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Opinion of Justice JOHNSON, on the motion for a HABEAS CORPUS in the case of

UNITED STATES,
vs.
SWARTWOUT & BOLLMAN.

In this case I have the misfortune to dissent from the majority of my brethren. As it is a case of much interest, I feel it incumbent upon me, to assign the reasons, upon which I adopt the opinion, that this court has not authority to issue the writ of Habeas Corpus now moved for. The prisoners are in confinement under a commitment ordered by the superior court of the district of Columbia, upon a charge of high treason. This motion has for its object, their discharge or admission to bail, under an order of this court, as circumstances upon investigation shall appear to require. The attorney general having submitted the case without opposition, I will briefly notice such objections as occur to my mind against the arguments urged by the counsel for the prisoners.

Two questions were presented to the consideration of the court. 1st. Does this court possess the power generally of issuing the writ of Habeas Corpus? 2d. Does it retain that power in this case after the commitment by the district court of Columbia? In support of the affirmative of the first of these questions two grounds were assumed:

1st. That the power to issue this writ was necessarily incident to this court as the supreme tribunal of the union:

2dly. That it is given by statute, and the right to it has been recognized by precedent.

On the first of these questions it is not necessary to ponder long, this court has uniformly maintained that it possesses no other jurisdiction of power than what is given it by the constitution and laws of the United States, or is necessarily incident to the exercise of those expressly given.

Our decision must then rest wholly on the due construction of the constitution and laws of the Union, and the effect of precedent, a subject which certainly presents much scope for close legal enquiry, but very little for the play of a chastened imagination.

The first section of the third article of the constitution vests the judicial power of the United States, in one supreme court, and in such inferior courts as the Congress may from time to time establish. The second section declares the extent of that power and distinguishes its jurisdiction into original and appellate.

The *original jurisdiction* of this court is restricted to cases affecting ambassadors or other public ministers, and consuls, and those in which a state shall be a party. In all other cases within the judicial powers of the union, it can exercise only an appellate jurisdiction. The former it possesses independently of the will of any other constituent branch of the general government. Without a violation of the constitution, that division of our jurisdiction can neither be restricted or extended. In the latter its powers are subjected to the will of the legislature of the Union, and it can exercise appellate jurisdiction, in no case unless expressly authorised to do so by the laws of Congress. If I understand the case of Marbury and Madison, it maintains this doctrine in its full extent. I cannot see how it could ever have been controverted.

It is incumbent then, I presume, on the counsel in order to maintain their motion, to prove that the issuing of this writ is an act within the power of this court in its original jurisdiction, or that in its appellate capacity, the power is expressly given by the laws of Congress.

This it is attempted to do, by the fourteenth and thirty third sections of the judiciary act, and the cases of Hamilton and Burford, which occurred in this court, the former in 1795, the latter in 1806.

How far their position is supported by that act and those cases, will now be the subject of my enquiry.

With a very unnecessary display of energy and pathos, this court has been imperatively called upon to extend to the prisoners the benefit of precedent. I am far, very far, from denying the general authority of adjudications. Uniformity in decisions is often as important as their abstract justice. But I deny that a court is precluded from the right or exempted from the necessity of examining into the correctness or consistency of its own decisions or those of any other tribunal. If I need precedent to support me in this doctrine, I will cite the example of this court, which in the case of the United States, vs. Moore, February 1803, acknowledged that in the case of the U. States, vs. Sims, February 1803, it had exercised a jurisdiction it did not possess. Strange indeed would be the doctrine, that an inadvertency once committed by a court shall ever after impose on it the necessity of persisting in its error. A case that cannot be tested by principle is not *law*, and in a thousand instances have such cases been declared so by courts of justice.

The claim of the prisoners as founded on precedent stands thus. The case of Hamilton was strikingly similar to the present. The prisoner had been committed by order of the district Judge on a charge of high treason. A writ of Habeas Corpus was issued by the Supreme Court and the prisoner bailed by their order. The case of Burford was also strictly parallel to the present; but the writ in the latter case having been issued expressly on the authority of the former, it is presumed that it gives no additional force to the claim of the prisoners, but must rest on the strength of the case upon which the court acted.

