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Fear and Loathing in America: Application of Treason Law in Times of National Crisis and the Case of John Walker Lindh

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If the crime of high treason be indeterminate, this alone is sufficient to
make the government degenerate into arbitrary power.

—Charles Montesquieu, *The Spirit of Laws*¹

**Introduction**

It has been two years since the harrowing terrorist attacks on
American soil that are collectively referred to simply by the date on
which they occurred: 9/11. That day sent the country reeling through a
spectrum of emotions which, in turn, set off a chain of reactionary and
reparatory actions. Sadness caused people to take stock of, and make
changes in their lives. Fear led to intensified security measures and
broad legislative reforms affecting travel, privacy rights and immigration.
Doubt caused an edginess, a suspicion that resulted in questioning and
jailing Muslim students, business owners, and workers, many of whom
came here decades ago, raised families and forged strong ties in their
communities. Anger spurred a desire for retribution. In the weeks and
months after the September 11, 2001, American forces cleared caves in
some of the most remote regions of Afghanistan and won battles in the
country’s major cities. Still, vindication and peace of mind required the
capture and prosecution of the attacks’ alleged mastermind, Osama bin
Laden. Failing that, attention turned to John Walker Lindh (Walker).

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Both as an American and a Taliban soldier Walker is—to so many—a traitor. While the desire for retribution is unsurprising and human, what has, at times, been shocking is the resulting disregard for both the letter and spirit of the law. After the capture of Walker in Afghanistan, politicians and columnists, in emotionally charged speeches and editorials, demanded he be charged with treason, a conviction that can carry the penalty of death. Many, even some in the legal profession, were angered and stunned by the government’s decision not to bring a treason charge. The message in the public outcry and the pressure from politicians reeked of misplaced vengeance, and was riddled with accusations that the government was being too soft on Walker. In truth, however, the reason Walker was not charged with treason was simply because the law would not allow it.

As the controversy over the Walker case has shown, and perhaps because cases of treason arise almost exclusively in times of great political and social turmoil, there is a tremendous lack of understanding of what constitutes the offense of treason. Surprisingly few people can articulate not only the reason it would be impossible to charge Walker with treason but, more importantly, what constitutes treason under the law.

This Note examines the elements that must converge in order to consummate the crime of treason and the limited and challenging ways to prove those elements in the courts. This examination will demonstrate the intent of the framers of the Constitution to shield Americans from a government that might abuse its power with overreaching treason prosecutions. Treason is the only crime defined in the Constitution because the framers sought to protect against the dual dangers of a flexible or ambiguous treason law. First, since “there is no crime which can more excite and agitate the passions of men than treason” a carefully crafted law incorporated into the Constitution ensures against the danger that the inevitable hysteria that accompanies a treason charge will not reach the seat of justice. Second, the American treason law protects against the historical ambiguities in the English law that allowed for the often-brutal suppression of political and religious speech.

2. See, e.g., Douglas W. Kmiec, Try Lindh for Treason, It’s Not Too Late, NATIONAL REVIEW ONLINE, at http://www.nationalreview.com (Jan. 21, 2002) (Kmiec is Dean of the law school at Catholic University and former constitutional legal counsel to Presidents Bush and Reagan).


6. Ex parte Bollman, 8 U.S. (1 Cranch) 75, 98 (1807).
Part I of this Note provides background information on these dual dangers of treason. This section discusses the long-held notion that treason is the greatest of crimes against humanity and, as a result, possesses the unique power to excite hatred and fear against those charged with the crime. Part I also looks at the historical application of treason at common law as a powerful tool in squelching dissident ideas. Part II details the careful manner by which treason came to be defined in the Constitution in reaction to these dual dangers. This section demonstrates the intent of the framers to provide safeguards to ensure that, (1) particularly in times of national crises, prosecutors and courts would disregard the hysteria of the frightened, angry public in carrying out treason trials, and (2) the history of misuse of treason in England would not repeat itself in America. Part III uses the Walker case to illustrate how the operation of the protections woven into the treason law preclude charging him with treason. Part IV looks at treason law in the contemporary setting. This section demonstrates the persistent danger of ignoring or even extending treason laws beyond their definitional boundaries, using examples from the last century to illustrate the potential for frightening results. The discussion in this section concludes with a brief survey of some of the alternative laws available to prosecutors that allow for deterrence and punishment of crimes that threaten national security, while protecting against abuse of the highly inflammatory crime of treason.

I. Background of the Law of Treason

A. Dual Danger 1: The Power of Treason

Treason has long been considered the highest of crimes. Lord Hale wrote, "the high crime of treason is the greatest crime against faith, duty and human society." Analysis of why treason has been consistently placed at the top of the catalogue of crimes, while sometimes focusing on government security, generally centers on the element of betrayal. In writing about the discovery of Walker among the Taliban, columnist Joan Ryan expresses what she believes causes some of the uproar that inevitably surrounds accusations of treason:

Treason, conspiring to kill an American abroad, providing support to a terrorist organization that results in American deaths—they are all the legal expressions of something much more personal, an offense that

11. Robert Nolin, Founding Fathers Made Treason Difficult to Prove; Rarely Used Law Crafted to Prevent Abuse, SUN SENTINEL (Ft. Lauderdale, Fla.), Dec. 16, 2001, at 1F.
stirs some ancient ganglia deep inside us, triggering emotions that reach back to the beginning of time.\textsuperscript{12}

It is therefore not surprising that treason convictions have almost universally carried the death penalty.\textsuperscript{13} The method of execution for treason in this country at the time the Constitution was drafted is illustrative of the intense sense of betrayal and the accompanying primeval response described by Ryan. A traitor was hanged, then cut down; while still alive his entrails were removed and burned after which he was beheaded and quartered.\textsuperscript{14} The methods used in modern executions are more humane, but the word “treason” and its connotations are still highly charged and the tendency to inflame juries and the public sentiment remains.

