

Winter 2020

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### Recommended Citation

J. Richard Broughton, *Constitutional Discourse and the Rhetoric of Treason*, 47 HASTINGS CONST. L.Q. 303 (2020).

Available at: [https://repository.uchastings.edu/hastings\\_constitutional\\_law\\_quarterly/vol47/iss2/5](https://repository.uchastings.edu/hastings_constitutional_law_quarterly/vol47/iss2/5)

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# Constitutional Discourse and the Rhetoric of Treason

by J. RICHARD BROUGHTON\*

## I. Introduction

“There’s a Smell of Treason in the Air.”<sup>1</sup>

So read the title of commentary in *The New York Times* on March 23, 2017 (quoting presidential historian Douglas Brinkley).<sup>2</sup> Three days earlier, the Federal Bureau of Investigation (“FBI”) had confirmed in a congressional hearing that Donald Trump’s presidential campaign was under federal investigation for possible complicity with Russian active measures in American elections.<sup>3</sup> *Times* columnist Nicholas Kristof then penned this piece focused not primarily upon the Russia investigation, but upon the actions of Richard Nixon as he campaigned for the presidency in 1968.

Nixon, Kristof explains, was engaged in a deliberate strategy to sabotage President Lyndon B. Johnson’s effort to bring the war in Vietnam to a peaceful resolution.<sup>4</sup> Nixon, the story goes, was frustrated by President Johnson’s effort to work with the South Vietnamese to end the war, and thereby improve the election prospects for Vice President Hubert Humphrey, Nixon’s opponent.<sup>5</sup> Nixon therefore created a backchannel to Saigon with the aim of staving off peace until after his election.<sup>6</sup> His personal envoy was a Republican fundraiser, with whom Nixon met the ambassador from South

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1. Nicholas Kristof, *There’s A Smell of Treason in the Air*, N.Y. TIMES (Mar. 23, 2017), <https://www.nytimes.com/2017/03/23/opinion/theres-a-smell-of-treason-in-the-air.html>.

2. *Id.*

3. See Russell Berman, *It’s Official: The FBI Is Investigating Trump’s Links to Russia*, THE ATLANTIC (Mar. 20, 2017), <https://www.theatlantic.com/politics/archive/2017/03/its-official-the-fbi-is-investigating-trumps-links-to-russia/520134/>.

4. Kristof, *supra* note 1.

5. *Id.*

6. *Id.*

Vietnam.<sup>7</sup> An angry President Johnson reportedly described Nixon's machinations as "treason."<sup>8</sup>

Although this story was only conjecture for nearly fifty years, in January 2017, the *Times* published a piece that revealed the personal notes of Harry Robbins Haldeman, who would go on to infamously serve as Nixon's White House Chief of Staff, which arguably confirmed Nixon's role in the peace talks sabotage.<sup>9</sup>

Kristof calls this the "greatest political scandal in American history," and concludes, "it's hard to see [Nixon's] behavior as anything but treason."<sup>10</sup>

He then turns his attention to the Trump-Russia investigation. He notes the Russians' potential influence on Trump in light of Trump's work in private business, and states that Trump was "by nature inclined to admire [Russian President] Vladimir Putin as a strongman ruler."<sup>11</sup> He also highlighted Trump campaign chairman Paul Manafort's ties to Russia. Kristof's ultimate question—which he left open in light of the need for more evidence—was a weighty one: "was there treason?"<sup>12</sup>

This occurred only two months into the Trump presidency. After Kristof's article, public reporting revealed that multiple members of the Trump campaign had direct contact with representatives of the Russian government.<sup>13</sup> After the recusal of United States Attorney General Jeff Sessions (among those who, it turned out, had contact with Russians), and appointment of Special Counsel Robert Mueller, Special Counsel secured multiple high-profile indictments against, or guilty pleas from, Trump campaign officials.<sup>14</sup> Special Counsel also secured indictments against thirteen Russian individuals and the Internet Research Agency, which the indictment describes as a "Russian organization engaged in operations to interfere with elections and political processes."<sup>15</sup>

Then came the President's meeting with President Putin in Helsinki, Finland in July 2018.

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7. Kristof, *supra* note 1.

8. *Id.*

9. Peter Baker, *Nixon Tried to Spoil Johnson's Peace Talks in '68, Notes Show*, N.Y. TIMES (Jan. 2, 2017), <https://www.nytimes.com/2017/01/02/us/politics/nixon-tried-to-spoil-johnsons-vietnam-peace-talks-in-68-notes-show.html>.

10. Kristof, *supra* note 1.

11. *Id.*

12. *Id.*

13. Meg Kelly, *All the Known Times the Trump Campaign Met with Russians*, WASH. POST (Nov. 13, 2017), <https://www.washingtonpost.com/news/fact-checker/wp/2017/11/13/all-of-the-known-times-the-trump-campaign-met-with-russians/>.

14. Indictment, U.S. v. Manafort & Gates, No. 1:17-cr-00201 (D.D.C. Oct. 27, 2017); *see also* Statement of the Offense, U.S. v. Papadopolous, No. 1:17-cr-00182 (D.D.C. Oct. 5, 2017) (providing factual basis for guilty plea of former Trump campaign foreign policy advisor for making false statements to federal investigators during Russian active measures investigation).

15. Indictment, U.S. v. Internet Research Agency, No. 1:18-cr-00032 (D.D.C. Feb. 16, 2018).

On the Friday preceding the Helsinki meeting, the United States Justice Department announced that it had obtained indictments against twelve members of the Russian military intelligence services—the Main Intelligence Directorate of the General Staff (“GRU”). It alleged that these defendants “engaged in cyber operations that involved the staged releases of documents stolen through computer intrusions.<sup>16</sup> These units conducted large-scale cyber operations to interfere with the 2016 United States presidential election.”<sup>17</sup> President Putin has consistently denied that his government engaged in, directed, or supported the alleged attacks on American elections, and repeated these denials in Helsinki.<sup>18</sup> He did acknowledge, however, that he wished to see Trump elected as President of the United States.<sup>19</sup>

In Helsinki, President Trump failed to publicly condemn the Russian government, the named defendants in the indictments, and others connected to Russia who may have been involved in the alleged operations.<sup>20</sup> During a press conference there, he appeared to accept Putin’s denials, and although he said that both countries were blameworthy, he was unspecific about Russia’s culpability, and did not confront Putin about the concerns that the American intelligence community had first raised in 2016.<sup>21</sup>

President Trump’s performance in Helsinki was condemned across the American political spectrum.<sup>22</sup> At one extreme were those who said that his actions were “treasonous.”<sup>23</sup>

In the spring of 2019, the Special Counsel’s investigation ultimately concluded that there was insufficient evidence to conclude that the Trump campaign had engaged in a criminal conspiracy or had in any way

16. Indictment, U.S. v. Netyksho., No. 1:18-cr-00215, at 1 (D.D.C. July 13, 2018).

17. *Id.*

18. John T. Bennett, *Trump, Putin Address Election Meddling Charges in Helsinki*, ROLL CALL (July 16, 2018, 8:00 AM), <https://www.rollcall.com/news/politics/trump-putin-summit>.

19. Stephanie Murray, *Putin: I Wanted Trump to Win the Election*, POLITICO (July 16, 2018, 12:07 PM), <https://www.politico.com/story/2018/07/16/putin-trump-win-election-2016-722486>.

20. Jordyn Phelps & Meridith McGraw, *Trump Casts Doubt on US Intelligence, Calls Putin’s Meddling Denial ‘Strong and Powerful,’* ABC NEWS (July 16, 2018, 5:16 PM), <https://abcnews.go.com/Politics/stakes-high-expectations-low-trump-putin-meet-helsinki/story?id=56603366>.

21. *Id.*

22. *U.S. Lawmakers Condemn Trump Over Helsinki Summit with Putin*, REUTERS (July 16, 2018, 1:56 PM), <https://www.reuters.com/article/us-usa-russia-summit-lawmakers-highlight/us-lawmakers-condemn-trump-over-helsinki-summit-with-putin-idUSKBN1K62P2>.

23. Christina Zhao, *President Donald Trump ‘Treasonous’ in Helsinki, Says Half of America in New Poll*, NEWSWEEK (July 20, 2018, 7:23 AM), <https://www.newsweek.com/president-donald-trump-acted-treasonous-helsinki-says-half-america-new-poll-1034104>; Mike Lillis, *Hoyer: Trump Committed ‘Treason’ in Helsinki*, THE HILL (July 17, 2018, 1:52 PM), <https://thehill.com/home-news/house/397456-hoyer-trump-committed-treason-in-helsinki>.

coordinated with the Russians that would violate federal campaign law.<sup>24</sup> Still, though, the findings, or “Mueller Report,” also produced extensive evidence of contact between the two entities.<sup>25</sup> The Report was equivocal on whether the President had engaged in criminal obstruction of justice with respect to the Special Counsel’s investigation, declining to bring an indictment (long-standing United States Justice Department policy would forbid such an indictment), but refusing to rule out criminality on the part of the President.<sup>26</sup> So although the Mueller Report found insufficient evidence for a criminal prosecution regarding the connection between the Trump campaign and the Russian government, it did little to dispel the suspicions of those who believe the Trump campaign endeavored to obtain Russian assistance (even if doing so did not violate a criminal statute), and likely benefitted, at least indirectly, from the Russian efforts.<sup>27</sup>

Still, despite the possibility that the Mueller Report could have helped to at least mitigate some of the treason rhetoric that exploded in recent years, President Trump has constantly added fuel to the treason talk fire.

On May 23, 2019, the President—after being reminded by a reporter that treason is a capital offense—lobbed the treason accusation against several specific individuals from the federal law enforcement community, who played roles in the Russian active measures investigation.<sup>28</sup> In particular, he attacked the opposition to his presidential candidacy by FBI lawyer Lisa Page and Special Agent Peter Strzok, and accused them of wanting the Russia investigation as an “insurance policy” if Trump won the presidential election, concluding “that’s treason. That’s treason.”<sup>29</sup>

A few days earlier, on May 17, 2019, the President appeared to accuse federal law enforcement and intelligence agencies generally of treason,

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24. U.S. DEP’T OF JUSTICE, OFFICE OF SPECIAL COUNSEL, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (2019) at 9-10 (hereinafter MUELLER REPORT, VOL. I).

25. *Id.* at 5-8.

26. U.S. DEP’T OF JUSTICE, OFFICE OF SPECIAL COUNSEL, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (2019) at 2 (hereinafter MUELLER REPORT, VOL. II) (“[W]hile this report does not conclude that the President committed a crime, it also does not exonerate him.”).

27. Morgan Chalfant, *Jimmy Carter: Trump Only Won in 2016 Because of Russian Meddling*, THE HILL (June 28, 2019, 11:36 AM), <https://thehill.com/policy/national-security/450877-jimmy-carter-trump-only-won-in-2016-because-of-russian-meddling>; *see also* MUELLER REPORT, VOL. I., at 5 (stating that the Trump campaign “expected it would benefit electorally from information stolen and released through Russian efforts”).

28. President Donald J. Trump, *Remarks on Supporting America’s Farmers and Ranchers*, THE WHITE HOUSE (May 23, 2019, 4:28 PM), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-supporting-americas-farmers-ranchers/> (Trump named former FBI Director James Comey, former FBI Deputy Director and Acting Director Andrew McCabe, former Special Agent Peter Strzok, and former FBI lawyer Lisa Page).