It appears to my mind that the case of Hamilton bears upon the face of it evidence of its being entitled to little consideration, and that the authority of it was annihilated by the very able decision in Marbury vs. Madison. In this case it was decided that Congress could not vest in the supreme court any original powers beyond those to which this court is restricted by the constitution. That an act of Congress vesting in this court the power to issue a writ of Mandamus in a case not within their original jurisdiction, and in which they were not called upon to exercise an appellate jurisdiction, was unconstitutional and void. In the case of Hamilton the court does not assign the reasons on which it founds its decision, but it is fair to presume that they adopted the idea which appears to have been admitted by the district attorney in his argument, to wit: That this court possessed a concurrent power with the district court in admitting to bail. Now a concurrent power in such a case must be an original power, and the principle in Marbury and Madison applies as much to the issuing of a Habeas Corpus in a case of treason as to the issuing of a Mandamus in a case not more remote from the original jurisdiction of this court. Having thus disembarrassed the question from the effect of precedent, I proceed to consider the construction of the two sections of the judiciary act above referred to.

It is nessary to premise that the case of *treason* is one in which this court possesses neither original nor appellate jurisdiction. The 14th section of the judiciary act, so far as it has relation to this case is in these words:—"All the beforementioned courts (of which this is one) of the U. S. 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." I do not think it material to the opinion I entertain, what construction is given to this sentence. If the power to issue the writs of Scire Facias and Habeas Corpus, be not restricted to the cases within the original or appellate jurisdiction of this court, the case of Marbury and Madison rejects the clause as unavailing; and if it relate only to cases within their jurisdiction, it does not extend to the case which is now moved for. But it is impossible to give a sensible construction to that clause without taking the whole together—it consists of but one sentence—intimately connected throughout, and has for its object the creation of those powers which probably would have vested in the respective courts, without statutory provision as incident to the exercise of their jurisdiction. To give to this clause the construction contended for by counsel, would be to suppose that the legislature would commit the absurd act of granting the power of issuing the writs of Scire Facias and Habeas Corpus, without an object or end to be answered by them. This idea is not a little supported by the next succeeding clause in which a power is vested in the individual judges to issue the writ of Habeas Corpus, expressly for the purpose of enquiring into the cause of commitment. That part of the thirty third section of the judiciary act, which relates to this subject is in the following words: "And upon all arrests in criminal cases, bail shall be admitted, except where the punishment is 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 a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and usage of law."

On considering this act it cannot be denied that if it vests any power at all, it is an original power. "It is the essential criterion of appellate jurisdiction that it revises and corrects the proceeding in a cause already instituted." I quote the words of the court in the case of Marbury vs. Madison.

And so far is this clause from giving a power to revise and correct, that it actually vests in the district judge the same latitude of discretion by the same words, that it communicates to this court. And without derogating from a respectability which I must feel as deep an interest in maintaining as any member of this court, I must believe that the district court or any individual district judge possesses the same power to revise our decision, that we do to revise theirs; nay more, for the powers with which they may be vested are not so particularly limited and divided by the constitution as ours are. Should we perform an act which according to our own principle we cannot be vested with power to perform, what obligation would any other court or judge be under to respect that act? There is one mode of construing this clause, which appears to me to remove all ambiguity, and to render every part of it sensible and operative. By the consent of his sovereign, a foreign minister may be subjected to the laws of the state near which he resides. This court may then be called upon to exercise an original criminal jurisdiction. If the power of this court to bail, be confined to that one case, *reddendo singula singulis*, if the power of the several courts and individual judges be referred to their respective jurisdictions, all clashing and interference of power ceases, and sufficient means of redress are still held out to the citizen, if deprived of his liberty. And this surely must have been the intention of the legislature, it never could have been contemplated that the mandates of this court should be borne to the extremities of the states to convene before them every prisoner, who may be committed under the authority of the general government. Let it be remembered that I am not disputing the power of the individual judges who compose this court to issue the writ of Habeas Corpus.—This application is not made to us as at chambers, but to us as holding the supreme court of the United States—a creature of the constitution and possessing no greater capacity to receive jurisdiction or power than the constitution gives it. We may in our individual capacities, or in our circuit courts be susceptible of powers merely ministerial and not inconsistent with our judicial characters, for on that point the constitution has left much to construction; and on such an application the only doubt that could be entertained would be, whether we can exercise any power beyond the limits of our respective circuits. On this question I will not now give an opinion. One more observation and I dismiss the subject.

In the case of Burford, I was one of the members who constituted the court. I owe it to my own consistency to declare that the court were then apprized of my objections to the issuing of the writ of Habeas Corpus. I did not then comment at large on the reasons which influenced my opinion, and the cause was this: The gentleman who argued that cause confined himself strictly to those considerations, which ought alone to influence the decisions of this court. No popular observations on the necessity of protecting the citizen from executive oppression, no animated address calculated to enlist the passions or prejudices of an audience in defence of his motion, imposed on me the necessity of vindicating my opinion. I submitted in silent deference to the decision of my brethren.

