

NOTE

AN OLD MEANS TO A DIFFERENT END: THE WAR ON TERROR, AMERICAN CITIZENS . . . AND THE TREASON CLAUSE

I. INTRODUCTION

In 2004, Supreme Court Justice Antonin Scalia, while dissenting in *Hamdi v. Rumsfeld*,¹ stated that when the United States government accuses one of its own citizens of waging war against it, “our constitutional tradition has been to prosecute him in federal court for treason or some other crime.”² Justice Scalia added that “[c]itizens aiding the enemy have been treated as traitors subject to the criminal process.”³ The tradition that Justice Scalia speaks of, though, has not been practiced recently. The government has either utilized conspiracy statutes,⁴ which encompass some of the elements of treason,⁵ or the government has labeled American citizens as enemy combatants and proceeded to detain them indefinitely.⁶ Justice Scalia’s reference to treason, therefore, appears in today’s context to be nothing more than a passing note. However, this should not be the case.⁷ The government should use the treason clause enshrined in the Constitution as a means to prosecute American citizens detained during the war on terror and later designated as enemy combatants. There needs to be a refocus on treason, not just because there are American citizens waging war against their

1. 542 U.S. 507, 554 (2004).

2. *Id.*

3. *Id.* at 559.

4. *See, e.g.*, 18 U.S.C. § 2384 (2006).

5. *See id.*

6. *See Hamdi*, 542 U.S. at 510; *Padilla v. Hanft*, 423 F.3d 386, 397 (4th Cir. 2005).

7. On February 13, 2006, the District Court of the District of Columbia granted a motion for a preliminary injunction filed by an American citizen detained in Iraq during the war on terror. *Omar v. Harvey*, 416 F. Supp.2d 19, 30 (D.D.C. 2006). The injunction prevented the Multinational Force stationed in Iraq, and detaining Sandra Omar, from transferring Omar into the custody of the Central Criminal Court of Iraq. *Id.* at 21. American citizen detainees in the war on terror and how to deal with them is clearly therefore a vital and current question.

country,⁸ but because the treason clause is a prosecutorial tool that can be used to successfully prosecute these citizens. The treason clause has been used successfully in the past,⁹ and there is no substantive reason why it cannot be again.

The treason clause has both historical and constitutional precedents, which imbues it with legitimacy, unlike holding American citizens indefinitely. Importantly, treason is founded in the Constitution.¹⁰ Article III, section 3, clause 1 of the United States Constitution states that, “[t]reason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. 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.”¹¹ It is the only crime defined in the Constitution.¹² In the eyes of the American public, there can surely be no firmer or more legitimate grounds to deal with citizens who have waged war against their country than the Constitution itself. This should be an important factor to today’s oft criticized government.¹³ Treason has been recognized as a crime in this country since before the Revolution.¹⁴ Whether the treason clause, as drafted in 1787, is an appropriate criminal prosecution for the government to bring in the twenty-first century, while waging the war on terror, is the purpose of this Note. Significantly, though, treason has risen to the fore in times of rebellion and world war, when America’s enemies have been most distinct and threatening. Now, in another time of global war, when America’s enemies are not as distinct, but equally as threatening, it is this Note’s position that it is appropriate for the treason clause to be applied again.

8. See, e.g., Declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy, *Hamdi v. Rumsfeld*, No. 2:02CV439 (E.D. Va. July 24, 2002), available at <http://www.pbs.org/wgbh/pages/frontline/shows/sleeper/tools/mobbshamdi.html> [hereinafter Mobbs Hamdi Declaration]; Declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy, *Padilla v. Bush*, No. 02 Civ. 4445 (S.D.N.Y. Aug. 27, 2002), available at <http://www.cnss.org/Mobbs%20Declaration.pdf> [hereinafter Mobbs Padilla Declaration].

9. See generally *Kawakita v. United States*, 343 U.S. 717, 741 (1952); *Stephan v. United States*, 133 F.2d 87, 95 (1943); *Haupt v. United States*, 330 U.S. 631, 635 (1947).

10. See U.S. CONST. art. III, § 3, cl. 1.

11. *Id.*

12. *United States v. Greathouse*, 26 F. Cas. 18, 21 (C.C.N.D. Cal. 1863).

13. See generally Mary-Rose Papandrea, *Under Attack: The Public’s Right to Know and the War on Terror*, 25 B.C. THIRD WORLD L.J. 35, 55-56 (2005); Kenneth Lasson, *Incitement in the Mosques: Testing the Limits of Free Speech and Religious Liberty*, 27 WHITTIER L. REV. 3, 70-71 (2005); *US Terror Suspect to Get Lawyer*, BBC NEWS, Dec. 3, 2003, <http://news.bbc.co.uk/2/hi/americas/3286371.stm>.

14. See Willard Hurst, *Treason in the United States: I. Treason Down to the Constitution*, 58 HARV. L. REV. 226, 226 (1945).

Part II of this Note will explore the intent of the Founding Fathers in drafting the treason clause. It will focus on the policy considerations that drove them to adopt the only crime within the Constitution, and the restrictions they purposefully drafted into its text.

Part III will set out the different elements that constitute treason under the Constitution. This Part will start with an analysis of the first case law that dealt with the issue of treason, and the courts' deference to the Constitution's specific prerequisites. I will then move to the application of the treason clause in the Civil War period, and likewise during World War I. Finally the focus will shift to the most recent and (in terms of number of cases) most prominent period of treason prosecutions, which occurred during and after the Second World War. The purpose of this Part is to uncover the distinct elements of treason, and to demonstrate the requirements necessary to satisfy them.

Part IV will introduce the Seditious Conspiracy statute.¹⁵ In 2004 the government prosecuted a number of persons under this statute, which is similar in part to the treason clause, but different in several critical aspects. The case to be discussed is *United States v. Khan*.¹⁶ This Part will consider why the Seditious Conspiracy statute was used in this case, and distinguish the facts in *Khan* from those in the cases that found treason to have occurred. It will then explain why the facts in *Khan* were amenable to the Seditious Conspiracy statute and not the treason clause, and why the Seditious Conspiracy statute cannot be used to prosecute Hamdi and Padilla.

Part V will document the facts behind the detention of two American citizens held during the war on terror.¹⁷ It will outline the events that led up to the capture of these citizens, and most particularly, the actions that caused them to be detained.

Part VI will demonstrate how the elements of treason under the constitution should be applied to the facts as they exist in the detentions of Hamdi and Padilla. It will also argue the policy factors in favor of using the treason clause, despite the fact that a plurality of the Supreme Court,¹⁸ the Fourth Circuit,¹⁹ and the D.C. Circuit²⁰ gave support to the government's use of military commissions to try American citizens detained and designated as enemy combatants during the war on terror.

15. 18 U.S.C. § 2384 (2006).

16. 309 F. Supp.2d 789 (E.D. Va. 2004).

17. Yaser Esam Hamdi and Jose Padilla.

18. Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004).

19. Padilla v. Hanft, 423 F.3d 386, 389 (4th Cir. 2005).

20. Hamdan v. Rumsfeld, 415 F.3d 33, 38 (D.C. Cir. 2005), cert. granted, 126 S. Ct. 622 (Nov. 7, 2005).

II. THE CONSTITUTIONAL CONVENTION AND POLICY

The treason clause was born at the Constitutional Convention and thus it is important to consider the reasons for its creation, so one can understand its purpose. Although by adopting the Constitution the Framers had created an enhanced federal government, an equally enhanced ability to wield a treason power was not intended.²¹ The text of the clause was intended to be restrictive and its scope to be at the bare minimum necessary to protect the country.²² The first draft of the clause, offered by the Committee of Detail to the Convention, read: "Treason against the United States shall consist only in levying war against the United States . . . and in adhering to the enemies of the United States No person shall be convicted of treason, unless on the testimony of two witnesses."²³

Thus, much of what was to become the treason clause was adopted in the first draft of the Constitution. The evidentiary requirement of two witnesses was incorporated, but it had not, at this stage, been linked to the overt act of either levying war or adhering to America's enemies.²⁴ Although both overt acts were present in the first draft, the act of adhering to the enemies of America had not yet been qualified by the further stipulation requiring "giving them Aid and Comfort."²⁵ Despite this, the restrictive quality of the treason clause is indicated in the first draft.²⁶ It was the Committee of the Whole, after much debate, who then added the text clarifying adherence to the enemy as giving aid and comfort.²⁷ This amendment was also an attempt to restrict the scope of the clause, because the Framers believed that adherence to America's enemies was too broad a phrase, and thus susceptible of abuse.²⁸

The Committee of the Whole then fundamentally changed the overt act requirement by placing "witnesses" before "to the same overt act."²⁹ Before this change the witness requirement had been placed at the end of

21. See Willard Hurst, *Treason in the United States: II. The Constitution*, 58 HARV. L. REV. 395, 395 (1945) [hereinafter Hurst, *The Constitution*]. By "treason power" I mean the ability of the government to use the crime of treason against the general citizenry as an offensive weapon. See *id.* at 412, 414.

22. *Id.* at 395.

23. *Id.* at 399 (quoting 4 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 45 (rev. ed. 1937)).

24. *Id.*

25. U.S. CONST. art. III, § 3, cl. 1.

26. Hurst, *The Constitution*, *supra* note 21, at 399-400.

27. *Id.* at 401, 402.

28. See *id.* at 401-02.

29. *Id.* at 402.

the clause.³⁰ It could have applied generally to the entire clause, but there was no certainty to this. The text in the original draft left the phrase, “No person shall be convicted of treason, unless on the testimony of two witnesses,” as a separate sentence. The requirement was not tied to any of the elements of treason.³¹ Thus, if the text of the clause had not been changed, the witness requirement could have been manipulated to shift its demand for two witnesses to different elements of the crime as circumstances dictated. The Committee of the Whole prevented this and maintained its restrictive attitude to the clause by tying the witness and overt act requirements together.³² By tying the requirement for two witnesses to the overt act specifically, rather than to the clause generally, the application of this evidentiary standard is clear. The two witness requirement is indisputably placed within the overt act element of the clause, and therefore, although restricting the application of the offense, it gives far greater clarity to those who wish to prosecute under its terms.

This is important in the context of the war on terror because in such a war when access to evidence of a treasonable action may be limited, any prospective prosecutor hoping to use the treason clause knows instantly exactly what he needs to bring into court to establish an overt act has been committed. Unlike many criminal cases where a prosecutor can never always be sure whether he has presented sufficient evidence to establish his case-in-chief in the jury’s mind,³³ in the treason context if two witnesses testify to the commission of the same overt act by the accused, then the prosecution has met its constitutional evidentiary burden. Therefore, even though the witness requirement restricts the use of treason to those situations where two witnesses do actually exist, a prosecutor knows this, can plan accordingly, and if he can produce these two witnesses there is a relative degree of certainty that the overt act element will be established. This is because the Constitution requires only two persons to have witnessed the overt act.³⁴ If two witnesses are produced and the overt act, such as opposing American soldiers on a

30. *Id.* at 399.

31. *Id.*

32. *Id.* at 402.

33. *See generally* United States v. Khan, 309 F. Supp.2d 789 (E.D. Va. 2004). In *Khan*, although four witnesses were presented at trial to support numerous conspiracy charges against the defendants, the government was unable to establish sufficient evidence to prove all of the charges. *Id.* at 821. For example, the witness testimony established beyond a reasonable doubt that Khan was guilty of conspiracy to levy war against the United States, but it was insufficient to establish that Khan conspired to aid Al-Qaeda by providing them with material support. *Id.* at 820-21.

34. U.S. CONST. art. III, § 3, cl. 1.

battlefield, is deemed treasonable, then the government has carried its burden as to this element. In contrast, even when the government puts on more than two witnesses in the conspiracy context, this does not necessarily mean that it will be able to prove its case.³⁵

The Framers had many reasons for restricting the scope of the treason clause, even while they were being far less restrictive in granting the federal government other enumerated powers.³⁶ Prior to 1787 the charge of treason had been used to oppress political dissent.³⁷ The consequences of this misapplication of the treason law was what primarily motivated the Framers to first restrict the potential uses of the treason clause and then enshrine it in the Constitution where it could not be altered.³⁸ James Wilson, a member of the Committee of Detail, stated that “if the crime of treason be indeterminate, this alone is sufficient to make any government degenerate into arbitrary power.”³⁹ It was this fear of indeterminacy that led the Framers to restrict the scope, and precisely define the treason clause.⁴⁰ The Framers feared that a lack of precision would lead to misapplication of the treason law to situations involving the normal machinations for the struggle over political power.⁴¹ As treason prosecutions were seen to be used at times of particular public virulence, the evidentiary requirement was placed into the text in order to prevent perjury of testimony, which would tend to punish the innocent.⁴²

The precise definition of the clause was also intended to prevent the creation of judge-made or constructive treason, which had been used in England as a means to establish novel treasons in situations where the traditional charge of treason was insufficient.⁴³ The charges of levying war and of adhering to the enemy were insufficient because all the accused had done was speak out against the king.⁴⁴ In England judges formulated the constructive charge of “compassing the king’s death.”⁴⁵ Charges would often contain counts of both encompassing the king’s death and levying war, and subsequent broad rulings would not

35. See *Khan*, 309 F. Supp.2d at 809, 821.

36. See Hurst, *The Constitution*, *supra* note 21, at 395.

37. *Id.* at 429.

38. See *id.* at 405, 431.

39. *Id.* at 405 (quoting *Lectures on Law*, delivered in the College of Philadelphia 1790 and 1791, in 3 WORKS OF HON. JAMES WILSON 95-106 (Bird Wilson ed. 1804)).

40. *Id.* at 403, 412.

41. *Id.* at 412.

42. See *id.* at 403, 412.

43. See *id.* at 409-11.

44. *Id.* at 413.

45. *Id.* at 411.

differentiate between the two.⁴⁶ In one of the more infamous cases of constructive treason in England, a man owned a “buck, and, on finding it killed, wished the horns in the belly of the person who killed it. This happened to be the king; the injured complainant was tried, and convicted of treason for wishing the king’s death.”⁴⁷

The Framers feared such a loose interpretation of the treason clause.⁴⁸ Importantly, the purpose of the treason clause was to remove from the Legislature the ability to oppress the people.⁴⁹ The Framers did not intend for the treason clause, as it had in Europe, to be used to build or uphold domestic political factions, or to extend to conduct that would normally be associated with efforts to influence public policy.⁵⁰ James Wilson was primarily concerned with any attempts to use treason to suppress essentially political conduct.⁵¹ James Madison wrote in the *Federalist No. 43* that the extension of the treason clause was one of “the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other.”⁵² The Framers’ treason clause, though, was to allow none of this. In fact the treason clause was used by supporters of the Constitution, during the ratification debates in the States, as an argument for the protection with which the Constitution (without the Bill of Rights) gave to the people.⁵³ The security provided by the creation of the treason clause did “away [with] the objection that the most grievous oppressions might” occur under the stronger federal government.⁵⁴

III. TREASON CASE LAW

A. Pre-1850

Much of the early groundwork for the interpretation of the treason clause was laid out in the first case to come to the Supreme Court dealing with the issue in *Ex parte Bollman*.⁵⁵ Bollman and another

46. *Id.*

47. *Id.* at 409 n.101 (quoting 2 ELLIOT 487).

