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Breach of Allegiance: The History of Treason Charges in the U.S., and its Rebirth in the Age of Terrorism

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BREACH OF ALLEGIANCE:
THE HISTORY OF TREASON CHARGES IN THE U.S., AND ITS REBIRTH IN THE AGE
OF TERRORISM

by

DAVID J. LEWIS

A thesis submitted in partial fulfillment of the requirements
For the Honors in the Major Program in Legal Studies
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Abstract

The purpose of this thesis is to provide a legal history and analysis of how the treason clause has been utilized since the U.S. Constitution was ratified in 1789. Further, the United States and the United Kingdom share not only a historical parallel of the meaning and use of the charge of treason, but also an abandonment of using the charge today. This thesis will provide an in-depth legal history of treason charges in the United States, along with its close parallels in historical evolution and usage to that of the United Kingdom. Focusing prominently on treason throughout United States history, this project will analyze several of the famous treason trials in the nineteenth century, namely the federal prosecution of Aaron Burr in 1807, and the Commonwealth of Virginia's prosecution of John Brown for treason against a state government in 1859. This thesis will also examine the last person prosecuted for treason in the United States: Tomoya Kawakita in 1952. In addition, as a contribution to the "legal history" genre, this paper will summarize the last use of the treason offense in Great Britain in 1946, for which Nazi propaganda broadcaster William Joyce was tried and executed. The core of this thesis will be an analysis of treason law in the United States and also the United Kingdom, with a particular emphasis on why this charge was abandoned by both countries after the early 1950s, and why it should be re-instituted in the twenty-first century. The premise of this thesis will demonstrate a prominent factor in the 1950s leading to the discontinuation of the usage of the treason clause was the negative cultural impact of the era of McCarthyism, and the political misuse of the treason label for his political purposes. The thesis will close with a new approach to the charge of treason, with the recommendation that the utilization of this offense become a viable tool against

the War on Terrorism in modern day, by establishing how various terrorists could have been adjudicated for treason, and how similarly situated defendants should be tried in the future.

“Treason is betraying one's country. He who commits treason is a traitor.” - Anonymous

“The victor will always be the judge, the vanquished the accused...”— Hermann Göring¹

“Self-betrayal comes out of all human pores.” – Sigmund Freud²

¹ Overy, Richard. *Making Justice at Nuremburg, 1945-1946*. BBC History. February 17, 2011.

http://www.bbc.co.uk/history/worldwars/wwtwo/war_crimes_trials_01.shtml

² Meerloo, Joost and Abraham Maurits. "Chapter 14: The Turncoat in Each of Us." *Rape of the Mind*. Cleveland: PA World Pub, 2000. Print.

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Introduction

In seventeenth century England, Puritan religious beliefs drove the Pilgrims to commit treason against the Anglican Church and the monarchy of King James I,³ in part for the freedom to determine their own leaders. It was this quest for religious freedom that drove the Pilgrims to sail to the New World in 1620, planting the seed for what was to become the United States. Treason and America were tightly bound from this starting point, and together they appeared throughout the history of our country.

On May 30, 1765, firebrand Patrick Henry's maiden speech to the House of Burgesses in Virginia was interrupted by the delegates with cries of treason. Henry was merely pointing out that the deaths of Julius Caesar and Charles the First (both guilty of treason) should be a cautionary tale to King George regarding his unfair treatment of the colonists. For his part, King George was preparing for the arrival of Samuel Adams and John Hancock, who were to be arrested for treason and brought to London for trial. These plans were interrupted when a traitor's gunshot on a small bridge in Massachusetts marked the beginning of a revolution. Further acts of treason continued and culminated in 1776, when fifty six men signed a document that many feared to be their own death warrant. This certainly was a time when the word treason was frequently spoken and on everyone's mind.

The very creation of the United States of America was in fact an act of treason committed against the crown of England. Our founding fathers drew up a declaration of

³ "Aboard the Mayflower, 1620," *EyeWitness to History*, (2004). www.eyewitnesstohistory.com

independence that severed allegiance to the British government, daring to deprive King George of sovereignty over the New World. About two months after independence was formally declared, the Continental Army was defeated at the battle of Long Island, while King George planned his next campaign. Two nations spilled blood over acts of alleged treason, and in defeating England, the founding fathers finally threw off the label of traitors. It is somewhat ironic that years later when the United States Constitution was adopted, the only crime expressly defined and delineated in the landmark new constitution was the criminal offense of treason. Article III states:

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.⁴

It would seem apparent then that the use of treason charges to protect the newly declared United States was of grave importance to our founding fathers. They recognized the level of protection the clause provides a country (namely, the “two witness rule” delineated in the second sentence of the treason clause), and understood its inclusion in the Constitution was essential. Insofar as the genesis of our laws came from England, the concept of treason was also of utmost importance to Britain. Yet today, neither the United States nor the United Kingdom uses the charge of treason as it was implemented in the

⁴U.S. Const. Art. III, § 3, cl. 1.

past. In fact, the last use of treason by the U.S. and U.K. was in 1952 and 1946, respectively.

Treason was definitely palpable at the time of our independence, when firebrands such as Patrick Henry spoke at the House of Burgesses, and at the signing of the Declaration of Independence. Treason, being the only crime written into the constitution, was further defined by Chief Justice John Marshall in 1807 with the acquittal of Aaron Burr.⁵ John Brown was hanged for treason against a state government in 1859, giving his life for his radical beliefs, making himself a martyr in the North and murderer in the South—and sparking the American Civil War. Four years later, the words, “all men are created equal” from the Declaration of Independence, were repeated by President Lincoln at the turning point of the Civil War in Gettysburg, Pennsylvania. In 1865, Mary Surratt was the first woman hanged for treasonous activities in the U.S., through her complicity in Lincoln’s murder.

While the crime of treason was written into our founding documents, it can be argued, in a sociological aspect, that the act of treason against ourselves as a free people was committed. The first draft of the Declaration of Independence by Thomas Jefferson condemned King George for allowing the slave trade in the colonies, labeling it “a cruel war against human nature.”⁶ Yet in order to assemble all thirteen colonies to form the new republic, Jefferson’s outrage was removed. This edit was a concession to the delegates from South Carolina and Georgia. Thus, the issue of slavery was not formally

⁵ Hoffer, Charles. *The Treason Trials of Aaron Burr*. Lawrence, KS: University Press of Kansas, 2008. Print.

⁶ Post, David G. *“Words Fitly Spoken”: Thomas Jefferson, Slavery, and Sally Hemings*. Philadelphia, PA: Temple University Law School, n.d. 8. Print.

addressed in the Declaration or in the Constitution. One may argue that our founding fathers never maintained the moral high ground as they sought freedom from British rule. Surely, they must have seen the hypocrisy of demanding freedom for themselves, but not for the slaves in the southern colonies. As British Dr. Samuel Johnson stated, “how is it that we hear the loudest yelps for liberty from the drivers of Negroes.”⁷

Indeed, the only justification to this dilemma is that ethics and morality were temporarily abandoned to appease all thirteen colonies, in order to form our new government with its initial set of laws. In the next several decades between the end of the Revolutionary War and the beginning of the Civil War, many slavery-related compromises (including the Missouri Compromise) were fought over in our nation’s capital. That is to say, a decent segment of society felt that their nation was committing “treason” against natural law and those enslaved by withholding freedoms to slaves as arguably guaranteed by the Declaration of Independent and the Bill of Rights. William Lloyd Garrison, a passionate abolitionist, publicly burned a copy of the Constitution on July 4, 1854 because it sanctioned slavery, both directly and indirectly.⁸ Not one to mince words, Garrison declared the document a “Covenant with Death, an Agreement with Hell.” His severe language took aim at The Three-Fifths Compromise found in

⁷ Ambrose, Stephen E. “Founding Fathers and Slave Holders: To What Degree Do the Attitudes of Washington and Jefferson towards Slavery Diminish Their Achievements?” *Smithsonian*, November 2002 Print.

⁸ Finkelman, Paul. "The Covenant with Death and How It Was Made." *Prologue Magazine*. Winter 32.4 (2000): Print.

Article 1, Section 2, Paragraph 3, among many other provisions. As the Constitution burned Garrison proclaimed, “So perish all compromises with tyranny!”⁹

Important steps toward correcting our Constitution were accomplished at the end of the Civil War with the Thirteenth and Fourteenth Amendments, and again three years later with the Fifteenth Amendment, finally giving equality to all men (at least on paper). The Thirteenth Amendment abolished slavery. The Fourteenth Amendment included the Privileges or Immunities Clause, Due Process and Equal Protection Clauses. The Fifteenth Amendment grants voting rights regardless of “race, color, or previous condition of servitude.” Together these are the Reconstruction Amendments, which were designed to finally give freedom and civil rights to African-Americans. Unfortunately, this was not to be the case until Supreme Court and the legislature acted in the years 1954 through 1965.

Charges and cries of “treason” could be found cropping up at the time of every major conflict from independence, throughout the Civil War, and World War II. This thesis will demonstrate that Senator Joseph McCarthy’s crusade against communism in the early 1950s all but poisoned the use of the crime of treason by prosecutors (which had been used not infrequently up to the 1950s), and left everyone with a feeling that treason accusations are detrimental to our freedoms and should not be utilized—even in a criminal prosecution. This is unfortunate, given that the legal offense of treason held unique meaning and connoted certain grave conduct against the government worthy of societal condemnation. Our lives have now become preoccupied with terrorism on the

⁹ Mayer, Henry. *All on Fire: William Lloyd Garrison and the Abolition of Slavery*. New York: St. Martin's Press, 1998. Print.

scale of the September 11th attacks, and many individuals since September 11th have committed offenses which could be charged as “treason” if the government desired. As this thesis will demonstrate, treason carries its own stigma, which may dissuade a would-be terrorist from taking action against our country. It would certainly be harder to act against one’s country through a misguided sense of patriotism if the act were to be labeled treason. If the use of treason were to return to the justice system, old safeguards could easily be re-established and honored to avoid the paranoia that developed in the 1950s. The McCarthy style of treason with Blacklists, the Red Scare, and hearings that demanded citizens ‘to name names’ belongs in the past, and should never again pervade our branches of government. Although the Constitution protects our rights of free speech under the First Amendment, McCarthy demonstrated how these rights can be trampled, causing undue hardship upon law abiding citizens.

Treason must be a well-defined act that can be objectively measured and quantified. Further, pursuant to Article III of the Constitution, two witnesses must testify in open court as to the same overt act of treason. In order to again use treason, we must very strictly hold to these parameters if we are to prosecute. This thesis will explore how a litmus test might be developed and implemented when considering a specific charge of treason against the accused, not only to better adapt to the modern technological innovations present today, but also to prevent a misuse of the charge.

The following chapters critically examine treason throughout the history of the United States, and theorize on its sudden and seemingly permanent disappearance in the 1950s. The issue of whether our government should reinstate its use today is discussed.

Perhaps central to this entire discussion is the core understanding that committing genuine treason is more than merely committing it against a country. No one would argue that going to war with England was high treason in the eyes of King George, but was he a just ruler who governed fairly? The colonists apparently thought not, and came to understand that the New World would be subject to increasing taxes without a voice to object to the excessive hardships imposed. In this setting, “if this be treason,” said Patrick Henry, “then make the most of it,”¹⁰ daring King George to do his worst. Similarly, Thomas Jefferson once famously remarked that the “tree of liberty must be watered from time to time with the blood of tyrants.”¹¹ Essentially, when dealing with an unjust government, the charge of treason by that government must be questioned.

Clearly, if one were to allow that no real treason is ever committed against a tyrant, then the patriots of revolutionary times did not commit treachery. If a person were to behave in a strictly ethical and moral manner as they committed acts against an unjust government, then they would not have committed “treason” against the country or themselves, because they would not have run afoul of any just and fair government. However, if the government is fair and their ethics true, then in order for the accused to betray the government, they must commit acts that betray their personal core morality and those ethics upon which their government is based. This sociological component is critical to in order properly utilize the charge of treason in modern day.

¹⁰ Randall, Henry Stephens. *The Life of Thomas Jefferson*. New York: Derby & Jackson, 1858. 39. Print.

¹¹ Smucker, Samuel M., and Henry Ketcham. *The Life of Thomas Jefferson*. New York: A. L. Burt, 1903. 138. Print.

Chapter 1: Origin and Practice of Treason in the United States from Independence to
Civil War

While the concept of treason has been used throughout previous centuries, the most specific origin of our treason clause in the United States Constitution derives from the Treason Act of 1351 established by England. This Act outlined the parameters necessary for a subject of the Crown to be prosecuted under treason. Its primary use was to protect the sovereignty of the country, as well as safeguard the King, his royal family, and other prominent members of the government from assassination.

The Act states a person shall be convicted of high treason if they planned the execution of the King, Queen, or royal heirs; violated the Queen, or the King's eldest daughter; levied war against England, supported the enemies of the Crown, including aiding them within England; executing the Treasurer, Chancellor, or various Justices while they are commissioned to the Crown; and finally, the counterfeiting of England's monies.¹²

Although today a few of those elements may seem outdated, they nevertheless served a vital role for England. The objective of this Act is clear: it is protecting the infrastructure of the British government. If an enemy of the Crown were to attack the royal family, the king who presides over the country, or the high-ranking government officials whom the King relies upon to carry out his rule, they would be charged with treason. Similarly, if they were to aid and comfort forces hostile toward England and its

¹² Great Britain. *Treason Act of 1351*. Section II, (1351). London: The Stationery Office. <http://studymore.org.uk/law.htm>

rule, or forge the currency that keeps the country stable, they would be guilty of harming England.

