Treason in the Age of Terrorism: Do Americans Who Join ISIS 'Levy War' Against the United States?

Stephen Jackson
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TREASON IN THE AGE OF TERRORISM: DO AMERICANS WHO JOIN ISIS ‘LEVY WAR’ AGAINST THE UNITED STATES?

Stephen Jackson

ABSTRACT

Treason is a crime often considered archaic and unnecessary in the modern era. In the post-9/11 world, however, treason is a viable legal instrument available for use against a ruthless enemy known as the Islamic State in Iraq and Syria (“ISIS”). To combat this floundering but still formidable foe, the U.S. government must consider how the crime applies to those Americans who actively or previously supported ISIS. To be sure, terrorism statutes will remain the main weapons in a U.S. prosecutor’s legal arsenal, but for those cases where an American ISIS member commits the heinous acts of a traitor, for example murdering his fellow citizen in cold blood, treason is the most apparent crime committed.

The only crime defined in the U.S. Constitution is treason. The Founding Fathers understood the gravity of the crime and sought to limit its scope to avoid its use in those “doubtful cases.” The arguments in this manuscript aim to respect this notion by exploring the genesis of the Treason Clause and applying legal precedent to today’s war against ISIS. Although treason has a place in the War on Terror, certain legal ambiguities must be eliminated to ensure its proper utilization. Only by addressing these difficult issues directly can U.S. prosecutors hope to avoid maneuvering in the shadows similar to how the American betraying his nation for ISIS operates.

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As there is no crime which can more excite and agitate the passions of men than treason, no charge demands more from the tribunal before which it is made a deliberate and temperate inquiry. Whether this inquiry be directed to the fact or to the law, none can be more solemn, none more important to the citizen or to the government; none can more affect the safety of both.¹

¹ *Ex parte* Bollman, 8 U.S. 75, 125 (1807).
INTRODUCTION

The crime of treason carries an emotional response unlike any other. Its severity is second to none because one who commits treason aims to support the enemies his government, betray his own nation, and wage war against his own people. Infamous traitors such as Benedict Arnold conure a near-unanimous feeling of disdain and anger amongst Americans, while others like John Brown do not so easily create the same uniform negative perception. Such is the nature of treason: those convicted of betraying their nation receive the designation of "traitor," arguably the most severe, polarizing, and stigmatic title law can provide, which may partially explain why the last case of treason occurred in 1952. However, the centuries-old crime of treason is still as relevant as it was during the establishment of the United States. America currently faces a stateless enemy which operates in the shadows using unconventional warfare. This enemy engages in terrorism and promotes small-scale attacks against civilians.

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2 See Joseph Story, 3 Commentaries on the Constitution § 1791 (1833), in 4 The Founders’ Constitution 467 (Philip B. Kurland & Ralph Lerner eds., 2000) (stating "[t]reason is generally deemed the highest crime, which can be committed in civil society, since its aim is the overthrow of the government... Its tendency is to create universal danger and alarm; and on this account it is peculiarly odious, and often visited with the deepest public resentment.").


4 See David S. Reynolds, John Brown, Abolitionist: The Man Who Killed Slavery, Sparked the Civil War, and Seeded Civil Rights 1 (2005) (stating “John Brown planted seeds for the civil rights movement by making a pioneering demand for complete social and political equality for America’s ethnic minorities.”).


This enemy is named the Islamic State of Iraq and Syria ("ISIS"), a Sunni terrorist organization\(^7\) that views the United States as an enemy with which it is at war.\(^8\) Since the outbreak of the Syrian civil war in 2011, ISIS has sought to overthrow the Assad regime and establish an Islamic caliphate that traverses Iraqi and Syrian borders.\(^9\) Led by Abu Bakr al-Baghdadi, ISIS is notorious for brutally beheading journalists,\(^10\) burning its enemies alive,\(^11\) and slaughtering innocent civilians.\(^12\) Notwithstanding major defeats over the past several years in Iraq and Syria, the terror group continues to disrupt daily life in the Middle East and poses a direct threat to Western Europe and the United States.\(^13\)


On November 13, 2015, ISIS successfully executed a coordinated attack in Paris, where 129 people were killed.14 Less than a month later, two people affiliated with ISIS murdered 14 people in San Bernardino, California.15 The horrific attack was magnified by the realization that one of the attackers was an American.16 As a result, Americans drew their attention to the emerging threat posed by fellow citizens engaging in terrorism both at home and abroad. The bloodshed continued on March 22, 2016, when ISIS cells successfully executed coordinated terrorist attacks in Brussels, Belgium killing 32 victims and injuring 340 others.17 Later that year, the United States witnessed the deadliest terror attack on American soil since September 11, 2001,18 when Omar Mateen slaughtered 49 people at the Pulse nightclub in


Orlando, Florida. Prior to executing the attack, Omar pledged allegiance to ISIS during a 911 phone call. Following these devastating attacks, ISIS continued to execute successful terror attacks around the world over the next two years, notwithstanding losing most of its territory held in Syria and Iraq.

To combat terrorism, the U.S. government has traditionally used counterterrorism laws found in Title 18, Chapter 113B of the U.S. Code. The U.S. government also holds another legal tool at its disposal: treason. Treason is the only crime defined in the U.S. Constitution and may be used in prosecutions against Americans who join ISIS. As stated by the late Justice Antonin Scalia, "[w]here the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime." The U.S. government could argue that Americans who join ISIS and wage war against the United States or support its combat efforts necessarily engage in treason.

Terrorism is a relatively new and unique form of warfare. For the purpose of the Treason Clause, terrorism must be analyzed differently than warfare conducted against the United States by a sovereign nation. Sovereign nations with standing armies have few issues with the loyalty of their troops or the intent of those troops to fight Americans in times of conflict with the United States.

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20 See id.


23 U.S. CONST. art. 3, § 3, cl. 1; United States v. Greathouse, 26 F. Cas. 18, 21 (C.C.N.D. Cal. 1863) (No. 15,254).


Terrorists do not function in the same way. Terrorist organizations such as ISIS are often comprised of smaller cells and subgroups. When terror cells form in the United States, the question of whether those cells commit treason against the United States is hard to answer. Terror cells must hold a duty of loyalty to the United States and engage in actual hostilities on behalf of an enemy of America to commit treason. An assessment of actual Americans who act on behalf or in support of ISIS is imperative to assess and apply the elements of treason to this modern threat. In analyzing the merits of any treason claim against these Americans, the inquiry must first examine the history of the Treason Clause. Treason derives from British common law and was carefully defined by the Founding Fathers in the Constitution.

The inquiry must then outline U.S. case law, following the evolution of the treason convictions deemed important by the U.S. government throughout later criminal proceedings. This examination will necessarily delve into the "Levying War" and "Aid and Comfort" provisions of the Treason Clause and apply them to Americans who join ISIS.

An examination and application of the Treason Clause to American ISIS members will lead to the conclusion that treason is a viable option for the U.S. government in combating ISIS. The conclusion is not all-encompassing, but

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26 See id. (explaining that terrorist groups are often organized either in a hierarchy or network structure).

27 See U.S. CONST. art. III, § 3, cl. 1 (stating, in relevant part, "[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.").

28 The government must prove a purported traitor's intent to commit treason against the United States to receive a guilty verdict. See Cramer v. United States, 325 U.S. 1, 31 (1945) (stating "to make treason the defendant not only must intend the act, but he must intend to betray his country by means of the act.").

29 See JAMES W. HURST, THE LAW OF TREASON IN THE UNITED STATES: COLLECTED ESSAYS 25 (1945) (stating Lord Coke cited the common law in outlining what constituted an overt act); J. Taylor Mcconkie, State Treason: The History and Validity of Treason Against Individual States, 101 KY. L. J. 281, 286 (2013) (stating "[i]n seeking to restrict the content of the crime [of treason], the drafters of the resolution evidenced an awareness that existing treason laws in the colonies had expanded dangerously beyond recognition.").

distinguishes between those American supporters of ISIS who are eligible and ineligible for treason prosecution. Because treason should be used as one of many weapons in the U.S. government’s legal arsenal in the fight against ISIS, this crime is best applied to those Americans who fit legal precedents found throughout American history.

Treason is not an obsolete and ancient crime, but one that can be useful and relevant today when combating organizations like ISIS. Though treason convictions are rare in U.S. history, they have been effective in putting traitors behind bars and signaling the gravity of betraying one’s nation.\(^{31}\) In a time where numerous Americans seek to join a group that is avidly waging war against the United States, treason prosecutions may help battle this threat, which has penetrated the U.S. border and successfully executed attacks on American soil.\(^{32}\)

I. **THE HISTORY OF THE TREASON CLAUSE**

Since the dawn of America’s experiment with democracy, treason has played an important role in efforts to administer the rule of law.\(^{33}\) The original American colonists understood the severity of the crime due to its use against both common citizens and royalty throughout English history.\(^{34}\) The American colonies adopted the concept when drafting the Treason Clause of the U.S. Constitution, in large part because of English influence in the colonies.\(^{35}\) While English law played a vital role in constructing the Treason

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\(^{32}\) See, e.g., Ellis, et al., supra note 19.

\(^{33}\) See, e.g., Laws of Maryland at Large 1638, in 4 THE FOUNDERS’ CONSTITUTION 408 (Philip B. Kurland & Ralph Lerner eds., 2000) (including “compass or conspire the Death of the King,” “levy War against his Majesty,” to counterfeit the King’s Great or Privy Seal,” and “to join or adhere to any foreign Prince or State” within the scope of treason).

\(^{34}\) See Kristen E. Eichensehr, *Treason in the Age of Terrorism: An Explanation and Evaluation of Treason’s Return in the Democratic States*, 42 Vand. J. Transnat’l L. 1443, 1448 (2009) (explaining King Charles I was put to death for levying war against the “Parliament and Kingdom.”).

Clause, the Founding Fathers sought to safeguard against arbitrary use of the crime. These concerns led to the inclusion of the Treason Clause in the Constitution, a tactical maneuver that sought to restrain subsequent American leaders from expanding its meaning. Understanding the history and intent of the Treason Clause is important for determining whether it may be used against Americans who join ISIS or conduct terrorist attacks in its name.

A. The Treason Act of 1351

The American concept of treason is rooted in England’s Treason Act of 1351, implemented during the reign of King Edward III. The Treason Act of 1351 provided English courts a much-needed definition of the high crime. Until the passage of the Act, English courts held much latitude in construction of the ill-defined crimes. In the Act, “treason” was defined as “compassing the Death of the King, Queen, or their eldest son,” “levying War,” “adhering to the King’s Enemies,” and “killing the Chancellor, Treasurer, or Judges in Execution of their Duty.” The passage of this act signified a new restrictive nature to treason jurisprudence. As Sir Matthew Hale explained, “there should be some fixed and settled boundary for this great crime of treason, and

\[56\] See The Federalist No. 43, at 436 (James Madison) (Philip B. Kurland & Ralph Lerner eds., 1987) (explaining the Treason Clause’s purpose in eliminating “new-fangled and artificial treasons.”).

\[37\] See Treason Act of 1351, 25 Edw. III (Eng.).

\[38\] See Hurst, supra note 29, at 4, 16–17 (explaining King Edward III’s intentions to resolve uncertainties in the common law regarding treason); Eichensehr, supra note 33, at 1447 (discussing the enactment of the Treason Act).


\[40\] Id. (stating “[the Treason Act of 1351] attempted to define the law and abolish the latitude for construction which the local courts had exercised up to that time.”).


\[42\] See Hurst, supra note 29, at 17 (stating “the general terms of [Lord] Coke’s analysis are all such as to stress that the distinguishing mark of the Statute of Edward III is its limitation of the scope of the crime [of treason].”).
of what great importance the [Treason Act of 1351] was, in order to that end.\textsuperscript{43} While commentators applauded the restrictions inherent in the Treason Act of 1351, the scope of the crime fluctuated over the course of several centuries, garnering much debate.\textsuperscript{44}

Perhaps the most significant clarification in the statute was the requirement of an overt act. As Lord Coke explained, "a compassing or conspiracy to levy war is no Treason, for there must be a levying war in facto."\textsuperscript{45} Without an actual, overt act, a person cannot commit treason. The Treason Act of 1351 attempted to codify an invaluable procedural safeguard against arbitrary criminal convictions: the requirement for a court to find that a purported traitor actually committed an act against the State with treasonous intent.\textsuperscript{46} Though English leaders often abused use of the crime after the passage of the Treason Act of 1351,\textsuperscript{47} its text served as the foundation for the United States' clearer and more narrowly defined Treason Clause.\textsuperscript{48}

\textbf{B. The Treason Clause – Article III, Section 3 of the U.S. Constitution}

In deciding to secede from the British Empire, the American colonies listed numerous "despotic" wrongdoings committed by Great Britain in the Declaration of Independence as support for their secession.\textsuperscript{49} Many of these grievances related to arbitrary and unlawful acts committed by King George


\textsuperscript{44} See \textit{generally} D. Alan Orr, \textit{Treason and the State: Law, Politics, and Ideology in the English Civil War} 15–28 (2002); Eichensehr, \textit{supra} note 34, at 1447 (explaining the role of the Tudor monarchs in expanding the reach of the Treason Act of 1351).

\textsuperscript{45} Hurst, \textit{supra} note 29, at 28.

\textsuperscript{46} See Edward Coke, \textit{Third Institute} 38 (1641), in \textit{4 The Founders' Constitution} 408–09 (Philip B. Kurland & Ralph Lerner eds., 1987) (stating that "besides [...] confederacy, compassing, conspiracy, or imagination, there must be some other over act or deed tending thereunto, to make it treason within the [Treason Act of 1351]").

\textsuperscript{47} See \textit{generally}, \textit{Historical Concept of Treason: English, American}, \textit{supra} note 39, at 73–76.

\textsuperscript{48} See \textit{id.} at 76–77 (noting the similarities between the text of the Treason Act of 1351 and that of Article III, Section 3 of the U.S. Constitution).