48. *Id.* at 409.

49. *Id.* at 418.

50. *Id.* at 412.

51. *Id.* at 413.

52. *Id.* at 414 (quoting THE FEDERALIST No. 43 (James Madison)).

53. *Id.* at 406.

54. *Id.* at 407.

55. 8 U.S. 75 (1807).

defendant were charged with levying war against the United States⁵⁶ after they joined an expedition against the territories of Spain.⁵⁷ Although Chief Justice Marshall dismissed the charges of treason due to insufficient evidence to support them,⁵⁸ the Court took this opportunity to define many of the terms within the clause. In a unanimous decision the Court held that “to levy war” meant the actual assembling of a body of men for the purpose of carrying out a treasonable intent.⁵⁹ The extent or force of “the act” necessary to meet the requirement of being “overt,” was defined as “any force” connected with the treasonable intent.⁶⁰

The Court’s holding began by stating the separate elements of treason. First, a person must have an intent to carry out a treasonable design,⁶¹ such as levying war or adhering to America’s enemies. Second, that person must use some force to carry out the design.⁶² However, neither a conspiracy to carry out the intent, nor an enlistment of men constitutes a levying of war.⁶³ In *Bollman*, there was no evidence that the defendants had intended to levy war against the United States when they embarked on their expedition.⁶⁴ *Bollman* also established the necessity of the two witnesses’ requirement.⁶⁵ The Court held that the application of the treason clause had been purposefully limited by requiring the testimony of two witnesses to the same overt act.⁶⁶ Chief Justice Marshall stated that the Framers “not only defined and limited the crime, but with jealous circumspection attempted to protect their limitation by providing that no person should be convicted of it, unless on the testimony of two witnesses to the same overt act.”⁶⁷ The purpose of this requirement was to make sure that treason was not “inflicted under the influence of those passions which the occasion seldom fails to excite,

56. *Id.* at 125.

57. *Id.* at 131.

58. *Id.* at 135.

59. *Id.* at 126.

60. *Id.* at 128.

61. *Id.* at 126.

62. *Id.* at 126, 128; *see also* United States v. Vigol, 28 F. Cas. 376, 376 (C.C.D. Pa. 1795) (holding that the defendant’s conduct constituted an overt act because he committed acts of violence and devastation against United States Excise Officers, and separately, intent was shown when the defendant compelled the resignation of an Excise Officer, which was the apparent object of the defendant’s acts).

63. *Bollman*, 8 U.S. at 127.

64. *Id.* at 131.

65. *Id.* at 127.

66. *Id.*

67. *Id.*

and which a flexible definition of the crime, or a construction which would render it flexible, might bring into operation.”⁶⁸

Chief Justice Marshall was not alone in defining the scope of the force necessary to constitute an overt act. Justice Story, in a charge to a grand jury,⁶⁹ stated that “present” intention to use force is sufficient to constitute an overt act, although “no actual blow” is needed to be struck.⁷⁰ As an example, Justice Story explained that if an assembly of persons should, with force, resist and oppose soldiers sent by the President, such an act would constitute a levying of war against America.⁷¹ After *Bollman* and Justice Story’s charge to the grand jury, the scope of the overt act element of levying war had been settled. In *Bollman* the Court held that “any force connected with the intention will constitute the crime of levying war.”⁷² Justice Story then explained this meant that “no actual blow” need be struck against the United States.⁷³ This is an important definition of “levying war” for people detained in the war on terror because it may be difficult to show that a particular person actually struck a blow, or in reality, actually shot at an American soldier. If the combatant is merely detained in the midst of an ongoing skirmish there may not actually be a witness to him firing a weapon. However, after *Bollman* and Justice Story’s definitions, “any force” in the context of “levying war” does not require the actual firing of a weapon. “Any force” can be a body of men, who with force, oppose American soldiers.⁷⁴ A person detained in the midst of fighting American soldiers while part of a military unit during the war on terror, therefore, would constitute sufficient “present force” to be “levying war,” which is consistent with the definitions set out by Justice Story and *Bollman*.

B. The Civil War

In 1861, the Civil War caused once again for treason charges to be placed before the courts. In *United States v. Greiner*,⁷⁵ the defendant joined a military formation in the state of Georgia and seized a fort of

68. *Id.*

69. *In re Charge to Grand Jury*, 30 F. Cas. 1046 (C.C.D. R.I. 1842) (No. 18,275) (Grand Jury Charge of Mr. Justice Story) [hereinafter Charge of Mr. Justice Story].

70. *Id.* at 1047.

71. *Id.*

72. *Bollman*, 8 U.S. at 128 (emphasis added).

73. Charge of Mr. Justice Story, *supra* note 69, at 1047.

74. *See id.*; *see also Bollman*, 8 U.S. at 126.

75. 26 F. Cas. 36 (E.D. Pa. 1861).

the United States without encountering resistance.⁷⁶ The men then left the fort in possession of the Georgia State government.⁷⁷ The court held that the occupation of the fort with the intent to detain it against the United States was an overt act of levying war.⁷⁸ The court stated, like Justice Story, that an actual blow need not be struck.⁷⁹ It was sufficient for a body of men, whether large or small, to muster into “military array” and carry out a “treasonable purpose,” such as opposing American soldiers.⁸⁰ Every step that any one of the men then took as part of the execution of their treasonable purpose would constitute an overt act of levying war.⁸¹ The court added, “This is true, though not a warlike blow may have been struck. The marching of such a corps, with such a purpose, in the direction in which such a blow might be struck, is levying war upon land.”⁸²

On the element of intent, the court held that the surrender of the fort to the state government was sufficient evidence of a treasonable intent to take the case to a jury.⁸³ The court stated, “[i]f the treasonable intent had at first been legally doubtful, the subsequent unqualified surrender of the fortress to the state would, if the doubt were not removed . . . , render the case a proper one, at all events, for the consideration of a jury.”⁸⁴ This is an important interpretation of the intent element because it means that the circumstances of the commission of the overt act can *alone* establish the necessary intent to commit a treasonous act, or at the very least get the case to the jury. The commission of the overt act in *Greiner* removed doubt as to treasonable intent because the handing over of the fort to a state government could leave little doubt as to the intent of the perpetrators to remove the fort from the control of the United States government. In other words, as soon as the fort was given to the state government, the purpose of the act was revealed. Similarly, there can be little doubt of a person’s intent when he joins a military unit that then moves into a position that results in it firing upon American soldiers. That person’s intent would be even more evident if he was in possession of a weapon, such as a rifle, when captured.

76. *Id.* at 36.

77. *Id.*

78. *See id.* at 39.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

As the Civil War progressed, the courts continued to interpret the “levying war” element of treason. In *United States v. Greathouse*,⁸⁵ the court held that once war is levied, “all who aid in its prosecution, whether by open hostilities in the field, or by performing any part in the furtherance of the common object, ‘however minute or however remote from the scene of action,’ are equally guilty of treason” The court seems to have borrowed from the “adherence to the enemy” element when it referred to any person who “aids” in the prosecution of the war.⁸⁶ However, the court explained that this was because the conduct in question took place during the Civil War, and adherence to the enemy does not embrace rebels in insurrection against their government.⁸⁷ The “levying war” element, though, was still applicable and thus the court extended its scope to encompass any aid in the prosecution of the war.⁸⁸ The important aspect of this interpretation is the fact that the “aid” does not have to be engaging in “hostilities in the field,” but can be “any part” in the furtherance of the war.⁸⁹ In the context of the war on terror, this interpretation could include any person who aids in the development of weapons that could be used against American soldiers or the general populace.

In *Greathouse*, the defendants had been captured while on board a Confederate ship that had been authorized to commit hostilities against citizens and vessels of the United States.⁹⁰ Although the defendants had not fired any shots, they had purchased cannon and ammunition, placed them on board the ship, and set sail.⁹¹ The court held that it was not essential for the actions entered into by the defendants to be successful or that they actually render assistance.⁹² It is sufficient if the natural consequences of the actions would have advanced the interests of the enemy.⁹³ Thus, in *Greathouse*, the defendants, who were found guilty of treason by levying war,⁹⁴ did not actually have to be in open hostilities with American forces.⁹⁵

85. 26 F. Cas. 18 (N.D. Cal. 1863).

86. *Id.*

87. *Id.* at 22-23.

88. *Id.* at 23.

89. *Id.* at 22 (emphasis added).

90. *Id.* at 24.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 30.

95. *See id.* at 22, 24.

Furthermore, the defendants did not actually have to render any assistance to the Confederacy in order to be aiding the prosecution of the Civil War.⁹⁶ In *Greathouse*, all the defendants had done was purchase ammunition and then set sail,⁹⁷ but the fact that the natural consequences for this ammunition was its future use against American soldiers, meant that the defendants had committed treason, even though the consequence had not yet occurred. Thus, in the war on terror, a person may aid in the research or development of weapons to be used against the United States, but those weapons would not then have to be utilized in the war, as long as the natural consequence of the weapon's development was for it to be used against America, in order for the person aiding in the research to have aided an enemy of the United States.

Justices giving charges to grand juries during the Civil War remained an illustrative way of defining the treason clause. Justice Nelson, in a charge to a grand jury,⁹⁸ explained the scope of the "adhering to America's enemies" element. The Justice stated that this element depends upon the facts and circumstances of each case.⁹⁹ In cases of sending provisions, money, furnishing arms, or giving intelligence, there was no doubt that aid and comfort had been rendered.¹⁰⁰ However, words spoken, written, or printed were insufficient to satisfy the element.¹⁰¹ Consistent with Justice Nelson's definition, in *Medway v. United States*,¹⁰² a woman wrote a letter to the President of the Confederacy during the Civil War, offering her services to aid the Confederate cause.¹⁰³ The court held that the letter, which had not been sent or uttered, did not constitute giving aid and comfort to the enemy.¹⁰⁴

However, the *Medway* court confined the scope of its ruling to letters that had not been sent or uttered,¹⁰⁵ which is inconsistent with Justice Nelson's interpretation. Therefore, the only reason that the defendant in *Medway* was not found guilty of treason was because she

96. *Id.* at 24.

97. *Id.*

98. *In re Charge to Grand Jury*, 30 F. Cas. 1034 (C.C.S.D.N.Y. 1861) (No. 18,271) (Grand Jury Charge of Mr. Justice Nelson) [hereinafter Charge of Mr. Justice Nelson].

99. *Id.* at 1035.

100. *Id.*

101. *Id.*

102. 6 Ct. Cl. 421 (1870).

103. *Id.* at 426-28.

104. *Id.* at 432-33; *see also* *United States v. Pryor*, 27 F. Cas. 628, 630 (C.C.D. Pa. 1814) (holding that going in search of provisions with the intent to supply the enemy, but stopping short before realizing any provisions, was not an overt act; it was merely a treasonable intent).

105. *Medway*, 6 Ct. Cl. at 432-33.

had not sent the letter to the President of the Confederacy. As the court stated, “writing a letter in a man’s closet is not of itself a crime.”¹⁰⁶ This though is a limited holding because its legal conclusion is self-evident; writing a letter, whatever the context, without ever sending it, is not a crime. In contrast with Justice Nelson, the court held that the defendant had not committed an act of treason because the letter was “unaccompanied by the sending, uttering, or publishing” of it.¹⁰⁷ For Justice Nelson, the printing or speaking of words would also have been insufficient to constitute “adhering to the enemy.” However, with the dawn of the First and Second World Wars and the development of technology, the *Medway* court’s interpretation of “adhering to the enemy” would prevail.

C. World War I

As war took place again in 1914, the composition of treason cases began to shift to the “adherence to the enemy” element. In *United States v. Fricke*,¹⁰⁸ the court explained how a person becomes an enemy of America, in order for his actions to be within the authority of the treason clause. The court held that upon the outbreak of war with the United States, the subjects of a foreign power, its military and naval forces, its agents and spies, are enemies, until the cessation of hostilities.¹⁰⁹ The court interpreted “adherence to the enemy” to mean any act that strengthens, or tends to strengthen, the enemy, or an act that weakens, or tends to weaken, America.¹¹⁰ If the defendant knew that a person who he had harbored was a spy for Germany during World War I and then concealed his identity, supplied him with funds, or assisted his mission, he would have given aid and comfort to the enemy.¹¹¹ The court’s interpretation of the act necessary to constitute “adhering to the enemy” is reminiscent of the *Bollman* court’s interpretation of the act necessary to constitute “levying war.”¹¹² Both of these rulings place the act necessary to accomplish the element at the minimum-end or prosecutor’s-end of the spectrum. In other words, these rulings are interpretations that assist the prosecution in a treason case. “Any force”

106. *Id.*

107. *Id.* at 433.

108. 259 F. 673 (S.D.N.Y. 1919).

109. *Id.* at 675-76.

110. *Id.* at 676.

111. *Id.*

112. See *Ex parte Bollman*, 8 U.S. 75, 128 (1807).

does not mean an actual blow,¹¹³ and “tends to strengthen” does not mean actually strengthening America’s enemies. Thus, although the treason clause defines an *externally* restrictive crime because it can only occur through “levying war” or “adhering to the enemy” and there must be two witnesses to testify to the overt act, it is *internally* far less restrictive because the overt act does not have to be an actual blow or actually strengthen the enemy, and intent can be inferred from the circumstances of the overt act.

During World War I the courts were also given an opportunity to revisit the concept of treason in the context of written words. In *United States v. Werner*¹¹⁴ the overt act at issue in the case was the publication of a newspaper.¹¹⁵ The court held, in agreement with Justice Nelson, that mere words cannot constitute an overt act.¹¹⁶ However, the court expanded on Justice Nelson’s charge to the grand jury, when it stated that a written letter or oral message does rise to the level of a treasonable act when it is used to convey information of value to the enemy.¹¹⁷ This is a deviation from Justice Nelson’s meaning because he stated that no words “however treasonable” could be an overt act.¹¹⁸

The *Werner* court stated that letters or oral messages themselves could constitute treason.¹¹⁹ Justice Nelson, though, charged the grand jury that words at most, even when in conjunction with a treasonable overt act, could only be admissible as evidence to characterize the act, not of the act itself.¹²⁰ This interpretation may have been in response to the fear of constructive treasons, such as encompassing the king’s death, which had consisted solely of words wishing for the king’s death.¹²¹ In *Werner*, though, words *can* be treasonable if they “convey information of value to an enemy.”¹²² The court also held that words could be evidence of a treasonable intent as well.¹²³ This is clearly in conflict with Justice Nelson because “*no words* however treasonable” cannot be reconciled with “*words* if they convey information of value to the enemy.” However, despite these differences, the reliance on the

113. See Charge of Mr. Justice Story, *supra* note 69, at 1047.

114. 247 F. 708 (E.D. Pa. 1918).

115. *Id.* at 710.

116. *Id.* at 711.

117. *Id.*

118. Charge of Mr. Justice Nelson, *supra* note 98, at 1035.

119. *Werner*, 247 F. at 711.

120. Charge of Mr. Justice Nelson, *supra* note 98, at 1035.

121. See Hurst, *The Constitution*, *supra* note 21, at 409-11.

122. *Werner*, 247 F. at 711.

123. *Id.*

“adhering to the enemy” element was to continue into the Second World War.

