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## Articles

### Treason and Terror: A Toxic Brew

B. Mitchell Simpson, III\*

#### INTRODUCTION

Loyalty is the obligation that holds all levels of society together. From families and personal relations, to large and complex states, loyalty promotes cohesion and stability. The classic depiction of loyalty is Socrates' refusal to flee Athens to avoid an unjust death sentence because, as a citizen of Athens, he had agreed to obey its laws and therefore, flight would be disloyal.<sup>1</sup> Betrayal is the opposite of loyalty, and when betrayal is applied to states, it is treason.<sup>2</sup> Betrayal and its frequent companion, violence, have been recurring themes in human affairs and remain so to this day.

States, as well as individuals, have exercised their undoubted right to protect themselves against betrayal by creating the offense of treason. Treason is an ancient offense, having been first

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1. PLATO, *Crito*, in THE WORKS OF PLATO 102–103 (1928).

2. See DAVID PRYCE-JONES, TREASON OF THE HEART: FROM THOMAS PAINE TO KIM PHILBY (2011), for an interesting study of various persons who have been disloyal and may have committed treason. See also ERIC FELTEN, LOYALTY: THE VEXING VIRTUE (2011), for a more general analysis of loyalty and the absence of it.

codified in the Anglo-American legal system in 1352.<sup>3</sup> More recently, it has been strictly defined in the United States Constitution.<sup>4</sup> The basic concept of treason is to punish a betrayer of the larger community, regardless of whether the betrayer be the king or the state. Historically, treason has remained constant from its codification at the height of the Middle Ages to its inclusion in the Constitution, written in 1787, at the height of the Enlightenment. In our jurisprudence, its original purpose was to punish those who would kill or betray the king. Under the United States Constitution, the intention to punish betrayal remains; however, it is limited to just two specific acts: levying war against the United States or adhering to its enemies by giving them aid and comfort.<sup>5</sup>

Since gaining its independence in 1776, the United States on numerous occasions, has invoked treason, as defined in the Constitution, to punish perceived or actual betrayal.<sup>6</sup> The Continental Congress in 1776 realized that independence required treason laws to protect the newly independent states from disloyal citizens. The courts have produced a notable body of case law that has defined, analyzed, and applied the constitutional definition of treason to specific fact patterns. However, most of these cases have gone no further than the lower courts. Notably, it was not until 1945 that the Supreme Court reviewed a treason conviction for the first time.<sup>7</sup>

Historically, the law of treason developed in the context of traditional international conflict, which is conflict between organized states, usually by traditional armed forces. Treason applied to those persons who breached the duty of loyalty owed to their own country, by doing something to help an enemy. Recent examples include Jane Fonda visiting North Vietnam, and John Walker Lindh sojourning in Afghanistan; both of which received

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3. 4 Halsbury's Statutes of England 273. However, a more convenient source is *Cramer v. United States*, 325 U.S. 1, 16 n.22 (1945), in which the text of the entire statute is set forth.

4. U.S. CONST. art. III, § 3, cl. 2.

5. *Id.*

6. Associated Press, *Past Americans Charged With Treason*, FOX NEWS (Dec. 17, 2001), <http://www.foxnews.com/story/2001/12/17/past-americans-charged-with-treason.html>.

7. *Cramer*, 325 U.S. at 1.

much public notoriety as well as accusations of treason.<sup>8</sup> Fonda espoused the North Vietnamese cause, and visited Hanoi while American servicemen (including the future Senator John McCain) were imprisoned in the notorious prison camp the “Hanoi Hilton.”<sup>9</sup> Lindh was associated with the Taliban and was captured in Afghanistan.<sup>10</sup> Although generally unknown to the American public, Adam Gadahn appeared in several al Qaeda videos.<sup>11</sup>

Did these individuals commit treason? Only Gadahn has been formally charged with treason by adhering to the enemy and giving them aid and comfort.<sup>12</sup> Many believe Fonda and Lindh should have been tried for treason.<sup>13</sup> The justifications for refusing to prosecute Fonda and Lindh for treason are complex. For instance, one important factor was that the facts might not support convictions. Another likely reason Fonda was not charged with treason was the unruly domestic divisiveness caused by the Vietnam War. Lindh was charged with numerous other offenses and ultimately pled guilty to only two counts.<sup>14</sup> Lindh is currently serving a twenty-year sentence.<sup>15</sup>

However, today there is a new form of conflict mostly waged by small groups of non-state actors working in the shadows of

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8. Colby Itkowitz, *How Jane Fonda's 1972 trip to North Vietnam earned her the nickname 'Hanoi Jane,'* THE WASH. POST (Sept. 18 2017), [https://www.washingtonpost.com/news/retropolis/wp/2017/09/18/how-jane-fondas-1972-trip-to-north-vietnam-earned-her-the-nickname-hanoi-jane/?utm\\_term=.dfd8f13a16fc](https://www.washingtonpost.com/news/retropolis/wp/2017/09/18/how-jane-fondas-1972-trip-to-north-vietnam-earned-her-the-nickname-hanoi-jane/?utm_term=.dfd8f13a16fc); Paul Theroux, *Pardon the American Taliban*, N.Y. TIMES (Oct. 22, 2016), <https://www.nytimes.com/2016/10/23/opinion/sunday/pardon-the-american-taliban.html?mcubz=0>.

9. HENRY MARK HOLZER & ERIKA HOLZER, AID AND COMFORT: JANE FONDA IN NORTH VIETNAM 1 (2002).

10. Theroux, *supra* note 8.

11. *Adam Gadahn Fast Facts*, CNN (Aug. 17, 2016), <http://www.cnn.com/2013/03/23/us/adam-gadahn-fast-facts/index.html>.

12. First Superseding Indictment, United States v. Gadahn, SA CR 05-254(A) (C.D. Cal. Oct. 11, 2006), available at [http://www.usdoj.gov/opa/documents/adam\\_indictment.pdf](http://www.usdoj.gov/opa/documents/adam_indictment.pdf) [hereinafter Gadahn Indictment].

13. Itkowitz, *supra* note 8; Theroux, *supra* note 8. For the purposes of this article, the Fonda and Lindh cases are illustrative of the passions they have aroused.

14. Neil A. Lewis, *American Who Joined Taliban Pleads Guilty*, N.Y. TIMES (Jul. 15, 2002), <http://www.nytimes.com/2002/07/15/national/american-who-joined-taliban-pleads-guilty.html?mcubz=0>.

15. See *infra* note 304 and accompanying text.

modern society, both at home and abroad.<sup>16</sup> The American response has been dubbed “the war against terror” both on foreign soil and within the United States. Small groups of individuals attacked the United States abroad by bombing the embassy in Kenya<sup>17</sup> and the USS Cole in Yemen,<sup>18</sup> and also killed almost three-thousand people in attacks on New York City and the Pentagon on September 11, 2001.<sup>19</sup>

The continuing threat to the United States from such groups is real and dangerous. Public security is rightly a major concern in contemporary America. The possibility still remains that an attack could occur in the United States, such as a suicide attack by a small group of individuals. There are many statutes in effect that provide important legal weapons in the war against terrorism.<sup>20</sup> These statutes provide criminal penalties for a variety of acts that may be committed by anyone, regardless of whether that person owes a duty of loyalty to the United States.<sup>21</sup>

However, the treason statute is unique.<sup>22</sup> It only applies to persons who owe a duty of loyalty to the United States, and thus the treason statute applies to the so-called “homegrown terrorists.”<sup>23</sup> The statute defines treason as a breach of loyalty; only criminalizing levying war against the United States or

16. Sam Finegold & Gina Kim, *Treason in the War on Terror*, HARVARD POLITICAL REVIEW (Dec. 7, 2011, 10:02 PM), <http://harvardpolitics.com/covers/constitution/treason-in-the-war-on-terror/>.

17. *Rescuers search for life in rubble of Nairobi bomb attack*, CNN (Aug. 8, 1998, 2:05 AM), <http://www.cnn.com/WORLD/africa/9808/07/africa.explosions.04/>.

18. Raphael Perl & Ronald O'Rourke, *Terrorist Attack on USS Cole: Background and Issues for Congress*, NAVAL HISTORY AND HERITAGE COMMAND (Jan. 30, 2001), <https://www.history.navy.mil/research/library/online-reading-room/title-list-alphabetically/t/terrorist-attack-on-uss-cole-background-and-issues-for-congress.html>. On October 12, 2000, suicide terrorists attacked the USS Cole with a small boat of explosives in Yemen. *Id.*

19. Peter L. Bergen, *September 11 attacks*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/September-11-attacks> (last visited Sept. 9, 2017).

20. In addition to the Treason statute (18 U.S.C. § 2381), there are two broad statutes, Use of Weapons of Mass Destruction (18 U.S.C. § 2332a), and Acts of Terrorism Transcending National Boundaries (18 U.S.C. § 2332b), which cover a wide variety of proscribed acts. 18 U.S.C.A. §§ 2381, 2332a, 2332b (Westlaw through Pub. L. No. 115-51).

21. *Id.* § 2332a (Westlaw); § 2332b (Westlaw).

22. *Id.* § 2381 (Westlaw).

23. *See id.*

adhering to its enemies by rendering them aid and comfort.<sup>24</sup> The Constitution, and the treason statute under it, have provided the union with a powerful weapon to protect itself and to punish wrongdoers.

In the twenty-first century, treason is an appropriate legal weapon in the war against domestic terrorism. For example, a small group of American citizens or residents could plan and execute an attack against one or more soft targets, the effects of which could be significant, even if they are not as devastating as the attacks on September 11th. Depending on the attackers' intent, they could be tried for treason.

In an attempt to provide a greater insight as to why a treason charge would be appropriate in these new situations, Part I of this Article will explain why treason is the greatest of all crimes, and then examine the law of treason as it has developed and been applied under the Constitution. Part II of this Article will discuss the treason clause in the Constitution and its origins. Part III will discuss the early American experience with treason trials under the Constitution, mostly involving questions of levying war against the United States. Part IV examines the second prong of treason—adhering to the enemy by giving aid and comfort—and how courts have dealt with this in the twentieth century. Finally, Part V will conclude that, under the appropriate circumstances, acts of terror committed against the United States by citizens or non-citizen residents constitute treason as defined in the Constitution.

#### I. TREASON: THE GREATEST OF ALL CRIMES

Treason is a crime of betrayal on the grandest scale possible, worse than any other major felony, such as murder or arson. It has no individual victims because it is a crime against all members of the state. Treason “imports a betraying, treachery, or breach of faith.”<sup>25</sup> It requires both an act and an intent, which may be inferred from the act itself. Our constitutional definition of treason is directly derived from its first codification in 1352 in

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<sup>24.</sup> *See id.*

<sup>25.</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 75 (facsimile of the first edition of 1765–1769, London & Chicago: The University of Chicago Press, 1979) (1769).

the statute of 25 Edward III.<sup>26</sup> At that time, under the feudal order, there was no state in the modern sense. This medieval statute only proscribed acts that constituted a breach of faith (loyalty) by a lord or other vassal against the king because the king was at the apex of the feudal order.<sup>27</sup> These acts included both levying war against the king and compassing his death. As society developed and political currents shifted, so too did the concept of treason as a breach of faith, not of the king, but of an impersonal or abstract conception of the state.<sup>28</sup> The legal rationale of the Roundheads to try King Charles I for treason in 1649 was based on this shift in the concept of treason.

The original hierarchical feudal society was gradually replaced by a complex, diversified mercantile society, in which states were based on national lines, although kings were usually the rulers. When the American colonies achieved their independence from the British Crown in 1776, they needed a unifying theory to replace their former allegiance to King George III. Fortunately, the seventeenth and eighteenth centuries articulated such a theory in the form of a social contract. In 1680, Robert Filmer claimed that political sovereignty originated with God and was transmitted by primogeniture through succeeding generations. The Glorious Revolution of 1688 put an end to such notions; yet, there was still no systematic explanation as to why humans formed civil society until 1690 when John Locke published his *TWO TREATISES OF GOVERNMENT*.<sup>29</sup> Essentially, Locke held that humans voluntarily consented with others to “make one body politic,” and by doing so, put themselves “under an obligation to every one of that society to submit to the determination of the majority.”<sup>30</sup> Locke’s concept of a social contract as the foundation of civil society was in tune with the prevailing political notions then prevalent in England. His ideas

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26. 4 Halsbury’s Statutes of England 273.

27. *See id.*

28. D. ALAN ORR, *TREASON AND THE STATE: LAW, POLITICS AND IDEOLOGY IN THE ENGLISH CIVIL WAR* (2002). The complex politics of the English Civil War aside, Orr’s explanation of the underlying and shifting ideological and legal concepts is both comprehensive and masterful. *See id.*

29. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Ernest Rhys ed., J.M. Dent & Sons, Ltd. last rpt. 1943) (1690).

30. *Id.* at 165.

were also extremely influential in the American Revolution and later in the Constitutional Convention of 1787.<sup>31</sup>

The United States Constitution expresses the concept of a social contract in its Preamble with the opening phrase, “We the People . . . .”<sup>32</sup> This phrase unequivocally states that the people, that is, American society at large, created the federal government for certain specified purposes. One purpose is to establish justice; that is, to secure the rights of the people by a judicial system to settle disputes. These rights include personal rights and the right to hold property.<sup>33</sup> In this way, the Constitution is an expression of the abstract social concept as reduced to written form for the sole purpose of establishing an organic, fundamental law for the governance of the United States. Today, this has transcended into a modern state or body politic wholly divorced from a ruling monarch and rests on the consent of the governed. For this reason, a betrayal of the United States by an act of treason is tantamount to a betrayal of all the people, because it threatens

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31. The concept of humans living in a state of nature and then coming together to form a civil society was not original for Locke. He was indebted to RICHARD HOOKER’S *LAWS OF ECCLESIASTICAL POLITY* (1594) for the notions of a state of nature and the formation of civil society. Locke was by no means the only person who wrote about the social contract *in* the seventeenth and eighteenth centuries. Thomas Hobbes, Jean Jacques Rousseau, Samuel von Pufendorf and many others contributed variations on this theme. The Founding Fathers in 1787 were well-educated men who were keenly aware of those various intellectual currents. Of the fifty-five delegates to the 1787 Constitutional Convention, twenty-nine held undergraduate degrees, twelve had done some form of postgraduate study, six had completed their law studies at London’s Inns of Court and three held degrees from Oxford, St. Andrews and Glasgow Universities. RICHARD BEEMAN, *PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION* 65–66 (2009). TREVOR COLBOURN, *THE LAMP OF EXPERIENCE: WHIG HISTORY AND THE INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION* (Liberty Fund 1998) (1965) has catalogued the contents of their libraries. For a discussion of how rationalism and the Enlightenment relate to natural law see HEINRICH A. ROMMEN, *THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY* 67–96 (Thomas R. Hanley trans., Liberty Fund 1998) (1936).