\textsuperscript{49} See \textit{generally} \textit{The Declaration of Independence} ¶ 6–29 (1776).
III and the British Parliament.50 Several drafters of the Constitution were perturbed by what appeared to be rampant arbitrariness in the administration of the law.51 The drafters of the Treason Clause considered these concerns and added several new procedures to protect potential defendants.52 In particular, the drafters added the qualifying phrase “giving them Aid and Comfort” to restrict the phrase “adhering to their Enemies.”53 They also included the requirement that two witnesses must present testimony to the same overt act, adding more procedural safeguards during treason prosecutions.54

Several of the drafters, such as James Madison, were wary of making the clause too restrictive and sought to grant the legislative branch more latitude in defining treason.55 They believed congressional oversight over how treason is defined would offer sufficient protections.56 The drafters also determined that the terms “levying war” and “adhering to their enemies” should be separated by the conjunction “or” instead of “and” to signify both were separate overt acts of treason.57 Upon ratification, the new United States adopted Article III, Section 3, which reads:

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court. The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work

50 See id. See also Story, supra note 35, at §§ 1791–94, 1796.
51 See HURST, supra note 29, at 142–44.
53 George Mason proposed this restrictive phrase because he thought without it, the provision would be too indefinite. See Records from the Federal Convention, supra note 52.
54 U.S. CONST. art. III, § 3, cl. 1.
55 See Records From The Federal Convention, supra note 52, at 435.
56 Id.
57 See id. The use of “or” provides for two distinct overt acts instead of one. This is in line with James Madison’s view of avoiding an overly restrictive Treason Clause, outlined in the beginning of the paragraph.
Corruption of Blood, or Forfeiture except during the Life of the Person attainted. 58

As the only crime defined in the Constitution, treason became solidified in the bedrock of American law. The statutory definition of “Treason,” states “[w]hoever [] ow[es] allegiance to the United States” commits treason if he “levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere . . .” 59 The statute clarifies the Treason Clause by explaining that a treason charge may only be invoked against someone who owes allegiance to the United States. 60 The term allegiance, which the Second Continental Congress defined in its “Committee on Spies,” 61 caused debate as to the extent of its reach. 62

Treason cases are often surrounded by controversy due to the lack of uniformity in definition. Calls to utilize the treason statute in the post-9/11 “War on Terror” only add to this controversy. In light of successful attempts by Americans to join ISIS and enter Syria and Iraq to fight on the group’s behalf, this constitutional crime may benefit the government in potential prosecutions while also protecting those who owe allegiance to the United States. For example, Hoda Muthana, an American woman who seeks to return to the United States after joining ISIS in 2014, may have committed treason by

58 U.S. CONST. art. III, § 3.
59 See Treason, 18 U.S.C. § 2381 (2018). This crime carries either the death penalty or a prison term of no less than five years and includes a fine of no less than $10,000. Id. Someone convicted of treason also relinquishes his ability to hold any office in the United States. See U.S. CONST. art. 3, § 3.
61 John Adams, et al., Continental Congress, “Committee on Spies” (June 5, 1776), in 4 THE FOUNDERS’ CONSTITUTION 430 (Philip B. Kurland & Ralph Lerner eds., 2000) (stating that “all persons abiding within any of the United Colonies, and deriving protection from the laws of the same, owe allegiance . . . [including] all persons passing through, visiting, or mak[ing] a temporary stay in any of the said colonies, being entitled to the protection of the laws . . .”). See also An Act for the Punishment of Certain Crimes Against The United States, 1 Stat. 112, § 1 (1790) (including the “allegiance” provision).
62 See, e.g., Carlisle v. United States, 83 U.S. 147, 148 (1872) (stating “[t]hose aliens who, being domiciled in the country prior to the [Civil War], gave aid and comfort to the rebellion, were, therefore, subject to be prosecuted for violation of the laws of the United States against treason and for giving aid and comfort to the rebellion.”).
tweeting her support for ISIS atrocities across the globe and urging Americans
to join the jihadist cause. The crime may provisions of the Treason Clause
may protect Kimberly Gwen Polman, a Canadian-American citizen who
traveled to the former Islamic State, may be protected by the restricted nature
of the Treason Clause because she did not tweet her support of terror attacks
or propagandize on behalf of ISIS.

Similar to the Treason Act of 1351, the Treason Clause evolved over time
in U.S. courts. To properly understand the evolution of treason and its role
in the age of terrorism, reference to major American treason cases is beneficial.
This inquiry is timely because treason is no longer merely a historical aspect
of American law. The common assumption that the clause had all but
disappeared from American legal practice are no longer warranted after the
indictment of Adam Gadahn, known as Azzam al-Amriki (Azzam the
American). In 2006, a federal grand jury indicted Gadahn for treason because
he joined al Qaeda and participated in propaganda videos. Though Gadahn
never faced trial, this indictment serves as precedent for potential future
indictments against American members of ISIS. An analysis of previous
treason cases is necessary to better understand the legitimacy of any action
against an American ISIS member, mirroring the Gadahn example.

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64 See id.
65 See Hurst, supra note 29, at 10–11, 186–92.
66 See First Superseding Indictment, at 2–8, United States v. Gadahn, SA CR 05-254(A) (D.C.C. Cal. 2006) [hereinafter Gadahn Indictment].
67 Id.
II. Treason in the Courts: An Analysis of the Treason Case Law

When debating over which provisions would comprise the Treason Clause, the drafters of the U.S. Constitution attempted to define which overt acts and what sort of intent constituted a betrayal of one's nation.\(^{69}\) Though they added language to clarify aspects of treason and narrow its scope, ambiguities remained.\(^{70}\) As the young nation faced various conflicts and rebellions, U.S. courts had to interpret the intent of the drafters and the terms and provisions of the Treason Clause. This arduous process resulted in a series of court decisions which shaped the "Levying War" and "Aid and Comfort" provisions.\(^{71}\)

Though there are fewer than thirty instances of treason charges in U.S. history,\(^{72}\) an examination of these cases is useful in determining whether joining ISIS warrants a treason indictment. This section outlines the most prominent historical cases of treason in the United States, beginning with the Whiskey Rebellion and ending with the World War II cases. These cases show that the charge of "levying war" essentially disappeared in the 20th century, leaving the charge of "adhering to their Enemies" as the favored option for prosecutors.\(^{73}\) In the current conflict against ISIS, the levying war charge should be considered for use against Americans who wage war in the name of ISIS jihad.

\(^{69}\) See generally, Hurst, supra note 29, at 129–38 (outlining the debates, examinations, and discussions of the Constitutional Convention of 1787).

\(^{70}\) See id. at 190–92 (noting the early legal debate over the extent to which British precedent could be used in American treason cases).

\(^{71}\) See generally id. at 196–210 (outlining U.S. court cases related to both provisions of the Treason Clause).


A. Early Rebellions and the Case of Aaron Burr

Within ten years of the ratification of the Constitution, the first overt act of treason occurred on American soil. After the Washington administration implemented a whiskey excise tax in 1791, the United States witnessed an uprising by farmers in rural Pennsylvania, known as the Whiskey Rebellion.\(^74\) The uprising occurred because these farmers experienced a major shortage of credit and hard currency as well as waves of foreclosures.\(^75\) The Pennsylvania farmers viewed the whiskey tax, one they opposed since at least 1783, as a violation of the U.S. Constitution and a betrayal of their efforts during the Revolutionary War.\(^76\) As the rebellion began to spiral out of control in 1794,\(^77\) President Washington led an army against the farmers and quelled the opposition.\(^78\)

As a result of this rebellion, twenty-four farmers were indicted in the Circuit Court for the Federal District of Pennsylvania for committing treason, the first such instance in U.S. history.\(^79\) Of these twenty-four, only two, Philip Vigol and John Mitchell, were convicted of treason for levying war against the United States.\(^80\) During these trials, Justice William Paterson accepted the prosecution's argument that since Vigol and Mitchell intended to force Congress to repeal the tax, the tax "would be suppressed throughout the Union," which would accomplish the goal of levying war against their

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\(^75\) See id. at 158.

\(^76\) See id. at 162 (stating those opposed to the Whiskey Excise Tax of 1791 believed U.S. constitutionalism embraced the idea of the "People" over the state and federal governments, including their right to resist taxes deemed unjust and unequal).


\(^78\) Fritz, supra note 74, at 153, 174.


nation. Justice Paterson’s conclusion is based not on a factual occurrence but on a logical inference, known as a “constructive treason.” The concept of constructive treason originated in England when “tyrannical princes [] had abundant opportunities to create . . . forced and arbitrary constructions, to raise offences into the guilt and punishment of treason, which were not suspected to be such.” Constructive treason broadened the reach of the Treason Clause to those acts that would have resulted in the levying war or adherence to enemies without an actual act occurring. Americans voiced their disdain for this concept, with commentators such as Francis Scott Key arguing “[i]f 100 men conspire, and only 50 actually levy war, the latter only are guilty as principals.”

Several years after the convictions of Vigol and Mitchell, a second related rebellion led to another set of famous treason trials. In 1798 the U.S. Congress imposed a direct tax to fund military efforts during the “Quasi War” with France. In response, a Pennsylvanian named John Fries led an unsuccessful rebellion against the U.S. government. As a result of this uprising, over forty Americans faced trial for their participation, eleven of whom faced treason charges. Fries, the leader of the rebellion, faced two treason trials due to an issue Justice James Iredell had with one juror during the first trial. During the second trial, Justice Samuel Chase instructed the jury that the overt act of levying war consists of an actual assemblage of persons with actual violence or force, regardless of whether it is sufficient violence or force, and a universal or general intention among the participants to “resist or oppose the execution of any statute of the United States . . ..” For Justice Chase, the key factor of

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81 See id. at 40. After accepting this notion in Mitchell’s case, Justice Paterson instructed the jury that Mitchell “must be pronounced guilty.” Id.

82 See Story, supra note 35, § 1791.


85 Thomas Carpenter, The Two Trials of John Fries 201–02 (1800).

86 Newman, supra note 84, at 241.


88 Carpenter, supra note 85, at 197 (relating the judge’s instructions to the jury).
levying war against the United States was *actual* force. As he explained to the jury, conspiracy or combination to levy war does not amount to treason.\(^8^9\)

The Whiskey Rebellion and the rebellion of John Fries serve as the foundation of American treason jurisprudence. These seminal cases helped clarify the language in the Treason Clause, but in the instance of the Whiskey Rebellion, diverged from the intent of its drafters. With the incorporation of constructive treason, U.S. courts departed from the actual text of the Treason Clause and opened the door to constructing new forms of treason. However, this possibility became less problematic when former Vice President Aaron Burr stood trial after purportedly attempting to form his own nation in Spanish-controlled territories.

Described as "the greatest criminal trial in American history and one of the notable trials in the annals of the law,\(^9^0\) the trial of Aaron Burr was pivotal in shaping the Treason Clause. With much engagement by President Thomas Jefferson, the Aaron Burr trial was full of personal vendettas and scandal.\(^9^1\) After serving as Vice President and relinquishing his role as a U.S. Senator, Burr set out on an expedition along the Mississippi, allegedly to evaluate which territories would become his new nation.\(^9^2\) While filled with mystery, the plot likely included the seizure of New Orleans and parts of Mexico.\(^9^3\) The plan never came to fruition, however, after members of the Ohio militia helped disperse a group of men dedicated to the enterprise assembled at Blennerhassett Island in December 1806.\(^9^4\) Burr himself was not present on the island, located on the Ohio River.\(^9^5\) After the events at Blennerhassett Island, Burr and several main collaborators were arrested and stood trial for treason.\(^9^6\)

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\(^8^9\) See id.

\(^9^0\) *Newmyer, supra* note 83, at 1 (quoting constitutional historian Edward Corwin).

\(^9^1\) See *The Treason Trials of Aaron Burr* viii (Peter C. Hoffer ed., 2008) (explaining President Jefferson claimed Burr was guilty before the trial began).

\(^9^2\) See *id.* at 42. His initial plot allegedly began while he was still Vice President, when he spoke with English Minister to the United States Anthony Merry about the "independence" of parts of the western United States. *Id.* at 40.

\(^9^3\) See *Ex parte* Bollman, 8 U.S. 75, 133 (1807).


\(^9^5\) See *id.* at 159.

Prior to Burr’s trial, Erick Bollman and Samuel Swartwout, two of Burr’s associates, were tried for levying war against the United States at Blennerhassett Island.\(^97\) The case eventually reached the Supreme Court, where Chief Justice John Marshall found them not guilty.\(^98\) Although Bollman and Swartwout claimed to have seized New Orleans and robbed banks to fund their operation, these statements alone did not amount to proof of an overt act of treason.\(^99\) Chief Justice Marshall defined levying war as “an actual assemblage of men for the purpose of executing a treasonable design.”\(^100\) Chief Justice Marshall elaborated that merely traveling to the rendezvous point is not sufficient to commit treason.\(^101\) Bollman and Swartwout failed to engage in rebellion and only “rendezvoused” on Blennerhassett Island.\(^102\)

During Burr’s trial, Chief Justice Marshall presided over the case at the U.S. Circuit Court for the District of Virginia.\(^103\) The trial, described as “of infinite importance” for the United States, featured a myriad of complex legal issues.\(^104\) The most important legal question of the trial was whether a treason suspect could levy war against the United States if he were not a part of a treasonous assemblage of men.\(^105\) The prosecution argued Burr was legally present at the assemblage on Blennerhassett Island due to his role as leader and advisor beforehand.\(^106\)

In his famous opinion, Chief Justice Marshall explained that a treason suspect who was not an actual member of an assemblage of men levying war must perform an overt act constituting “a ‘part’ in the fact of levying war” to

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\(^97\) *Ex parte Bollman*, 8 U.S. at 76.

\(^98\) *Id.* at 135.

\(^99\) *Id.*

\(^100\) *Id.* at 127.

\(^101\) *Id.* at 134.

\(^102\) *Id.* at 135.

\(^103\) *Lewis, supra* note 94, at 294.

\(^104\) See *id.* (quoting Delaware Republican George Read and Maryland Federalist Luther Martin). See generally *id.* at 294–300 (issues included battles over the size of the grand jury, the first use of executive privilege by a U.S. president, and debates over whether the prosecution must produce two witnesses to the same overt treasonous act before reaching the question of treasonous intent).

