emergency, and to surprize those upon whom fell the task of opposition in a state of unpreparedness? What were Wilkinson and the people of Orleans to believe from the statement of Bollman corroborated by 'Alexander?' On the twentieth of the month in which the commu-

* Belsham; Memoirs George 3, vol. 6, p 3[illegible].

† *This was written before the discharge of Bollman and Swartwout by the Supreme Court of the U. States; but that discharge does not involve the question of guilt or innocence.*