B. Dual Danger 2: The Constructive Treason Experience at Common Law

In the first chapter of his book, \textit{The Law of Treason in the United States}, which represents the compilation of his vast expertise in this area,\textsuperscript{15} James Willard Hurst notes that “[T]he framers did not choose to contrive their own definition of the crime of attempting subversion of the government.”\textsuperscript{16} Instead, definition of the crime was drawn from English common law.\textsuperscript{17} However, Hurst goes on to note that the early American view of treason was as much shaped by what the colonies sought to reject as that which they sought to retain from the English law of treason.\textsuperscript{18} Thus, while the architects of the Constitution borrowed many concepts and even some of the exact language from the English Statute of Treasons, they also declined to adopt portions of the Statute, thereby renouncing part of the English experience.\textsuperscript{19}

Notably, English law made compassing the death of the King a treasonable offense. “In light of the record, it is too shallow an explanation to hold that this omission occurs simply because that provision had no analogue in the republic.”\textsuperscript{20} Closer examination reveals that although the Statute of Treasons was intended to curb the power of treason laws, to punish not just acts against the state, but also the

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15. Hurst is perhaps the most prominent scholar on the subject of American treason law. He was instrumental in the compilation and analysis of historical materials which accompanied the U.S. government’s brief on reargument of \textit{Cramer v. United States}, 320 U.S. 730 (1943). \textit{Hurst, supra note 10, at vii.} \textit{Cramer}, which is discussed in greater detail later in this Note, was the first writ of certiorari granted by the Supreme Court for review of a treason conviction. \textit{Id.} As newcomers to the treason law, the Court in \textit{Cramer} sought significant background materials on the English and American treason offense to inform their deliberations in that case. \textit{Id.} Hurst worked with the Solicitor General and other legal scholars in the preparation of those materials. \textit{Id.}
16. \textit{Hurst, supra note 10, at 4.}
17. \textit{Id.}
18. \textit{Id. at 5.}
19. \textit{Id.}
20. \textit{Id.}
expression of political beliefs contrary to the ruling power, it often failed
to do so.21 Political factions in England repeatedly "subject[ed] dissident
speech to criminal prosecution" construing the phrase "compassing the
death of the king" to include mere speech in what was commonly
referred to as "constructive treason."22

Mindful that a treason law crafted from the language of the Statute
of Treasons might invite prosecutions for constructive treason, the
Constitution's framers rejected an analogous provision as antithetical to
the system of government they sought to establish.23 Thus, in the spirit of
permitting open discourse and even political opposition, American
"[j]udges have accordingly denied the general relevance of English
precedents peculiarly derived from the charge of compassing the king's
death and have agreed that mere expression of beliefs cannot be deemed
'treason' within the constitutional definition."24

In sum, while the American law of treason is built on the framework
provided by its English precedent in the Statute of Treasons, it has been
adapted and interpreted in ways that are acutely mindful of its history of,
and power to, suppress political ideas.25

II. Tempering the Power of Treason: The Constitutional
Definition of Treason and Interpretation in the Courts

A. Constitutional Definition of Treason

Treason is the only crime defined in the U.S. Constitution.26 Article
III, Section 3 of the Constitution delineates the two acts which constitute
treason, the methods for proving those acts, and gives Congress the
power to set punishment within certain limitations:

Article III, Section 3, Clause 1:

Treason against the United States, shall consist only in levying War
against them, or in adhering to their Enemies, giving them Aid and
Comfort. No person shall be convicted of Treason unless on the
Testimony of two Witnesses to the same overt Act, or on Confession in
open Court.27

Article III, Section 3, Clause 2:

The Congress shall have Power to declare the Punishment of Treason,
but no Attainder of Treason shall work Corruption of Blood, or
Forfeiture except during the Life of the Person Attainted.28

STAN. L. REV. 139, 155 (1986).
22. Id. at 155 & n.90.
23. Id.
24. Id. at 156-57.
25. Id.
26. Stephan v. United States, 133 F.2d 87, 90 (6th Cir. 1943).
28. Id. cl. 2.
The following analysis will deal only with clause 1 of the treason offense, which contains the real substance of constitutional protections against the misuse of treason.

(I) Evidentiary Proof of Treason: Overt Act and Two-Witness Requirements

Both components of the treason definition—levying war and adherence to the enemy—are subject to the evidentiary safeguards imposed by the second portion of the treason definition contained in Article III, Section 3, Clause 1. Thus, before delving into the meaning of the first section of that clause, it is instructive to survey these applicable standards of proof.

The second part of Clause 1, mandating that “[n]o person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court,” represents a combination of the limitations imposed by the Statute of Treasons as well as an additional safeguard originating at the Constitutional Convention. The Statute of Treasons contained the overt act requirement as well as the two-witness requirement. However, the founding fathers took these protections a substantial step further by requiring that there be two witnesses to the same overt act.

The two-witness rule provides a considerable safety valve in treason prosecutions by ensuring that an individual will not be convicted upon the testimony of a single, biased, or self-interested witness. This restrictive measure was designed to avoid situations in which treason would be “misused for private ends by those willing to perjure themselves and accuse others of uttering treasonable thoughts.” The two-witness rule requires not only the sworn testimony of two people regarding a defendant’s traitorous activities, but both witnesses must testify about the same treasonous act. Thus, testimony about two separate acts accomplished for the same ends will not suffice, except perhaps where the prosecution can show “a closely woven net of behavior.”

Finally, the overt act requirement insists that spoken words alone cannot be the basis for a treason conviction as they are “inherently too unreliable in witnesses’ memories to be a just basis for establishing so

29. Id. “No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.” U.S. CONST. art. III, § 3, cl. 1.
31. Id.
32. Id. at 24.
35. HURST, supra note 10, at 250.
36. Id. at 251.
high a crime." The Supreme Court interpreted the overt act clause as requiring proof of both the intent to betray and a manifestation of that intent in an act that provides aid and comfort to the enemy. In *Cramer v. United States*, discussed in greater detail later in this Note, Justice Jackson artfully lays out the distinction:

A citizen intellectually or emotionally 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 and 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.

These standards of proof begin to reveal the distrust and caution with which the framers approached the topic of treason. However, to fully understand the protections and limitations of the treason law, it is critical to look carefully at the two acts that constitute treason, laid out in the first clause of the definition.

