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Reviving the Treason Charge

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REVIVING THE TREASON CHARGE

by

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ABSTRACT

Can Americans who join terrorist organizations and fight against United States troops be charged with treason? Does the January 6th riot in Washington D.C. constitute “levying war”? Despite ongoing acts of levying war, and providing aid and comfort to enemies, the United States has not had a treason conviction since the 1950’s. Courts and prosecutors actively avoid the charge, leading to a substantial lack of case law and legal guidance. Today, legal scholars disagree on how the Treason Clause should be applied. In this thesis, I discuss the disappearance of treason, and analyze opposing views on how the treason charge should be utilized in the twenty-first century. Specifically, I argue that treason holds significant constitutional importance, and should return as a viable charge in criminal law.

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INTRODUCTION

"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."[1]

John Walker Lindh joined the Taliban and took up arms against American troops.[2] Eric Snowden leaked classified federal information.[3] Rioters led an insurrection on the capitol.[4] All have been called "traitors" and "treasonous" by the public, but none have resulted in a treason charge, much less a conviction.[5] The Treason Clause is the only constitutional issue that has not been applied in the twenty-first century. Should treason return as a viable charge in American law? If so, how should it be applied?

Perhaps the highest and most imperative charge in criminal law is treason.[6] It holds the unique position of being the only crime defined in the constitution.[7] Yet despite its historical and constitutional importance, treason has fallen out of favor; the last true case was tried in 1952.[8] This is not due to a lack of treasonous acts since the 1950's. Rather, courts have been actively avoiding the charge. This has led to a lack of substantial case law and legal guidance. Scholars

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[1] U.S. CONST. art. III, § 3.
[2] U.S. v. Lindh, 212 F. Supp. 2d 54 (E.D. Va. 2002).
[3] *United States Obtains Final Judgment and Permanent Injunction Against Edward Snowden*, Justice News, The United States Department of Justice: Office of Public Affairs, Oct. 1, 2020, https://www.justice.gov/opa/pr/united-states-obtains-final-judgment-and-permanent-injunction-against-edward-snowden.
[4] *Capitol Violence*, FBI, Jan. 8, 2021, https://www.fbi.gov/wanted/capitol-violence.
[5] *E.g.*, Lois Beckett, Why Aren't We Calling the Capitol Attack Treason?, The Guardian, Apr. 5, 2021, https://www.theguardian.com/us-news/2021/apr/05/the-capitol-attack-treason.
[6] *See* Cramer v. United States, 325 U.S. 1, 22 (1945).
[7] U.S. CONST. art. III, §3.
[8] Kawakita v. U.S., 343 U.S. 717 (1952).

have also largely ignored the Treason Clause. The few who dive into the subject often note the lack of attention paid to it by legal professionals. Today, courts and scholars either disregard the charge entirely, or disagree on how it should be applied in the twenty-first century.[9] In this paper I argue why treason should return as a viable charge in criminal law and analyze how it should be applied to modern issues.

Section I establishes a fundamental understanding of the Treason Clause and how to commit treason. Section II describes why the founders chose to define treason in the Constitution, rather than leave it to Congress. It also studies how treason has evolved over time and analyzes why treason prosecutions have disappeared. Section III discusses treason's importance and argues why it should return as a charge in criminal law. Section IV gives proscribed changes that will enable the treason charge to return as a viable and workable charge. Section V applies the proscriptions to relevant cases and delineates how they should have resulted.

[9] *E.g.*, Jennifer Malone, *American Taliban Avoids Charge of Treason, Claims to be Victim of Coercion*, 7 PUB. INT. LAW REP. 1, 17 (2002) https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1451&context=pilr.

I. STEP BY STEP GUIDE TO COMMITTING TREASON IN THE UNITED STATES

In the United States, there are two ways to commit treason: "levying war" and "adhering to an enemy, providing them aid and comfort."[10] Either way, three elements must be proven to sustain a treason conviction: allegiance, an "overt act", and treasonous intention.[11] The elements are characterized differently between the two forms of treason. However, both require the "overt act" be proven by the testimony of two witnesses or be confessed in open court.[12]

a) How to Levy War

To "levy war" the participants must first owe allegiance to the United States and revolt against their own government.[13] If an individual aids a foreign enemy to overthrow the United States, then war has not been levied.[14] However, if a group of American citizens or nationals attempt to suppress the law by force or try to overthrow their own government, then war may be levied.[15]

Second, is intent.[16] In "levying war "cases, treasonous intentions are proven by a plan to overthrow the government or to suppress the law by force.[17] For example, planning to attack congress for an unwanted law proves treasonous intentions.[18] Attempting to overthrow congress

[10] U.S. CONST. art. III, § 3.
[11] *E.g.*, Kawakita v. U.S., 343 U.S. 717 (1952).
[12] U.S. CONST. art. III, § 3.
[13] United States v. Greathouse, 26 F. Cas. 18, 22 (C.C.N.D. Cal. 1863).
[14] *Id*.
[15] *Id*.
[16] *E.g.*, Case of Fries, 9 F. Cas. 924, 930 (C.C.D. Pa. 1800).
[17] *Id*.
[18] *Cf*. U.S v. Mitchell, 2 U.S. 348 (C.C.D. Pa. 1795) (finding that targeting an excise office of the United States to suppress the law is treason).

by force is another example.[19] However, a protest without the intent to suppress or overthrow is not treason by "levying war."[20]

Third, a treasonable design must be put into action. This is the "overt act" that must be proven by two witnesses or confessed in open court.[21] Conspiracy to overthrow the government or to suppress the law by force does not amount to "levying war."[22] War is only levied when the conspired plan is put into action.[23] This can be characterized by the assemblage of men for a treasonable design.[24] However, if men are recruited to serve an individual, or to protest, then war has not been levied.[25]

b) How to Adhere to an Enemy, Providing Aid and Comfort

To commit treason by "adhere to an enemy, providing aid and comfort", the individual must owe allegiance to the United States. Regardless of residency or dual citizenship, American citizens and nationals owe allegiance to the United States.[26] Because treason is a breach of allegiance, those owing no loyalty to the United States cannot commit treason.[27]

[19] *Id*.
[20] *Fries*, 9 F. Cas. at 931.
[21] U.S. CONST. art. III, § 3.
[22] *E.g.*, Ex Parte Bollman and Ex Parte Swartwout, 8 U.S. 75, 126 (1807).
[23] *Id*.
[24] *Id*. at 127.
[25] *Id*.
[26] Kawakita v. U.S., 343 U.S. 717, 733-35(1952).
[27] *See id*.

Next is the "overt act." Unlike "levying war", this form of treason is not bridled by specific deeds.[28] Providing "aid and comfort" comes in many different forms. A few examples are speech, harboring, holding money, providing information, and working behind enemy lines.[29]

Last is intention, or "adhering" to the enemy. The intention requirement protects unknowing participants.[30] For example, providing housing to an enemy, without the knowledge they are an enemy, is not treason.[31] Proving intentions also distinguishes free speech from treason in the form of speech. For example, dissenting opinions are protected.[32] However, if speech is created with the intent to betray while aiding an enemy, then treason has been committed.[33]

[28] *Cf*. Cramer v. United States, 325 U.S. 1, 58 (1945) ("Acts innocent on their face, when judged in the light of their purpose and of related events, may turn out to be acts of aid and comfort committed with treasonable purpose.").
[29] *E.g.*, *id*.
[30] *See id*. at 30.
[31] *See id*. at 28.
[32] U.S. CONST. amend. I.
[33] Chandler v. United States, 171 F.2d 921 (1st Cir. 1948).