32. U.S. CONST. pmbl.

33. The entire Preamble reads, “WE THE PEOPLE of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.” *Id.* See also NICHOLAS PHILLIPSON, *ADAM SMITH: AN ENLIGHTENED LIFE* 110 (2010), for Adam Smith’s unpublished Edinburgh lectures on jurisprudence.



their security. James Wilson, the presumed author of the Constitution's treason clause, described treason in a law lecture in 1790 as "unquestionably [the] crime most dangerous to the society, and most repugnant to the first principles of the social compact."<sup>34</sup> Justice Bradley succinctly said, "[n]o crime is greater than treason."<sup>35</sup> Simply put, "[a] traitor's offense is that he conspires against the liberty of his fellow countrymen to choose their way of life."<sup>36</sup>

To constitute treason under the Constitution, an act does not need to be performed in furtherance of the interests of another state.<sup>37</sup> Rather, all that is required is that the act amount to a levy of war against the United States or an adherence to its enemies by giving them aid and comfort.<sup>38</sup> The Constitution focuses on the act itself, and is not concerned with whether or not the act is designed to further the interests of a foreign state.<sup>39</sup> The first treason cases under the Constitution did not involve foreign states, but they did involve armed resistance to the authority of the federal government, which was construed as levying war against the United States.<sup>40</sup> Prosecutions for treason, therefore, are a matter of justified self-preservation for the United States, that is the body politic or the state identified by the phrase

34. James Wilson (1742–1798), a member of the Constitutional Convention of 1787, made this statement in his law lecture "Of Crimes Against the Community." 2 JAMES WILSON, *Of Crimes, Immediately Against the Community*, in COLLECTED WORKS OF JAMES WILSON 1149, 1149 (Kermit L. Hall & Mark David Hall eds., Liberty Fund, Inc. 2007). Wilson was one of six men who signed both the Declaration of Independence and the Constitution. President Washington appointed him to the first United States Supreme Court. James Willard Hurst strongly suggests that Wilson, as a member of the Committee of Detail, was the most likely the author of the treason clause. See Willard Hurst, *Treason in the United States: The Constitution*, 58 HARV. L. REV. 395, 404–05 (1945).

35. *Hanauer v. Doane*, 79 U.S. 342, 347 (1870).

36. REBECCA WEST, *THE NEW MEANING OF TREASON* 370 (1964).

37. See Captain Jabez W. Loane, IV, *Treason and Aiding the Enemy*, 30 MIL. L. REV. 43, 57–58 (1965).

38. The U.S. Constitution defines treason as: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." U.S. CONST. art. III, § 3, cl. 1.

39. See Loane, *supra* note 37, at 58.

40. See *United States v. Vigol*, 2 U.S. (2 Dall.) 346 (1795); *United States v. Fries*, 3 U.S. (3 Dall.) 515 (1799).

“We the People” and created by the Constitution.<sup>41</sup> For these reasons, acts involving levying war or adhering to national enemies, which rise to the level of treason under the Constitution, properly remain crimes punishable as treason, even in the twenty-first century, although contemporary circumstances were hardly contemplated by the Founding Fathers.

In World War II, the enemies of the United States were other states and were clearly identified by formal declarations of war. Germany and Japan levied war against the United States with forces armed and arrayed in a military manner. During the Cold War, the identified enemy was another state, the Soviet Union, although there was no formal declaration of war, or even a direct military conflict. There were numerous indictments of treason during World War II, but no one was indicted for treason as a result of aiding the Soviet Union, not even the Rosenbergs who spied for the Russians during wartime, even though the court referred to them as traitors. They were tried, convicted, and executed under the Espionage Act.<sup>42</sup>

So far in the twenty-first century conflict has been markedly different. The so-called “war against terror” has been waged against the United States not by a state but by non-state actors, whose forces are seldom armed and arrayed in a traditional military manner. The “enemy” has been small groups of men, women and even children, who have detonated bombs in crowded areas abroad or have attempted or actually committed other acts of violence at home.<sup>43</sup> Indeed, the “enemy” may be anyone,

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41. See U.S. CONST. art. VI, cl. 2.

42. See *United States v. Rosenberg*, 109 F. Supp. 108, 110 (S.D.N.Y.), *aff'd*, 204 F.2d 688 (2d Cir. 1953). On a motion for reduced death sentences, the defendants, Julius and Ethel Rosenberg, sought judicial review of their convictions. *Id.* The Rosenbergs were dedicated communist spies who, during World War II, turned over documents and other information relating to nuclear weapons to the Soviet Union. See *id.* The trial court referred obliquely to the social contract, “[t]he murderer kills only his victim while the traitor violates all the members of his society, all the members of the group to which he owes his allegiance.” *Id.* Prior to this motion, the Rosenbergs’ convictions were consistently upheld. See *United States v. Rosenberg*, 195 F.2d 583 (2d Cir.), *cert. denied*, 344 U.S. 838, and *rehearing denied*, 344 U.S. 889 (1952). See also *Cramer v. United States*, 325 U.S. 1 (1945), which was the leading treason case during World War II.

43. See, e.g., Bryan Denson, *FBI thwarts terrorist bombing attempt at Portland holiday tree lighting, authorities say*, OREGONLIVE (Nov. 29, 2010),

including residents and even citizens of the United States. At home the “enemy” frequently has remained quiet, and has been covert until some form of action has been taken, thus making difficult their identification before they have acted. These changed circumstances have led to extensive legislation that applies to acts which may be motivated by a treasonous intent, but do not fall within the Constitutional definition of treason.<sup>44</sup>

Do these changed circumstances and the enactment of new legislation mean that treason is now an outmoded legal concept, and that other statutes have superseded treason as an appropriate legal weapon?<sup>45</sup> On the contrary, if a person owing allegiance to the United States because he or she is a citizen or a non-citizen resident commits an act falling within the constitutional definition of treason, that person has committed treason, regardless of whether or not other charges could be preferred. The reason is clear: that person has breached the underlying social contract. Whether or not the Attorney General seeks an indictment for treason is within his or her discretion, and will depend on a plethora of other factors, including, but not limited to political if not electoral considerations. But the fact remains that treason, as defined in the Constitution, remains a violation of the social contract, and the perpetrator should be charged with treason, along with any other appropriate charges.<sup>46</sup>

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1:07 PM), [http://www.oregonlive.com/portland/index.ssf/2010/11/fbi\\_thwarts\\_terrorist\\_bombing.html](http://www.oregonlive.com/portland/index.ssf/2010/11/fbi_thwarts_terrorist_bombing.html).

44. Chapter 115 of Title 18 of the United States Code not only contains the treason statute (§ 2381), but also misprision of treason (§ 2382), rebellion or insurrection (§ 2383), seditious conspiracy (§ 2384) and advocating overthrow of government (§ 2385). 18 U.S.C.A. §§ 2381–2385 (Westlaw through Pub. L. No. 115-51). Additionally, 18 U.S.C. § 2332a applies to the use of weapons of mass destruction, specifically, against a national of the United States, or within the United States, and § 2332b applies to acts of terrorism transcending national boundaries. *Id.* § 2332a–2332b. The defendants in the World Trade Center bombing in 1993 were convicted of seditious conspiracy, a violation of § 2384. *Id.* § 2384. The convictions were affirmed in *United States v. Rahman*, 189 F.3d 88, 160 (2d Cir. 1999).

45. See, e.g., George P. Fletcher, *Ambivalence About Treason*, 82 N.C. L. REV. 1611 (2004) (arguing that treason is indeed an outmoded concept). See Kristen E. Eichensehr, *Treason in the Age of Terrorism: An Explanation and Evaluation of Treason's Return in Democratic States*, 42 VAND. J. TRANSNAT'L L. 1443 (2009), for a capable and compelling refutation.

46. See U.S. CONST. art. III, § 3, cl. 1.

## II. THE TREASON CLAUSE AND ITS ORIGINS

It is no accident that treason is the only crime defined in the Constitution, and that it is strictly defined.<sup>47</sup> The Founders were aware of the English experience, and they had two objectives in mind. First, they defined treason strictly by limiting it to only two specific acts of betrayal: levying war against the United States and adhering to its enemies by giving them aid and comfort.<sup>48</sup> Secondly, by strictly defining treason in the Constitution, they prevented Congress and the courts from expanding its definition either by legislation or by judicial interpretation.<sup>49</sup>

The Continental Congress was concerned with treason even before independence was declared in 1776. In June of that year, a month before American Independence was declared, the thirteen American colonies were at least nominally part of the British Empire, and George III was still their king. However, in that month the Continental Congress, in anticipation of independence, recognized that popular support would be necessary to the long-term survival of the independent colonies. Congress was keenly aware that many residents opposed independence, and that these people would remain loyal to the Crown. These loyalists could pose a threat to American independence.

Congress appointed a committee to look into assuring the colonists' allegiance to the soon-to-be independent colonies.<sup>50</sup> This

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47. U.S. CONST. art. III, § 3, cl. 1 is very specific: "Treason against the United States shall consist only in levying War against them, or in adhering to their enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." *Id.* In § 3, cl. 2, the Founders authorized Congress to prescribe the punishment for treason, but specifically limited the punishment of corruption of blood to the life of the defendant. Also, U.S. CONST. art. I, § 9, cl. 3 deprives Congress of the power to enact a bill of attainder. Both of these constitutional provisions are significant and deliberate departures from the English law. Later in 1791, U.S. CONST. amend. VIII forbid "cruel and unusual punishment," presumably a rejection of the English punishment of hanging, drawing, and quartering traitors.

48. *See* U.S. CONST. art. III, § 3, cl. 1.

49. *See id.*

50. *See* James Willard Hurst, *Treason in the United States: I. Treason Down to the Constitution*, 58 HARV. L. REV. 226, 247 (1944). This article is the first of a series of three articles that comprise an authoritative, if not magisterial, review and analysis of the law of treason in the United States from the earliest settlements to 1944. They were later collected and

committee included James Wilson, John Adams, Thomas Jefferson, John Rutledge, and Robert Livingston, who reported back to Congress even before the Declaration of Independence was signed. Their report acknowledged the imminent creation of new political entities and urged the states to enact laws providing for the punishment of treason, that is disloyalty to the soon to be independent states. The Continental Congress adopted it on June 24, 1776.

The resolution adopting the report echoed the Statute of 25 Edward III, which was well known to the committee, and contained the traditional elements of treason.<sup>51</sup> First, it recited the reciprocal duties of individuals and then stated, “all persons abiding within any of the United Colonies, and deriving protection from the laws of the same, owe allegiance to the said laws.”<sup>52</sup> It continued by specifying the two major acts of treason later embodied in the Constitution: “all persons, . . . owing allegiance to any of the United Colonies, . . . who shall levy war against” any of them “or be adherent to the king of Great Britain, or others the enemies of the said colonies, . . . are guilty of treason against such colony.”<sup>53</sup>

Six months after independence, Pennsylvania enacted a comprehensive treason statute on February 11, 1777.<sup>54</sup> This statute is important because it illustrates the then prevailing concept of treason, most of which was deliberately omitted from the Constitutional definition drafted in 1787.<sup>55</sup> The statute minces no words. The preamble recognizes the Tory threat to the newly independent state of Pennsylvania and recites the necessity “for the safety of every state to prevent . . . treasonable and dangerous practices” by “internal enemies.”<sup>56</sup> The purpose of the statute was deterrence of “all persons from the perpetration of

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published as *THE LAW OF TREASON IN THE UNITED STATES* in 1971 by the Greenwood Publishing Company.

51. Treason Act, 1351, 25 Edw. 3, c. 2 (Eng.).

52. 5 *Journals of the Continental Congress, 1774–1789*, at 475 (Worthington Chauncey Ford ed., 1906) (1776).

53. *Id.*

54. Law of Feb. 11, 1777, ch. DCCXL, 1777 Penn. Laws 45 (repealed 1860).

55. U.S. CONST. art. III, § 3.

56. Law of Feb. 11, 1777, ch. DCCXL, § I, 1777 Penn. Laws 45, 45 (repealed 1860).

such horrid and dangerous crimes.”<sup>57</sup>

Its scope was broad and inclusive. It applied to everyone “now inhabiting, residing or sojourning” in Pennsylvania, and to everyone in the future who voluntarily comes into the state to “inhabit, reside or sojourn.”<sup>58</sup> The statute with the concept that it was the state’s duty to provide protection to persons within the state, whether or not they were citizens, and the reciprocal duty of those persons to refrain from betraying the state by committing certain specified acts, was firmly grounded in what was generally understood to be the law of treason.<sup>59</sup>

The Pennsylvania statute proscribed six categories of overt acts: (1) accepting “commissions from the King of Great Britain,” or other enemies; (2) “levy[ing] war against the state or government”; (3) providing “aid or assistance” to “any enemies at open war against this state, or the United States of America”; (4) “carrying on a traitorous correspondence with them”; (5) forming a “conspiracy for betraying this state or the United States of America”; and (6) “giv[ing] or send[ing] any intelligence to the enemies of this state for that purpose.”<sup>60</sup>

The statute included a procedural safeguard by specifically requiring “two sufficient witnesses” for a conviction, but it was silent as to whether these two witnesses must testify to the same overt act.<sup>61</sup> Conviction carried with it the death penalty and a forfeiture of the traitor’s estate to the commonwealth. However, the trial judges could modify the forfeiture to provide for the support of the traitor’s wife and children.<sup>62</sup>

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57. *Id.*

58. *Id.* § II.

59. At the time of the Constitutional Convention a widely read and leading authority on criminal law was Sir Matthew Hale’s *History of the Pleas of the Crown*. MATTHEW HALE, *HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN* 59–100 (London, In the Savory: Printed by E. and R. Nutt, and R. Gosling for F. Gyles, T. Woodward, and C. Davis 1736). James Wilson and the other lawyers in the convention as well as many educated persons were familiar with it and by inference with the discussion of treason. I am grateful to the staff of the Redwood Library and Athenaeum in Newport for access to the 1736 edition of this work, which is part of its original collection.