(2) **Levying War and Adherence to the Enemy, Giving Them Aid and Comfort**

The specific defining phrase in Article III, Section 3 which states that "[t]reason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort" was taken directly from the English Statute of Treasons. As discussed in Part I, the English statute, which was adopted in 1352, was intended to clarify and limit the kinds of offenses punishable by treason. There was well-founded concern that reigning powers might expansively define treason to increase their power and authority. Although, as previously noted, this limiting language did not always prevent factional political parties from punishing political speech as treason, it did do some of the work in providing greater certainty with respect to punishable offenses and greater protections for private action. It was those specific protections and limitations that the founding fathers sought to carry over and instill in the American law when they adopted the language from the English statute.

There are two acts specified in the treason definition that, by virtue of the use of the word "only," are the exclusive acts that constitute the

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37. *Id.* at 25 (interpreting EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 24 (5th ed. 1671)).
39. *Id.*
40. United States v. Greathouse, 26 F. Cas. 18, 21 (C.C.N.D. Cal. 1863) (No. 15,254).
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
crime. Thus, treason will "consist only in levying war" against the United States or "adhering to their enemies, giving them aid and comfort." Such constrictive language was intentionally crafted to prohibit the legislature and the judiciary from creating new treasons.

The first prong of the treason offense, that of levying war against the United States, has been interpreted narrowly. In United States v. Hoxie, the court pointed out that both the English and American authorities make clear that, in order to sustain a charge of treason under this prong, "war must be actually levied." In Hoxie, the court refused to extend "levying war" to the direct violation of a national embargo, even where that violation was accomplished through "armed opposition to the national troops seeking to enforce it." Acknowledging the difficulty, absent a state of open war, in distinguishing between treason and other offenses in opposition to the government, the court attempted—through description—to brighten the lines:

\begin{quote}
Every one will at once perceive a very wide separation, between regular and numerous assemblages of men, scattered over large portions of the country, under known officers, and in every respect armed and marshaled in military and hostile array, for the avowed purpose not only of disturbing and arresting the course of public law... by forcibly compelling the officers of government to resign, but by intimidation and violence, of coercing its repeal.
\end{quote}

This is contrasted with "a sudden, transient, weak, unmilitary, and unsystematized resistance, and that in a solitary instance, and for the single object of personal emolument."

These descriptions provide insight into the resistance by the courts to extend the levying war prong of treason to include actions of insurrection that do not carry with them the trademarks of an attempt to overthrow the government. While the court encourages the use of other criminal laws to punish such offenders, it admonishes the jury not to extend the law of treason where the prosecutor cannot prove the intent to forcibly overcome the general laws and the government of this country. To do so, the court warned, would set a dangerous precedent for an expansive interpretation of treason.

Hoxie stands for the idea that the phrase "levying war" against the United States in the treason context does not include armed opposition to the laws of this country. Instead, levying war can only be found in "the embodying of a military force, armed and arrayed, in a warlike

45. Stephan v. United States, 133 F.2d 87, 90 (6th Cir. 1943).
49. 26 F. Cas. 397, 398 (C.C.D. Vt. 1808) (No. 15,407).
50. Id. at 399.
51. Id. at 400.
52. Id.
53. Id. at 400–03.
54. Id. at 402.
manner, for the purpose of forcibly subverting the government, dismembering the Union, or destroying the legislative functions of congress." There must be an intention to accomplish one of these aims and "[t]hese troops should be so armed, and so directed, as to leave no doubt, that the United States, or their government, were the immediate object of their attack."56

In addition to this narrow reading of the levying war prong, it is important to reiterate that the constitutional safeguards discussed previously are applicable when such a charge is brought. In other words, if the government can satisfy the definition outlined in Hoxie, it must still meet the two other burdens of proof imposed by the constitutional definition of treason, namely the overt act and the two-witness rule.57 A series of cases arising out of the famous treason trial of Aaron Burr and his co-conspirators give context and contour to these standards of proof, as they weigh on the levying war component of the treason offense.58

The basis for the charge against Burr was an alleged conspiracy to launch an insurrection against the government of the United States.59 Burr had resigned as Vice President at the end of Thomas Jefferson's first term.60 He is then said to have traveled west by boat, horseback, and foot seeking support for his plan to sever the western states from the Atlantic states and, conquering Mexico, to bring this new territory under sovereign rule.61 Trusted co-conspirators who advised Jefferson of Burr's plans thwarted Burr's conspiracy.62 At trial, the government's proof consisted of witness testimony to the effect that Burr had raised a force of about 25 armed men who had congregated on an island in Virginia with the intent to launch their rebellion.63 However, the evidence

55. Id. at 398 (emphasis added).
56. Id. See also United States v. Bollman, 24 F. Cas. 1189 (C.C.D.C. 1807) (No. 14,622). Justice Fitzhugh made clear that, in addition to this assemblage, to sustain a charge of levying war requires proof of state of mind. Id. at 1195. To illustrate the point, Fitzhugh drew an analogy between proving treason and proving murder. Id. Reciting the established proof requirements to sustain a murder charge—the presence of the mens rea element in addition to the act that caused the death—Fitzhugh asserted:

[N]o degree of violence, however atrocious, no enlisting or marching men, no injury, if limited in its object to personal rivalry, or even extensive enough in point of locality to contemplate or threaten the opposition and destruction of the laws or government of any one of the United States, will amount to treason against the United States. It is the intention, alone, which fixes the grade of the offence.

Id.

57. U.S. CONST. art. III, § 3.
60. Id.
61. Id.
62. Id.
63. Id.
showed that Burr himself was not present on the island where these men had assembled.64

In examining the meaning of “levying war” and analyzing whether Burr’s actions, despite his absence from the island of armed men, could fall under that meaning, Chief Justice Marshall referred to the origins of the phrase in the Statute of Treasons and undertook a lengthy survey of English and American authorities.65 He concluded that in order to be guilty under the strict constitutional standards of the levying war prong, the government must prove Burr committed an overt act of levying war.66 He went on to say that the Constitution requires such proof to be established by the defendant’s own sworn testimony or by the testimony of two witnesses.67 Thus, where—as here—the assemblage of armed men was proved by the requisite number of witnesses, such testimony could be submitted to the jury for a determination whether that assemblage amounted to a levying of war.68 However, since there is no proof that the accused was present at that assemblage, “the overt act is not proved by a single witness, and . . . all other testimony must be irrelevant.”69

Marshall’s decision in the Burr case explains that while the question of whether certain actions amount to a levying of war is one of fact for the jury, such a question will only reach a jury where the government has satisfied the two-part constitutional test for proof, specifically that there was some overt act (words are insufficient) and that there are two witnesses who will testify to that same act.