A few centuries later, the Parliament of England further defined treason through the Act of 1695. This law specified the procedures for holding a treason trial in court. According to the Act of 1695, those accused of treason could be represented by up to two counsels at trial, and two witnesses would be required to provide the court with evidence against the accused. This modification to the Treason Act was significant because it allowed the accused with more of an opportunity for due process than what they were originally afforded. Thus, the draconian nature of high treason was tamed and made reasonable.¹³

It was this improvement the Framers took note of as they drafted the Constitution of the United States. Article III, Section 3 reads:

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.¹⁴

¹³ Great Britain. *Treason Act of 1695*. Section I, (1695). London: The Stationery Office. <http://studymore.org.uk/law.htm>

¹⁴ U.S. Const. Art. III, § 3, cl. 1.

Not only had the Framers used the same concept of treason, it is apparent that they also closely duplicated the charge from the Acts of 1351 and 1695. Excluding attacks on the King, his queen, his officials, and counterfeiting, our treason clause follows that of England's very closely. Just as England needed the protection of treason to safeguard it from attack within, so too did the thirteen colonies who had emancipated themselves from the crown to form the United States.

In addition to its place in our Constitution, Treason also resides in the United States Code:

Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than \$10,000; and shall be incapable of holding any office under the United States.¹⁵

Treason Uses at the Beginning of the United States

Throughout the history of the United States, the charge of treason has been used on several notable occasions. The first instance of treason technically occurred during the Revolutionary War and was perpetrated by Benedict Arnold, who attempted to surrender his fort, West Point, to the British for payment in silver. However, there was no charge of treason ever levied against him as he managed to escape by ship to England. Had he been

¹⁵ 18 USC § 2381 (2012).

captured, Arnold certainly would have met the criteria for the charge of treason. Instead, he led raids for the British army into Virginia and Connecticut before the Revolutionary War ended.

The first two treason trials were held against John Mitchell and Philip Vigol, who had led a rebellion in Pennsylvania in protest of U.S. Government taxation. The two were indicted for the act of levying war against the country. According to the prosecution, they had used force to prevent agents of the government from enforcing the Acts of Congress. The court convicted Mitchell and Vigol of treason, yet they were pardoned from hanging by President Washington.¹⁶

They were pardoned as the charge of treason was found to be misplaced by the prosecution, because “to [halt] by force of arms a particular law of the United States, does not amount to levying war against the United States, with-in the true meaning of the Constitution, and therefore it is not treason, but a riot only.”¹⁷ Essentially, merely rioting against a law does not constitute an overt act against the infrastructure of the country, and as such the indictment of treason cannot be levied against the accused.

Thus, the first clear case of treason in the United States was the trial against Aaron Burr. Burr was an officer during the Revolutionary War, and later became the Vice President of the United States under Thomas Jefferson in 1801. However, Jefferson made

¹⁶ Chase, Samuel. *The Answer and Pleas of Samuel Chase One of the Associate Justices of the Supreme Court of the United States, to the Articles of Impeachment Exhibited against Him in the Senate by the House of Representatives of the United States, in Support of Their Impeachment against Him for High Crimes and Misdemeanors Supposed to Have Been by Him Committed*. Buffalo, NY: William S. Hein &, Co. 2008. 5. Print.

¹⁷ *Id.* at 7.

clear his lack of trust in Burr, and subsequently his tenure as vice president ended in 1805, despite Jefferson's re-election.

Burr's failing political career was not helped by his famous duel with Alexander Hamilton, who was fatally shot, or by losing the election for Governor of New York. Meanwhile, Napoleon's schemes of expansion into the Louisiana territory, originally held by Spain, fell apart due to internal strife in Saint Domingue (a French colony), whose rebels had defeated the French army. The United States would then purchase all of the Louisiana territory from France, and it was this new conquest that Aaron Burr desired.

An uneasy tension existed between Spain and the newly formed United States, regarding the vast Louisiana territory formerly owned by Spain, and with Mexico, which was at the time still under Spanish control. This tension became further exacerbated by frontiersmen interested in the territories of Florida and Texas, and a potential war between the two countries began to appear likely. Burr not only used that interest in Spanish-held lands, he also proposed the idea of Ohio, Kentucky, and Tennessee seceding from the United States. These states, along with the seizure of the Spanish territory in Texas, California, and Mexico, could potentially form a new country.¹⁸

This served as the beginning of Burr's treachery. Burr recruited a number of men on Blennerhassett's Island, situated in the middle of the Ohio River, and utilized his contacts in the military to bolster the ranks for his campaign. Burr relied on General

¹⁸ Stewart, David O. *American Emperor: Aaron Burr's Challenge to Jefferson's America*. New York: Simon & Schuster, 2011. Print.

James Wilkinson to aid him in carrying out his plans.¹⁹ Wilkinson, who had initially decided to join with Burr, realized that the plan was not likely to succeed. He then betrayed Burr by sending letters to President Jefferson, alerting him of Burr's actions against the United States.

As a result, Jefferson had Aaron Burr indicted for treason, and interestingly this case would prove to not only be one of the more well-known trials of American law, but also responsible for setting forth principles pertaining to treason which are still legal requirements today.²⁰ Chief Justice John Marshall presided over the case and agreed with defense counsel that a strict definition of treason was required "so that it [treason] would not become an instrument of government or party tyranny."²¹ The final opinion was said to be complex, but it came down to the fact that the original indictment against Burr alleged that Burr levied war on Blennerhassett's Island. That is to say, according to the indictment, the overt act of treason was committed on the island, while Burr himself was in New Orleans. Had the indictment stated that the treasonous overt act was to arrange for men to participate in a military expedition, including obtaining supplies and seeking funding while traveling in the western states, and that there were at least two witnesses to this, the treason charge would have stood a better chance.

¹⁹ Hobson, Charles. *The Aaron Burr Treason Trial*. Omohundro Institute of Early American History and Culture. Williamsburg, VA: College of William and Mary. 3. 2006. Print.
<http://www.fjc.gov/history/docs/burrtrial.pdf>

²⁰ Hoffer, Peter Charles. *The Treason Trials of Aaron Burr*. 1st ed. Vol. 19. Lawrence, KS: University of Kansas, 2008. 64-67. Print.

²¹ Hobson, Charles. *The Aaron Burr Treason Trial*, at 52.

Justice John Marshall held that, “no man can be convicted of treason who was not present when the war was levied.”²² Aaron Burr was not on the island where this alleged “overt act” of war would have taken place. Thus, he was peripheral to a true assembly of men that would satisfy Justice Marshall, and Burr was found not guilty:

To complete the crime of levying war against the United States, there must be an actual assemblage of men for the purpose of executing a treasonable design . . . the mere enlisting of men, without assembling them, is not levying war.²³

Perhaps one of the more important conclusions to the trial was that it demonstrated despite the difficulties and uncertainty our new nation was struggling with, the people of the western states were ultimately not interested in secession from the United States. Ohio, Kentucky, and Tennessee never left the union, and from this moment of our history, our nation grew with each new state, and would not face the threat of true secession until the Civil War. As far as the treason charge was concerned, it also illustrated that the legal requirements would be strictly enforced to ensure (in the words of Chief Justice Marshall) that charges of treason “would not become an instrument of government or party tyranny.”

In 1844, the Dorr Rebellion in Rhode Island would prove to be the first use of treason by a state, instead of the Federal government. Thomas Dorr, the Governor of Rhode Island, led an insurrection intent on providing non-landowners the right to vote in

²² Keyes, Stephen. *Reports of Cases Argued and Decided in the Supreme Court of the United States*. New York: Lawyers' Co-operative Pub., 1882. 684. Print.

²³ Moore, John N. *National Security Law 2nd Edition*. Durham, NC: Carolina Academic Press. 2005. 1091-1092. Print.

the state. Dorr's supporters attempted to capture a state arsenal in Providence, yet failed and were subsequently captured after retreating. Due to the attack being levied against a state government's infrastructure, this overt act was subject to the Rhode Island general law against treason, which states:

Every person who shall be convicted of treason against this state by levying war against the state or by adhering to the enemies of this state, giving them aid and comfort, shall be imprisoned during life.²⁴

With his clear act of attacking the state arsenal, along with the numerous witnesses who defended the installation, it was an easy conviction against Dorr for the prosecution. Interestingly the state's definition of treason called for a life imprisonment, which Dorr was sentenced to. Yet, due to overwhelming opposition by the public to this draconian sentence, in light of his ailing health Dorr was released a year later.

John Brown's Act of Treason

Described as martyr, passionate abolitionist, revolutionary, terrorist, and hero, John Brown is also memorialized in our history as traitor. One of the more iconic cases of treason in the United States is the trial of John Brown. As in the Dorr trial, it was not the Federal government, but instead the Commonwealth of Virginia that prosecuted the case against him.

Frederick Douglass's description of Brown in 1847 was given after the two met in Springfield, Massachusetts. Douglass was quoted as saying, "though a white gentleman,

²⁴ RI Gen L §11-43-1 (2012)

[Brown] is in sympathy a black man, and as deeply interested in our cause, as though his own soul had been pierced with the iron of slavery.”²⁵ Brown’s subsequent brutal killings on proslavery towns in the mid 1850s were but a prelude to his raid on Harper’s Ferry, Virginia.

In the decade before the start of the Civil War, tensions between North and South were escalating at an alarming rate. Compromises regarding which new states were designated free and which allowed slavery, the underground railroad, the Fugitive Slave Act, and inflammatory editorials and political speeches had divided our nation. *Uncle Tom’s Cabin* was the best-selling novel of the 19th century, and the second best-selling book of that century, following the Bible.²⁶ It was in this era John Brown, raised by his father to be an abolitionist, took a drastic step for this cause. In July 1859, he organized and led a raid, attacking the United States armory at Harper’s Ferry, with the intention of arming Virginia slaves with seized arms and leading them in guerilla warfare against anyone who attempted to stop them.

However, Brown’s plan failed, as the people of Harper’s Ferry fought against his men, and the slaves did not rise up to support Brown. He was captured, and subsequently charged with treason against Virginia. The reaction from the Southern States was not a surprise, comparing it to Brown’s violence of Bleeding Kansas, where he killed pro-slavery settlers three years earlier. Harper’s Ferry bolstered the calls for secession.

²⁵ Public Broadcast Station. "John Brown." Africans in America. PBS, 1999. Web. 26 June 2013. <<http://www.pbs.org/wgbh/aia/part4/4p1550.html>>.

²⁶ Stowe, Harriet Beecher, and Elizabeth Ammons. *Uncle Tom's Cabin: Authoritative Text, Backgrounds and Contexts, Criticism*. New York: W.W. Norton, 1994. Intro. Print.

Reaction in the Northern States was also not surprising. Brown was compared to Garrison, “but having less caution.”²⁷ He was described as foolish, but brave and simple-hearted...whose heart has been lacerated by his own sufferings. Brown was “the most terrible fruit slavery has ever borne.”²⁸ Brown’s actions were blamed on the slave holder, according to Ralph Waldo Emerson in a speech one year later. Wendell Phillips, in a November 1, 1859 speech stated that, “Brown has twice as much right to hang Governor Wise as Governor Wise has to hang him.”²⁹ Henry David Thoreau compared Brown to Christ. In summary, he was a traitor in the south, and a patriot in the north.

Brown’s defense argued that since it was a Federal arsenal Brown seized (and not property of the state), the trial could not be held by Virginia court. However, while that was true, John Brown had led an insurrection throughout the streets of Harper’s Ferry, which was Virginia land. Additionally, the defense argued that Brown did not meet the parameters of treason, which stipulates the person indicted must first owe an allegiance to the state or country in order to allegedly breach this allegiance in an act of treason. Phrased another way, the defense argued (quoting Chief Justice John Marshall in a case from 1820) that “treason is a breach of allegiance, and can be committed by him only who owes allegiance either perpetual or temporary.”³⁰

The prosecution countered that a traitor need not be a citizen of the state in order to have an allegiance to it.³¹ A brief allegiance is formed when the person temporarily

²⁷ McGinty, Brian. “The Testimony Begins.” *John Brown’s Trial*. Cambridge, MA: Harvard UP, 2009. 273. October 2009. Print

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id* at 245.

³¹ *Id* at 145.

resides in the state. They contended that by residing and traveling throughout the countryside in the several months leading up to the raid (since July 1, 1859, with the raid occurring on October 16, 1859), Brown met the criteria of owing an allegiance to Virginia. That is, during the time Brown was present and traveling the countryside, he availed himself of Commonwealth (protection of its laws, use of its roadways and infrastructure, et cetera) and therefore owed the Commonwealth a reciprocal level of allegiance. Thus, in so arguing, the government clearly demonstrated John Brown had been in Virginia prior to the raid, had owed (and breached) his corresponding allegiance to the Commonwealth (even if temporary), and had committed an overt act against the Commonwealth of Virginia. Between the testimony of witnesses from hostages such as Colonel Lewis Washington, and an affidavit from Robert E. Lee who led the U.S. Marines that stormed the arsenal, they had the testimony to convict him.³²

John Brown was promptly sentenced to death, and on December 2, 1859, he was hanged. Yet his martyrdom lived on, further fueling the divisive sentiments that would metastasize into the Civil War. Additionally, Brown was not the only one to be tried for treason against Virginia for the raid on Harper's Ferry. Aaron Stevens was an accomplice of Brown's, who faced the same charges, and in 1860, faced the same sentence. Ironically, another colleague of Brown (John Cook), who had come to the town as a spy for Brown a year prior to the raid to collect intelligence for Brown, "was acquitted of the

³² *Id* at 153.

charge [of treason] despite the fact that he had lived and worked in the state for more than a year, even married there.”³³

Lastly, an interesting facet of the trials stemming from the raid on Harper’s Ferry was related to Brown’s accomplice Shields Green. Brown met Green through Douglas as an escaped slave who was enthusiastic of Brown’s scheme. He was by John Brown’s side until they were all captured by Lee, and along with the others, he too was indicted for treason. However, it became apparent Green was exempt from the charge for a very unique reason: he was not deemed a citizen because he was not a free man.

