



Written by [Joe Wolverton, II, J.D.](#) on August 23, 2023

## This Week at the Convention of 1787: Treason and Sovereignty

This was a week of some of the most intense conflict among some of the most imminent Founding Fathers gathered at the convention of 1787. And the subjects of their impassioned speeches are subjects that still dominate political debates some 236 years later.

Given the persecution and prosecution of former President Donald Trump, one of the topics debated this week at the Constitutional Convention of 1787 is timely, and I would encourage all of our readers to go to James Madison's "[Notes of Debates in the Federal Convention of 1787](#)" and familiarize yourselves with the various points of view put forward by some varsity-squad Founding Fathers on the definition of treason against the United States.



George Mason

Beginning on August 20, the treason clause was scrutinized by the delegates. Specifically, Article VII, Section 2 of the first draft of the Constitution was the provision providing a definition of treason against the United States. That section read:

Treason against the United States shall consist only in levying war against the United States, or any of them; and in adhering to the enemies of the United States, or any of them. The Legislature of the United States shall have power to declare the punishment of treason. No person shall be convicted of treason, unless on the testimony of two witnesses. No attainder of treason shall work corruption of blood, nor forfeiture, except during the life of the person attained.

In this first draft, treason was placed in the document under the powers of the legislature. In the final version of the Constitution, treason would be transferred to Article III, the article defining the duties of the judiciary.

James Madison stood first and argued that the definition was too narrow and "did not appear to go as far as the statute of Edward the Third."

The treason statute of Edward III ([Treason Act of 1351](#)) was familiar to the Founders and is the basis for our current constitutional definition of that act. The 1351 Act read in relevant part:

If a Man do levy War against our Lord the King in his Realm, or be adherent to the King's Enemies in his Realm, giving to them Aid and Comfort in the Realm, or elsewhere, and thereof be attainted of open Deed by the People of their Condition.



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George Mason recommended simplicity, suggesting that the 1351 statute was sufficient and should just be copied into the new Constitution. Although it's not obvious today, Mason's recommendation was a bit radical considering that the section under consideration included the provision requiring "two witnesses to the same overt act" that was added in 1552 to the English definition of treason. Mason would have omitted that latter addition.

As usual, Gouverneur Morris had something to say. Morris said he favored "giving to the Union an exclusive right to declare what should be treason." That way, he explained, a person would never be put in the position of deciding between treason to his state and treason to the Union.

I am reminded of that famous dilemma faced by Robert E. Lee of "standing by the old Union" or "following [his] native state with [his] sword."

At this point, Luther Martin of Maryland made a motion that was not recorded by Madison in his *Notes*. Madison left no explanation of why he omitted Martin's motion, but the proposal is worth restoring to the record.

After Gouverneur Morris advocated for making declaration of treason the exclusive authority of the union, Luther Martin rose and pushed for that power to be retained by the states, offering the following amendment:

Provided that no act or acts done by one or more of the States against the United States, or by any citizen of any one of the United States, under the authority of one or more of the said States shall be deemed treason or punished as such; but, in case of war being levied by one or more of the States against the United States, the conduct of each party towards the other, and their adherents respectively, shall be regulated by the laws of war and nations.

Martin's motion was rejected by the delegates, but the fact that one of the leading members of the convention proposed providing for an eventual conflict between a state or group of states and the Union is extraordinary and remarkably foresightful, given that fewer than 75 years from the adjournment of that convention several states would secede from the union, resulting in armed conflict between the seceding states and the federal government.

Remarkably, had Luther Martin's motion been approved and become part of the U.S. Constitution, then there would have been no option for the federal government to allege the need to "suppress insurrection," as the conflict with the seceding states would have been constitutionally classified as a war, as with any other nation.

In a letter to the Maryland state Legislature, Martin reported that his motion was rejected due to the opposition by those delegates committed to "leaving the States at the mercy of the General Government."

Next, with a view to the Founders' understanding of the concept of sovereignty, it is worth noting the explanation of the difference between the sovereignty of the states and the sovereignty of the federal government.

"The United States will have a qualified sovereignty only. The individual States will retain a part of the sovereignty. An act may be treason against a particular State, which is not so against the United States," Mason observed.

In those two sentences Americans could learn more about the correct constitutional relationship



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between the states and the federal government than in shelves of civics textbooks teaching that the states are subordinate to the federal government.

In creating the federal government, the individual sovereignty of the states was not at all impaired. By ratifying the Constitution, the states agreed to unite in exerting their powers over a few and defined areas through an agent we call the federal government. The powers exercised by the federal government, as George Mason explained, were not inherent in it, but were provisionally granted to it by the states.

Finally, after several amendments and revisions, the definition of treason approved by the delegates was that which is found in Article III, Section 3 of the current U.S. 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. 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.

Next up: the debate over direct taxation!



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