II. THE RISE AND FALL OF TREASON

a) The Inclusion of Treason in the Constitution and the Rational for It Being the Only Crime Defined in The Constitution

Treason holds the unique position of being the only crime defined in the Constitution. This phenomenon can be attributed to England's abuse of the crime.[34] In English law during the American Revolution, many deeds were considered treason: (1) encompassing the death of the King, the Queen, or their heir; (2) violating the King's companion, wife, eldest unmarried daughter, or the eldest son's wife; (3) levying war; (4) adhering to the King's enemies, providing them aid and comfort; (5) and slaying the Chancellor, Treasurer, or Judges.[35] The wide variety of treasonous acts dangerously exposed people to prosecution. Specifically, accusations of "imaging the death of the King" were used to eliminate political rivals, or to suppress resistance to the Crown.[36] If treason were left to Congress, it could be changed easily to fit the wants of the party in power and be utilized as a political weapon. However, by placing it in the Constitution, the Founder's set treason on a higher level than other laws and made it extremely difficult to change. Because the Treason Clause is in the Constitution, amending it requires a two-thirds majority vote, or a constitutional convention to be called with a two-thirds majority vote.[37] It is

[34] *Cf.*, Cramer v. United States, 325 U.S. 1, 22-23 (1945) ("The temper and attitude of the Convention toward treason prosecutions is unmistakable. It adopted every limitation that the practice of governments had evolved or that politico-legal philosophy to that time had advanced.").
[35] *See* Treason Act 1351, 25 Edw. 3 c. 2 § 5 (Eng.).
[36] JAMES WILLARD HURST, THE LAW OF TREASON IN THE UNITED STATES: COLLECTED ESSAYS 5 (1971).
[37] U.S. CONST. art. V.

unlikely the Treason Clause will ever be amended through Congress; out of the 11,000 amendments proposed since 1789, only twenty-seven have been ratified.[38]

Also due to the abuse suffered in England, the Founders adopted a narrow definition of the crime.[39] Language such as "levying war" and "adhering to enemies, giving them aid and comfort" were borrowed from English law.[40] However, the narrow definition was not enough. They also included a difficult evidentiary requirement, the "two witness" rule.[41] Requiring the testimony of two witnesses to the same overt act would protect against flagrant accusations and ensure treason would not be used as a political weapon. Concerns were voiced at the Constitutional Convention regarding the limiting nature of the Treason Clause.[42] Some believed the limited definition combine with the two-witness rule would make treason too difficult to prove.[43] However, the majority thought it best to err on the side of caution.[44] The final Treason Clause was decided as follows: "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."[45]

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[38] *Amending the Constitution*, U.S. Senate, 2019, https://www.senate.gov/reference/reference_index_subjects/Constitution_vrd.htm#:~:text=It%20has%20become%20the%20landmark,11%2C000%20amendments%20proposed%20since%201789.
[39] Cramer, 325 U.S. at 22.
[40] *Compare* 25 Edw. 3, Stat. 5 (". . . 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. . .") *with* U.S. CONST. art. III, § 3 ("Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. ").
[41] MAX FERRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 346-48 (1911).
[42] *Id*. at 345-50.
[43] *Id*.
[44] *Id*.
[45] U.S. CONST. art. III, § 3.

b) A Brief History of Treason in The United States

The first wave of treasonous offenses addresses the issue of levying war. In 1795, John Mitchell was found guilty of treason for his participation in the Whiskey Rebellion.[46] Mitchell, along with other armed insurgents, revolted against the region's tax collector and burned his house down.[47] Because the intent of the revolt was to prevent the execution of an act of Congress through force, and the insurgents showed a substantial show of force, acting in a military manner, it was considered treason.[48] Mitchell, along with other rioters, were found guilty and sentenced to hang. A similar situation arose from Fries Rebellion in 1799-1800. Angered over taxation, John Fries lead a large group of affected people to prevent the implementation of the tax.[49] Fries was subsequently charged with treason. At trial, the court emphasized the difference between lesser crimes and treason is the intention behind the actions.[50] Fries was found guilty and sentenced to death.[51]

Two men were charged with treason for participating in Aaron Burrs military expedition to Mexico in the case of *Ex Parte Bollman*.[52] Allegedly, the true intention behind the expedition was to levy war against the Unites States in New Orleans.[53] However, the plan was never fully realized. Consequently, the evidence was insufficient and the intention behind the defendant's participation was inconclusive.[54] Chief Justice Marshall wrote: "To complete the crime of

[46] U.S v. Mitchell, 2 U.S. 348, 356 (C.C.D. Pa. 1795).
[47] *Id*. at 348.
[48] *Id*. at 356.
[49] Case of Fries, 9 F. Cas. 924 (C.C.D. Pa. 1800).
[50] *Id*. at 930 ("The true criterion to determine whether acts committed are treason, or a less offence (as a riot), is the quo animo, or the intention, with which the people did assemble.")
[51] *Id*. at 932.
[52] Ex Parte Bollman and Ex Parte Swartwout, 8 U.S. 75 (1807).
[53] *Id*. at 132.
[54] *Id*. at 136.

levying war against the United States, there must be an actual assemblage of men for the purpose of executing a treasonable design."[55]

The second and most prominent wave occurred in light of World War II. The most notable case is *Cramer v. United States*, which reached the Supreme Court. Anthony Cramer was a German born, naturalized United States citizen.[56] In 1924, he was accused of treason by aiding German spies.[57] The spies entered the United States by submarine with plans to sabotage American industry.[58] Cramer met them multiple times and held $3,600 for them.[59] He was found guilty in the lower court, but the judge did not administer the maximum sentence stating: "I shall not impose the maximum penalty of death. It does not appear that this defendant Cramer was aware that Thiel and Kerling were in possession of explosives or other means for destroying factories and property in the United States or planned to do that."[60] This is where the controversy began. In plain language, the Treason Clause only requires an overt act.[61] While some courts adopted this strict view, others contended mens rea was needed to find a person guilty of treason.[62] The Supreme Court decided extreme overt acts would show guilty intentions themselves.[63] However, in uncertain situations, such as Cramer's, treasonous intent would need to be proven.[64] The ruling in this case proved to be controversial.

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[55] *Id*. at 126.
[56] Cramer v. United States, 325 U.S. 1 (1945).
[57] *Id.* at 3.
[58] *Id.*
[59] *Id.*
[60] *Id*. at 3-4.
[61] U.S. CONST. art. III, §3.
[62] Cramer v. United States, 325 U.S. 1, 4 (1945).
[63] *Id*. at 47.
[64] *Id*.

In contrast to *Cramer*, treason was rather obvious in *Chandler v. United States*.[65] However, this case does demonstrate how the court treats propaganda related treason. Born and raised in America, Douglas Chandler found political kinship with Nazi Germany.[66] He moved to Europe and worked as a radio broadcaster for the German Reich.[67] The radio broadcasts were used as psychological warfare to create division and problems among allies, and to demoralize troops.[68] The aim of the broadcasts was explicit to employees, including Chandler.[69] In 1943, Chandler was apprehended in Germany and returned to the United States where he was indicted for treason, and found guilty.[70] On appeal, the court made two important distinctions to the Treason Clause. First, treason committed abroad is still within the jurisdiction of the United States.[71] Second, although mere words are not enough to constitute treason, speech produced to betray while aiding an enemy is.[72] This case demonstrates where free speech ends, and treason begins.