60. Law of Feb. 11, 1777, ch. DCCXL, § III, 1777 Penn. Laws 45, 45–46 (repealed 1860).

61. *Id.* at 46.

62. *Id.*

It was not long before the Pennsylvania treason statute was enforced with a vengeance. The British had occupied Philadelphia in late 1777, a few months after the statute had been enacted, and remained there until June 1778.<sup>63</sup> After the British left Philadelphia, it was time to confront all those persons who were even remotely suspected of cooperating with the British occupiers. Quakers were particularly suspect because of their refusal on religious grounds to bear arms for either side. In addition, a radical party was in control of the state, and brought numerous treason charges against their real or supposed enemies with a great deal of relish.

James Wilson<sup>64</sup> defended twenty-three men who were charged with treason, twenty-one of whom were acquitted.<sup>65</sup> Only Abraham Carlisle<sup>66</sup> and John Roberts<sup>67</sup> were convicted and soon afterwards were hanged.<sup>68</sup>

Carlisle was an elderly and prosperous carpenter. He was also a Quaker. During the British occupation he had served in some capacity at a gate to the city. At the very least, he had been a civilian employee of the British. However, he was charged with taking a commission from the British. Despite Wilson's best efforts in pointing out that no commission was ever proven, Carlisle was nevertheless convicted of taking a commission from the British.

John Roberts, like Carlisle, was also a Quaker. He was a miller in Lower Merion and father of nine children. The state's witnesses generally testified to Roberts' sympathies for the British

63. *Id.* at 47. Note that this was approximately the same time that General Washington and the Continental Army wintered at Valley Forge.

64. Robert Aitken, *James Wilson: A Lost American Founder*, 29 LITIG. 61, 61–62, 64 (Summer 2003). Wilson was born in Scotland and emigrated to Pennsylvania in 1763. He read law under John Dickinson and later became an eminent Philadelphia lawyer. By this time, he was well known in Philadelphia, not only as an extremely competent lawyer, but also as having little sympathy with the radical party that controlled Pennsylvania, and particularly Philadelphia. *Id.*

65. *Id.* at 64.

66. *Respublica v. Abraham Carlisle*, 1 U.S. (1 Dall.) 35 (1778).

67. *Respublica v. John Roberts*, 1 U.S. (1 Dall.) 39 (1778).

68. The account of the Carlisle and Roberts trials is based on both the reported cases and CHARLES PAGE SMITH, *JAMES WILSON: FOUNDING FATHER, 1742–1798*, at 117–122 (1956), a good biography with an excellent account of the Philadelphia treason trials of 1778.

and his oral statements to that effect. The state sought to introduce Roberts' "confession." Wilson strenuously objected on grounds that a Pennsylvania statute specifically forbade the use of a confession as evidence in such matters. He was overruled, and Roberts was convicted. Death by hanging and forfeiture of his property were the penalties.

The judges and the juries at the trials of Carlisle and Roberts performed their respective duties under the law. Remarkably, both the judges and the jurors pleaded for clemency for both men in petitions to the Supreme Executive Council of Pennsylvania, which alone had the power to commute the sentences.<sup>69</sup> More than 1,500 other people in Philadelphia and its environs signed numerous other petitions for clemency.<sup>70</sup> The blood lust of a significant portion of the populace could only be satisfied by hanging Carlisle and Roberts. Presumably, political expediency explains the denial of these petitions. This realization may also explain why later juries acquitted all remaining defendants.<sup>71</sup>

The Carlisle and Roberts trials are no longer remembered. But what must have been a searing experience made a lasting impression on James Wilson. Nine years later, in 1787, he had the opportunity as a member of the Constitutional Convention to influence the definition of treason, the only crime set forth in the Constitution.<sup>72</sup> He was well aware of the extraordinary passions that could be aroused by just the suspicion of treason; he had seen what happened with the introduction of Robert's out of court confession; he knew the breadth of the Pennsylvania statute, and the imprecision of its language. Even so, there would always be threats from one source or another, and citizens and residents could be tempted to betray the country. The question was how much restraint was required to satisfy the justifiable need for

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69. *Id.* at 122.

70. 7 SAMUEL HAZARD, PENNSYLVANIA ARCHIVES, 26–37 (1853).

71. See Carlton F.W. Larson, *The Revolutionary American Jury: A Case Study of the 1778–1779 Philadelphia Treason Trials*, 61 SMU L. REV. 1441, 1493, 1496–97 (2008). The juries were faced with a cruel dilemma. Under the law, they could either acquit or convict; there was no lesser offense. If they convicted, a pardon was not likely as the Carlisle and Roberts cases showed. This may be one explanation for the remaining acquittals.

72. Wilson is widely believed to be the author of this provision. See Hurst, *supra* note 34, at 404.



security. The events in Philadelphia, in the autumn of 1778, led Wilson to his views on the law of treason, which were later embodied in the Constitution, and which he explained in his law lectures.

In his famous law lectures of 1790, James Wilson provided an early explanation of why treason was strictly defined in the Constitution: “Treason against the United States, shall consist *only* in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.”<sup>73</sup> In addition to the strict definition of treason, the Constitution includes the procedural safeguards of requiring two witnesses to the same overt act and excluding out of court confessions.<sup>74</sup> Wilson and other members of the convention were acutely aware of the English experience with the use and abuse of treason. For example, he noted that in the reign of Henry VIII the “malignant spirit of inventing treasons revived” and produced the absurd result that the king’s physicians refused to inform their patient that his condition was terminal, lest they be charged with treason for predicting the king’s death.<sup>75</sup> By defining treason in the Constitution, both Congress and the courts were precluded from “inventing” new treasons.

In these law lectures, Wilson drew on the experience of several centuries of English history and established two criteria for the law of treason: it should be “determinate” and it should be “stable.”<sup>76</sup> These criteria were necessary to avoid the abusive use of treason that had occurred in England, and which were well known to the drafters of the Constitution. The prime example is the treason trial of Sir Walter Raleigh in 1603, which was based on insufficient evidence at best. The real motivation behind the trial was political intrigue at the court of James I.<sup>77</sup>

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73. U.S. CONST. art. III, § 3, cl. 1 (emphasis added).

74. *Id.*

75. WILSON, *supra* note 34, at 1151.

76. *Id.* at 1149. The lectures were given at the College of Philadelphia (later the University of Pennsylvania) to a distinguished audience, which included the President, Mrs. Washington and Vice-President John Adams, among other luminaries. Larson, *supra* note 71, at 1442. The University of Pennsylvania School of Law traces its origin to these lectures and claims Wilson as its founder.

77. See CATHERINE DRINKER BOWEN, *THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE, 1552–1634*, at 190–217 (Little, Brown & Co. 1990) (1957), for a scholarly, but exceptionally well-written account of the

The constitutional definition of treason is determinate because it clearly specifies that it “shall consist only in levying War” or “in adhering to their Enemies” and nothing else.<sup>78</sup> It is also stable because it is defined in the Constitution, and for that reason Congress lacks the power to define it. As Wilson explained, the citizens are “secured effectually from even legislative tyranny.”<sup>79</sup> Even though the Constitution prevents Congress from expanding the definition of treason by labeling other acts as treason, Congress may decide that other acts that could have been reasonably considered treasonous are felonies, and provide severe penalties for committing them.<sup>80</sup>

A strict definition of treason is not a modern idea. It was embodied in the treason statute of 1352, generally known as the Statute of 25 Edward III.<sup>81</sup> This statute was remedial.<sup>82</sup> No longer could acts which otherwise were legitimate political dissent be treason. It clearly stated what acts constituted treason in the context of a medieval society.<sup>83</sup> Only those acts specifically enumerated in the statute were treasonous.<sup>84</sup> Even though it was enacted under conditions very different from those found in succeeding generations, this statute is the generally accepted bedrock of the law of treason. Its basic concept of enforcing loyalty to the king has been transferred easily to the American republic. Indeed, the phrase “levying war” in the Constitution was taken directly from this statute.<sup>85</sup>

After defining specific acts of treason, the statute provided

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trial.

78. U.S. CONST. art III, § 3, cl.1.

79. WILSON, *supra* note 34, at 1152.

80. *See* Cramer v. United States, 325 U.S. 1, 45 (1945).

81. *See id.* at 16 & n.22. The statute is fundamental to the English and later American law of treason. In the seventeenth century, Sir Edward Coke started his discussion of treason in the *Third Part of the Institutes*. 2 SIR EDWARD COKE, *The Third Part of the Institutes: Cap. I. Of High Treason, reprinted in THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE* 952 (Steve Sheppard ed., Liberty Fund, Inc. 2003). In the twentieth century, Sir William Holdsworth discussed it and its application in *A History of English Law*. 3 SIR WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 287–293 (Methuen & Co. Ltd. 3d ed. 1923).

82. HOLDSWORTH, *supra* note 81, at 287.

83. *Id.*

84. *Id.* at 291.

85. U.S. CONST. art III, §3, cl. 1.

that if a fact pattern of presumed treason arises, the judge hearing the matter “shall not go to judgment in such cases; but shall tarry” until the king or parliament determines whether or not it should be considered treason or another felony.<sup>86</sup> This provision was an early attempt at strict construction of the statute so as to limit the number of acts that would be treasonous. It did not succeed. English law is replete with examples of constructive treasons, which expanded the scope of the offense significantly by judicial decision.<sup>87</sup> The Constitutional definition four and a half centuries later is a more recent and a more successful limitation.<sup>88</sup> Unlike the Statute of 25 Edward III, the Constitution also includes the procedural safeguards of two witnesses to the same overt act, and excludes out of court confessions, thus making prosecution of treason more difficult than prosecution for other criminal acts.<sup>89</sup>

The Statute of 25 Edward III was based on the notion that treason is a betrayal of the duty of loyalty a person owes to his sovereign king.<sup>90</sup> Historically, the sovereign was the king, but in republics, the sovereign is the political entity of a country. Clearly, citizens may commit treason against their sovereign, whoever or whatever it may be. There is a reciprocal relationship between the sovereign who provides protection to the citizen, and to the non-citizen resident alike, in exchange for a degree of loyalty, or at least the absence of betrayal in the form of outright rebellion or subversion. For this reason, Wilson concludes that an alien or a non-citizen may commit treason in the country in which he resides, as well as citizens of that country.<sup>91</sup>

In explaining “levying war” Wilson warms to his subject by describing it as persons “arrayed in a warlike manner,” and specifying an assembly “in great numbers, armed with offensive weapons, or weapons of war, if they march thus armed in a body” with commanders or officers, and “with banners displayed, or with

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86. WILSON, *supra* note 34, at 1150.

87. 8 SIR WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW*, 307–322 (Methuen & Co. Ltd. 1925).

88. U.S. CONST. art III, § 3, cl. 1.

89. *See id.*

90. HOLDSWORTH, *supra* note 81, at 287.

91. WILSON, *supra* note 34, at 1153. The point appears to be well settled. *See Carlisle v. United States*, 83 U.S. (16 Wall.) 147, 154 (1872); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 97 (1820).

drums or trumpets.”<sup>92</sup> The important point is that the assembly of persons must be organized for war, not that war must be actually waged. Wilson describes levying war in the manner of the eighteenth century: “arrayed in a warlike manner.”<sup>93</sup> However, he only alluded to the necessity of a treasonous intent of the principals, which by definition, and later court decisions, is required to levy war against the United States.

Unfortunately, Wilson devotes scant attention to the other prong of treason—adhering to the enemy. He explains this phrase with the constitutional words “giving them aid and comfort” which apparently ends the discussion as far as he is concerned.<sup>94</sup> However, he does provide a few classic examples, such as giving intelligence, sending provisions and selling arms “to enemies of the United States.”<sup>95</sup> All of these examples involve providing some form of aid or comfort to an enemy and thus they follow the constitutional definition.<sup>96</sup> His analysis is spotty, presumably because he considered the means of providing “aid and comfort” to be self-explanatory.<sup>97</sup>

Wilson’s analysis identifies who may commit treason and explains the meaning of the phrases “levying war” and “adhering to enemies.”<sup>98</sup> Anyone who has enjoyed the protection of the United States can commit treason because there are reciprocal duties of the nation to protect its citizens and lawful residents, and of those same people, to refrain from levying war against the United States or adhering to her enemies.<sup>99</sup>

Wilson’s description of treason is simple and by today’s standards it could be called simplistic. But, his lecture was not intended to be a detailed analysis of treason. Nevertheless, it is accurate as far as it goes, and in that sense, he succeeded admirably. However, any chance to apply Wilson’s analysis would have to wait for later judicial decisions in specific instances.

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92. WILSON, *supra* note 34, at 1153–54.

93. *Id.* at 1153.

94. *Id.* at 1155.

95. *Id.*

96. WILSON, *supra* note 34, at 1155.

97. *Id.*

98. *Id.* at 1153.

99. *Id.*; see *Carlisle v. United States*, 83 U.S. (16 Wall.) 147, 154 (1872); see *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 97 (1820).

Early decisions were presented with the factual question of what precisely constitutes “levying war.” Later in the twentieth century, courts were concerned with what is required to render “aid and comfort” to an enemy. Regardless of the factual questions of the case, all treason cases were concerned with intent one way or the other, because if there was no treasonous intent, there was no treason despite the consequences of a particular act.<sup>100</sup> In 1795, the new federal government was faced with an insurrection. Was it treason?

### III. THE FIRST CHALLENGES: LEVYING WAR

The first treason cases under the new Constitution did not involve betrayal to foreign powers. Instead, they involved domestic quasi-military opposition to acts of Congress. These cases were mainly concerned with specifying what acts are required to levy war against the United States. In most cases, intent was inferred from the acts themselves. As a rule, in the early cases, the second prong of treason—adhering to the enemy—was not charged.

Soon after the new federal government was established, it levied a tax on whiskey distilleries as part of a broader financial plan.<sup>101</sup> Western Pennsylvania was the scene of opposition to the tax, and in 1794, the opposition became violent.<sup>102</sup> Rallies fanned the flames of opposition, which spilled over into an attack on the home of John Neville, the tax collector, and resulted in his home being destroyed by fire.<sup>103</sup> The federal government responded by calling for the muster of large militia forces, and even President Washington went to Carlisle to inspect them.<sup>104</sup> Suspects were rounded up and taken to Philadelphia for trial.<sup>105</sup>

Prosecutors sent thirty-five bills for treason to the grand jury,

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100. See *Cramer v. United States*, 325 U.S. 1, 31 (1945). In his third installment of his article, Hurst maintains that treason requires a specific intent. Willard Hurst, *Treason in the United States: Under the Constitution*, 58 HARV. L. REV. 806, 815 (1945).