29. Trump, *supra* note 28.

tweeting that his campaign was “conclusively spied on . . . this was TREASON!”<sup>30</sup> In April of 2019, he posted a Tweet in which he said that Democrats were “treasonous” in opposing the President’s policies at the United States southern border.<sup>31</sup> In May of 2018, the President posted a Tweet that denounced White House leakers as “traitors.”<sup>32</sup> Shortly after taking office, he used the same label for former United States Army soldier Chelsea Manning, after she had been released from incarceration for providing military information to WikiLeaks.<sup>33</sup> He also referred to treason in rebuking the anonymous author of a *New York Times* op-ed piece that criticized him.<sup>34</sup> He even alluded to treason—in response to the claim from an audience member at a rally—in describing the refusal of congressional Democrats to stand and applaud during his 2018 State of the Union Address; the White House now claims this was just a joke.<sup>35</sup>

Missing from this rhetoric is appreciation for the legal problems, some of them quite complicated, that would be key to determining if anyone committed treason.

The Treason Clause of Article III, Section 3 of the United States Constitution provides the relevant legal text. Narrowing American treason from the far broader English statute on which it was based,<sup>36</sup> American treason consists “only” of “levying war” against the United States or “adhering to their enemies, giving them aid and comfort.”<sup>37</sup> To be found guilty of American treason, one must owe allegiance to the United States.<sup>38</sup>

30. Donald J. Trump (@realDonaldTrump), TWITTER (May 17, 2019, 4:11 AM), <https://twitter.com/realdonaldtrump/status/1129343742748569601>.

31. Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 10, 2019, 7:33 PM), <https://twitter.com/realdonaldtrump/status/1116167275948597249> (writing “I think what Democrats are doing with the open border is TREASONOUS.”).

32. Donald J. Trump (@realDonaldTrump), TWITTER (May 14, 2018, 1:46 PM), <https://twitter.com/realdonaldtrump/status/996129630913482755> (stating “leakers are traitors and cowards”).

33. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 26, 2017, 3:04 AM), <https://twitter.com/realdonaldtrump/status/824573698774601729> (stating that “[u]ngrateful TRAITOR Chelsea Manning, who should never have been released from prison, is now calling President Obama a weak leader. Terrible!”).

34. Allie Malloy, *Trump on New York Times Op-ed: ‘You Could Call It Treason’*, CNN (Sept. 6, 2018, 10:49 PM), <https://www.cnn.com/2018/09/06/politics/trump-new-york-times-op-ed/index.html>.

35. President Donald J. Trump, *Remarks by President Trump on Tax Reform*, THE WHITE HOUSE (Feb. 5, 2018, 3:20 PM), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-tax-reform-3/>. See also Dan Merica & Jim Acosta, *Trump was ‘joking’ when he accused Democrats of treason, White House says*, CNN (Feb. 6, 2018, 12:49 PM), <https://www.cnn.com/2018/02/06/politics/treason-donald-trump-joking/index.html> (quoting White House press secretary saying the President was “clearly joking.”).

36. Statute of Treasons, 25 Edw. III, ch. 2 (1351).

37. U.S. CONST. art. III, § 3.

38. 18 U.S.C. § 2381.

Therefore, treason law does not require affirmative proof of an enemy for all treasons. Proof of an enemy is not mandated for Levying War Treason. That is, one may “levy war” against the United States, and thereby commit treason, without the Government showing beyond a reasonable doubt that he or she waged war on behalf of an enemy. By waging war, the perpetrator does not become an enemy; he is, rather, a traitor because he owes allegiance.<sup>39</sup> Adherence Treason, however, requires proof that the alleged traitor intended to betray the United States by giving aid and comfort to an *enemy* of the nation.<sup>40</sup> One is therefore either an enemy or a traitor, but not both.

The constitutional definition of treason is codified in Section 2381 of Title 18 of the United States Code.<sup>41</sup> The statutory definition does not—indeed, cannot—deviate from the constitutional one because the elements of treason are fixed by the Constitution.

None of the recent treason talk appears to consider these constitutional elements: Is Russia an enemy of the United States? Who, in fact, are United States enemies, as that term is used and understood in American treason law, and how do we determine this designation? Did any of these accused traitors actually intend to betray the country? Did any party actually levy war against the United States?

Naturally, the kind of treason talk we have witnessed during recent years, but particularly during the current presidency, can be easily dismissed as bluster. Treason has long-served as a political epithet,<sup>42</sup> but typically the rhetorical force of a treason accusation tends to far outweigh its legal force. Simply contrast the sheer number of popular treason accusations over the past few decades to the sheer number of actual treason prosecutions (none). The treason accusation may also tend to serve as a kind of energetic euphemism for national disloyalty. One, however, may be disloyal to the country without committing treason. In most instances, then, the accusations of treason we have had to recently endure simply cannot be taken seriously. Nevertheless, there are lessons to be drawn from the current environment of promiscuous treason rhetoric.

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39. Edward Coke, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 4-5 (1671) (distinguishing between traitor and enemy); accord 1 Matthew Hale, HISTORY OF THE PLEAS OF THE CROWN 59 (1736); see also Carlton F. W. Larson, *The Forgotten Constitutional Law of Treason*, 154 U. PA. L. REV. 863, 874-900 (2006) (analyzing English and American authorities on allegiance, and discussing problem of whether non-citizen terrorists are subject to the Treason Clause).

40. U.S. CONST. art. III, § 3 (emphasis added).

41. 18 U.S.C. § 2381.

42. J. Richard Broughton, *The Snowden Affair and the Limits of American Treason*, 3 LINCOLN MEM'L. U. L. REV. 5, 7 (2015); Kristen E. Eichensehr, *Treason in the Age of Terrorism: An Explanation and Evaluation of Treason's Return in Democratic States*, 42 VAND. J. TRANSNAT'L L. 1443, 1444 (2009).

This Article asserts that treason talk is a form of constitutional discourse. Further, the Article explains that although treason remains a crime worth taking seriously in American criminal and constitutional law, colloquial invocations of treason have the potential to undermine treason's seriousness and erode its constitutional and historical foundations, as well as diminish an appreciation of its limits. That is particularly true when treason is invoked by a sitting president, whose unique role in constitutional government—and potential to influence criminal prosecutions—requires special caution with respect to public rhetoric about treason. This Article then cites two specific and complicated areas of treason law that are often overlooked in today's public commentary on treason: (1) whether a person owing allegiance to America has aided an "enemy" of the United States, such that giving aid and comfort to them would be treasonous; and (2) whether a person owing allegiance acted with an intent to betray the United States. The complicated nature of these two issues reinforces the need for meaningful, but more prudent and constitutionally focused, public conversations about treason. Ultimately, this Article contends that a more responsible public discourse about treason may be helpful in framing and resolving important questions of constitutional meaning, to appreciate the limits of American treason, and to reflect on whether and how we should revive punishment of national disloyalty.

## **II. The (Mostly) Vices of Today's Treason Talk, and the Virtues of Constitutional Discourse on Treason**

In informal conversation, it is not unusual to conflate two distinct crimes that seem similar, or to use the language of the criminal law to describe something that is not actually a prosecutable crime. Think, for example, about the person whose home is invaded while she is away on vacation, only to return and find many valuables missing from the home. "I was robbed!" she might exclaim, though the offense against her property was most likely burglary, and not robbery.<sup>43</sup> Or think about the person who describes the victim of a homicide as one who was "murdered," even though the victim may have been killed, for example, in self-defense or through the justifiable use of police force.<sup>44</sup> Even those who are law-trained will tend to forgive these kinds of colloquial uses of criminal law terminology, and, though inaccurate, accept them as a part of how we communicate with one another without pointing out the need to consult statute books and case law.

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43. MODEL PEN. CODE, § 222.1(1) (robbery typically requires that property be taken from the person by force or threat of force).

44. WAYNE R. LAFAYE, PRINCIPLES OF CRIMINAL LAW 581 (2d ed. 2010) (*murder* requires that the killing of another be unlawful, without justification or excuse).

People do not always wish to be lawyered, and we typically do not demand legal precision from nonlawyers in casual conversation.

With contemporary treason talk, though, the problem goes beyond the unremarkable assertion that nonlawyers do not always speak with legal precision. Consequently, we should be prepared to more readily condemn—or at least correct—colloquial uses of treason, particularly where treason is invoked as part of a public narrative. After all, notwithstanding the examples above, we would not lightly accept a public accusation that X is a “murderer” if X did not actually commit the crime of murder, nor would we tolerate publicly accusing X of being a “rapist” if X did not commit the crime of rape. These are serious offenses, the accusation of which brings immediate stigma and other social consequences. This is also true for treason. By understanding treason talk as a form of constitutional discourse, there are then compelling reasons to urge greater care when engaging in treason talk, eschewing the colloquial use of the term as a political tool and hewing as closely as possible to the fundamentals of treason as criminal and constitutional law. Divorcing treason rhetoric from the constitutional text and its underlying concerns thus works its own form of infidelity—that is, infidelity to the Constitution itself.

#### A. Taking a Serious Law, and Its Underlying Values, Seriously

First, treason is a crime of national disloyalty that has long been regarded with a special degree of seriousness. If it is desirable to continue enforcing treason law because betrayal to the country is potentially harmful to American institutions and interests, then it is perhaps still worthy of such seriousness. Promiscuous treason talk, divorced from the law of treason that must be enforced, undermines the seriousness of the Constitution’s counter-treason program.

Chief Justice of the United States Supreme Court, John Marshall, presiding during the treason trial of Aaron Burr, wrote that treason was “the most atrocious offence which can be committed against the political body.”<sup>45</sup> And in the Supreme Court’s ruling in *Ex parte Bollman*, arising from the Burr episode, Marshall wrote that “there is no crime which can more excite and agitate the passions of men than treason.”<sup>46</sup> Marshall’s observations closely track those of other historical commentators that have noted treason’s unique status. Dante, after all, placed traitors in the Ninth and lowest Circle of Hell (far below the murderers of the Seventh Circle).<sup>47</sup> William

45. U.S. v. Burr, 25 F. Cas. 2, 13 (C.C.D. Va. 1807).

46. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 125 (1807).

47. DANTE ALIGHIERI, *INFERNO* 95-99 (Indiana Critical ed., Mark Musa, ed. & trans., 1995) (1308); see also Paul G. Chevigny, *From Betrayal to Violence: Dante’s Inferno and the Social Construction of Crime*, 26 LAW & SOC. INQUIRY 787, 808-13 (2001) (discussing Dante’s treatment of political crimes of betrayal).