The last true treason case was in 1952. *Kawakita v. United States* addressed the issues of dual citizenship in relation to treason.[73] Tomoya Kawakita was born in America and left for Japan at age 17.[74] While in Japan, Kawakita received formal education, and during WWII

[65] *Compare id*. (finding the "overt act" was meeting with spies in a public space) *with* Chandler v. United States, 171 F.2d 921, 925 (1st Cir. 1948) (finding the defendant was on the enemies payroll and clearly understood his assignment was to create propaganda for the enemy).
[66] Chandler v. United States, 171 F.2d 921, 925 (1st Cir. 1948).
[67] *Id*.
[68] *Id*. at 926.
[69] *Id*.
[70] *Id*. at 927-29.
[71] *Id.* at 929.
[72] *Id*. at 944. ("Trafficking with the enemy, in whatever form, is wholly outside the shelter of the First Amendment.").
[73] Kawakita v. U.S., 343 U.S. 717 (1952).
[74] *Id*.

became a translator at Oeyama, a prisoner of war camp.[75] The record shows that during his time at the POW camp, he not only participated in, but also instigated, abuse of the POW's.[76] After the war, Kawakita returned to America, where a former POW recognized him, and alerted the authorities.[77] The trial court found Kawakita guilty of treason for adhering to the enemy and giving them aid and comfort by mistreating prisoners of war while employed in Japan.[78] Kawakita lost the case and appealed. His primary defense was that as a dual citizen, he owed allegiance to Japan while there.[79] His defense failed in the Supreme Court and the ruling of the lower court was affirmed.[80] He was sentenced to death for his crimes.[81] However, in 1953 President Eisenhower commuted the death sentence and gave him life imprisonment.[82] Then, for political purposes, President Kennedy and the Attorney Generals' office reversed that decision, and released Kawakita on the condition he return to Japan in 1963.[83]

c) Why Treason Has Fallen Out of Favor

The United States has not pursued a treason prosecution since the 1950's. Similarly, the Treason Clause has been largely ignored by law professors and legal scholars alike. The few who delve into the clause often report the alarmingly sparse selection of relevant case law and legal scholarship.[84] But the disappearance of treason is not due to a lack of treasonous acts, nor is the

[75] *Id*.
[76] *Id*. at 726.
[77] *Id*. at 721.
[78] *Id.* at 743.
[79] *Id*. at 735.
[80] *Id*. at 745.
[81] *Id*.
[82] NAOKO SHIBUSAWA, TOMOYO KAWAKITA, Densho Encyclopedia https://encyclopedia.densho.org/Tomoya_Kawakita/#top.
[83] *Id*.
[84] *See* Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863, 865-66 (2006) (". . . there is virtually no scholarship engaging

disappearance merely coincidental. Rather, the lack of treason charges after the 1950's can be explained by a few factors.

The following section covers the primary reason why treason has disappeared. First, the ruling in *Cramer v. United States* made it nearly impossible to prove treason, and the Supreme Court encouraged Congress to enact laws that would essentially usurp the Treason Clause. Second, following *Cramer*, the legislature enacted laws to replace treason, which prosecutors subsequently utilized. Third, post-9/11 policy hands enemy combatants who are American citizens over to military jurisdiction, thus removing such cases from the traditional civil system.

i. The Problems with Cramer

The majority based their decision to reverse on the intentions of the "overt acts."[85] They ruled if treasonous intent is not obvious, then it must be proven that the acts were done with treacherous intent, to further a treasonous plot.[86] Furthermore, the Court found that only evidence pertaining directly to the specific acts could aid in proving intentions.[87] For example, the following facts, admitted by Anthony Cramer at trial, were ruled impermissible to proving treasonous intentions because they did not occur during the acts at issue and were not evident to the witnesses (meeting, dining, and drinking with the spies): (a) Cramer knew one of the spies well, Thiel, years before the incident, (b) knew Thiel had left the states to fight for the Nazi party, (c) Cramer admitted he supposed Thiel and the other spy had illegally entered the country through submarine, (d) Cramer held money for them, (e) Cramer admitted Kiel told him he was

doctrinal issues in American treason law."); s*ee also* George P. Fletcher, *Ambivalence About Treason*, 82 N.C. L. REV. 1611, 1612 (2004) (observing an alarming lack of attention to treason in American law).
[85] Cramer v. United States, 325 U.S. 1, 35 (1945).
[86] *Id.*
[87] *Id.*

here on a mission for the German government, (f) Cramer actively helped to keep Thiel's identity hidden, and attempted to throw federal agents off of the spies tracks.[88] The troublesome aspects of this ruling are best highlighted in the dissent:

> To say that we are precluded from considering those admissions in weighing the sufficiency of the evidence of the true character and significance of the overt acts is neither good sense nor good law. Such a result makes the way easy for the traitor, does violence to the Constitution, and makes justice truly blind.[89]

Dissenting Justice Douglas, with Chief Justice Stone, Justice Black and Justice Reed concurring, found the ruling to be unreasonable and unprecedented: historically, there was no record to indicate the acts themselves must function as evidence for intent.[90] Furthermore, the majority contradicted standard protocol for proving intentions in criminal law.[91] Normally, people of sound mind are assumed to understand the natural consequence of their actions.[92] Therefore, intent is usually evident from their actions or from their own admissions in open court.[93] If ambiguity exists, background information may be used as evidence to prove criminal intentions.[94] Without the ability to infer intent or to utilize the defendant's admissions to prove intent in treason prosecutions, Justice Douglas believed the charge would be unduly challenging for the prosecution, and eventually lead to the release of traitors.[95]

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[88] *Id*. at 56-57.
[89] *Id*. at 65-66.
[90] *Id.* at 58-59 (arguing the Constitution does not require the two-witness rule be applied all evidence to proving intent and finding no historical basis for the Majorities conclusion).
[91] *Id*.
[92] *Cf.*, *id*. at 54-55 (arguing that people understanding the consequences of their actions is an established staple in criminal law, particularly regarding treasonous intentions).
[93] *Id*.
[94] *Id*. at 60 ("The treasonable intent or purpose which it is said may be proved by a single witness or circumstantial evidence must, in the absence of a confession of guilt in open court, be inferred from all the facts and circumstances which surround and relate to the overt act.")
[95] *Id*. at 75.