\(^105\) See *id.* at 299–300.

be found guilty.\textsuperscript{107} A suspect merely serving in an advisory role to men who later assembled to levy war could not be found guilty under the U.S. Constitution.\textsuperscript{108} Chief Justice Marshall stated "[t]hose only who perform a part, and who are leagued in the conspiracy, are declared to be traitors. . . . [T]hey must 'perform a part,' which will furnish the overt act; and they must be 'leagued in the conspiracy.' The person who comes within this description in the opinion of the court levies war."\textsuperscript{109}

Conspiracy without an actual overt act is not enough to satisfy the Treason Clause. As outlined by Chief Justice Marshall, a purported traitor must be accused of executing a specific, overt act.\textsuperscript{110} In the case of \textit{Burr}, the prosecution accused Burr of levying war at Blennerhassett Island.\textsuperscript{111} However, Burr was not on Blennerhassett Island in early December 1806. Due to this fact, the court could not legally find Burr to be guilty of committing treason.\textsuperscript{112} The Chief Justice explained that a purported traitor could not be constructively present at a treasonous assemblage of men, for "if many conspire to levy war, and some actually levy it, they may not be indicted for levying war generally."\textsuperscript{113}

In concluding his opinion, Chief Justice Marshall ruled the jury could not consider any of Burr's statements revealing his intent to betray the United States because Burr was not on Blennerhassett Island in December 1806.\textsuperscript{114} The court said this testimony was at most corroborative, which may enter into evidence only after an overt act is proved.\textsuperscript{115} Since the prosecution could not prove Burr was a part of the December 1806 assemblage on Blennerhassett

\textsuperscript{107} \textit{Id.} at 182.
\textsuperscript{108} See generally \textit{id.}.
\textsuperscript{109} \textit{Id.} at 161 (citing \textit{Ex parte Bollman}).
\textsuperscript{110} See \textit{id.} at 169-70.
\textsuperscript{111} See \textit{id.}.
\textsuperscript{112} See \textit{id.} at 179.
\textsuperscript{113} \textit{Id.} at 173-75 (referencing Lord Hale).
\textsuperscript{114} \textit{Id.} at 180 (quoting "No testimony relative to the conduct or declarations of the prisoner elsewhere, and subsequent to the transaction on Blennerhassett's Island, can be admitted; because such testimony, being in its nature merely corroborative and incompetent to prove the overt act in itself, is irrelevant until there be proof of the overt act by two witnesses.").
\textsuperscript{115} See \textit{id.} at 170.
Island, the court barred it from entering Burr's statements and actions into evidence.\textsuperscript{116}

Chief Justice Marshall's legal determinations in both \textit{Bollman} and \textit{Burr} overturned the precedent set by the Whiskey Rebellion cases and reinstated the original interpretation of the Treason Clause. In doing so, Chief Justice Marshall left a legacy of legal restraint for the Treason Clause, which limited the ability of courts to construct new forms of treason.

**B. John Brown's Raid and the Civil War**

Prior to the Civil War, several prominent treason charges, cases, and convictions caught the eye of the American public. Charges of attempting to form a monarchy along the Mississippi River\textsuperscript{117} and a conviction for betraying an individual state\textsuperscript{118} are representative of the wide array of acts that warranted judicial scrutiny. However, with the outbreak of the American Civil War, treason case law reached an entirely new level of challenge and complexity. The U.S. courts faced the difficult task of providing guidance for how to deal with an enemy consisting of half of the nation.

On October 16, 1859, prior to South Carolina's secession from the Union, outspoken abolitionist John Brown staged a raid on the federal armory in Harper's Ferry, Virginia (now West Virginia) with the goal of sparking a

\textsuperscript{116} Id. at 180.

\textsuperscript{117} Warrant for Arrest of Joseph Smith on the Charge of Treason (June 25, 1844), UMKC Sch. of L., http://law2.umkc.edu/faculty/projects/ftrials/carthage/treasonwrit.html (last visited Oct. 4, 2018) (describing the indictment against the founder of the Church of Latter Day Saints for committing treason against Illinois); see Alex Beam, American Crucifixion: The Murder of Joseph Smith and the Fate of the Mormon Church xiv (2014) (stating that before Joseph Smith could stand trial, a mob broke into his prison cell and killed him).

\textsuperscript{118} See Amasa M. Eaton, Thomas Wilson Dorr, in \textit{5 Great American Lawyers: The Lives and Influence of Judges and Lawyers Who Have Acquired Permanent National Reputation, and Have Developed the Jurisprudence of the United States} 175, 228 (William Draper Lewis ed., 1908); \textit{Ex parte Dorr}, 44 U.S. 103, 104-06 (1844) (denying a request to issue a writ of habeas corpus because the Court did not have jurisdiction over a person convicted of treason under a competent state court unless that person was being called as a witness in a federal case).
rebellion against the south and its institution of slavery. After seizing the
armory, a bloody battle ensued between Brown's men and townspeople. The
ordeal quickly ended after President James Buchanan sent U.S. troops led by
Colonel Robert E. Lee to Harper's Ferry. After President Buchanan declined
to prosecute a federal case against the captured Brown and several of his
raiders, the Commonwealth of Virginia prepared for trial.

In an already divided nation, the Brown trial garnered nationwide
interest. Held in Charlestown, Virginia, the trial resulted in Brown's
conviction for levying war against Virginia. The guilty verdict posed several
problems not adequately addressed by the state court. The most pressing
issue was whether Brown, a nonresident of Virginia, could be found guilty of
betraying the state. The court dismissed Brown's argument that he could not,
stating "the Constitution did not give rights and immunities alone but also
imposed responsibilities." A federal prosecution would have better
rebutted Brown's argument because a citizen of a state is also a citizen of the
collective United States, thus owing allegiance to the entire nation. English
common law supports the notion that a citizen has the responsibility to
maintain his allegiance to his entire country, not only to his local
government. Comparable to English precedent, the connection between the
United States and its citizens or residents forms duties inherent in the concept

120 See generally id. at 49-62.
121 See id. at 82 (noting that both the United States and Virginia had jurisdictional
claims over the armory).
122 Id. at 120.
123 Id. at 216-217.
124 See Carlton F.W. Larson, The Forgotten Constitutional Law of Treason and the
of Brown's arguments and issues regarding the verdict).
125 See John Adams et al., supra note 611, at 430; Sir Michael Foster, Discourse on High
Treason (1762) 183-90, 193-98, 200-01, 205-11, 213, 216-19, 221-24, 220-46, 249-50, in 4
THE FOUNDERS' CONSTITUTION 410 (Philip B. Kurland & Ralph Lerner eds., 1987) ("High
Treason being an Offence committed against the Duty of Allegiance . . . The Duty of
Allegiance, whether Natural or Local, is founded in the Relation the Person standeth
in to the Crown, and in the Privileges He deriveth from that Relation. Local Allegiance
is founded in the Protection a Foreigner enjoyeth for his Person, his Family or Effects
during his Residence here[.]").
of allegiance. In the case of Brown, one could argue that because Brown held American citizenship, and because he was in Virginia at the time of the insurrection, he owed allegiance to that state. Though the state court failed to adequately answer this question, treason jurisprudence would progress further still during the largest insurrection the United States ever faced.

In the early hours of April 12, 1861, General P.G.T. Beauregard bombarded Fort Sumter, initiating the bloodiest conflict in U.S. history. The ensuing American Civil War posed several distinct issues related to the Treason Clause. First, almost half of U.S. citizens betrayed their allegiance to the Union by openly waging war against the United States. When the citizens of the southern states seceded, they defied all duties and obligations inherent in citizenship. These states also entered into open rebellion with the intent to overthrow the U.S. government operating in the South. By supporting these secessionist efforts and participating in open conflict against the United States, Americans who supported the Confederate States committed treason.

Second, unlike previous American insurrections such as the Whiskey and Fries rebellions, the Civil War was more akin to a traditional war warranting a congressional declaration. However, during the course of the conflict, Congress never formally exercised its Article I power to declare war against the Confederacy. Without a formal declaration of war, potential issues arose

126 See Carlisle v. United States, 83 U.S. 147, 154 (1873) (stating that "‘allegiance’ is . . . the obligation of fidelity and obedience which the individual owes to the government under which he lives, or his sovereign in return for the protection he receives.").


129 See Carlisle, 83 U.S. at 156 (citing President Johnson’s December 25, 1868 pardon of all people participating directly or indirectly in insurrection during the Civil War).

130 See U.S. CONST. art. I, § 8, cl. 11. See also Official Declarations of War by Congress, U.S. SENATE,
concerning the legality of U.S. military operations against the secessionist states and the use of treason against ordinary citizens living within them.

President Andrew Johnson shed some light on which citizens committed treason against the United States when he issued Proclamation 179, which fully pardoned all rebels who participated in the Civil War and granted them amnesty. This proclamation, issued on Christmas Day 1868, offered "amnesty and pardon to persons who had been or were concerned in the late rebellion against the lawful authority of the Government of the United States," which included "every person who, directly or indirectly, participated in the late insurrection or rebellion." The all-encompassing nature of this identified group of Americans appeared to indicate that most, if not all, of those who contributed in any way to the war effort against the Union were guilty of treason. Judging by the scope of Proclamation 179, contributions to the war effort included conducting business with the Confederacy and merely residing within one of the thirteen seceding states as a citizen of the Confederacy. However, the Civil War treason cases did not address

http://www.senate.gov/pagelayout/history/h_multi_sections_and_teasers/WarDeclarationsbyCongress.htm (last visited Feb. 28, 2019).

131 See The Prize Cases, 67 U.S. 635, 636 (1863) (challenging President Lincoln’s ability to blockade Confederate ports and capture ships within those ports without a congressional declaration of war).

132 See, Carlisle, 83 U.S. at 155 (holding British citizens domiciled in the United States have committed treason by manufacturing saltpeter and selling it to the Confederacy).


134 Id.


136 James Hurst argues that during the Constitutional Convention, the Framers chose to not limit the Treason Clause’s ability to reach those participating in a civil war against the United States. See Hurst, supra note 29, at 134 (stating “[t]he only respects in which the Convention may be said to have rejected opportunities to confine the scope of the offense were in rejecting the suggestions that the states be denied any authority to define treason against themselves, and that participation in a civil war, between a state and the nation, be excepted.”).
whether remaining a citizen of the Confederacy constituted an overt act of treason. 137

In *The Prize Cases*, the Supreme Court remained focused on what constituted an act of levying war. *The Prize Cases* presented the question of whether President Abraham Lincoln could legally blockade Confederate ports and take violators’ cargo as a “prize” without a congressional declaration of war. 138 To determine the legality of President Lincoln’s actions, the Court examined whether a state of war existed at the time of the blockade, and to what extent the President may act to thwart hostile actors absent congressional action. 139 The Court concluded that a state of war did exist at the time of the blockade and the President, through his constitutional powers as Commander-in-Chief, had the duty to “resist force by force” when it was thrust upon the nation. 140 The Court clarified that while the President may not initiate or declare war, he must counter insurrection or hostilities “without waiting for any special legislative authority.” 141 For the Treason Clause, the holding in *The Prize Cases* applies the reasoning in the case of the Whiskey and Fries rebellions that levying war occurs when Americans engage in rebellion even without a congressional declaration of war. When rebellion or insurrection occurs within the United States, all direct and indirect participants are subject to the Treason Clause.

The Civil War featured several prominent treason cases, some of which posed major issues for criminal procedure and the constitutional right to a fair criminal trial. 142 Throughout the conflict, Union forces made examples of Southerners who committed acts disrespectful to the United States. In one particular instance, Union forces executed a gambler named William

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137 Note that one should construe the term “overt act” broadly to justify the inclusion of people remaining in a State in open rebellion but who choose not to participate further in hostilities against the U.S. government.
139 *Id.* at 659, 666.
140 *Id.* at 668–69.
141 *Id.*
142 See U.S. CONST. amends. V, VI (codifying rights in criminal cases and the right to a fair trial).
Mumford after he tore down and desecrated a U.S. flag in New Orleans. Mumford’s trial took place within the Union-occupied city and featured a jury comprised of officers handpicked by the de-facto military governor, General Benjamin Butler. During his trial, Mumford faced various treason charges, including “maliciously and willfully tear[ing] down said flag from said building and trail[ing] it ignominiously through the public streets, and . . . destroy[ing] [it].” Upon conclusion of the trial, the jury found Mumford guilty and sentenced him to death. On June 7, 1862, Mumford was hanged by Union troops next to the same building from which he removed the American flag several weeks earlier. This trial appeared inherently unjust to the citizens of New Orleans and was arguably unconstitutional because it lacked an impartial judge and jury.

The Civil War also presented one of the first treason cases dealing with the “Aid and Comfort” provision of the Treason Clause. In United States v. Greathouse, several seamen were indicted for levying war against the United States and giving aid and comfort to the Confederacy for attempting to intercept and seize mail ships traveling between California and the port of Panama and capture the U.S. fort at Alcatraz in March 1863. The men had previously received a letter of marque from Confederate President Jefferson Davis to engage in hostilities but were apprehended by authorities before achieving their objective. Before the sailors could leave the port of San

143 BENJAMIN F. BUTLER, AUTOBIOGRAPHY AND PERSONAL REMINISCENCES OF MAJOR-GENERAL BENJ. F. BUTLER 438–42 (1892).
144 See id.
145 Id.
146 Id.
147 Id.
148 See id. Treason trials must protect the defendant’s right to due process and a fair trial. See U.S. CONST. art. III, § 3; U.S. CONST. amends. V, VI.
149 See United States v. Greathouse, 26 F. Cas. 18, 18–21 (C.C.N.D. Cal. 1863) (No. 15,254) (involving defendants indicted under An Act to Suppress Insurrection, to Punish Treason and Rebellion, and Confiscate the Property of Rebels, and for Other Purposes, 12 Stat. 589 (1862)).
150 See id.
Francisco, however, U.S. revenue officers seized their schooner and arrested them.\footnote{See id. at 18.}

The court in \textit{Greathouse} made two significant contributions to treason jurisprudence when it outlined to the jury what acts constituted treason. First, the court explained that to aid and comfort the enemy, one must provide assistance to subjects of a foreign nation and \textit{not} rebels or insurrectionists.\footnote{See id. at 22 (instructing to the jury that “[t]he term ‘enemy’ . . . applies only to the subjects of a foreign power in a state of open hostility with us. It does not embrace rebels in insurrection against their own government. An enemy is always the subject of a foreign power who owes no allegiance to our government or country.”).}

Because the defendants in \textit{Greathouse} supported the Confederacy, the court instructed the jury to omit any consideration of aiding and comforting the enemy.\footnote{Id. (explaining that all parties assisting rebels effectively levy war themselves against the United States because they are “equally involved in guilt.”); id. at 23.} Second, the court stated that a crew’s postponement of actual hostilities did not preclude a guilty verdict.\footnote{See id. at 28 (instructing the jury that “it can hardly be contended that the mere postponement of actual hostilities can deprive the voyage of character stamped upon it by its main purpose and design.”).}

The court explained that if a hostile voyage is postponed for a lengthy amount of time and the ship resumes legal and innocent voyages, the original treasonous intent could not lead to a guilty verdict.\footnote{Id. at 28. \textit{See also} Medway v. United States, 6 Ct. Cl. 421, 432 (1870) (holding that writing letters to the president of the Confederacy offering support and aid during the Civil War did not amount to treason because they were not sent or uttered).} However, the most important question for the jury was whether “the vessel sail[ed] under the letter and in the service of the rebel government[,]”\footnote{\textit{Greathouse}, 26 F. Cas. at 29.} \textit{Greathouse} offered needed clarification for the scope of an “Aid and Comfort” charge by demonstrating how to assess instances where hostilities were thwarted properly.