D. World War II

As in 1861 and 1914, the treason clause was again used to confront American citizens during the Second World War. The courts, though, began to place increasing emphasis on the intent element of the crime. In *Stephan v. United States*,¹²⁴ the court affirmed a conviction for treason.¹²⁵ The defendant had concealed an escaped German prisoner’s identity, bought him a travel bag and his train ticket.¹²⁶ On the testimony of one witness, the court found that the defendant knew the person he was aiding was a German prisoner of war.¹²⁷ This constituted the entire witness testimony for the intent aspect of treason. The court held that the element of intent did not require the testimony of two witnesses.¹²⁸ Instead, intent can be proven by one witness, by circumstances, or by a single fact.¹²⁹ The overt act element, though, cannot be proven by the testimony of one witness, in conjunction with circumstantial evidence.¹³⁰

World War II marked the first shift away from using the treason clause, to trying American citizens as enemy combatants. In *Haupt v. United States*,¹³¹ the Supreme Court stated that the overt act had been proven when it was shown that the defendant gave harbor and shelter to his son (a German spy), assisted in obtaining him employment at a lens factory, and helped him to buy a car.¹³² As to the question of the defendant’s intent, the Court stated that the specific factor, which must be considered before making such a determination, is whether the defendant intended to “injure the United States” or merely to give aid to his son “as an individual.”¹³³ The Court held that when the question of intent is open to dispute, it is for the jury to weigh the competing evidence.¹³⁴ The curious aspect of the *Haupt* case is that the son, which the defendant had aided, was also an American citizen, who was

124. 133 F.2d 87 (6th Cir. 1943).

125. *Id.* at 100.

126. *Id.* at 93, 95.

127. *Id.* at 95.

128. *Id.* at 94.

129. *Id.*

130. *Id.*

131. 330 U.S. 631 (1947).

132. *Id.* at 635.

133. *Id.* at 641.

134. *Id.*

captured and tried as an enemy combatant.¹³⁵ Haupt's son ("Haupt II") had been captured on American soil after he had landed in Florida, discarded his uniform, and proceeded in civilian clothes with the intent to commit hostile acts, such as destroying war industries, utilities, and materials.¹³⁶

Although, Haupt II was an American citizen,¹³⁷ he was not tried under the treason clause. Instead the Supreme Court held that he could be tried as an enemy combatant by a military commission.¹³⁸ If Haupt II had been tried under the treason clause it would have been for levying war against the United States because, as the Court stated, "[m]odern warfare is directed at the destruction of enemy war supplies and the implements of their production and transportation quite as much as at the armed forces."¹³⁹ Thus, Haupt II's intent to destroy war industries would have been sufficient to constitute treason because by entering the United States with three other men and proceeding to Jacksonville to carry out his intent, Haupt II took steps in execution of his treasonable purpose. His conduct is thus consistent with the holding in *Greiner*.¹⁴⁰ The United States, though, decided not to prosecute Haupt's son under the treason clause for levying war. Instead, Haupt himself was tried under the treason clause for "adhering to the enemy" by giving "aid and comfort" to his son.

The only apparent distinction between these two decisions by the Justice Department is that one would have been tried for "levying war" and the other was tried for "adhering to the enemy." As treason cases were almost entirely being tried under the "adhering to the enemy" element, the Justice Department appears to have taken the decision to remove "levying war" from the treason table. In other words, if American citizens were to levy war against the United States, then the *Ex parte Quirin* decision gave the government an alternative avenue to pursue outside of the treason clause.¹⁴¹ *Ex parte Quirin* effectively opened a door for the government, which led away from the treason clause, and the government stepped through it. Before this case, the government did not have a mandate to charge American citizens as

135. See *Ex parte Quirin*, 317 U.S. 1, 37-38 (1942).

136. *Id.* at 21.

137. *Id.* at 37-38.

138. *Id.* at 46.

139. *Id.* at 37.

140. See *United States v. Greiner*, 26 F. Cas. 36, 39 (E.D. Pa. 1861).

141. See *Quirin*, 317 U.S. at 37-38.

enemy belligerents, and thus, reliance on the treason clause was still necessary.

After *Quirin*, though, when faced with those who had attempted to levy war against it, the government could rest on the laurels given to it by the Supreme Court and detain citizens as enemy belligerents. Such a definite course of action had not existed before *Quirin*. This is important because the present decision by the government to detain American citizens and label them as enemy combatants may be based on a desire to continue to step through the door opened by the Court during World War II.¹⁴² As for “adhering to the enemy,” though, the treason clause remained a method to prosecute American citizens because of the Court’s classification of persons who could be tried in a military commission.¹⁴³ This system could only be used against those persons who were deemed to be unlawful combatants,¹⁴⁴ which the Court defined as those persons “bent on hostile acts.”¹⁴⁵ However, a person who gives “aid and comfort” to the enemy, such as Haupt, is not a combatant because he is not bent on the commission of hostile acts. Thus, the treason clause remained essential for these prosecutions where military commissions were not viable.

During World War II, the courts were again presented with the issue of written words. In *Gillars v. United States*,¹⁴⁶ the defendant had engaged in a campaign of propaganda for Germany during the Second World War, aimed at the armed forces and civilians of America.¹⁴⁷ Although citing Justice Nelson, by stating that mere opinion or criticism does not constitute an overt act, the court held that speaking words, which formed part of a propaganda campaign against the United States, on behalf of the enemy, made the words an overt act.¹⁴⁸ This interpretative difference with Justice Nelson is similar to that of the *Werner* court. Both courts abandoned Justice Nelson’s charge to the grand jury that words “however treasonable” could not constitute treason. The *Werner* court held that words containing “information of value” to the enemy were treasonable,¹⁴⁹ and the *Gillars* court continued this reinterpretation during the Second World War when it held that

142. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004).

143. See *Quirin*, 317 U.S. at 38.

144. See *id.* at 31.

145. *Id.* at 38.

146. 182 F.2d 962 (D.C. Cir. 1950).

147. *Id.* at 967.

148. *Id.* at 971.

149. *United States v. Werner*, 247 F. 708, 711 (E.D. Pa. 1918).

words spoken on “behalf of the enemy” were treasonable.¹⁵⁰ In *Best v. United States*,¹⁵¹ the issue was again treason in the context of radio broadcasts made for the enemy. The court stated that the accused knew of the hostile mission of the German Broadcasting Company, which was to destroy the fighting morale of American armed forces. Despite this, the accused still voluntarily offered himself for employment with the intention of contributing to this hostile mission,¹⁵² and then made radio broadcasts in furtherance of it.¹⁵³ The court found such conduct to be within the definition of adhering to America’s enemies.¹⁵⁴

The court in *Gillars* discussed another important aspect of the treason clause. Although the language only appears in 18 U.S.C. § 2381,¹⁵⁵ the statute extends the judicial reach and enforcement of the treason clause to “within the United States or elsewhere.”¹⁵⁶ The court held that the treason clause could, thus, be applied against a perpetrator “wherever” he may be, and therefore the treasonous acts could occur outside of America.¹⁵⁷ This is of crucial importance for the war on terror; a war that is taking place predominately in Iraq and Afghanistan, both of which are areas outside the jurisdiction of the United States. The treason clause, though, has no jurisdictional boundaries and can be exercised against an American citizen “wherever” he or she may be in the world.¹⁵⁸ Otherwise, war would have to be levied against the United States on American soil, which, apart from the architects of the 9/11 attacks, would render the treason clause all but nugatory. However, with American armed forces spread throughout the world where the United States has no jurisdiction, the treason clause enables the government to prosecute any citizens captured during the war on terror while opposing those armed forces. The court also held that an “essential element of the crime of treason” was that the accused must owe allegiance to the United States.¹⁵⁹ The court stated such an allegiance “inheres in citizenship.”¹⁶⁰

150. *Gillars*, 182 F.2d at 971.

151. 184 F.2d 131 (1st Cir. 1950).

152. *Id.* at 137.

153. *Id.*

154. *Id.*

155. The descendent of the 1790 treason clause, which set the penalty for treason at death, reaffirmed the elements of the charge in the Constitution and added that a person must owe allegiance to America to be charged with treason. *See* 18 U.S.C. § 2381 (2006).

156. *Gillars*, 182 F.2d at 979; *see also* 18 U.S.C. § 2381.

157. *Gillars*, 182 F.2d at 979.

158. *Id.*

159. *Id.* at 981.

160. *Id.*

The heaviest criticism of a treason case decided during the Second World War came from Willard Hurst¹⁶¹ after the Supreme Court ruled in *Cramer v. United States*.¹⁶² In *Cramer*, the defendant met twice with German saboteurs who had entered America.¹⁶³ Two witnesses testified that Cramer drank with saboteurs and engaged them in conversation.¹⁶⁴ However, there was no testimony as to what was said, nor if any information of value was divulged to the saboteurs.¹⁶⁵ Cramer did not provide any shelter, offer supplies, or give any encouragement to the saboteurs.¹⁶⁶ Consequently, the “[m]eeting with Cramer . . . was no part of the saboteurs’ mission and did not advance it.”¹⁶⁷ The Court held that the minimum function of the overt act in a treason case was for it to sustain a finding that the accused “*actually* gave aid and comfort to the enemy.”¹⁶⁸ Significantly, due to the insufficiency of proof, the prosecution was forced to withdraw from the charges the fact that Cramer had been given possession of one of the saboteur’s money belts, containing about \$3,600, for safekeeping.¹⁶⁹ This was even though Cramer had admitted to the transaction occurring.¹⁷⁰ The Court stated that if this act had been established by two witnesses then the case against Cramer would have been very different.¹⁷¹

It is this distinction between proving Cramer actually took the money belt and proving that Cramer met with the saboteurs to effectuate the transfer of the money belt, which draws much of Hurst’s criticism.¹⁷² Hurst argues that there is no basis for the Court to require an overt act to prove that actual aid or a tangible benefit was conferred upon the enemy.¹⁷³ Instead, an act that is a step in furtherance of giving aid and comfort or a means to effectuate it should be sufficient.¹⁷⁴ In the context of *Cramer*, this means that the testimony of two witnesses to the second meeting between Cramer and the two saboteurs, a meeting made in order

161. See Willard Hurst, *Treason in the United States: III. Under the Constitution*, 58 HARV. L. REV. 806, 832-46 (1945) [hereinafter Hurst, *Under the Constitution*].

162. 325 U.S. 1 (1945).

163. *Id.* at 5.

164. *Id.* at 37.

165. *Id.*

166. *Id.*

167. *Id.* at 38.

168. *Id.* at 34 (emphasis added).

169. *Id.* at 38, 39.

170. See *id.* at 39.

171. *Id.*

172. See Hurst, *Under the Constitution*, *supra* note 161, at 835.

173. *Id.* at 832.

174. See *id.* at 832, 835.

to take into safekeeping the enemies' funds, should have been sufficient to establish the commission of an overt act.¹⁷⁵ Hurst argued that reinterpreting "aid and comfort" to require "actual" aid and comfort meant that the treason could be allowed to continue "to the point at which there will no longer be a sovereign to punish it."¹⁷⁶

However, Hurst's criticism of *Cramer* on this point may be a little far-fetched. The *Cramer* case, in the context of other "aid and comfort" cases,¹⁷⁷ was rather unique because of the act charged against the defendant. After the government withdrew the possession of the money belt, all that was left against Cramer was his participation in a meeting with the saboteurs.¹⁷⁸ This is a decidedly weak act with which to charge a person with treason, especially when there is not testimony as to what was said.¹⁷⁹ It is thus unlike other "aid and comfort" cases, such as *Greathouse*, where the defendants had been captured on board a Confederate ship in the possession of cannon and ammunition.¹⁸⁰ Although the court in *Greathouse* held that it is sufficient if the natural consequences of an act would have advanced the interests of the enemy,¹⁸¹ which is similar to the rejected concept in *Cramer* that a step in furtherance could be sufficient,¹⁸² this difference in the decisions is due to the fact that possession of ammunition would have *actually* benefited the Confederacy.

The problem with the act in *Cramer* was that there was no evidence that the meeting would, or could, have benefited the enemy.¹⁸³ As the content of the conversation was never heard, Cramer could have been discussing the most mundane and everyday of matters with the saboteurs. It should be irrelevant that Cramer took possession of a money belt after the meeting because the government could not establish this act with the required testimony.¹⁸⁴ The government was attempting to establish the overt act element with the two-witness testimony of the meeting along with the unsubmitted evidence of the money belt

175. *Id.* at 835, 844.

176. *Id.* at 837.

177. *Cf.* *United States v. Greathouse*, 26 F. Cas. 18, 24 (N.D. Cal. 1863) (noting that the aid and comfort offered by the defendants included purchasing a boat, placing cannon, shells, and ammunition aboard her, and then attempting to depart from a San Francisco wharf).

178. *Cramer v. United States*, 325 U.S. 1, 37 (1945).

179. *Id.*

180. *Greathouse*, 26 F. Cas. at 24.

181. *Id.*

182. *Cramer*, 325 U.S. at 34.

183. *Id.* at 38.

184. *See id.* at 39.

transaction.¹⁸⁵ However, intent can only be proven by one witness, by circumstances or a single fact.¹⁸⁶ The inference that the government was trying to establish between the meeting and the money belt must be made pursuant to the two-witness requirement, because the government is trying to make the purpose of the meeting, which was to effectuate the transfer of the money belt, the overt act.¹⁸⁷ As the Court stated in *Cramer*, the overt act should not rest “on even a little imagination.”¹⁸⁸ By asking the Court to draw an inference from the meeting that an overt act had taken place, the government was requiring the use of “some imagination.”¹⁸⁹

The insufficiency of the overt acts charged against Cramer, though, should be placed in their context. Such need for imagination was very rare in “aid and comfort” cases.¹⁹⁰ In fact, the narrowness of the holding in *Cramer* is evident by the Court’s subsequent opinion in *Kawakita v. United States*.¹⁹¹ In *Kawakita*, the overt acts alleged were acts of cruelty against American prisoners of war.¹⁹² On one occasion the defendant hit a prisoner over the head with a wooden pole and forced him to sit in a cesspool.¹⁹³ On another occasion he forced a prisoner to hold a bucket of water over his head, and with the prisoner’s elbows bent, the defendant would strike him.¹⁹⁴ The Court agreed with the jury that each act of cruelty gave aid and comfort to the enemy, because the acts “tended to strengthen the enemy and advance its interests.”¹⁹⁵ The Court was thus using the same standard as that used in *Fricke*.¹⁹⁶ Justice Douglas, the author of the dissent in *Cramer*,¹⁹⁷ wrote the opinion for the Court in *Kawakita*.¹⁹⁸ Defining the scope of “aid and comfort,” Justice Douglas stated that it was the “nature of the act that is important.”¹⁹⁹ This was explained in the following manner:

185. *Id.*

186. *See* *Stephan v. United States*, 133 F.2d 87, 94 (6th Cir. 1943).

187. *See Cramer*, 325 U.S. at 36-39.

188. *Id.* at 38.

189. *Id.*

190. *See, e.g., Best v. United States*, 184 F.2d 131, 137 (1st Cir. 1950) (holding that the defendant voluntarily hired himself to participate in a German Radio Broadcasting campaign to foster a spirit of defeatism and hopelessness in Americans).

