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Treason, Defined and Enforced

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. The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted. — U.S. Constitution, Article III, Section 3

From New York to Los Angeles and in American diplomatic outposts worldwide, people are calling for the head of Julian Assange on a silver charger. WikiLeaks, the company founded by Assange, recently released scores of secret and confidential memos embarrassing to diplomats and foreign services workers, including the Secretary of State Hillary Rodham Clinton. “Treason!” is the cry heard from podiums and pundits, convinced that such effrontery to the “dignity” of the American diplomatic corps is the very definition of a traitorous act.

On the other side, there are those who consistently have called for the conviction of President Barack Obama on charges of treason. In fact, there are dozens if not hundreds of websites devoted to presenting the evidence against the President, evidence that the providers believe establish irrefutable proof that the sitting President of the United States is guilty of the greatest of all the offenses of which he could be accused — treason.

Whether or not Julian Assange (who is not even an American citizen) or President Barack Obama are guilty of treason should not, in a republic built upon the foundation of the rule of law, be a matter decided by conjecture, hysteria, or vote. Treason is a legal term and as such has a very precise definition. What’s more, many of the men who framed our Constitution were lawyers and jurists and were familiar with the historic definition and application of the charge of treason.

Before judgment is passed in any particular case, therefore, it will be informative and enlightening to review the history of the charge of treason as it is understood in American jurisprudence, including the acts that legitimately constitute actionable, treasonous behavior.

The Constitution defines the charge of treason, but lamentably says nothing of any lesser-included crimes. We are left, therefore, to make educated assumptions as to when an act falls within the definition provided by Article III. As with so many other tasks of constitutional analysis, history of the clause itself and the application thereof illuminates the otherwise hazy borders of the law.

History of Treason

Our Founding Fathers did not create their accepted definition of treason from whole cloth. Rather, they incorporated the traditional definition of this most vile crime into the clauses of the Constitution created in Philadelphia in 1787.

The record of the deliberations of the Constitutional Convention makes it clear that the Framers intended to base the new charter's treason clause on the Statute of 25 Edward III, wherein the essential elements of levying war, adhering to an enemy, and the giving of aid and comfort were set forth. In fact, such terms were already well established in the Anglo-Saxon jurisprudence before Edward III enacted his statute. As far back as Alfred the Great, the English proscribed such behavior and made it the only crime not compensable with money.

In the days following the ratification of the Constitution and the establishment of the national government created thereby, the question of the American definition of treason came up a few times and a finer point was put on one aspect of the crime: the punishment thereof. In the Act of April 30, 1790, Congress expressly named death as the penalty for conviction of the crime of treason.

American jurists continued, however, to look to the English constitution and the application of the laws thereof in the adjudication of treasonous activity in the New World. Dr. Benjamin Church, for example, was accused of relaying critical information to the British during the War for Independence. Serving as his own defense counsel, Church asserted his innocence, and he was eventually convicted only of "consorting with the enemy," certainly a crime of much duller teeth than treason. Church was incarcerated in a Connecticut jail and was denied visitors except in the presence of the sheriff until his release.

Perhaps the most famous treason trial from the early days of our Republic is that held in the case of Aaron Burr in 1807. Vice President Burr was tried for treason for "conspiring to invade territories of a nation at peace with the United States." Basically, Burr was accused of attempting to raise an army in order that he might invade a part of the Louisiana Territory and found a republic with himself as ruler.

The pertinent inquiry in this case in light of the Constitution's embrace of the traditional English definition of treason was whether or not Burr's actions rose to the level of levying war against the United States. The cast of characters in this melodrama reads like a "Who's Who" in the Founding Generation. Thomas Jefferson, Burr's running mate, loathed Burr and made regular premature pre-trial pronouncements of the accused's guilt in the matter.

Another key figure in the cause of action was John Marshall. Marshall's nascent form of judicial activism as expressed in his decisions in the landmark Supreme Court cases of *McCulloch v. Maryland* and *Marbury v. Madison* had already established him as a lightning rod for Republican *sturm und drang*.

In the Burr trial, Marshall once again delivered an opinion that was classed as clever by his proponents and inexplicable by his enemies. It was in this trial that Marshall enunciated the "levying war" doctrine wherein the law would require two witnesses to testify that they personally saw the accused preparing to levy war against the United States.