\footnotesize{\textsuperscript{151} See id. at 18.} 
\footnotesize{\textsuperscript{152} See id. at 22 (instructing to the jury that “[t]he term ‘enemy’ . . . applies only to the subjects of a foreign power in a state of open hostility with us. It does not embrace rebels in insurrection against their own government. An enemy is always the subject of a foreign power who owes no allegiance to our government or country.”).} 
\footnotesize{\textsuperscript{153} Id. (explaining that all parties assisting rebels effectively levy war themselves against the United States because they are “equally involved in guilt.”); id. at 23.} 
\footnotesize{\textsuperscript{154} See id. at 28 (instructing the jury that “it can hardly be contended that the mere postponement of actual hostilities can deprive the voyage of character stamped upon it by its main purpose and design.”).} 
\footnotesize{\textsuperscript{155} Id.} 
\footnotesize{\textsuperscript{156} Id. at 28. \textit{See also} Medway v. United States, 6 Ct. Cl. 421, 432 (1870) (holding that writing letters to the president of the Confederacy offering support and aid during the Civil War did not amount to treason because they were not sent or uttered).} 
\footnotesize{\textsuperscript{157} Greathouse, 26 F. Cas. at 29.}
The Civil War cases presented many issues regarding how to properly conduct treason trials during obstreperous times. These cases also helped clarify ambiguous terms within the Treason Clause. Specifically, The Prize Cases better defined when war is levied against the United States. President Johnson’s Proclamation 179 offered insight into who commits treason during a major rebellion. Greathouse clarified the scope of the Aid and Comfort provision and outlined the importance of a treasonous intent after U.S. officials thwarted traitorous acts. In many ways, the Civil War cases helped future courts deal with traitors during World War II.

C. World War II and the Rise of Aid and Comfort Convictions

When the Japanese bombarded Pearl Harbor on December 7, 1941, the United States quickly entered into the already raging global conflict, aptly named World War II. Soon after the attack, Congress officially declared war on the major Axis powers of Japan, Germany, and Italy. With these declarations came open and total warfare. The global conflict ushered in new treason cases and legal issues of first impression. Instances of a German-American saboteur scheming on U.S. soil, American propagandists operating on behalf of the Axis powers, and Nazi sympathizers helping German soldiers escape from prison camps became almost commonplace during the war. With the dawn

159 See Peters & Woolley, supra note 133.
160 Greathouse, 26 F. Cas. at 18–20, 28.
162 See id. (discussing Congress’s declaration of war against the major Axis Allies as well as Bulgaria, Hungary, and Rumania the following year); see also Official Declarations of War by Congress, supra note 130.
163 See, e.g., Ex parte Quirin, 317 U.S. 1, 2 (1942).
164 See, e.g., Best v. United States, 184 F.2d 131, 137 (1st Cir. 1950) (convicting an American of treason for serving as a commentator for the Nazi Third Reich); Chandler v. United States, 171 F.2d 921, 925–26 (1st Cir. 1948) (stating that the defendant was the highest paid Nazi commentator in the U.S.A. Zone Short Wave Station of the German Radio Broadcasting Company).
165 See, e.g., Stephan v. United States, 133 F.2d 87, 90 (6th Cir. 1943) (finding an American guilty of treason for assisting a Nazi soldier in attempting to escape a prison camp in Ontario, Canada).
of modern warfare emerged a new norm for treason law: prosecuting Americans for aiding and comforting the enemy.\(^{166}\)

In the first major treason case of World War II, *Cramer v. United States*, the Supreme Court overturned a treason conviction against Anthony Cramer, an American who met with German saboteurs in New York and agreed to hold their money belt for safekeeping.\(^{167}\) In reversing the lower court’s judgment, the Supreme Court explained that without proof Cramer provided *actual aid and comfort with intent* to betray his nation, the prosecution’s case must fail.\(^{168}\) The Court further explained that “[t]he very minimum function that an overt act must perform . . . is that it show sufficient action by the accused, in its setting, to sustain a finding that the accused actually gave aid and comfort to the enemy.”\(^{169}\) Thus, an overt act and an intent to betray one’s nation are so intertwined that intent must be inferred from the overt act itself.\(^{170}\) In citing Lord Reading, the Court explained the significance of an overt act and its portrayal of the traitor’s criminal intent.\(^{171}\) In *Cramer*, the Court was not convinced that Cramer intended to betray the United States by meeting with German citizens and agreeing to hold a money belt for safekeeping.\(^{172}\)

In a similar case, the Supreme Court affirmed a treason conviction because the accused provided aid and comfort to a saboteur in order to help him complete his mission.\(^{173}\) This case, *Haupt v. United States*, was intimately related to *Ex parte Quirin*, one of the most prominent cases of World War II. In *Ex parte Quirin*, a German-American named Herbert Hans Haupt and several

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\(^{166}\) See HURST, supra note 29, at 25 (explaining that of ten reported World War II cases dealing directly with treason, nine resulted in convictions for adhering to an enemy of the United States by offering some form of aid and comfort).

\(^{167}\) Cramer v. United States, 325 U.S. 1, 4, 48 (1945).

\(^{168}\) Id. at 30–31.

\(^{169}\) Id. at 34–35. The Court also held that two witnesses must validate and prove the “sufficient” overt act occurred. See id. at 33.

\(^{170}\) Id. at 31.

\(^{171}\) Id. at 45 (quoting Lord Reading’s statement that “[o]vert acts are such acts as manifest a criminal intention and tend towards the accomplishment of the criminal object. They are acts by which the purpose is manifested and the means by which it is intended to be fulfilled.”).

\(^{172}\) Id. at 48.

other members of the Nazi Third Reich arrived in the United States via submarine to plant explosives in New York City.\textsuperscript{174} Before the saboteurs could execute their plan, American officials intervened.\textsuperscript{175} The saboteurs were subsequently placed before a military commission and tried as enemy combatants, where they all received guilty verdicts.\textsuperscript{176} Several days later, Haupt was executed for participating in the plot.\textsuperscript{177}

In Haupt, Herbert Hans’ father Hans Max faced prosecution for treason after he gave his son shelter, helped him purchase a car, and assisted him in attaining employment in a lens factory.\textsuperscript{178} Unlike in Cramer, the Court in Haupt was convinced Hans Max’s actions revealed an intent to betray the United States and assist in Herbert Hans’ mission.\textsuperscript{179} The Court believed that providing his son shelter for six days and helping him purchase a car and find work were central enough to Haupt’s plot to warrant a treason conviction for Hans Max.\textsuperscript{180}

The outcomes in Cramer and Haupt illustrate the importance of how subtle factual differences lead a court to identify treasonous intent. For the Supreme Court, only a few details in Haupt led to the affirmation of a treason conviction.\textsuperscript{181} Though the facts in Cramer and Haupt may seem too similar to easily distinguish, each case provides distinct guidance for courts overseeing treason prosecutions. The Cramer opinion offers a restricted view of the Treason Clause by limiting the potential for new constructive treasons. The ruling in Cramer also remains true to both the text of the Treason Clause and Founding Fathers’ intent to limit the scope of the crime, much like Chief Justice Marshall’s rulings in Ex parte Bollman and Burr.\textsuperscript{182} In contrast, Haupt represents

\textsuperscript{174} See Ex parte Quirin, 317 U.S. 1, 21 (1942).
\textsuperscript{175} Id.
\textsuperscript{176} Id. at 25.
\textsuperscript{178} Haupt, 330 U.S. at 635.
\textsuperscript{179} Id. at 635–36 (describing such actions as “essential” to furthering Hans Herbert’s mission of sabotage).
\textsuperscript{180} Id.
\textsuperscript{181} See Haupt, 330 U.S. at 635–36.
\textsuperscript{182} See Hurst, supra note 29, at 187–89.
the notion that although an act may appear innocent on its face, it may rise to the level of treason if the evidence reveals the actor intended to aid and comfort the enemy. In conjunction, these cases demonstrate the hardships courts face when determining the scope of the Treason Clause, in particular, the crime of aiding and comforting the enemy.

A more straightforward case of aid and comfort for the Supreme Court was *Kawakita v. United States*. In *Kawakita*, a dual-citizen of Japan and the United States was convicted of treason for providing aid and comfort to the Japanese when he abused American prisoners-of-war. When the United States formally declared war on Japan, Tomoya Kawakita acted as an interpreter for the Japanese in a prison camp housing captured U.S. soldiers. The Court held Kawakita adhered to the enemy by offering aid and comfort in abusing American soldiers and inflicting punishment on them. The Court explained that Kawakita's acts were treasonous because "they were acts which tended to strengthen the enemy and advance its interests," which amounted to "more than sympathy with the enemy, more than a lack of zeal in the American cause, [and] more than a breaking of allegiance to the United States." If the Supreme Court found Hans Max's actions of helping his Nazi son obtain shelter, a job, and a car to be treasonous, the Court had no issue determining Kawakita's acts of violence against U.S. prisoners-of-war in Japan amounted to treason.

*Kawakita* presented the unique issue of dual-citizenship. In his defense, Kawakita argued a dual-citizen could only commit treason against the country in which he currently resides. The Court quickly dismissed this argument by explaining the Treason Clause contains no territorial limitation, extending

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183 See id. at 247–49 (arguing the Court convoluted the intent and overt act elements of the Treason Clause in *Cramer*, and that the Haupt opinion provided much needed clarification).


185 Id. at 737.

186 Id. at 740–41.

187 Id. at 741.

188 See id. at 737.

189 See id. at 732.
to Americans living abroad.\textsuperscript{190} The Court continued by declaring, “American citizenship, until lost, carries obligations of allegiance as well as privileges and benefits.”\textsuperscript{191} After \textit{Kawakita}, the duties of loyalty inherent in citizenship expressly applied to not only U.S. citizens and resident aliens residing within the United States,\textsuperscript{192} but also all American dual-citizens regardless of whether they lived inside or outside American territory.\textsuperscript{193} If any person within these categories levies war against the United States or adheres to enemies by offering aid and comfort, he commits treason.

World War II also introduced a new breed of propagandist traitors whose sole overt act of betrayal was speaking on behalf of U.S. enemies in Europe and Asia.\textsuperscript{194} Two of the most infamous propagandists, “Axis Sally” and “Tokyo Rose,” became household names.\textsuperscript{195} These two women received jail sentences after working for German and Japanese radio broadcast services and targeting both U.S. soldiers and citizens with propaganda.\textsuperscript{196} Both women, named Mildred Gillars and Iva Ikuko Toguri D’Aquino, were found guilty of treason because their speech helped further the enemy’s propaganda efforts.\textsuperscript{197} Like \textit{Kawakita}, both Gillars and D’Aquino committed treason while living in

\begin{footnotesize}
\begin{enumerate}
\item[190] See id. at 732–33.
\item[191] Id. at 734.
\item[192] See Carlisle v. United States, 83 U.S. 147, 154 (1872) (“[t]he citizen or subject owes an absolute and permanent allegiance to his government or sovereign, or at least until, by some open and distinct act, he renounces it and becomes a citizen or subject of another government or another sovereign.”); Adams, et al., supra note 61.
\item[193] See \textit{Kawakita}, 343 U.S. at 732–33.
\item[194] See \textit{D’Aquino} v. United States, 192 F.2d 338, 348 (9th Cir. 1951); Gillars v. United States, 182 F.2d 962, 968–69 (D.C. Cir. 1950); Best v. United States, 184 F.2d 131, 137 (1st Cir. 1950); Chandler v. United States, 171 F.2d 921, 925–26 (1st Cir. 1948).
\item[196] See Gillars, 182 F.2d at 968–69; \textit{D’Aquino}, 192 F.2d at 348.
\item[197] See Gillars, 182 F.2d, at 971 (holding that Gillars’ words were “spoken as part of a program of propaganda warefare (sic), in the course of employment by the enemy in its conduct of war against the United States, to which the accused owes allegiance, may be an integral part of the crime.”); \textit{D’Aquino}, 192 F.2d, at 353 (stating it is “psychologically possible” for a person to intentionally commit treason while still feeling compassion for individual prisoners).
\end{enumerate}
\end{footnotesize}
enemy territory.\textsuperscript{198} Their overt acts consisted of recording propaganda for the Axis powers from abroad, which was enough to uphold guilty verdicts. While these cases sparked intense First Amendment debates,\textsuperscript{199} they also expanded the scope of the Treason Clause to include propagandists who supported a wartime enemy of the United States.

With the conclusion of World War II came the end of treason case law.\textsuperscript{200} As global governance began to evolve through the creation of institutions such as the United Nations, several legal scholars began to argue that the Treason Clause should be left by the wayside.\textsuperscript{201} Although the decades following World War II featured prominent U.S. conflicts where Americans joined the ranks of oppositional forces or helped issue enemy propaganda, the Treason Clause remained dormant.\textsuperscript{202} Instead of charging defectors with treason, the U.S. government began using other statutes, such as the Espionage Act.\textsuperscript{203} After the September 11 terrorist attacks, the U.S. government continued to ignore the Treason Clause, instead seeking convictions under terrorism statutes.\textsuperscript{204}

\textsuperscript{198} See Lucas, supra note 195, at viii; Kawashima, supra note 195, at xi.

\textsuperscript{199} See, e.g., Kawashima, supra note 1955, at 166--67 (arguing the verdict in D' Aquino was a political ploy which distorted the constitutional right to make critical speech against the U.S. government).

\textsuperscript{200} Kawakita was the last treason conviction in the United States. See Dan Eggen & Karen DeYoung, U.S. Supporter of Al Qaeda is Indicted on Treason Charge, Wash. Post (Oct. 12, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/10/11/AR2006101101121.html.

\textsuperscript{201} See Eichensehr, supra note 34, at 1445 ("[c]ommentators argued that the crime was antiliberal, too difficult to prove, unnecessary in times of stability and security, and based on a sense of loyalty to the state that has become extinct in the modern era.").

\textsuperscript{202} See Henry M. Holzer, Why Not Call it Treason? From Korea to Afghanistan, 29 S.U. L. REV. 181, 194 (2002) (arguing that traitors from the Korean War, Vietnam War, and the War on Terror in Afghanistan should have been tried for treason).

\textsuperscript{203} See id. at 182 (citing the famous Cold War case against the Rosenbergs for committing espionage). See also Espionage and Censorship, 18 U.S.C. pt. 1, ch. 37.

