Levying War

Early judicial interpretation of the meaning of treason in terms of levying war was conditioned by the partisan struggles of the early nineteenth century, which involved the treason trials of Aaron Burr and his associates. In *Ex parte Bollman*,[1424] which involved two of Burr's confederates, Chief Justice Marshall, speaking for himself and three other Justices, confined the meaning of levying war to the actual waging of war. "However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offences. The first must be brought into open action by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed. So far has this principle been carried, that . . . it has been determined that the actual enlistment of men to serve against the government does not amount to levying war." Chief Justice Marshall was careful, however, to state that the Court did not mean that no person could be guilty of this crime who had not appeared in arms against the country. "On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assembling of men, for the treasonable purpose, to constitute a levying of war." [1425]

On the basis of these considerations and because no part of the crime charged had been committed in the District of Columbia, the Court held that Bollman and Swartwout could not be tried in the District, and ordered their discharge. Marshall continued by saying that "the crime of treason should not be extended by construction to doubtful cases" and concluded that no conspiracy for overturning the Government and "no enlisting of men to effect it, would be an actual levying of war." [1426]

The Burr Trial.—Not long afterward, the Chief Justice went to Richmond to preside over the trial of Aaron Burr. His ruling [1427] denying a motion to introduce certain collateral evidence bearing on Burr's activities is significant both for rendering the latter's acquittal inevitable and for the qualifications and exceptions made to the *Bollman* decision. In brief, this ruling held that Burr, who had not been present at the assemblage on Blennerhassett's Island, could

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[1424] 8 U.S. (4 Cr.) 75 (1807).
[1425] 8 U.S. at 126.
[1426] 8 U.S. at 127.
[1427] United States v. Burr, 8 U.S. (4 Cr.) 469, Appx. (1807).