Thus, reviewing the multiple components of proving the “levying war” prong of the treason offense in light of the Constitutional language and the case law, the test seems to be: (1) “an assemblage of men,” that is “prepared and intending to act with force[;]”70 (2) with the intent to do some treasonable act; (3) at least one overt act of “levying war” by the specific defendant; and (4) testimony of two witnesses to that same overt act.

(3) Adhering to the Enemy, Giving them Aid and Comfort

With respect to the second prong of Article III, Section 3 involving “adhering to the enemy, giving them aid and comfort,” the courts have been similarly restrictive in their interpretation.71 The term “enemies” has been limited to “the subjects of a foreign power in a state of open hostility with us.”72 The term would not include “rebels in insurrection

64. Id.
65. In re Burr, 8 U.S. (4 Cranch) 470 (1807) (Chief Justice Marshall’s opinion on the Motion to Introduce Certain Evidence in the Trial of Aaron Burr for Treason).
66. Id.
67. Id.
68. Id.
69. Id.
70. Id. at 483-84.
71. See HURST, supra note 10, at 3.
72. United States v. Greathouse, 26 F. Cas. 18, 22 (C.C.N.D. Cal. 1863) (No. 15,254).
against their own government. An enemy is always the subject of a foreign power who owes no allegiance to our government or country.”

As with the “levying war” prong, “adhering the enemy” contains an intent element, i.e. alliance with the enemy and a conduct requirement, giving them aid and comfort. The conduct component serves to fulfill the overt act requirement in the second clause of the definition such that the government must prove an overt act of giving aid and comfort.

In Cramer v. United States, the Supreme Court directly addressed the meaning of this language in overturning the defendant’s conviction for treason. Although born in Germany, Anthony Cramer was a naturalized U.S. citizen. His initial conviction was based on his relationship with two German saboteurs during World War II. The two men had come to the United States by submarine in 1942 with the intention of interfering with war efforts by disrupting American industry. One of the saboteurs had previously lived in the United States and had been Cramer’s friend, roommate, and business partner. It was this man who contacted Cramer after his arrival on U.S. shores, asking him to place some money in a safe deposit box and to contact his fiancée on his behalf. Although Cramer did both these tasks, the Court concluded there was insufficient proof he had done them with the intent to betray the United States. Moreover, it was not clear these acts had even the inadvertent effect of betraying his country by giving aid and comfort to the enemy. Finally, the Court noted that even presuming the overt act evidence against Cramer had been sufficient, the government had failed to meet the two-witness requirement.

Thus, Cramer stands for the proposition that a conviction under the prong of the treason offense dealing with adherence to the enemy can only be sustained where the defendant acted with the intent to betray his country, and his actions actually provided aid and comfort to the enemy. Proof of these overt acts is subject to the same procedural safeguards applicable to the “levying war” prong (two witnesses testifying to the same overt act).

In another World War II-era case, Kawakita v. United States, the Court held that a sufficient measure of an overt act of adherence is

73. Id.
74. Id.
75. 325 U.S. 1 (1945)
76. Id. at 3.
77. Id.
78. Id.
79. Id. at 3-4.
80. Id. at 5.
81. Id. at 37-39.
82. Id.
83. Id. at 38.
whether it gives the enemy the heart and courage to go on with the war.\textsuperscript{84} In \textit{Kawakita}, the defendant was a U.S. citizen who went to Japan to visit relatives.\textsuperscript{85} Due to the outbreak of war between the two countries, he was prevented from returning to the United States. Kawakita remained in Japan for the duration of the war and worked during that time for a corporation that produced materials for Japan's war efforts.\textsuperscript{86} His conviction for treason rested on numerous overt acts of brutally abusing American prisoners of war who were forced to work in the manufacture of such materials.\textsuperscript{87} The Court in \textit{Kawakita} found that the acts "showed more than sympathy with the enemy, more than a lack of zeal in the American cause."\textsuperscript{88} The defendant's actions, according to the Court, "tended to strengthen the enemy and advance its interests."\textsuperscript{89}

\textit{Kawakita} provides this additional contour to the test mandated in the Constitution and elaborated on in \textit{Cramer}. The test under the crime of treason for adherence to the enemy, giving them aid and comfort can be defined in the following way: The government must prove, by the testimony of two witnesses to the same act, (1) that there was an overt act of aid and comfort to the enemy, (2) performed with the intention of betraying the United States, (3) which has the actual effect of providing aid and comfort to the enemy.

In conclusion, it is evident that the framers of the Constitution were acutely aware of a legal history in England tainted by arbitrary prosecutions for treason as well as the peculiar power of a treason charge to engender a lynch-mob mentality.\textsuperscript{90} Fearing the proliferation of constructive treasons common under the reign of Richard II, which included prosecutions for spoken and written words critical of the King, the framers explicitly confined the constitutional definition of treason to acts that were intended to overthrow the government. In addition, the framers imposed numerous procedural safeguards to minimize the risk of convictions driven by the flaring passion treason invokes.\textsuperscript{91}

\textbf{B. Intent of Framers Still Valid in Modern Times}

For at least two reasons it is critical to hold true to the intent of the framers and the early interpretations of treason law. First, the interconnectedness of the modern world does not lend itself to earlier notions of strict national allegiances and its attending obligations. "We

\textsuperscript{84} 343 U.S. 717, 741–42 (1952) (relying on the test established by Lord Chief Justice Treby in Trial of Thomas Vaughan, 90 Eng. Rep. 1280, 1281 (K.B. 1696), as a sufficient measure of the overt act required by the Constitution).
\textsuperscript{85} Id. at 720.
\textsuperscript{86} Id.
\textsuperscript{87} Id. at 737–38.
\textsuperscript{88} Id. at 740.
\textsuperscript{89} Id.
\textsuperscript{90} Cramer v. United States, 325 U.S. 1, 30 n.41 (1945); Hurst, supra note 10, at 30.
live increasingly in ‘one world’ and lines of demarcation become blurred—the personal lines of loyalty as well as the political or national boundaries.” In order for Americans to engage happily and productively in this global community, the parameters of legally protected behavior must remain static. Legal decision-making must be predictable so individuals can rely on the law when they act and are not punished after the fact for what they believed at the time was lawful.