\textsuperscript{204} See Attorney General Transcript: News Conference — Indictment of John Walker Lindh, Dep't of Justice (Feb. 5, 2002), https://www.justice.gov/archive/ag/speeches/2002/020502transcriptindictmentofjohnwalkerlindh.htm (stating that John Walker Lindh was indicted on 10 separate counts by a grand jury in the Eastern District of Virginia for conspiring with the Taliban, training with al Qaeda, carrying firearms and destructive devices, and conspiring to kill Americans).
Although the U.S. government chose to not charge American members of al Qaeda under the Treason Clause, the constitutional crime remains a viable option in the future. The executive branch’s decision to refrain from pursuing treason convictions during any conflict after World War II should not be interpreted as rendering the Treason Clause moot. For example, the limited use of the Treason Clause is not comparable to when the Supreme Court significantly restrained the 14th Amendment’s Privileges or Immunities Clause in the *Slaughter-House Cases.* 205 Unlike this pivotal instance in constitutional precedent, the Court has placed zero restraints on the Treason Clause. The Court understands and acknowledges the Treason Clause is as much a tactical weapon as it is a legal one and must be used as such. 206

The Treason Clause should be viewed as a potential option for prosecutors to use against Americans who join and fight for ISIS. ISIS is currently levying war against the United States as a new and unconventional enemy, notwithstanding the recent collapse of the Islamic State. This does not mean all ISIS sympathizers are automatically subject to treason liability. The analysis must focus on distinct types of ISIS fighters and sympathizers, including: (1) Americans who travel to the Middle East intending to join ISIS; (2) Americans who commit terrorist attacks against U.S. citizens on behalf of ISIS in the United States and abroad; (3) Americans who are featured in ISIS propaganda videos; and (4) Alien residents who commit terrorism on American soil. This analysis guarantees the appropriate and effective use of the Treason Clause in accordance with the Founding Fathers’ original intent to limit the use of treason for the “preservation of liberty.” 207

205 See *Slaughter-House Cases,* 83 U.S. 36, 78 (1872) (holding the Privileges or Immunities Clause has no application to a state’s own citizens).

206 See *Cramer v. United States,* 325 U.S. 1, 45 (1945) (“the treason offense is not the only nor can it well serve as the principal legal weapon to vindicate our national cohesion and security.”).

207 See *Records from the Federal Convention,* *supra* note 532, at 435 (quoting Gouverneur Morris).
III. THE TREASON CLAUSE AS APPLIED TO ISIS

According to the Program on Extremism at The George Washington University, about 250 Americans either attempted to or successfully traveled to Syria and Iraq to join ISIS since Fall 2015. American affiliates of ISIS have killed Americans on U.S. soil and have fought on the battlefield in Iraq. Based on the willingness of some Americans to join the ranks of ISIS, the Executive Branch should consider using the Treason Clause against those who violate their allegiance to the United States. To determine whether applying a charge of treason against ISIS is indeed legal, the following must be established: (1) American members of ISIS levy war against the United States; or (2) ISIS is an “enemy” of the United States. If neither is true, then any American who joins ISIS cannot be tried under the Treason Clause. However, if either is true, an assessment of the four aforementioned categories of ISIS members is warranted.

A. Has ISIS Levied War Against the United States?

Is ISIS currently levying war against the United States? The answer to this question is not easily ascertainable. The terror group’s heinous acts against Americans in U.S. territory and abroad support the claim that it is levying war against the United States. For the Treason Clause to apply to American ISIS members...

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208 LORENZO VIDINO & SEAMUS HUGHES, ISIS IN AMERICA: FROM RETWEETS TO RAQQA ix (2015).

209 See Karimi, et al., supra note 6 (San Bernardino terrorist attacks).


211 See U.S. CONST. art. 3, § 3, cl. 1.

212 See, e.g., US Missed Chattanooga Attack but Foiled ‘Over 60’ Isis-Linked Plots: Security Chair, THE GUARDIAN (July 19, 2015), http://www.theguardian.com/us-news/2015/jul/19/chattanooga-isis-terror-plots-homeland-security (writing that naturalized U.S. citizen Mohammad Youssef Abdulazeez killed four marines and one sailor at the Navy Operational Support Center and Marine Corps Reserve...
members, these Americans must actually "assemble[] for the purpose of effecting by force a treasonable purpose." As explained by Chief Justice Marshall in United States v. Burr, "where a body of men are assembled for the purpose of making war against the [U.S.] government and are in a condition to make that war, the assemblage is an act of levying war."

Certain assemblages are more easily discernable as an actual levying of war. As stated by Lord Coke, levying war "must be such an assembly as carries with it speciem belli, the appearance of war." In the United States, Congress's eleven formal declarations of war are the most straightforward examples of when war was levied against the United States. When Congress declares war, it expressly acknowledges an already-existing state of warfare or consents with the President's utilization of the U.S. military to counter hostilities. As observed in The Prize Cases, however, the United States may engage in war absent a congressional declaration. A formal acknowledgment of hostilities by Congress was not necessary during the Civil War because of the force used against the United States. The degree of fighting and the assemblage of troops managed by the self-declared Confederate States of America constituted a total war.


213 See Ex parte Bollman, 8 U.S. (4 Cranch) 75, 126 (1807).
215 See id. at 163 (quoting Lord Coke). In Burr, "the judges proceeded entirely on the idea that a warlike posture was indispensable to the fact of levying war." Id. at 164.
216 See Official Declarations of War by Congress, supra note 13030.
217 See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 642 (Jackson, J., concurring) ("a state of war may in fact exist without a formal declaration [of war].").
218 The Prize Cases, 67 U.S. 635, 668–69 (1863).
219 See id.
The Supreme Court has also recognized the existence of “limited, partial, war.” When the United States engaged in the “Quasi-War” with France, Congress did not declare war but authorized certain types of forces to engage in hostilities under certain circumstances. In analyzing this situation, the Supreme Court found a state of “public war” existed. The key factor of “public warfare” is the public nature of hostilities, meaning the relevant governments hold authority over those participating in the conflict. Limited and partial war may best describe the Whiskey and Fries rebellions. In both examples, the insurrectionists committed treason by using open but limited rebellion to inhibit the U.S. government’s ability to collect taxes. Although these hostilities did not rise to the level witnessed during the Civil War, the rebels legally levied war against the United States.

Warfare is difficult to analyze in the context of terrorism because wars, excluding internal conflicts, are traditionally fought between nations. ISIS is not a nation, but is a designated Foreign Terrorist Organization employing “soldiers” waging unconventional and asymmetric warfare against civilians.

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220 See Bas v. Tingy, 4 U.S. (4 Dall.) 37, 43 (1800) (determining that an partial and limited war existed with France).

221 See id.

222 See id. See also Imperfect War, BLACK'S LAW DICTIONARY (10th ed. 2014) (“[a]n intercountry war limited in terms of places, persons, and things.”); Mixed War, BLACK’S LAW DICTIONARY (10th ed. 2014) (“[a] war between a country and private individuals.”).

223 See Public War, BLACK'S LAW DICTIONARY (10th ed. 2014) (“[a] war between two countries under authority of their respective governments.”).


225 The governmental response was significant, however. For example, President Washington led 13,000 militiamen in battle during the Whiskey Rebellion. See IDEAS AND MOVEMENTS THAT SHAPED AMERICA: FROM THE BILL OF RIGHTS TO “OCCUPY WALL STREET” 984 (Michael S. Green & Scott L. Stabler eds., 2015).


227 See Foreign Terrorist Organizations, supra note 7.
and military personnel alike.\textsuperscript{228} Thus, the term "war" in the traditional sense may not appear to apply to the United States' conflict with ISIS.

Yet the definition of "war" has evolved since September 11, 2001.\textsuperscript{229} Though terrorist groups are not sovereign states, the U.S. government treats them as enemies of the United States due to their aggressiveness, objectives to defeat or topple governments, merciless attacks, and combative behavior.\textsuperscript{230} Throughout the War on Terror, the United States has fought terrorist groups such as al Qaeda and governments such as the Taliban on traditional battlefields.\textsuperscript{231} As President Bush explained after al Qaeda executed the September 11 attacks, "[t]he terrorists and their supporters declared war on the United States, and war is what they got."\textsuperscript{232}

In the early stages of U.S. engagement with ISIS, the Obama administration relied on congressional authorizations implemented during the Bush administration. To justify air strikes against ISIS operatives, President Barack Obama cited both the 2001 and 2002 Authorizations for Use of United States Armed Forces ("AUMFs") against al Qaeda and Iraq as providing sufficient legal authority.\textsuperscript{233} The President also argued the War


\textsuperscript{229} See Authorization for the Use of United States Armed Forces, Pub. L. 107-40 (2001) (authorizes the President to "use all necessary and appropriate forces against those nations, organizations, or persons" determined to be a part of the September 11 terrorist attacks). This congressional authority was used as the legal basis to invade Afghanistan shortly after the September 11 terrorist attacks.

\textsuperscript{230} See ABRAMS, supra note 2266, at 195 (distinguishing the War on Terror with similar "wars" against organized crime, white collar crime, and drugs).

\textsuperscript{231} See id.

\textsuperscript{232} See id. at 210.

Powers Resolution's 60-day limitation barring military operations absent congressional authorization did not apply because "the operations are authorized by a statute." According to President Obama, because ISIS existed as an al Qaeda faction in 2004, both AUMFs grant the executive branch the power to conduct air strikes and deploy U.S. troops to the region. Because the 2001 AUMF applies to ISIS, President Obama argued the executive branch could continue operations past the 60-day limitation created by the War Powers Resolution. Similarly, the Trump administration has cited both AUMFs to support the continued deployment of U.S. troops to the region.

This legal theory is not without criticism, however. Commentators have argued that applying the 2001 and 2002 AUMFs against ISIS is not valid because ISIS is a major enemy of al Qaeda. Some speculators believe the Obama administration's use of the 2001 and 2002 AUMFs was an attempt to

necessary means to enforce United Nations Security Council Resolution 660 (1990) and subsequent relevant resolutions and to compel Iraq to cease certain activities that threaten international peace and security . . .).


avoid the legislative process of declaring war. Commentators also argue that since President Obama submitted a request to Congress to pass a new AUMF to counter ISIS, the 2001 and 2002 AUMFs do not properly extend to the ISIS conflict. Opponents of the legal theory also believe President Obama’s call for repealing the 2001 and 2002 AUMFs conflicts with his argument that both laws support military action against ISIS. It is important to note the U.S. Supreme Court has yet to make a legal determination on the merits of this argument.

The absence of a specific ISIS AUMF does not indicate Congress does not acknowledge that war exists between the United States and ISIS. At the very least, Congress’s failure to pass a new AUMF acts as a form of congressional acquiescence, described by Justice Jackson as a “zone of twilight.”

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239 See, e.g., id. (“[t]he 2001 AUMF is a delightfully expansive law if you’re a member of the U.S. Executive Branch looking to swiftly implement strategy in a far-flung land. Whereas under normal circumstances, Congress has to declare war or authorize the use of force, the executive is free under the AUMF to carry out this action provided that it is actively targeting an al Qaeda affiliate.”).


243 See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J. concurring) (“[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in
famous concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Jackson explained the President and Congress held "concurrent authority" during this "zone of twilight," which "enables" or "invites" the President to act within his constitutional powers to combat an emerging threat. 244

However, the "zone of twilight" rationale is not the strongest indicator that Congress believes the United States is at war with ISIS and supports the executive branch's wartime efforts. The strongest indicator is the annual appropriations Congress continuously passes to counter ISIS, valued in the billions of dollars. 245 The power of the purse is the most important mechanism Congress can use to support military efforts, especially during imperfect or mixed wars. 246 Based on its continuous passage of appropriations to fund U.S. military activities countering ISIS, Congress implicitly acknowledges the United States is at war with the terror organization, or at the very least acquiesces to executive action. 247

The United States is also at war with ISIS due to its obligations under the North Atlantic Treaty Organization ("NATO"). As a member of NATO, the United States adheres to Article 5 of the Washington Treaty, which provides that any armed attack against a NATO ally is an attack against all of NATO. 248 This concept is known as "collective self-defense." 249 Under the Washington Treaty an "armed attack" includes any attack:

which its distribution is uncertain. Therefore, congressional inertia . . . may sometimes . . . enable, if not invite, measure on independent presidential responsibility.").

244 See id.

245 See GARCIA & ELSEA, supra note 242, at 12; Jennifer Bendery, Congress Just Voted to Fund the War Against ISIS: Did They Authorize it, Too?, HUFFINGTON POST (Dec. 18, 2015), http://www.huffingtonpost.com/entry/congress-war-authorization-isis_us_56743423e4b0b958656590a (arguing that U.S. appropriations funding efforts against ISIS constitutes a de facto authorization of hostilities).

246 See JENNIFER K. ELSEA ET AL., CONG. RESEARCH SERV., R41989, CONGRESSIONAL AUTHORITY TO LIMIT MILITARY OPERATIONS 4, 19 n.104 (2013); cf. Louis Fisher, Congressional Abdication on war and Spending xiii-xiv (2000) (arguing that because Congress has delegated much of its war and spending authorities to the executive, congressional funding should not be seen as an expression of its intent).

247 See GARCIA & ELSEA, supra note 242, at 12.


on the territory of any of the Parties in Europe or North America, on the Algerian Departments of France, on the territory of Turkey or on the Islands under the jurisdiction of any of the Parties in the North Atlantic area north of the Tropic of Cancer; [or]

on the forces, vessels, or aircraft of any of the Parties, when in or over these territories or any other area in Europe in which occupation forces of any of the Parties were stationed on the date when the Treaty entered into force or the Mediterranean Sea or the North Atlantic area north of the Tropic of Cancer.250

Article 6's definition of "armed attack" further authorizes NATO operations south of the Tropic of Cancer.251

In the event of an armed attack against any NATO ally, every NATO member, to include the United States, must exercise the right of individual or collective self-defense recognized in Article 51 of the United Nations Charter.252 Thus, per the Washington Treaty, ISIS's attacks in Paris on November 13, 2015 and Brussels on March 22, 2016 constitute an armed attack against all of NATO.253 Furthermore, the phrase "shall be considered an attack against them all" in NATO Article 5 requires all NATO allies to use collective self-defense when a NATO ally encounters an armed attack.254 Based on these NATO obligations, the United States must recognize any ISIS attack against a NATO ally as triggering NATO Article 5's collective self-defense provisions. For the purposes of the Treason Clause, ISIS attacks in Paris and Brussels easily fit the definition of "levying war," especially when compared with the small Whiskey and Fries rebellions.

252 ld.; see also U.N. Charter art. 51.
The fact that ISIS targets and kills Americans, attacks NATO members, aspired to be and functioned as a de facto nation-state, and openly engages in hostilities against the United States with tens of thousands of fighters logically supports the conclusion that the terror group is not only capable of levying war against the United States but has already done so. Though Congress has not yet passed an AUMF specific to ISIS, both President Donald Trump and President Obama have cited the 2001 and 2002 AUMFs as statutory support for legally conducting air strikes against ISIS fighters. Congressional appropriations which fund U.S. military efforts against ISIS provide additional support for interpreting Congress's intent. Based on these executive and legislative actions, both governmental branches arguably believe ISIS is levying war against the United States. Furthermore, Congress's actions reveal its implicit support of the President's use of military action against ISIS, thus supporting the executive's claim of statutory and constitutional authority to do so.