101. BRADLEY CHAPIN, *Constitutional Definition*, in THE AMERICAN LAW OF TREASON: REVOLUTIONARY AND EARLY NATIONAL ORIGINS 85–90 (Univ. of Wash. Press 1964).

102. *Id.*

103. *Id.*

104. *Id.* at 87.

105. *Id.*

which, to the credit of their independence and good sense, endorsed eleven of them “ignoramus.”<sup>106</sup> Of the remaining twenty-four men who were indicted, thirteen had already fled.<sup>107</sup> Philip Vigol<sup>108</sup> and John Mitchell<sup>109</sup> were tried and convicted. In both cases, the issue was essentially whether the acts complained of were a riot or an insurrection. The defense was that a charge of treason did not lie because the acts did not constitute treason.

The court focused first on the object of the “insurrection.”<sup>110</sup> It held that because the object of the acts was “to suppress the excise offices, and to prevent the execution of an act of Congress, by force and intimidation” it was High Treason, “an usurpation of the authority of government . . . by levying war.”<sup>111</sup> The Court then reviewed the evidence and found that the participants were “arrayed in a military manner; they affected the military forms of negotiation by a flag” and they demanded that John Neville surrender his commission.<sup>112</sup> On the basis of these facts “the object of the insurrection was of a general and public nature.”<sup>113</sup>

With a lack of thoroughness and subtlety in its analysis, the Court stated that the treasonous intent could be inferred from the purpose of the “insurrection” as well as the overt acts committed.<sup>114</sup> Despite the flagrancy of the acts and the burning of John Neville’s house, there was no evidence of an intent to betray the United States.<sup>115</sup> Nevertheless, the Court found the requisite intent in the acts of Mitchell and Vigol which converted those acts from mere riot to treason.<sup>116</sup> The defense correctly argued, but to no avail, that the charge was a constructive treason, which was well known in English law, but specifically excluded from the constitutional definition of treason.<sup>117</sup> President Washington

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106. CHAPIN, *supra* note 101, at 87. “Ignoramus” meaning “we do not know.” The jury found the evidence insufficient for a true bill.

107. *Id.*

108. *See* United States v. Vigol, 2 U.S. (2 Dall.) 346 (1795).

109. *See* United States v. Mitchell, 2 U.S. 348 (1795).

110. *Id.* at 348–49.

111. *Id.* at 355.

112. *Id.*

113. *Id.*

114. United States v. Vigol, 2 U.S. (2 Dall.) 346, 346–47 (1795).

115. *Mitchell*, 2 U.S. at 352–53.

116. *Id.* at 349–50; *Vigol*, 2 U.S. at 346–47.

117. *Mitchell*, 2 U.S. at 350; *Vigol*, 2 U.S. at 347.

pardoned both Mitchell and Vigol as well as the other men who had been indicted.

In 1798 there was another vigorous, if not particularly violent, protest against a federal excise tax.<sup>118</sup> This time it was in eastern Pennsylvania.<sup>119</sup> Great trouble arose after the U.S. Marshal arrested several men who had resisted paying the tax.<sup>120</sup> He sequestered his prisoners in a tavern in Bethlehem for safekeeping.<sup>121</sup> A federal posse then surrounded the tavern to prevent their rescue by John Fries, the leader of a motley group of armed men bent on releasing the arrested men by any means possible.<sup>122</sup> After a brief standoff, the U.S. Marshal agreed to release his prisoners on their promise to surrender to federal authorities in Philadelphia.<sup>123</sup> Fries and his men had succeeded. No shots had been fired and no one had even been injured, let alone killed.<sup>124</sup>

Despite the lack of overt violence—although it was certainly a possibility, which thankfully was averted—Fries was tried for treason in 1799 on the grounds that he had levied war against the United States by leading an armed band of men in military array against the marshal, specifically to prevent the collection of the excise tax imposed pursuant to an act of Congress. In this sense, his acts were similar to those of Mitchell and Vigol a few years before in the Whiskey Rebellion.

Fries was tried twice. His first trial resulted in his conviction, but his motion for a new trial was granted on grounds of the possible bias of a juror.<sup>125</sup> In April 1800, Fries was convicted a

118. CHAPIN, *supra* note 101, at 90.

119. *Id.*

120. *Id.* at 91.

121. *Id.*

122. *Id.*

123. *Id.* at 92.

124. *Id.* at 92; *United States v. Fries*, 3 U.S. (3 Dall.) 515 (1799); *see generally* W.W.H. DAVIS, *THE FRIES REBELLION 1798–99* (Doylestown Pub. Co. 1899).

125. Perhaps the most interesting aspect of the second Fries trial was the withdrawal of defense counsel. In the first trial, the defense had argued that armed opposition to enforcement of federal laws was not treason. Before the second trial started, Justice Samuel Chase, sitting as a Circuit judge, distributed to defense counsel and others his conclusion in writing that such opposition was treason, ostensibly in order to shorten the length of the trial. At that time, juries were allowed to make findings of law. Thus, Chase not

second time and was sentenced to hang. The matter did not end there. It had become embroiled in the political struggle between the Federalist administration of John Adams and Jefferson's Republicans who opposed the excise tax and leapt to the defense of the man who had acted against its collection.

President Adams' cabinet was delighted with the verdict and the sentence. They thought it necessary to show the Jeffersonian Republicans that they could not foment disruption of national laws with impunity. They strongly advised Adams to deny Fries' petition for pardon. A horrible example was a public necessity, they maintained.<sup>126</sup> Adams gave deep and thorough consideration to the pardon and to the opinions of his cabinet, but after much thought, he disregarded partisan politics and pardoned Fries just as Washington had pardoned the participants in the Whiskey Rebellion.<sup>127</sup>

In both the Fries case and the Whiskey Rebellion cases, a charge of treason was used to defend the authority of the federal government in a matter that was exclusively internal. No foreign power was involved and it was never even suggested that the defendants had betrayed the United States in favor of its enemies either by levying war or by adhering to them by giving them aid and comfort. At the most, all that the defendants had done was take up arms against a hated act of Congress. While their acts may have technically amounted to treason, the threat to the country was limited and local. Treason charges may have been appropriate, but the leaders' convictions stressed the point that acts of Congress had to be obeyed. Both Washington and Adams

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only deprived the defense of its major argument, he also invaded the province of the jury. After defense counsel had withdrawn, no successor defense counsel was appointed. Chase stated he would protect the rights of the defendant. Chase's unusual act was a godsend to Jefferson and the Republicans in their attempt to cleanse the federal bench of Federalist judges. It was one of the reasons Chase was impeached, but not removed from the bench. He has the dubious distinction of being the only Supreme Court Justice ever to be impeached. CHAPIN, *supra* note 101, at 93–95. See LEONARD BAKER, JOHN MARSHALL: A LIFE IN LAW 420–38 (Macmillan Pub. Co., Inc. 1974), for a concise and informative account of the impeachment trial of Justice Chase.

126. CHAPIN, *supra* note 101, at 96; *see also* PAGE SMITH, JOHN ADAMS, 1784–1826, at 1007 (Doubleday & Co., Inc. 1962).

127. SMITH, *supra* note 126, at 1033–34.



rose above domestic politics and wisely concluded that conciliation was more important than hanging the defendants.

Not all incidents involving armed resistance to the enforcement of national law rise to the level of levying war against the United States in the constitutional sense. In 1808, Frederick Hoxie was hired to deliver a raft loaded with timber on Lake Champlain from Vermont into Canada. He would be paid \$800 only upon a successful completion of his mission, but the federal embargo laws prohibited the transaction. These laws were key to the Jefferson administration's policy to keep the United States out of the European war then raging. A federal official in Vermont attempted to enforce the embargo laws, which were detested in New England as much as the excise taxes had been detested in Pennsylvania. He seized the raft at Isle La Motte near the Canadian border. A United States trooper guarded the raft after its seizure until Hoxie, with about sixty men armed with muskets and clubs, forcibly re-took it and moved it northwards towards Canada. About an hour later, federal troops opened fire on the raft. Hoxie and the men on the raft returned the fire. Although the firing was in earnest on both sides, no one was even injured, let alone killed.<sup>128</sup> The Jefferson administration was anxious for policy reasons to enforce the embargo laws by all means possible. They charged Hoxie with treason and brought him to trial. The court all but directed a verdict of acquittal.<sup>129</sup> The court based its conclusion on the sometimes narrow distinction between insurrection and riot.<sup>130</sup> After examining the facts of the case, the court looked at the object or purpose of the affray and found that it was of a local or private nature, not having a direct tendency to destroy all property and all government.<sup>131</sup> Moreover, in order to be considered treason, the intention must be "universal or general, as to effect some object of a general, public nature" and that necessary intention was lacking.<sup>132</sup>

What was the difference between Frederick Hoxie's efforts to deliver a raft of timber to Canada in violation of federal law, which included a shootout with federal forces, John Fries' acts,

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128. *United States v. Hoxie*, 26 F. Cas. 397 (C.C.D. Vt. 1808) (No. 15,407).

129. *Id.*

130. *Id.* at 400.

131. *Id.* at 402.

132. *Id.*

which involved assembling forces but no shootout, and John Mitchell's and Philip Vigol's armed resistance to the excise laws? The most obvious difference was in scope and intent: Hoxie sought only to deliver the timber to Canada so he could be paid for it despite the embargo, while the others resorted to violence or the threat of it to prevent the execution of lawful acts of Congress throughout the country. The court in *Hoxie* seized upon this distinction and found that the controversy was a private one, that Hoxie did not intend to force rescission of the embargo.<sup>133</sup> Therefore, Hoxie lacked treasonous intent, despite the exchange of serious musket fire with federal troops.<sup>134</sup> The lack of the requisite treasonous intent prevented an armed conflict from being transformed from a riot or an affray into an act of treason by levying war. The intent, not the act, limited the scope of the crime.<sup>135</sup>

The acquittal of Hoxie was undoubtedly the right decision. He was simply pursuing his own private interests in violation of the embargo laws. He lacked treasonous intent. The same cannot be said for Fries and the participants in the Whiskey Rebellion. Their intent was a "universal intent" to "resist or impede the operation" of the tax laws as enacted by Congress, which was a form of betrayal.<sup>136</sup> These cases raise the troubling point that the treason statute of 1790<sup>137</sup> was used to enforce acts of Congress in the Whiskey Rebellion and against John Fries. Hoxie was tried for treason to make a political point about enforcing the embargo. Since that time, Congress has enacted statutes more appropriate to the enforcement of federal authority, thus reserving treason prosecutions for cases involving betrayal of the United States.<sup>138</sup>

Forceful opposition in Pennsylvania to lawfully imposed excise taxes prepared the way for the first two major treason cases under the Constitution.<sup>139</sup> These cases articulated in American

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133. *Id.* at 403.

134. *Id.* at 402.

135. *Id.*

136. *Id.*

137. Act of Apr. 30, 1790, ch. 9, 1 Stat. 112 (1790).

138. See 18 U.S.C.A. § 2381 (Westlaw through Pub. L. No. 115-51); *Kawakita v. United States*, 343 U.S. 717, 736 (1951); *Cramer v. United States*, 325 U.S. 1, 29 (1944).

139. See *Ex Parte Bollman*, 8 U.S. (4 Cranch.) 75 (1807); *United States v.*

jurisprudence the basic principles of treason by levying war. For this reason, they merit close examination. These cases arose from the complex web that Aaron Burr created in 1805 and 1806 and, like the Pennsylvania cases, involved allegations of levying war against the United States.<sup>140</sup> Burr became involved in mysterious plots and inchoate plans, possibly to detach the region west of the Appalachian Mountains from the eastern United States.<sup>141</sup>

Samuel Swartwout and Erick Bollman were connected in some way with the Burr plots. They were arrested in New Orleans, at the time recently purchased by the United States from France, and sent to Washington to stand trial for treason. The Supreme Court heard their *ex parte* motions for habeas corpus and then discharged the prisoners on the grounds that the facts of the case would not support a charge of treason.<sup>142</sup>

The main issue was whether the indictment charged treason. In order to constitute the crime for which Swartwout and Bollman were accused, Chief Justice John Marshall held that there must have been an actual levying of war against the United States. He distinguished between conspiracy to levy war and the actual levying of war as two distinct offenses, and noted that a conspiracy did not rise to the level of treason.<sup>143</sup> Marshall emphasized that “there must be an actual assemblage of men for the purpose of executing a treasonable design.”<sup>144</sup>

Drawing on the court’s decision in *Fries*, Marshall concluded that “if they proceed to carry such intention into execution by force, . . . they are guilty of the treason of levying war; and the *quantum* of the force employed neither lessens nor increases the

Burr, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694).

140. Burr served as vice-president under Jefferson from 1801 to 1805, during which time Burr fought the famous duel with Alexander Hamilton and killed him.

141. Aaron Burr and his plots, assuming they were plots, are endlessly fascinating. See CHAPIN, *supra* note 101, at 98–113, for a good, but brief, discussion of the legal issues and complicated facts of the case. See BAKER, *supra* note 125, at 448–518, for a deeper review of the legal and factual issues. See J.J. COOMBS, *THE TRIAL OF AARON BURR FOR HIGH TREASON* (W. H. & O. H. Morrison 1864), for Burr’s treason trial record. It, too, has its own fascination.

142. *Bollman*, 8 U.S. at 136.

143. *Id.* at 126.

144. *Id.* at 127.

crime.”<sup>145</sup> In other words, levying war means an assembly of men for a treasonous purpose with the intent to achieve their goal by force. It is still considered treason even if the intended force is not used, or if it is insufficient to achieve its purpose. All that is required is that the assembly intends to use some amount of force and have it at their disposal.