Scholars have taken similar issue with *Cramer*. The most in-depth analysis of Treason was conducted by James Willard Hurst in 1971. Hurst believed the Court's decision to be overly narrow and unclear: ". . . The majority opinion in *Cramer v. United States* has cast such a net of ambiguous limitations about the crime of 'treason' it is doubtful whether a careful prosecutor will ever again charge an indictment under that head."[96] Hurst contends, similar to Justice Douglas, no policy in English or American law supports the majority adding additional requirements to prove intentions.[97] Other scholars have attributed the lack of treason cases directly to the Court's decision. ". . . . I argue that a confluence of factors—namely *Cramer*, Congress, and prosecutorial discretion—was responsible for the lack of treason prosecutions after 1954."[98] The Court's decision has caused a lack of supply and distinction on the topic of treason, leaving future courts reliant on outdated case law with little guidance on modern issues.[99]

Unfortunately, the issues with *Cramer* do not end with shackling the Treason Clause. In Section V of the opinion, the majority notes treason is extremely restrictive, and encourages alternate forms of prosecution.[100] They indicate that Congress has the full power to create alternatives to treason, such as crimes of disloyalty or forbidding acts that could endanger

[96] HURST, *supra* note 36, at 217.
[97] *See Id*.
[98] Paul Crane, *Did the Court Kill the Treason Charge?: Reassessing Cramer v. United States and Its Significance*, 36 FLA. ST. U. L. REV. 635, 640 (2009).
[99] *See* Larson, *supra* note 84, at 856-66 (". . . there is virtually no scholarship engaging doctrinal issues in American treason law."); *See also* George P. Fletcher, *Ambivalence About Treason*, 82 N.C. L. REV. 1611, 1612 (2004) (observing an alarming lack of attention to treason in American law).
[100] *See* Cramer v. United States, 325 U.S. 1, 45 (1945) ("But the power of Congress is in no way limited to enact prohibitions of specified acts thought detrimental to our wartime safety. The loyal and the disloyal alike may be forbidden to do acts which place our security in peril, and the trial thereof may be focused upon defendant's specific intent to do those particular acts.").

national security, particularly in times of war.[101] This portion of the opinion was not addressed in the dissent. However, Hurst mentions this section briefly, warning that straying from the original intention to keep treason out of the legislature's hands could cause strain in the balance of power, and delete the safeguards embedded in the Constitution.[102]

ii. Proxy Laws

But while treason is always disloyalty, disloyalty is not always treason. "Proxy laws" are laws which punish disloyalty to the United States. Most actions committed in violation of these could be tried under the Treason Charge. When the Supreme Court wrote:

> The loyal and the disloyal alike may be forbidden to do acts which place our security in peril, and the trial thereof may be focused upon defendant's specific intent to do those particular acts52 thus eliminating the accusation of treachery and of general intent to betray which have such passion-rousing potentialities.[103]

It gave prosecutors their blessing to try treason under lesser charges.[104] When a possible treason case arises, prosecutors have the discretion to pick which crime they will charge. Any reasonably prosecutor would choose to charge a crime under the following laws and sidestep the strenuous Treason Clause.

One such proxy law is the Espionage Act, which criminalizes acts that cause injury to the United States or provide advantage to other nations, particularly regarding matters of national security.[105] The law applies to all other nations, parties, or military forces in foreign nations,

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[101] *Id*. at 939 (arguing that treasonous cases too difficult to prove under their decision in Cramer should be tried under other offenses).
[102] HURST, *supra* note 36, at 217-218.
[103] *Cramer*, 325 U.S. at 45-46.
[104] *See id*.
[105] 10 U.S.C.A. § 903a.

whether they are enemy or ally.[106] Acts committed to benefit enemies of the United States could fall under treason or espionage.[107] Consequently, espionage is viewed as a lesser degree of treason.[108] However, the procedural requirements for espionage are not as strenuous as those for treason.[109]

More recent proxy laws have been enacted in response to the War on Terror. 18 U.S.C. § 2 criminalizes activities that harm the interests of the United States, while 18 U.S.C. § 2339B prohibits providing material support or financial assistance to enemy terrorist organizations.[110] Similarly, 31 CFR § 595.204 prohibits Americans from providing or participating in transaction that would provide support to designated terrorist organizations.[111] Violation of these laws is considered providing aid and comfort to enemies of the United States[112] Such actions should be subject to the Treason Clause. While other laws punish acts which jeopardize national security, they do not punish betrayal and carry lower sentences than the Treason Clause.[113] For example, terrorist organization "Al-Qaeda" declared war against the United States in 1998.[114] The

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[106] *Id*.
[107] *Compare* 10 U.S.C.A. § 903a (punishing acts committed to benefit other nations, military forces, and agents of foreign governments and forces) *with* U.S. CONST. art. III, §3 (punishing acts committed to aid or comfort an enemy of the U.S.).
[108] *See* United States v. Rosenberg, 195 F.2d 583, 610 (2d Cir. 1952) (Considering the crime of espionage to be crime of the same kind as treason- but of a lesser degree.)
[109] *See id*. at 610-11 ("The constitutional safeguards applicable to a trial of the greater crime of this kind must be applied to the lesser. . . here there were no such safeguards, since the trial judge did not give the instructions constitutionally required in a treason trial.").
[110] *See* 18 U.S.C.A. § 2 *and* 18 U.S.C. § 2339B.
[111] *See* 31 CFR § 595.204.
[112] U.S. v. Lindh, 212 F. Supp. 2d 541, 547 (E.D. Va. 2002).
[113] *Compare* 18 U.S.C. § 2339B (requiring the defendant no more than twenty years) *and* 31 CFR § 595.204 (Requiring no less than twenty years imprisonment unless death results from the action) *with* U.S. CONST. art. III, § 3 (Requiring imprisonment no less than five year and up to capital punishment).
[114] *See* J. T. Caruso, *Al-Qaeda International*, FBI, 2001, https://archives.fbi.gov/archives/news/testimony/al-qaeda-international; *see also* National Commission on Terrorist Attacks, *9/11 Commission Report*, 2004, https://govinfo.library.unt.edu/911/report/911Report.pdf.

organizations leader, Usama Bin Laden, publicly encouraged his follower to kill Americans, with no regard to whether they are military or civilians.[115] Since then, Al-Qaeda and organizations under their umbrella have orchestrated various terrorist attacks against United States civilians and military.[116] Because they are an active enemy, if an American were to join or aid these organizations, it would be a breach of allegiance. Therefore, any act committed, whether it be providing monetary funds or fighting on the front lines, should be punished under the Treason Clause. However, like espionage, it is far easier to acquire a guilty conviction under the forementioned laws than under the Treason Clause. These proxy laws do not require the testimony of two witnesses, nor do they require proof of intent. [117] Furthermore, these proxy laws do not carry the stringent precedent from *Cramer*, only allowing evidence from the overt act witnessed to prove intent.[118]

iii. Military Jurisdiction

Jurisdictional issues have also contributed to the decline of treason prosecutions. In 2001, Congress enacted law allowing the President to use military force against any nation or participants he believed to be involved in the 9/11 terrorist attack.[119] The law allowed enemy combatants, even those who are American citizens, to be charged in military jurisdiction.[120] This raises three concerns. First, the law is problematic for case law and scholarship. Although Americans joining terrorist organization to fight against their own is unpatriotic, their betrayal

[115] Caruso, *supra* note 114.
[116] National Commission on Terrorist Attacks, *9/11 Commission Report*, 2004, https://govinfo.library.unt.edu/911/report/911Report.pdf.
[117] *See* 18 U.S.C. § 2; *see also* 18 U.S.C. § 2339B; *and* 31 CFR § 595.204.
[118] Cramer v. United States, 325 U.S. 1, 35 (1945).
[119] *See* Authorization for Use of Military Force of 2001, PL 107–40, 115 Stat. 224.
[120] *See id.*; *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 508 (2004) (holding that U.S. citizens can be detained as enemy combatants when there is sound factual basis).

does give the legal system the opportunity to apply archaic laws, such as treason, to modern warfare. This would allow the Treason Clause to modernize, and provide legal guidance for the future. Unfortunately, if these cases are tried under military jurisdiction, they do not apply as precedent in non-military courts, leaving the Treason Clause to collect dust. The second issue regards the Founder's intentions. The Treason Clause was specifically written for situations where those with allegiance to the United States decide to betray their country.[121] There is no indication the Constitution contemplates that citizens who are not part of the United States military should be tried under military jurisdiction after committing acts of betrayal.[122] Last, despite any transgression against the country, American's still retain Constitutional protections. If tried as an "enemy combatant" those rights are relinquished.[123]

[121] *See* U.S. CONST. art. III, § 3; Cf., Cramer v. United States, 325 U.S. 1, 8 (Finding the Founders had no reluctance to punish breaches of allegiance through the crime of treason).
[122] *Cf.* Larson, *supra* note 84, at 925 (". . . there is therefore little reason to think that terrorist groups pose such a distinctive and unique threat as to warrant departure from the ordinary criminal law paradigm.").
[123] *See id.* at 897.