Ironically enough, Shields Green was just as guilty of committing treason as Brown, Stevens, and the other conspirators for attempting to free the Virginia slaves and instigate guerilla warfare. Yet, because he was an escaped slave himself, the Virginia treason statute could not recognize him as a traitor since he could not owe an allegiance to Virginia as a slave.³⁴

Furthermore, the Supreme Court ruling from the *Dred Scott v. Sanford* decision had determined African Americans were “altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect.”³⁵ As such, Shields Green was not recognized as a citizen of the United States, a parameter necessary to be indicted for treason. While the racism of the era, in both law and precedent, had paradoxically safeguarded him from

³³ McGinty, Brian. “The Execution.” *John Brown’s Trial*, Cambridge, MA: Harvard UP, 2009. 240. October 2009. Print.

³⁴ Bushong, Millard Kessler. *A History of Jefferson County, West Virginia*. Bowie, MD: Heritage, 2002. 130. Print.

³⁵ *Dred Scott v. Sanford*, 60 U.S. 393 (1857).

treason, unfortunately for Green neither such an allegiance nor recognized citizenship were necessary for the charges of murder and inciting a slave rebellion. He was subsequently hanged for his role in aiding John Brown in the raid a couple weeks after his leader's execution.

It appears the south did not want to hang Brown and his co-conspirators on mere charges of murder or instigating an uprising, but rather for a stigmatizing and heinous act that would best underscore the sentiment of seemingly every citizen south of the Missouri Compromise Line. The prosecution of treason and the label of traitor for John Brown likely eased the fears of slave holders, who were always anxious of the very type of slave uprising that nearly happened. Thus, the charge of treason is not only an indictment of betrayal by a person against the government and its people, but it also serves as a rallying point by which the people can come together against such actions.

Chapter 2: Practice of Treason from Civil War to World War II

In 1861, the country plunged deeply into the Civil War, the nation's most solemn conflict. In the chaos of the four years of this fight, there was one formal instance of treason. It was committed in 1862 by a professional gambler named William Mumford, who, with a group of friends in confederate New Orleans, removed an American flag at the Mint. The United States Navy, led by David Farragut, had just captured the city, and replaced the Confederate flag with an American one. Angered, Mumford scaled the Mint and tore it down. For this action, he was tried by military tribunal on the grounds of treason.³⁶

His overt act was found to be the desecration of the American flag, and since the United States contended the southern states were still a part of the Union, Mumford was a U.S. citizen who owed allegiance to the country. The tribunal presented testimony from a police officer who overheard Mumford admit to being the person who tore down the flag, and a New Orleans citizen testified he witnessed Mumford carrying the flag out of the Mint. With this, the adjudication was swift, and Mumford was convicted and sentenced to death on June 7, 1862. Interestingly, he was hung from the scaffolding of the Mint from which he had torn down the flag.

On July 7, 1865 Mary Elizabeth Jenkins Surratt was the first woman executed in the United States. She was found guilty of aiding and abetting John Wilkes Booth in

³⁶ Buhk, Tobin T. *True Crime in the Civil War: Cases of Murder, Treason, Counterfeiting, Massacre, Plunder, & Abuse*. Mechanicsburg, PA: Stackpole. 39. 2012. Print.

Lincoln's assassination, as well as committing treason.³⁷ She hanged, along with three co-conspirators, on the gallows that had been constructed the night before at the Washington Arsenal. Despite pleas from her lawyer, her priest, and her daughter, President Andrew Johnson refused to grant a reprieve, stating that Surratt, "kept the nest than hatched the rotten egg," and willingly did Booth's bidding.³⁸

The aftermath of the Civil War saw Reconstruction, the manifest destiny expansion of the country's prowess, and numerous innovations. Yet it was not until World War II that formal cases of treason against the United States arose. One of the first instances of treason during the war resulted from Germany's attempt to deploy saboteurs into the United States. Four Germans were delivered by U-Boat to the shores of New York, and four were brought by submarine to Florida. One of four who landed in Florida, Herbert Haupt, immediately boarded a train bound to Chicago to reunite with his parents, Max and Erna Haupt.

Meanwhile, the two German spies who landed in New York, George Dasch and Ernst Burger, decided to defect and went to the Federal Bureau of Investigation, revealing their mission and the identities of the other spies. Consequently, Herbert Haupt and the other seven German spies (including Dasch and Burger) were captured and brought before a military tribunal. For their part in defecting, Dasch and Burger were spared from the fate decided for the other six spies: death by electrocution.³⁹

³⁷ Steers, Edward. *Blood on the Moon: The Assassination of Abraham Lincoln*. Lexington: University of Kentucky, 2001. 232. Print.

³⁸ *Id.* at 226.

³⁹ *Ex parte Quirin*, 317 U.S. 1, 48 (1942).

Although none of these spies were charged with treason, Haupt's parents were. The government indicted Max and Erna Haupt for giving aid and comfort to an enemy combatant, despite owing an allegiance to the United States.⁴⁰ According to the prosecution, Max Haupt had knowledge of his son's involvement with a nation the United States was at war with, yet had aided him regardless. Max and Erna were convicted, and their case was appealed up to the U.S. Supreme Court. In ultimately upholding the treason conviction, the Supreme Court concluded "there can be no question that sheltering, or helping to buy a car, or helping to get employment is helpful to an enemy agent, that they were of aid and comfort to Herbert Haupt in his mission of sabotage."⁴¹

Shortly after the invasion of France by Allied Forces, flight officer Martin Monti defected to Germany in 1944 by flying an Air Force plane to Italy. There, he proceeded to surrender to the Third Reich, and later aided the Axis as a propaganda broadcaster, and later even wrote flyers that were given to Allied POWs. Following the surrender of the Axis in Europe, Monti was eventually found in Italy. Initially charged for desertion by the military, Monti was later approached by the F.B.I. in 1948 and charged for treason against the United States.

The prosecution alleged Monti, as a citizen of the United States and officer in the Air Force, owed an allegiance to the country, and his theft of a U.S. aircraft and defection

⁴⁰ Eichensehr, Kristen E. "Treason in the Age of Terrorism: An Explanation and Evaluation of Treason's Return in Democratic States." *Vanderbilt Journal of Transitional Law*. 42.5 (2009): 1455. Web. 24 June 2013. <<http://www.vanderbilt.edu/jotl/manage/wp-content/uploads/Eichensehr-final-crv2.pdf>>.

⁴¹ Haupt v. United States, 330 U.S. 635 (1947).

to the Axis constituted a clear overt act against that allegiance.⁴² Monti pled guilty to the charge of treason, and was sentenced to 25 years in prison.⁴³

On the home front, another prominent treason case arose regarding Anthony Cramer, whom the prosecution claimed had provided assistance to two German combatants, Edward Kerling and Werner Thiel, present in the United States to commit sabotage.⁴⁴ Cramer had immigrated to the United States during the 1920s after World War I from Germany.⁴⁵ Cramer became friends with Thiel who, following the outbreak of World War II, departed to Germany, where he became a saboteur. Thiel returned to the United States by German U-Boat along with Kerling, and met with Cramer. He provided Cramer with funds from the Third Reich for safekeeping. This money was to be used by Thiel against America.⁴⁶

The defendants were convicted of treason. In so holding, the lower trial court had found that “[t] here was ample evidence for the jury's conclusion that the assistance Cramer rendered was assistance to the German Reich, not merely assistance to Kerling and Thiel as individuals.”⁴⁷ They concluded a reasonable person in Cramer’s situation would recognize Kerling and Thiel as highly suspicious. Instead, Cramer was “one who they were confident would not report them to the authorities, as a loyal citizen should.”⁴⁸

⁴² United States v. Monti, 168 F. Supp. 671 (E.D.N.Y. 1958).

⁴³ *Id.*

⁴⁴ Cramer v. United States, 325 U.S. 1 (1945).

⁴⁵ Moore, John N. *National Security Law 2nd Edition*. Durham, NC: Carolina Academic Press. 2005. 1093. Print.

⁴⁶ *Id.* at 1094.

⁴⁷ Cramer v. United States. 325 U.S. 56 (1945).

⁴⁸ Moore, John N. *National Security Law 2nd Edition*. at 1099.

While he was initially convicted for treason, the United States Supreme Court reviewed this case the following year. This case became a landmark in treason law when the convictions were overturned. According to the Supreme Court, in order to convict Cramer, the courts would have to ignore the rules established by the treason clause. While Cramer had associated with enemies of the United States, he did not provide them with aid and comfort in any capacity, as is required by the treason clause. Thus, in a monumental decision, the Supreme Court decided to preserve the fundamental components of treason because, “the treason rule, whether wisely or not, is severely restrictive.”⁴⁹

Treason Through Propaganda Broadcasting

At the onset of World War II, there were numerous cases of United States citizens who became propaganda broadcasters for Axis powers. For instance, Robert Best, Edward Delaney, Ezra Pound, Jane Anderson, Fred Kaltenbach, Constance Drexel, Douglas Chandler, and Max Otto Koischwitz were all indicted, *in absentia*, for treason against the United States in June 1943.⁵⁰ Robert Best serves as a generic example of the adjudication the other seven indicted for treason had received.

U.S. reporter Robert Best was stranded in Germany when the United States entered World War II, yet he declined an opportunity to be sent back in order to marry his fiancée. Best eventually became a broadcaster for German radio until the fall of the Third Reich. The following year, he was captured by British forces, and sent to the United

⁴⁹ Moore, John N. *National Security Law 2nd Edition*. at 1102.

⁵⁰ Sarasota Herald-Tribune. "Americans Indicted as Traitors." [Sarasota] 28 July 1943: No. 254, 1. Print.

States to stand trial. The government indicted him for twelve counts of treason against the country, arguing he provided aid and comfort to our enemies.⁵¹ Best admitted to the court he had broadcasted in support of Germany, and he was convicted and sentenced to a life imprisonment.

Two distinct instances of propaganda broadcasters from the aforementioned eight above were Mildred Gillars and Iva D'Aquino. These two traitors were well-known to the public, and especially to returning GIs, who often tuned in to hear their broadcasts. Hence, the Allied Forces bestowed them the nicknames "Axis Sally" and "Tokyo Rose," respectively.

In the case of Mildred Gillars, the prosecution interestingly deviated from the typical demonstration that the propaganda used by the Defendant was an overt act, as specified in the Constitution, by providing 'aid and comfort' to the enemy. Instead, they established Gillars had committed treason by providing Germany with a written oath of allegiance to the Axis country. This was a clear overt act against the United States and the allegiance she owed to it.⁵² The Federal Communications Commission had recorded several of her broadcasts, and ultimately Gillars was convicted of treason and sentenced to thirty years in prison.

Perhaps the one controversial occasion of using the charge of treason was the case of Iva Toguri D'Aquino, a United States citizen who was stranded in Japan when the attacks on Pearl Harbor were carried out in December 1941. D'Aquino found work with a Tokyo radio station, and contributed to many Japanese broadcasts aimed at Allied Forces.

⁵¹ Best v. United States., 184 F.2d 131 (1st Cir. 1950)

⁵² Gillars v. United States, 182 F.2d 962 (1950).

However, it is noted that D'Aquino had refused to participate in anti-American propaganda, and in a case history report the F.B.I. would later claim, "As far as its propaganda value, Army analysis suggested that the program had no negative effect on troop morale and that it might even have raised it a bit."⁵³

Nevertheless, D'Aquino was arrested and indicted in 1948 for eight counts of treason, and the jury convicted her on only one of those counts. The prosecution argued she provided aid and comfort to an enemy nation, and two key witnesses, George Mitsushio and Kenkichi Oki, testified at trial against D'Aquino. Upon appeal, the Ninth Circuit Court of Appeals held:

We think that the Geneva Convention did not change the law of treason. If the overt act performed by appellant was such as to give aid and comfort to the enemy, the fact that the enemy could have legally demanded a similar act under the terms of the Convention is irrelevant. It is essential to the crime of treason that the overt act be committed with the intent to betray the United States. Appellant says that unless the act itself is criminal, "no intent can turn it into treason". Such is not the law.⁵⁴

Based on this determination, D'Aquino's conviction was upheld, and she remained incarcerated for six years. It was not until 1976 that she was formally pardoned by President Ford, after an investigation revealed George Mitsushio and Kenkichi Oki, the two key witnesses the prosecution used to secure the conviction, in fact lied under

⁵³ "Iva Toguri D'Aquino and "Tokyo Rose"." *Famous Cases & Criminals*. FBI, 21 May 2010. Web. 25 June 2013. <<http://www.fbi.gov/about-us/history/famous-cases/tokyo-rose>>.

⁵⁴ *Iva Ikuko Toguri D'Aquino v. United States*, 192 F. 2d 338 (9th Cir. 1951).

oath.⁵⁵ According to these witnesses, they had perjured themselves due to coercion by the F.B.I. Ultimately, D'Aquino's legacy is that of an American hero, who endured a false conviction and today is recognized for not betraying the United States.

In conclusion, our interpretation of the charge of treason had come a long way from the initial British Acts, whose definitions our Constitution had so closely adhered to. Through the adversarial system of the courts, we established mere riots were not grounds for treason, and that the prosecution must demonstrate the accused had committed an overt act against the country, and that the overt act was testified to by at least two witnesses in opinion court. Otherwise, no conviction for treason should stand, no matter how many people claim and cry "treason."

The unique dynamic of individual states and the central federal government allowed for the crimes of state treason as well as federal treason. We also determined that an act of treason can encompass a broad spectrum, from inciting a slave revolt whose consequences would reverberate throughout the country for decades, to a seemingly victimless crime of desecrating a flag. Lastly, we recognize an extensive and global war is capable of producing many forms of traitors. However, as made clear by the narrative of "Tokyo Rose," the prosecution must exercise caution when aggressively adjudicating treason cases. In modern day, we recognize the Framers of the Constitution not only included the treason clause to be used to protect the infrastructure of the United States, but to also prevent the exploitation of such a charge from being inflicted unreasonably:

⁵⁵ Uyeda, Clifford I. "The Pardoning of "Tokyo Rose": A Report on the Restoration of American Citizenship to Iva Ikuko Toguri." *Amerasia Journal* 5.2 (1978): 69-93. Print.