Blackstone, too, described treason as the worst of offenses.<sup>48</sup> The Framers of the United States Constitution took treason seriously to the point that, not only did they ensure a fixed definition of it in the Constitution, they also placed it among the Constitution's specifically enumerated impeachable offenses.<sup>49</sup>

Both history and today's popular rhetoric, suggest that Americans understand the rhetorical power of treason or, at least, the dark perception that accompanies a treason accusation. But what, precisely, is its power today, its value in American law? There has been no American treason conviction in well over a half century.<sup>50</sup> The terrorist support cases, however, seem to provide the best modern cases for reviving treason—those involving American citizens or residents who have joined forces with foreign terror groups fighting against Americans and American national interests.<sup>51</sup> In 2006, the United States Justice Department obtained a treason indictment against Al-Qaeda adherent Adam Gadahn, but was never able to bring him to trial (he was later killed in a drone strike).<sup>52</sup> In the many other instances in which Americans have joined foreign terrorist organizations, such as the Islamic State or Al Qaeda, the Government has preferred to use the material support statutes rather than treason.<sup>53</sup>

Perhaps this is due to the heavy evidentiary burden that a treason prosecution requires of the Government, or perhaps, relatedly, it is because other criminal laws can achieve the same results—and target the same conduct—without those special burdens.<sup>54</sup> Or perhaps, as George Fletcher argued, it is because treason's feudal bases are inconsistent with the modern liberalism of the criminal law.<sup>55</sup> “Betrayal and disloyalty are grievous moral wrongs,” Fletcher writes, “yet today when the disloyal commit treason we seem reluctant to punish them.”<sup>56</sup> The result, he says,

48. 4 WILLIAM BLACKSTONE, COMMENTARIES \*75.

49. U.S. CONST. art. III, § 3; *id.* art. II, § 4; *see also* Erin Creegan, *National Security Crime*, 3 HARV. NAT'L SEC. J. 373, 376 (2012) (calling treason “the most serious of all offenses against the nation”); B. Mitchell Simpson III, *Treason and Terror: A Toxic Brew*, 23 ROGER WILLIAMS U. L. REV. 1, 5 (2018) (“Treason is a crime of betrayal on the grandest scale possible, worse than any other major felony, such as murder or arson.”).

50. *See* Creegan, *supra* note 49, at 379.

51. Heather J. Williams, et al., TRENDS IN THE DRAW OF AMERICANS TO FOREIGN TERRORIST ORGANIZATIONS FROM 9/11 TO TODAY 13-15 (RAND 2018), [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR2500/RR2545/RAND\\_RR2545.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR2500/RR2545/RAND_RR2545.pdf).

52. First Superseding Indictment, *U.S. v. Gadahn*, SA CR 05-254 (C.D. Cal. Oct. 11, 2006) (hereinafter *Gadahn Indictment*).

53. 18 U.S.C. §§ 2339A & 2339B; *see also* J. Richard Broughton, *Of Puppets and Terrorism*, 62 S.D. L. REV. 682, 689 (2017) (discussing recent examples).

54. Paul T. Crane, *Did the Court Kill the Treason Charge?: Reassessing Cramer v. United States and Its Significance*, 36 FLA. ST. U. L. REV. 635 (2009).

55. George P. Fletcher, *Ambivalence About Treason*, 82 N.C. L. REV. 1611, 1612 (2004)

56. *Id.* at 1611.

is now ambivalence: “we supposedly hate treason, but we are unsure whether and how we should punish it.”<sup>57</sup>

Still, notwithstanding the dormancy of treason law, there remain sound arguments for it, and legitimate cases, like the terrorism support cases, for consideration. Fletcher’s rationale for thinking more carefully about treason and its centrality to the development of Anglo-American law is instructive.<sup>58</sup> The core of treason, he argued, is breached loyalty, but treason law must grapple with the relationship between disloyalty and harm: “The evil of treason consists not only in threatening the security of the state or the constitutional order, but also in breaching a personal obligation of fidelity.”<sup>59</sup> It is the subjective element of treason, particularly Adherence Treason, which animates its treatment in Anglo-American criminal law theory. Adherence requires more than “intent to render aid and comfort. In principle, it requires a deep emotional connection to the enemy.”<sup>60</sup>

Drawing on these themes of disloyalty, as well as its concurrence with actions that pose risks of grave harm to American institutions and constitutional order, a number of contemporary commentators, myself included, have sought a more robust place for treason in modern American law.<sup>61</sup> Much of this commentary uses the post-September 11 terrorism cases as the point of departure for considering treason’s continuing relevance, and understanding the harm to American interests that a “deep emotional connection with the enemy”<sup>62</sup> can produce. Viewing treason in light of modern terrorism both in the United States and other democratic countries, Kristen Eichensehr offers a compelling list of the benefits of maintaining a regime of tolerable but enforced treason law, and responds to Fletcher’s later concerns about ambivalence toward treason.<sup>63</sup> Enforcing treason law can reinforce social identity and highlight that of the enemy, deter future treasons, further retribution in the sense of satisfying the political community’s sense of solidarity, and clarify, and possibly legitimize, a procedural framework for handling terrorism cases.<sup>64</sup> As for Fletcher’s later concerns about the decline in interest in enforcing loyalty to the state, Eichensehr counters that treason law remains consistent with our moral

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57. Fletcher, *Ambivalence*, *supra* note 55, at 1612.

58. George P. Fletcher, *The Case for Treason*, 41 MD. L. REV. 193, 206-07 (1982).

59. *Id.* at 197. For a broader discussion of national allegiance, see Ashwini Vasanthakumar, *Treason, Expatriation, and ‘So-Called’ Americans: Recovering the Role of Allegiance in Citizenship*, 12 GEO. J.L. & PUB. POL’Y 187 (2014).

60. Fletcher, *supra* note 58, at 207.

61. See, e.g., Larson, *supra* note 39; Eichensehr, *supra* note 42, at 1507; Broughton, *Snowden Affair*, *supra* note 42, at 35; Jameson A. Goodell, Comment, *The Revival of Treason: Why Homegrown Terrorists Should be Treated as Traitors*, 4 NAT’L SEC. L.J. 311 (2016).

62. Fletcher, *supra* note 58, at 207.

63. Eichensehr, *supra* note 42, at 1462-88 (citing Fletcher, *Ambivalence*, *supra* note 55).

64. *Id.* at 1489-95.

intuitions that condemn other forms of betrayal, and that states are today both sources of benefits to their people as well as primary players in international relations, thus supplying strong incentives for punishing disloyalty that could increase costs to the state or threaten it.<sup>65</sup>

A theory of *national* allegiance, then, as opposed to allegiance to a person or particular political leader, combined with the convergence of broken loyalty and an overt act of aid to the enemy or levying war, sustains treason in both the American mind and American law. Loose and careless treason talk, though, divorced from these concerns and from the relevant legal text and history that would guide a treason prosecution, diminishes the seriousness of treason by treating it as a meaningless tool of lower-order politics. This carries the grave risk that it will be understood as a mechanism for political advantage or point-scoring, or as the refuge of the authoritarian strongman, rather than as a serious crime with constitutional dimension and foundation.

If we value national loyalty as an object of the law—meaning we take seriously the notion that American criminal law ought to punish specific forms of national betrayal, so as to not only promote fidelity, but also to help protect the Nation against threats to its security when the bonds of loyalty are broken in favor of those who would harm us—then public discourse about treason must be sufficiently responsible for taking a severe crime seriously. Using treason as a mere political weapon, however, erodes the seriousness of criminalizing national betrayal by giving primacy to low politics.

## B. Respecting the History and Limits of Treason in America

Second, the Framers crafted treason law carefully, ensuring that it would be far narrower than treason under English law, more difficult to prosecute, and less likely to result in abuses of power exerted against political opponents and dissenters.<sup>66</sup> But today's treason talk tends to obscure the limited nature of American treason law.

English history is littered with examples of abuses of power connected to treason.<sup>67</sup> As Steve Vladeck writes, treason accusations were used as “a means of suppressing political dissent and punishing political opponents for crimes as trivial as contemplating a king's future death (what was known as ‘compassing’) or speaking ill of the king (‘lèse majesté’).”<sup>68</sup> Prominent

65. Eichensehr, *supra* note 42, at 1486-88.

66. J. Willard Hurst, *THE LAW OF TREASON IN THE UNITED STATES* (1971).

67. J. G. BELLAMY, *THE LAW OF TREASON IN ENGLAND IN THE LATER MIDDLE AGES* 102-37 (1970) (giving examples of treason's extension after the enactment of 25 Edward III).

68. Steve Vladeck, *Americans Have Forgotten What ‘Treason’ Actually Means – and How It Can Be Abused*, NBC NEWS (Feb. 16, 2018, 9:10 AM), <https://www.nbcnews.com/think/opinion/americans-have-forgotten-what-treason-actually-means-how-it-can-ncna848651> (Vladeck also

constitutional framer, Rufus King, observed that the limits of American treason “will readily be approved by every man who is acquainted with the vindictive spirit that, at different times in the History of England, has animated the ascendant faction against political adversaries.”<sup>69</sup>

Viewing treason from the time of the Constitution’s adoption, J. Willard Hurst supplies a compelling analysis of the abuses that prompted the “restrictive policy” of treason in America.<sup>70</sup> Hurst surveys the Treason Clause’s development in Philadelphia in 1787, finding that debate on the definition “seems clearly to establish a general agreement on the wisdom of limiting the scope of the offense in all doubtful cases,”<sup>71</sup> even placing the Clause in Article III rather than Article I, so as to signal that the definition was constitutionally fixed and not subject to congressional tinkering.<sup>72</sup> But, why so restrictive? Hurst notes the concerns at the time of the Constitution’s framing regarding oppressive uses of treason. Describing the “particular types of oppression which the proponents of the treason clause feared under loose definitions of the offense,”<sup>73</sup> Hurst finds that “the fear most in mind was abuse of ‘treason’ for the building or upholding of domestic political faction.”<sup>74</sup> He adds that the restrictive policy was “most consciously based on the fear of extension of the offense to penalize certain types of conduct familiar in the normal processes of the struggle for domestic political or economic power.”<sup>75</sup>

Notably, Hurst identifies the same kind of loose treason rhetoric with which we contend today, and concludes that the Framers knew its dangers: “[i]t is plain that in 1787 men appreciated the potentialities of ‘treason’ as a political epithet.”<sup>76</sup> Madison, for example, lamented in *The Federalist Papers* that “new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free governments, have usually wreaked their alternate malignity on each other.”<sup>77</sup> And Marshall

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refers to the fact that Henry VIII had two of his wives executed “for alleged adultery on the ground that such adultery was, itself, ‘treason.’”

69. Hurst, *supra* note 66, at 143 (quoting 5 RUFUS KING, LIFE AND CORRESPONDENCE OF RUFUS KING 73-75 (1898)).

70. *Id.* at 126.

71. *Id.* at 134.

72. *Id.* at 139. Hurst also notes the influence of James Wilson, generally, and specifically with respect to the definition of treason as a limit on Congress. *Id.* at 136. Wilson’s law lectures in the early 1790s emphasized the point. Citing Montesquieu, Wilson said that “if the crime of treason be indeterminate, this alone is sufficient to make any government degenerate into arbitrary power.” 2 WORKS OF JAMES WILSON 663 (Robert Green McCloskey ed., 1967) (1791). Americans, though, “are secured effectually from even legislative tyranny.” *Id.*

73. Hurst, *supra* note 66, at 140.

74. *Id.* at 141.

75. *Id.*

76. *Id.* at 150.