191. 343 U.S. 717 (1952).

192. *Id.* at 739.

193. *Id.*

194. *Id.* at 740.

195. *Id.* at 741 (emphasis added).

196. *United States v. Fricke*, 259 F. 673, 676 (S.D.N.Y. 1919).

197. *Cramer v. United States*, 325 U.S. 1, 48 (1945).

198. *Kawakita*, 343 U.S. at 719.

199. *Id.* at 738.

The act may be unnecessary to a successful completion of the enemy's project; it may be an abortive attempt; it may in the sum total of the enemy's effort be a casual and unimportant step. But if it gives aid and comfort to the enemy at the immediate moment of its performance, it qualifies as an overt act²⁰⁰

Thus, an act designed to speed up the enemy's production of munitions by making prisoners work faster "plainly [gives] aid and comfort to the enemy" ²⁰¹ The Court then went on to distinguish *Kawakita* from *Cramer*, and place the scope of the latter's holding into a limited factual scenario.²⁰² The Court stated that unlike *Cramer*, the acts in *Kawakita* were not "innocent and commonplace in appearance," and did not gain treasonable significance only by reference to other evidence.²⁰³ Thus, *Cramer* was confined to those acts that were both: 1) innocent and commonplace in appearance; and 2) reliant on other evidence to gain treasonable significance.²⁰⁴ Therefore, the holding in *Cramer* should not be a reason for prosecutors to avoid using the treason clause.²⁰⁵

However, the *Cramer* Court's interpretation of "aid and comfort" was not the only one which Hurst criticized.²⁰⁶ It was on the element of intent that the Court found the greatest difficulty in reaching a concise definition.²⁰⁷ The Court conceded that proof of the act itself may be sufficient under the circumstances it was committed to establish that the defendant intended to aid an enemy.²⁰⁸ However, the Court rejected the government's assertion that intent could be shown by the testimony of two witnesses to an otherwise insignificant act and other circumstances not established by two witnesses.²⁰⁹ It was this unwillingness by the Court to rely on other circumstances that disturbed Hurst.²¹⁰ Hurst argued that often "other circumstances" were all there would be to prove intent in a treason case.²¹¹ This is because the acts that can serve to advance the purpose of subverting a government, by aiding its enemies,

200. *Id.*

201. *Id.* at 739.

202. *Id.* at 741.

203. *Id.*

204. *See id.*

205. *Cf. Hurst, Under the Constitution, supra* note 161, at 845.

206. *See id.* at 837-46.

207. *See Cramer v. United States*, 325 U.S. 1, 31-32 (1945).

208. *See id.*

209. *Id.* at 34.

210. *See Hurst, Under the Constitution, supra* note 161, at 842.

211. *See id.* at 839-41.

might in other contexts serve innocent purposes.²¹² As an example, Hurst used the act of tying a shoelace, which although seemingly innocent, may convey intelligence to an observer by code.²¹³ It is thus necessary in such cases for other circumstances or facts to be used to establish intent.²¹⁴ The Court's unwillingness to do just this, though, in *Cramer*, is indicated by its refusal to consider Cramer's admission of taking possession of the money belt as evidence of intent.²¹⁵ Hurst argued that the reason for this was because the defendant's possession of the money belt was not established by two witnesses.²¹⁶ This created the prospect, for Hurst, as to "whether intent [could] be established at all, outside the scope of the two-witness testimony."²¹⁷

Clearly such a prospect would be inconsistent with the treason clause in the Constitution,²¹⁸ as it requires only two witnesses to the commission of an overt act.²¹⁹ The Court's uncertainty on how to establish intent led Hurst to the conclusion that it was "doubtful whether a careful prosecutor will ever again chance an indictment under that [treason's] head."²²⁰ However, the uncertainty that the Court supposedly created in *Cramer* was ameliorated in *Kawakita*.²²¹ The Court expressly held that "[t]he two-witness requirement does not extend to this [the intent] element."²²² Rather, intent "must" be inferred from conduct or circumstances.²²³ However, Hurst's other argument, that careful prosecutor's would avoid the use of the treason clause,²²⁴ has proven remarkably prophetic. Although the government continued to prosecute American citizens who aided the enemy during the Second World War after *Cramer*,²²⁵ *Kawakita* proved to be the last treason case brought before the Supreme Court.²²⁶ Hurst believed that the purpose of the *Cramer* opinion may have been to deter prosecutors from using the

212. *Id.* at 840.

213. *Id.*

214. *See id.*

215. *See Cramer v. United States*, 325 U.S. 1, 39 (1945).

216. Hurst, *Under the Constitution*, *supra* note 161, at 842.

217. *Id.*

218. *See* U.S. CONST. art. III, § 3, cl. 1.

219. *See id.*

220. Hurst, *Under the Constitution*, *supra* note 161, at 845.

221. *See Kawakita v. United States*, 343 U.S. 717, 742-43 (1952).

222. *Id.* at 742.

223. *Id.*

224. Hurst, *Under the Constitution*, *supra* note 161, at 845.

225. *See, e.g., D'Aquino v. United States*, 192 F.2d 338 (9th Cir. 1951); *Gillars v. United States*, 182 F.2d 962 (D.C. Cir. 1950).

226. Suzanne Kelly Babb, Note, *Fear and Loathing in America: Application of Treason Law in Times of National Crisis and the Case of John Walker Lindh*, 54 HASTINGS L.J. 1721, 1743 (2003).

treason clause.²²⁷ Hurst argued that the Court effectively invited Congress to enact statutes prohibiting certain acts thought detrimental to the country's safety.²²⁸ Certainly the Court's concluding statements indicated a wariness towards the treason clause:

The framers' effort to compress into two sentences the law of one of the most intricate of crimes gives a superficial appearance of clarity and simplicity which proves illusory when it is put to practical application The little clause is packed with controversy and difficulty. The offense is one of subtlety²²⁹

This statement seems to indicate that the Court believed the use of treason to be a fool's errand.²³⁰ This, though, does not explain the continued application of the treason clause after *Cramer*, or the more liberal approach taken by the Court in *Kawakita*.²³¹ However, taken in conjunction with the Court's holding in *Ex parte Quirin*, which opened the door for the government to hold American citizens as enemy belligerents,²³² *Cramer* may have convinced Congress that after the Second World War treason cases were completed, to look to other statutes and other forms of detention to deal with acts against the United States analogous to treason.²³³ The Court's facilitated change in tact is evidenced by the government's recent use of the Seditious Conspiracy statute.²³⁴

As the Second World War cases came to a close, significant changes had occurred in the meaning and application of the treason clause. The abandonment of Justice Nelson's interpretation of "aid and comfort" can be attributed to changing times and technology.²³⁵ When his charge was delivered in 1861 there were certainly no problems caused by radios, and he probably had no idea of the power that words could wield in an effective propaganda campaign, such as those undertaken during World War II. The power to disillusion and confuse that radio broadcasts exert can be considered a form of giving "aid and

227. See Hurst, *Under the Constitution*, *supra* note 162, at 845.

228. See *id.*

229. *Cramer v. United States*, 325 U.S. 1, 46-47 (1945).

230. Cf. Hurst, *Under the Constitution*, *supra* note 161, at 845.

231. See *Kawakita v. United States*, 343 U.S. 717, 738, 742-43 (1952).

232. *Ex parte Quirin*, 317 U.S. 1, 37-38 (1942).

233. Cf. Hurst, *Under the Constitution*, *supra* note 161, at 846 (arguing that the Court created a shift of power from the executive to the legislative branch when it deterred the use of the treason clause.)

234. See *United States v. Khan*, 309 F. Supp.2d 789, 796 (E.D. Va. 2004); *United States v. Rahman*, 189 F.3d 88, 103 (2d Cir. 1999).

235. See, e.g., *Gillars v. United States*, 182 F.2d 962, 967 (D.C. Cir. 1950).

comfort” that constitutes “adhering to the enemy.” It thus would have been unreasonable to have locked this element into a previous, dated, and impractical interpretation. This is important because it indicates that court’s *are* prepared to reinterpret the clause; so treason, and specifically “adhering to the enemy,” keeps pace with developing ways to actually aid and comfort that enemy. There is no reason to believe that this would not happen for the war on terror, just as it did during the Second World War.

The decisions in *Haupt* and *Ex parte Quirin* marked a dual shift in the application of the treason clause. One shift was to a complete reliance on the “adhering to the enemy” element to try treason cases.²³⁶ The other shift was to utilizing military commissions to try American citizens who had levied war against the country. Over time the use of the “adhering to the enemy” element increased, and by the Second World War it was the *only* form of a treasonable overt act used.²³⁷ Perhaps a result of this was that the only American citizen tried for levying war against the United States during the Second World War was not tried under the treason clause, but rather in a military commission.²³⁸ However, this does not mean that Haupt II could not have been tried under the treason clause. In fact, he could have been. By landing on American soil and then proceeding to Jacksonville,²³⁹ he took steps constituting an overt act consistent with the holding in *Greiner*.²⁴⁰ Just as Haupt II could have been tried under the treason clause, so too can both Hamdi and Padilla.

IV. SEDITIOUS CONSPIRACY

Seditious conspiracy has been used on a number of occasions by the government recently to prosecute actions similar to those encompassed by the treason clause.²⁴¹ The Seditious Conspiracy statute²⁴² states in pertinent part that seditious conspiracy occurs if “two or more persons . . . in any place subject to the jurisdiction of the United States,” conspire to overthrow the United States government, or levy war

236. See *Kawakita v. United States*, 343 U.S. 717, 741 (1952); *Gillars*, 182 F.2d at 971; *D’Aquino v. United States*, 192 F.2d 338, 347-48 (9th Cir. 1951).

237. See, e.g., *Kawakita*, 343 U.S. at 741; *Gillars*, 182 F.2d at 971; *D’Aquino*, 192 F.2d at 347-48.

238. *Ex parte Quirin*, 317 U.S. 1, 37-38 (1942).

239. *Id.* at 21.

240. See *United States v. Greiner*, 26 F. Cas. 36, 39 (E.D. Pa. 1861).

241. See generally *United States v. Rahman*, 189 F.3d 88, 103 (2nd Cir. 1999); *United States v. Khan*, 309 F. Supp.2d 789, 796 (E.D. Va. 2004).

242. 18 U.S.C. § 2384 (2006).

against it, or hinder the execution of any law, or seize any United States property.²⁴³ Offenders shall either be fined or imprisoned for no more than twenty years.²⁴⁴

A recent case utilizing the Seditious Conspiracy statute is *United States v. Khan*.²⁴⁵ In *Khan* the defendant was convicted of seditious conspiracy for levying war against the United States.²⁴⁶ The court stated that the government established, beyond a reasonable doubt, the following facts: 1) Khan attended a meeting of several Muslims on September 16, 2001, where he was told to heed the Taliban's call to defend Afghanistan;²⁴⁷ 2) Khan agreed with three co-conspirators to travel to Pakistan to obtain training for the imminent fight in Afghanistan;²⁴⁸ (3) Even though Khan never made it into Afghanistan,²⁴⁹ he did attend training camps in Pakistan;²⁵⁰ (4) Khan fired an AK-47, an anti-aircraft gun, and a rocket-propelled grenade, at the camp as part of his training.²⁵¹ The court held that the government had established its evidence through the testimony of multiple witnesses.²⁵² It is important to note, therefore, that the requirement of two witnesses, although not contained in § 2384, would have caused no problems for the government in *Khan* because it was able to establish each stage of Khan's conspiracy with the testimony of multiple witnesses.²⁵³

The government used § 2384 in *Khan* because of the elements necessary to commit a crime under the statute.²⁵⁴ In other words, the acts performed by Khan, as so far mentioned, would not have been sufficient to convict him under the treason clause. Khan may have committed an act in furtherance of the conspiracy to levy war against America by traveling to Pakistan, but this was not the overt act of levying war itself. For the overt act of levying war to occur an actual assembling of a body of men must take place, who then use *some force* to carry out their

243. *Id.*

244. *Id.*

245. 309 F. Supp.2d 789 (E.D. Va. 2004).

246. *See id.* at 820-21. Khan was also convicted of numerous other conspiracy charges, including conspiracy to contribute services to the Taliban and use of firearms in connection with a crime of violence. *Id.* at 796.

247. *Id.* at 809, 821. The court stated that by September 16th it was clear that to fight for the Taliban would be to fight against American forces. *Id.* at 821.

248. *Id.*

249. *Id.* at 811.

250. *Id.* at 811, 821.

251. *Id.* at 811.

252. *Id.* at 821.

253. *See id.*

254. *See id.* at 820.

treasonable intent.²⁵⁵ In *Khan*, there was no assembling of men, nor was there use of “any force” against the United States.²⁵⁶ Nor did Khan give aid or comfort to the enemy by traveling to Pakistan. When Khan arrived in Pakistan on September 19, 2001, America’s enemy was the Taliban.²⁵⁷ In order for Khan to have committed a treasonable overt act, therefore, he would need to have given aid and comfort to the Taliban. However, the evidence in *Khan* is clear that this did not happen.²⁵⁸ In fact, the training camps that Khan attended in Pakistan were not organized by the Taliban,²⁵⁹ but by a different terrorist organization known as Lashkar-e-Taiba (“LET”).²⁶⁰ The purpose of the LET organization, at the time, was the destruction of Indian influence in Kashmir.²⁶¹ To this end, LET was engaged in a number of violent actions against Indian forces.²⁶² There is no indication, though, of a connection or support structure between the Taliban and LET.²⁶³ Thus, one cannot say that support for LET was in effect support for the Taliban.

Although Khan intended to fight for the Taliban,²⁶⁴ he attended LET camps because they were viewed by his associates as a good place to receive the requisite military training.²⁶⁵ Therefore, the firing of an AK-47 and an anti-aircraft gun cannot be seen as aid and comfort for the Taliban, because those acts were performed at a LET training camp. Furthermore, Khan then never made it into Afghanistan where he could have used or passed on these newly acquired skills to the aid and comfort of the Taliban. As the court stated in *Khan*, he “never actually contributed his services to the Taliban.”²⁶⁶ This therefore indicates one

255. *Ex parte Bollman*, 8 U.S. 75, 126, 128 (1807).

256. *See Khan*, 309 F. Supp.2d. at 821.

257. *See id.*

258. *See id.*

259. *See id.* at 811.

260. *Id.*

261. *Id.* at 807.

262. *Id.*

263. *See id.* at 801-18.

264. *Id.* at 821.

265. *Id.* at 810.