In recognition of the potential for political manipulation of the treason charge, the Framers may have formulated the Treason Clause as a protection against promiscuous resort to this particularly stigmatizing label.⁵⁶

The issue of the “stigmatizing label” of treason is a concept that will be more fully addressed in the last chapter of this thesis.

⁵⁶ Moore, John N. *National Security Law 2nd Edition*. Durham, NC: Carolina Academic Press. 2005. 1110. Print.

Chapter 3: Mid-Twentieth Century Abandonment of Treason by U.S. and U.K.

Just as the United States experienced an extensive history of treason trials, so too has the United Kingdom. Of importance, however, is their last indictment and conviction of treason against William Joyce in 1947. The United Kingdom as well was prosecuting several propaganda broadcasters for violating their allegiance and aiding enemy countries. On May 23, 1940, Parliament passed the Treachery Act of 1940 to combat the burdensome dilemma of handling numerous spies in the United Kingdom during World War II. The Act functioned by making treachery a capital felony.

The original charge of treason was recognized to be a difficult crime for the prosecution to prove against the accused. Namely, the duty to owe allegiance aspect concerned the British, who believed, "In as much as treason is a crime committed by someone who owes allegiance, it might be well argued that such a person does not owe allegiance to the British Crown. For these reasons it is urgently necessary that this Bill [Treason Act of 1940] should be passed."⁵⁷

Through this Act, the government would not have to establish an allegiance owed. From 1940 to 1944, seventeen German spies were subsequently convicted for violating the Treason Act of 1940, and executed for treachery by either hanging or firing squad.⁵⁸ Thus it is clear these prosecutions were far easier to prove, and the House of Lords determined after the war's conclusion, the Act would be repealed for this very reason.

⁵⁷ Viscount Simon. Treachery Bill. cc391-8, 116 392 (1940) (enacted). Print.
http://hansard.millbanksystems.com/lords/1940/may/23/treachery-bill#column_391

⁵⁸ Stratford, Stephen. "Treachery during World War Two." *British Military & Criminal History in the Period 1900 to 1999*. N.p., n.d. Web. 28 Jan. 2013. <<http://www.stephen-stratford.co.uk/treachery.htm>>

World War II ended in August 1945, at which point the United Kingdom no longer had a legitimate use of the Treason Act of 1940, and half a year later it was suspended. However, the Treason Act of 1945 was enacted in May, and this law essentially updated the procedural practice of adjudicating treason, making it very similar to the procedure for a murder trial.⁵⁹ This modernization is crucial in order to examine the last four treason trials carried out by the United Kingdom.

John Amery, Thomas Cooper, and Walter Purdy were tried by the United Kingdom for high treason after the war. Amery pled guilty and was immediately convicted and sentenced to execution. Cooper and Purdy were also found guilty, yet due to the extenuating circumstance that they were not leaders in their treachery, their sentences were ultimately commuted.⁶⁰ Finally, the United Kingdom's last treason conviction, against William Joyce, was a case of significant circumstances.

The UK Trial and Execution of William Joyce

Joyce was a gifted speaker. Originally from Brooklyn, New York, he was from Irish descent, yet attended college in England, and later became attracted to fascism. After he was attacked during a political meeting, Joyce was convinced that “Jewish Communists” were the perpetrators who cut his face with a razor, and this left him with both a permanent scar and an even stronger desire to explore the ideas of fascism.⁶¹ He furthered this interest by joining the British Union of Fascists, and this political party

⁵⁹ Earl of Munster. Treason Bill. c227, 136 227 (1945) (enacted). Print.

<http://hansard.millbanksystems.com/lords/1945/may/17/treason-bill-hl>

⁶⁰ Stephen Stratford. *Id* at http://www.stephen-stratford.co.uk/walter_purdy.htm

⁶¹ Joyce, William. *Dictatorship*. British Union of Fascists Publications Limited: London, UK. 1933. Print.

soon recognized his oratory talent. As he continued to campaign with the British Union of Fascists, William Joyce became more profoundly anti-Semitic.⁶² These attributes would lead to the British authorities developing an interest in detaining Joyce. Thus, he promptly fled to Germany.

In 1940 Joyce became a broadcaster on German radio in Berlin, and with the pseudonym “Lord Haw-Haw,” (given because of his nasal twang), he garnered much popularity from British listeners. According to estimates, during World War II he would average approximately six million consistent listeners. His airings, laced with sarcasm, would call on the United Kingdom to surrender, disparage Jews in England, and demonstrate he was cognizant of the latest military encounters and political meetings. As his infamy grew, Joyce revealed his identity on the air, and would defiantly repeat it for years to come. Ultimately, as the Allied Forces captured both Berlin and the radio station, British soldiers would derisively mock Joyce’s broadcasts and flaunt their victories.⁶³

While in hiding from Allied Forces, Joyce was approached by British soldiers and asked for identification. Reaching for his fake passport, he was wounded when the soldiers, believing him to be armed, opened fire. Joyce was captured, and brought before trial in London in September 1945. There, the court indicted him through the newly enacted Treason Act of 1945 for high treason based on the charges:

1. William Joyce, on the 18th of September, 1939, and on other days between that day and the 29th of May, 1945, being a person owing

⁶² Julius, Anthony. *Trials of the Diaspora: A History of Anti-semitism in England*. Oxford: Oxford UP, 2010. 307. Print.

⁶³ http://www.earthstation1.com/WWIIAudio/Mock_'Germany_Calling'_broadcast.wav

allegiance to our Lord the King, and while a war was being carried on by the German Realm against our King, did traitorously adhere to the King's enemies in Germany, by broadcasting propaganda.

2. William Joyce, on the 26th of September, 1940, being a person who owed allegiance as in the other count, adhered to the King's enemies by purporting to become naturalized as a subject of Germany.
3. William Joyce, on 18 September 1939, and on other days between that day and the 2 July 1940, being a person owing allegiance to our Lord the King, and while a war was being carried on by the German Realm against our King, did traitorously adhere to the King's enemies in Germany, by broadcasting propaganda⁶⁴

However, the first two charges could not be applied, for Joyce did not owe an allegiance to the United Kingdom because he was American, of Irish descent. Moreover, with the end of World War II, the Treason Act of 1940 that made treachery a felony and did not require allegiance could no longer be exercised. Nevertheless, the court convicted William Joyce on the final count, arguing that because he possessed a counterfeit British passport, he was permitted the British diplomatic safeguards assured by it. The Court of Appeal and House of Lords upheld the conviction, and at the beginning of 1946, Lord Haw-Haw was hung for high treason.

⁶⁴ DeLacey, Anne. *Enemy Planes Above Us: From a Young Child's Perspective of World War II*. Bloomington, IN: Xlibris Corporation, 2010. 60. Print.

Joyce marked the very last use of high treason by the United Kingdom. What is puzzling is that the very Treason Act of 1945, used to convict the four traitors caught after World War II, was repealed from the British justice system in December 1953. This was implemented by the Statute Law Revision Act of 1953. This Act followed the recommendations of a committee that would serve as the forerunner to the Law Commission, a formal bureaucracy that monitors British law and advises reform where needed.⁶⁵

According to the first report by the Law Commission, a component of their function was to remove law deemed irrelevant or archaic.

[T]here are many statutes which cannot be satisfactorily consolidated without first being amended ; and that consolidation is not infrequently impeded by provisions which are completely obsolete, or of no practical value, but which, for one reason or another, have to be reproduced and cannot merely be repealed as unnecessary.⁶⁶

While this report came over a decade after the 1953 repeal of the Treason Act of 1945, it still aids in understanding the British government's explanation of why the Statute Law Revision Act of 1953 repealed that Treason Act. However, as previously established, treason, whether through the charge of high treason or through the treachery felony, has proved instrumental in the defense of the United Kingdom, as well as

⁶⁵ Opeskin, Brian R., and David Weisbrot. *The Promise of Law Reform*. Sydney: Federation, 2005. 44. Print.

⁶⁶ The Law Commission. *Law Commission's First Programme on Consolidation and Statute Law Revision*. Her Majesty's Stationary Office: London. 1965. 3. Print. <http://www.bailii.org/ew/other/EWLC/1966/2.pdf>

responsible for the justice carried out against those who betrayed the country during World War II.

Yet, the purpose of such law revision acts is stated “to get rid not only of those provisions which are obviously unnecessary, but also of those which upon examination are found to fulfill no useful purpose.”⁶⁷ It would seem apparent that other forces were behind this decision to abridge treason in the United Kingdom. What was once a strong buttress for the infrastructure of the country was inexplicably repealed and consolidated.

The Final Conviction of Treason: Tomoya Kawakita

Of crucial importance is also the puzzling circumstance surrounding the last use of the treason clause in the United States. Like the Joyce trial, this case occurred at the end of World War II. It involved United States citizen Tomoya Kawakita, who upon renouncing his citizenship to the country when he was stranded in Japan, later functioned as an interpreter in a Japanese Prisoner Of War camp. There, he is accused of committing various atrocities, and it was on these grounds he was indicted for treason.

After the war, Kawakita returned to the United States, and continued to live there until a former POW recognized him and informed the F.B.I. Perhaps most damning in his trial, Kawakita had attested on his passport application in 1945 that he had never renounced his citizenship of the United States. The prosecution demonstrated his obvious betrayal to fellow countrymen during his tenure in the camp, as well as illustrated Kawakita still owed an allegiance to the country due to his passport application.

⁶⁷ *Id* at 6.

Kawakita was promptly sentenced to death on eight of the fifteen acts he was indicted for. The Supreme Court of the United States heard his appeal, and they upheld the decision. It was President Eisenhower who spared Kawakita from execution in October, 1953. He instead reduced the sentence to life in prison. The next president, John F. Kennedy, would later pardon him after he served a decade, on the condition that Kawakita be banished from the United States for life.

Tomoya Kawakita and Iva Toguri D'Aquino similarly found themselves stranded in Japan during World War II. Yet, unlike "Tokyo Rose," Kawakita not only renounced his citizenship, he aided and comforted an enemy of the United States. D'Aquino was later found to have never truly supported Japan, nor to have in any way negatively impacted the United States or the countless troops who listened to Zero Hour. In contrast, former prisoners testified Kawakita behaved cruelly toward the POWs, and would devise despicable methods of tormenting them.

It is clear the use of treason in the case of Kawakita was legitimate by any means. With the conclusion of the trial, the record of treason cases stemming from World War II displayed the use of treason was an outstanding defense against saboteurs, propaganda broadcasters, and other miscellaneous traitors. At the time, it was not known that D'Aquino's trial had been laced with perjured testimony, and that government reports indicated she had not negatively affected morale.

The United States was far from enjoying an era of peace. While the conquest of Nazism and the Third Reich had been shattered, new threats emerged to take their place. With the power of splitting the atom demonstrated in Hiroshima and Nagasaki, the people

of the United States wondered how long it would be until another country, chiefly the United Soviet Socialist Republic, would develop their own version of the bomb. The answer came quickly in 1949 with an implosion nuclear device called *First Lightning*, making the Soviet Union the second nation to detonate a nuclear device. Since the end of the war, both countries were developing the capability for delivering nuclear bombs with inter-continental ballistic rocketry. This desire for nuclear strength would also mark the beginning of the space race. Added to these new threats was the creeping influence of communism in the U.S. and around the world. Real or imagined, Americans were terrified that the Russians were coming.

As World War II came to an end, the Soviets and the Americans attempted to collect as many German rocket scientists and German rockets as possible through Operation Paperclip. On May 2, 1945, Dr. Wernher von Braun, a top ranking SS officer in charge of the Nazi rocket program, surrendered to the 44th Infantry Division. He was brought to the United States under provisions of Operation Paperclip, and ultimately many believe that our country would not have landed on the moon were it not for this turn of events. Von Braun is significant to underscore the degree of fear the leaders of the United States had, and that they would overlook his checkered past in exchange for his invaluable contribution to the space race against the Soviets.⁶⁸

Consequently, following World War II our nation was fraught with anti-communist rhetoric, intense paranoia of an impending thermonuclear war, and hysterical accusations of anti-American sentiment. This combination created a belief, in some of

⁶⁸ Ward, Bob. *Doctor Space: The Life of Wernher Von Braun*. Annapolis, MD: Naval Institute Press, 2009. 90. Print.

our citizens and leaders, that a Red Menace was about to take over the U.S., casting suspicion over our neighbors, politicians, and even the actors in favorite TV shows and movies. It became a period where Soviet spies were captured and tried, a time when professional entertainers were blacklisted for ties to communists groups. Into this predicament, a politician intent on establishing his name among the great leaders of our country took center stage. Joseph R. McCarthy, a Republican senator from Wisconsin, had his own ideas of using the charge of treason, and they would prove very different from the purpose the framers of Constitution had in mind.

Chapter 4: Theory of McCarthyism

“I have here in my hand,” he proclaimed, “a list of 205 that were known to the Secretary of State as being members of the Communist Party and who, nevertheless, are still working and shaping the policy of the State Department.”⁶⁹ It was this startling announcement in 1950 at an otherwise insignificant Republican Women’s club in remote Wheeling, West Virginia, that single-handedly launched Joseph McCarthy into the international spotlight. It is almost remarkable how rapidly the Wisconsin senator rose from the “Pepsi-Cola Kid,”⁷⁰ troubled from scandals, investigations, and ridicule to become “Tail-Gunner Joe,”⁷¹ an American war hero continuing to combat our enemies with his witch trials reminiscent of the Spanish Inquisitions.