77. THE FEDERALIST NO. 43, at 241 (James Madison) (Clinton Rossiter ed., 1961).

wrote in *Burr* that treason “is the charge which is most capable of being employed as the instrument of those malignant and vindictive passions which may rage in the bosoms of contending parties struggling for power.”<sup>78</sup>

The Supreme Court has also taken careful note of this history. In *Cramer v. United States*, one of its most important treason decisions from the twentieth century, the Court reminds us that the Declaration of Independence accused King George III of “transporting us beyond Seas to be tried for pretended offenses.”<sup>79</sup> Those who participated in the Constitutional Convention, the Court wrote, were “familiar with government in the Old World, and they looked back upon a long history of use and abuse of the treason charge.”<sup>80</sup> After surveying English treason prosecutions, and some of the major treatise writers on English treason, the Court explained that “the basic law of treason in this country was framed by men who . . . were taught by experience and by history to fear abuse of the treason charge almost as much as they feared treason itself.”<sup>81</sup>

Rhetorical uses of treason that are divorced from its narrow understanding in American law, and pursue questionable and even nonsensical applications, undermine the central purposes for restrictively defining treason, and thus raise the same concerns that compelled the Framers to treat the definition of treason with special care.

Moreover, if popular use of treason creates the impression that it is broader, or encompasses more action than it does as a matter of constitutional reality, then the public will fail to appreciate the virtues of a limited treason law. More dangerous still, prosecutors may be inclined to pursue treason charges of dubious legality, succumbing to pressures created by popular passion. Alternatively, prosecutors may become too cautious, consciously avoiding the impression that they are endeavoring to satisfy public sentiment, and thereby avoid charging in legitimate treason cases. As Vladeck argues, “the more we use the t-word to refer to conduct that doesn’t remotely resemble the constitutional definition, the more we are—willfully—turning a blind eye to the sordid history of treatment that led to its unique treatment in the U.S. Constitution.”<sup>82</sup> For this reason, responsible constitutional discourse about treason requires acknowledging its limits, as well as its power.

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78. *Burr*, 25 F. Cas. at 13.

79. 325 U.S. 1, 14 (1945). The Court explained that, though vague, this accusation actually referred back to statements made during the Continental Congress in 1774. *Id.* at 14-15 and n.20.

80. *Id.* at 15.

81. *Id.* at 21.

82. Vladeck, *supra* note 68.

### C. The Problem of Presidential Power

Third, in light of the foregoing reasons for prudence in employing treason rhetoric, and given the unique position of the president in the American constitutional government, presidential deployment of treason language raises special concerns and requires further caution.

The President sits atop the American military command structure,<sup>83</sup> oversees all federal criminal prosecutions, and shall “take Care that the Laws be faithfully executed.”<sup>84</sup> When, therefore, the President speaks on a matter of federal criminal law or one of constitutional interpretation, his voice is all-important. And treason involves both matters. If the President accuses someone of treason, he is effectively asserting that the person either (1) levied war against the United States, in which case he is drawing a legal conclusion about the sufficiency of the relevant overt act of war-levying, or (2) gave aid and comfort to the enemy, in which case he is drawing a legal conclusion about the sufficiency of the overt act that would constitute the prohibited aid, but also giving notice to the entire world about who is an American enemy (more on that later).<sup>85</sup> Presidential assignment of the “enemy” label is especially notable in light of his constitutional status as the United States Commander-in-Chief. Therefore, his use of treason terminology can carry significant and perhaps far-reaching legal consequences. This is no area in which to be casual, particularly if the speaker has power to direct and control criminal prosecutions, and give orders to American military forces about who is an enemy subject to the laws of war.

Of course, we know that past American presidents have contended with treason. President George Washington’s administration obtained the first treason convictions under the Constitution—arising from the Whiskey Rebellion, on an expansive theory of “levying war”—only to see Washington subsequently pardon the convicts.<sup>86</sup> President Thomas Jefferson not only accused Aaron Burr of treason, but closely managed and even participated in Burr’s federal treason prosecution.<sup>87</sup> “Jefferson had become obsessed with Burr and ruthlessly kept up the pressure for his conviction,” writes Willard Sterne Randall, “despite the lack of evidence of treason.”<sup>88</sup> Randall explains that Jefferson “never read the trial record or

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83. See U.S. CONST. art. II, § 2 (making president “Commander in Chief of the Army and Navy”).

84. U.S. CONST. art. II, § 3.

85. See *infra* Section III.

86. Hurst, *supra* note 66, at 196.

87. John C. Yoo, *The First Claim: The Burr Trial, United States v. Nixon, and Presidential Power*, 83 MINN. L. REV. 1435, 1442-43 (1999).

88. WILLARD STERNE RANDALL, THOMAS JEFFERSON: A LIFE 576 (1993).

weighed the evidence presented against Burr,”<sup>89</sup> and when Marshall ruled that Burr could not be convicted of treason and had to be released on bond to face only a misdemeanor charge, Jefferson thought that Marshall was simply motivated by politics.<sup>90</sup> Similarly, Lyndon B. Johnson privately reflected on Nixon’s conduct, which must be understood within the context of the 1968 presidential election.<sup>91</sup>

President Trump’s treason rhetoric is notable both for the sheer number of publicly leveled treason accusations, as well as for the particularly attenuated relationship of those accusations to the law of treason. As of the spring of 2019, President Trump had accused numerous individuals—and groups of people, and entire media outlets—of treason;<sup>92</sup> or, in one instance a “virtual act of treason,” a notion he left undefined.<sup>93</sup> Some of those are enumerated above, but even that list is incomplete. After an administration official crafted an anonymous opinion piece that was critical of the President and published in *The New York Times* in September 2018, the President said publicly that the *Times* had committed treason by *publishing the piece*.<sup>94</sup> In April of 2019, while speaking to reporters prior to a meeting with the President of South Korea, President Trump said that “Democrats” were laughing internally about the “hoax” (as the President likes to describe the Russian interference investigation), and that “it’s called politics, but this is dirty politics and this is actually treason.”<sup>95</sup>

By accusing—or at least appearing to accuse—others of treason for merely expressing disagreement with, opposition to, or antipathy toward him, President Trump’s use of the term often misunderstands even the very basics of American treason law, and is ignorant of its troubled history in the

89. Randall, *supra* note 88, at 578.

90. *Id.* at 576-78; see also Yoo, *supra* note 87, at 1442 (describing the “intensely partisan lens through which Jefferson viewed events, which caused the President to suspect that his political enemies were engaged in a vast conspiracy to support Burr”).

91. Kristoff, *supra* note 1.

92. Zachary Basu, *The 24 Times Trump Has Accused Somebody of “Treason”*, AXIOS (June 16, 2019), <https://www.axios.com/trump-treason-russia-investigation-new-york-times-e1660029-c73c-4809-8bd5-8988f1ed4fda.html>.

93. Donald J. Trump (@realDonaldTrump), TWITTER (June 15, 2019, 6:15 PM), <https://twitter.com/realdonaldtrump/status/1140065300186128384> (stating that *The New York Times* committed a “virtual act of treason” by publishing a story concerning American cyberattacks on Russian electric grid); see also Marina Pitofsky, *NYT Publisher: Trump Crossed ‘Dangerous Line’ in Accusing Outlet of ‘Treason’*, THE HILL (June 19, 2019, 8:53 PM), <https://thehill.com/blogs/blog-briefing-room/news/449441-nyt-publisher-trump-crossed-dangerous-line-in-accusing-outlet> (describing *The New York Times*’ response).

94. Allie Malloy, *Trump on New York Times Op-Ed: ‘You Could Call It Treason,’* CNN (Sept. 6, 2018, 10:49 PM), <https://www.cnn.com/2018/09/06/politics/trump-new-york-times-op-ed/index.html>.

95. President Donald J. Trump, Remarks by President Trump and President Moon Jae-in of the Republic of Korea Before Bilateral Meeting (Apr. 11, 2019, 12:19 PM), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-president-moon-jae-republic-korea-bilateral-meeting/>.

hands of those who control prosecutions. Indeed, the President appears to be relying on a kind of democratized version of compassing or, more likely, a kind of *lèse majesté* doctrine for the American presidency—both of which were obviously and thoroughly rejected in our Constitution—by suggesting loyalty to the Chief Executive that could be criminally enforceable as treason.<sup>96</sup> But in the American constitutional system, “[w]e do not regard the president as the embodiment of the state or as the object of our allegiance.”<sup>97</sup> The Court has observed, one of the chief dangers against which the founding generation sought to protect the American people was “[p]erversion by established authority to repress peaceful political opposition.”<sup>98</sup> This could be accomplished by “[c]ompassing’ and like loose concepts,” which “had been useful tools for tyranny.”<sup>99</sup>

Nothing in the text or history of American treason would permit its application to those who simply oppose the President’s policies or his election, who work for the election of someone else, or who seek to undermine him in favor of some other policy goal or perceived national interest. Indeed, the narrow definition of treason adopted by the Framers was designed to assure that mere political dissent was not subject to treason prosecution. “The idea that loyalty will ultimately be given to a government only so long as it deserves loyalty and that opposition to its abuses is not treason,” Justice Robert H. Jackson wrote in the *Cramer* case, “has made our government tolerant of opposition based on differences of opinion that in some parts of the world would have kept the hangman busy.”<sup>100</sup>

President Trump’s hyper-reliance on “treason,” then, cannot be taken seriously. In fact, it is not clear that he wants it to be: despite the President’s rhetoric, the Justice Department has not obtained any indictments for treason during the Trump Administration, and even United States Attorney General William Barr has acknowledged that the President’s treason accusations are insufficient “as a legal matter.”<sup>101</sup> Yet, the accusation alone carries unique meaning when uttered by a president because 1) he has the power to influence what federal prosecutors do;<sup>102</sup> and 2) mere accusations may suppress dissent or deter other speech by those who fear he will wield his power to compel treason charges, even if he ultimately does not.

96. See Vladeck, *supra* note 68 (describing “*lèse majesté*” as “speaking ill of the king”).

97. Fletcher, *supra* note 58, at 199.

98. *Cramer*, 325 U.S. at 27.

99. *Id.* at 28.

100. *Cramer*, 325 U.S. at 21.

101. Camilo Montoya-Galvez, *Does Barr Think Obama Officials Committed Treason? “Not as a Legal Matter, No.”*, CBS NEWS (May 30, 2019, 6:30 PM), <https://www.cbsnews.com/news/william-barr-interview-ag-says-he-doesnt-think-obama-officials-committed-treason-as-a-legal-matter-exclusive/>.

102. For a favorable view of such authority, see Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521 (2005).

One cannot help but be reminded of President Trump's similarly loose rhetoric about imposing the death penalty.<sup>103</sup> In one instance, after Sayfullo Saipov allegedly killed eight people by running over them on a bike path in New York City,<sup>104</sup> the President immediately Tweeted that "NYC terrorist was happy as he asked to hang ISIS flag in his hospital room. He killed 8 people, badly injured 12. SHOULD GET DEATH PENALTY!"<sup>105</sup> Saipov later challenged the Government's decision to seek the death penalty, arguing that the Attorney General was left with little choice after the President's Tweet.<sup>106</sup> Although at the time I predicted Saipov's challenge and argued that it should fail,<sup>107</sup> and it did, I also analyzed the dangers to the federal death penalty review process when a president recklessly demands a particular outcome before all of the facts and evidence have been assessed by the Justice Department's professional prosecutors, death penalty experts, and the Attorney General.<sup>108</sup> His treason rhetoric creates similar awkwardness for prosecutors in his administration.