Marshall continued with a celebrated statement, which later gave him difficulty in the trial of Aaron Burr:

[I]f 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.<sup>146</sup>

Regardless of this dictum, Marshall’s analysis is consistent with the criteria Wilson set forth in his law lecture.<sup>147</sup> Marshall’s rule follows the strict definition in the Constitution and is “determinate” in that it limits treason by levying war to (1) an assemblage of men, (2) who use force, regardless of its quantum for (3) a treasonous purpose.<sup>148</sup> Marshall’s dictum explaining that remoteness from the scene of action is not a defense so long as there is a link between the accused and the “general conspiracy” appears to cover the situation in which a defendant with the requisite intent assembles with the main body but does not actually participate in the use of force.<sup>149</sup> But this fact pattern was not before the Court in *Bollman*.<sup>150</sup>

In examining the evidence against Swartwout and Bollman, the Court held that “[t]he mere enlisting of men, without assembling them, is not levying war” and “[t]he travelling of individuals to the place of rendezvous . . . would be an equivocal act, and has no warlike appearance.”<sup>151</sup> However, “[t]he meeting

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145. *Id.* at 128 (quoting Case of Fries, 9 F. Cas. 924, 931 (C.C.D. Pa. 1800) (No. 5,127)) (emphasis in original).

146. *Id.* at 126.

147. WILSON, *supra* note 34, at 1149–56.

148. *Bollman*, 8 U.S. at 127, 128.

149. *See id.* at 126.

150. *Id.* at 135.

151. *Id.* at 134.

of particular bodies of men, and their marching from places of partial to a place of general rendezvous, would be such an assemblage.”<sup>152</sup> Such was not the case with these defendants and, because no treasonous acts were alleged, the Court discharged Swartwout and Bollman.<sup>153</sup>

This ruling clearly distinguished between conspiracy and plotting, neither of which amounts to treason, and acts of an assemblage of men in furtherance of the conspiracy or plot, which, no matter how great or slight, do amount to treason. The allegations must be fact specific. Using the Constitutional definition of treason against the United States, which states that treason “shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort,”<sup>154</sup> limits judges from expanding it by construction.

A few months later, Aaron Burr himself was brought to trial on charges of treason. It is no exaggeration to say that this was the trial of the nineteenth century.<sup>155</sup> The political passions of the time were extraordinary. Thomas Jefferson, as president, brought the full weight of the federal government against his former vice-president.<sup>156</sup> Not only was Jefferson bent on destroying Burr, but he and his party also sought to control the judicial branch as well as Congress.<sup>157</sup> His political aims brought him into conflict with Chief Justice John Marshall, who favored an independent judiciary and a strong central government.<sup>158</sup> Chief Justice Marshall sat as a trial judge at Burr’s trial in the Circuit Court for Virginia, which followed the common procedure at that time in which Supreme Court justices sat as Circuit Court judges.<sup>159</sup> Counsel on both sides were distinguished, extraordinarily

152. *Id.*

153. *Id.* at 136.

154. U.S. CONST. art. III, § 3, cl. 1.

155. There is extensive literature on the Burr treason trial. See CHAPIN, *supra* note 101, at 98–113, for a short, but readable and accurate, account. See PETER CHARLES HOFFER, *THE TREASON TRIALS OF AARON BURR* (Univ. Press of Kan. 2008), for a recent study. The extensive record of the trial may be found in DAVID ROBERTSON, *THE TRIAL OF AARON BURR FOR TREASON* (Hopkins & Earle 1808, 1875) and in COOMBS, *supra* note 141.

156. CHAPIN, *supra* note 101, at 100.

157. See BAKER, *supra* note 125, at 466–518, for a thorough and relatively brief account of the Burr conspiracy and the trials.

158. *Id.* at 477.

159. *Id.* at 455.

competent lawyers who presented thorough, exhaustive, and sometimes brilliant arguments.<sup>160</sup> No trial has ever been more politically charged or produced more rancor between the parties and widespread, outright popular hatred of the defendant.

The fundamental question of law raised by this trial was what constituted levying war under the Constitution.<sup>161</sup> Both sides agreed that a treasonous intent was necessary. However, the argument concerned the extent of the overt act.<sup>162</sup> The defense urged that levying war required an actual assemblage of men with the paraphernalia of war.<sup>163</sup> The Government argued that arms and the application of force were not necessary so long as the assembled men had a treasonous intent.<sup>164</sup> Other important legal questions were raised, argued at length, and ruled upon. These legal questions included executive privilege when the defense subpoenaed Jefferson's papers, whether the common law applied in federal courts, and the extent of the guilt of an aider, abettor or procurer of treason.<sup>165</sup>

Marshall instructed the jury that levying war required the use of force or the capability and readiness to use it. He said,

War is an appeal from reason to the sword; and he who makes the appeal evidences the fact by the use of the means. His intention to go to war may be proved by words; but the actual going to war is a fact which is to be proved by open deed. The end is to be effected by force; and it would seem that in cases where no declaration is to be made, the state of actual war could be created by the employment of force, or being in a condition to employ it.<sup>166</sup>

The underlying concept is that a resort to arms indicates that peaceable means have been discarded in favor of force. Here, Marshall followed the conclusion of the Whiskey Rebellion cases in which Mitchell and Vigol actually participated in the use of force,

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160. *Id.* at 470.

161. CHAPIN, *supra* note 101, at 107.

162. *Id.* at 107–108.

163. *Id.* at 108.

164. *Id.*

165. *Id.* at 107.

166. COOMBS, *supra* note 141, at 315.

burning John Neville's house to obtain their goals.<sup>167</sup> Although one might argue that Fries did not use force to obtain the release of his prisoners, the fact that his men were assembled and arrayed in a military manner and threatened to use it was consistent with Marshall's later analysis.<sup>168</sup>

In all of these cases the defendants had the requisite treasonous intent: Mitchell, Vigol, and Fries sought to prevent the collection of excise taxes and the enforcement of lawful acts of Congress and they were present at the commission of the overt acts: the burning of John Neville's house and surrounding the tavern, respectively. Burr may well have sought to detach much of the trans-Appalachian country from the eastern United States, and thus, had the requisite treasonous intent, based on betrayal. However, unlike the earlier cases, the government in Burr's case admitted Burr was not actually present at the time of the overt act.<sup>169</sup> The result was a procedural victory for the defense, which soon led to Burr's acquittal, despite the jury's expressed inclination to convict.<sup>170</sup>

Marshall had identified the elements of levying war. A generation later in 1842, when Rhode Island was faced with two governments and an actual civil war, Justice Joseph Story, sitting as a circuit judge in Rhode Island, elaborated upon, but did not change, Marshall's elements in a charge to federal grand jury.<sup>171</sup> He identified five separate elements of levying war: (1) an assembly of persons, (2) met for a treasonous purpose (a general intent), (3) an overt act with forces to execute or towards executing a treasonous purpose, (4) a present intent to proceed in the execution of the treasonous purpose by force (a specific

167. *United States v. Mitchell*, 2 U.S. 348, 348 (1795); *United States v. Vigol*, 2 U.S. (2 Dall.) 346, 346 (1795).

168. *United States v. Fries*, 3 U.S. 515 (1799).

169. COOMBS, *supra* note 141, at 307. The Government argued that even if he had not been present at the commission of the overt act, he still was an aider, abettor, or some form of accomplice in the treasonous event. *Id.* at 324. However, Marshall correctly held that, because principals in the treason had not been convicted, an accomplice could not be convicted first. *Id.* at 347–48.

170. The jury's original verdict was "not proved to be guilty under this indictment." It was soon changed to an outright acquittal. *Id.* at 352–54.

171. Charge to Grand Jury—Treason, 30 F. Cas. 1046, 1046 (C.C.D. R.I. 1842) (No. 18,275).

intent).<sup>172</sup> He added a fifth element, which was logically implied in his definition: (5) the capability of the assembly to use that force.<sup>173</sup>

Two later Civil War cases followed in the same vein. In January 1861, an artillery company in Georgia took possession of Fort Pulaski from the United States “without encountering any forcible resistance.”<sup>174</sup> A member of that company was later apprehended in Philadelphia and tried for treason.<sup>175</sup> Following Marshall’s holding in *United States v. Burr*,<sup>176</sup> the court defined the overt act in levying war as: (1) a body of armed men, (2) mustered in military array, (3) for a treasonous purpose. This definition is consistent with recognized legal authority.<sup>177</sup>

In another case, the defendants obtained letters of marque from Confederate President Jefferson Davis.<sup>178</sup> They outfitted a ship in San Francisco for the express purpose of preying on United States shipping in the Pacific, specifically on the route from Panama to California.<sup>179</sup> As they were leaving the pier in San Francisco harbor, federal agents surrounded the ship and arrested the defendants.<sup>180</sup> In charging the jury on the meaning of levying war, Justice Field, sitting as a circuit judge, pointed out that levying war requires: (1) “an assemblage of persons in force, [(2)] to overthrow the government, or to coerce its conduct.”<sup>181</sup> The overt act of levying war can be either an act by which “war is brought into existence” or an act by which “war is prosecuted.”<sup>182</sup> The act of outfitting the ship with an intention to use it against United States shipping was sufficient to support a conviction for

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172. *Id.*

173. *Id.*

174. *United States v. Greiner*, 26 F. Cas. 36, 39 (C.C.W.D. Mo. 1861) (No. 15,259).

175. *Id.*

176. *See* COOMBS, *supra* note 141, at 307–23.

177. *Greiner*, 26 F. Cas. at 39. The court relied on English authorities, including: 1 Hale, P. C. 152; Fost. Crown Law, 218; and an unnamed Kings Bench case found at 13 How. State Tr. 485; as well as Chief Justice Marshall’s opinion in the *Burr* case (Cases Nos. 14,692a–14,694a).

178. *United States v. Greathouse*, 26 F. Cas. 18, 19 (C.C.N.D. Cal. 1863) (No. 15,254).

179. *Id.*

180. *Id.* at 20.

181. *Id.* at 22.

182. *Id.*



treason, even though no force had been used against the United States.<sup>183</sup>

By the time of the American Civil War, the law of treason, as far as the elements required for levying war were concerned, had been settled and was generally consistent with the classic English writers.<sup>184</sup> More importantly, it was consistent with the Constitutional requirements that it be “determinate” and “stable” as James Wilson had prescribed.<sup>185</sup>

#### IV. TREASON IN THE TWENTIETH CENTURY—THE SECOND PRONG

The twentieth century saw the United States emerge as a large, complex, modern state. Gone were the days when men were tempted to take up arms against the enforcement of federal taxes or even odious legislation, such as the Fugitive Slave Law.<sup>186</sup> The enemies of the United States were external: the German Empire in 1917 and the Japanese Empire in 1941, along with the German Reich of Adolf Hitler. Treason prosecutions no longer charged levying war against the United States. Instead, the leading World War II cases charged the second prong of the constitutional definition: adhering to its enemies by giving them aid and comfort, a more subtle form of betrayal than levying war.

In 1943, the Supreme Court received its first ever appeal from a treason conviction.<sup>187</sup> Anthony Cramer was born a German national and became a naturalized American citizen in the 1930s.<sup>188</sup> He was sympathetic to the aims of Germany, and he made no secret of his opposition to American entrance into the war against Germany,<sup>189</sup> although Hitler gratuitously declared war against the United States a few days after the attack on Pearl Harbor in December 1941. In 1942, Cramer met twice publicly in New York restaurants with two German friends who had arrived

183. *Id.* at 23.

184. *See* COKE, *supra* note 81; *see also* 1 SIR MATTHEW HALE, THE HISTORY OF PLEAS OF THE CROWN 131 (1736).

185. *See* WILSON, *supra* note 34.

186. *See* United States v. Hanway, 26 F. Cas. 105, 106 (C.C.E.D. Pa. 1851) (No. 15,299). In this case, the defendant was charged with treason for resisting the execution of the Fugitive Slave Law; the jury acquitted him. *Id.*

187. *See* Cramer v. United States, 325 U.S. 1, 1 (1945).

188. *Id.* at 3.

189. *Id.* at 4.

unannounced in New York.<sup>190</sup> They had left the United States before war broke out and returned home to help Germany in the war effort.<sup>191</sup> Later the German government sent them and others back to the United States by submarine to disrupt the American war effort.<sup>192</sup> Cramer was arrested, tried, and convicted of treason on the grounds that he adhered to enemies of the United States by giving them aid and comfort.<sup>193</sup>

The overt act, witnessed by two FBI agents, was nothing more than Cramer's public meetings in restaurants with the saboteurs.<sup>194</sup> There was no evidence as to what they discussed or whether any plans were made at these two meetings.<sup>195</sup> The government did not even have any evidence from which an inference could be made as to what happened, other than eating and drinking together.<sup>196</sup> The Court of Appeals for the Second Circuit affirmed Cramer's conviction.<sup>197</sup> Upon review, the Supreme Court reversed in a 5-4 decision written by Justice Robert Jackson.<sup>198</sup>

The two elements of treason are intent and an overt act in furtherance of that intent. Cramer's adherence to Germany, the enemy, was a state of mind and, thus, it was not susceptible to direct proof. It could only be established by circumstantial evidence: Cramer's sympathies towards Germany were tantamount to his adherence to the enemy.<sup>199</sup> The overt act charged was meeting publicly with the two saboteurs in restaurants.<sup>200</sup>

The issue on appeal was not whether Cramer had a treasonous intent, but whether his overt act of meeting twice with the two saboteurs rose to the level of providing them with aid and

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190. *Id.* at 5.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 6.

196. *Id.*

197. *Cramer v. United States*, 137 F.2d 888, 890 (2d Cir. 1944).

198. *Cramer*, 325 U.S. at 2. Justice Douglas wrote a vigorous dissent, which included an extensive appendix mainly of legal authorities. *Id.* at 48-76 (Douglas, J., dissenting).

199. *Id.* at 31-32.

200. *Id.*

comfort, so as to satisfy the constitutional definition of treason.<sup>201</sup> They were the only overt acts charged. Cramer either knew, or had reason to know, that the men he met with were enemies of the United States. The issue, then, concerned the function of the overt act. Cramer urged that the overt act “alone and on its face must manifest a traitorous intention” while the Government contended that “an apparently commonplace and insignificant act and . . . other circumstances [may] create an inference that the act was a step in treason and was done with treasonable intent.”<sup>202</sup>

The Supreme Court took the middle road between these two contentions and held that the minimum function of the overt act was to “show sufficient action by the accused . . . that [he] actually gave aid and comfort to the enemy.”<sup>203</sup> Since there was no showing that these meetings conferred any benefit upon the two saboteurs, Cramer did not provide aid and comfort to them.<sup>204</sup> As the Court said, “[m]eeting with Cramer in public drinking places to tipple and trifle was no part of the saboteurs’ mission and did not advance it.”<sup>205</sup> This is the reason the Court reversed his conviction.<sup>206</sup> It is noteworthy that the Court did not hold that the overt act must manifest a treasonous intent (although it could have), only that the overt act must in fact give actual aid and comfort to the enemy.<sup>207</sup> The Court did not specify the quantum of aid and comfort.