Not only was McCarthy alleging the existence of traitors working in the State Department, with that carefully worded statement, he was insinuating that the Secretary of State, part of the Cabinet to the President of the United States, was clearly aware of their existence yet did not seem to be acting upon such a terrifying revelation. Such an outlandish declaration would seem almost outrageous for anyone to state, yet an examination into the character of Joseph McCarthy reveals that, as an individual voracious for the spotlight, McCarthy was willing to make it. To accurately comprehend the actions of Joseph McCarthy, it is imperative to examine the development of his aspiration for fame.

⁶⁹ Johnson, Haynes. "Tail Gunner Joe." *The Age of Anxiety: McCarthyism to Terrorism*. Orlando, FL: Harcourt, 2005. 14. Print.

⁷⁰ *Id* at 10.

⁷¹ *Id* at 52.

The Crafting of ‘Tail-Gunner Joe’

Joseph McCarthy’s future was originally a promising one. Those who knew him growing up recalled a hard worker and fierce fighter. He was depicted by classmates as determined to be a nationally known figure.⁷² However, even in its early stages, McCarthy’s true character showed. According to a law school peer, despite an agreement to vote for the opponent during a campaign for class president, McCarthy instead won by a narrow margin of two votes by voting for himself.⁷³ In 1942, he enlisted into the Marine Corps as an officer, though this respectable service was tarnished by his belief in a “need for a military credential to further his political career.”⁷⁴ McCarthy would later request, and be granted, a discharge in 1945 to run for reelection for judgeship, right before the iconic and gruesome battle of Iwo Jima was waged.⁷⁵

Even his self-provided patriotic nickname “Tail-Gunner Joe” was a sham. Most Americans would naturally assume when McCarthy would declare his slogan “America Needs a Tail Gunner,” he was fighting our enemies with distinction. Instead, he insignificantly was credited the title for setting a record of “most ammunition shot on a single mission,”⁷⁶ by shooting a series of trees as the plane traveled in a flight path in the designated green zone. Ironically, not only was this in no way heroic, as a political figure in Wisconsin he had needlessly wasted taxpayer dollars by using the ammunition. Nevertheless, he boldly declared, “this is worth 50,000 votes to me” to a fellow Marine.

⁷² *Id* at 40.

⁷³ *Id* at 45.

⁷⁴ *Id* at 45.

⁷⁵ *Id* at 49.

⁷⁶ *Id* at 52.

After fracturing a bone in his foot during a hazing ritual in the Marines, McCarthy would later sport a limp, while boasting it was a war wound from shrapnel.⁷⁷

His disgraceful display certainly did not end after his military service. McCarthy was investigated and reprimanded for taking kickbacks in exchange for providing political favors for a housing developer and even Pepsi-Cola, thus earning him the derogatory nickname, “Pepsi-Cola Kid.” None of his fellow Republican senators would associate with McCarthy, and ironically the senator who would become one of the most recognized politicians in 1950 was voted America’s worst senator a mere four years prior in 1946.⁷⁸ In fact, it was due to this very hatred for McCarthy that his infamous declaration of “205 communists in the State Department” was given in the unimportant and isolated town of Wheeling, West Virginia, where his fellow senators had naively concluded he could do little harm.

In almost every account of Joseph McCarthy, it is made incredibly apparent that the “Pepsi-Cola Kid” was a deplorable congressman, yet the American public knew virtually none of this in the blossoming Cold War era of communist paranoia. Although McCarthy’s speech in Wheeling had plagiarized a Richard Nixon Congressional speech, the apprehensive public never recognized this. Instead, all they heard were McCarthy’s charges that Presidents Roosevelt and Truman were supporters of the Communist Party.⁷⁹ It was for this reason that McCarthy’s strategy to profit off of Americans’ fear worked so well, and allowed him to hurl the charge of treason whichever way he pleased.

⁷⁷ *Id* at 54.

⁷⁸ *Id* at 10.

⁷⁹ *Id* at 15.

McCarthy's Misusage of Treason as a Political Tool

In February 1950, it was along with his proclamation of 205 suspected communists that McCarthy first alleged acts of treason by officials in the United States government:

[O]ne of the important reasons for the graft, the corruption, the dishonesty, the disloyalty, the Treason in high Government positions--one of the most important reasons why this continues is a lack of moral uprising on the part of the 140,000,000 American people.⁸⁰

In fact, McCarthy had even underscored the degree to how reprehensible committing treason is:

As you know, very recently the Secretary of State proclaimed his loyalty to a man [Hiss] guilty of what has always been considered as the most abominable of all crime — of being a traitor to the people who gave him a position of great trust.

When this pompous diplomat in striped pants [Hiss], with a phony British accent, proclaimed to the American people that Christ on the Mount endorsed communism, high treason, and betrayal of a sacred trust, the blasphemy was so great that it awakened the dormant indignation of the American people.⁸¹

⁸⁰ McCarthy, Joseph, and Thomas C. Reeves. "McCarthyism." *The Fight for America*. New York: The Devin-Adair Company. (1952). Print.

⁸¹ *Id.*

Following these staggering claims, McCarthy's fame skyrocketed. Every journalist was desperate to learn the identities of these traitors in the State Department. Every fearful citizen was anxious to hear of the treacherous acts their leaders were committing under the will of communism. In the early 1950s, McCarthy would maintain prominence in the newspapers with "headline-winning charges that America's leaders were guilty of treason."⁸²

He would frequently allege the current and previous administrations, both Democrat, were guilty of twenty years of treason:

The issue between the Republicans and Democrats is clearly drawn. It has been deliberately drawn by those who have been in charge of twenty years of treason. The hard fact is -- the hard fact is that those who wear the label, those who wear the label Democrat wear it with the stain of a historic betrayal.⁸³

The most decisive issue in the country was quickly becoming McCarthy's allegations that the government was becoming infested with traitors. In modern times, even proponents of the unscrupulous senator recognize his attacks as charges of treason. "Despite the left's creation of a myth to defeat legitimate charges of treason, McCarthy had so badly stigmatized Communism, his victory survived him."⁸⁴ It is apparent by all historical accounts and analysis that McCarthy had used treason, the charge of treason,

⁸² Johnson, Haynes. *The Ages of Anxiety: McCarthyism to Terrorism*. 211. Print.

⁸³ Friedman, John S. *The Secret Histories: Hidden Truths That Challenged the Past and Changed the World*. New York: NY: Picador, 2005. 114. Print.

⁸⁴ Coulter, Ann H. "The Indispensable Joe McCarthy." *Treason: Liberal Treachery from the Cold War to the War on Terrorism*. New York: Crown Forum, 2003. Last Page. Print.

and the moral outrage and stigma that accompanies such claims. He had “focused national attention in the early 1950s on the issue of loyalty and the possibility of betrayal by one's fellow-citizens.”⁸⁵ “With each passing day, “traitors in government” became a more potent issue.”⁸⁶

Interestingly, while McCarthy is infamous for alleging traitors existed in the government, and for sparking witch hunt investigations into revealing suspected communists, it was actually President Truman who had first implemented an agenda to discover traitors. Called the Truman Loyalty Program, this 1947 crusade requested oaths of loyalty from those suspected of subversive party persuasions, and even conducted investigations into them. A few months after McCarthy’s Wheeling speech, the *American Scholar* would reflect that:

The atmosphere in government is one of fear – fear of ideas and of irresponsible and unknown informers. . . . Everyone knows of someone who has been accused of disloyalty – and it amounts to an accusation of treason – on ridiculous charges.⁸⁷

Immediately after his Wheeling, West Virginia speech, Congress authorized a subcommittee to investigate Joseph McCarthy’s claims, which would become known as the Tydings Committee. Before Congress, in a five hour speech, McCarthy exhibited eighty one individuals suspected of being communists in the State Department, despite providing these individuals as case numbers and not by their names. Regardless, both the

⁸⁵ Herbig, Katherine L., and Martin F. Wiskoff. *Espionage Against the United States by American Citizens 1947-2001*. Tech. no. 02.5. N.p.: Defense Personnel Security Research Center, 2002. 6. Print.

⁸⁶ Johnson, Haynes. *The Ages of Anxiety: McCarthyism to Terrorism*. 174. Print.

⁸⁷ *Id* at 130.

country and the legislature took him seriously, and the Tydings Committee began its hearings to investigate government employees.

Ultimately, the Tydings Committee came down to a battle waged by the Chairman, Senator Millard Tydings, against McCarthy, in order to discredit him before the nation. Partisan fighting began between Democrats opposing McCarthy and Republicans defending the junior senator they paradoxically had once all despised. Tydings alleged McCarthy's accusations of treason were a hoax, and Senator William Jenner would charge that through attempting to disrepute McCarthy, Tydings had committed "the most brazen whitewash of treasonable conspiracy in our history."⁸⁸

Meanwhile, the American people, fearful of the communist threat, looked upon Joseph McCarthy as their protector. Ironically, when his critics labeled McCarthy's witch hunting and baseless accusations as "McCarthyism," he would later alter the tone of that slight to become a slogan: "McCarthyism is Americanism with its sleeves rolled."⁸⁹ Indeed, the period of McCarthyism was in full effect, and with his constant accusations of treason, it was evident everyone, the public and their leaders alike, were all concerned about traitors within.

Julius and Ethel Rosenberg would become two potent sources of ammunition for McCarthyism. In August of 1950, they were arrested and indicted for handing over nuclear secrets to the Soviets. This furthered communist hysteria and McCarthyism, which culminated in 1953 when the couple were executed by electrocution in Sing Sing

⁸⁸ Griffith, Robert. *The Politics of Fear: Joseph R. McCarthy and the Senate*. University of Massachusetts Press. 1970. 101. Print.

⁸⁹ Robertson, Connie. *Book of Humorous Quotes*. London: Bibliophile, 1993. 125. Print.

Prison on June 19th.⁹⁰ In the same year, Republicans gained control of both houses of Congress as well as the White House, and the Korean War came to an end.

President Dwight D. Eisenhower was exasperated by the rants of Senator McCarthy even before he took office. Others in the Republican party were also anxious to see the Senator leave the spotlight. With the deaths of the Rosenbergs fresh in everyone's minds, McCarthy's constant pursuit of communists was starting to wear thin. In 1953, Walt Kelly, the creator of the popular comic strip *Pogo*, introduced the character Simple J. Malarkey, whose job was to clean up the dangerous elements.

When a newspaper threatened to drop *Pogo* because Malarkey looked a lot like McCarthy, Kelly started to draw him with a bag over his head. Some thought the cartoon McCarthy character now looked like he belonged to the KKK.⁹¹ Public sentiment would begin to shift away from McCarthyism. The American people would eventually come to understand that communism was not synonymous with treason, and that the Democratic Party was not the party of treason.

Anti-Communist Strategy of the US and UK

Meanwhile, the United States was not the only country in fear of the United Soviet Socialist Republic and its doctrine of communism. The United Kingdom had immediately begun an organized method to combat communism propaganda with

⁹⁰ Wilson, Steven H. *The U.S. Justice System: An Encyclopedia*. Santa Barbara, CA: ABC-CLIO, 2012. 673. Print.

⁹¹ Kercher, Stephen E. *Revel with a Cause: Liberal Satire in Postwar America*. Chicago: University of Chicago, 2006. 71. Print.

essentially its own form of anti-communist propaganda.⁹² Furthermore, the United Kingdom also engaged in "cooperation and eventually coordination of propaganda activities with the United States Government [that] became a defining feature of Britain's anti-communist propaganda policy."⁹³

In 1950, the United States began to implement these anti-communism efforts in what Truman would label the Campaign of Truth.⁹⁴ The establishment of this program was in response to the *First Lightning* nuclear explosion test performed by the Soviets as well as the blockade created by the Berlin wall. The United Kingdom, ecstatic over this effort, abandoned their latest potential endeavor called Third Force "in favour of 'the closest association with the United States.'"⁹⁵ The Campaign of Truth would serve as "a fundamental reassessment of the Soviet threat and America's response."⁹⁶

However, the United Kingdom did not fully agree with all of the anti-communist campaigns implemented by the United States. "McCarthyism was perceived as a threat to U.S. democracy that undermined the American pretension to lead the "free" world. Too many aspects of McCarthyism, according to some British observers, resembled totalitarian practices."⁹⁷ In fact, the "invocation of "national security" to curtail civil

⁹² Defty, Andrew. *British Anti-communist Propaganda and Cooperation*. Thesis. European Studies Research Institute, 2002. Manchester: University of Salford, 2002. iv. Print.

⁹³ *Id.*

⁹⁴ *Id.* at 163.

⁹⁵ *Id.*

⁹⁶ *Id.* at 166.

⁹⁷ Goodman, Giora. "The British Government and the Challenge of McCarthyism in the Early Cold War." *Journal of Cold War Studies* Winter 12.1 (2010): 62. Print.

liberties and tarnish political opponents . . . became a serious source of friction between the United States and its allies.”⁹⁸

The hysteria throughout Washington D.C., as well as the extraordinary power McCarthy wielded, had troubled the United Kingdom.⁹⁹ Furthermore, they were worried about the intense concern the United States had in regard to the British government’s security, insofar as containing communist traitors. Indeed, the United Kingdom was anxious not to affront the United States and damage their close partnership by refusing to practice the same anti-communist approach, yet they were also uneasy this would enrage those in England who were critical of such McCarthyism practice.¹⁰⁰ Thus, they had to maintain a balance between appeasing the near-panic of the United States and the ridicule of that panic by their own citizens.

Unfortunately for the British, the December 1952 release of a captured spy, Allen May, coincided with the approaching execution date of the American spies, Julius and Ethel Rosenberg. Consequently, the American press showcased his release, resulting in ample disapproval of the United Kingdom’s seemingly docile stance towards Communism.¹⁰¹ Elected officials in the United States, intent on discovering and eradicating all communists from the government, became highly critical of the United Kingdom. One official in particular was Junior Senator Joseph McCarthy.¹⁰²

⁹⁸ *Id.*

⁹⁹ *Id* at 67.