B. Are ISIS Members “Enemies” of the United States?

Although congressional and executive actions tend to reveal a belief that ISIS is levying war against the United States, it is necessary to determine whether ISIS members are considered “enemies.” If Congress expressly prohibits

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255 See, e.g., Carter, supra note 10.
257 See Brigitte L. Nacos, Terrorism and Counterterrorism (5th ed. 2016) (describing ISIS as “a pseudo-state led by a conventional army.”) (quoting terrorism expert Audrey Kurth Cronin).
260 See Letter to Senator Kaine, supra note 237; Letter from President Obama to Congress, supra note 240.
261 See Jennifer K. Elsea et al., Cong. Research Serv., R41989, Congressional Authority to Limit Military Operations 4, 19 n.104 (2013); Bendery, supra note 245.
military operations against ISIS or declares that the terror group is not at war with the United States, the Treason Clause may still apply to ISIS members. To commit treason under the Constitution, a person who owes loyalty to the United States must either levy war against the nation or adhere to its enemies by offering them aid and comfort. If ISIS is an enemy of the United States, anyone owing allegiance to the United States who offers aid or comfort to the terror organization is guilty of treason.

The term "enemy" historically applied to a person when: (1) He is a subject of a foreign power; (2) The foreign power was in open hostilities with the United States; and (3) The subject had no allegiance to the United States. In describing the Treason Act of 1351, William Blackstone explained that "enemies are here understood the subjects of foreign powers with whom we are at war", and the "[Treason Act of 1351] is taken strictly, and a rebel is not an enemy; an enemy being always the subject of some foreign prince, and one who owes no allegiance to the crown of England." As explained by Circuit Judge Field in his jury instruction for United States v. Greathouse, an enemy of the United States cannot be an American rebel or insurrectionist. Black's Law Dictionary follows this traditional view by defining "enemy" as "[a] person possessing the nationality of a state with which one is at war."

This understanding of "enemy" contains two major factors which seem to exclude members of a non-state actor such as ISIS: an enemy must be a subject

262 U.S. CONST. art. 3, § 3, cl. 1.
263 United States v. Greathouse, 26 F. Cas. 18, 22 (C.C.N.D. Cal. 1863) (No. 15,254) (instructing the jury that "[t]he term 'enemy' . . . applies only to the subjects of a foreign power in a state of open hostility with us. . . . An enemy is always the subject of a foreign power who owes no allegiance to our government or country.").
264 See 4 WILLIAM BLACKSTONE, COMMENTARIES 74-91, 350-51 (1769) (located in 4 THE FOUNDERS' CONSTITUTION 426 (Philip B. Kurland & Ralph Lerner eds., 1987) (explaining that imposing war against one's king is treason.).
265 Greathouse, 26 F. Cas. at 22 (stating anyone performing or aiding in a treasonous act are to be considered traitors).
266 See Enemy, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining 'enemy' as: "1. An opposing military force; 2. A state with which another state is at war; and 3. A foreign state that is openly hostile to another whose position is being considered"). See also Alien enemy, BLACK'S LAW DICTIONARY (10th ed. 2014) ("[a] citizen or subject of a country at war with the country in which the citizen or subject is living or traveling.").
of a foreign power engaged in hostilities with the United States, and the subject must not owe allegiance to the United States. Because ISIS is not a "foreign power," it cannot be recognized as a nation. However, Blackstone anticipated this conundrum and explained further 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 treason."  

If Blackstone's reasoning is applied in the modern era, it is apparent the term "enemy" in the Treason Clause applies to ISIS. Similar to the pirates and robbers described by Blackstone, ISIS members are non-state actors from various nations not at war with the United States, led by a private Iraqi citizen named Abu Bakr al-Baghdadi. ISIS cannot be described as an American uprising and (excluding American members) none of its foreign fighters owe allegiance to the United States when located physically outside of American territory. ISIS members also arguably qualify for the designation of "enemy combatants." An enemy combatant is a person who "belongs to or actively supports forces (such as al Qaeda) hostile to or in conflict with the United States or its allies." Congress renamed the term to "unprivileged enemy belligerent" in the Military Commissions Act of 2009, but the basic premise remains the same: irregular fighters affiliated with non-state actors are enemies of the United States.

267 BLACKSTONE, supra note 264, at 426 (explaining that providing support to enemies is treason).


269 Enemy Combatant, BLACK'S LAW DICTIONARY (10th ed. 2014).

270 See 10 U.S.C. § 948a(7) (2018) ("[t]he term 'unprivileged enemy belligerent' means and individual (other than a privileged belligerent) who—(A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the alleged offense under this chapter.").
This term reflects Congress’s intent to differentiate between traditional forces loyal to a sovereign nation and the modern-day terrorist, who holds allegiance to a non-state entity. The U.S. Supreme Court has recognized Congress’s authority to designate terrorists as enemy combatants, although these individuals must receive some form of due process to satisfy the 1949 Geneva Conventions. This recognition is useful when applying the Treason Clause’s definition of “enemy” to ISIS members. The Supreme Court previously acknowledged the legitimacy of the “enemy combatant” – or “unprivileged enemy belligerent” – status in the context of irregular forces. When applied to modern terrorism, the “enemy combatant” status provides support sufficient to legally deem terrorists as enemies of the United States. As argued by Blackstone, the original understanding of “enemy” in the context of treason embraced the idea that enemies may act on behalf of non-

271 See Michael T. McCaul & Ronald J. Sievert, Congress’s Consistent Intent to Utilize Military Commissions in the War against al Qaeda and its Adoption of Commission Rules that Fully Comply with Due Process, 42 ST. MARY’S L. J. 595, 609 (2011) (explaining that by creating the term “unprivileged enemy belligerent”, Congress sought to, inter alia, differentiate between al Qaeda and its affiliates and prisoners of war).

272 See Hamdan v. Rumsfeld, 548 U.S. 557, 631–32 (2006) (holding that Common Article 3 of the Geneva Conventions applies to procedures used by military commissions); see also Geneva Convention Relative to the Treatment of Prisoners of War art. 3(1)(d), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (guaranteeing the following to hors de combat currently in detention: “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”).

273 Some commentators argue the unprivileged belligerent enemy status provided a means to prosecute Americans with using procedural rules less stringent than those provided by the Treason Clause. See Larson, supra note 123, at 868 (explaining Hamdi v. Rumsfeld affirmed Ex parte Quirin); Benjamin A. Lewis, Note, An Old Means to a Different End: The War on Terror, American Citizens, and the Treason Clause, 34 Hofstra L. Rev. 1215, 1230 (2005–2006) (citing Ex parte Quirin as precedent).

274 See Ex parte Quirin, 317 U.S. 1, 37–38 (1942) (“[b]y passing our boundaries for such purposes without uniform or other emblem signifying their belligerent status, or by discarding that means of identification after entry, such enemies become unlawful belligerents subject to trial and punishment.”).
state actors like pirates and robbers.\textsuperscript{275} Based on a modern understanding of an "enemy combatant" and Blackstone's explanations related to non-state actors, ISIS members are justifiably enemies of the United States.

The term "enemy" is conditioned on the existence of actual hostilities. As explained by the District Court for the Southern District of New York, "[o]n the breaking out of [World War I] between the United States and [Germany], the subjects of the [German] Emperor ... were enemies ... and remained such enemies during the continuance of the war."\textsuperscript{276} According to the court, a sovereign nation is not considered an enemy until it thrusts war upon the United States.\textsuperscript{277} For ISIS to be an "enemy", it must engage in actual warfare against the United States. When analyzing application of the Treason Clause to ISIS, it is imperative to not limit the discussion to hostilities between sovereign nations. Non-state actors such as ISIS may also engage in hostilities with the United States when they coordinate attacks against American and NATO troops.\textsuperscript{278} For example, ISIS in the Greater Sahara conducted a coordinated attack against U.S. and Nigerien troops, resulting in the deaths of four Americans.\textsuperscript{279} ISIS is, in fact, levying war against the United States when it targets and kills Americans at home and abroad.

Since ISIS meets the criteria for an enemy levying war against the United States, an inquiry into whether the Treason Clause applies to Americans supporting ISIS is appropriate. However, a treason analysis must be individualized and assess American ISIS members in smaller, distinct categories. This procedure offers credence to the Founding Fathers, who

\textsuperscript{275} See Blackstone, supra note 264, at 426 (explaining that providing assistance to "foreign pirates or robbers who may happen to invade Our coasts without any open hostilities between their nation and the United States, and without any commission ... . would be treason ... because such unauthorized invaders are to be considered as enemies ... ").

\textsuperscript{276} United States v. Fricke, 259 F. 673, 675 (S.D.N.Y. 1919).

\textsuperscript{277} See id.


\textsuperscript{279} See id.
intentionally limited the scope of the Treason Clause to avoid the formation of "new-fangled and artificial treasons." 280

IV. APPLYING THE TREASON CLAUSE TO AMERICAN MEMBERS AND SUPPORTERS OF ISIS

ISIS is the poster child for terrorist recruitment. The organization's utilization of social media to recruit fighters is so successful that Congress has debated whether it should regulate social media corporations such as Facebook and Twitter.281 ISIS's efforts have also convinced significant numbers of Americans to join their ranks in the Middle East.282 According to the Center for National Security at Fordham Law, U.S. federal government prosecutions have led to 173 terrorism cases, 115 of which resulted in criminal convictions.283 In 2015 alone, officials conducted 900 investigations against suspected ISIS members and sympathizers in every state in America.284 Although European nationals account for a larger proportion of ISIS recruits,285 Americans actively seek to join the terror group and execute terrorist attacks on U.S. soil.286

In determining that ISIS is an enemy actively levying war against the United States, any American who joins, wages war on behalf of, or offers aid

280 See generally THE FEDERALIST NO. 43 (James Madison).
282 See VIDINO & HUGHES, supra note 208, at ix (estimating 250 Americans traveled to or attempted to join ISIS in Syria and Iraq).
284 See VIDINO & HUGHES, supra note 208, at ix.
285 See PETER BERGEN ET AL., ISIS IN THE WEST: THE NEW FACES OF EXTREMISM 10, 16, 45 (2015) (including data on the number of European nationals who joined ISIS.
286 Id. at 4–6, 11.
and comfort to ISIS can be convicted of committing treason. However, courts should ensure criminal defendants are convicted of treason using a series of categories of traitors. The following categories will be analyzed to define which types of ISIS members and sympathizers qualify for a treason conviction: (1) Americans who were arrested while en route to the former "Islamic State"; (2) Americans who execute terror attacks in the United States or abroad on behalf of ISIS; (3) Americans who propagandize for ISIS; and (4) Aliens who commit terror attacks in the name of ISIS on American soil.

A. Americans Traveling to the Former Islamic State

On June 29, 2014, ISIS declared a caliphate traversing the borders of Iraq and Syria. In doing so, it formed the "Islamic State," a self-proclaimed nation for ISIS members and sympathizers. The Islamic State officially fell on March 23, 2019, when American-backed forces took the village of Baghuz, Syria. The Federal Bureau of Investigation ("FBI") estimated over 200 Americans traveled or attempted to reach Syria to enter ISIS-controlled territory since 2014. In one particular instance, Jaelyn Delshaun Young and her proclaimed husband Muhammad Oda Dakhllalla, both U.S. citizens, attempted to travel to Syria to join ISIS. Before the couple could reach Syria, the FBI arrested and charged both with attempting to provide material support to ISIS. Young

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288 Id.
290 See Counterterrorism, Counterintelligence, and the Challenges of “Going Dark” Before the S. Select Comm. on Intelligence, 114th Cong. 5057 (2015) (statement of FBI Director James B. Comey), https://www.intelligence.senate.gov/sites/default/files/hearings/S.%20Hrg.%20114-739.pdf#page=54 (discussing the efforts underway in identifying fighters traveling to join and support ISIS).
291 See Complaint at 2, United States v. Young, 3:15MJ32-SAA (D.C.N.D. Miss. May 21, 2015) [hereinafter Young Complaint] (stating the steps taken by Young and Dakhllalla in attempting to travel to Syria to join ISIS).
292 See id. at 1; see also Providing Material Support or Resources to Designated Foreign Terrorist Organizations, 18 U.S.C. § 2339B (2015) (defining 'material support' as
and Dakhlalla received prison sentences of twelve and eight years, respectively.  

Although Young and Dakhlalla never reached the Islamic State, their attempt to join ISIS does raise the question of whether they committed treason. In planning their trip to Syria, did Young and Dakhlalla perform an overt act sufficient to reveal a treasonous intent? Is an attempt to join ISIS an act of treason, or is the fact that they never reached Syria enough to disqualify them from treason scrutiny? These questions are important and must be answered, especially in light of the number of Americans currently facing terror charges for attempting to offer material support to ISIS. These legal questions must also be answered before the executive branch can begin forming policies necessary to leverage the Treason Clause against ISIS. Without clear legal insight, any treason policy will be tenuous and justifiably challenged by legal scholars.

For the Treason Clause to apply to Americans like Young and Dakhlalla, they must owe allegiance to the United States and execute an overt act in furtherance of a treasonous plot. Since Young and Dakhlalla are U.S. citizens, they automatically owe allegiance to the United States through duties inherent in American citizenship. The question then becomes whether their attempt to reach the former Islamic State is an intentional, overt act of treason.

providing any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation, except medicine or religious materials to foreign terrorist organization).


296 See HURST, supra note 29, at 205–06.
As the Supreme Court explained in *Cramer*, treasonous intent can be inferred by the overt act itself.\(^{297}\) The Court in *Cramer* emphasized, however, that "mental attitudes or expressions should not be treason[.]"\(^{298}\) It is not enough to conclude that Young and Dakhlalla are guilty of treason because they sought to aid and comfort ISIS or levy war against the United States by joining ISIS.\(^{299}\) This would be a blatant example of constructive treason the Supreme Court quashed in *Cramer* and *Burr*.\(^{300}\) The act of boarding a plane to join ISIS must be determined to be an overt treasonous act to result in a treason conviction.

For the Young and Dakhlalla situation, the key word is *attempt*. When Americans like Young and Dakhlalla never leave the United States, a prosecutor cannot reasonably argue they assembled with ISIS fighters or sympathizers. Since an actual assemblage is required to levy war against the United States,\(^ {301}\) it appears Young and Dakhlalla did not commit treason by levying war. The Supreme Court explained in *Ex parte Bollman* that the act of traveling to a rendezvous point does not equate to an actual assemblage.\(^ {302}\) Americans who fail to leave the United States may intend to join the actual warlike assemblage in Syria and Iraq. However, these Americans fail to implement their traitorous intentions when apprehended by U.S. officials. Similar to the case of Aaron Burr,\(^ {303}\) the fact the alleged perpetrators never physically joined the ISIS ranks is enough to exonerate them from the crime of treason by levying war.