With Marshall's interpretation of the "levying war" doctrine as a guide, a grand jury found Burr "not guilty" of treason.

Unremarkably, there was widespread reaction to Marshall's decision in the case against Aaron Burr. One of the most encompassing restatements of the proper understanding of the law against treason was expressed in a letter written in 1808 from Rufus King, a delegate to the Constitutional Convention, regarding a bill recently introduced in the Senate to prevent a recurrence of an outcome like the one in Burr's case. Wrote King:

> The limitation which the Constitution establishes on the subject of Treason, proceeded from a

> principle, which will readily be approved by every man who is acquainted with the vindictive spirit that, at different times in the history of England, has animated the ascendant faction against their political adversaries. If the proposed law on the subject of Treason neither enlarges nor lessens its constitutional definition, the law is unnecessary; if it does the one or the other, it is unconstitutional. In the unfortunate periods, during which a country is torn by contending factions, the Treason laws should not be altered. Neither ought they to be changed just at the time when the Government is angry or disappointed in the failure to convict such as are believed to have committed Treason.

The question of whether one has committed the crime of treason as defined in Article III of the Constitution is answered by a two-pronged analysis. First, did the accused levy war against the United States; or, second, did he adhere to an enemy of the United States by offering that enemy aid and comfort? This threshold consideration has been applied in a few key Supreme Court decisions wherein the borders of the crime were drawn more brightly.

The first relevant case is the case of *Cramer v. United States*. In this case, decided in 1926, the issue was whether the intent of a person to commit treason was enough to sustain the charge, or whether there was a requirement of an "overt act," which would itself be required to "openly manifest treason." Speaking for a Court divided 5-4, Justice Robert H. Jackson held in the majority opinion that "Every act, movement, deed, and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses." This is in furtherance of the requirement of such as found in Article III, Section 3 of the Constitution.

This decision remained the accepted expression of the law until the time of the Haupt Case. For the very first time in its history, the Supreme Court upheld a conviction of treason in this case decided in 1947. In this case, the defendant was accused of providing harbor and shelter to his son, a man known to be an enemy spy. Haupt assisted his son in buying a car and getting a job at a defense plant. In the decision handed down, again by Justice Jackson, the court held that although the senior Haupt's acts might have been those naturally performed by a father for his son, this relationship was not enough to remove the taint of treason from them. Justice Jackson's opinion states, "No matter whether young Haupt's mission was benign or traitorous, known or unknown to the defendant, these acts were aid and comfort to him. In the light of this mission and his instructions, they were more than casually useful; they were aids in steps essential to his design for treason. If proof be added that the defendant knew of his son's instruction, preparation and plans, the purpose to aid and comfort the enemy becomes clear."

Perhaps the most operationally important elements of the Haupt decision are the exclusions made to the "two witness rule." The constitutional requirement of two witnesses does not exclude any confession, conversation, or admission that was made outside of court, prior to the indictment for treason, from working as proof of the defendant's treasonous intent. While the necessity for an "open court" testimony of two witnesses is still intact as to the treasonous acts, the totality of the circumstances (so to speak) may be considered and weighed as corroborative of the proof of the allegation of treasonous intent. In dictum, the court expressed this new rule thus: "The present decision is truer to the constitutional definition of treason when it forsakes that test [the Cramer test] and holds that an act, quite innocent on its face, does not need two witnesses to be transformed into an incriminating one."

The final case in this treasonous trio is the case of *Kawakita v. United States*. The case involves a man born in America to Japanese parents who traveled to Japan on an American passport. During his visit to

Japan, war broke out between the two nations, and he was prevented from returning to the United States. While living in Japan, Kawakita changed his registration in that nation from "American" to "Japanese" and began working for a company that manufactured munitions for use in the war against the country of his birth. Furthermore, the accused was shown to have ruthlessly abused several American prisoners of war who were forced to work at the plant where he was employed. Upon the surrender of the Japanese to the United States that ended World War II, Kawakita re-registered as an American citizen and tried to repatriate to the United States. He was accused of treason, found guilty thereof by the lower court, and the Supreme Court heard the case in 1952.