III. WHY TREASON SHOULD RETURN AS A VIABLE CHARGE

Treason plays a unique role in American law: the Treason Clause is the only law properly equip to handle betrayal against the United States. When not utilized, betrayal goes unpunished. The "passions of men" are not quelled. Case law and legal scholarship fail to develop, and the public is left with little knowledge of what constitutes treason. This section argues why treason should return as a viable charge in criminal law.

> As there is no crime which can more excite and agitate the passions of men than treason, no charge demands more from the tribunal before which it is made a deliberate and temperate inquiry. Whether this inquiry be directed to the fact or to the law, none can be more solemn, none more important to the citizen or to the government; none can more affect the safety of both.[124]

a) By Any Other Name

Treason should not be charged under any lesser crime. The Founders set a high bar for treason to prevent abuse, however, they never intended it to be so stringent that prosecutors would avoid using it.[125] Legal minds often emphasize the Founders' intention to restrict treason.[126] In doing so, they omit why it was included in the Constitution at all.[127] At the time, under English law, treason was committed against the Monarchy.[128] In a country with no monarchy, whose politicians are voted in and out regularly, a treason law would not be

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[124] Ex Parte Bollman and Ex Parte Swartwout, 8 U.S. 75, 125 (1807).
[125] *See* Cramer v. United States, 325 U.S. 1, 8 (1945); *see also* FERRAND, *supra* note 41, at 345-50 (Establishing the Treason clause should be stringent.).
[126] *See* Ex parte Bollman, 8 U.S. at 126-27 (emphasizing the founder's intentions to protect citizens from abuse of treason); *c.f.*, Cramer, 325 U.S. at 47-48 (arguing it is better to err on the founders side of condition when judging cases of treason); c.f., HURST, *supra* note 36, at 137 (". . . . though the most obvious emphasis in discussion was upon limiting the scope of 'treason', there can be no doubt that the restrictive policy was intended likewise to restrict judged and to curb the creation of novel treasons by construction.").
[127] *C.f.*, Cramer, 325 U.S. at 8 (1945) ("There is no evidence that the forefathers intended to withdraw the treason offense from use as an effective instrument of the new nation's security against treachery that would aid external enemies.").
[128] 25 EDW. 3, STAT. 5.

reasonable unless allegiance is vital for a nation to thrive. Specifically, a treason law in the United States would only make sense if loyalty to the Constitution is necessary for the nation to function. This is evident from how treason is defined. To "levy war" against the United States is to forgo the Constitutional process of changing law: protest, appeal, and voting for leaders who will truly represent the people's will.[129] Likewise, to "adhere" and "give aid and comfort" to an enemy, is to assist an enemy who means harm to the United States. Should the enemy succeed, the liberties protected by the Constitution would be placed in jeopardy.

However, the Treason Clause does not punish action alone.[130] Courts have repeatedly emphasized that treasonous intent is necessary for a conviction.[131] Actually, it is treachery and action, rather than damage done that makes a traitor.[132] The intention to betray separates treason from other crimes. To commit treason is to betray the United States, the Constitution, and every single American.[133] While other crimes punish violence or the conveyance of national secrets, the Treason Clause is the only law crafted to punish Americans who betray the United States.

b) Passions of Men

When treason arises, often a public outcry for justice follows. Considering there is ". . . no crime which can more excite and agitate the passions of men than treason. . .", prosecutors must

[129] U.S. v. Mitchell, 2 U.S. 348, 355 (C.C.D. Pa. 1795) (If its object was to suppress the excise offices, and to prevent the execution of an act of Congress, by force and intimidation, the offence, in legal estimation, is High Treason; it is an usurpation of the authority of government; it is High Treason by levying of war.).
[130] U.S. CONST. art. III, § 3; *e.g.*, *Cramer*, 325 U.S. at 35.
[131] *E.g.*, *Bollman*, 8 U.S. at 128-33.
[132] *See* Chandler v. United States, 171 F.2d 921, 941-42 (1st Cir. 1948) (Holding it does not matter whether a treasonous action causes damage).
[133] *C.f.*, *id.* (Finding that treason is not committed against politicians, but rather the United States as an entity).

be careful in utilizing the charge.[134] The accusation alone brings unwanted stigma to the defendant's life.[135] But, to not try treason under the proper heading may cause civil discord, and lead citizens to serve their own means of justice. For example, had the POW who first found Kawakita not been completely stunned upon seeing him in the states he "might have taken the law into my own hands--and probably Kawakita's neck."[136] Furthermore, the POW's who were the victims of Kawakita's treason (and the primary witnesses in his trial) threatened to take matters into their own hands if he were released.[137] Similarly, when American Taliban fighter, John Walker Lindh, was not charged for treason, there was fury among the public.[138] Walker was kept in strict custody. Had he been available to the public, Americans may have served their own form of justice.

c) Punishments

One additional benefit of the treason charge is that, unlike the proxy laws or military tribunal being used in its stead, treason carries a very flexible sentencing range. Those found guilty can be sentenced to no less than five years, but up to capital punishment.[139] For example, John Mitchell in the Whiskey Rebellion and John Fries in Fries Rebellion, were both found guilty of levying war, and sentenced to hang.[140] Douglas Chandler, who created propaganda for the Third

[134] *See Bollman*, 8 U.S. at 125.
[135] Suzanne Babb, *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, 1734-37 (2003).
[136] David Rosenzweig, *POW Camp Atrocities Led To Treason Trial*, Los Angeles Times, Sep. 20, 2002, https://www.latimes.com/archives/la-xpm-2002-sep-20-me-onthelaw20-story.html.
[137] *Id*.
[138] *See* Robert Barr, *John Walker: The Definition of Treason*, Gwinnett Citizen, Sept. 10, 2002, http://www.gwinnettcitizen.com (on file with Hastings Law Journal).
[139] 18 U.S.C.A. § 2381.
[140] Megan Israelitt, *Is treason applied as the founders intended?* 9 NAT. LAW REV. 5 (2019) https://www.natlawreview.com/article/treason-applied-founders-intended.