Second, the U.S. Constitution affords criminal defendants due process under the law. Statutes and case law have repeatedly reinforced the idea that our adversarial system requires the government to prove their case to a jury beyond reasonable doubt. Our system takes pains to select juries that are impartial and that reasonably represent a cross-section of society. In this system—that values objectivity and evidence, that allows the defendant to confront all witnesses against him, that rejects hearsay and provides every individual charged with a criminal offense the right to an attorney and the right not to incriminate himself—unstudied charges of treason are incongruous. The capacity of treason to ignite hatred and loathing makes it incumbent upon lawyers and judges to protect criminal defendants against its abuse. This, in turn, protects the system of criminal procedure we have carefully crafted through shared values and experience.

The risk associated with a treason charge is analogous, in one way, to charges of sexual molestation by a student against a teacher. The individual will carry the stain of their suspected betrayal forever, even if eventually acquitted. Whether true or not, once the suggestion has been made, the charge is “deemed so opprobrious, that...it subjects him to suspicion and hatred.” Moreover, in the case of treason, which almost always arises in times of political excitement, “acts of a very subordinate nature are often, by popular prejudices as well as royal resentment, magnified into ruinous importance.”

III. Why John Walker Lindh Is Not a Traitor under the Law

Walker’s case was an easy target for political commentators and the public seeking to lay blame. As Walker’s lawyer, James Brosnahan, commented, “they had no one to blame for their hurt.” Although Walker was not charged with treason, he has been labeled a traitor by many, including Senators Barbara Boxer and Hillary Rodham Clinton,

92. JOHN BULLOCH, AKIN TO TREASON, at xv (1966).
93. U.S. CONST. amend. V.
94. Ex parte Bollman, 8 U.S. (4 Cranch) 75, 98 (1807).
96. Id.
and will face the rest of his life branded with that mark.\footnote{Weinstein, supra note 91 ("The Bush administration appears to be moving cautiously despite widespread outcry from the public and politicians, ranging from Sen. Hillary Rodham Clinton (D-N.Y.) to Senate Minority Leader Trent Lott (R-Miss.), in favor of a treason prosecution."); Epstein, supra note 4.} But treason is not a tag that can be applied to an act by politicians and the public. As previously explained, it is a specific, constitutionally established legal standard.\footnote{See U.S. CONST. art. III, § 3.}

The government’s actual charges against Walker included conspiring to kill Americans abroad and aiding in a terrorism network.\footnote{Grand Jury Indictment, United States v. Lindh, No. 02-37a (E.D. Va. Feb. 5, 2002).} Responding to the lack of a treason charge in the indictment, former Representative Bob Barr wrote, “In failing to charge Walker with treason, the United States has not only forfeited the opportunity to seek the death penalty against him, but also has sent a clear message to future traitors that treason, as outlined in the Constitution, will rarely be prosecuted again.”\footnote{Robert Barr, John Walker: The Definition of Treason, GWINNETT CITIZEN, Sept. 10, 2002, http://www.gwinnettcitizen.com (on file with Hastings Law Journal).} Barr is a lawyer and, at the time he wrote those words, an elected official. Thus, he presumably represented the views the voters from his district and conceivably he was expressing a widely held opinion. In fact, the public opinion polls on the particular issue of whether to charge Walker with treason bear this out. One poll showed over one-third of Americans favoring such a charge.\footnote{Gary Langer (analysis), Poll: Charge Walker: Trial Favored for “American Taliban”, ABCNEWS.COM, at http://abcnews.go.com (Dec. 10, 2001) (on file with Hastings Law Journal).} Considering that 21% of those polled declined to state an opinion, this represents a large number of the answering participants.\footnote{Id.}

Many believed, as Barr did, that it was unlikely the government would ever have such a consummate case of treason before it. Moreover, many believed that a treason charge in the Walker case was needed to send a message to all would-be traitors that if they are caught taking up arms against the United States, they will be put to death.\footnote{Barr, supra note 101.} This argument, however, fails to recognize that (1) the legal standard for sustaining a charge of treason could not be met in the Walker case, and (2), because of the stigmatizing power of the treason charge, it is not only irresponsible but dangerous to apply the label to an individual without first evaluating whether the legal standard can be satisfied.

\section*{A. Legal Standard as Applied to the Case of John Walker Lindh}

First, as discussed, the purpose of the treason clause was to protect against governmental abuse and extension in just such times as we faced following the attacks of September 11, 2001. Our sense of security was rattled, and our faith in those branches of government we trusted to protect us was severely undermined. We reacted defensively and from a
moral high ground, claiming we had to protect the principles of freedom and individual rights for which we were attacked.\textsuperscript{105} John Walker Lindh was thrown into this roiling rhetoric of patriotism and anger and the facts of his case dissolved. He became an indistinguishable part of the plot to destroy America.\textsuperscript{106} In describing his experience representing Walker, James Brosnahan, commented on the danger this kind of passion without process.\textsuperscript{107} It is fortunate for all Americans the treason clause was incorporated into the Constitution and our courts have held true to the intent of the framers, because this is not the first time public hysteria has threatened to undermine our criminal justice system. A case now nearly 100 years old, involving treason charges, illustrates the wisdom of the Constitutional Convention in anticipating this repeating danger:

The class of treason with which we are dealing in this case only takes place, and can only take place, during war—when war is on. Naturally passion is high; patriotic men and women are concerned with the safety of their country; and in the excitement it is but human nature sometimes to lose sight of the calm requirements of the law, and convict as the expression goes, on general principles . . . .\textsuperscript{108}

That decision goes on to laud the safeguards in the Constitution that ensure that convictions for treason are based on overt acts, not personally held beliefs.\textsuperscript{109} The fact that Walker left the United States with his religious convictions to seek out and live among those who shared the same beliefs, no matter how extreme or how opposed to those of his own country, can never make him a traitor. To appease those, such as Barr, who called for treason charges, the government would have been required to fit Walker’s conduct into the confines of the treason law as outlined above.