¹⁰⁰ *Id* at 68.

¹⁰¹ *Id* at 69.

¹⁰² *Id* at 77.

In McCarthy's eyes, anyone who opposed his witch hunt mentality was either an impediment to the destruction of communism, or a communist sympathizer themselves. To the people of the United Kingdom, McCarthy was a bigot who would denounce his political opponents as traitors before the American citizens who had an insatiable urge to eradicate all communists from the government.¹⁰³ "They regarded the damage he had done to the reputation of the United States around the globe as a godsend to the Communists and to the "anti-Americans" in Britain."¹⁰⁴

The United Kingdom was also worried of "the harm that McCarthy seemed likely to inflict on Britain's image and anti-Communist credentials in the United States."¹⁰⁵ Both countries had been working collectively to combat communism with a level-headed propaganda approach. To avoid the further persecution of McCarthyism by the senators fueling it, "who were often nearly as anti-British as they were anti-Communist,"¹⁰⁶ the United Kingdom ultimately began to enforce harsher anti-communist policies, and used vetting measures that would inevitably infringe on the civil rights of their citizens. Additionally, it would later become apparent that, "the governments and security services on both sides of the Atlantic had long developed a close working relationship and were exchanging information about British Communists."¹⁰⁷ It had seemed that despite their objections, McCarthyism had inexorably affected the United Kingdom.

¹⁰³ *Id* at 78.

¹⁰⁴ *Id.*

¹⁰⁵ *Id* at 79.

¹⁰⁶ *Id* at 95.

¹⁰⁷ *Id* at 85.

Downfall of McCarthyism and the Charge of Treason

Just as history shows that any immoral force eventually receives its punishment, so too did Senator McCarthy. For years the “Pepsi-Cola Kid” had led an elaborate fraud, and deceived the American people with baseless accusations and sly political tricks to cast his enemies as traitors. McCarthy began to investigate the Army in response to Julius Rosenberg having worked with the Army Signal Corps. He began to rouse reporters with scandalous information such as suspected spy rings in the Army. Unfortunately for “Tail-Gunner Joe,” the F.B.I. conducted an investigation, but was unable to determine the existence of any spies.¹⁰⁸

Undeterred, McCarthy saw the Army as an excellent source of inciting fear in American citizens by alleging traitors existed throughout the nation’s first line of defense. In January 1954, among those vilified was General Ralph Zwicker, whom McCarthy interrogated and criticized at length. Instead of support, McCarthy was met with much public disapproval of his persecution of a World War II general and war hero. Following this, the Army responded with a hearing against McCarthy himself, for using his political influence to obtain preferential treatment for a former aide who was enlisted in the Army as a private.¹⁰⁹ In Congress, even his fellow Republicans were critical of McCarthy’s baseless investigations into the Army, and it was clear a Congressional hearing would be called to examine McCarthy.

¹⁰⁸ Herman, Arthur. *Joseph McCarthy: Reexamining the Life and Legacy of America's Most Hated Senator*. Free Press: New York, NY. 1999 239–243. Print.

¹⁰⁹ Johnson, Haynes. *The Ages of Anxiety: McCarthyism to Terrorism*. 379. Print.

To combat McCarthy, the Army obtained the counsel of Joseph Welch, who would become famous as one of the figures who brought Tail-Gunner Joe crashing down. With every consecutive day of the hearing, McCarthy's popularity was falling. His influence on Capitol Hill was becoming moot, despite the conclusion that McCarthy had not inappropriately used Congressional power for his former aide. However, during the thirtieth day of the hearing, McCarthy made the mortal mistake of alleging Welch's legal associate was a communist, to which Welch retorted:

Until this moment, Senator, I think I never really gauged your cruelty or your recklessness. Fred Fisher is a young man who went to the Harvard Law School and came into my firm and is starting what looks to be a brilliant career with us. . . . Little did I dream you could be so reckless and cruel as to do an injury to that lad. . . . It is, I regret to say, equally true that I fear he shall always bear a scar needlessly inflicted by you.

McCarthy, failing to see the impending consequences, attempted to rebuke Welch, to be met with Welch's famous charge:

Let us not assassinate this lad further, Senator. You've done enough. Have you no sense of decency, sir, at long last? Have you left no sense of decency?"¹¹⁰

A thunderous applause exploded throughout the hearing. McCarthy's popularity was abysmal, and he was subsequently censured by Congress. Needless to say, the British were ecstatic over the sharp downfall of McCarthy. "[E]ven the harshest British left-wing

¹¹⁰ *Id* at 422-424.

critics of American anti-Communism were forced to admit that “the air of Washington” was “miraculously” clearing and “the oppressive cloud of McCarthyism is rolling away.”¹¹¹ They were not alone; American officials and lawmakers alike were also pleased the fear-mongering of McCarthyism, wrought with claims of treason, was greatly subdued. It would seem apparent that in this aftermath, the United Kingdom, having survived the onslaught of McCarthy’s attacks, would be eager to support the United States’ Campaign of Truth program of anti-communist propaganda by advising both countries shy away from the failed tactics of McCarthy.

At this point, the American people, having been duped by the “Pepsi-Cola Kid,” would not have embraced indictments for treason levied against traitors like they would have during World War II or even the days of McCarthyism. Instead, they would rather become more dubious of the allegations, and compare them to the baseless accusations McCarthy himself would proudly hurl. In fact, it is thoroughly clear the charge of treason had been tarnished, its stigma trivialized from the repeated abuses by McCarthy.

As the United States and the United Kingdom continued their campaign against communism, both countries discovered Soviet spies, who had aided and comforted an enemy despite owing an allegiance.¹¹² Yet neither country would prosecute those spies for treason. To do so would only provide their defense with a counter that their client was the victim of post-McCarthyism persecution, and lead the people to not accept them as traitors. Through his fraudulent claims of traitors, and proclamations of treachery by

¹¹¹ Goodman, Giora. 2010. 96. Print

¹¹² Haynes, John Earl., and Harvey Klehr. *Early Cold War Spies: The Espionage Trials That Shaped American Politics*. Cambridge: Cambridge UP, 2006. 5. Print.

government officials, Joseph McCarthy had ruined the charge of treason. In order to determine the ability of the United States to again use this Constitutional charge, one would have to analyze treason *de novo*, and from a new perspective.

Chapter 5: The Meaning of Treason to Us

Along with the historical perspective, it is crucial to also examine what treason is from a sociological standpoint. In the most basic terms, treason is a literal breach of allegiance to one's sovereign. It is a conscious choice to overthrow, to harm, or to kill an entity to which loyalty is expected. An extrapolation of this concept might be that instead of a king or a country, the sovereign is ourselves.

In early childhood, most human beings typically begin to develop a sense of right and wrong, fair and unfair, and moral and amoral. This usually results from the teachings of religion/spirituality or from emulating parents/family, the cultural environment, or the rules/laws of the "village." In one way or another, the concepts of the "golden rule" are conveyed to almost every person on earth. Later, in childhood development, ethical and unethical thoughts take form as we cultivate a personality. How altruistic or egotistical we become depends on how our sense of fairness developed in childhood and how much we are now willing to betray our identities to satisfy our wants. For example, a terrorist must betray his morality, taught through his religion, to wage a jihad. This type of treason is of a small magnitude compared to the harm caused not only to the country, but also its citizens.

While the bomber might never come to understand the treason he carried out against himself, it is plainly seen on the news by the rest of the world. If this terrorist is a citizen of the United States, then it follows that he has committed treason against his country, and therefore should be tried for this crime. The fact that his act was premeditated indicates that he has had time to reflect on the innocents who he was

intending to kill, and somehow rationalized that his act was for the “greater good.” We do not have to understand why the terrorist detonated a bomb, only that he believed it was justifiable to kill innocent people. The terrorist’s first act of treason was therefore, treason against himself, and this satisfies one of the integral aspects of a litmus test to ensure the accused is truly guilty of treason.

When the word treason is mentioned, most people have a negative emotional response. Momentarily, “innocent until proven guilty” is forgotten, and feelings of anger and incredulity surface. Acquaintances turn their backs on the accused, and deny any substantial connection to the “traitor”. Once there is time to reflect, we want to know what sort of person did this and why, however, the explanation may not be sufficient or seem logical.

Rather than asking why treason was committed, it is perhaps more important to question what the traitor got in return for his act. Even if slight, it may aid in understanding treason to identify if some reward or compensation for an act can speak for or against the validity of a treason charge. If so, the payment may be as simple to understand as the thousands of pounds sterling promised to Benedict Arnold. Payment in the form of martyrdom or other misguided interpretation of a religion is difficult to comprehend. Fame from committing an act of treason can also be a reward, even if such fame could only be enjoyed from a prison cell or a foreign country without an extradition treaty to the United States.

Revenge for a grievance, real or perceived, would motivate someone to commit treason, and might be used in a legal argument to mitigate punishment. Timothy J.

McVeigh's claim that his Oklahoma City bombing was in retaliation for the Waco Siege and Ruby Ridge did not help his defense, and he was convicted of first degree murder and executed by lethal injection in 2001. Were it for not Senator McCarthy, McVeigh's conviction potentially could have been that of treason. The prosecution of this charge, as well as the label of traitor added to McVeigh's legacy, was lost as a result of the stigma cast on the inappropriate use of treason from McCarthyism. At his execution, McVeigh had no last words, but did ask for a reading of the poem *Invictus*, thinking he was a true patriot. How might this episode in American history have been different if he were executed as a convicted traitor, and what lessons were lost to future discontents planning similar treasonous acts?

In his book *Rape of the Mind*, Joost Meerloo, M.D. states that traitors have two common characteristics. "They were easily influenced by minds stronger than their own, and none of them would admit his disloyalty as an act of treason."¹¹³ This translates to a real need to bring back the charge of treason as deterrent to would-be traitors. The recent rise in domestic terrorism might well be impacted if we can once again use the charge of treason to further signify the magnitude of evil inherent in the attack.

The meaning of treason to us is to have loyalty to our country. Loyalty is felt toward America by most, although not often spoken about. Sadly, we are starting to shun many of our traditions that have reinforced this loyalty, such as reciting the Pledge of Allegiance in public school. This simple exercise performed as a group is a visual reminder to each participant that our country is only as strong as its people, and that

¹¹³ Meerloo, Joost Abraham Maurits. "Chapter 14: The Turncoat in Each of Us." *Rape of the Mind*. Cleveland: PA World Pub, 2000. Print.

without our allegiance we will become weak as a nation. It is this allegiance that is expected of every U.S. citizen, and it is this allegiance that is broken in an act of treason.

One shining example proving that we as a country have not lost our allegiance is the aftermath of the 9/11 bombing. We proved to the world that we cannot be eliminated. Americans gave thought as to what their country really meant to them, and dug deep to rebuild the ruins. Heroes were made, flags were flown, and together we stood as a nation.

A New Understanding of Treason

Dating back to the Crown of England, that allegiance has always been a critical component of treason. It is the core component of the charge, for in its most basic form treason is a breach of allegiance. However, at exactly what point does one begin to owe an allegiance to the United States? Some could argue merely dwelling within the United States is sufficient, because of the freedoms and protections that the traitor has enjoyed: be it the freedom of speech or travel, or the protection of police and fire/rescue units, as well as our military defense. At the birth of our nation, there was no true effective degree of law enforcement or organized rescue units, nor a comprehensive national defense. Today with our technological advances all inhabitants within our borders are well protected. Without these protections, a traitor would reside in a greatly unstable country.

Such a lenient requirement to establish allegiance could allow for prosecution of terrorists who enter the United States with the intent to levy war against the nation. We must be cognizant that allowing the allegiance requirement to be satisfied by the accused having resided temporarily within our borders can diminish the intentions the Framers of

the Constitution had when they incorporated treason. Thus, we must decide not only whether treason should be used to combat terrorists, but also to what extent we consider terrorists traitors as well.

Detonating an explosive device or crashing a seized aircraft into a building is a clear overt act of war against the United States. Yet, with the numerous advances of technology in the modern day, should releasing classified information globally for all our enemies to see be considered an overt act to levy war as well? An overt act is explicit of the intentions of the traitor to destabilize the integrity of the United States government. Should highly sensitive information be leaked that could inhibit our defenses, such an act would greatly damage the country just as an explosive device or crashed plane.

The other available prong by which to prosecute a traitor is the adherence to enemies of the United States in order to provide them aid and comfort. However, today we can communicate instantly with anyone around the world. Should adherence still require a physical siding with our enemies against us as was evident by Martin Monti and Axis Sally? Perhaps our courts can recognize the electronic correspondence between the traitor and our enemies abroad constitutes adherence to them. Furthermore, we must determine whether aid and comfort is still be expected to be a physical attribute, or if the electronic correspondence of classified information is sufficient.

The Framers required two witnesses to testify against the traitor as to the overt act committed or the adherence our enemies obtained. Yet in modern day, much of these actions as previously stated, could be furnished through the internet. We must determine if investigators or analysts who observe such actions should be adequate to testify against

the traitor. In order to satisfy the parameters of prosecuting treason, the government must address all these concerns. Yet above all, we must determine without doubt that such modernized admissions of overt acts, adherence, aid and comfort, and the witnesses to these actions not abuse the power of treason.

In conclusion, in order to not allow the charge of treason to be violated again, it is crucial we determine how best to adapt the eighteenth-century clause to the vast technological advances of modern day in order to serve as the second part of the litmus test. First and foremost, we must recognize that treason can only be prosecuted against those who are true traitors. If we fail to establish the accused has not betrayed both himself and country, we risk returning to a dangerous state analogous to McCarthyism, which ruined the charge before.