As one commentator stated, the restrictive nature of American treason was meant to guard "against the possibility that Americans would one day elect a man so morally weak and corrupt that he would falsely accuse political enemies of treason."<sup>109</sup> To some degree, then, we must place our trust not only in the constitutional definition of treason, but in the good judgment of federal prosecutors, who should take Article III of the United States Constitution more seriously than they take a president's Twitter account.<sup>110</sup>

This is not to say that treason talk, even specific accusations from a sitting President, are always or necessarily vicious. Discerning observers may well find that treason is still a viable and legitimate option in some cases. Additionally, presidents can, and ought to, contribute to important national conversations about constitutional meaning and their own role, as well as that of other institutions, in constitutional government.<sup>111</sup> Indeed,

103. J. Richard Broughton, *The Federal Death Penalty and Civil Rights Enforcement*, 67 AM. U. L. REV. 1611, 1622-25 (2018).

104. Indictment, U.S. v. Saipov, No. 17cr722 (S.D.N.Y.) (filed Nov. 21, 2017).

105. Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 1, 2017, 8:43 PM), <https://twitter.com/realdonaldtrump/status/925931294705545216>.

106. Defendant's Motion to Preclude Government from Seeking the Death Penalty, U.S. v. Saipov, No. 17cr722 at 8 (S.D.N.Y.) (filed Sept. 6, 2018).

107. Broughton, *supra* note 103, at 1626-27.

108. *Id.*

109. Conor Friedersdorf, *A President Falsely Charging 'Treason' Is What the Founders Feared*, THE ATLANTIC (Apr. 11, 2019), <https://www.theatlantic.com/ideas/archive/2019/04/trump-treason/586915/>.

110. By all indications, this is thankfully true of the Justice Department under Trump. See Montoya-Galvez, *supra* note 101.

111. JOSEPH M. BESSETTE & JEFFREY K. TULIS, *On the Constitution, Politics, and the Presidency*, in THE CONSTITUTIONAL PRESIDENCY 13-27 (Joseph M. Bessette & Jeffrey K. Tulis eds., 2009).

presidential rhetoric is at its zenith when it pursues responsible constitutional discourse, seizing upon the weight of the Constitution, situating the president as an authoritative defender and enforcer of the constitutional order, and affirmatively promoting the fulfillment of his oath of office.<sup>112</sup> If criminal prosecution for national disloyalty remains desirable, and I have suggested here why it may be, then a responsible public conversation about treason law and treasonous conduct may not only keep treason alive, but actually aid its development and clarify its contours. The challenge is to identify the necessarily narrow category of persons for whom the treason charge is constitutionally fitting. That is no easy task and requires appreciation of the challenges posed by an underdeveloped American treason law.

### III. Know Your Enemy

Despite the rhetorical overuse of “treason” as a political weapon, not every use of treason lacks legal seriousness. In cases where a person with allegiance to America has joined forces with a foreign state or cohesive group engaged in hostile action against the United States, with the specific intent to betray the country, a treason accusation gains greater legitimacy (again, consider the terrorism support cases involving Americans).<sup>113</sup> Still, if Adherence Treason is the operative theory of criminality, the question remains as to whether the person who owes American allegiance is aiding an “enemy.” I do not wish to conclusively determine here which countries or groups should be regarded as enemies—that is a determination that circumstances, and time, may alter. Rather, I wish only to demonstrate how and why any public narrative about treason should account for this complicated constitutional problem.

#### A. Uncovering the Actual Hostility Test

Little case law or scholarly authority exists on the question of who, precisely, is an “enemy” of the United States for purposes of treason. Several English and early American sources address the question generally. And because those sources would likely have been influential to the generation that framed the Treason Clause, they stand as the best authorities on the subject. Carlton F. W. Larson, who has emerged a leading contemporary voice on American treason law, canvasses these authorities in an excellent piece from 2006, written in the wake of the September 11 attacks when

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112. JEFFREY K. TULIS, *Revising the Rhetorical Presidency*, in BEYOND THE RHETORICAL PRESIDENCY 10-13 (Martin J. Medhurst ed., 1996); see also J. Richard Broughton, *The Inaugural Address as Constitutional Statesmanship*, 28 QUINNIPIAC L. REV. 265 (2010) (examining inaugural addresses as opportunities for constitutionalist rhetoric).

113. See WILLIAMS, ET AL., *supra* note 51, at 11-13.

treason began a brief reemergence in legal scholarship.<sup>114</sup> Larson notes that the Soviet Union would not have been regarded as an enemy during the Cold War years,<sup>115</sup> and, most recently, he has offered commentary as to why he believes that today's Russia is not an American enemy, notwithstanding Russia's alleged election interference efforts (instead, he argues that we are formally at peace with Russia, and "a treason prosecution naming Russia as an enemy would amount to a declaration of war").<sup>116</sup> His argument is a sensible one, and likely correct. I wish to not only illuminate this research, but to place it in the context of the relevant authorities and of what we have recently learned about Russian active measures in and against the United States.

The easiest case for proving an "enemy" is a state actor against whom there is a declared war or some specific legislative authorization for the use of force. So, for example, Germany and Italy in 1941;<sup>117</sup> Great Britain in 1812.<sup>118</sup> Beyond this, the question becomes trickier. To determine the scope of the Constitution's reach on this matter, a further taxonomy is helpful: state actors against whom there is not a declared war (e.g., Russia, China, Iran); non-state actors against whom there *is* a declared war or congressionally approved authorization for the use of military force (e.g., Al-Qaeda); and non-state actors against whom there is no declared war or specific legislative authorization, but against whom the United States is engaged in hostile action (e.g., likely the Islamic State).

I believe Larson and other commentators have correctly argued that the latter two categories are sufficient for enemy status.<sup>119</sup> Admittedly, there is continued controversy regarding these categories.<sup>120</sup> Even the United States

114. Larson, *supra* note 39, at 915-16.

115. *Id.* at 920.

116. Carlton F. W. Larson, *Five Myths About Treason*, WASH. POST (Feb. 17, 2017), [https://www.washingtonpost.com/opinions/five-myths-about-treason/2017/02/17/8b9eb3a8-f460-11e6-a9b0-ecee7ce475fc\\_story.html?utm\\_term=.5880c09d0443](https://www.washingtonpost.com/opinions/five-myths-about-treason/2017/02/17/8b9eb3a8-f460-11e6-a9b0-ecee7ce475fc_story.html?utm_term=.5880c09d0443).

117. For a brief summary of the congressional declaration of war against Germany and Italy on December 11, 1941, see Andrew Glass, *Congress declares war on Nazi Germany and Italy, December 11, 1941*, POLITICO (Dec. 11, 2017), <https://www.politico.com/story/2017/12/11/congress-declares-war-on-nazi-germany-and-italy-dec-11-1941-282980>. The declaration followed Adolph Hitler's declaration of war against the United States, which was followed by Italy's, and came three days after the declaration of war against Japan following the attack on Pearl Harbor. *Id.*

118. For an account of the deliberations leading to the declaration of war against Great Britain in 1812, and President Madison's role, see RALPH KETCHAM, *JAMES MADISON: A BIOGRAPHY* 526-33 (1990). Madison's war message focused on Britain's belligerence in attempting to protect "the monopoly which she covets for her own commerce and navigation, . . . a commerce polluted by . . . forgeries and perjuries." *Id.* at 527. The House approved the declaration 79 to 49; the Senate approved it 19 to 13. *Id.* at 528-29.

119. Larson, *supra* note 39, at 920; *cf.* Broughton, *Snowden Affair*, *supra* note 42, at 24 n.116 (acknowledging the "better understanding" that the Islamic State should be regarded as an enemy).

120. 4 WHARTON'S CRIMINAL LAW § 663 (15th ed. 2016) ("[E]nemies," as used in the constitutional definition of treason, is limited to the citizens or subjects of *nations who are engaged*

Justice Department's Office of Legal Counsel grappled with this problem when trying to determine whether it could bring treason charges against John Walker Lindh, an American citizen captured in Afghanistan, where he was fighting for the Taliban shortly after the September 11 attacks.<sup>121</sup> The Justice Department eventually resolved this question in favor of finding enemy status for non-state actors when it obtained a treason indictment against Al-Qaeda spokesman Gadahn, and specifically named Al-Qaeda as an enemy.<sup>122</sup> Assuming this is the correct approach, this leaves the second category—state actors against whom there is no declared war, but who maintain an adversarial posture toward the United States—as an especially problematic category. Unfortunately, this category has captured much of the attention in today's treason talk.

One possible theory of “enemy” status that has emerged in the Trump-Russia-Treason conversation is that we are not in a declared war against Russia.<sup>123</sup> That is, of course, true, but might not be dispositive of the question.

Sir Michael Foster's 1762 *Discourse on High Treason* provided the following analysis pursuant to the Statute of 25 Edward III, which defined treason as adhering to the “King's enemies in his realm, giving to them aid and comfort in the realm or elsewhere”:<sup>124</sup>

States in Actual Hostility with Us, though no War be solemnly declared, are Enemies within the meaning of the Act. And therefore in an Indictment on the Clause of Adhering to the King's Enemies, it is sufficient to aver that the Prince or State Adhered to *is an Enemy*, without shewing any War Proclaimed. And the Fact, whether War or No, is triable by the Jury; and Publick Notoriety is sufficient Evidence of the Fact. And if the Subject of a Foreign Prince in Amity with Us, invadeth the Kingdom without

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*in open war* against the United States. It is not sufficient that a ‘cold war’ exists or that a particular nation is hostile to or unfriendly toward the United States.”) (emphasis added).

121. Memorandum from John Yoo, Deputy Asst. Att’y Gen., to William J. Haynes II, Possible Criminal Charges Against American Citizen Who Was A Member of the al Qaeda Terrorist Organization or the Taliban Militia, at 9 (Dec. 21, 2001), <https://www.justice.gov/sites/default/files/olc/legacy/2009/12/30/aclu-ii-122101.pdf> (Walker was never charged with treason). The Memorandum also concedes that treason charges for Walker might fail because of the Constitution's two-witness rule. *Id.* at 8.

122. Gadahn Indictment, *supra* note 52, at 3.

123. See Larson, *Five Myths*, *supra* note 116. Larson acknowledges that the absence of declared war would require consideration of whether we are in a state of “open” war with Russia. *Id.*

124. Statute of Treasons, 25 Edw. III, ch. 2 (1351).

Commission from his Sovereign, He is an Enemy. And a Subject of England adhering to Him is a Traitor within this Clause of the Act.<sup>125</sup>

Sir Matthew Hale offered a similar explanation, acknowledging that a state of hostility could exist between states where there is a *de facto* war, in which case the states are enemies of each other.<sup>126</sup> These descriptions of the English understanding of “enemy” did not require formally *declared* war in every instance—only open warfare, or actual hostilities.