It is noteworthy to revisit the case of *United States v. Greathouse* before concluding that Americans attempting to travel to Syria and Iraq cannot legally commit treason.\(^ {304}\) In *Greathouse*, the court explained that when war is

\(^{297}\) *See Cramer*, 325 U.S. at 31.

\(^{298}\) Id. at 28.

\(^{299}\) Id.


\(^{301}\) *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 127 (1807).

\(^{302}\) *See id.* at 75, 134.

\(^{303}\) *Burr*, 25 F. Cas. at 113 (explaining Aaron Burr was not guilty of treason because he was not present at the assemblage of men on Blennerhassett's Island).

\(^{304}\) *See United States v. Greathouse*, 26 F. Cas 18, 22 (C.C.N.D. Cal. 1863) (No. 15,254).
thrust upon the United States, "all who engage in the rebellion [or war effort] at any stage of its existence, or . . . give to it any species of aid and comfort, in whatever part of the country they may be, stand on the same platform; they are all principals in the commission of the crime; they are all levying war against the United States." 305 If boarding a plane to join ISIS is a part of the war effort against the United States, these Americans commit treason. However, this is simply not the case. In most instances, Americans seeking to join ISIS are never in actual contact with ISIS leaders and are not following military orders. Instead, they tend to be "lone wolves" inspired by online ISIS news and propaganda. 306 Neither Young nor Dakhlalla received orders from ISIS leaders to travel to Syria or execute a mission on behalf of ISIS. 307 Young and Dakhlalla informed undercover FBI agents of their desire to join ISIS in Syria on their own volition. 308 ISIS lone wolves are fundamentally different from the Greathouse defendants, who received a letter of marque from Confederate President Davis to carry out specific acts of armed aggression against U.S. ships. 309 If Americans in the United States specifically receive orders from ISIS leaders or reach ISIS fighters in Syria and Iraq, they are more likely to be found guilty of treason. 310 However, an attempt to board a plane in the United States, without more, cannot qualify as an overt act of treason.

The act of boarding a plane in an attempt to travel to the Islamic State may still be a treasonous overt act if it is "essential to [the] design for treason." 311 The factor of essentiality pertains to the "Aid and Comfort" provision of the Treason Clause, as explained in Haupt. 312 Americans attempting to travel to

305 Id.
307 See Young Complaint, supra note 291, at 2.
308 See id.
309 See Greathouse, 26 F. Cas. at 18, 24.
310 Id.
312 Id.
Syria and Iraq may commit treason if the act of boarding a plane or planning a trip to the former Islamic State constitutes an overt act essential to offering aid and comfort to ISIS and its members.

Americans arrested while attempting to travel to Syria and Iraq may offer some form of existential support to ISIS. When the public media reports the arrest of these Americans, each specific instance of betrayal may act as an ISIS advertisement, which may add fuel to the ISIS fire. Though any press is good press, this is not sufficient aid to qualify as an overt act essential to ISIS’s mission. While news coverage may provide some marginal benefits to ISIS, the fact Young and Dakhlalla never met or worked with ISIS members or reached ISIS territories to fight NATO and the United States is significant. In relation to the Treason Clause, Americans cannot commit the crime of offering aid and comfort ISIS if they fail to leave the United States. This is not to say Americans must be in Syria and Iraq in order to aid and comfort ISIS. To the contrary, if ISIS were to commit a terrorist attack on U.S. soil and Americans offered ISIS sleeper cells a place to live or helped prepare weaponry for the attack, they assuredly commit treason. Yet, for those Americans who intend to betray the United States by leaving for Syria and Iraq but are first arrested, they never committed treason because they never provided aid or comfort to ISIS. The Supreme Court previously advised against applying the Treason Clause to “doubtful cases.”

In *Haupt*, the Supreme Court upheld Hans Max’s treason conviction because he provided his son shelter, a car, and employment while knowing his son’s intended on executing a mission for the Nazis. The key difference between the situation in *Haupt* and that of Americans like Young and Dakhalla is the actual rendering of assistance to an enemy. Young and Dakhalla wanted to assist ISIS but could not while Hans Max provided assistance to his Nazi son in multiple ways. Young and Dakhalla’s inability

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313 See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 127 (1807) (advising against the use of constructive treasons).
314 See *Haupt*, 330 U.S. at 635.
315 Id.
to execute the treasonous act saves them from treason scrutiny but should not save them from criminal terror charges. An entire section of the U.S. Code is devoted to dealing with attempts to join terrorist groups or commit terrorism. The executive branch should continue to use these terrorism statutes to prosecute Americans who attempt to join ISIS abroad instead of pursuing treason convictions. Treason is inapplicable to this class of ISIS supporters and would justifiably be dismissed by any court.

**B. Americans Who Commit Armed Attacks on U.S. Soil or the Battlefield**

Perhaps the classification of ISIS traitors arousing the greatest emotional response from Americans is U.S. citizens who commit armed attacks within the United States or on the battlefield. Since 2014, ISIS members and sympathizers have conducted several attacks against American civilians, military personnel, and police. One of the most notable and alarming attacks occurred in San Bernardino, California by U.S. citizen Syed Rizwan Farook and his wife Tasheen Malik, a permanent U.S. resident, with the assistance of U.S. citizen Enrique Marquez, Jr. Just as alarming was a report in early January 2019 of Syrian Democratic forces capturing two Americans in Syria for allegedly fighting on behalf of ISIS. The capture of these Americans, named Warren Christopher Clark and Zaid Abed al-Hamid, supports the claim that Americans are on the front lines in Syria and Iraq. The San Bernardino killers and the two alleged ISIS fighters share in common

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321 See id.
a desire to fight and kill on behalf of ISIS. The San Bernardino killers and American ISIS fighters also share the common bond of betrayal. Not only do both levy war against the United States, but they also adhere to U.S. enemies by offering them aid and comfort.

When Syed Rizwan Farook gunned down fourteen Americans and attempted to detonate a pipe bomb inside the Inland Regional Center, he conducted an armed attack against the United States in the name of ISIS. For his actions to be considered treasonous, Farook must have either levied war against the United States or provided aid and comfort to an enemy. In all likelihood, both Farook (and Marquez) were self-radicalized and never contacted ISIS members in the former Islamic State. Farook made the decision to use firearms and construct a pipe bomb to kill Americans in the name of ISIS, an enemy of the United States. Unlike the official directions provided by the Confederate States of America to the Greathouse defendants, ISIS did not plan the attack but did unofficially sanction it afterward and encouraged future attacks. The United States recognizes terrorism as a new form of asymmetric warfare akin to an imperfect or mixed war, as evidenced by the wars in Afghanistan and Iraq. Additionally, ISIS declared war on the

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322 See Marquez Indictment, supra note 319, at 1–7; Ahmed, supra note 318.
324 See United States v. Greathouse, 26 F. Cas. 18, 22 (C.C.N.D. Cal. 1863) (No. 15,254); Ex parte Bollman, 8 U.S. (4 Cranch) 75, 127 (1807).
325 See Bill Chappell, ISIS Praises San Bernardino Attackers; ‘We Will Not be Terrorized,’ Obama Says, NPR (Dec. 5, 2015), http://www.npr.org/sections/thetwo­way/2015/12/05/458578960/isis-praises-san-bernardino-attackers-we-will-not-be­terrorized-obama­says.
326 See Greathouse, 26 F. Cas. 18, 24 (C.C.N.D. Cal. 1863) (No. 15,254).
327 See Chappell, supra note 325.
United States as early as 2012. Based on these facts, any armed attack against Americans by ISIS lone wolves or sleeper cells, especially on U.S. soil, must be deemed an act of warfare executed by ISIS.

Farook cannot stand trial for treason because police killed him in a shootout shortly after the attacks, leaving Marquez as the only living member of the San Bernardino trio. Since Marquez helped purchase firearms for Farook and Malik, it is warranted to examine whether his actions constitute an overt act of treason. As the Supreme Court stated in Ex parte Bollman, “all those who perform any part [of the treasonous act], however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors.” To be guilty of levying war against the United States, Marquez must have been a member of an ISIS assemblage formed to wage war against his nation. To be guilty of aiding and comforting a U.S. enemy, Marquez must have provided actual aid and comfort with intent to betray his nation.

Marquez’s actions played an important part in the San Bernardino attack because the shooters used the firearms Marquez to kill Americans. Though Farook and Malik used Marquez’s firearms to kill Americans in the name of ISIS, the timeline of the purchase matters in identifying any treasonous intent. Marquez purchased the firearms for Farook and Malik several years prior to the actual attacks. Marquez previously conspired with the shooters to

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330 See Winton & Queally, supra note 323.

331 Ex parte Bollman, 8 U.S. (4 Cranch) 75, 126 (1807).


334 See 25 Years Urged for Buyer of Rifles Used in Terror Attack, ASSOCIATED PRESS (Apr. 10, 2018), https://www.apnews.com/cea2b7c35cda4a9b8e45dd5d6764dd4c.

conduct terror attacks, but not the San Bernardino attack specifically.\footnote{See 25 Years Urged for Buyer of Rifles Used in Terror Attack, supra note 334.} Marquez also did not provide additional support or aid during the San Bernardino attack.\footnote{See id.} Marquez’s situation is comparable to that of Aaron Burr’s, who likely conspired in a treasonous plot but did not conduct an actual overt act.\footnote{See United States v. Burr, 25 F. Cas. 55, 180 (C.C.D. Va. 1807) (No. 14,693).} Based on this context, Marquez would not be liable for levying war against the United States. Marquez would also likely not be guilty of providing aid and comfort because he did not specifically aid Farook and Malik in executing the San Bernardino attack.\footnote{Regardless, prosecutors successfully reached a guilty plea with Marquez for providing material support to terrorists. See 25 Years Urged for Buyer of Rifles Used in Terror Attack, supra note 334.}

Americans fighting for ISIS on the battlefield present the most straightforward instance of treason. When Americans fight against the United States on behalf of or alongside enemy fighters, they are the epitome of a traitor.\footnote{See Sir Michael Foster, Discourse On High Treason Ch. 2 § 12, in 4 THE FOUNDERS’ CONSTITUTION 416 (Philip B. Kurland & Ralph Lerner eds., 2000).} These individuals blatantly breach their allegiance by taking up arms against their country without remorse. Not only do they assemble with enemy fighters, but they also intend to kill American and NATO troops. These overt acts are enough to reveal a treasonous intent.\footnote{See Cramer v. United States, 325 U.S. 1, 8 (1945) (quoting Lord Reading’s statement that “[o]vert acts are such as manifest a criminal intention and tend towards the accomplishment of the criminal object.”).} Assuredly, the intent to kill Americans on the battlefield is the type addressed in the Treason Clause.\footnote{See Hamdi v. Rumsfeld, 542 U.S. 507, 554 (2004) (Scalia, J. dissenting).}

Attempting to kill U.S. soldiers on the battlefield is more extreme than the torture and abuse outlined in Kawakita, where Kawakita abused Americans in a Japanese prison camp.\footnote{Kawakita v. United States, 343 U.S. 717, 733–38 (1952).}

The holding in \textit{Ex parte Quirin} poses a problem for prosecuting American ISIS fighters for treason, however. In \textit{Quirin}, the Supreme Court distinguished between the crimes of treason and unlawful belligerency.\footnote{Ex parte Quirin, 317 U.S. 1, 38 (1942).} The Court
outlined the essential elements of unlawful belligerency to include an American citizen who attempts or commits a hostile act against the United States while not wearing a proper uniform or holding military identification. The Court then explained that these essential elements were distinct from those of the crime of treason. Yet, an American ISIS fighter may levy war against the United States without wearing proper uniforms or holding military identification. It is important to understand that the crime of treason should not be removed from a prosecutor’s legal arsenal merely because a suspect also committed other crimes. The crimes of treason and unlawful belligerency are not mutually exclusive. What is essential to the crime of treason is an intent to betray the United States when conducting an overt act. When an American ISIS member fires upon a member of the U.S. military on the battlefield, he affirmatively acts in furtherance of his treasonous intent. As long as the U.S. government can produce two witnesses to prove this overt act occurred, the American ISIS fighter may be found guilty of treason.

Americans who fight and kill for ISIS, like Farook or allegedly Clark and al-Hamid, are more easily found to be traitors because their actions unquestionably reveal an intent to betray the United States. Motivations behind an American’s decision to join a group like ISIS are always complex. This complexity should not shield this category of ISIS supporters from treason scrutiny though, because the simple fact remains: whatever their motivations are, they still intend on betraying the United States.

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345 Id.
346 See id.
347 See Larson, supra note 124, at 914 (arguing treason applies to certain terrorist activities).
349 See id. at 53-54.
350 See U.S. CONST. art. III, § 3, cl. 1.
351 See VIDINO & HUGHES, supra note 208, at 15 (explaining how some Americans joined ISIS for religious and ideological reasons while others sought to help in the formation of a “utopian Islamic society.”).
reasons, as long as two witnesses can testify to the same overt act, these American ISIS members are justifiably considered traitors.

C. American ISIS Propagandists

One of the most unique and disturbing characteristics of ISIS is its use of propaganda films and social media. The group is notorious for its beheading videos and Twitter feeds.\textsuperscript{353} Much like the constitutional issues raised in the World War II propaganda cases of Axis Sally and Tokyo Rose,\textsuperscript{354} the legal problems surrounding treason’s application to American ISIS propagandists are numerous. For example, application of the Treason Clause is difficult and potentially harmful to an American’s constitutional right to free speech.\textsuperscript{355} These are valid concerns for any presidential administration seeking to counter ISIS and deter Americans from joining the terror group. For the purposes of this inquiry, the question must focus not on the particular policy choices of whether an administration should prosecute American ISIS propagandists, but rather on whether a prosecution is viable.

Since speech cannot be construed as an assemblage of men holding a treasonous intent, any prosecutions of ISIS propagandists for committing treason will assessed only under the “Aid and Comfort” provision of the Treason Clause.\textsuperscript{356} During World War II, U.S. courts found Americans adhered to the Axis Powers by making propaganda films and radio broadcasts.\textsuperscript{357} These courts determined that when an American’s speech equates to an act “in furtherance of a program of an enemy[,]" the speaker “gives aid with intent to betray his own country," thereby committing

\textsuperscript{353} See, e.g., Carter, supra note 10; VIDINO & HUGHES, supra note 208, at ix.

\textsuperscript{354} See, e.g., KAWASHIMA, supra note 195, at 166–67 (arguing the D’Aquino decision infringed on the constitutional right to criticize the U.S. government).

\textsuperscript{355} For an excellent assessment of technology and the implications of applying the Treason Clause to the War on Terror, see generally Tom W. Bell, Treason, Technology, and Freedom of Expression, 37 Ariz. St. L. J. 999 (2005).