There must be an allegiance owed to the United States, and we must determine the threshold to this allegiance, be it the requirement of citizenship or the more lenient aspect of enjoying our freedoms and protections. Should we also establish uses of electronic communication and technology as overt acts of war alongside bombings, or must those uses of technology be considered adhering to enemies of the United States and providing them aid and comfort? Lastly, the prosecution must provide at least two witnesses who can testify to the overt act or adherence to our enemies, yet we must determine whether they can testify to virtually witnessing the act of treason. In order to properly and effectively use treason in modern day, we must answer all of these crucial issues, and we must do so in a manner that will not again tarnish the meaning and the power of the treason clause.

Chapter 6: Importance of Using Treason in Modern Day U.S.

“Those who fail to learn from history are doomed to repeat it,”¹¹⁴ paraphrased from George Santayana’s popular quote, best illustrates our capability to resurrect the use of the treason clause of the United States Constitution. In every period of major conflict (until after the Korean War), our country has relied on the charge of treason to best maintain the stability of the United States. After the birth of the nation, it was used to prevent a secession by Aaron Burr, and to determine how best to handle riots and insurrection. During the chaotic events leading to and during the Civil War, treason was implemented to galvanize the approach both the states and the federal government would take toward breaches of their citizens’ allegiance. In the pivotal years of World War II, the influence of treason was harnessed to protect the United States domestically.

In a post September 11th nation plagued by terrorism, we are at war against an enemy with no clear country, whose operatives exploit domestic weaknesses to inflict catastrophic damage against the functioning of the United States. Some of those arrested for such heinous crimes are citizens of the United States, and should not be indicted on mere murder or conspiracy charges. Nor should they be convicted for the same murder offense that typically occurs over 16,000 times per year in the United States.¹¹⁵ Indeed, the use of treason against these terrorists would distinguish between isolated homicides and victims of clear acts of war.

¹¹⁴ Santayana, George. *The Life of Reason*. Vol. 1. New York: C. Scribner's Sons, 1905. Print.

¹¹⁵ National Center for Health and Statistics. "Assault or Homicide." *Centers for Disease Control and Prevention*, 30 May 2013. Web. 08 July 2013. <<http://www.cdc.gov/nchs/fastats/homicide.htm>>.

Furthermore, in an age of unprecedented advances in technology, communication, and worldwide access, an increasingly important concern regarding the stability of the United States Government is the security of sensitive intelligence information both obtained and analyzed by government operatives and officials in the various federal departments such as the National Security Agency, Federal Bureau of Investigation, and Central Intelligence Agency.

This intelligence gathering by these departments is considered instrumental in the war on terrorism this country faces. Recent unauthorized disclosures of clandestine government programs utilized to maintain the infrastructure of the government could potentially have catastrophic consequences for the United States. By reviving the charge of treason, we as a nation can clearly underscore the threshold between acts of violence and illegal disclosure, and that of betrayal. “The Treason Clause is one of the great forgotten clauses of the Constitution, and many well trained lawyers might even be surprised to learn that it even exists.”¹¹⁶

Lastly, in a period where many citizens are fearful of an impending attack on the country, it is crucial a specific procedural process be employed in order to protect not only the nation, but also any person who is wrongly accused of terrorism. The Framers of the Constitution had clearly understood that paramount to the stability of a free society, “an even greater danger lay in permitting the government to punish individuals as enemies of the state without significant procedural protections.”¹¹⁷ In order to remain as

¹¹⁶ Larson, Carlton F.W. *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*. Thesis. University of Pennsylvania, 2006. Philadelphia: University of Pennsylvania, 2006. 2. Print.

¹¹⁷ *Id* at 25.

the country of liberty and judicial fairness our founders envisioned, in the most trying of times we must have the most trying of charges to utilize against our enemies. A few recent cases are explored below to illustrate this point.

Twenty-First Century Traitors

Growing up in San Francisco, John Walker Lindh did not appear, by any means, a freedom fighter. Described as a “frail college-aged young person,” Lindh became interested in practicing Islam after seeing the film *Malcolm X*, and at age sixteen, he became a Muslim. He left the United States to attend an Islamic school in Pakistan, where he joined a terrorist organization fighting India, the Harkadat-ul Mujahedeen-Al Almi.¹¹⁸ Dissatisfied with the Harkadat-ul Mujahedeen, he later traveled to Afghanistan and enlisted with the Taliban.

It was there Lindh “swore an allegiance to Jihad (armed struggle),”¹¹⁹ and was practiced in combat. Immediately after September 11th, Lindh began fighting against United States forces who were deployed to Afghanistan to liberate the country from Taliban control. Subsequently, Lindh was captured by the coalition forces, and brought back to the United States a few months later to stand trial.

Initially, prosecutors threatened to indict Lindh for committing treason against the United States. However, this charge was dropped, and instead he was tried for ten various indictments, ranging from conspiracy to murder citizens of the United States, to

¹¹⁸ *Id.*

¹¹⁹ *Id.*

conspiracy to provide material support to foreign terrorist organizations.¹²⁰ Ultimately, Lindh pled guilty to “supplying services to the Taliban” and “carrying a rifle and two hand grenades while engaged in a felony.”¹²¹ He was sentenced to twenty years in prison without parole until May, 2019.

Legal scholars theorize the government abandoned the charge of treason against Lindh due to the complexity that encompasses obtaining a conviction of treason in court.¹²² Nevertheless, the prosecution could have convicted Lindh for treason. As an American citizen, he clearly owed an allegiance to the United States. Yet he swore an allegiance to committing Jihad against the United States, and levied war against United States forces in Afghanistan with a rifle and hand grenades. Furthermore, at least two of the coalition soldiers could have testified in court against Lindh.

Also fighting with the Taliban, United States citizen Yaser Esam Hamdi was captured shortly after Lindh by coalition forces. As an American citizen, Hamdi was designated an enemy combatant and detained without the right to counsel or due process for approximately two years.¹²³ Eventually he was provided the right to counsel, who proceeded to contest the deprivation of a citizen’s right to due process. The case reached the Supreme Court, and it was determined that despite being enemy combatants, United States citizens are still entitled to due process to challenge that status.¹²⁴

¹²⁰ United States v. Lindh, Criminal No. 02–37–A (E.D.Va. June 17, 2002).

¹²¹ Lippman, Matthew R. at 587.

¹²² *Id.*

¹²³ Addicott, Jeffrey F., and Jeffrey F. Addicott. *Terrorism Law: The Rule of Law and the War on Terror*. Tucson, AZ: Lawyers & Judges Pub., 2004. 425. Print.

¹²⁴ Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

In addition to being provided the rights guaranteed by the United States Constitution, a citizen owes an allegiance to the country that provides him with that due process. Thus, Hamdi was a suitable candidate to be indicted for treason. Similarly to Lindh, he was engaged in an overt act of war against the United States, and the testimony of United States soldiers to his surrender and capture would prove instrumental in convicting Hamdi of treason.

In 2002, Jose Padilla was designated an enemy combatant for “supporting forces hostile to the United States,”¹²⁵ as well as engaging in belligerent warfare acts by joining al-Qaeda, the terrorist organization that perpetrated the September 11th attacks. Similarly to both Lindh and Hamdi, Jose Padilla had clearly adhered to an enemy of the United States, and provided them with aid and comfort. In addition, Padilla was a citizen and owed an allegiance to the United States. However, the prosecution would face difficulty in obtaining two witnesses to testify against Padilla’s treason. If he were to have been tried for treason, it is likely the government would have called upon federal agents investigating Padilla to testify against him in order to satisfy that parameter of the treason clause.

Four years later, Adam Gadahn marked the first time in decades an indictment for treason was alleged by the United States. In 2006, Gadahn was charged *in absentia* for adhering to al-Qaeda, and for providing aid and comfort to them.¹²⁶ The indictment further specified Gadahn appeared in an al-Qaeda video aired both in the United States

¹²⁵ Elsea, Jennifer. *Enemy Combatant Detainees: "Habeas Corpus" Challenges in Federal Court*. N.p.: Congressional Research Service, 2010. 17. Print.

¹²⁶ First Superseding Indictment at 3–8, *United States v. Adam Gadahn*, No. SA CR 05-254(A) (C.D. Cal. Oct. 11, 2006), http://www.usdoj.gov/opa/documents/adam_indictment.pdf.

and abroad and was thus seen by at least two witnesses. In the video, Gadahn declares he “has joined a movement waging war on America and killing large numbers of Americans.”¹²⁷

Gadahn was never captured by United States or allied forces. Eventually, reports surfaced indicating he was killed by a C.I.A. Predator drone strike in 2008.¹²⁸ Though Gadahn was never captured and never adjudicated for treason, he nonetheless serves as proof that despite some legal scholar’s skepticism, the Constitution’s treason clause can still be indicted against those found to have breached their allegiance to the United States.

Perhaps one of the most clear-cut instances of treason lie with the actions of Nidal Malik Hasan in 2009. Hasan was a Major in the United States Army who opposed his upcoming deployment to Afghanistan based on religious grounds.¹²⁹ He communicated with Anwar al-Awlaki, a jihadist cleric born in the United States. Hasan then attacked the military base he was stationed at by shooting forty two victims, of which thirteen were killed. Only one victim was a civilian, the rest were soldiers and officers alike.¹³⁰

Hasan currently faces a court martial trial for the premeditated murder of thirteen people, and the attempted murder of thirty two. As of print, Hasan will be defending himself in the court martial. Through being not only a United States citizen, but also an officer in the United States Army, Hasan clearly owes an allegiance to the United States.

¹²⁷ *Id.*

¹²⁸ Tucker, Spencer, Priscilla Mary. Roberts, and Anthony C. Zinni. *The Encyclopedia of Middle East Wars: The United States in the Persian Gulf, Afghanistan, and Iraq Conflicts*. Santa Barbara, CA: ABC-CLIO, 2010. 475. Print.

¹²⁹ Jervis, Rick. "Fort Hood Massacre Trial: Hasan Goes on the Defense." USA TODAY. N.p., 8 July 2013. Web. 8 July 2013. <<http://www.usatoday.com/story/news/nation/2013/07/08/fort-hood-shooting-trial-hasan-court-martial/2427095/>>.

¹³⁰ *Id.*

This allegiance was breached by the numerous killings and injuries inflicted by Hasan in an overt act against the infrastructure of the Army and, by extension, the United States government itself. Furthermore, there is an abundant source of witnesses to the overt acts made by Hasan. Lastly, Hasan corresponded with Anwar al-Awlaki, a member of al-Qaeda.¹³¹ This association further underscores Hasan's allegiance to an enemy engaged in war against the United States.

Current Potential Uses of Treason

The most recent terror attack our nation has faced is the Boston Marathon bombing in April, 2013. The perpetrators, brothers Tamerlan and Dzhokhar Tsarnaev, improvised two crude explosive devices they detonated seconds apart as runners were crossing the finish line.¹³² This attack claimed the lives of three, and injured 264. Law enforcement and F.B.I. agents began scouring the city for five days, suspending the civil rights of Boston citizens as they searched for the bombers. On the fourth day, after killing a MIT police officer, the two brothers engaged law enforcement officers using firearms and more improvised bombs. Subsequently, Tamerlan Tsarnaev was captured by authorities, yet died from the multiple gunshot wounds he sustained from firing at law enforcement.¹³³ Dzhokhar Tsarnaev was found wounded the following day after law

¹³¹ Herridge, Catherine. *The next Wave: On the Hunt for Al Qaeda's American Recruits*. New York: Crown Forum, 2011. 17. Print.

¹³² Serrano, Richard A. "Dzhokhar Tsarnaev Indicted in Boston Marathon Bombings." *Los Angeles Times*. Los Angeles Times, 27 June 2013. Web. 06 July 2013. <<http://articles.latimes.com/2013/jun/27/nation/la-na-boston-bombing-20130628>>.

¹³³ *Id.*

enforcement used the public safety justification in order to search the Watertown suburb of Boston to apprehend the bomber.

Of importance is the suspension of Dzhokhar Tsarnaev's Miranda warning by authorities, citing public safety exception.¹³⁴ Currently there is debate as to whether Tsarnaev should be tried as an enemy combatant in non-civilian court,¹³⁵ with proponents of this measure arguing he and his brother "were not common criminals attempting to profit from a criminal enterprise, but terrorists trying to injure, maim and kill innocent Americans."¹³⁶ However, legal scholars recognize this form of prosecution against Tsarnaev would be impossible as neither brother was affiliated with any terrorist organization.

What is acceptable, however, is for Tsarnaev to be charged by the treason clause. Adhering to enemies of the United States and provided them aid and comfort is one possible venue for adjudicating treason. The other venue is an overt act of levying war against the United States. By detonating two improvised bombs, killing three and injuring 264, fighting against law enforcement with weapons and additional improvised bombs, and then intending to travel to New York City to likely inflict more damage,¹³⁷ the prosecution can clearly illustrate at trial both brothers had committed multiple overt acts against the nation.

¹³⁴ Dilanian, Ken, and Brian Bennett. "Legal Questions Surround Boston Bombing Suspect." *Los Angeles Times*. Los Angeles Times, 20 Apr. 2013. Web. 06 July 2013. <<http://articles.latimes.com/2013/apr/20/nation/la-na-boston-bombings-legal-20130421>>.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Serrano, Richard A. "Dzhokhar Tsarnaev Indicted in Boston Marathon Bombings."