Reich, was given life imprisonment.[141] Kawakita, who abused POW's and was responsible for the death of some Americans, was sentenced to death.[142] On the other hand, before his Supreme Court appeal, Anthony Cramer was only sentenced to forty-five years imprisonment for aiding German saboteurs.[143] The flexibility of punishment is one of the most advantageous and overlooked aspects of the treason charge. Because Congress cannot create lesser degrees of treason, it would be unreasonable for every individual found guilty to be sentenced to life imprisonment or death. Especially because treason may be committee to varying degrees. If the treason is egregious, life imprisonment or the death penalty may be appropriate. However, if the treasonous act is of less impact, then fewer years can be assigned. This ensures treason does not go unpunished but allows the court to decide how severe a punishment is needed.

d) Clarity in Modern Terms

Since the last treason case in 1952, war, international relations, and American society have changed drastically.[144] Nearly every constitutional issue has been applied to modern issues, except treason.[145] If a case arose today, courts would be looking to outdated caselaw for guidance. The rise of terrorism and Americans who leave the United States to fight for the enemy has compelled scholars to revisit the Treason Clause.[146] But with little legal guidance on

[141] Chandler v. United States, 171 F.2d 921, 943 (1st Cir. 1948)
[142] Israelitt, *supra* note 139, at 8.
[143] *Id.*
[144] John Gordon, *The 50 Biggest Changes In The Last 50 Years,* American Heritage, 2021, https://www.americanheritage.com/50-biggest-changes-last-50-years.
[145] George P. Fletcher, *The Case for Treason,* 41 MD. L. REV. 193, 194 (1982) ("the basic criminal law course focuses on homicide, sometimes on rape and burglary, but no one discusses treason.").
[146] *E.g.*, Jameson A. Goodell, *The Revival of Treason: Why Homegrown Terrorists Should Be Tried As Traitors*, 4 NAT'L SEC. L.J. 311, 312 (2016).

modern issues, scholars often disagree on what treason looks like in the twenty-first century.[147] Similarly, the public has little understanding of what treason actually is.[148] This results in flagrant accusations which are harmful to those who have not committed any form of treason.[149] The treason charge must return so that it may be established in modern terms.

Scholars have addressed the ambiguity surrounding the treason charge. First there is the question of "levying war." Should a domestic terrorist be tried under the Treason Clause?[150] If so, does it matter if they are a lone actor or part of an organization?[151] On a similar note, if an American joins ISIS and announces publicly that he is "waging war on America", is he guilty of levying war?[152] The United States has only addressed "levying war" in cases resulting from an increase of taxes in the 1800's.[153] While those cases may provide some guidance, there are no cases that directly address the questions above.

Then, the law must consider the issue of "adhering to, providing aid and comfort to an enemy."[154] Some argue the terrorist organizations are not an "enemy", despite the American military warring with such organizations for over two decades.[155] Others argue an "enemy" is someone engaged in hostile and militarized relations with the United States.[156] Contrastingly,

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[147] *Compare id*. at 313 (arguing Americans who join foreign terrorist organization should be charged with treason) *with* Babb, *supra* note 134, at 1722 (arguing Americans who join foreign terrorist organizations cannot be charged with treason).
[148] Babb, *supra* note 134, at 1735 (finding the public often has misplaced outcry when a possible treason case arises).
[149] *Id*.
[150] Goodell, *supra* note 146, at 311.
[151] *Id*.
[152] *Id*.
[153] Israelitt, *supra* note 139, at 8.
[154] U.S. CONST. art. III, § 3.
[155] Babb, *supra* note 134, at 1728.
[156] Henry Mark Holzer, *Why Not Call It Treason?: From Korea to Afghanistan*, 29 S.U. L. REV. 181, 221-22 (2002).

some believe a congressional declaration of war is necessary for someone to be an enemy.[157] Next, is the argument that treasonous actions motivated by religious purposes would not fulfill the "treacherous intentions" requirement.[158] Conversely, there is the opinion that religious intentions do not excuse traitorous actions. Again, most "aid and comfort" cases resulted from WWII, so the questions of enemy, declarations of war, and possible religious exemptions have not fully been addressed.

The public is also in need of clarification. Hillary Clinton, Donald Trump, Eric Snowden, and the rioters at the January 6th insurrection have each been, at some point, accused of treason.[159] While these accused are among the more notable in modern times, the terms "treason" and "traitor" are thrown around brazenly.[160] The problem with someone being deemed a "traitor" without an indictment or trial, is that this label severely impacts people's lives and how Americans view public figures. Treason carries a stigma that once adopted, cannot be undone.[161] Unfortunately, if legal scholars cannot agree on what treason is, how can the public begin to truly understand it? The treason charge must be reconsidered and brought back so that when treason

[157] Babb, *supra* note 134, at 1731.
[158] *Id*. at 1735.
[159] *Gorka says Hillary Clinton is guilty of treason, could 'get the chair'*, The Daily Beast, Oct. 27, 2017. https://www.thedailybeast.com/gorka-says-hillary-clinton-is-guilty-of-treason-could-get-the-chair; Daniel Hannan, *Donald Trump is guilty of treason*. Gazette, Oct. 21, 2021.https://www.post-gazette.com/opinion/Op-Ed/2021/01/21/Donald-Trump-is-guilty-of-treason/stories/202101210036; Zackary Keck, *Yes, Edward Snowden is a traitor*, The Diplomat, Dec. 21, 2013. ://thediplomat.com/2013/12/yes-edward-snowden-is-a-traitor/; Lois Beckett, *Why aren't we calling the Capitol Attack an act of treason?* The Guardian, Apr. 5, 2021. ://www.theguardian.com/us-news/2021/apr/05/the-capitol-attack-treason.
[160] Babb, *supra* note 134, at 1722 (explaining how the media and politicians will call someone a "traitor" and find them guilty before a trial takes place).
[161] United States v. Rahman, 189 F.3d 88, 112 (2d Cir. 1999) (warning that treason has a dangerous stigma attached to it).

occurs, everyone can recognize it. And, when baseless accusations arise, people will not automatically assume the accused is guilty.

IV. REESTABLISH THE TREASON CLAUSE AS A MEANINGFUL AND WORKABLE CHARGE IN THE LEGAL SYSTEM.

To reestablish the Treason Clause as a meaningful and workable charge in the legal system, three things must occur. First, *Cramer v. United States* must be restrained. Second, foreign terrorist organizations must be considered "enemies" as it applies to treason.

a) Restricting *Cramer*

To modernize the Treason Clause, the evidentiary requirements created in *Cramer v. United States* must be curtailed. In its original form, the Treason Clause is stringent, requiring the testimony of two witnesses to the same of overt act, and requiring intent or "adhering to the enemy" be proven.[162] Even some of the Founder's believed it to be overly strict because "Treason may sometimes be practiced in such a manner, as to render proof extremely difficult- as in a traitorous correspondence with an enemy."[163] The decision in *Cramer* took proof from "extremely difficult" to nearly impossible, except for when treasonous intent is obvious, such as when an individual is on the enemy's payroll.[164] Today, *Cramer* would be the largest hurdle in securing a treason conviction.[165] For example, consider an American is caught meeting with an enemy by two witnesses. The American is indicted for treason. During investigation, the authorities find text messages, social media posts, and videos of the American, showing clear support of the enemy. They also find a Cashapp transfer from the American to the Enemy with

[162] U.S. CONST. art. III, §3.
[163] *See* FERRAND, *supra* note 41, at 348.
[164] *See* HURST, *supra* note 36, at 218 ("The majority opinion in *Cramer v. United States* has cast such a net of ambiguous limitations about the crime of 'treason' that it is doubtful whether a careful prosecutor will ever again chance an indictment under that head.").
[165] *See* HURST, *supra* note 36, at 218.

the caption "for the materials", followed by a bomb emoji. They also discover the enemy purchased explosives and planned to bomb Congress. Under *Cramer,* none of the above evidence would be permissible to prove treasonous intent because they were not observed by either witness during the "overt act" of meeting with the enemy.[166] The intention requirement of the Treason Clause would not be fulfilled, and the American would be set free. If *Cramer* is overruled, prosecutors would be able to use evidence beyond the "overt act" to prove intentions.

b) Expanding the Definition of "Enemies" to Include Modern Organizations and Non-Traditional Enemies That Were Not Prevalent at the Inception of the Treason Clause

The definition of enemies should be expanded to include modern organizations and non-traditional enemies that were not prevalent at the inception of the Constitution. To commit treason by providing "aid and comfort", the act must be done with adherence to an enemy.[167] When Congress declares war, the enemy is obvious. However, the United States has only been congressionally at war eleven times, the last time being in WWII.[168] Most wars, or conflicts which resulted in the death of American troops, were not conducted while being congressionally at war. When war is not declared by Congress, who is the enemy? Is there an enemy? This is arguably the most crucial point in bringing the charge of treason into the twenty-first century.