266. *Id.* at 821. Apart from the fact that Khan did not give aid and comfort to the Taliban, would the acts of firing an AK-47, an anti-aircraft gun, and a rocket-propelled grenade have constituted “aid and comfort” at all? In order to constitute “aid and comfort,” the act, at its moment of completion, must have the tendency to strengthen the enemy. *Kawakita v. United States*, 343 U.S. 717, 738 (1952). In *Kawakita*, the Court found that the defendant’s acts of beating and threatening prisoners of war gave aid and comfort because the acts were aimed at getting more out of the prisoners, which inevitably contributed to the enemy’s war effort. *Id.* at 738-39. This was even though the increased effort beaten out of the prisoners only contributed in a minor fashion to

of the primary differences between the Seditious Conspiracy statute and the treason clause. The *conspiracy* element of § 2384 is the critical factor. Khan's training could not constitute an *actual* attempt to levy war against the United States,²⁶⁷ but it did constitute a conspiracy to commit the act of levying war.²⁶⁸ Even though Khan never attended a camp run by an organization at war with the United States,²⁶⁹ he did have the intent to fight against American forces in Afghanistan, and to pursue this intent he took the concrete steps of attending the LET training camps.²⁷⁰ This is all that is required under the Seditious Conspiracy statute.²⁷¹ The lack of an overt act element is the principal benefit of applying § 2384 instead of § 2381. In this respect the Seditious Conspiracy statute is broader than the treason clause because only a conspiracy is required rather than an actual act of levying war.²⁷²

the overall war effort of the enemy. *Id.* at 738. Here, certainly the firing of one AK-47 is a minor effort, and the presence of one additional trained man is similarly minor, in the context of an entire fighting force. However, this does not foreclose the inquiry. *See id.* The pertinent question is: whether Khan becoming trained in the arts of soldiering, in some way, however minor, contributed to the fighting capacity, and consequently the war effort, of LET? *See id.* Under *Kawakita*, it would appear as if the answer to this question is yes. A person acquiring the skills to fire a rocket-propelled grenade contributes to a force's fighting capacity because it gives them access to additional skilled manpower, which they can then use in their fight. Khan providing himself as a trained fighting tool in such a manner gave "aid and comfort" to LET. LET, though, was not an enemy, in the treason clause sense, at the time Khan performed this training. In *Fricke*, the court held that Germany and America became enemies upon "the breaking out of war" between the two countries. *United States v. Fricke*, 259 F. 673, 675-76 (S.D.N.Y. 1919). In *Khan*, there is no evidence that war had broken out between America and LET. *See Khan*, 309 F. Supp.2d at 801-18. LET was not even designated as a foreign terrorist organization by the State Department until December 2001, *id.* at 812, three months after Khan attended the training camp.

267. *See supra* notes 256-57 and accompanying text.

268. *See Khan*, 309 F. Supp.2d at 821.

269. *Id.* at 811.

270. *Id.* at 821.

271. *See id.* For the conspiracy, here, to be established, the government need only prove intent to levy war against America and some concrete step in pursuit of that intent. *See id.* at 820. For "levying war" to be established under the treason clause, though, the government must not only prove the intent, but also an actual assembling of a body of men who then use some force against the United States. *Ex parte Bollman*, 8 U.S. 75, 126, 128 (1807). Importantly, the concrete step does not have to involve *actually* giving "aid and comfort" to an enemy of the United States (here, the Taliban), *see id.*, but can involve giving aid and comfort to an organization distinct from the Taliban, and at the time, not an enemy of the United States, *see supra* note 266, as long as the step in some way allows the defendant to pursue his intent. *See Khan*, 309 F. Supp.2d at 821. Learning how to fire an AK-47, therefore, constituted a step in pursuit of Khan's intent to fight for the Taliban, even if he learned how to do it at a LET training camp. Aid and comfort under the treason clause, though, must involve an actual giving of "aid and comfort," even if it is minor, *Kawakita v. United States*, 343 U.S. 717, 738 (1952), to an enemy of the United States. U.S. CONST. art. III, § 3, cl. 1.

272. 18 U.S.C. § 2384 (2006).

The other pertinent charge against Khan was of conspiring to provide material support to LET.²⁷³ The conduct that was used against Khan to establish his guilt of this offense referred to events that occurred after his return to America in December 2001.²⁷⁴ In December 2002, Khan purchased an airplane control module that can control the altitude and speed of a model airplane, and turn a video camera, if attached to the airplane, on or off.²⁷⁵ Khan was also in possession of an airborne video system that included a camera, which could be attached to a model airplane.²⁷⁶ The court found that Khan transferred both of these devices to Pal Singh,²⁷⁷ who was found to have played a major role in LET operations.²⁷⁸ As Hurst argued, though, these devices could have an innocent purpose.²⁷⁹ However, the court in *Khan* held that no evidence was introduced to suggest that the defendant had any “hobby interest” in model airplanes,²⁸⁰ and thus the innocent purpose argument is inapplicable. The court instead drew the inference, from LET bulletins which stated they had used model airplanes in Kashmir, that the model airplane equipment transferred from Khan to Singh was for LET’s military use in Kashmir.²⁸¹ The court further held that Khan *intended* his purchase of the control module to be put towards LET’s military use because of his knowledge of Singh’s connection to LET.²⁸²

Under the treason clause, Khan’s procurement and transfer of a model airplane control module to an operative of LET, for LET’s military use in Kashmir, would constitute an act of giving “aid and comfort.”²⁸³ Significantly, Singh had already tried and failed to purchase similar equipment for himself.²⁸⁴ Khan was therefore performing a task for LET that LET could not do for itself. Under *Kawakita*, this conduct

273. *Khan*, 309 F. Supp.2d at 821.

274. *Id.* at 811-14.

275. *Id.* at 813.

276. *Id.* at 812-13.

277. *Id.* at 814.

278. *Id.*

279. *Cf.* Hurst, *Under the Constitution*, *supra* note 161, at 839-41; *see also supra* notes 210-212 and accompanying text.

280. *Khan*, 309 F. Supp.2d at 814.

281. *Id.*

282. *Id.*

283. *Cf.* *United States v. Pryor*, 27 F. Cas. 628, 630 (1814) (holding that *carrying* provisions towards the enemy, with intent to supply, even though this purpose is defeated before the enemy is supplied, is a very different case than merely going in search of provisions with such an intent and stopping short before anything was found). Khan went one step further than “*carrying*,” when he actually *delivered* the equipment.

284. *Khan*, 309 F. Supp.2d at 812, 814.

constituted an act that tended to strengthen LET.²⁸⁵ Presumably, LET was hoping to use the airplane equipment because it would strengthen its efforts to defeat the Indian government in Kashmir,²⁸⁶ rather than hinder those efforts. At the very least, Khan provided Singh with military technology that Singh could not get for himself, and any such technology must be seen as strengthening LET's capability to engage and defeat the Indian government.

Therefore, why was the treason clause not used as applied to these acts? One answer may be that LET was still not an enemy of the United States. Although LET had been officially declared a terrorist organization in December 2001,²⁸⁷ and thus in some sense may be seen as an enemy of America during the war on terror, designating a group as a terrorist organization may not be sufficient to make that group an enemy under the treason clause. The court in *Fricke* held that only "[o]n the breaking out of the war between" America and Germany, did the subjects of Germany become enemies of the United States.²⁸⁸ Although the record in *Khan* is not tailored for this point, it does not appear as if war had broken out between LET and the United States by December 2002.²⁸⁹ Under a strict reading of *Fricke*, therefore, LET would not be an enemy of America. Consequently, Khan may not have committed treason, even though he gave "aid and comfort" to a terrorist organization. This then may be a limitation of the treason clause in the modern context of the war on terror because it may not only be impractical, but impossible, for the United States government to declare war on each and every terrorist organization that *could* receive "aid and comfort" from American citizens, especially when that terrorist organization is not even engaged in terror against the United States. In the case of Al-Qaeda this issue is not difficult because of the attacks on the World Trade Center, which would constitute an outbreak of war. Similarly, in the case of the Taliban, the United States went to war with

285. See *Kawakita v. United States*, 343 U.S. 717, 741 (1952).

286. See *Khan*, 309 F. Supp.2d at 814.

287. *Id.* at 812. As Khan's procurement and transfer of the airplane equipment to Singh occurred in December 2002, if LET was an enemy of the United States at time, then he would have given "aid and comfort" to an enemy of the United States.

288. *United States v. Fricke*, 259 F. 673, 675-76 (S.D.N.Y. 1919); see also Charge of Mr. Justice Nelson, *supra* note 98, at 1035 (charging that on the outbreak of "war between two nations, the citizens or subjects of the respective belligerents are deemed . . . to be the enemies of each other").

289. See *Khan*, 309 F. Supp.2d at 801-18.

that organization when it launched its military offensive in Afghanistan.²⁹⁰

For other terrorist organizations, though, the Constitution's requirement that they be "enemies" of the United States²⁹¹ may limit the treason clause's application to American citizens that support terrorist groups. Interestingly, after the guilty verdict was rendered in *Khan*, the then United States Attorney General said that: "[w]e [the United States government] will not stand by as United States citizens support terrorist causes."²⁹² This, therefore, may be the overriding concern of the government, and it may be a concern that the treason clause cannot address when applied to *every* terrorist organization. However, this is a *war* on terror, and LET has been designated a terrorist organization. Thus, if the government is fighting a war against the very objective which the State Department has determined that LET fights for, then under these circumstances, LET may be an enemy of the United States. The existence of a state of war or open hostilities is the gravamen of this element.²⁹³ For these reasons it is very important for future research to find out if designating a group as a terrorist organization is sufficient to make that group an enemy of the United States in light of the circumstances of the war on terror.²⁹⁴

The Seditious Conspiracy statute, though, is limited by its jurisdictional reach.²⁹⁵ Whereas the treason clause can reach any American citizen "wherever" they may be, § 2384 is only applicable in places subject to the jurisdiction of the United States.²⁹⁶ On September

290. Ian Christopher McCaleb, *Defense Officials: Air Operation to Last 'Several Days'*, CNN, Oct. 7, 2001, <http://archives.cnn.com/2001/US/10/07/ret.attack.pentagon/index.html>.

291. U.S. CONST. art. III, § 3, cl. 1.

292. Kevin Bohn & Terry Frieden, *'Virginia Jihad' Members Found Guilty*, CNN, Mar. 5, 2004, <http://www.cnn.com/2004/US/South/03/04/paintball.terror/index.html>.

293. *In re Charge to Grand Jury*, 30 F. Cas. 1036 (C.C.S.D. Ohio 1861) (No. 18,272) (Grand Jury Charge of Mr. Justice Leavitt) [hereinafter Charge of Mr. Justice Leavitt]; *Stephan v. United States*, 133 F.2d 87, 94 (6th Cir. 1943).

294. The Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224, may be the starting point for this research. The AUMF states that: the "President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." If LET aided Al-Qaeda in its World Trade Center attacks or harbored any member of Al-Qaeda, then the AUMF would seem to encompass them. The Authorization for Use of Military Force would satisfy the treason clause, just as the United States' Declaration of War against Germany on December 11, 1941, did in *Gillars v. United States*, 182 F.2d 962, 967 (D.C. Cir. 1950) (holding that after December 11, 2001, the defendant participated in the enemies' purpose of spreading radio propaganda programs in the United States).

295. 18 U.S.C. § 2384 (2006).

296. *Id.*

16, 2001, Khan attended a meeting that included his fellow conspirators.²⁹⁷ This meeting formed the basis of the government's evidence establishing that Khan had conspired to levy war against the United States.²⁹⁸ At the meeting Khan was urged to go to Afghanistan to help defend the Taliban.²⁹⁹ The meeting took place at the home of one of the co-conspirators, which was in Virginia.³⁰⁰ Thus, Khan's actions were within the authority of § 2384 because while in Virginia he conspired to go to Afghanistan to fight, at some point in the future, American soldiers; this is clearly subject to the jurisdiction of the United States.

This is not so in the cases of Hamdi and Padilla. Hamdi was detained while fighting Northern Alliance forces in Afghanistan.³⁰¹ His overt act of levying war, thus, occurred in a place outside the jurisdiction of the United States. Neither is there any evidence presented in the Mobbs Declaration that he conspired with anyone in America prior to leaving for Afghanistan.³⁰² As for Padilla, although he was detained in Chicago, for § 2384 to apply, "two or more persons" must conspire in a "place subject to the jurisdiction of the United States."³⁰³ The Mobbs Declaration, though, does not state that Padilla *conspired* with anyone in Chicago.³⁰⁴ Assuming that Padilla did conspire against the United States for § 2384 purposes, this could not have occurred in a place subject to America's jurisdiction because the Mobbs Declaration states he was in Afghanistan and Pakistan when he was conversing with members of Al-Qaeda.³⁰⁵ In fact, the Mobbs Declaration states that Padilla had left America by 1998 for Egypt, then in 1999 or 2000 he had traveled to Pakistan, and in 2001 he was in Afghanistan.³⁰⁶ It was not until he was in Afghanistan in 2001 that the Mobbs Declaration alleges that Padilla met with Al-Qaeda members to begin planning his return to America.³⁰⁷ Thus, neither Padilla nor Hamdi could be prosecuted under § 2384 because neither of them conspired in places subject to American jurisdiction.

297. United States v. Khan, 309 F. Supp.2d 789, 809 (E.D. Va. 2004).

298. *Id.* at 821.

299. *Id.*

300. *See id.* at 803, 821.

301. *See* Mobbs Hamdi Declaration, *supra* note 8.

302. *See id.*

303. 18 U.S.C. § 2384 (2006).

304. *See* Mobbs Padilla Declaration, *supra* note 8.

305. *Id.* at 3-4.

306. *Id.* at 2-3.

307. *Id.* at 3.

Apart from the overt act and jurisdictional differences between the treason clause and the Seditious Conspiracy statute, there are two other significant differences. First, there is no two-witness requirement to establish that an accused did conspire against the United States in § 2384.³⁰⁸ This means that the evidentiary requirements are more susceptible to a prosecutor's discretion than under the treason clause. Second, seditious conspiracy "includes no requirement that the defendant owe allegiance to the United States, an element necessary to conviction of treason."³⁰⁹ Therefore, the government can prosecute a wider pool of people under § 2384 because the statute is not limited to American citizens, but instead *any* person, citizen or not, within the jurisdiction of the United States.³¹⁰

V. THE FACTS SURROUNDING THE DETENTION OF HAMDI AND PADILLA

The circumstances surrounding the detentions of Yaser Hamdi and Jose Padilla are detailed by the government through the Special Advisor to the Under Secretary of Defense for Policy, Michael H. Mobbs.³¹¹ Each declaration is bulleted by a chronological numbering of the acts performed by both Hamdi and Padilla prior to and after their detentions.³¹²

308. See 18 U.S.C. § 2384 (2006).

309. *United States v. Rahman*, 189 F.3d 88, 113 (2d Cir. 1999).