Specifically, if the government had charged Walker with treason, it would have had to prove acts \textit{against Americans} or the United States.\textsuperscript{110} Showing that Walker trained in Al Qaeda camps and fought with the Taliban is insufficient, as that may only have proved his participation in an ongoing battle to oust the Northern Alliance.\textsuperscript{111} If the government were somehow able to prove beyond a reasonable doubt that Walker’s actions were directed at Americans, it would also be required to show those acts were voluntary \textit{and} that they were done with the requisite


\textsuperscript{106} See id.

\textsuperscript{107} Brosnahan, supra note 97. Brosnahan said Walker was held in Afghanistan and interrogated despite a letter Brosnahan sent to the Attorney General advising him that he was representing Walker. Id.

\textsuperscript{108} United States v. Fricke, 259 F. 673, 677 (D.C.N.Y. 1919).

\textsuperscript{109} Id.


This mental state includes not only intent to commit the specific act, but an additional level of intent to betray the United States. Further, the government would have to show that these intentional acts actually provided the enemy with aid and comfort. Applying the Kawakita test, no one could seriously argue that Walker’s involvement gave Al-Qaeda the heart and courage to go on with the war.

It is apparent that, with or without Walker, Al-Qaeda would have waged a war of terrorism on the United States. Thus in the Walker case it is entirely accurate, from what we currently know, that the United States did not indict him on charges of treason. Unfortunately, the public figures that prematurely branded Walker made him the focus of so much anger and feelings of betrayal that the plea bargain he has entered into with the government was likely an acknowledgment of the difficulty he would face in obtaining a fair trial. This is the second problem with the early and frequent assertions that Walker should be charged with treason: Given the high status of the crime and gravity of the punishment, it is dangerous to apply the label without some real belief that the legal standard can be met. As discussed in the following section, to do so not only ignores the rule of law but unfairly besmirches the defendant.

**B. The Power of Treason**

In a column in 2002, Joan Ryan commented, “Whatever happens in the courts, [Walker] has already been sentenced. Fair or not, true or false, he will bear the stain of betrayal forever.” It is not difficult to imagine that Walker and his lawyers felt that stain was too bold and ugly for them to risk coming before a jury.

From what we currently know, Walker played no operative part in the prison uprising that led to the death of American agent Michael Spann. Nor is there evidence that he was ever engaged in any other acts of violence against American soldiers in Afghanistan. It seems the only way to explain the uncommonly great weight that was placed on his presence at the prison and ideological involvement with the Taliban was that we had not captured Osama bin Laden. For many, Walker became the embodiment of the evil behind the attacks of September 11, 2001. The politicians who sought to provide answers and proof of action to their constituents sacrificially offered up John Walker Lindh. He fulfilled the public need to hold someone responsible for the pain and fear and frustration while Bin Laden remained, and still remains, elusive.

112. See supra Part II.A.(1) and accompanying notes.
113. Id.
114. Id.
117. Weinstein, supra note 91.
118. Id.
Yet, as the careful crafting of the treason clause teaches us, even in times of war we cannot allow the well-established rules of evidence and procedure that are the anchor of fairness in the criminal justice system be bulldozed by a frenzied public. Studying the language and tracing the roots of the Treason Clause serve as a reminder that our system does not tolerate making Walker an example or scapegoat at the expense of his due process rights. However little an individual may care about Walker's own rights, there should be real concern about the erosion of the judicial system itself when public outcry is allowed to seep in and affect judicial outcomes. As Thomas Paine once wrote, "He that would make liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach himself."119

We may not understand what Walker did; we may find his involvement with Al-Qaeda detestable and punishable; but we should also be relieved, rather than incensed, that he was not charged with treason. We should be grateful that the system is not so malleable as to bend with the emotions of the moment, and that we are protected from the modern-day witch trial. Prosecuting Walker for treason would have worked perilous distortion of law.

As the following section points out, and the indictment against Walker demonstrates, there are numerous criminal laws at the government's disposal that can be used to punish acts that threaten our national security without setting dangerous precedents by ignoring the language of the law. Refraining from making treason accusations before there is evidence to meet the legal standard, gives Walker no more than that which the Constitution guarantees him: an opportunity for a fair trial. This protects the individual, the integrity of the system under which he is charged and the legitimacy of government.

IV. The Modern Law of Treason

A. The Danger of Bad Precedent

Although it may seem alarmist and extreme to use Nazi Germany to illustrate the dangerous effects of expanding the law of treason in times of national conflict, it provides a valuable, albeit particularly stark, example of the maxim that "[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."120

During Nazi rule, the supreme court of Germany punished as treason any act "that remotely threatened to undermine the people's will to preserve the Reich."121 Under orders from Hitler to “take all necessary

measures” and to “deviate from any existing laws,” individuals were convicted and sentenced to death for minor acts, those executed included priests who made anti-war sermons. “One cleric was executed for telling a joke that compared the sacrifice of a soldier to that of Christ.” This expansion of the criminal law made it impossible for individuals to know where legal conduct ended and treason began. As a result, a large number of treason executions were added to the horrific tragedies of the Nazi era.

In England, during the same period, there was equivalent hysteria focused on the Germans who had lived in the country for most of their lives but were now suspected of being spies and saboteurs. Yet this hysteria was even more prevalent during World War I under the English government’s aggressive anti-German propaganda campaign. “In the highest ranks of Government there were those who believed ‘enemy aliens’ within the country were responsible for all that went wrong.”

In his book Akin to Treason, John Bulloch illustrates the damaging effect this extension of treason law had in Britain through the trial of Nicolaus Emil Ahlers. Ahlers was a naturalized British citizen who, it was charged, “maliciously and traitorously aided and comforted the King’s enemies.” Under orders from the German consul general in London, Ahlers had arranged for three German citizens living in England to return to Germany. The entire substance of the treason charge against Ahlers was that he followed these orders to assist in sending the men back to Germany, where they intended to join the German forces.