U.S. v. Frick held treason by "providing aid and comfort" only occurs when there is war.[169] However, it does not specify whether Congress must declare war for there to be a war or an enemy. Indeed, it does not define what an enemy is in quasi-wars or conflicts (every "aid and

[166] Cramer v. United States, 325 U.S. 1, 34–35 (1945) ("Every act, movement, deed, and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses.").
[167] U.S. CONST. art. III, §3.
[168] *About Declarations of War,* United States Senate, https://www.senate.gov/about/powers-procedures/declarations-of-war.htm.
[169] United States v. Fricke, 259 F. 673, 677 (S.D.N.Y. 1919).

comfort" case has arisen out of formal wars).[170] However, at the inception of the Treason Clause, England, Spain, and France were all considered enemies, and Native Americans were "potential enemies", despite the United States not being congressionally "at war" with Spain, France, or the Native Americans. [171] Likewise, in 1798 treason was applied to French citizens purchasing supplies for their military bases.[172] Further support is found in definitions. Black's Law Dictionary, defines enemies as "An opposing military force." and "A foreign state in open hostility to another whose position is being considered."[173] 10 U.S.C.A. § 948a defines "hostilities" as "any conflict subject to the laws of war."[174] Neither definition requires a Congressional declaration of war.

Foreign terrorist organizations should be considered "enemies" as it applies to the Treason Clause. First, organizations which pose a threat to the United States are enemies as defined by technical and realistic application.[175] Spain and France were considered "nation security risks" and "enemies" for simply having land adjacent to the original thirteen states and wanting to expand their reach from Europe.[176] Under such reasoning, foreign militant groups that have attacked, threatened, and killed Americans, would be considered enemies. Furthermore, no congressional declaration of war is needed: only a foreign, opposing military force, that aims to

[170] *About Declarations of War*, *supra* note 168.
[171] *C.f.*, Cramer v. United States, 325 U.S. 1, 8 (1945) ("England was entrenched in Canada to the north and Spain had repossessed Florida to the south, and each had been the scene of invasion of the Colonies; the King of France had but lately been dispossessed in the Ohio Valley; Spain claimed the Mississippi Valley; and, except for the seaboard, the settlements were surrounded by Indians—not negligible as enemies themselves, and especially threatening when allied to European foes.").
[172] Loane, *supra* note 125, at 62.
[173] *Enemy*, BLACK'S LAW DICTIONARY (11th ed. 2009).
[174] 10 U.S.C.A. § 948a.
[175] *C.f.*, Cramer v. United States, 325 U.S. 1, 8 (1945) (Labelling every country and Native American with interest near the colonies to be "enemies"). *See also supra note* 75, at *Enemy*.
[176] *Id*.

threaten or harm the United States.[177] While the charge of treason would be viable for any foreign group that poses a national security threat, it is especially applicable when those organization become firmly established and are actively fighting American troops. For example, Al-Qaeda has been at war with the United States for years.[178] They are responsible for various attacks on military and civilian Americans, including the attacks of September 11, 2001.[179] Then came the Islamic State (ISIS). ISIS has held various territories in the Middle East but has a global reach.[180] They recruit, train, and bring terror to the world, aiming to destroy western civilization, and calling for "death to America."[181] Likewise, the Taliban are known for their violent, gruesome, and inhumane behavior.[182] They also are responsible for the death of Americans and have threatened the United States.[183]

Susan Babb contends that groups such as ISIS, Al-Qaeda, and the Taliban are not enemies under the Treason Clause because they are groups rebelling against their own governments.[184] Her reasoning originates in *U.S. v. Greathouse*:

> The term 'enemies,' as used in the second clause, according to its settled meaning, at the time the constitution was adopted, applies only to the subjects of a foreign power in a state of open hostility with us. It does not embrace rebels in insurrection against their own government. An enemy is always the subject of a foreign power who owes no allegiance to our government or country.[185]

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[177] *Id.*
[178] *Al Qaeda*, History.com, Dec. 4, 2018, https://www.history.com/topics/21st-century/al-qaeda.
[179] *Id.*
[180] *Timeline: The rise, spread, and fall of the islamic state*, Wilson Center (Oct. 28, 2019), https://www.wilsoncenter.org/article/timeline-the-rise-spread-and-fall-the-islamic-state.
[181] *Id.*
[182] Mark A. Drumbl, *The Taliban's 'Other' Crimes*, 23 Third World Quarterly 1121, 1121-22, 2002, https://www.jstor.org/stable/pdf/3993566.pdf.
[183] Oliver Browning, *CNN reporter describes Taliban chanting 'death to America' on streets as 'friendly'*. The Independent, Aug. 16, 2021, https://www.independent.co.uk/tv/news/taliban-chanting-death-america-friendly-v83e72cc6.
[184] Babb, *supra* note 134, at 1730-31.
[185] United States v. Greathouse, 26 F. Cas. 18, 22 (C.C.N.D. Cal. 1863)

The ruling appears damaging to contrary arguments. However, Babb misses the most relevant part of *Greathouse*: context. *Greathouse* is a Civil War case from 1863.[186] The defendants provided "aid and comfort" to other Americans under the guidance of Jefferson Davis.[187] The court ruled the defendant could not be charged with "aiding the enemy" because the aid was provided to Americans in insurrection against their own government.[188] To clarify, before *Greathouse*, Confederates could be considered enemies.[189] Post *Greathouse*, they were no longer considered enemies, and could only be charged with "levying war."[190] However, "subjects of a foreign power in open hostility with us" would apply to modern terrorist organizations.[191] Under 10 U.S.C.A. § 948a, "enemy combatants" or "unprivileged enemy belligerents" are any individual who: "(a) has engaged in hostilities against the United States or its coalition partners; (b) has purposefully and materially supported hostilities against the United States or its coalition partners; or (c) was a part of Al Qaeda at the time of the alleged offense under this chapter."[192] Therefore, under *Greathouse* and U.S.C. Title 10, the term "enemy" would apply to all members of foreign terrorist organizations, such as ISIS, Al Qaeda, and the Taliban.[193]

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[186] *Id*.
[187] *Id*.
[188] *Id*.
[189] *See* Capt. Jabez W. Loane, Iv, *Treason and Aiding the Enemy*, 30 MILITARY LAW REVIEW 1, 61-62 (1965).
[190] *Id*. at 61.
[191] 10 U.S.C.A. § 948a (defining any person who engages in hostilities with the United States as an "enemy").
[192] *Id*.
[193] See *id*. (defining any person engaged in hostilities with the United States, or who is a member of al Qaeda as an enemy); *see also* United States v. Greathouse, 26 F. Cas. 18, 22 (holding that "enemies" as is applies to the Treason Clause are individuals subject to a foreign power, who are in open hostilities with the United States).