310. See 18 U.S.C. § 2384 (2006).

311. Mobbs Hamdi Declaration, *supra* note 8; Mobbs Padilla Declaration, *supra* note 8.

312. Mobbs Hamdi Declaration, *supra* note 8.

The declaration concerning Yaser Hamdi³¹³ states that he traveled to Afghanistan in either July or August 2001.³¹⁴ Once there, Hamdi joined a Taliban military unit and received weapons training.³¹⁵ After the September 11th attacks Hamdi continued with this unit, and remained with it even after the United States began military operations against the Taliban on October 7, 2001.³¹⁶ In late 2001, Northern Alliance forces (with whom the United States was allied) were engaged in fighting against the Taliban.³¹⁷ It was during this fighting that Hamdi and his Taliban unit surrendered to Northern Alliance forces.³¹⁸ While en route to a prison, Hamdi was ordered to hand over his Kalashnikov rifle, which he did.³¹⁹ It was the presence of the Kalashnikov rifle in Hamdi's hands at the time of his detention that forms the basis of the government's evaluation of him as an enemy combatant.³²⁰ The

313. Hamdi was released from detention in October 2004 into the custody of Saudi Arabia. Joel Brinkley & Eric Lichtblau, *U.S. Releases Saudi-American It Had Captured in Afghanistan*, N.Y. TIMES, Oct. 12, 2004, at A15. Although Hamdi had been held for three years because of the supposed threat he posed to national security, *see id.*, the government required only a few conditions for his release. *See* Joel Brinkley, *The Saturday Profile: From Afghanistan to Saudi Arabia, via Guantánamo*, N.Y. TIMES, Oct. 16, 2004, at A4. Hamdi had to promise not to leave Saudi Arabia for five years and to renounce his American citizenship. *Id.* Hamdi's release came less than four months after the Supreme Court decision in *Hamdi v. Rumsfeld*, which ruled that the government must give Hamdi an opportunity to rebut his status as an enemy combatant in front of a federal district court. 542 U.S. 507, 533, 538-39 (2004). Instead of giving Hamdi this opportunity, the government decided to release him. This has consequently raised concerns about the legitimacy of the government's original claims against Hamdi contained in the Mobbs Declaration. *See, e.g.*, Brinkley & Lichtblau, *supra*, at A15 (giving Hamdi's side of his story; stating that his only aim when he entered Afghanistan in 2001 was to "reconnect with Islam," and that he wanted no part in "any war with the United States"). Clearly, either the government felt that the Mobbs Declaration would not stand up to judicial scrutiny at Hamdi's status hearing, or the government did not wish to reveal the sources of their intelligence, which may have occurred at such a hearing. The government's claim that Hamdi was "no longer considered a threat" and did not "possess any further intelligence value," seems rather empty at this stage. Brinkley, *supra*, at A4. However, for the purposes of this Note, the Mobbs Declaration must remain the guidepost for determining whether Hamdi could have been tried for treason, because the Declaration is what the government based its decision to detain Hamdi as an enemy combatant in the first place. *See Hamdi*, 542 U.S. at 512. Thus, to conduct an analysis of whether treason is an equally or more effective means to deal with American citizens detained during the war on terror than declaring a person to be an enemy combatant, the same factual material (here, the Mobbs Declaration) must be used.

314. Mobbs Hamdi Declaration, *supra* note 8.

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Hamdi v. Rumsfeld*, 542 U.S. 507, 521(2004).

Declaration added that the Taliban was, and still is, a hostile force engaged in armed conflict with the United States and its allies.³²¹

The declaration involving Jose Padilla³²² states that he was born in

321. Mobbs Hamdi Declaration, *supra* note 8.

322. Similar to Hamdi, Padilla's status has also changed since he was first detained. Unlike Hamdi, though, Padilla is still in the custody of the federal government, but he is no longer officially an enemy combatant. *Hanft v. Padilla*, 126 S. Ct. 978, 978 (2006). At the beginning of 2006, the Supreme Court granted a government application to transfer Padilla from military custody to the custody of a warden of a federal detention center in Florida. *Padilla*, 126 S. Ct. at 978. The government had originally made this application in November 2005, *see id.*, after it decided not to file a brief with the Supreme Court in response to Padilla's petition for certiorari on the Fourth Circuit's ruling that the government was justified in holding Padilla in military detention. *See Padilla v. Hanft*, 432 F.3d 582, 584 (4th Cir. 2005). Now that Padilla's transfer to a federal detention center has been authorized, he will be facing charges "considerably different" from those for which he had been detained militarily. *Id.* Padilla has been charged with conspiracy to murder, kidnap, and maim persons in a foreign country; conspiracy to provide material support for terrorists; and providing material support for terrorists. Padilla November 2005 Indictment, at 4-5, 17, 18-19, available at <http://files.findlaw.com/news.findlaw.com/nytimes/docs/Padilla/uspadi111705ind.pdf>. Of these three charges, only the first is accompanied with a factual account of Padilla's supposed actions. *See id.* at 7-19. As for Hamdi, the original Mobbs Declaration against Padilla must be used to evaluate the merits of using treason as a tool for dealing with American citizens detained during the war on terror because it was the facts contained within the Mobbs Declaration that presumably formed the basis of the government's detention of Padilla as an enemy combatant. *See Padilla v. Hanft*, 423 F.3d 386, 389-90 (4th Cir. 2005). However, it may also be relevant to review the overt acts alleged against Padilla in the government's November 2005 indictment to determine whether these are sufficient to still bring a treason charge.

As the Fourth Circuit stated in its denial of the government's application to transfer Padilla, the indictment makes "no mention" of the acts upon which the government purported to base its military detention of Padilla. *Padilla*, 432 F.3d at 584. Most glaringly, the government omitted their previous assertion that Padilla had taken up arms against American forces in Afghanistan, and that he had entered this country in 2002 for the purpose of blowing up buildings in cities. *Id.* In fact, in the indictment, Padilla is certainly not the main focus of the government's charges. *See Padilla November 2005 Indictment*, at 7-19, available at <http://files.findlaw.com/news.findlaw.com/nytimes/docs/Padilla/uspadi111705ind.pdf>. The main thrust of the indictment is directed at two men who founded and ran the "American Islamic Group," which promoted violent jihad. *See id.* at 3-4. These men are accused by the government to have operated a North American support cell that sent money and recruits to overseas conflicts. *Id.* at 3. Padilla is alleged to have been one of these recruits, and sent overseas to participate in violent jihad. *Id.* at 4. The overt acts, in furtherance of the conspiracy to murder, kidnap, and maim persons in a foreign country, alleged against Padilla are few. *See id.* at 7-17. The government alleges that: in April 1996, Padilla obtained an American passport. *Id.* at 8. Within a month, two of the other defendants discussed their intention to "prepare" Padilla. *Id.* In July 1997, one of the defendants participated in a conversation with Padilla, in which Padilla replied that "it's gonna happen soon." *Id.* at 11. It was not until September 1998, though, that Padilla flew from America to Egypt. *Id.* at 13. In July 1999, Padilla reported that he had requested an army jacket, a book bag, and a sleeping bag. *Id.* at 14. A month later, one of the defendants issued a \$1,000 check in Padilla's name. *Id.* In July 2000, Padilla filled out a "Mujahideen Data Form" in preparation for violent jihad training in Afghanistan. *Id.* at 15. The final act involving Padilla is that in October 2000 he was in Afghanistan. *Id.* at 16. In their sum total, these acts do *not* constitute treason. As an initial matter, a conspiracy to commit acts in a foreign country does not rise to the level of levying war unless the United States is the object of these acts. *See Ex parte Bollman*, 8 U.S. 75, 131 (1807).

New York, but by 1998 he had moved to Egypt and in either 1999 or

Bollman would be the most analogous case to a charge alleging acts against a foreign country. In *Bollman*, the defendants were accused of levying war against the United States when they enlisted men for an expedition against Mexico. *Id.* at 125, 131. The Court stated that if the enterprise was against Mexico it would amount only to a high misdemeanor and not treason. *Id.* at 131. If, however, in the progress of the enterprise the subversion of the American government was also necessary, then the assembling of a body of men to carry out the enterprise would be treason. *Id.* Unfortunately for the prosecution, there was no evidence “which would justify a suspicion that any territory of the United States was the object of the expedition.” *Id.* Similarly, here there is no act presented in the indictment that would suggest without some imagination an action against the United States. In fact, the government does not even allege this, but instead an act committed against a foreign country. See Padilla November 2005 Indictment, at 4, available at <http://files.findlaw.com/news.findlaw.com/nytimes/docs/Padilla/uspad111705ind.pdf>. Therefore, Padilla certainly did not levy war against the United States.

The next question is whether Padilla gave “aid or comfort” to an enemy of the United States. As a threshold matter, determining whether Padilla was benefiting an actual *enemy* of the United States is vital. In *Fricke*, the court held that the government and people of Germany became enemies of the United States “[o]n the breaking out of war between” the two countries. *United States v. Fricke*, 259 F. 673, 675-76 (S.D.N.Y. 1919). Here, all of the acts alleged against Padilla took place before the September 11th attacks in 2001. See Padilla November 2005 Indictment, at 7-17, available at <http://files.findlaw.com/news.findlaw.com/nytimes/docs/Padilla/uspad111705ind.pdf>. Thus, even if Padilla had entered Afghanistan in October 2000, *id.* at 16, for the purpose of training for violent jihad, there would not be an outbreak of war between the Taliban or Al-Qaeda and the United States for nearly another year. *Cf. supra* note 266. *Fricke* requires that there be an outbreak of war before a country or group becomes an enemy, *Fricke*, 259 F. at 675-76, this did not occur here until September 11th, 2001, nearly a year after the last act alleged against Padilla. See Padilla November 2005 Indictment, at 16, available at <http://files.findlaw.com/news.findlaw.com/nytimes/docs/Padilla/uspad111705ind.pdf>. However, even if Padilla had been giving aid and comfort to an actual enemy of the United States, the acts alleged against him are still insufficient to constitute “aid and comfort.”

The most damaging allegation against Padilla is that he filled out a “Mujahideen Data Form” in preparation for training in Afghanistan. *Id.* at 15. However, even this act fails under the *Fricke-Kawakita* framework for aid and comfort because it does not tend to strengthen the enemy. *Fricke*, 259 F. at 676; *Kawakita v. United States*, 343 U.S. 717, 741 (1952). Although the filling out of a data form may have provided an enemy with information about the person who filled it out, such data, at the moment of its completion, would not tend to strengthen the enemy. *Cf. Kawakita*, 343 U.S. at 738. The only possible inference in favor of finding that this act gave “aid and comfort” is that it may have led those who received Padilla’s data form to believe that the number of men who could potentially fight for them might have increased. Even if the increase is only one person, this can still constitute “aid and comfort” because an overt act does not need to be necessary “to [the] successful completion of the enemy’s project.” *Id.* However, unlike *Kawakita*, who aided the war efforts of the enemy by increasing the production of munitions at a prisoner of war camp, *id.*, the filling out of a data form alone would not constitute aid to the enemy’s war effort. In other words, the data on the form would not tend to strengthen its recipient. Something more is necessary. For example, if Padilla had gone to Afghanistan and participated in violent jihad training, this would have constituted aid and comfort because it would have increased the fighting capacity, and thus the war effort, of the enemy. *Cf. id.* Although, the indictment alleges that Padilla went to Afghanistan, Padilla November 2005 Indictment, at 16, available at <http://files.findlaw.com/news.findlaw.com/nytimes/docs/Padilla/uspad111705ind.pdf>, there is no indication that this was in connection with any violent jihad training. See *id.* Merely traveling to Afghanistan is not treason. Therefore, the November 2005 indictment, as it now stands, could not be used to prosecute Padilla for treason.

2000 had traveled to Pakistan.³²³ During this time, Padilla is alleged to have been closely associated with members of the Al-Qaeda network.³²⁴ In 2001, Padilla met with a senior lieutenant of Al-Qaeda to discuss a proposal for him to conduct terrorist operations within the United States.³²⁵ After this meeting, Padilla engaged in research on the construction of a “uranium-enriched” explosive device or “dirty bomb.”³²⁶ In 2002, Padilla again met with senior Al-Qaeda operatives to discuss his participation in terrorist operations targeting the United States.³²⁷ The Declaration states that it was believed Al-Qaeda members directed Padilla to return to the United States to conduct reconnaissance and/or attacks.³²⁸ Padilla then traveled from Pakistan to Chicago, where he was apprehended on May 8, 2002.³²⁹ On June 9, 2002, the President determined that Padilla had engaged in conduct that constituted war-like acts, which included preparation for acts of international terrorism aimed to cause injury to the United States.³³⁰

The Mobbs Declaration involving Jose Padilla emphasizes from the start that it is based on “multiple intelligence sources.”³³¹ These intelligence sources included two confidential sources who were detained members of the Al-Qaeda organization.³³² In a footnote, the Declaration stated that although some of the information provided by these confidential sources may have been part of an effort to mislead the United States, much of their information had been corroborated by other intelligence information.³³³

VI. THE REASONS FOR USING THE TREASON CLAUSE

Although a plurality of the Supreme Court has held that the government can hold American citizens as enemy combatants as long as they are given the opportunity to rebut this status,³³⁴ the application of the treason clause in a criminal court, with a jury, will be a more beneficial form of prosecution for the government. The most important

323. Mobbs Padilla Declaration, *supra* note 8, at 2-3.

324. *Id.* at 3.

325. *Id.*

326. *Id.*

327. *Id.* at 4.

328. *Id.*

329. *Id.*

330. *Id.* at 5.

331. *Id.* at 2.

332. *Id.*

333. *Id.*

334. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).

reason for this conclusion is the ability to meet the evidentiary and element prerequisites of the crime of treason, and therefore successfully prosecute American citizens detained as enemy combatants during the war on terror. The government must prove either a levying of war against the United States or giving aid and comfort to its enemies, in addition to a treasonable intent.³³⁵ The overt act must be proven by the testimony of two witnesses.³³⁶ It would seem that Yaser Hamdi, based on the Mobbs Declaration, levied war against the United States. In fact, Justice O'Connor, in her plurality opinion in *Hamdi*, stated that the basis for the detention of Hamdi was his carrying of a weapon against American troops on a foreign battlefield.³³⁷ Thus, the basis for holding Hamdi as an enemy combatant would also be an overt act sufficient to prosecute him under the treason clause. Justice Story stated in his charge to a grand jury that if an assembly of men should use force to oppose soldiers sent by the President, then such an act would constitute the required overt act.³³⁸

Here, in late 2001, the Taliban was engaged in fighting against Northern Alliance forces including American soldiers.³³⁹ Hamdi was then captured on the battlefield in the course of this fighting,³⁴⁰ which would constitute the use of force to oppose soldiers dispatched by the President. In *Bollman* and Justice Story's charge to the grand jury the emphasis, when defining what force is necessary to constitute an overt act, is on "any force" or "present force."³⁴¹ This is therefore a liberal interpretation of "levying war" because it places the force necessary at a bare minimum. Certainly engaging in a battle with Northern Alliance forces would constitute "any force."³⁴² Furthermore, Hamdi was detained while in possession of a Kalashnikov rifle,³⁴³ which would indicate his participation in the act of opposing soldiers sent by the President with force. For Hamdi to have committed an act of levying war two witnesses do not need to have seen him fire his weapon either. The emphasis in *Bollman* and Justice Story's charge to the grand jury is

335. U.S. CONST. art. III, § 3, cl. 1.

336. *Ex parte Bollman*, 8 U.S. 75, 127-28 (1807).

337. *Hamdi*, 542 U.S. at 522.

338. Charge of Mr. Justice Story, *supra* note 69, at 1047.

339. Mobbs Hamdi Declaration, *supra* note 8.

340. *Id.*

341. *Bollman*, 8 U.S. at 128 (emphasis added); Charge of Mr. Justice Story, *supra* note 69, at 1047.

342. *Cf.* United States v. Greiner, 26 F. Cas. 36, 36, 39 (1861) (holding that the defendants, who had seized a United States fort, committed an act of levying war).