In this case, I feel myself much relieved from the painful sensation resulting from the necessity of dissenting from the majority of the court, in being supported by the opinion of one of my brethren, who is prevented by indisposition from attending.

We are indebted, for the interesting information contained in the two following letters, to Dr. *Mitchill* of the Senate, to whom they were addressed:—the first from Mr. B D. Warden, Secretary to the American legation, dated Paris, Oct. 15; and the last from President Meigs, dated Athens, Geo. Jan. 24.

Paris, October 15, 1806.

SIR,

"I beg leave to inform you, that Mr. Godon, of Versailles, a very distinguished mineralogist and chemist, proposes to emigrate to the United States, and seems to prefer the city of New York, as a place of residence. His plan is, if encouraged, to give, during the winter season, a course of lectures on mineralogy. In summer, he proposes to take a mineralogical survey of the country, and to collect, and analyse specimens of fossils. Those he would designate and arrange, according to the best method, for the use of the state; provided the legislature is pleased to patronise his undertaking.

"If the trustees of Columbia college have a desire to promote a knowledge of this useful branch of science, they might appoint him Professor. As Mr. Godon is the proprietor of a small estate in this country, which affords him a decent subsistence, he would be contented with a very moderate salary.

"I have heard Messrs. Vauquelin, Delamitherie, and other chemists, deliver the most favorable opinion of the talents of Mr. Godon, which are as clearly marked in several other sciences, as in those he proposes to teach. His political creed is sound and rational. In his morals he is irreproachable.

"As your labors, sir, are so often, and so happily directed to the improvement of chemistry and its collateral branches, I trust this project will interest you. Will you have the goodness to give Mr. Godon your advice, and to inform him what support he may expect. If your reply be favorable, he will embark for New-York, in the course of the ensuing spring.

"I embrace this opportunity of transmitting, for your inspection, a bit of a metallic substance, of which there is a vein of considerable dimensions, at Saghertics, near Eropus. It is sulphuret of antimony, as you will perceive; and, although found several feet below the surface of the earth, and certainly not exposed to fire since it was taken from the mine, several French chemists, and particularly Mr. Godon, who analysed it, thinks that it has undergone some fusible process.

"As this substance is employed in the formation of printing types, in pharmacy, and in the art of dying; and, as much of it is imported, yearly, from France, into the United States, it might be useful to examine the vein. I cannot describe the particular spot, but some of the inhabitants of the village (Saghertics) can doubtless point it out.

"I gave the Abbe Hauy an extract from the *Medical Repository* concerning the *Columbium*, said to be found in the United States. If procured, you could not do him a greater favor than by sending him a specimen.

"I find many mineralogists here doubt its existence.

"It may not be uninteresting to you to mention, that Mr. Vauquelin has lately discovered that iron stones contain a portion of chrome, which substance was found in the meteoric stones, and was supposed to render them *magnique*. He has not as yet detected Nickel. This discovery may have considerable influence over the opinion concerning the formation of meteoric stones. It appears, that the iron stone of Siberia, discovered by Pallas, gives the same result, by analysis, as the meteoric stones."

Athens, Jan. 24, 1807.

"The last year was very dry in some parts of our state, but on the whole the crops of corn, cotton, &c. were very abundant. It was an unusually healthy year. A few days before the great tempest, in which the ship Rose in Bloom, from Charleston to New York, suffered, we had a remarkably brilliant halo around the sun. The weather with us was serene in the latter part of August and through the month of September generally—but there was a peculiarity of meterological character, worth noticing.

"Several times from a perfectly clear sky insulated clouds would pour down a whirl of great violence, but of short continuance. On the 7th of September, one of those fell, I verily believe, almost perpendicularly on this place—several trees were blown down, and my house was shaken so as to excite serious alarm. In fact the sky during three weeks, frequently exhibited the characteristics of that of the latitude of the Cape of Good Hope, as described by St. Pierre, in Etudes de la Nature.

"I have found in this neighborhood very good *Manganese* and *martial pyrites*. There is abundanse of both. The Manganese exhibits in its fracture groups of protuberances, intermixed with delicate striae, sometimes laying parallel—and at other times diverging as radii from a center.

"There is a gradual improvement in the vegetable products of our gardens and fields. This country will one day be as beautiful as any part of Italy. At present the culture of cotton presents such a facility to the acquisition of money, that this people scarcely think of any thing but the necessary quantity of corn and pork. I have seen the white clover in as great perfection here as in any other place. We shall, beyond a doubt, drink our own wine here one hundred years hence. The vine of various species grows every where, and in all exposures from the edge of the rivers and branches to the rocks on the ridges.