Furthermore, as Dzhokhar Tsarnaev became a naturalized citizen in 2012, he owed a clear allegiance to the United States.¹³⁸ Their overt acts of war resulted in the derailment of Boston for five days, including the suspension of many citizens' civil liberties, as authorities searched extensively for the brothers in homes throughout the Watertown suburb. Law enforcement who were engaged in fighting against the brothers would serve as witnesses to testify to the overt acts committed by Dzhokhar Tsarnaev. Lastly, though they are not associated with any terrorist organizations, their motives are illustrated as religious retaliation to United States involvement in middle east countries. Before capture, Dzhokhar Tsarnaev wrote "the U.S. Government is killing our innocent civilians.... I can't stand to see such evil go unpunished," and "now I don't like killing innocent people it is forbidden in Islam but due to said [illegible] it is allowed."¹³⁹

Considered one of "the most significant breaches in the strict secrecy of the N.S.A., the largest American intelligence agency, since its creation in 1952,"¹⁴⁰ the recent release of classified intelligence information by N.S.A. contractor Edward Snowden may serve as another example of modern day treason. Snowden was a government employee for the C.I.A. and later an employee of Booz Allen Hamilton, a security and intelligence

¹³⁸ Carter, Chelsea J., Carol Cratty, Susan Candiotti, Michael Pearson, John King, Joe Johns, Chris Lawrence, Deborah Feyerick, Ben Brumfield, Jake Tapper, and Drew Griffin. "'CAPTURED!!!' Boston Police Announce Marathon Bombing Suspect in Custody." *CNN*. Cable News Network, 20 Apr. 2013. Web. 07 July 2013. <<http://edition.cnn.com/2013/04/19/us/boston-area-violence>>.

¹³⁹ Serrano, Richard A. "Dzhokhar Tsarnaev Indicted in Boston Marathon Bombings."

¹⁴⁰ Shane, Scott, and Ravi Soyamaia. "New Leak Indicates Britain and U.S. Tracked Diplomats." *Europe*. The New York Times, 16 June 2013. Web. 7 July 2013. <http://www.nytimes.com/2013/06/17/world/europe/new-leak-indicates-us-and-britain-eavesdropped-at-09-world-conferences.html?_r=0>.

firm contracted by the N.S.A.¹⁴¹ As of print, the extent of this intelligence breach is unclear, and a careful examination is required to determine whether Snowden meets the criteria of a traitor.

Among the confidential intelligence released by Snowden was the PRISM clandestine surveillance program, which was previously unknown to the global community until it was leaked by Snowden. PRISM functions as “the number one source of raw intelligence used for NSA analytic reports.”¹⁴² Additionally, he released information on the program Boundless Informant, N.S.A. acquisition of call logs and databases, and even the British version of PRISM called Tempora.

Furthermore, “Snowden has admitted he sought a position at Booz Allen Hamilton so he could collect proof about the US National Security Agency's secret surveillance programmes ahead of planned leaks to the media.”¹⁴³ This statement illustrates his premeditated decision to reveal classified information and intelligence, as well as his understanding that such action was a violation against his position working for the N.S.A. Thus, a prosecutor could theoretically make the argument Snowden breached his allegiance owed to the United States, as well as to the agency tasked with maintaining the nation's security.

Snowden committed no overt act of levying war against the United States in any capacity. And while it can be determined his actions may have provided “aid and

¹⁴¹ Lam, Lana. "Snowden Sought Booz Allen Job to Gather Evidence on NSA Surveillance." *South China Morning Post*. N.p., 25 June 2013. Web. 09 July 2013. <<http://www.scmp.com/news/hong-kong/article/1268209/snowden-sought-booz-allen-job-gather-evidence-nsa-surveillance>>.

¹⁴² "NSA Slides Explain the PRISM Data-collection Program." Politics. The Washington Post, 29 June 2013. Web. 7 July 2013. <<http://www.washingtonpost.com/wp-srv/special/politics/prism-collection-documents/>>.

¹⁴³ Lam, Lana. "Snowden Sought Booz Allen Job to Gather Evidence on NSA Surveillance."

comfort” to enemies of the United States such as al-Qaeda, it would be very difficult for prosecutors to establish he committed treason on these grounds, as the treason clause requires that Snowden had adhered to those enemies. Snowden maintains his decision to leak the classified information was to inform the American public of the extent to which the United States Government was conducting clandestine surveillance of its citizens,¹⁴⁴ and there is no evidence of any involvement with enemies of the United States.

Thus, while various elected and government officials are quick to allege Snowden is guilty of committing treason, upon further examination it becomes apparent he does not meet the parameters set forth by the Framers of the Constitution to be designated a traitor to the United States. It would appear that Snowden is the litmus test to whether the United States can again utilize the charge of treason in a post-McCarthy United States. Snowden had not betrayed himself by leaking the intelligence globally, as he believes the public has the right to know of the clandestine programs used by the government.

An Argument For Treason Today

Following the 2,996 deaths from the September 11th terrorist attacks, the United States has been engaged in war against an unusual enemy who does not reside in any one country, but rather is comprised of secretive organizations and cells with one unified goal: killing civilians of the United States as well as its allies. Since the tragedies of 2001, the United States Government began implementing several programs to better defend the

¹⁴⁴ Greenwald, Glenn, Ewen MacAskill, and Laura Poitras. "Edward Snowden: The Whistleblower behind the NSA Surveillance Revelations." *The Guardian*. Guardian News and Media, 09 June 2013. Web. 08 July 2013. <<http://www.guardian.co.uk/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance>>.

United States from attack. It is clear a new addition to these countermeasures should be the resurrection of the charge of treason.

“In the late colonial period, as today, the charge of treason carried a ‘peculiar intimidation and stigma’ with considerable potentialities... as a political epithet.”¹⁴⁵ Indeed, the charge of treason was abused recklessly by McCarthy as a political weapon, both to further his political career and to subdue his opponents. In the era of McCarthyism, the United States was plagued with hysteria, and as a result the power of treason was tarnished. It is abundantly clear that today we are no longer in a period of McCarthyism, and we now have the potential to use a charge our founders felt was so important, it was included in the mere 4,500 words of the Constitution.

However, decades later we have learned from our history, and as a nation we have become stronger because of it. In 1999, recognized in *United States v. Rahman*:

In recognition of the potential for political manipulation of the treason charge, the Framers may have formulated the Treason Clause as a protection against promiscuous resort to this particularly stigmatizing label, which carries such harsh consequences. It is thus possible to interpret the Treason Clause as applying only to charges denominated as “treason.”¹⁴⁶

¹⁴⁵ *United States v. Rahman*, 189 F.3d 88 (2d. Cir. 1999).

¹⁴⁶ *Id.*

Rahman illustrates our courts now recognize the dangers that a misuse of treason can result in. Lawmakers rashly accuse Edward Snowden of treason,¹⁴⁷ yet the developing situation with adjudicating Snowden will serve as a litmus test to demonstrate the United States can again utilize the treason charge without abusing it.

As mentioned, the Supreme Court also acknowledged that treason carried with it a ‘peculiar stigma.’ This stigma was used in the foundation of our country to prevent a potential secession by Burr. It was additionally used in the turbulent times of the Civil War and World War II, when the United States needed to rely on a unique criminal code to address clear breaches of allegiance that could destabilize the country. It is crucial that in modern day, we distinguish between common, isolated homicides, and acts of terrorism and war. The Supreme Court underscores a caution in *Rahman* that to use the charge of treason, we must follow the strict procedural definitions as outlined by the Framers of the Constitution. Through doing this, we can guarantee treason will not be misused.

Lastly, it is crucial that if we were to prosecute future actors of terrorist plots or attacks, we would maintain the strict procedural rules of treason. The Framers recognized not only the importance of the Treason Act of 1351, but also the requirements imposed on the government to prosecute from the Treason Act of 1695. The United Kingdom would later suspend some of these requirements in the Treason Act of 1940, and it is because of this our Framers placed treason in Article III of the Constitution, where it not

¹⁴⁷ Wasson, Erik. "Cheney Calls Snowden a 'Traitor,' Defends NSA Phone Call, Internet Tracking." *The Hill*, 16 June 2013. Web. 8 July 2013. <<http://thehill.com/blogs/blog-briefing-room/news/305817-cheney-calls-snowden-a-traitor-defends-nsa-surveillance-programs>>.

only couldn't be altered without an Amendment, but it also fell under the jurisdiction of the Judicial System and not the Legislature. Treason was a charge they believed so vital to the infrastructure of the nation, it had to be protected by Constitutional power. Thus, it would seem apparent they would support its usage today, with only the caveat it be administered properly.

Summary

Treason was a charge our very country was founded upon in the late eighteenth century. Incensed by taxation without representation, and intent on creating a nation based on freedom, our founders committed high treason as they declared independence from the Crown of England. Following the tumultuous years of instability under a government proscribed by the Articles of Confederation, we drew up a document of a little over 4,500 words that would operate a country with a strong government, yet paradoxically, allow for a free and powerful society. The result would become a prospering United States that two hundred years later has maintained those freedoms and powers of the Constitution.

Embedded deep in Article III of the Constitution lies the treason clause of the United States. The Framers acknowledged the importance of having the treason charge to protect the blossoming nation from damage within, yet they were also fearful of a too powerful government abusing the clout that such a charge carries. Thus, they included treason in the Constitution as the only criminal code in the relatively small and succinct document.

The outcome of this constitutional charge has been the repeated use of treason to protect the infrastructure of the United States, as well as its people. We determined very quickly the proper limitations of treason with the various riots and insurrections of the 1790s, and the trial of Aaron Burr. It became clear treason could not be used against small offenses like rioting. From the Burr trial, we determined in order to convict an accused traitor, the government must satisfy all parameters of the treason charge.

States' rights were not infringed upon by the federal government, as they too were capable of indicting traitors on grounds of treason. The trial and execution of John Brown for his treacherous raid on the federal arsenal of Harper's Ferry was used by the South to underscore their determination to prevent such attempts at slave uprisings. As this nation bitterly fought itself in the Civil War, the charge of treason was paramount to maintaining as much stability of the country as possible. The assassination of President Lincoln was met with the robust retaliation against the conspirators like Mary Surratt.

World War II marked one of the most trying times globally. Genocide and imperialistic conquest by Axis powers was met by determination of Allied nations to restore liberty. Both the United States and the United Kingdom heavily relied on their respective treason charges to fight against spies, saboteurs, and propaganda broadcasters, as well as demonstrate to their people their government is still strong enough repel attacks from within.

Despite the effectiveness displayed by the charge of treason, both countries mysteriously abandoned its use after World War II, despite the clear recognition of the United Soviet Socialist Republic as the new and formidable enemy. Anti-communist hysteria swept the United States into a panic that was exploited by an unabashed Senator Joseph McCarthy, who began alleging the existence of hundreds of traitors in the State Department, along with the treachery of Democratic administrations.

Across the Atlantic, a concerned United Kingdom became highly critical of this anti-communist witch hunting, yet was actively engaged with the United States in propaganda activities against communist influence. When the house of cards labeled

McCarthyism finally fell, in its ruins lay the tarnished charge of treason. The United States and United Kingdom, eager to continue the fight against communism without salvaging McCarthyism sentiment, decided to leave treason in ruin.

Treason highlights a very clear distinction between those patriotic and critical of the country, and those who clearly intend to harm it. This contrast is pivotal not only to understanding why its usage was halted, but why it should be resurrected today. The fatal mistake of McCarthy alleging treason was it not only met none of the parameters necessary for the charge to be used, it also infringed upon the freedoms of the accused. In order to again institute the charge of treason, one must examine the sociological components of treason for both the accused and society. By understanding the principles of treason, as well as the strict parameters that must be met to convict, we can resurrect the charge.

It is in the most trying of times that we need to rely on the most trying of charges. Today, we face a global war against terrorism. Our enemies do not comprise a country, but are spread throughout the world as terrorist organizations, all intent on destroying the United States and its way of life. Even more staggering is the existence of homegrown terrorists, and United States citizens who align themselves with these terrorist groups. Currently, those citizens who are captured as terrorists are adjudicated for the same crimes associated with common criminals.

Convicting these terrorists of the same crimes that regularly occur every day is an inappropriate method to combat such terrorism. Instead of being added to a list that also encompasses serial killers such as Charles Manson, street gangs fighting for territory, and

random acts of murder committed frequently, these terrorists should be designated as a very different variety of criminal: traitor.

Lindh, Hamdi, Padilla, Gadahn, and Hasan are all United States citizens, terrorists, and traitors. Through overt acts or through adhering to enemies of the United States and providing aid and comfort, these traitors could all have been prosecuted by the charge of treason. In addition, their acts betrayed their core moral and religious code, and through this sociological aspect, they satisfy the litmus test to use treason. Thus, they committed treason against themselves. While it would understandably be more difficult to meet the requirements of the treason charge, the prosecution nonetheless could have sufficiently demonstrated their allegiance to the United States as well as provide at least two witnesses to testify against them.

Very recently, the United States suffered yet another terrorist attack during the 2013 Boston Marathon, where two brothers intent on jihad detonated two devices that inflicted catastrophic damage on both the city and its people. Their clear overt act, coupled with their citizenship and allegiance to the United States, and witnessed by authorities levying war against the United States, would be sufficient to prosecute the only surviving brother.

Lastly, in a twenty-first century period teeming with advanced technology and communications, the security of classified information is vital to protecting the United States. Intelligence leaks like those by Edward Snowden are met by lawmakers who rashly accuse him of treason. Yet, because we have learned from the calamity of McCarthyism, we can closely examine Snowden's circumstances, and ascertain he has

not committed treason. This litmus test best serves to illustrate that despite the trying times of a post-September 11th world, the United States has the capability not only to prosecute terrorists who clearly commit treason, but also to prevent, as the Supreme Court in *United States v. Rahman* calls, “the political manipulation of the treason charge.”¹⁴⁸

It is for all of these reasons that our nation should again rely on the power of Article III, Section 3, Clause I: Treason.

“Though those that are betrayed do feel the treason sharply, yet the traitor Stands in [the] worse case of woe.”¹⁴⁹

¹⁴⁸ *United States v. Rahman*, 189 F.3d 88 (2d. Cir. 1999).

¹⁴⁹ Shakespeare, William. *Cymbeline*, Act 3, Scene 4. 1611.

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