By the time of Ahlers’ trial, about four months later, the heated excitement of the government’s initial hunts for traitors had cooled. As Bulloch notes, “[t]reason carries the death penalty, and with passions now more subdued, there came the realization that to put a man in danger of his life on such a trivial charge was entirely contrary to the spirit of British law.” The prosecutor, himself, sought to acquit the

122. Id. at 240.
123. Id. at 255.
124. Id.
125. Id.
126. Id. at 276–77.
127. Id. at 256–57.
128. BULLOCH, supra note 92, at 9.
129. Id.
130. Id.
131. Id. at 9–11.
132. Id. at 9–10.
133. Id. at 10.
134. Id.
135. Id.
136. Id.
defendant. The judge advised the jury that Ahlers should not be convicted "but public opinion had not then caught up with the change in the official attitude, and the ... jury decided against Ahlers." The Ahlers case is a clear demonstration of the power of treason accusations to permanently brand an accused. The potency of the charge could not be overcome and despite the efforts by the prosecutor and the judge to change the outcome, the jury handed down a conviction, which carried a mandatory death sentence.

Before the wartime hysteria, it would not have been conceivable that the law would be extended to such lengths, "so contrary to the spirit of British law." The Ahlers case illustrates not only the indelible stain of the treason charge but also the grim effects of a government that ignores its own law in times of national crisis. Justice Brandeis addressed this last point in his renowned dissent to the Supreme Court's decision in United States v. Olmstead. Calling the government a "potent" and "omnipresent teacher" Brandeis warned of the inevitable wave of public sentiment that follows irresponsible, reactionary official action. The Ahlers case is a depressing illustration of the point Brandeis was making when he wrote: "[f]or good or for ill ... [government] teaches the whole people by its example. ... If the [G]overnment becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

B. Alternatives to Treason

In advocating for careful, sparing use of treason law it is not suggested that many presumed traitors go unpunished. Full prosecution for an individual's crimes is not hindered by measured use of treason charges. Justice Marshall provides a clear reminder of this in Ex parte Bollman. That decision, as described in Part I, stemmed from the alleged plot of Colonel Burr to invade Mexico, sever the western states from the Atlantic states, and instate himself as the ruling sovereign in the west. Warning against the extension of the definition of treason Marshall indicated that "[c]rimes so atrocious as those which have for their object the subversion by violence of those laws and institutions which have been ordained in order to secure the peace and happiness of society, are not to escape punishment because they have not ripened into treason." Instead, Marshall advocated a separation of powers approach, counseling

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137. Id.
138. Id.
139. Id.
140. Id.
141. Id.
142. 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).
143. Id.
144. Ex parte Bollman, 8 U.S. (4 Cranch) 75, 100 (1807).
145. Id.
the judiciary to refrain from extending treason by construction to cases that are more safely addressed under statutory law. He wrote:

> The wisdom of the legislature is competent to provide for the case; and the framers of our constitution, who not only defined and limited the crime, but with jealous circumspection attempted to protect their limitation ... must have conceived it more safe that punishment in such cases should be ordained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they were to operate, than it should be inflicted under the influence of those passions which the occasion seldom fails to excite, and which a flexible definition of the crime ... might bring into operation.

Under this theory, the presumed "traitor" would not be at liberty to commit their bad acts. In lieu of charging treason, however, the acts would be prosecuted under the laws written by elected officials which carry the same power to punish but not the same stigma and potential for abuse.

There are many laws that protect against criminal behavior that threatens national security. For example, the United States has a law punishing seditious conspiracy that covers a large number of conceivable treason-like crimes:

> If two or more persons ... in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined under this title or imprisoned not more than twenty years, or both.

While the seditious conspiracy law is similar to that of treason, it does not carry the same stigma and, therefore, does not require the same Constitutional safeguards. In United States v. Rahman, a group of terrorists convicted of seditious conspiracy appealed to the Supreme Court on the ground that the statute punishes conspiracy to "levy war" against the United States without the two-witness requirement and is therefore unconstitutional. This case arose out of a wide-ranging plot to conduct a campaign of urban terrorism in and around the city of New York. Targets included major bridges and tunnels as well as the World Trade Center. The Supreme Court confirmed the convictions, holding

146. Id. at 100-01.
147. Id.
148. Id.
150. Id.
152. Id.
153. Id. at 103.
154. Id.
that the statute was not unconstitutional for want of proof by two
witnesses because seditious conspiracy is a different offense that does not
carry the same "peculiar intimidation and stigma" of treason. 155

The Rahman case demonstrates a certain judicial pragmatism in
reaching the end goal of obtaining convictions for those involved in
subversive activities. The Court identified the caution required in
charging treason due to the potential for political manipulation and the
stigmatizing label. 156 Far from allowing the conspirators to escape justice
as a result of the strict standards required under treason, however, the
Court suggested that the seditious conspiracy charge is easier to prove. 157
The end result of seeking the seditious conspiracy charge over one for
treason is that courts are spared the inevitable drama of a treason trial,
defendants are spared the highly prejudicial label of "traitor,"
prosecutors are spared the burden of meeting the stringent standards of
treason, and those who have harmed or conspired to do harm to the
national security are nonetheless made answerable. In fact, the
conspiracy component of the statute ensures that government can take
action before a substantive crime has been committed as it provides for
the criminalization of "certain preparatory steps." 158

Espionage, while considered a treasonous offense, is also distinct
from treason. 159 Espionage statutes are useful in bringing to justice those
who compromise national security by imparting classified information to
adversary governments or organizations. 160 The federal espionage statute
provides that anyone who obtains copies, takes, communicates, receives
or improperly disposes of national defense information with the intent or
with reason to believe that the information will be used in some injurious
way, or to the advantage of a foreign nation, is subject to fines and
imprisonment. 161 In certain situations, the statute even provides for
criminal penalties for those who are entrusted with or have control over
national defense information who, through gross negligence, lose or
misplace the information. 162

In addition to the espionage and seditious conspiracy laws, treason-
like crimes have been punished under the Uniform Code of Military
Justice absent the treason label. 163 For example, the Court has held that,
in times of war, entering or remaining on American territory with a

155. Id. at 112.
156. Id.
157. See id. at 112–17.
158. See id. at 116.
161. Id.
162. Id.
(1942) (case arose under the Articles of War, the predecessor statute to 10 U.S.C. § 801).
hostile purpose without uniform or appropriate means of identification is a crime distinct from treason, even when committed by a U.S. citizen.\textsuperscript{164}

In sum, the seditious conspiracy statute, the Uniform Code of Military Justice, and the Espionage Act provide clear examples of the ways in which American laws can protect its citizens and residents without eroding the judicial system and stigmatizing criminal defendants through improper or inflammatory treason trials. Undoubtedly, for some, the question in charging one of these or some other offense instead of treason would hinge on the severity of punishment prescribed. Put simply, the availability of the death penalty in treason trials makes it a more appealing charge for many prosecutors and perhaps a large part of the public.