*Cramer’s* holding that the overt act must result in some aid and comfort to the enemy—promoting or furthering the enemy’s mission—is consistent with the constitutional definition of treason, which specifies that the overt act following adherence to the enemy must be accompanied by “giving aid and comfort.”<sup>208</sup>

201. U.S. CONST. art. III, § 3, cl. 1.

202. *Cramer*, 325 U.S. at 34.

203. *Id.*

204. *Id.*

205. *Id.* at 37.

206. See Paul T. Crane, *Did the Court Kill the Treason Charge?: Reassessing Cramer v. United States and its Significance*, 36 FLA. ST. U. L. REV. 635, 651–52 (2009). Crane has reviewed, among others, the papers of Chief Justice Stone and of Justices Jackson, Frankfurter, and Douglas, including memoranda from Supreme Court clerks. He has written a fascinating account of what was really bothering the justices and why they set this matter down for re-argument.

207. See *id.*

208. U.S. CONST. art. III, § 3, cl. 1.

The Constitution uses the word “giving,” which requires an actual rendition of aid and comfort, not an overt act that would likely or even could provide aid and comfort.<sup>209</sup>

In this respect, *Cramer’s* requirement that treason “consist of something outward and visible and capable of direct proof” is consistent with the framers’ intent to protect free speech and political dissent.<sup>210</sup> Justice Jackson made this point abundantly clear: “[a] citizen intellectually or emotionally may favor the enemy and harbor sympathies or convictions disloyal to this country’s policy or interest, but so long as he commits no act of aid and comfort to the enemy, there is no treason.”<sup>211</sup>

*Cramer* is the law.<sup>212</sup> Its holding was roundly criticized in a vigorous dissent by Justice Douglas on the grounds that it is a departure from the historic function of the overt act in treason cases.<sup>213</sup> He pointed out that the purpose of the overt act requirement is “to preclude punishment for treasonable plans or schemes or hopes which have never moved out of the realm of thought or speech.”<sup>214</sup> All that is necessary is that the government “must . . . establish[] beyond a reasonable doubt that the act was part of the treasonable project and done in furtherance of it.”<sup>215</sup> Under this concept, Justice Douglas concluded that *Cramer’s* conviction should have been affirmed.<sup>216</sup>

There have been other criticisms as well.<sup>217</sup> A more modern critique has pointed out that *Cramer* did not foreclose future

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209. *Id.*

210. 325 U.S. at 29.

211. *Id.*

212. *Id.*

213. *Id.* at 48 (Douglas, J., dissenting).

214. *Id.* at 61.

215. *Id.*

216. *Id.* at 67.

217. The first and most telling criticism was by James Willard Hurst almost immediately after the decision was announced. See WILSON, *supra* note 34. Hurst was a young scholar on active duty with the Navy Department in Washington. He was loaned to the office of the Attorney General to prepare briefs for the re-argument. Hurst’s comments, insights, and criticism must be taken seriously, because they are the seminal work of the law of treason. However, the reader should also remember that Hurst wrote for the losing side in *Cramer* and it is understandable that he would not necessarily embrace a decision which reversed a major conviction.

prosecutions and convictions for treason.<sup>218</sup> The Court simply made future prosecutions and convictions more difficult by requiring the government to show that actual aid and comfort were conferred on an enemy.<sup>219</sup> By making a conviction more difficult, *Cramer* follows the intent of James Wilson and other drafters of the treason clause.<sup>220</sup> As the dissent so aptly points out, they made no bones about making a treason conviction difficult for three good reasons: (1) “to preclude punishment for treasonable plans or schemes or hopes which have never moved out of the realm of thought and speech” thus removing treason as a means of repressing political dissent; (2) “to foreclose prosecutions for constructive treason” because the constitutional definition of treason is “determinate” and may not be expanded; and (3) to make sure that treason “is complete as a crime only when the traitorous intent has ripened into a physical and observable act.”<sup>221</sup> These reasons were consistent with the historical function of the overt act.<sup>222</sup>

Despite the assertions set forth by the *Cramer* dissent, as well as other critics,<sup>223</sup> convictions were upheld on appeal in other major treason cases arising out of World War II. In these cases, treason was based on the defendant’s adherence to the enemy by giving aid and comfort.<sup>224</sup> These cases focused on the element of intent, because the overt acts clearly satisfied the aid and comfort

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218. Crane, *supra* note 206, at 671.

219. See *id.* (maintaining that the paucity of treason trials in conjunction with the Korean and Vietnam wars may be attributed to the creation of other offenses which are easier to prove in the absence of the two-witness rule). See *Cramer v. United States*, 325 U.S. 1, 45 (1945), in which Justice Jackson dropped more than a broad hint that Congress may prohibit “specified acts thought detrimental to our wartime safety. . . . [T]hus eliminating accusations of treachery and general intent to betray which have such passion rousing potentialities.” Prosecution for these acts could be in lieu of a prosecution for treason. Even so, on the same set of facts, an acquittal on a charge of treason would not necessarily preclude a conviction on another charge.

220. WILSON, *supra* note 34, at 1149–56.

221. *Cramer*, 325 U.S. at 61 (Douglas, J., dissenting).

222. *Id.*

223. Hurst, *supra* note 100, at 814–27.

224. See, e.g., *D’Aquino v. United States*, 192 F.2d 338, 347–48 (9th Cir. 1951); *Burgman v. United States*, 188 F.2d 637, 639 (D.C. Cir. 1951); *Best v. United States*, 184 F.2d 131, 133, 136–37 (1st Cir. 1950); *Gillars v. United States*, 182 F.2d. 962, 966 (D.C. Cir. 1950).

element of treason. The defendants actually provided aid and comfort to the enemy.

Max Stephan provided food, shelter, money, and other assistance to Hans Peter Krug, a Luftwaffe pilot, who had escaped from a prisoner of war camp in Canada and made his way to Detroit in 1942 after the United States and Germany went to war.<sup>225</sup> The Sixth Circuit affirmed Stephan's treason conviction in 1943.<sup>226</sup> It was clear that Stephan had provided aid and comfort to Krug. The essential element of treasonous intent was inferred from the facts of the case.<sup>227</sup>

*Cramer* made clear that aid and comfort must actually be provided to an enemy to sustain a conviction for treason.<sup>228</sup> But what about an otherwise innocent act, such as a father's provision of shelter and other assistance to a son? Max Haupt found that a treasonous intent will transform an otherwise innocent act into treason.<sup>229</sup> He provided shelter and other assistance to his son, known to him to be a saboteur and spy who returned to the United States from Germany by submarine.<sup>230</sup> Haupt's defense was that the aid and comfort he rendered to his son was not evidence of adhering to an enemy of the United States or even of a treasonous intent.<sup>231</sup> Rather, it was only a father's solicitude for his son and, thus, was an innocent act.<sup>232</sup> The jury found otherwise, and the Supreme Court affirmed the conviction.<sup>233</sup>

A treasonous intent may be inferred "from the natural consequences [a speaker] knows will result from his acts."<sup>234</sup> A person may have a First Amendment right to criticize the president as he wishes, even intemperately, and to state that the United States cannot win a war, and also to urge voters to elect a new administration that will change policy.<sup>235</sup> However, Douglas

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225. *Stephan v. United States*, 133 F.2d 87, 90 (6th Cir. 1943).

226. *Id.* at 100.

227. *Id.* at 90.

228. *Cramer v. United States*, 325 U.S. 1, 29 (1945).

229. *Haupt v. United States*, 330 U.S. 631, 641-42 (1947).

230. *Id.* at 633.

231. *Id.* at 634.

232. *Id.* at 641.

233. *Id.* at 631.

234. *Chandler v. United States*, 171 F.2d 921, 943 (1st Cir. 1949). This well-written opinion is both comprehensive and insightful.

235. U.S. CONST. amend. I.

Chandler went beyond the limits of his First Amendment rights when he trafficked with the enemy by taking a paid position in Nazi Germany's propaganda organization and by making radio broadcasts for the enemy.<sup>236</sup> In doing so, he went "outside the shelter of the First Amendment," even though he may have sincerely believed that Nazi Germany was "the bulwark of Western Civilization against . . . the Jewish-Bolshevist menace."<sup>237</sup> The jury could, and did, infer a treasonous intent from the natural consequences of his propaganda broadcasts and convicted him of treason.<sup>238</sup>

In 1952, the Supreme Court had an opportunity to rule again on the sufficiency of overt acts in light of its holding in *Cramer*.<sup>239</sup> Tomoya Kawakita was a dual national of both Japan and the United States.<sup>240</sup> He was in Japan at the outbreak of war in December 1941 and remained there for the duration of the war.<sup>241</sup> After the war, he was charged with treason on grounds that he adhered to the enemy and rendered aid to Japan by his brutal treatment of American prisoners of war while he was guarding them.<sup>242</sup>

The Court agreed with the jury verdict that each of Kawakita's six overt acts of cruelty in fact gave aid and comfort to the enemy, because they promoted the cause of Japan, as "[t]hey were acts which tended to strengthen the enemy and advance its

236. *Chandler*, 171 F.2d at 924.

237. *Id.* at 925, 939.

238. Other World War II propaganda cases also resulted in convictions. See, e.g., *Gillars v. United States*, 182 F.2d 962 (D.C. Cir. 1950) (a defendant made radio broadcasts for the German government); *D'Aguino v. United States*, 192 F.2d 338 (9th Cir. 1951) (notorious Tokyo Rose made broadcasts for Japan). In both cases, the sufficiency of the overt acts was not challenged. See also *Best v. United States*, 184 F.2d 131 (1st Cir. 1950); *Burgman v. United States*, 188 F.2d 637 (D.C. Cir. 1951) (affirming the convictions for treason of defendants who had made radio broadcasts for the German government).

239. *Cramer v. United States*, 325 U.S. 1, 29 (1945). The court held that "the crime of treason consists of two elements: adherence to the enemy; and rendering him aid and comfort. A citizen intellectually or emotionally may favor the enemy and harbor sympathies or convictions disloyal to this country's policy or interest, but so long as he commits no act of aid and comfort to the enemy, there is no treason." *Id.*

240. *Kawakita v. United States*, 343 U.S. 717, 719 (1952).

241. *Id.* at 721.

242. *Id.* at 738.

interests.”<sup>243</sup> The Court stressed the importance of the nature of the overt act, which presumably means the ultimate effect of conferring benefit on the enemy.<sup>244</sup> The Court said,

The act may be unnecessary to a successful completion of the enemy’s project; it may be an abortive attempt; it may in the sum total of the enemy’s effort be a casual and unimportant step. But if it gives aid and comfort to the enemy at the immediate moment of its performance, it qualifies as an overt act within the constitution of treason.<sup>245</sup>

In this respect, the Court followed Marshall’s reasoning in *Ex Parte Bollman*, “[i]f war be actually levied . . . 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.”<sup>246</sup>

Because of the World War II cases, the second prong of the law of treason became well settled. The character of the overt act and not its success, or even its failure, is the proper focus of any inquiry: Did adherence to the enemy result in any aid and comfort to the enemy by advancing the enemy cause? If so, there would be betrayal and thus, treason.

#### V. TREASON AND THE WAR AGAINST TERROR

The Constitution specifies that treason consists of only two acts: levying war against the United States and adhering to its enemies by giving them aid and comfort.<sup>247</sup> The first treason cases involved armed domestic rebellion against the federal

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243. *Id.* at 741.

244. *Id.* at 738.

245. *Id.* at 738; *see also* *Rex v. Casement*, 1 K.B. 98, 133 (1917) (enunciating the English standard, which is conceptually the same: “If a British subject does an act which strengthens or tends to strengthen the enemies of the King in the conduct of a war against the King, that is in law the giving of aid and comfort to the King’s enemies. Again, if a British subject commits an act which weakens or tends to weaken the power of the King and of the country to resist or to attack the enemies of the King and the country, that is in law the giving of aid and comfort the King’s enemies.”).

246. *Kawakita*, 343 U.S. at 738 (citing *Ex Parte Bollman*, 8 U.S. (4 Cranch.) 75, 126 (1807)).

247. U.S. CONST. art. III, § 3, cl. 1.



government.<sup>248</sup> The most recent World War II cases involved a foreign enemy. Germany and Japan were easily discernable as enemies because war had been declared. However, in the twenty-first century, the enemy in the war against terror has not been a state and its forces are seldom armed and arrayed in a traditional military manner, all of which makes its identification as an enemy difficult. Whether the enemy is al-Qaeda or another group, the fact remains that the main “enemy” in the war against terror is not a state, although a state may succor and even encourage non-state actors in their endeavors. At home, the threats are covert and frequently the “enemy” can be identified only with difficulty before he strikes.

These changed circumstances do not mean that treason is now an outmoded legal concept, or even that other statutes have superseded treason as the most appropriate legal weapon in the proper circumstances. At its root, treason is a crime of betrayal.<sup>249</sup> Thus, courts have stated, “[n]o crime is greater than treason.”<sup>250</sup> The treason statute is not aimed at “any person,” rather it applies only to citizens who owe a duty of loyalty or allegiance to the state, and to non-citizens who enjoy its protection.<sup>251</sup> In this way, it is reserved for the most egregious overt acts, which involve an intent to betray the United States.<sup>252</sup> Prosecutions for treason are a matter of self-preservation for a

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248. See *Respublica v. Abraham Carlisle*, 1 U.S. 35 (1778); *Respublica v. John Roberts*, 1 U.S. 39 (1778).

249. *D’Aguino v. United States*, 192 F.2d 338, 366 (9th Cir. 1951).

250. *Hanauer v. Doane*, 79 U.S. 343, 347 (1870).