343. Mobbs Hamdi Declaration, *supra* note 8.

also placed on the assembling of a body of men who then *together* oppose the United States.³⁴⁴ This is beneficial to the government because it is unlikely that a soldier in a battle would see any one specific person fire his weapon, but witnessing a body of men oppose you, which the accused was a part of, is a completely different matter. The Mobbs Declaration alleges that Hamdi was a part of a Taliban military unit,³⁴⁵ which would constitute the required body of men.

Hamdi's presence in a body of men, alone, though, is not sufficient to constitute treason. If this was the case, then an errant tourist, embedded journalist, or a local aid worker,³⁴⁶ may become subject to the treason clause. Consequently, intent must also be shown from Hamdi's possession of a Kalashnikov rifle. In *Kawakita*, the Court held that "conduct" alone was the guidepost for inferring intent.³⁴⁷ Here, Hamdi's conduct, which is the possession of a rifle on a battlefield, requires no need for imagination as to the inferring of intent to oppose forces of the Northern Alliance.³⁴⁸ The natural consequence of Hamdi's possession of a rifle on a battlefield would certainly be sufficient to get the case to a jury.³⁴⁹ In *Stephan*, the court held that intent could be proven by the circumstances of the case or by a single fact.³⁵⁰ The court found that the defendant had knowledge that a person he was aiding was an escaped German prisoner, and despite this he bought a travel bag and train tickets for him.³⁵¹ If knowledge that a person is an enemy of America and acting upon it to the enemy's benefit is sufficient to establish intent,³⁵² then certainly possession of a firearm on a battlefield while fighting American forces, would leave no reasonable doubt as to that person's intent to levy war against those forces. As the court stated in *Khan*, the Taliban's status as an enemy of America was clear at the time in question.³⁵³ The fact that Hamdi's actions and detention occurred in a country outside of the United States is irrelevant to this analysis because

344. See *Bollman*, 8 U.S. at 126; Charge of Mr. Justice Story, *supra* note 69, at 1047.

345. Mobbs Hamdi Declaration, *supra* note 8.

346. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004).

347. *Kawakita v. United States*, 343 U.S. 717, 742 (1952).

348. *Cf.* *Cramer v. United States*, 325 U.S. 1, 38 (1945) (stating that some imagination was necessary to perceive how a meeting between the defendant and two saboteurs was treasonous).

349. *Cf.* *D'Aquino v. United States*, 192 F.2d 338, 352-53 (9th Cir. 1951) (holding that the question of intent was one for the jury when the defendant had participated in a Japanese radio broadcast used as an instrument for psychological warfare, but she had also cared for American prisoners of war).

350. *Stephan v. United States*, 133 F.2d 87, 94 (6th Cir. 1943).

351. *Id.* at 95.

352. *Id.*

353. *United States v. Khan*, 309 F. Supp.2d 789, 821 (E.D. Va. 2004).

there is no territorial limitation to the treason clause.³⁵⁴ Nor is the fact that Hamdi is a dual citizen of both America and Saudi Arabia prohibitive to a treason charge, because as stated in *Gillars* allegiance inheres in citizenship,³⁵⁵ and there is no evidence in the Mobbs Declaration that Hamdi had renounced his citizenship at the time.³⁵⁶ Therefore, the circumstances of Hamdi's detention would seem to have created a case that could be prosecuted under the treason clause.

However, one problem with charging Hamdi with levying war against the United States is that he was detained while fighting forces of the Northern Alliance. If these forces did not contain any American soldiers or military personnel, then there may be a question as to whether Hamdi opposed soldiers sent by the President.³⁵⁷ Even if the levying war element is negated by this,³⁵⁸ though, Hamdi certainly gave "aid and comfort" to an enemy of the United States. The Mobbs Declaration states that Hamdi was detained in late 2001.³⁵⁹ This would have, thus, been after September 11, 2001, when the outbreak of hostilities occurred between America and the Taliban or Al-Qaeda.³⁶⁰ Therefore, if Hamdi was giving aid and comfort it was to an actual enemy of the United States. Under the *Fricke-Kawakita* rule, the aid and comfort need only tend to strengthen an enemy or tend to weaken America.³⁶¹ In *Kawakita*, because of the cruelty with which the defendant treated American prisoners of war, they were less likely to be troublesome, and thus needed fewer guards.³⁶² The Court held that this would tend to give the enemy the "heart and courage to go on with the war."³⁶³ Similarly, here, Hamdi's participation in a battle against Northern Alliance forces, against whom the Taliban were fighting, would not only give the Taliban extra manpower to prosecute its war, but it would give them the "heart and courage" to continue fighting.³⁶⁴

354. *Kawakita v. United States*, 343 U.S. 717, 733 (1952).

355. *Gillars v. United States*, 182 F.2d 962, 981 (D.C. Cir. 1950).

356. Mobbs Hamdi Declaration, *supra* note 8. Since the Mobbs Declaration, one of the conditions of Hamdi's release was that he renounce his citizenship, and thus, today, he would not be subject to the treason clause. See Brinkley, *supra* note 313, at A4.

357. *Cf.* Charge of Mr. Justice Story, *supra* note 69, at 1047.

358. From the Mobbs Declaration it is unclear whether the Northern Alliance forces contained any American forces. See Mobbs Hamdi Declaration, *supra* note 8.

359. *Id.*

360. *Cf.* *United States v. Fricke*, 259 F. 673, 675-76 (S.D.N.Y. 1919) (holding that America and Germany became enemies during World War I when war broke out between the two countries).

361. See *id.* at 676; *Kawakita v. United States*, 343 U.S. 717, 741 (1952).

362. *Kawakita*, 343 U.S. at 741.

363. *Id.*

364. *Cf. id.*

Next are the more uncertain acts of Jose Padilla. Assuming, for now, that the government could establish the facts alleged in the Mobbs Declaration, the important question is whether there is any precedent that supports a charge of treason when the acts committed by the accused were meeting with senior members of the Al-Qaeda organization, researching the construction of a uranium-enriched explosive device, boarding an airplane bound for the United States, and landing in the United States.³⁶⁵ First, researching the construction of a uranium-enriched explosive device for an enemy force indicates a treasonable intent. After the September 11th attacks the hostile mission of Al-Qaeda was evident,³⁶⁶ but Padilla continued to render a benefit for the organization, in a similar manner to the accused in *Best*. In *Best*, the court stated that the accused knew of the hostile mission of the German Broadcasting Company and still voluntarily offered himself for employment with the intention of contributing to the hostile mission.³⁶⁷ Here, Padilla had knowledge of Al-Qaeda's hostile mission³⁶⁸ and yet still conducted research into the construction of a uranium-enriched explosive device.³⁶⁹ In *Stephan*, knowledge and acting upon it was sufficient to establish treasonable intent,³⁷⁰ it should be equally sufficient here.

As the Court stated in *Kawakita*, the two-witness requirement does not extend to the element of intent.³⁷¹ In fact, the element of intent does not even require the existence of one witness.³⁷² Instead, conduct or circumstances alone are sufficient.³⁷³ In *Kawakita*, intent was inferred from statements made by the defendant concerning the Second World War.³⁷⁴ The defendant had said to American prisoners of war that he would "be glad when all of the Americans [are] dead," and that Japan would win the war.³⁷⁵ The Court stated that the hostility inherent in the defendant's words meant that if the jury believed those words were actually spoken, then traitorous intent would be proven by overwhelming evidence.³⁷⁶ Similarly, here, although there is no evidence

365. Mobbs Padilla Declaration, *supra* note 8, at 3-4.

366. See *United States v. Khan*, 309 F. Supp.2d 789, 821 (E.D. Va. 2004).

367. *Best v. United States*, 184 F.2d 131, 137 (1st Cir. 1950).

368. See Mobbs Padilla Declaration, *supra* note 8, at 4.

369. Mobbs Padilla Declaration, *supra* note 8, at 3.

370. *Stephan v. United States*, 133 F.2d 87, 95 (6th Cir. 1943).

371. *Kawakita v. United States*, 343 U.S. 717, 742 (1952).

372. See *Stephan*, 133 F.2d at 94.

373. See *id.*; *Kawakita*, 343 U.S. at 742.

374. *Kawakita*, 343 U.S. at 743.

375. *Id.*

376. *Id.* at 744.

of hostile words in the Mobbs Declaration,³⁷⁷ the hostility inherent in conducting research on the construction of a “‘uranium-enhanced’ explosive device”³⁷⁸ is self-evident. This hostile intent is particularly indicated when Padilla discussed with leaders of Al-Qaeda plans to detonate such a device.³⁷⁹ Thus, just as in *Kawakita*, if a jury believes that Padilla did commit such research, then traitorous intent would be proven by overwhelming evidence.³⁸⁰

Thus, the inquiry turns on the acts performed by Padilla. This should begin with Hamdi’s research on the construction of a uranium-enriched explosive device for Al-Qaeda. The facts here do not present the classic example of “levying war,” which involves the assembly of a body of men with the purpose to carry out a treasonable intent.³⁸¹ However, in *Bollman* the Court held that “any force” connected to the treasonable intent was sufficient.³⁸² Despite this, and unlike the President’s determination that Padilla engaged in war-like acts,³⁸³ it is unlikely that Padilla’s actions can be considered a levying of war under the treason clause. This is because Padilla has not carried out any force to oppose the United States.³⁸⁴

However, in *Fricke*, the court, interpreting the adherence to the enemy element, held that it meant any act that strengthens, or tends to strengthen the enemy, or weakens, or tends to weaken the United States.³⁸⁵ Thus, the question is, does researching the construction of a uranium-enriched explosive device strengthen the enemy or weaken the United States? Given the nature of the war on terror and the types of weapons used by terrorists, any research into uranium-enriched devices that may be used to facilitate the use of such weapons would tend to strengthen an enemies’ ability to wage war against America, which would consequently, under the *Fricke* framework, give aid to that enemy. As the Court stated in *Kawakita*, only one overt act in adherence to the enemy is necessary to satisfy the element.³⁸⁶ It is therefore immaterial whether boarding an airplane bound for the United States or meeting with senior members of the Al-Qaeda network constituted

377. See Mobbs Padilla Declaration, *supra* note 8, at 3-4.

378. See *id.* at 3.

379. See *id.* at 4.

380. Cf. *Kawakita*, 343 U.S. at 744.

381. *Ex parte Bollman*, 8 U.S. 75, 126 (1807).

382. *Id.* at 128.

383. Mobbs Padilla Declaration, *supra* note 8, at 5.

384. See *id.* at 3-4.

385. *United States v. Fricke*, 259 F. 673, 676 (S.D.N.Y. 1919).

386. *Kawakita v. United States*, 343 U.S. 717, 737 (1952).

adherence to the enemy or levying war. Padilla's research on the construction of a uranium-enriched device is the one overt act sufficient to establish adherence to the enemy under the treason clause.

However, treason cases have involved the submission of more than one overt act to the jury.³⁸⁷ Thus, the other overt acts committed by Padilla should also be considered. The other acts committed by Padilla are: discussions with leaders of the Al-Qaeda network in 2002, boarding an airplane for the United States, and landing in the United States.³⁸⁸ As for the discussions with leaders of Al-Qaeda, whether this gives aid and comfort to the enemy would depend entirely on the content of the conversations.³⁸⁹ Unlike *Cramer*, though, the Mobbs Declaration does disclose what Padilla discussed with the enemy.³⁹⁰ The Mobbs Declaration states that Padilla's discussions included a plan to "detonate a 'radiological dispersal device'" within the United States.³⁹¹ A later conversation included Padilla's potential participation in terrorist operations targeting America and the radiological dispersal device plan.³⁹² These discussions, if they involved such content, would probably fall within the holding of *Kawakita*. The overt acts in *Kawakita* tended to strengthen the enemy because they contributed to its war effort.³⁹³ Here, the discussions tended to strengthen Al-Qaeda because they included Padilla unveiling a plan to detonate a device within the United States.³⁹⁴ Just having knowledge of such a plan would contribute to Al-Qaeda's war effort, not least because it would give them additional options with which to target America; a benefit that undoubtedly aids the enemy of America.

As for Padilla's other overt acts of boarding a plane for, and landing in, America, the determinative factor is intent. Clearly, boarding a plane or landing in America, alone, although an act that is overt, is not treason. This, then, is one of those circumstances alluded to by Hurst in which an act may serve the purpose of treason but also in another

387. See *Kawakita*, 343 U.S. at 741. In *Kawakita*, six overt acts of cruelty to American prisoners of war were submitted to the jury. *Id.* The jury found that each one constituted aid and comfort. *Id.*

388. Mobbs Padilla Declaration, *supra* note 8, at 4.

389. Cf. *Cramer v. United States*, 325 U.S. 1, 37-38 (1945) (holding that without proof of what was said during a meeting between the defendant and two enemy saboteurs, it would take some imagination to perceive if the meeting gave "any advantage" to the enemy).

390. See Mobbs Padilla Declaration, *supra* note 8, at 3-4.

391. *Id.* at 3.

392. *Id.* at 4.

393. *Kawakita v. United States*, 343 U.S. 717, 738, 741 (1952).

394. Mobbs Padilla Declaration, *supra* note 8, at 3-4.

context serve innocent purposes.³⁹⁵ It is in such cases that the intent of the actor plays the pivotal role. In *Cramer*, the intent of the defendant could not be discerned by the otherwise commonplace acts submitted by the government.³⁹⁶ Here, though, according to the Mobbs Declaration, the intent of Padilla boarding the plane can be discerned, because the Declaration states that Padilla flew to America to conduct reconnaissance and/or attacks.³⁹⁷ Furthermore, Padilla had discussed with leaders of Al-Qaeda these purposes before leaving for America, and thus he was in full knowledge of why he was going.³⁹⁸ A negative for these acts, though, is that they probably fall within the narrow class of cases encompassed by *Cramer*.³⁹⁹ This is because the acts of boarding a plane and landing in America are first, commonplace in appearance, and second, only gaining treasonable significance by reference to other evidence,⁴⁰⁰ such as the purpose of Padilla to return to America and conduct reconnaissance or attacks.⁴⁰¹ Therefore, the government would have to present two witnesses to establish the fact that Padilla went to America with the intent to conduct reconnaissance for Al-Qaeda.⁴⁰²

Perhaps the most contentious issue for the American government, which has frequently repeated its desire to maintain secrecy around its intelligence-gathering operations,⁴⁰³ is the evidentiary requirement for two witnesses to the same overt act. However, in the case of Hamdi, this should not be a problem, because the government would have “ready-made” witnesses in the form of the soldiers that first detained him. Making two soldiers testify as to the acts of the detainee would not place at risk members of the intelligence community, and would only cause minimal logistical difficulties in getting the soldiers to the appropriate courtroom, as a trial would not occur immediately.

Such a compromise between military logistics and testifying at trial has been discussed by Justice O’Connor in her plurality opinion for the

395. See Hurst, *Under the Constitution*, *supra* note 161, at 840.

396. See *Cramer v. United States*, 325 U.S. 1, 34, 37 (1945).

397. Mobbs Padilla Declaration, *supra* note 8, at 4.

398. *Id.*

399. See *Kawakita v. United States*, 343 U.S. 717, 741 (1952).

400. See *id.*

401. See Mobbs Padilla Declaration, *supra* note 8, at 4.

402. Cf. Hurst, *Under the Constitution*, *supra* note 161, at 842; see also *Cramer v. United States*, 325 U.S. 1, 33, 34 (1945).