"I am an idle correspondent; and *idle* only—for I am delighted to see your name addressed to me, if it be only on a newspaper. If I love any thing on earth I love the approbation of the wise, the benevolent and the good.

"We have had intensely cold weather. On the 19th it was 2 above 0. I never before saw it lower than 6 above 0.

"We had a snow on the 18th, of about 6 inches. It yet whitens the hills, and the weather is cold."

LETTER

From General Kosciusko to the Poles.

Brave countrymen!—At the sound of arms, which once more resounds in Poland, Kosciusko flies into the midst of you; it is no longer Barbarians in search of plunder, which advance into our plains; it is no longer those ferocious men who come to divide our fields, and insult our weakness, after having fattened themselves on our misfortunes and our blood. By their valour, by their triumphs, by the thundering eagle which soars before them, you will know the unconquerable legions which have illustrated the four quarters of the globe by their victories; who have, in one campaign, annihilated the united power of two vast empires; and who have, in one week, crumbled into dust a throne raised by an age of successes, the work of Frederick and all his old generals.

Thus has the destiny of Napoleon decreed, who destroys and makes kings, who falls with the rapidity of lightning on his enemies, and who knows how, by the force of his arm, and the conception of his genius, to raise up nations, bowed down under the yoke of a frightful policy.

Polanders, thousands amongst you have followed the first general of Europe, in the defiles of Italy. Your battalions have rallied with the army of the brave—Napoleon comes to you; his eye observes you; he brings into the bosom of Poland those Frenchmen, amongst whom we have found a second country; who have collected the wrecks of us in their camps; who, treating us as brothers, have concealed our misfortunes under their laurels; these generous Frenchmen, in the midst of which Kosciusko has ceased to believe himself proscribed, before whom he has at last been able to raise up with a sentiment of coalition, and perhaps of pride, his vanquished but not dishonored head, and amongst which he has been permitted to entertain the love of his country and the hope of its future liberty.

Dear countrymen, all you who banished from your paternal soil, have remained Polanders in a foreign land, and you, on the contrary, who having become strangers in the bosom of Poland, have remained faithful to your brothers and the country, rise up, it is time, the grand nation is before you; Napoleon regards you and Kosciusko calls you.

See Europe shaken to her ancient foundations, hastening at the voice of genius to re-construct the social edifice, and to immortalise the nineteenth century, by new creations and new titles to glory. See how the yoke of the tyrant of the seas, of the enemy of the repose of Europe, is breaking to pieces on every coast; every where the people rise up sheltered by monarchies constituted by the laws; every where the oppressed nations march towards their independence. Polanders, what is wanting yet to inspire you and render you to yourselves? Without doubt you are the children of those heroes who saved Europe from the yoke of the Musselmen—your hearts shall burn with the fire which filled with esteem and fright even your enemies' conquerors.—Because they have divided you, you should be more united by blood, by language, by misfortune, and by every thing which is most dear and most sacred amongst men.

If Poland has been effaced from the political chart, she exists still entire in the hearts of her children. If abandoned by France, and having only for our support the justice of our cause and our valor, we were able to balance fortune between us and three empires, who united themselves to oppress us; what triumph shall appear doubtful, when the conqueror of the triple alliance has freed your frontiers, when the man of destiny has cast his views on you—do you not feel in his presence your blood quicken in your veins? Do you not now see the shades of so many heroes who have died fighting for you, press around him and implore vengeance? Hear their groans, hear the voice of the country who demands from us its glory and independence.

Polanders, escaped by a miracle from the sword of your assassins, from the chains of your tyrants, I have collected you, I have brought with me the last sighs of a dying country, full of confidence; this day I will make her last wishes rescund amongst you—I go to see that paternal land which my arm has defended, which my blood has reddened, and which I will cover on seeing it with tears and kisses. Unfortunate friends who I have not been able to follow to the tomb, dear and [illegible] patriots, [illegible] under the yoke of our usurper, I have only lived with the hope of avenging you—I return to break your fetters.

Sacred remains of my country, I salute you with an holy enthusiasm. I unite myself to you never to be separated. Worthy of the grand man, whose arm is raised for us. Worthy Polanders who hear my voice, I will aid to raise up my country and to fix her future prosperity on a stable basis; was the name of country no more to my compatriots than a word without meaning, then I would escape from my misfortunes and the common shame, and bury myself under the noble wrecks of Poland.

But no! Days glorious to Poland are about to appear, fortune has not conducted Napoleon and his invincibles, on the borders of the Vistula, to leave there no traces, we are under the Egis of a monarch, who combats difficulties with prodigies, the re-establishment of Poland is an event too glorious for the eternal master of all things not to have reserved it for him.

KOSCIUSKO.