Nor did it require that the enemy be a state actor.<sup>127</sup> Blackstone, in commenting upon the meaning of this portion of 25 Edward III, stated that “[b]y enemies are here understood the subjects of foreign powers with whom we are at open war.”<sup>128</sup> But he then stated that “[a]s to foreign pirates or robbers, who may happen to invade our coasts, without any open hostilities between their nation and our own, and without any commission from any prince or state at enmity with the crown of Great Britain, the giving them any assistance is also clearly treasonous.”<sup>129</sup>

Larson contends that “while the evidence is limited, these English definitions appear to have been widely accepted in late-eighteenth century America.”<sup>130</sup> Under the American Constitution, James Wilson repeated Foster’s understanding in his law lectures.<sup>131</sup> William Rawle—the federal prosecutor whose more expansive understanding of treason led to two treason convictions in the Whiskey Rebellion trials<sup>132</sup>—wrote of the distinction between treason in a monarchy and in a republic.<sup>133</sup> Noting that in a republic, subversion and destruction of government requires a contingent, rather than a single person,<sup>134</sup> Rawle states that “the citizen who unites himself with a hostile nation, waging war against his country, is guilty of a crime of which the foreign army is innocent; with him it is treason, with his associates it is, in the code of nations, legitimate warfare.”<sup>135</sup> Here, Rawle does not appear to limit treasonous conduct to those who adhere only to a country that is waging war against the nation. Rather, he appears to be

125. MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION OF OYER AND TERMINER AND GOAL DELIVERY FOR THE TRIAL OF REBELS IN THE YEAR 1746 IN THE COUNTY OF SURRY, AND OF OTHER CROWN CASES, TO WHICH ARE ADDED DISCOURSES UPON A FEW BRANCHES OF THE CROWN LAW 219 (1762).

126. Hale, *supra* note 39, at 162.

127. Larson, *supra* note 39, at 916.

128. 4 WILLIAM BLACKSTONE, COMMENTARIES 82-83.

129. BLACKSTONE, *supra* note 128, at 83.

130. Larson, *supra* note 39, at 916. Larson cautions against misreading *The Prize Cases*, 67 U.S. (2 Black) 635 (1863), to say otherwise. *Id.* at 918-19.

131. WILSON, *supra* note 72, at 668.

132. Larson, *supra* note 39, at 904.

133. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 141 (2d. ed. 1829).

134. *Id.*

135. *Id.*

using this simply as one example of how treason inheres in the duty of allegiance. Nevertheless, it is important that Rawle identifies a “hostile nation” in this context.<sup>136</sup> Later, as Larson notes, in the midst of the Civil War, Justice Stephen Johnson Field instructed a jury using the principles of treason law set forth by the dominant English authorities, defining “enemies” as “subjects of a foreign power in a state of open hostility with us.”<sup>137</sup>

What, then, is meant by “actual” or “open” “hostility”? Is a “hostile” adversary one at open, declared, *conventional* war with the United States, or can hostility be measured in other ways besides cannon fire or the drawing of bayonets or other traditional uses of force? The question, then, is whether the relevant hostilities must be armed ones. Blackstone, for example, clearly believed that piracy and robbery could amount to the kinds of hostilities that could create enemy status, such that aiding them was treason.<sup>138</sup>

The legal definitions of “enemy” in modern American law are noteworthy.<sup>139</sup> For example, the Trading with the Enemy Act of 1917 defines an enemy as any government with which the United States is at war, or anyone who resides within any nation with whom the United States is at war, or who does business with any nation with whom the United States is at war.<sup>140</sup> The Act also permits the President to proclaim one as an enemy who resides in or does business with any nation that is at war with the United States.<sup>141</sup> The “spoils of war” statutes, which concern the transfer of enemy movable property obtained during war, create yet another definition. There, enemy is defined as “any country, government, group, or person that has been engaged in hostilities, whether or not lawfully authorized, with the United States.”<sup>142</sup> Additionally, the military commission statutes define an “unprivileged enemy belligerent” as one who has engaged in hostilities against the United States or its coalition partners, has purposefully and materially supported hostilities against the United States or its coalition partners, or was part of Al-Qaeda at the time of the relevant offense.<sup>143</sup> The statute further defines “hostilities” as a conflict “subject to the laws of war.”<sup>144</sup>

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136. Rawle, *supra* note 133.

137. Larson, *supra* note 39, at 920 (citing *U.S. v. Greathouse*, 26 F. Cas. 18, 22 (Field, Circuit Justice, C.C.N.D. Cal. 1863) (No. 15,254)).

138. 4 WILLIAM BLACKSTONE, COMMENTARIES \*83.

139. For a helpful analysis of various statutory sources of the term “enemy,” see Stephen I. Vladeck, *Enemy Aliens, Enemy Property, and Access to the Courts*, 11 LEWIS & CLARK L. REV. 963 (2007).

140. 50 U.S.C. §4302.

141. *Id.*

142. 50 U.S.C. § 2204(2) (West 1994).

143. 10 U.S.C. § 948a(7) (West 2009).

144. 10 U.S.C. § 948a(9) (West 2009).

These statutes offer a window into modern thinking about enemy status, though they may be of limited use in determining the understanding of the word “enemy” that would have prevailed at the time of the Treason Clause’s framing. While there may well be significant overlap between modern national security statutes and the Constitution’s use of the term “enemy,” it is also possible that one may be an “enemy” for purposes of one of these statutes but perhaps not an “enemy” for purposes of the Treason Clause. Therefore, while modern statutory law can provide a definitive legal understanding of who an “enemy” is, or when “hostilities” exist, they do so only in the contexts in which those statutes were written and apply today. They tell us little about what the Framers understood when they used “enemy” in 1787, or even what the Reconstruction-era framers understood when they used the term in the Fourteenth Amendment.

The most relevant authorities, then, appear to emphasize actual hostilities, and no dominant strain of American legal thought appears to be at odds with this understanding. If that is the proper understanding of what triggers “enemy” status for purposes of Adherence Treason, then we must determine which countries or groups have engaged in actual hostilities with the United States.

#### **B. Applying the Actual Hostilities Test: Adversary, Frenemy, or Enemy?**

If we accept actual hostilities as the relevant standard, then any public narrative about treason must at least account for such hostilities before an accusation of Adherence Treason can be taken seriously.

It is unlikely that Russia is a “friend” of the United States. Perhaps, as some have suggested even before the 2016 elections, the Russian regime is merely a “frenemy,” an adversary, but one with whom with which we share common interests and goals.<sup>145</sup> After all, we enjoy diplomatic relations with Russia, and endeavor to ally with them for certain strategic purposes, such as combatting terrorism.<sup>146</sup> But the United States has imposed significant economic sanctions against Russia, including sanctions leveled as a direct result of its 2016 active measures campaign.<sup>147</sup> Moreover, the indictments from February and July 2018 name both an arm of the Russian government,

145. Editorial, *Putin as America’s Frenemy*, CHICAGO TRIBUNE (Nov. 17, 2015, 3:30 PM), <https://www.chicagotribune.com/politics/ct-russia-syria-islamic-state-edit-1118-20151117-story.html>.

146. *Transcript: Donald Trump’s Foreign Policy Speech*, N.Y. TIMES (Apr. 27, 2016), <https://www.nytimes.com/2016/04/28/us/politics/transcript-trump-foreign-policy.html> (pledging to work for peace and friendship with Russia and noting Russia’s experience with terrorism); Steve Holland, *Trump Says He Would Consider Alliance With Russia Over Islamic State*, REUTERS (July 25, 2016, 2:24 PM), <https://www.reuters.com/article/us-usa-election-trump-idUSKCN1052CJ>.

147. Matthew Lee & Josh Lederman, *U.S. Imposes Sanctions on 13 Russians Indicted By Robert Mueller*, PBS NEWSHOUR (Mar. 15, 2018, 11:11 AM), <https://www.pbs.org/newshour/politics/u-s-imposes-sanctions-on-13-russians-indicted-by-robert-mueller>.

as well as Russian government officials acting at the direction of Russia's head of state.<sup>148</sup> Today, top American law enforcement and intelligence officials are confident that Russia—as well as China and Iran—continues to engage in active measures to influence American governance and harm American interests.<sup>149</sup>

In March 2017, during a hearing on Russian active measures before the United States House of Representatives Permanent Select Committee on Intelligence (“HPSCI”), the following colloquy occurred between Representative Jackie Speier of California and FBI Director James Comey and Admiral Michael S. Rogers, second commander of the United States Cyber Command:

SPEIER: [S]o my first question to each of you is, is Russia our adversary?

Mr. Comey?

COMEY: Yes.

SPEIER: Mr. Rogers?

ROGERS: Yes.

SPEIER: Is—do they intend to do us harm?

ROGERS: They intend to ensure, I believe, that they gain advantage at our expense.

SPEIER: Director Comey?

COMEY: Yes, I want to be—harm can have many meanings. They're an adversary, so they want to resist us, oppose us, undermine us, in lots of different ways.<sup>150</sup>

This colloquy was then followed by another, in which Representative Speier introduced the notion of “hybrid warfare,” which she understood as encompassing a combination of conventional warfare, irregular warfare, and cyber warfare.<sup>151</sup> When asked whether he believed that Russia was engaged in such warfare, Director Comey stated,

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148. Internet Research Agency Indictment, *supra* note 15; Netyshko Indictment, *supra* note 16.

149. Daniel R. Coats, *Statement on the IC's Response to EO 13848 on Imposing Certain Sanctions in the Event of Foreign Interference in a U.S. Election*, OFFICE OF THE DIR. OF NAT'L INTELLIGENCE (Dec. 21, 2018), <https://www.dni.gov/index.php/newsroom/press-releases/press-releases-2018/item/1933-dni-coats-statement-on-the-intelligence-community-s-response-to-executive-order-13848-on-imposing-certain-sanctions-in-the-event-of-foreign-interference-in-a-united-states-election>; *Securing U.S. Election Infrastructure and Protecting Political Discourse: Hearing Before the Subcomm. on Nat'l Sec., H. Comm. on Oversight and Reform*, 116th Cong. (2019) (statement of Adam S. Hickey, Deputy Asst. Att'y Gen. of the United States), <https://docs.house.gov/meetings/GO/GO06/20190522/109538/HHRG-116-GO06-Wstate-HickeyA-20190522.pdf>.

150. *Russian Actives Measures Investigation, Hearing Before the H. Perm. Select Comm. on Intelligence*, 115th Cong. (2017).

151. *Id.*

I don't think I would use the term warfare. I think you'd—you would want to ask experts in the definition of war. They're engaged in a multifaceted campaign of active measures to undermine our democracy and hurt one of the candidates and—and hope to help one of the other candidates.<sup>152</sup>

Admiral Rogers then indicated his agreement with Director Comey's response.<sup>153</sup>

These exchanges before HPSCI suggest that while we may not be at “war” with Russia, the Russian regime is nonetheless engaged in activities designed to disrupt the processes of American democratic governance in ways that would benefit Russian national interests, and thus create risks for American national security. Because we know from early authorities that declared war is not a prerequisite for enemy status, these responses by Comey and Rogers do not rule out such a status for Russia, but certainly do not confirm it. The hesitation of both witnesses against acknowledging that Russia is engaged in warfare—even while conceding Russia's adversarial posture—suggests that both men wished to be cautious in characterizing Russia's status. Perhaps that caution was meant to avoid interference with, or confusion in, the conduct of American foreign policy. Perhaps it was meant to avoid the legal consequences of being seen by others as asserting publicly that the United States Government believes that Russia is an enemy. Perhaps it was meant to mitigate the breadth of Representative Speier's characterization of Russian activities: after all, there seems to be little evidence that Russia is engaged in “conventional” warfare with the United States, even if it is engaged in irregular warfare or cyber warfare. While these responses do not definitively determine whether Russia is an “enemy”—and seem sufficiently cautious that they make that conclusion less likely—they nonetheless describe Russia's efforts to influence American politics in an aggressive and adversarial way.