251. “Treason is a breach of allegiance, and can be committed by him only who owes allegiance either perpetual or temporary.” *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 97 (1820). See 5 Journals of the Continental Congress, *supra* note 52, which specifically applied to “all persons abiding within any of the United Colonies, and deriving protection from the laws of the same.” This was the same concept that led Wilson to conclude that non-citizens, as well as citizens, can commit treason against the United States. See WILSON, *supra* note 34, at 1153. For a more modern application of “allegiance,” see *United States v. Rahman*, 189 F.3d 88, 113 (2d Cir. 1999), in which the Second Circuit in a per curiam opinion, unlike *Wiltberger*, did not make any distinction between perpetual or temporary allegiance. Even so, no court has ever held, or even indicated, that non-citizens by definition cannot commit treason against the United States. To do so would not only be illogical, but it would also fly in the face of substantial legal history.

252. See *D’Aguino*, 192 F.2d at 366.

state, that is, for the body politic to which the traitor belongs either permanently or temporarily.<sup>253</sup>

An early, if not the first, attack against the United States in the war of terror was the 1993 bombing of the World Trade Center. The perpetrators of this attack were not charged with treason.<sup>254</sup> However, they were tried and later convicted of seditious conspiracy.<sup>255</sup> In holding that the defendants were convicted under the correct statute, the Second Circuit pointed out that the crime of treason is limited to “betrayals of allegiance that are substantial” and only to levying war and rendering aid and comfort to enemies.<sup>256</sup> Whether some or all the defendants could have been charged with treason is moot.<sup>257</sup>

The horrendous attacks of September 11, 2001, revealed to the American public that the United States was in fact involved in a new kind of war. However, even afterwards, some Americans sided with the enemy. Many Americans who supported the terrorists have been charged with various federal crimes, such as seditious conspiracy. Surprisingly, only one indictment for treason against an American citizen, Adam Gadahn, has resulted.<sup>258</sup> However, Gadahn might have been killed in Waziristan in 2008 after the indictment was returned and is still missing. Thus, he may never come to trial.<sup>259</sup> The thrust of the indictment is that Gadahn was an American citizen who adhered to enemies of the United States by giving them aid and comfort.<sup>260</sup>

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<sup>253</sup> Chandler v. United States, 171 F.2d. 921, 930 (1st Cir. 1948).

<sup>254</sup> Treason is defined in U.S. CONST. art. III, § 3, cl. 1. Pursuant to this definition, Congress made it a crime to engage in treason in 1790, and prescribed a penalty now codified as 18 U.S.C. § 2381.

<sup>255</sup> Seditious conspiracy is a violation of 18 U.S.C. § 2384. See United States v. Rahman, 189 F.3d. 88, 114 (2d Cir. 1999).

<sup>256</sup> Rahman, 189 F.3d at 114.

<sup>257</sup> The two-witness rule makes treason more difficult to prove than other crimes, which may be at least a partial explanation of why seditious conspiracy, rather than treason, was charged. See Cramer v. United States, 325 U.S. 1, 33 (1945) (noting that the two-witness rule serves as a “protection” for defendants in treason cases).

<sup>258</sup> He was indicted in the United States District Court for the Central District of California in 2005. See Gadahn Indictment, *supra* note 12.

<sup>259</sup> The FBI listed Adam Yahiyeh Gadahn as one of the FBI’s Most Wanted Terrorists in 2006. Federal Bureau of Investigation, *Most Wanted Terrorist – Adam Gadahn* (Oct. 11, 2006), [https://archives.fbi.gov/archives/news/stories/2006/october/gadahn\\_101106](https://archives.fbi.gov/archives/news/stories/2006/october/gadahn_101106).

<sup>260</sup> Gadahn Indictment, *supra* note 12, at 2–3.

The specific acts charged were making various videos for al-Qaeda.<sup>261</sup> In doing so, he breached his duty of allegiance to the United States, that is, the social contract.<sup>262</sup> His indictment for treason in 2006 was the first since World War II.<sup>263</sup> If only for this reason, it is worth examining.

The indictment opens with a statement that, pursuant to section 219 of the Immigration and Nationality Act, the Secretary of State has designated al-Qaeda as a foreign terrorist organization.<sup>264</sup> Presumably, this designation is sufficient to qualify al-Qaeda as an “enemy” of the United States. The indictment continues by describing the September 11, 2001, attacks and the assertion by Osama bin Laden, as leader of al-Qaeda, that those attacks were an al-Qaeda operation.<sup>265</sup>

The indictment then alleges that Gadahn is an American citizen whose last known residence was in Orange County, California and, importantly, that he owes allegiance to the United States as a citizen.<sup>266</sup> The gravamen of the offense is that he adhered to al-Qaeda, “an enemy of the United States . . . with intent to betray the United States” by committing five overt acts, all of which were appearances in al-Qaeda propaganda videos.<sup>267</sup> Statements that he allegedly made are recited in the indictment, including: “Fighting and defeating America is our first priority . . . .”; “So after all the atrocities committed by America . . . why should we target their military only?”; and “Escape from the unbelieving side and join the winning side . . . .”<sup>268</sup> Presumably, these videos were made outside the United States, probably in Afghanistan or Pakistan.

Gadahn’s acts mirror those of Douglas Chandler, as Gadahn also went abroad, joined an enemy propaganda organization and made communications, which were later broadcast, and thus

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261. *Id.* at 3–8.

262. *See* PHILLIPSON, *supra* note 33, at 110.

263. Dan Eggen & Karen DeYoung, *U.S. Supporter of Al-Qaeda Is Indicted on Treason Charge*, WASHINGTON POST (Oct. 12, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/11/AR2006101101121.html>.

264. Gadahn Indictment, *supra* note 12, at 1.

265. *Id.* at 2.

266. *Id.* at 2–3.

267. *Id.* at 3–8.

268. *Id.* at 3, 5, 7.

advanced the cause of an enemy of the United States by giving them aid and comfort.<sup>269</sup> Making propaganda broadcasts for an enemy meets the standard of *Cramer*, which held that the offense of treason requires that the defendant give actual aid and comfort to that enemy.<sup>270</sup> Underlying these overt acts is Gadahn's clear intent to betray the United States. Treason is the appropriate charge in his case.

In order to support a charge of treason, the facts of each case must clearly and precisely fit into the definition of this crime. Adam Gadahn, along with others, had not only adhered to the enemy, but he has also trafficked with them, and in doing so, has given them aid and comfort.<sup>271</sup> The facts as stated in Gadahn's indictment fairly support a charge of treason.<sup>272</sup> In other instances, the facts have ranged from ambiguous to inconclusive so far as a charge of treason is concerned. In those instances, unlike in Gadahn's case, prosecution under statutes other than treason was clearly warranted.

Gadahn might be tempted to use the First Amendment as a defense to these charges.<sup>273</sup> He might claim that in making the videos he was merely exercising his right of free speech and that the treason statute infringes upon that right. This defense will be of no avail to him. The First Circuit in *Chandler v. United States*<sup>274</sup> pointed out that Chandler trafficked with the Nazis by joining their propaganda organization and then making broadcasts for it. The court concluded, "[i]t is preposterous to talk about freedom of speech in this connection . . . ."<sup>275</sup> It is difficult to imagine that a court would fail to follow *Chandler*. In addition,

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269. *Chandler v. United States*, 171 F.2d 921, 924–25 (1st Cir. 1948).

270. There were multiple treason cases involving defendants who rendered propaganda services to Germany during World War II. *See, e.g.*, *Cramer v. United States*, 325 U.S. 1, 34 (1945); *see also* *D'Aquino v. United States*, 192 F.2d 338, 347–48 (9th Cir. 1951); *Burgman v. United States*, 188 F.2d 637, 639 (D.C. Cir. 1951); *Best v. United States*, 184 F.2d 131, 133, 136–37 (1st Cir. 1950); *Gillars v. United States*, 182 F.2d. 962, 966 (D.C. Cir. 1950).

271. *See* Gadahn Indictment, *supra* note 12, at 2–3, 9.

272. *See id.*

273. The *Chandler* court agreed that making disloyal statements is not treason, but when they are coupled with "an intent to betray" such statements can be an act of treason. 171 F.2d at 938.

274. *Id.* at 939.

275. *Id.*

both the treason clause and the First Amendment are constitutional provisions, and thus, both must be given effect unless the First Amendment repealed or modified the treason clause. That conclusion is indeed a long shot bordering on the preposterous.

An examination of some of the more publicized prosecutions arising out of the war against terror shows a wide variety of methods, acts, and conspiracies to act. Some individuals acted alone; others acted in concert with groups of varying sizes. Some instances involved pre-emptive arrests, which curtailed the acts and subsequently prevented a ripening into treason while also preventing significant property damage and loss of life. All of these people shared a common antipathy to the United States, and an intent to betray the United States. But few, if any, of these acts rose to the level of treason.

Bryant Neal Vinas went to Afghanistan specifically to join the Taliban so that he could fight the Americans.<sup>276</sup> He admitted to participating in two raids on American military installations in which two rockets were fired; fortunately without effect.<sup>277</sup> He joined an enemy military force, which was armed and arrayed in a military manner appropriate to the circumstances and intentionally engaged in a military operation against a United States military base.<sup>278</sup> These acts amounted to levying war against the United States with the requisite intent to betray the United States.<sup>279</sup> Thus, he could have been charged with treason, but he was not. Instead, he was charged with and pleaded guilty to conspiring to murder United States nationals, providing material support to al-Qaeda and receiving military training from al-Qaeda.<sup>280</sup> However, he did provide American authorities with significant intelligence about an al Qaeda plot to blow up a Long

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276. Claire Suddath, *Bryant Neal Vinas: An American in Al Qaeda*, L.A. TIMES (July 24, 2009), <http://content.time.com/time/nation/article/0,8599,1912512,00.html>.

277. See Superseding Information at 2, United States v. Vinas, No. 08-823 (NGG) (S-1) (E.D.N.Y. Jan. 28, 2009).

278. See *id.* at 2–3.

279. See *id.*

280. William K. Rashbaum & Souad Mekhennet, *L.I. Man Helped Qaeda, Then Informed*, N.Y. TIMES (July 22, 2009), <http://www.nytimes.com/2009/07/23/nyregion/23terror.html>.

Island Railroad commuter train in Penn Station.<sup>281</sup> His cooperation with authorities may partially explain why he was not charged with treason for his earlier participation with the Taliban, even though those acts were a significant act of betrayal of the United States. However, even if he may have participated in the al Qaeda plot in Penn Station, those acts alone do not rise to the level of treason. A mere plot or conspiracy is not treason. An overt act is required.

Michael Finton and Najibullah Zazi both attempted to wage war against the United States in furtherance of a terrorist cause. Both men had the requisite intent to betray the United States. However, both were arrested before their overt acts could ripen into treason. Finton is an American citizen who attempted to bomb the federal building in Springfield, Illinois.<sup>282</sup> He pleaded guilty to charges of attempted murder and attempted use of a weapon of mass destruction.<sup>283</sup> He is currently serving a twenty-eight-year term.<sup>284</sup> Najibullah Zazi is a Pashtun citizen of Afghanistan, but he is also a legal resident of the United States.<sup>285</sup> He was accused of planning a suicide bombing of the New York subway, and has pleaded guilty to charges of conspiring to use weapons of mass destruction, conspiracy to commit murder in a foreign country, and providing material support to a terrorist organization.<sup>286</sup>

The case of Colleen LaRose, also known as “Jihad Jane,” is

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281. *Id.*

282. Office of Public Affairs, *Illinois Man Admits Plotting to Bomb Federal Courthouse and Is Sentenced to 28 Years in Prison*, DEP’T. OF JUSTICE (May 9, 2011), <https://www.justice.gov/opa/pr/illinois-man-admits-plotting-bomb-federal-courthouse-and-sentenced-28-years-prison> [hereinafter DOJ Illinois Sentence].

283. *Id.*; Dirk Johnson, *Suspect in Illinois Bomb Plot ‘Didn’t Like America Very Much,’* N.Y. TIMES (Sept. 27, 2009), <http://www.nytimes.com/2009/09/28/us/28springfield.html>.

284. DOJ Illinois Sentence, *supra* note 282.

285. Phil Hirschorn, *Would-be subway suicide bomber Najibullah Zazi speaks*, CBS NEWS (Apr. 19, 2012, 12:25 PM), <https://www.cbsnews.com/news/would-be-subway-suicide-bomber-najibullah-zazi-speaks/>.

286. *Id.* However, it took until 2015 for the Court to render a sentence. Office of Public Affairs, *Al-Qaeda Operative Sentenced to 40 Years in Prison for Role in International Terrorism Plot that Targeted the United States and Europe*, DEP’T OF JUSTICE (Nov. 24, 2015), <https://www.justice.gov/opa/pr/al-qaeda-operative-sentenced-40-years-prison-role-international-terrorism-plot-targeted>.

different.<sup>287</sup> She is an American citizen who has encouraged enlistment in al-Qaeda, a foreign terrorist organization.<sup>288</sup> Clearly, the first prong of treason is satisfied, as she has adhered to the enemy, al-Qaeda. However, it remains to be seen whether her recruiting has produced recruits, and thus, has given aid and comfort the enemy. For this reason, prosecutors could examine her case closely to determine whether she should be charged with treason. Yet, they will not do so, because she has already been charged with conspiracy to murder Lars Vilks, a Swedish artist who drew a cartoon with the head of Mohammed on a dog, as well as a charge of providing material support to terrorists.<sup>289</sup> She pled guilty to the conspiracy to commit murder charge on February 1, 2011, in the U.S. District Court for the Eastern District of Pennsylvania.<sup>290</sup> At the time of her pleading, there were indications that she intended to change her “not guilty plea” of providing material support to terrorists, to “guilty.”<sup>291</sup>

John Walker Lindh, born 1981, was one of the first to face the combined wrath of the American people and the determination of the federal government to prosecute someone in the wake of the attacks of September 11, 2001.<sup>292</sup> As a teenager in Marin County, California, he converted to Islam, and before he was eighteen, he had traveled to Yemen to study Arabic.<sup>293</sup> He then went to Afghanistan, where he attended an al-Qaeda training camp, and later joined the Taliban.<sup>294</sup> He participated in the Taliban’s

287. Carrie Johnson, *JihadJane, an American Woman, Faces Terrorism Charges*, WASH. POST (May 10, 2010), [http://www.washingtonpost.com/wp-dyn/content/article/2010/03/09/AR2010030902670\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2010/03/09/AR2010030902670_pf.html).