V. APPLYING TREASON CHARGE

This section gives tangible examples of how the Treason Clause should be applied, given the prescriptions made in the prior section. First, it discusses how the Treason Clause should apply to January 6th insurrection at the United States Capitol was an act of "levying war." Second, it argues that John Walker Lindh should have been charged with treason.

a) January 6th Insurrection at the United States Capitol

If the evidentiary requirements in *Cramer* are restricted, the United States would be able to prosecute some participants of the January 6th insurrection at the United States Capital for treason by "levying war".[194] On January 6, 2021, Americans gathered at the United States Capitol to protest the transfer of power to the newly elected President.[195] Among the protesters were extremists.[196] Attempting to impose their will upon the government by force, they stormed Capitol Hill, fought police officers, and brought violence to the Capitol.[197] After the insurrection, the FBI discovered some of the extremists had previously conspired online to storm the Capitol.[198] Under early precedent, the insurrection would have been considered treason by "levying war".[199] The extremists conspired a treasonous plot and held an assemblage of men for

[194] *C.f.*, U.S. v. Mitchell, 2 U.S. 348 (holding the act of attacking a public official place pf residence was an act of war).
[195] Lindsey Wise Et Al., *'The Protesters Are in the Building.' Inside the Capitol Stormed by a Pro-Trump Mob*, Wall St. J., Jan. 6, 2021, https://www.wsj.com/articles/the-protesters-are-in-the-building-inside-the-capitol-stormed-by-a-pro-trump-mob-11609984654?mod=article_inline.
[196] *Id.*
[197] *Id.*
[198] Ian Talley & Rachael Levy, *Extremists Posted Plans of Capitol Attack Online*, Wall St. J., Jan. 7, 2021, https://www.wsj.com/livecoverage/biden-trump-electoral-college-certification-congress/card/x1dwwPqnJM1XfQh5LaUj.
[199] *See* U.S. v. Mitchell, 2 U.S. 348, 349 (C.C.D. Pa. 1795) ("an insurrection with an avowed design to suppress public offices, is an act of levying war").

the purpose of carrying out a treasonous design. [200] The conspired plan would be utilized to prove treasonous intentions and distinguish traitors from protesters who simply got caught in the riot. [201] Under *Cramer*, the previously conspired plan would be impermissible to prove intentions because they did not occur during the "overt act" that was witnessed.[202] However, if the evidentiary requirement of *Cramer* is curtailed, the conspired plot would be utilized to prove intentions, and treason could be proven.

b) John Walker Lindh

The case of John Walker Lindh (Walker) illustrates why treason must return as a viable and workable charge. Born and raised American, Walker turned on his homeland and became a Taliban fighter.[203] He trained and fought with Al Qaeda and the Taliban against United States and allied forces.[204] He even met with Usama Bin Laden.[205] Walker was found by American and allied forces after a ground fight with the Taliban.[206] Walker was brought back to the United States, and charged with ten crimes.[207] Among his charges were conspiracy to kill United States nationals, providing material support and resources to foreign terrorist organization, contributing services to Al Qaeda, supplying services to the Taliban, and using and carrying firearms and destructive devices during crimes of violence.[208] Yet, he was not charged with treason. Walker

[200] *C.f.*, *id* at 118 (holding evidence showing the leader's treasonous intent does not establish treasonous intent for every person involved).
[201] *Id*.
[202] Cramer v. United States, 325 U.S. 1, 34–35 (1945) ("Every act, movement, deed, and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses.").
[203] U.S. v. Lindh, 212 F. Supp. 2d 541 (2002).
[204] *Id*.
[205] *Id*. at 547.
[206] *Id*.
[207] *Id*.
[208] U.S. v. Lindh, 212 F. Supp. 2d 541, 547 (E.D. Va. 2002).

received twenty years but was let out early, serving only seventeen.[209] He was released in 2019 and is living freely in the United States; he is now in his early forties.[210]

If organizations like Al Qaeda and the Taliban are not considered enemies as it applies to the Treason Clause, people like Walker cannot be tried for treason.[211] Likewise, if the evidentiary requirements in *Cramer* are not restrained, proving intentions would be very difficult.[212] However, if foreign terrorist organizations were considered the enemy as it applies to the treason clause, and the evidentiary requirements in *Cramer* were restrained, Walker would have been charged with treason by "adhering to an enemy, providing aid and comfort." Furthermore, he would have been found guilty.

The outcome of Walker's case is problematic. First, it does not punish his betrayal. Walker's actions were tried, but his traitorous intentions were not. His treason began when he left the United States to join Al Qaeda. His treason was only furthered by him taking up arms with Al Qaeda and the Taliban to kill Americans. Walker's betrayal should be tried and punished under the rightful charge of Treason. Second, Walker likely would have received harsher punishment had be been tried under the Treason Clause. For creating propaganda, Chalder received life imprisonment.[213] Kawakita's actions in the POW camp led to him receiving the death penalty.[214] Walker's actions were comparable, if not worse than any other individual convicted of treason.

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[209] Justin Huggler, *American Taliban flies back, but not to the cages of Guantanamo Bay*, The Independent London, January 23, 2002.
[210] Greg Myer, John Walker Lindh, *The 'American Taliban,' Is Released From Prison*, National Public Radio, May 23, 2019.
[211] U.S. CONST. art. III, § 3.
[212] *See* HURST, *supra* note 36, at 218.
[213] Chandler v. United States, 171 F.2d 921, 925 (1st Cir. 1948).
[214] Kawakita v. U.S., 343 U.S. 717 (1952).

Yet, the Government allowed him to evade the possibility of life imprisonment or capitol punishment. Last, the United States missed the opportunity to provide current case law and legal guidance to the Treason Clause. This would have aided in future treason cases, and furthered scholars and the public's understanding of the Treason Clause.

CONCLUSION

The Founders placed the most important and foundational laws in the Constitution. Simply by its placement, the Treason Clause could be viewed as more imperative than other laws. It is uniquely equipped to handle betrayal against the United States because it places emphasis on the intent to betray and includes safeguards which prohibit it from being used as a political weapon. In eliminating the treason charge, the courts, legislature, and prosecutors have done a great disservice. As lesser crimes takes its place, the Treason Clause collects further ambiguity. Prosecutors and courts do not utilize it. Legal scholars struggle to define exactly what treason is. The public misunderstands what "treason" or a "traitor" is, leaving the media and everything other than legal guidance to tell them what it is.

As the Walker case shows, treason itself is still alive and relevant. If *Cramer* is restricted, and the definition of "enemies" is broadened as it applies to treason, the Treason Clause will once again be able to serve its proper function. The United States will be able to punish traitors accordingly, and call treason by its rightful name. Doing so quells the passions of men and allows the jury to decide a fitting punishment. While the actions, enemies, and specifics may differ from century to century, treason will always be treason. It cannot, nor should not be tried under any lesser crime. The time has come for legal minds to bring treason into twenty-first century. The treason charge must be revived.

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