Moving then, from friend to adversary to frenemy to enemy requires determining whether a nation or group has engaged in the kind of actual hostilities toward the United States that the English writers on treason required. But the kind of adversary that America faces in, for example, Russia, does not lend itself easily to traditional understandings of the term “actual hostilities.” Once we depart from formally declared wars, or, in contemporary American government, specific congressional authorizations

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152. *Russian Active Measures Investigation, Hearing Before the H. Perm. Select Comm. on Intelligence*, 115th Cong. (2017).

153. *Id.*

for the use of military force,<sup>154</sup> relations get tricky in modern political life. Perhaps, then, our thinking about actual hostility must go beyond conventional warfare, armed action, force, or violence, and account for the distinctive nature of modern international relations, warfare, and hostile action between adversaries.

Most notably, this new thinking about actual hostilities must account for harmful cyber-activity. In other words, when cyber-attacks are the basis for the adversarial nature of the relationship with another country, the question for treason purposes may well turn on whether those cyber-attacks would be the functional equivalent of an act subject to the laws of warfare.<sup>155</sup> Scholars have grappled with similar questions, albeit outside the context of American treason, in the fields of warfare and international law.<sup>156</sup> Nonetheless, as current FBI Director Christopher Wray testified to the United States Senate Judiciary Committee in July 2019, “[v]irtually every national security threat . . . the FBI faces is cyber-based or facilitated.”<sup>157</sup>

A single authoritative answer to the precise question of whether or when cyber-activity amounts to actual hostility for purposes of defining an “enemy” pursuant to American treason law seems, for now, elusive. The broad term “cyber-attack” requires more detail (beyond the scope of this particular Article), and both international law and the law of war remain in development on this matter.<sup>158</sup> Still, the United States Department of Defense’s *Law of War Manual* supplies some authority regarding when a

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154. The Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

155. Carlton F. W. Larson, *Treason and Cyberwarfare*, TAKE CARE (July 27, 2017) <https://takecareblog.com/blog/treason-and-cyberwarfare>.

156. See generally, e.g., TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS (Michael N. Schmitt, ed. 2017); Jeffrey T. Biller & Michael N. Schmitt, *Classification of Cyber Capabilities and Operations as Weapons, Means, or Methods of Warfare*, 95 INT’L L. STUD. 179 (2019); Oona A. Hathaway et al., *The Law of Cyber-Attack*, 100 CALIF. L. REV. 817 (2012); Jack Goldsmith, *How Cyber Changes the Laws of War*, 24 EUR. J. INT’L L. 129 (2013); Antonia Chayes, *Rethinking Warfare: The Ambiguity of Cyber Attacks*, 6 HARV. NAT’L SEC. J. 474 (2015); Michael Gervais, *Cyber-Attacks and the Laws of War*, 30 BERKELEY J. INT’L L. 525 (2012); Cmdr. Todd C. Huntley, *Controlling the Use of Force in Cyber Space: The Application of the Law of Armed Conflict During a Time of Fundamental Change in the Nature of Warfare*, 60 NAVAL L. REV. 1 (2010).

157. *Oversight of the Federal Bureau of Investigation, Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (2019) (opening statement of Christopher A. Wray, Dir. of the FBI) (Director Wray explained the scope of these cyber-threats, noting that they “hold our critical infrastructure at risk and harm our economy.”).

158. OFFICE OF THE GEN. COUNSEL, U.S. DEPT. OF DEFENSE, LAW OF WAR MANUAL § 16.1 (rev. 2016) (hereinafter DOD LAW OF WAR MANUAL) (“Precisely how the law of war applies to cyber operations is not well-settled, and aspects of the law in this area continue to develop, especially as new cyber capabilities are developed and States determine their views in response to such developments.”); Biller & Schmitt, *supra* note 156, at 181 (detailing conflicts among authorities on when an “attack” has occurred); Hathaway et al., *supra* note 156, at 821 (offering a concise definition of cyber-attack), TALLINN MANUAL 2.0, r.92, at 415-20 (same)

cyber-attack is subject to the law of war, and thus, arguably sufficient to constitute actual hostilities for purposes of defining an enemy.<sup>159</sup> The *Manual* acknowledges the Pentagon's recognition of cyberspace as a domain of warfare, and considers cyber-attacks with respect to both *ius ad bellum* and *ius in bello*.<sup>160</sup>

Neither the *Manual* nor other authorities provide a definitive or exhaustive list of cyber-attacks that would trigger the laws of war or justify the use of force in response to cyber-attacks. There seems to be agreement that using a cyber-incursion to merely conduct intelligence activity, to engage in a propaganda campaign, or to promote "fake news" likely does not rise to the level of an attack that would trigger the law of war.<sup>161</sup> However, other uses of cyber-capabilities might constitute such an act, such as compromising infrastructure in ways that would significantly affect the functionality of a weapon or weapon system.<sup>162</sup> Scholars have also noted the problem of attribution, also noted in the *Law of War Manual*,<sup>163</sup> in which state actors avoid responsibility for cyber-activity by shifting blame to private actors.<sup>164</sup>

This is but a small taste of the various problems that must be resolved with respect to the overlap of cyber-activity and the laws of war. Such resolution is far beyond the scope of this Article. But the point is that modern cyber-activity could constitute the kinds of hostilities that would be sufficient to implicate treason law's "enemy" status.

Of course, even when we consider these more modern variations on hostile action, "enemy" status likely must also account for the American response. Is it enough that the United States has been subject to hostile action, sufficient to trigger the lawful use of force in response? Or is "enemy" status attained only once the United States renders a hostile response? Consider, for example, a recent incident in June 2019, in which the United States accused the Iranian Revolutionary Guard Corps of using

159. DOD LAW OF WAR MANUAL § 16.1 et seq.

160. *Id.* §§ 16.3 & 16.5. See also ERIK LUNA & WAYNE MCCORMACK, UNDERSTANDING THE LAW OF TERRORISM § 7.01[A], at 378 (2d. ed. 2015) (stating that "just war theory distinguishes between rules that govern the justice in going to war (*jus ad bellum*) and rules that govern justice in conducting war (*jus in bello*).").

161. See DOD LAW OF WAR MANUAL § 16.5.2 (enumerating examples of activity that would not constitute an "attack").

162. Biller & Schmitt, *supra* note 156, at 213 (citing provisions of *Tallin Manual* regarding means of warfare); Goldsmith, *supra* note 156, at 133-135 (discussing examples of cyber-attacks that could be deemed uses of force).

163. DOD LAW OF WAR MANUAL § 16.3.3.4.

164. Eric Talbot Jensen, *The Tallinn Manual 2.0: Highlights and Insights*, 48 GEO. J. INT'L L. 735, 750-53 (2017) (discussing problem of attribution and highlighting provisions of *Tallin Manual* that address the issue).

force to down an unmanned American military surveillance drone.<sup>165</sup> President Trump considered a forcible response that would likely have produced casualties, but eventually did not order that response because it would have been disproportionate to Iran's action.<sup>166</sup> Instead, the President later reported that the United States Navy downed an Iranian drone in July 2019, in what the Navy described as a "defensive" measure using "electronic warfare methods."<sup>167</sup> Was the Iranian military's action a hostile one? Likely, yes. But absent an immediate forcible response from the American government, could the United States be described as engaging in "actual hostilities" with Iran? Does the downing of an Iranian drone a month later now constitute "actual hostilities?" To put it in the context of treason law, would an American citizen be guilty of treason if he or she provided material support to the Iranian regime after the downing of the drone? Possibly, if the United States determined that there was "actual hostility" with Iran.

These are the kinds of complexities that the current international system presents for treason law. To be sure, there are simpler cases. But treason talk must also account for the more complicated ones. These are useful, likely critical, conversations to have about American treason. But they demand prudent—not loose, casual, or reckless—rhetoric, which thoughtfully considers the Constitution's understanding of American enemies.

#### IV. Accounting for the Treason Mens Rea

It is worth briefly discussing one other firmly embedded aspect of treason law, though one not clearly articulated in the constitutional text, that has become lost in today's treason talk. In addition to an overt act of aid and comfort to an "enemy," treason requires proof of a distinctive mens rea element: intent to betray. So, even if Russia or Iran or the Islamic State could be regarded as an "enemy," and even if someone with American allegiance engaged in overt action that would have aided one of those entities, such acts would not be treasonous unless accompanied by the mens rea to betray the United States.

The requisite mens rea for treason is not immediately evident from the text of the Treason Clause. That is because it does not employ conventional

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165. Joshua Berlinger et al., *Iran Shoots Down US Drone Aircraft, Raising Tensions Further in Strait of Hormuz*, CNN.com (June 20, 2019, 8:39 PM), <https://www.cnn.com/2019/06/20/middleeast/iran-drone-claim-hnk-intl/index.html>.

166. Michael D. Shear et al., *Trump Says He was 'Cocked and Loaded' to Strike Iran, but Pulled Back*, N.Y. TIMES (June 21, 2019), <https://www.nytimes.com/2019/06/21/us/politics/trump-iran-attack.html>.

167. Nahal Toosi & Caitlin Oprysko, *Drone Downing Imperils Trump's Iran Outreach*, POLITICO (July 18, 2019, 7:18 PM), <https://www.politico.com/story/2019/07/18/trump-warship-iranian-drone-1422145>.

mens rea terminology from modern criminal law (terms like “intentionally” or “knowingly”). But the requirement of an intent to betray the country was familiar to English treason commentators, and to American authorities. Blackstone said that “a bare intent to commit treason is many times actual treason: as imagining the death of the king, or conspiring to take away his crown.”<sup>168</sup> Early treason cases referred to treasonous intention.<sup>169</sup> Additionally, Justice Joseph Story spoke of “intention” and “treasonable purpose” while adjudicating a treason case in Rhode Island.<sup>170</sup> As Hurst has described this state of mind generally, it is an intent to “benefit the enemy’s war effort and to harm that of the United States.”<sup>171</sup>

The Supreme Court later articulated its understanding of treason mens rea in *Cramer*,<sup>172</sup> the 1945 decision arising out of the arrival and eventual arrest of the Nazi saboteurs. The Court grounded treason mens rea in the text’s use of the term “adhering.”<sup>173</sup> Justice Jackson’s Opinion stated,

[a] citizen may favor the enemy and harbor sympathies or convictions disloyal to this country’s policy or interest, but so long as he commits no act of aid or comfort to the enemy, there is no treason. On the other hand, a citizen may take actions, which do aid and comfort the enemy—making a speech critical of the government or opposing its measures, profiteering, striking in defense plants or essential work, and the hundred other things which impair our cohesion and diminish our strength . . . but if there is no adherence to the enemy in this, if there is no intent to betray, there is no treason.”<sup>174</sup>

Justice Jackson also sought to reconcile any tension between the mens rea and the overt act requirement: “Questions of intent in a treason case are even more complicated than in most criminal cases because of the peculiarity of the two different elements which together make the offense.”<sup>175</sup> Treasonous intent cannot be shown through overt acts that are negligent or undesigned.<sup>176</sup> “To make treason,” according to Justice Jackson, “the

168. 4 WILLIAM BLACKSTONE, COMMENTARIES \*35.