288. *Id.*

289. *Id.*

290. Office of Public Affairs, *Colorado Woman Pleads Guilty to Conspiracy to Provide Material Support to Terrorists*, DEP’T. OF JUSTICE (Mar. 8, 2011), <https://www.justice.gov/opa/pr/colorado-woman-pleads-guilty-conspiracy-provide-material-support-terrorists>.

291. See Associated Press, *Pennsylvania: Plea Change for ‘Jihad Jane,’* N.Y. TIMES (Jan. 29, 2011), <http://www.nytimes.com/2011/01/29/us/29brfs-Jane.html?ref=topics>.

292. *The Case of the Taliban American*, CNN, <http://www.cnn.com/CNN/Programs/people/shows/walker/profile.htm> (last visited Sept. 22, 2017).

293. *Id.*

294. See Proffer of Facts in Support of Defendant’s Suppression Motion at 2, *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002) (No. 02-37-A), available at <http://news.findlaw.com/hdocs/docs/lindh/uslindh61302dstat.pdf> [hereinafter *Lindh Suppression Motion Proffer of Facts*].

campaign against the Northern Alliance in 2001.<sup>295</sup> He was aware of the attacks of September 11, but remained with the Taliban nevertheless.<sup>296</sup> He was ultimately captured by forces of the Northern Alliance, and was in captivity when representatives of the United States Government interrogated him and other captives.<sup>297</sup> The Taliban captives rioted and killed an American interrogator, Johnny Michael Spann.<sup>298</sup>

It is not clear when Lindh identified himself to his American captors as an American citizen. However, early in his interrogation, he requested to see a lawyer, but none were available in the field, or even later when he was in military custody.<sup>299</sup> What is clear is that his treatment while in American custody was rough, and possibly even inhumane; it is a surprise that he survived this ordeal.<sup>300</sup> He was photographed blindfolded and bound naked in a container.<sup>301</sup> This iconic photograph became a representation of the fate of a young man who had left his country to fight for the enemy, but not necessarily against the United States. Even so, Lindh received extraordinary public opprobrium and antipathy as a traitor.<sup>302</sup>

Lindh was not indicted for treason. Rather, of the ten counts in his indictment half were for conspiracy and only two were for

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295. *Id.*

296. Indictment, *Lindh*, 212 F. Supp. 2d 541 (No. 02-37-A), available at <https://www.justice.gov/archives/ag/united-states-district-court-eastern-district-virginia-alexandria-division> [hereinafter *Lindh* Indictment].

297. *Lindh* Suppression Motion Proffer of Facts, *supra* note 294, at 10, 14.

298. *Lindh* Indictment, *supra* note 296, at ¶ 25.

299. *Lindh* Suppression Motion Proffer of Facts, *supra* note 294, at 16; *see also* Defendant's Memorandum of Points and Authorities in Support of Motion to Suppress Statements of Violation of His Fifth Amendment Rights (Miranda and Edwards) at 19, 21, *U.S. v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002) (No. 02-37-A), available at <http://news.findlaw.com/hdocs/docs/lindh/uslindh61302sup5th.pdf> [hereinafter *Lindh* Motion to Suppress Statements Points and Authorities].

300. The rigor and the events of Lindh's ordeal attendant upon his capture by American forces was of no avail in his attempts to dismiss the indictment against him. *See Lindh*, 212 F. Supp. 2d at 545.

301. *Lindh* Motion to Suppress Statements Points and Authorities, *supra* note 299, at 18.

302. *See* Suzanne Kelly Babb, Note, *Fear and Loathing in America: Application of Treason Law in Times of National Crisis and the Case of John Walker Lindh*, 54 HASTINGS L.J. 1721 (2003), for a reasonably balanced account.



actual acts: supplying services to the Taliban and using and carrying firearms during crimes of violence.<sup>303</sup> After lengthy negotiations, he pleaded guilty to the two acts as charged and the remaining eight conspiracy charges were dismissed.<sup>304</sup> He was sentenced to twenty years' confinement.

Did Lindh commit treason as many have claimed? Probably not, because treason is strictly defined and reserved for the extreme cases where "betrayals of allegiance [] are substantial."<sup>305</sup> The evidence of the overt acts at best is ambiguous. Lindh did levy war against the Northern Alliance, but there is no clear evidence that he levied war against the United States. The interesting question remains as to whether the services he supplied to the Taliban amounted to aid and comfort under the constitutional definition of treason.

At the heart of the matter, the question of his intent remains. Without the requisite intent to betray the United States, Lindh's acts do not rise to the level of treason. Clearly, he adhered to the Taliban by attending their training camp, and participating in the campaign against the Northern Alliance. However, it remains to be seen whether a reasonable jury could find that by doing so he intended to betray the United States, especially in the face of his assertion that he was following his Islamic faith. Indeed, Lindh could have asserted the defense of duress; he could have claimed a policy of both the Taliban and the Northern Alliance to use coercive tools to enforce "loyalty" on their respective sides. Duress, then, would negate the requisite intent to betray the United States.

So far none of these cases, with the notable exception of Adam Gadahn, merit a charge of treason. However, a treason charge is still a viable option under the proper circumstances. For example, consider these plausible but hypothetical facts: A group of ten young men, all born in the United States and educated in local schools, received military training from a terrorist group or organization abroad in the use of weapons, and in the conception and execution of military operations to wreak havoc in the United

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303. Lindh Indictment, *supra* note 296.

304. Tom Jackman, *In Deal, Lindh Pleads Guilty to Aiding Taliban*, WASH. POST, July 16, 2002, at A1.

305. *United States v. Rahman*, 189 F.3d 88, 114 (2d Cir. 1999) (alteration in original).

States for the purpose of bringing down the government. In furtherance of this goal, they conceived a scheme and plotted to attack a major military base during its outdoor ceremonies while the Secretary of Defense is speaking. The purpose of this attack was to make war on the United States. They acquired the appropriate weapons and the means to deliver the payloads of these weapons. Their leader had even served as a junior officer in the United States Armed Forces. Moments before they were to make the attack, the FBI arrested them. No shots were fired.

These facts support a charge of treason by levying war against the United States. The men were assembled and arrayed in a military manner, and they were about to make an attack. These men levied war against the United States. John Marshall described the overt act of levying war in the *Burr* trial in 1807: “[W]ar might be levied without a battle, or the actual application of force to the object on which it was designed to act; that a body of men assembled for the purpose of war, and being in a posture of war, do levy war . . . .”<sup>306</sup> These ten men in the above hypothetical were assembled and arrayed in a military manner to conduct an attack on a United States military base. This would be enough to make it an overt act of treason. Because treasonous intent may be inferred from the act itself, the fact that the attack was frustrated only by their arrest, before any weapons were fired, is of no moment.

The Constitution requires two witnesses to the same overt act, which in this case should not be difficult.<sup>307</sup> However, treasonous intent may be proved by circumstantial evidence. Indeed, in these circumstances the overt act is “evidence of the treasonable purpose and intent” of its perpetrators.<sup>308</sup> These ten men in the above hypothetical were in the process of executing their plan, and had the capability of executing it. The matter had left the realm of conspiracy and entered the realm of action. Moreover, these men had received appropriate training by a terrorist group specifically for the purpose of making an attack against the United States. In addition, the FBI could have other

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306. *United States v. Burr*, 25 F. Cas. 201, 203 (C.C.D. Va. 1807) (No. 14,694) (alteration in original).

307. U.S. CONST. art. III, § 3, cl. 1.

308. *United States v. Cramer*, 325 U.S. 1, 32 (1945).

evidence of intent, not only from witnesses, but from legitimate wiretaps or computer based sources. Based on these facts, a reasonable jury could find that the ten men had the requisite treasonous intent. Their overt act became treason under the Constitution when it was accompanied by this intent.

While there is little, if any, dispute over what the acts were, the intent of these men still should be scrutinized carefully. At the very least they intended to destroy property which they knew would result in numerous deaths. However, their ultimate purpose was to bring down the United States government. So long as the government can produce evidence upon which a reasonable jury could find their intent was to levy war against the United States, and not just to murder unnamed individuals and destroy government property, then the jury could return a finding of guilty on a treason charge.<sup>309</sup> Levying war against the United States is treason because, at root, it is an attack on the body politic and a breach of the underlying social contract. Thus, the attack as planned was essentially an attack on all Americans, even if it was ultimately unsuccessful.

These men would probably assert lack of treasonous intent as a defense. However, their leader would be able to assert a novel defense. As an officer of the armed forces, he took an oath to support and defend the Constitution. He could assert the defense used by Jefferson Davis in 1868 to quash his indictment for treason. The Fourteenth Amendment to the Constitution came into effect in early 1868. Davis claimed that the disability from holding public office in section 3 of that Amendment constituted punishment and thus the Constitution prohibited a subsequent prosecution for treason.<sup>310</sup> The motion to quash was heard in the

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309. In addition, a jury could also return a verdict of guilty on lesser charges, such as conspiracy to murder government officials, under 18 U.S.C. § 1117 or an attempted offense under 18 U.S.C. § 2332b, "Acts of Terrorism Transcending National Boundaries." 18 U.S.C.A. §§ 1117, 2332b (Westlaw through Pub. L. No. 115-51).

310. Section 3 of the Fourteenth Amendment provides:

No person shall be a Senator or Representative in Congress, or elector of President or Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the

Circuit Court for Virginia, which failed to rule on it. Instead, the matter was sent to the Supreme Court. However, in December 1868, President Johnson issued a blanket pardon, which included Jefferson Davis, thus making the motion to quash moot. However, one question is still unanswered: whether the disability clause is a punishment for persons who have taken an oath to support the Constitution but later engage in rebellion or insurrection—that is, levying war—and thus precludes a prosecution for the crime of treason.<sup>311</sup>

The facts of this hypothetical meet the strict Constitutional requirements for a charge of treason. The overt act of preparing an attack on a United States military installation and the ability to launch it when coupled with the requisite treasonous intent, which may be inferred from the overt act itself, present a clear and convincing case of treason by levying war against the United States. A charge of treason is appropriate and it may be coupled with other lesser offenses.

#### CONCLUSION

An act of treason is a betrayal of the political body, because it is a deliberate, intentional breach of the social contract. John Marshall correctly observed that treason is “the most atrocious offense which can be committed against the political body”<sup>312</sup> and

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Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

U.S. CONST. amend. XIV, § 3.

311. Following the collapse of the Confederate Government there were four charges of treason filed against Davis. The motion to quash concerned the fourth charge. It was argued brilliantly by distinguished counsel. See Case of Davis, 7 F. Cas. 63 (C.C.D. Va. 1867-1871) (No. 3621); see also *Trial of Jefferson Davis; The Motion to Quash the Indictment—Argument of Robert Ould*, N.Y. TIMES (Dec. 4, 1868), <http://query.nytimes.com/gst/abstract.html?res=9D01E6DF1E3AEF34BC4C53DFB4678383679FDE&legacy=true>. See Horace Henry Hagan, *The United States v. Jefferson Davis*, 25 SEWANEE REV. 220, 223–25 (1917), for a discussion about the constitutional question. See C. Ellen Connally, *The Use of the Fourteenth Amendment by Salmon P. Chase in the Trial of Jefferson Davis*, 42 AKRON L. REV. 1165 (2009), for a thorough account of the trial.

312. *United States v. Burr*, 25 F. Cas. 2, 13 (C.C.D. Va. 1807) (No. 14,692).

that “there is no crime which can more excite and agitate the passions of men than treason.”<sup>313</sup> Recorded history is replete with examples of how the betrayal implicit in treason strikes at the very heart of society. Consider the fate of Eretria, a small Greek city on the island of Euboea, under siege by the Persian king Xerxes. Only two citizens of Eretria opened the gates to the Persians, who sacked and burned the city and then enslaved the inhabitants.<sup>314</sup> Because everyone is a victim, treason should be charged only for the most atrocious, the most serious, and the most heinous offenses.

American history is similarly replete with examples of the extraordinary passions that even a perception of betrayal can ignite, regardless of whether formal charges were preferred. Notable examples are former vice-president Aaron Burr in 1807, and in modern times, the actress Jane Fonda in 1970, and John Walker Lindh in 2001. Burr was tried and acquitted.<sup>315</sup> Fonda was not even charged, and Lindh pleaded guilty to lesser offenses.<sup>316</sup> All three were widely believed to have betrayed the United States. The acts of all three excited and agitated public passions.

Congress has enacted extensive legislation covering a wide variety of lesser, but still very serious, offenses that might otherwise be considered treasonous and has made it applicable to both citizens and residents of the United States.<sup>317</sup> These statutes have been invoked in numerous instances in the war

313. *Ex Parte Bollman*, 8 U.S. (4 Cranch.) 75, 125 (1807).

314. FELTEN, *supra* note 2, at 255–56.

315. COOMBS, *supra* note 141, at 352–54.

316. See Henry Mark Holzer, *Why Not Call it Treason?: From Korea to Afghanistan*, 29 S.U. L. REV. 181 (2002), for an informative, but polemical article. See also HENRY MARK HOLZER & ERIKA HOLZER, *supra* note 9, at 162.

317. Chapter 115 of Title 18 of the United States Code not only contains the treason statute (§ 2381), but also misprision of treason (§ 2382), rebellion or insurrection (§ 2383), seditious conspiracy (§ 2384), and advocating overthrow of Government (§ 2385). 18 U.S.C.A. §§ 2381–2385 (Westlaw through Pub. L. No. 115-51). Additionally, 18 U.S.C. § 2332a applies to the use of weapons of mass destruction, specifically against a national of the United States or within the United States, and § 2332b applies to acts of terrorism transcending national boundaries. *Id.* § 2332a–2332b (Westlaw). The defendants in the World Trade Center bombing in 1993 were convicted of seditious conspiracy under § 2384. *Id.* § 2384 (Westlaw). The convictions were affirmed in *United States v. Rahman*, 189 F.3d 88, 160 (2d Cir. 1999).

against terror, and convictions have resulted. Nevertheless, the constitutionally defined crime of treason remains available to prosecute the most egregious offenses.

The modern state representing contemporary society not only has the right, but also the duty to enforce the loyalty of its members and those who enjoy its protection. Treason is a crime of betrayal, because it is a threat to the security of all members of society. Society has determined that traitors should be punished. However, the Constitution limits the acts that constitute treason, and then it provides important procedural safeguards first by requiring two witnesses to the same overt act and then by excluding out of court confessions. In this way, the Constitution adequately protects both the interests of the state to punish betrayal and the rights of the accused. Treason is still a valid legal tool and it should be used.