\textsuperscript{356} See D’Aquino v. United States, 192 F.2d 338, 348 (9th Cir. 1951); Gillars v. United States, 182 F.2d 962, 968–69 (D.C. Cir. 1950); Best v. United States, 184 F.2d 131, 137 (1st Cir. 1950); Chandler v. United States, 171 F.2d 921, 925–26 (1st Cir. 1948).

\textsuperscript{357} See, e.g., Gillars, 182 F.2d at 968–69.
For an American ISIS propagandist to "aid and comfort" a U.S. enemy, his speech must be a part of an ISIS propaganda program established to counter U.S. efforts and he must intend to betray the United States. The category of American ISIS propagandists may be the most difficult to assess in regard to the Treason Clause due to the First Amendment's free speech protections. Specifically, the First Amendment protects an American's speech on his views, opinions, and criticisms of the United States.

The World War II propaganda cases offer much insight into this conundrum. In Gillars v. United States, the U.S. Court of Appeals for the District of Columbia Circuit found that "Axis Sally" committed treason when she made broadcasts on behalf of the German Radio Broadcast Company to dishearten American soldiers before the Allied invasion of Europe. The court reasoned that speech may constitute treason if the speaker seeks to adhere to the enemy by providing aid and comfort to the enemy and intends to betray the United States.

Similarly in D'Aquino, the Ninth Circuit found that "Tokyo Rose" committed treason when she recorded statements directed toward U.S. troops in the Pacific Theater on behalf of the Imperial Japanese Government and Broadcasting Corporation of Japan. The Ninth Circuit agreed with the lower court that these statements were intended to "destroy the confidence" of U.S. troops and sought to "undermine" the war effort by lowering morale.

After assessing the World War II propaganda cases, one can conclude that Americans who independently use Twitter to express their support for ISIS without the terror group's knowledge or sanction do not commit treason. Though these Americans make vile statements in support of an evil organization, the actors are legally expressing their views. Absent proof that these Americans tweet as official ISIS propagandists, these instances arguably

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358 See id. at 971.
359 See id.
361 See Gillars, 182 F.2d at 971 ("In addition, the First Amendment bars enlarging treason to include the mere expression of views, opinion or criticism.").
362 Id. at 968.
363 D'Aquino v. United States, 192 F.2d 338, 348 (9th Cir. 1951).
364 See id.
fall within the “doubtful cases” for which the Supreme Court advises against prosecuting under the Treason Clause.  

Conversely, any American who participates in a beheading video, an Internet video alongside ISIS members, or radio broadcast aimed at U.S. and allied troops commits treason against the United States. In these instances, there is sufficient proof the American is a propagandist adhering to ISIS by offering his aid and comfort to dishearten Americans and undermine the U.S. war effort. Establishing the existence of treasonous intent is possible because an American assuredly knows he is aiding the enemy when he is among ISIS’s ranks and propagandizes on its behalf. Assessing an American ISIS sympathizer’s online footprint and network is important to determine when online speech transforms into an essential facet of ISIS operations. Americans use social media to voice their support of ISIS attacks against Americans and swear allegiance to the terror group. Oftentimes ISIS does not officially sanction these statements but avidly encourages Americans to conduct armed attacks in the United States and abroad. Further complicating the issue is ISIS’s global and semi-autonomous online network.

365 See Ex parte Bollman, 8 U.S. (4 Cranch) 75, 127 (1807) (holding the principles of the constitution defined treason narrowly and should be held as such, allowing lesser crimes to be charged on their own).
368 See Haupt v. United States, 330 U.S. 631, 635 (1947) (holding that testimony by two eyewitnesess of a meeting between the defendant and an enemy agent not sufficient to view words as treasonous).
In the case of an American swearing allegiance to ISIS, treason is applicable if the American’s social media presence tends to strengthen ISIS and advance its interests.\(^{372}\) For example, an American’s online oath of allegiance to ISIS is arguably an act strengthening ISIS and advancing its interests. The American’s oath of allegiance conveys an intent to betray the United States and become an ISIS member. However, social networking sites are vulnerable to hackers, making the Treason Clause’s two-witness requirement likely very difficult to meet. The fact still remains that an American swearing allegiance to ISIS on social media may never encounter actual ISIS operatives or execute official ISIS instructions. In U.S. case law, propagandists were found guilty of treason when they propagandized on behalf of an enemy in an official capacity, not on their own volition.\(^{373}\) An American who independently declares allegiance to ISIS shows his initial support for ISIS and can begin to pursue avenues to meet ISIS members. The speech indirectly supports ISIS in the form of a positive externality. A swearing of allegiance to ISIS cannot be treasonous, though, because the individual is not speaking as an official agent of the terror group.

An American swearing allegiance to ISIS on social media is also not an actual member of an ISIS plot or program; further evidence would be necessary to show official ties with ISIS.\(^{374}\) Swearing allegiance on social media may reveal the American’s desire to collaborate with ISIS in the future. However, this act is not treasonous until the American actually joins ISIS and officially coordinates with the group in person or online.\(^{375}\)

The same can be said for an American using social media to celebrate or condone an ISIS attack in the United States. While sickening, this speech is


\(^{373}\) See D’Aquino v. United States, 192 F.2d 338, 348 (9th Cir. 1951); Gillars v. United States, 182 F.2d 962, 971 (D.C. Cir. 1950).

\(^{374}\) See Best v. United States, 184 F.2d 131, 133–36 (1st Cir. 1950) (outlining Best’s official ties to German radio propaganda).

\(^{375}\) See Cramer v. United States, 325 U.S. 1, 31 (1945).
closer to the non-treasonous opinions, views, and criticisms the Supreme Court outlined in Gillars.\textsuperscript{376} This is not to say that swearing allegiance to ISIS or praising a terrorist attack on social media is always protected speech. For example, the United States Code includes an anti-riot statute criminalizing the promotion or encouragement of carrying on a riot.\textsuperscript{377} The right to free speech is not unlimited and cannot be used to commit crimes.\textsuperscript{378} In relation to the Treason Clause, an American’s postings on social media pledging allegiance to ISIS or praising an ISIS terror attack, without more, are not overt acts of treason.

\textbf{D. Resident Aliens Acting on Behalf of ISIS}

The final category to be assessed is resident aliens of the United States who become radicalized by ISIS and act on its behalf. After the Civil War, the Supreme Court determined that resident aliens are capable of committing treason against the United States.\textsuperscript{379} The concept that aliens owe allegiance to their host country is not new and was discussed during the drafting of the Constitution.\textsuperscript{380} It was commonly understood that any alien residing in a nation or passing through it owes some level of allegiance to that nation because he benefits from its laws.\textsuperscript{381} This doctrine applies to resident aliens in the United States today as much as it did in 1789.

The question, therefore, becomes whether treason applies to U.S. resident aliens like Tashfeen Malik, one of the San Bernardino shooters and co-conspirators, when they are radicalized by ISIS and act on its behalf. In the case of \textit{Carlisle v. United States}, the Supreme Court found that British citizens who were legal residents of the United States had committed treason when

\textsuperscript{376} See Gillars, 182 F.2d at 971 (D.C. Cir. 1950) (stating that without intent to betray one's nation, words or actions alone do not usually constitute treason).


\textsuperscript{378} See United States v. Rahman, 189 F.3d 88, 116–17 (2d Cir. 1999) (acknowledging the First Amendment does not protect all speech, referencing several U.S. crimes committed by speech alone).

\textsuperscript{379} Carlisle v. United States, 83 U.S. (16 Wall.) 147, 148 (1872).

\textsuperscript{380} See Adams et al., \textit{supra} note 61.

\textsuperscript{381} See id.
they sold gunpowder to the Confederacy during the Civil War. The Court explained that when they sold gunpowder to the Confederacy, the British citizens were "participators in the treason of the Confederates equally as if they had been original conspirators with them".

If the sale of gunpowder to the Confederacy was an act of treason, then collaborating and executing an armed attack in the name of ISIS against Americans on U.S. soil must be treason. If Malik survived a shootout with police after the attacks, she would have been a prime candidate for a treason conviction. As an alien resident of the United States, Malik was a U.S. citizen for the purposes of the Treason Clause. Malik intended to levy war against the United States and violate her owed allegiance when she killed Americans in California in the name of ISIS. The obviousness of her intent to betray the United States, her host nation, is comparable to Tomoya Kawakita's blatant intent to betray the United States when he abused American soldiers in Japanese internment camps during World War II.

A more difficult scenario to discern is if an illegal alien decides to act on behalf of ISIS. To be sure, there is no indication that ISIS has previously sent aliens through illicit channels to settle in America or radicalized illegal aliens already residing in the United States. There is also no evidence that any illegal immigrants currently support ISIS or plan to do so in the near future. However, the question is still important when examining the boundaries of the Treason Clause. The Founding Fathers were silent on this issue and did not discuss the allegiance owed by aliens residing in the United States illegally. The inquiry must therefore assess legal norms related to those rights afforded to illegal immigrants.

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382 Carlisle, 83 U.S. (16 Wall.) at 150–51.
383 Id.
384 See Adams et al., supra note 61.
387 See Adams, et al., supra note 61 (discussing "all persons abiding within any of the United Colonies" and not differentiating between legal and illegal status).
The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." When the Supreme Court interpreted this language, it declared that no state "shall deny to any person the benefit of jurisdiction in the equal protection of the laws," including illegal immigrants seeking to attend public school. Illegal immigrants also enjoy the full protection of the Due Process Clause of the Fourteenth Amendment. Since aliens who illegally enter the United States are afforded significant and important rights under the U.S. Constitution, they owe allegiance to the United States. As explained by the Supreme Court, a person who receives benefits from the laws of the United States assuredly owes it allegiance. By benefitting from some of the most fundamental laws of the United States, illegal aliens owe a certain level of allegiance.

If an illegal immigrant becomes radicalized by ISIS, he must face similar treason scrutiny. The level of scrutiny should equate to the type of rights afforded to the alien. That is, if illegal immigrants benefit from fundamental rights such as equal protection and due process, they must also owe an equivalent level of allegiance to the United States. Illegal aliens who join ISIS should receive the same procedural protections included in the Treason Clause irrespective of their legal status. At the same time, they should not receive a preference higher than that of American citizens. If an illegal immigrant executes a terror attack in America on behalf of ISIS, he should be tried in a civilian court in conformity with the standards and requirements outlined in prior treason cases.

V. CONCLUSION

The crime of treason remains one of the most polarizing crimes in the U.S. criminal code and continues to garner much debate over its application to

388 U.S. CONST. amend. XIV, § 2.
390 See Zadvydas v. Davis, 533 U.S. 678 (2001) ("once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.").
391 See id.
modern terrorism. 393 From Aaron Burr’s plot to form a new nation in Spanish territories, to the secession of the Confederate States of America, to World War II propagandists, American treason cases are some of the most famous in U.S. history. Treason remained an important crime for state and federal governments to use against traitors up until World War II. 394 Upon the conclusion of that conflict, treason convictions all but disappeared. 395 In its place, Congress passed several statutes criminalizing terrorism, espionage, and seditious conspiracy. 396 While these laws are appropriate for certain instances of wrongdoing, they did not repeal the Treason Clause. Despite arguments claiming treason is immoral and prone to illiberal application, 397 the Treason Clause offers important procedural safeguards. 398 The crime will also likely continue to be used sparingly by the U.S. government. Allegiance remains one of the most important aspects of the nation-state, and betrayal of this civic duty should be punished. 399 The U.S. government should demonstrate restraint in punishing Americans for violating their allegiance to the nation. The Founding Fathers valued the idea of restricting constructive treason by including the limited Treason Clause in the U.S. Constitution. 400 They sought to ensure treason applied only to those who either actually levied war against the United States or adhered to its enemies through offering aid and comfort. 401


394 See generally supra PART III. (discussing charges of treason through America’s history).

395 See supra PART II.C.


397 See, e.g., Eichensehr, supra note 34, at 1443, 1445, 1462–64.

398 See U.S. CONST. art. III, § 3.


400 See Records From The Federal Convention, supra note 52.

401 See id.
As established earlier, ISIS qualifies as both a *de facto* and a *de jure* enemy of the United States in the age of terrorism. 402 Although the Islamic State has all but disappeared, ISIS continues to kill American soldiers on the battlefields in Iraq 403 and Syria, as well as American civilians globally. 404 Any actual levying of war by an American in the name of ISIS should be interpreted as an indication of intent to commit treason against the United States. Americans who adhere to ISIS by offering aid and comfort should be found guilty of committing treason. 405 The constitutional crime must also apply to those aliens within the United States who either levy war against the United States or provide aid and comfort to its enemies. 406

At the same time, treason should not be used in "doubtful cases" described by the Supreme Court in *Ex parte Bollman*. 407 Doubtful cases include instances where Americans are arrested while en route to the former Islamic State, independently use social media to support terrorist attacks, sympathize with ISIS but have yet to meet or join the ranks of ISIS, or offer ISIS monetary assistance. 408 By excluding these doubtful cases, the Treason Clause will function as a crime used against those who are traitors in fact while avoiding the creation of constructive treasons. 409

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402 See supra Part III.A–B.


406 See U.S. Const. art. III, § 3, cl. 1.

407 Ex parte Bollman, 8 U.S. (4 Cranch) 75, 127 (1807).


409 See generally supra Part I.B. (discussing the measures the drafters of the Treason Clause took to make it more restrictive).
It is important to note the responsibilities of Congress in clarifying the ambiguity surrounding the charge of treason. To avoid erroneous use of the Treason Clause, Congress must be proactive in drafting new treason legislation. Treason laws should unambiguously designate ISIS as an enemy of the United States through Congress’s constitutional power to declare war.\footnote{U.S. Const. art. I § 8, cl. 11.} For example, Congress may pass a new ISIS AUMF, upon which the U.S. government could rely during treason trials. A new ISIS AUMF should specifically explain that any person owing allegiance to the United States becomes a traitor when he levies war on behalf of ISIS or provides it aid and comfort. With this clarification, American citizens and aliens residing in the United States would be on notice that joining or supporting ISIS is an act of treason. These clarifications are vital because a treason conviction carries the potential of the death penalty.\footnote{See 18 U.S.C. § 2381 (1994).} Congress recently attempted to define “an organization that the Secretary of State has designated as a foreign terrorist organization” as an enemy of the United States.\footnote{See Treason and Passport Revocation Act of 2015, H.R. 2020, 114th Cong. (2015).} Although this bill failed to become law, the draft language could be used as a baseline for a new ISIS AUMF. Regardless, Congress must act to clear any ambiguities surrounding treason’s application to ISIS. Congressional action is necessary for the constitutional crime of treason to be utilized effectively against ISIS. With these policy and legal concerns in mind, the U.S. government needs to reconsider the Treason Clause as a viable weapon for the war against ISIS.