169. *U.S. v. Hoxie*, 26 F. Cas. 397, 399 (C.C.D. Vt. 1808) (No. 15,407); *U.S. v. Pryor*, 27 F. Cas. 628, 630 (C.C.D. Pa. 1814) (No. 16,096).

170. Charge to the Grand Jury – Treason, 30 F. Cas. 1046, 1047 (C.C.D. R.I. 1842).

171. Hurst, *supra* note 66, at 244. See also Vasanthakumar, *supra* note 59, at 208 (elaborating upon the intent to betray, and noting that it includes the defendant’s awareness that she owes allegiance).

172. *Cramer v. U.S.*, 325 U.S. 1 (1945). For excellent commentary on the *Cramer* litigation, see Crane, *supra* note 52.

173. *Cramer*, 325 U.S. at 29.

174. *Id.*

175. *Id.* at 31.

176. *Cramer*, 325 U.S. at 31.

defendant must not only intend the act, but he must intend to betray his country by means of the act.”<sup>177</sup> Treasonous intent can be inferred from conduct (including the relevant overt act itself), and one is deemed to intend the natural consequences of his actions.<sup>178</sup> The Court exculpated Cramer.<sup>179</sup>

*Cramer*, thus, leaves some ambiguity in the law of treason mens rea, jumping between what appears to be a requirement of specific intent and one of also inferring intent from the natural consequences of one’s actions. As I have argued previously,<sup>180</sup> a requirement of specific intent would be consistent not only with the meaning of “adhere” in the constitutional text, and with the desire to maintain a narrow definition of treason,<sup>181</sup> but also with the law of accomplice liability, which is the best criminal law analogue to the Constitution’s “aid and comfort” provision.<sup>182</sup> Though he does not analogize the law of accomplice liability as I do, Hurst argues that the “natural consequences formula” can be reconciled with the requirement of specific intent when placed in the context of what the individual defendant knew.<sup>183</sup> Importantly, then, the Court followed *Cramer* in two later cases that did not question *Cramer*’s language on mens rea.

In *Haupt v. United States*,<sup>184</sup> the Court sustained the treason conviction of an American father of one of the Nazi saboteurs. The father assisted his son by finding him shelter, a job, and a car, all with knowledge of the son’s sabotage mission.<sup>185</sup> Because the father acted with the purpose of assisting his son in executing the German sabotage effort, the Government was able to prove the treasonous intent to betray.<sup>186</sup> Indeed, the Court set forth evidence showing that father Haupt planned to return to Germany after the war (which he believed America would lose), that he would not allow his son to fight for the American Army and “that he would kill his son before he would send him to fight Germany.”<sup>187</sup>

And in *Kawakita v. United States*,<sup>188</sup> a dual Japanese-American citizen had traveled to Japan to pursue an education, but also took a job at a nickel company that supplied the Japanese war effort, and used American prisoners

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177. *Id.*

178. *Cramer*, 325 U.S. at 31-32.

179. *Id.* at 39-40.

180. Broughton, *Snowden Affair*, *supra* note 42, at 25-27.

181. Hurst, *supra* note 66, at 193.

182. Broughton, *Snowden Affair*, *supra* note 42, at 28.

183. Hurst, *supra* note 66, at 202-03; *see also* Vasanthakumar, *supra* note 59, at 208 (describing the Court’s approach to treason intent as the “more demanding” specific intent approach). For a different, pre-*Cramer* view, see Charles Warren, *What Is Giving Aid and Comfort to the Enemy?*, 27 *YALE L.J.* 331, 333-34 (1918).

184. *Haupt v. U.S.*, 330 U.S. 631 (1947).

185. *Id.* at 632-33.

186. *Id.*

187. *Id.* at 642.

188. *Tomoya Kawakita v. U.S.*, 343 U.S. 717 (1952).

of war as employees.<sup>189</sup> In communicating with the American prisoners of war, Kawakita made it clear that he supported the Japanese effort against America, saying, for example: “You Americans don’t have no chance. We will win the war; We will kill all you prisoners right here anyway, whether you win the war or lose it. You will never get back to the States; I will be glad when all of the Americans is dead, and then I can go home and live happy.”<sup>190</sup> Writing for the Majority, Justice William O. Douglas stated that “[o]ne may think disloyal thoughts and have his heart on the side of the enemy. Yet if he commits no act giving aid and comfort to the enemy, he is not guilty of treason.”<sup>191</sup> Justice Douglas wrote further, “He may on the other hand commit acts which do give aid and comfort to the enemy, and yet not be guilty of treason, as for example when he acts impulsively with no intent to betray.”<sup>192</sup> There, Kawakita’s treasonous intent could be inferred from his many professions of loyalty to the enemy.<sup>193</sup>

In each case, as Hurst notes in his summary of the post-*Cramer* law on treason *mens rea*, it is significant that defendants in cases like *Haupt* and *Kawakita* “were shown to have declared their animus against the United States war effort and their desire that the enemy prevail.”<sup>194</sup> Against this legal backdrop, it is easier to understand why we should be skeptical of many of today’s treason accusations. Take the example of Trump’s Helsinki meeting, which some, including respected current and former governmental officials, called “treasonous.”<sup>195</sup> Assume, for the sake of this example, that Russia is an American enemy. Assume further that the President engaged in an overt act that would aid and comfort the Russians—for example, by failing to condemn Russian election interference, or by casting doubt on American intelligence conclusions about Russian active measures, the President thereby encouraged or bolstered Russia’s fortitude in carrying out cyber-incursions or in further meddling in future American elections. The President’s state of mind in doing the act still matters.

189. *Id.*

190. *Id.* at 743. Kawakita said further: “Well, you guys needn’t be interested in when the war will be over because you won’t go back; you will stay here and work. I will go back to the States because I am an American citizen.” *Id.*

191. *Id.* at 736.

192. *Id.*

193. *Id.* at 742-43.

194. Hurst, *supra* note 66, at 246. Hurst also notes in this summary the radio-broadcast cases from the World War II era, in which Americans were convicted of treason for conducting radio broadcasts designed to spread propaganda and assist the German war effort. *See, e.g.*, *Chandler v. U.S.*, 171 F.2d 921 (1st Cir. 1948); *Best v. U.S.*, 184 F.2d 131 (1st Cir. 1950). As Hurst notes, although *Chandler* and *Best* argued that their broadcasts would benefit the United States, this did not negate their intent to assist Germany in winning and the United States in losing. Hurst, *supra* note 66, at 246. This was sufficient for proof of the treasonous intent, even if combined with a non-treasonous motive. *Id.*

195. Zhao, *supra* note 23; Lillis, *supra* note 23.

If it could be proven that the President sought to protect the Russian regime from greater scrutiny, or bolster its fortitude, so that it could continue to pursue harmful hostile action against the United States, the treason charge could gain greater traction, though it would still encounter the “enemy” problem. On the other hand, the President’s actions in Helsinki could arguably reflect the sincere, though perhaps foolish, belief that his conduct would help improve United States-Russia relations; or help secure Russian cooperation in American counterterrorism efforts; or ensure Russia’s help with other diplomatic or security matters. If that is the case, then the President has not done the act with the intent to betray America. That is true even if his act actually aids the Russians in their endeavor to harm American interests, or otherwise gain some strategic geopolitical advantage. The President may have been guilty of poor judgment or foolhardiness, but being naïve is not synonymous with being a traitor.

The instances in which President Trump has lobbed treason accusations are even weaker with respect to treason *mens rea*. The public commentary has not focused on it, but in *none* of these instances—for example, judicially authorized surveillance of Trump campaign officials, law enforcement agents privately expressing hope for the election of another candidate, a newspaper publishing reports about an American attack on a Russian grid<sup>196</sup>—is there evidence of an intent to betray the United States, that is, “adherence” to an American enemy. In none of these instances does there appear to be any evidence that these individuals desired enemy success at the expense of the United States, or that they intended harm to befall the United States so as to favor an enemy. So, quite apart from the enemy problem identified earlier, the President’s public accusations of treason do not even attempt to grapple with the problem of proving treasonous intent.

Of course, the Court has acknowledged that sometimes the overt act will manifest the intent to betray, and this is sufficient for proof of the treason *mens rea*.<sup>197</sup> It is also true that the intent to do the underlying act and the intent to betray will often converge by inference, as the dual intents converge in the conventional criminal law of accomplice liability.<sup>198</sup> But as in the Helsinki example, there may be cases where the act of aid and comfort, even if done intentionally, is not done with and does not manifest any intent to betray, but rather has some other—perhaps misguided, otherwise unlawful, or entirely innocent—objective. This is not to say that a mixed objective cannot be treasonous. In *Haupt*, for example, Hans claimed a fatherly desire

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196. See *infra* Parts I and II.C.

197. See *Cramer*, 325 U.S. at 31-32 & n.42.

198. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.05[A], at 474 & n.77 (7th ed. 2015).

to care for the well-being of his son Herbert.<sup>199</sup> But this was not mutually exclusive from an intent to betray the United States, by helping to facilitate Herbert's sabotage mission on behalf of the German Reich (combined with sentiments suggesting Hans was loyal to the Germans).<sup>200</sup> So, even in cases of multiple potential purposes, or a purpose mixed with motive, treason remains a potential charge so long as one of the purposes is an intent to betray.<sup>201</sup>

Still, though, the high bar of treason mens rea supplies yet another reason for more prudent treason talk; it is not an insurmountable hurdle, as *Haupt* and *Kawakita* demonstrate. Once we find facts that can be placed in the context of intentional aid to a foreign terrorist organization, or other group or nation actively engaged in open hostilities with the United States, we see a more plausible convergence of the elements—including the intent to betray.

## V. Conclusion

Promiscuous talk of treason has become rampant, particularly on the presidential Twitter account. On the upside, although non-prosecution of treason for over a half-century might lead one to wonder whether treason was effectively dead, this treason-talk has at least kept treason alive. Keeping treason alive is especially important if we value the criminalization of national disloyalty, and are willing to recognize the legitimate cases of treason in our midst.

But merely keeping treason alive with careless rhetoric will never be enough justify its enforcement. Using treason rhetoric merely as a colloquial epithet or as a political weapon will only serve to relegate treason to lower-order politics, or create an atmosphere in which it is understood merely as a tool for strongmen or electoral opportunists. These effects will delegitimize treason as a crime worthy of serious prosecutorial consideration, which will further undermine, rather than strengthen, the enforcement of a criminal law of national disloyalty. Greater care is of special necessity in light of the underdeveloped and often complex nature of American treason law, where questions about who is an American enemy, and whether someone intended to betray the country with his actions, remain essential questions with often elusive answers.

There are important conversations still to be had about American treason in both the political and legal arenas. If we desire an American treason law that is sufficiently robust to use responsibly in an appropriate case—and there are good reasons to think that we should—then public talk

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199. *Haupt*, 330 U.S. at 641-42.

200. *Id.* at 642.

201. Hurst, *supra* note 66, at 245-46.

about treason, particularly amongst political and governmental leaders, must align better with the constitutional text and with the law's mandates about the limits of treason as a criminal sanction. Public discourse about national loyalty, and of treason as a particular form of national betrayal, can be valuable—even crucial—to promoting national unity and security. That discourse should reach for the Constitution, not ignore it.