In its ruling sustaining the conviction pronounced by the lower court, the Supreme Court held that an American citizen, regardless of his country of residence, owes a duty of allegiance to the United States, and no consideration of the concept of dual citizenship may alter or abolish that duty.

Treason Today

In 2006, for the first time since the *Kawakita* case, a federal grand jury issued an indictment for treason. Adam Yahiye Gadahn was charged with treason for appearing in videos produced by al-Qaeda wherein he advocated attacks on America. The case is stalled as the whereabouts of Gadahn are unknown or unconfirmed.

Interestingly, it was Joseph McCarthy who employed a broader definition of treason than those more clear-cut examples discussed above. McCarthy's quest to uncover hidden cells of espionage within the government of the United States has been proven very prescient, despite popular notions to the contrary. McCarthy famously decried the Roosevelt and Truman administrations as "twenty years of treason." Given the evisceration of the Constitution carried out under those two regimes, there can be little serious debate as to the accuracy of that assertion.

In our own day, Presidents and Congressmen of both major political parties persist in the incremental obliteration of all the enclosures erected by our Founding Fathers around the limited powers granted to the national government in the Constitution.

There are men and women serving as representatives of the people whose plans extend beyond the obliteration of the Constitution to the abolition of freedom in the whole world. Yet year after year, these enemies of liberty are reelected and return to the sacred and important councils of the national government.

An influential book once warned that *None Dare Call it Treason*. Do we dare?

Is it treasonous for a sitting President to refuse to execute the lawfully promulgated acts of Congress?

Is it treasonous for the Congress of the United States to sit idly by in a stupor while the southern border of the United States is invaded daily?

Is it treasonous for a Congressman or Senator to stand and applaud a foreign President while he recriminates, reprimands, and lectures the American people?

Is it treasonous to pass laws mandating that every American purchase a commodity regardless of personal choice?

Is it treasonous for citizens to ignore the passage of so-called "laws" by a federal government whose means and ends are no longer legitimate?

The answer to all these crucial questions depends on where we look for the applicable standards. Do we look to a Supreme Court whose every decision for decades has worked to eliminate enumerated powers

and endow the national government with authority to act according to the dictates of its own whims? There may be instances where learned justices understand the nuances of jurisprudence that are a mystery to those not trained in the law. When it comes to the survival of our Republic, however, perhaps we are better served by recurring to the black letter of the law as set down in the Constitution itself.

The relevant inquiry then becomes whether the acts listed above constitute giving aid and comfort to an enemy of the United States (it is difficult to uphold an accusation that such acts demonstrate the levying of war). The second step in the analysis is the identification of the enemy.

Is one an enemy who works surreptitiously to detach the government of the United States from the fetters that moor it to the firm footings of the Constitution?

Is one an enemy who ignores evidence of the possible ineligibility of a candidate for President to hold that office because of questions regarding his birthplace?

Finally, is one an enemy of the United States if he permits millions of people to essentially invade this country through its southern border? And in a related question, is one an enemy who zealously works to prevent the lawful attempts of one of the sovereign states along that border to protect herself from said invasion?

If we genuinely care about the future of this Republic, we must not shun from boldly crying "Treason!" against those who commit such deplorable acts as those described above. We must learn to identify such traitors despite their well-rehearsed performances designed to fool us into believing their allegiance. We have been taught by the Master himself to beware of wolves in sheep's clothing. We care not for the letter after your name, we care only for your fidelity to the principles of good government as bequeathed to us by our Founding Fathers. We will not be deceived anymore.

As the noble Roman Cicero said over 2,000 years ago when faced with traitors in his midst:

> A nation can survive its fools and even the ambitious. But it cannot survive treason from within.... For the traitor appears no traitor; he speaks in the accents familiar to his victim, and he wears their face and their garments and he appeals to the baseness that lies deep in the hearts of all men. He rots the soul of a nation; he works secretly and unknown in the night to undermine the pillars of a city; he infects the body politic so that it can no longer resist. A murderer is less to be feared. The traitor is the plague.

Sadly, the days have passed when traitors were punished more severely than the bitterest of our foreign foes. Historically, we learn that we cannot rely on the courts to prosecute violations of this variety of treason. We are left with the option of wielding the two-edged sword of nullification and free election to fight this battle.

— Photo of Julian Assange: AP Images