Yet, crimes committed under the Articles of War can be punishable by death.\textsuperscript{165} Further, in the prominent Rosenberg espionage trial, it became clear that Congress has the power, in times of war, to prescribe the death penalty for individuals convicted of that crime.\textsuperscript{166} When Julius and Ethel Rosenberg petitioned for a rehearing after being sentenced to death under the Espionage Act, one of their claims was that since the statute authorized the death penalty but did not have the same safeguards as the Treason Clause it was unconstitutional under the Eighth Amendment's prohibition of cruel and unusual punishment.\textsuperscript{167}

The Rosenberg court rejected this idea. Citing \textit{Ex parte Quirin}, the court said the Supreme Court had impliedly rejected the Eighth Amendment argument since the statute at issue permitted the execution of "citizen-saboteurs for crimes other than treason."\textsuperscript{168} In Quirin, another World War II-era case, one of the German saboteurs who secretly landed on U.S. soil from a German submarine was an American citizen.\textsuperscript{169} Rather than prosecuting the American defendant for treason, the Supreme Court held that the law of war was the appropriate prosecutorial mechanism.\textsuperscript{170} Employing this rationale, the Rosenberg Court held that since the death penalty was permitted in \textit{Ex parte Quirin} without meeting the Constitutional safeguard requirements of treason, it stood to reason that the imposition of the death penalty in a wartime espionage case would pass Eighth Amendment muster.\textsuperscript{171} In other words, the fact that the Treason Clause had stringent proof requirements did not implicitly equate with the notion that all other lesser crimes must at least meet those requirements in order to impose the death penalty.\textsuperscript{172}

\begin{itemize}
\item 164. \textit{Id.}
\item 165. \textit{Id.}
\item 166. \textit{See United States v. Rosenberg, 195 F.2d 583 (2d Cir. 1952).}
\item 167. \textit{Id.} at 609–12.
\item 168. \textit{Id.} at 611.
\item 169. \textit{Ex parte Quirin,} 317 U.S. 1, 20 (1942).
\item 170. \textit{Id.} at 38.
\item 171. \textit{Rosenberg,} 195 F.2d at 611.
\item 172. \textit{Id.}
\end{itemize}
The rationale for the more relaxed standard is clear. Since the treason charge has such a powerful capacity to taint the minds of jurors and even judges, the Constitution requires more compelling proof before such a charge can be levied. A violation of the Uniform Code of Military Justice or the Espionage Act, however, is neither so ignoble nor volatile. Therefore, if the death penalty is imposed in such a case it is presumably done on the merits and not as a result of the crime’s infamy.

The legislation discussed in this section is not a comprehensive list of all existing laws that could be called upon to do the work of punishing subversive or dangerous acts that should not be labeled as treason. Nor is there a bar on Congress from creating new laws to cover any insufficiently protected areas. As the Supreme Court stated in the treason trial of Cramer v. United States:

[T]he treason offense is not the only nor can it well serve as the principle legal weapon to vindicate our national cohesion and security. . . . Congress is in no way limited to enact prohibitions of specified acts thought detrimental to our wartime safety. The loyal and the disloyal alike may be forbidden to do acts which place our security in peril, and the trial thereof may be focussed upon defendant's specific intent to do those particular acts thus eliminating the accusation of treachery and of general intent to betray which have such passion-raising potentialities.173

This passage clearly endorses Justice Marshall's view that when there is doubt whether a crime constitutes treason; it is far safer to turn to our powerful arsenal of criminal law in search of the appropriate punishment. In so doing, many societal goals are met: the representational system of government is reinforced, as Congress crafts legislation that addresses the issues that concern Americans; criminal defendants are protected from undue prejudice that adversely affects the ability to be tried fairly; those who pose a danger to national security are punished; and, finally, the criminal justice system retains its stability in the most critical times, so that its legitimacy endures for all time, and for the protection of all Americans.

Conclusion

The last case of treason before the Supreme Court was Kawakita v. United States in 1952.174 Changes in justices and political attitudes leave uncertainty as to how the current Court will respond if faced once again with this “mother of all crimes.”175 Then, as now, the United States was threatened, frightened and in a state of open conflict. It is in such tumultuous times that the calls for treason are heard and those calls can so cloud the facts and evidence in a case as to be, in themselves, proof of the crime. This is the first of what I have termed the “dual dangers” of

treason that the framers of the U.S. Constitution tried to ensure would be averted by incorporating a carefully crafted treason law into the Constitution. "The Constitution was made for times of commotion," wrote Chief Justice Cranch while presiding over the Circuit Court for the District of Columbia during the trial for treason of one of Burr's co-conspirators. "In the calm of peace and prosperity there is seldom great injustice. Dangerous precedents occur in dangerous times."76

The second of the dual dangers of treason is its power to suppress political ideas and speech. This, too, the framers sought specifically and ardently to avoid when choosing to include the language of Article III, Section 3 of the Constitution.

As the current conflict continues there may again be public cries for the revival of treason. If the careless ignorance regarding treason law exhibited by some of the politicians, pundits, and lawyers commenting on the Walker case is any indication of what to expect, it can only be hoped that the courts will continue to mitigate the damage. Cranch wrote that it was the duty of the courts "calmly to poise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude."77 Since many in this multitude seem not to know the law of treason or are willing to forgo some of its Constitutional protections in times of turmoil, it is of critical importance that the judiciary "say what the law is."78

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77. Id.
78. "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).