403. See generally Note, *Secret Evidence in the War on Terror*, 118 HARV L. REV. 1962, 1962-63 (2005); David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 645-49 (2005); Nina Bernstein, *Held in 9/11 Net, Muslims Return to Accuse U.S.*, N.Y. TIMES, Jan. 23, 2006, at A1.

Court in *Hamdi*.⁴⁰⁴ Justice O'Connor stated that she thought it unlikely that allowing Hamdi the "basic process" to rebut the government's assertion that he was an enemy combatant would have a "dire impact on the central functions of warmaking."⁴⁰⁵ The plurality attempted to alleviate any impact that there may have been on the government despite this, though, by conceding that hearsay may be accepted as the most reliable available evidence, and that the evidence presented by the government would enjoy a presumption in its favor.⁴⁰⁶ Although, the government would not be able to enjoy these benefits in a treason prosecution, the underlying thrust of the rest of Justice O'Connor's argument on this issue is applicable to treason too. In *Hamdi*, the government conceded that "documentation regarding battlefield detainees already is kept in the ordinary course of military affairs."⁴⁰⁷ As a result, Justice O'Connor stated that any "factfinding imposition" created by requiring a knowledgeable person "to summarize these records to an independent tribunal is a *minimal* one."⁴⁰⁸ Such documentation would also be kept in the case of battlefield detainees, such as Hamdi.⁴⁰⁹ As for Padilla, it would also seem implausible that the government did not keep any documentation on his detention, considering the supposed threat he posed to national security.⁴¹⁰ In fact, the existence of the Mobbs Declarations reveals that the government has kept documentation on both Padilla and Hamdi. Therefore, just as the factfinding imposition on a knowledgeable person would be minimal in an enemy combatant hearing,⁴¹¹ it would similarly be minimal in a treason proceeding. In the case of Hamdi, it would not be difficult for the government to match documentation on a battlefield detainee with a soldier who actually detained him, and then send this soldier to testify at a trial. In the grand scheme of the military, the temporary loss of two soldiers as witnesses in a treason case would place a "minimal" imposition on the government.⁴¹²

404. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 533-35 (2004).

405. *Id.* at 534. The government may not have agreed with the Justice, though, as it decided to release Hamdi rather than be faced with the "basic process" that the Court required. *Id.*; See Brinkley, *supra* note 313, at A4; see also *supra* note 313.

406. *Hamdi*, 542 U.S. at 534.

407. *Id.*

408. *Id.* (emphasis added).

409. See *infra* notes 411-12 and accompanying text.

410. See Mobbs Padilla Declaration, *supra* note 8, at 5.

411. *Hamdi*, 542 U.S. at 534.

412. *Cf. id.*

As for Padilla, the imposition on the government is greater. If Padilla was ever charged with treason it would be for adherence to the enemy,⁴¹³ by its nature such an act is harder to establish because often it happens in secret and requires more clandestine means of acquiring information on a suspect, than it does for the act of levying war.⁴¹⁴ Such a scenario occurred here because acts of “aid and comfort” to Al-Qaeda were conducted presumably out of the glare of a watchful eye.⁴¹⁵ Certainly uncovering information on a person conducting research on an uranium-enriched device, and discussions between Padilla and leaders of Al-Qaeda would require confidential sources.⁴¹⁶ However, the government has such confidential sources here.⁴¹⁷ In the Mobbs Declaration, the government states that the information on Padilla is derived from multiple intelligence sources, including, conveniently, “two” confidential sources.⁴¹⁸ Significantly, the two sources have been detained,⁴¹⁹ and thus are no longer part of the Al-Qaeda network. Therefore, using these sources would not compromise an embedded informant, which is part of the government’s justification for withholding such information.⁴²⁰ The Mobbs Declaration states, though, what may be a concern with the veracity of the information provided by the two sources.⁴²¹ Apparently the sources had “not been completely candid about their association with Al Qaeda and their terrorist activities.”⁴²² Also, some of the information provided may have been “part of an effort to mislead or confuse.”⁴²³ However, the Mobbs Declaration itself counters these issues by stating that both sources have been corroborated by independent sources and proven reliable.⁴²⁴ Therefore, the testimony provided by these witnesses would at the least get a case to the jury because as the Court in *Cramer* stated, the treason

413. See *supra* notes 365-402 and accompanying text.

414. See Charge of Mr. Justice Nelson, *supra* note 98, at 1035; Charge of Mr. Justice Leavitt, *supra* note 293, at 1036.

415. See Mobbs Padilla Declaration, *supra* note 8, at 3-4.

416. See *id.* at 3-4.

417. See *id.* at 2.

418. *Id.*

419. *Id.*

420. See *Secret Evidence in the War on Terror*, *supra* note 403, at 1963 (stating that proponents of secret evidence “argue that withholding classified information from the accused is necessary because its disclosure would jeopardize intelligence-gathering efforts in the field and dry up valuable sources of information”).

421. See Mobbs Padilla Declaration, *supra* note 8, at 2.

422. *Id.* at n.1.

423. *Id.*

424. *Id.*

clause “does not make other common-law evidence inadmissible nor deny its inherent powers of persuasion.”⁴²⁵ Whether the government wants to take a chance with a jury is clearly in their discretion, but when the government has two detained sources who witnessed treasonable overt acts,⁴²⁶ and corroborating evidence to support these sources, then there is no reason on the face of the Mobbs Declaration why they should not.

The government has demonstrated in a similar environment of secrecy and confidentiality that they have been able to present eyewitness testimony.⁴²⁷ In *Khan*, the government presented testimony from four different witnesses that formed the basis of three of the conspiracy charges against the defendant.⁴²⁸ The secrecy surrounding the meeting of the defendants⁴²⁹ is surely characteristic of the meetings between Padilla and leaders of Al-Qaeda.⁴³⁰ However, in both cases the government had multiple witnesses as to the context of these meetings in detention or cooperating.⁴³¹ Similarly, both *Khan* and Padilla involve the detention of persons during the war on terror.⁴³² Thus, no distinction can be drawn on the type of battle being fought and the difficulty in obtaining witnesses in such a conflict. Unlike *Khan*, though, the sources that provided the information on Padilla’s discussions with leaders of Al-Qaeda *would* be able to establish the overt act element.⁴³³ In *Khan*, the witnesses’ testimony was insufficient to demonstrate a conspiracy to provide material support for a terrorist organization.⁴³⁴ Here, if the government presented the testimony of the two sources then it would not be in a position of doubt as to which charges it could establish,⁴³⁵ as it must have been in *Khan* considering that it was not able to prove all of the charges.⁴³⁶ The government has shown that it is able to present

425. *Cramer v. United States*, 325 U.S. 1, 32 (1945).

426. *See* Mobbs Padilla Declaration, *supra* note 8, at 2; *supra* notes 365-402 and accompanying text.

427. *See* *United States v. Khan*, 309 F. Supp.2d 789, 809, 821 (E.D. Va. 2004).

428. *Id.* at 809, 814, 821. These conspiracy charges were: to overthrow or levy war against the United States; to provide material support to a terrorist organization; and to make or receive a contribution of funds for the benefit of the Taliban. *Id.* at 820.

429. Only those persons known to the defendants and who had attended a paintball training course and owned weapons were invited. *Id.* at 809.

430. *See* Mobbs Padilla Declaration, *supra* note 8, at 3-4.

431. *See* Mobbs Padilla Declaration, *supra* note 8, at 2; *Khan*, 309 F. Supp.2d at 809.

432. *See Khan*, 309 F. Supp.2d at 820; Mobbs Padilla Declaration, *supra* note 8, at 5.

433. *See supra* notes 418-26 and accompanying text.

434. *Khan*, 309 F. Supp.2d at 821.

435. *See supra* notes 418-26 and accompanying text.

436. *See Khan*, 309 F. Supp.2d at 821.

witness testimony of highly secretive encounters that have taken place during the war on terror.⁴³⁷ Therefore, unless there is a factor not stated in the Mobbs Declaration, there is no reason why the government could not present witnesses at trial just as it did in *Khan*.

A final comment made by Justice O'Connor on this issue in *Hamdi* was that the factual disputes at an enemy combatant hearing would be "limited to the alleged combatant's acts," and thus this "focus meddles little, if at all, in the strategy or conduct of war," or threatens military officers with litigation.⁴³⁸ In a treason case the focus of a witness' testimony is also on the defendant's acts.⁴³⁹ The Constitution does not require any witnesses to indicate a defendant's intent.⁴⁴⁰ In *Kawakita*, the Court held that intent could be inferred from conduct.⁴⁴¹ Thus, although the Constitution does not require the witnesses to speak of intent, in speaking on the overt act a jury can permissibly infer intent as well.⁴⁴² Here, intent can be inferred from the inherent hostility of possessing a rifle on a battlefield and conducting research into an uranium-enriched device.⁴⁴³ Therefore, the focus of the witnesses here, whether they be soldiers⁴⁴⁴ or confidential sources would be the same as those in an enemy combatant hearing, which would meddle little with the conduct of the war on terror.⁴⁴⁵

VII. CONCLUSION

Advantages therefore exist in using the treason clause. The treason clause has been used in the past.⁴⁴⁶ However, treason charges should not remain a thing of the past. The United States is fighting a global war on

437. *See id.*

438. *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004).

439. *See* U.S. CONST. art. III, § 3, cl. 1.

440. *See* *Stephan v. United States*, 133 F.2d 87, 94 (6th Cir. 1943).

441. *Kawakita v. United States*, 343 U.S. 717, 742 (1952).

442. *See id.*; *cf.* *United States v. Greathouse*, 26 F. Cas. 18, 28 (N.D. Cal. 1863) (charging the jury that when the preliminary acts of a voyage are to be performed, the purpose of such a voyage will be fixed by the process which has been initiated.)

443. *See supra* notes 346-53, 379-81 and accompanying text.

444. The fact that the government would be able to present soldiers as witnesses in the case of *Hamdi*, rather than officers, would also mitigate any impact on military logistics. *Cf.* *Hamdi v. Rumsfeld*, 542 U.S. 507, 534-35 (2004). Officers are required in an enemy combatant hearing because they are the ones with knowledge as to why an individual should continue to be detained. *See id.* Soldiers would only be required in *Hamdi*'s treason case because they would be the one's who witnessed his participation during the battle and/or his detention.

445. *See Hamdi*, 542 U.S. at 535.

446. *See supra* Part III.A-C.

terror⁴⁴⁷ that is analogous, but not the same as, the dangers created by the other most recent global war—the Second World War. The treason clause was used repeatedly in response to the actions of American citizens during that conflict.⁴⁴⁸ The viability of prosecuting under the treason clause, though, also suffered damaging blows during this period,⁴⁴⁹ particularly with the Supreme Court’s decision in *Cramer*.⁴⁵⁰ However, whatever the impact of this decision and the use of seditious conspiracy as an alternative⁴⁵¹ in practice, in terms of substantive law, treason prosecutions are as viable now as they were sixty years ago.

This has been demonstrated in the cases of both Hamdi and Padilla.⁴⁵² Significantly, this has been shown on both the “levying war”⁴⁵³ and “aid and comfort”⁴⁵⁴ prongs of the overt act element. It has also been explained that the government could, if the Mobbs Declarations are factually accurate, have produced the required two witnesses against both Hamdi and Padilla.⁴⁵⁵ The treason clause may have been created during the Constitutional Convention, over two hundred years ago,⁴⁵⁶ but this does not make it an out-dated prosecutorial tool. In fact this historical tradition⁴⁵⁷ gives the clause strength. This is in marked contrast to the policy of detaining American citizens as enemy combatants.

The most pointed criticism of the government’s legal strategy came from the Fourth Circuit Court of Appeals,⁴⁵⁸ after the court was asked to

447. *White House Lists 10 Foiled Attacks*, CNN, Feb. 15, 2006, <http://www.cnn.com/2006/US/02/09/whitehouse.plots/index.html>.

448. *See supra* Part III.D.

449. *See, e.g., Ex parte Quirin*, 317 U.S. 1, 37-38 (1942); *Cramer v. United States*, 325 U.S. 1, 46-47 (1945).

450. *See* Hurst, *Under the Constitution*, *supra* note 161, at 845; *supra* notes 225-34 and accompanying text.

451. *See, e.g., United States v. Khan*, 309 F. Supp.2d 789 (E.D. Va. 2004).

452. *See supra* Part VI.

453. *See supra* notes 339-58 and accompanying text.

454. *See supra* notes 358-402 and accompanying text.

455. *See supra* notes 403-45 and accompanying text.

456. *See* Hurst, *The Constitution*, *supra* note 21, at 398-404.

457. The treason clause has been used in the Supreme Court since *Ex parte Bollman*, 8 U.S. 75 (1807).

458. The Fourth Circuit is a relative newcomer to the criticism of the government’s detention policies. The Bush administration has received some of its most consistent and prolonged attacks from those groups and individuals who oppose its detention policies. *See generally U.S. Terror Suspect To Get Lawyer*, BBC NEWS, Dec. 3, 2003, <http://news.bbc.co.uk/2/hi/americas/3286371.stm> (reporting that Padilla received access to a lawyer because of the criticism leveled at the government); Papandrea, *supra* note 13, at 55-56 (arguing that the decision to label Hamdi and Padilla as enemy combatants was made due to political motivations based on the government’s inability to justify its prolonged detention of the two

transfer Padilla to civilian law enforcement.⁴⁵⁹ The court, in seeming frustration at the government's strategy, considering that it had already held that Padilla could be militarily detained,⁴⁶⁰ remarked that the government had left the impression that the President's power to detain enemy combatants "can, in the end, yield to expediency with little or no cost to its conduct of the war against terror"⁴⁶¹ The court was particularly frustrated with the government's lack of an explanation for its change of tact.⁴⁶² Ultimately, the court concluded with this foreboding statement: "these impressions have been left, we fear, at what may . . . prove to be substantial cost to the government's credibility before the courts, to whom it will one day need to argue again in support of a principle of assertedly like importance and necessity"⁴⁶³

No such impressions exist against the treason clause. While, for the Fourth Circuit at least, the well of deference towards the government's labeling of American citizens as enemy combatants appears to have run dry, the role of treason in the war on terror is, as yet, untapped. Importantly, it is an untapped resource with a particularly relevant advantage to the specific factual circumstances inherent in the war on terror.⁴⁶⁴ This is that it has an unlimited jurisdictional scope.⁴⁶⁵ Therefore, American citizens detained on foreign battlefields, or if not on a battlefield, then at least on foreign lands, can be brought before an American court.⁴⁶⁶ The Seditious Conspiracy statute has no such advantage and is limited to conspiracies subject to the jurisdiction of the

citizens); *Padilla Appears in Civilian Court*, BBC NEWS, Jan. 6, 2006, <http://news.bbc.co.uk/2/hi/americas/4586128.stm> (reporting that Padilla's detention has been heavily criticized by civil rights groups). By bringing detained American citizens into court, though, this metaphorical weight on the government's back may be lifted.

459. *Padilla v. Hanft*, 432 F.3d 582, 583 (4th Cir. 2005).

460. *Padilla v. Hanft*, 432 F.3d 386, 389, 391-92 (4th Cir. 2005).

461. *Padilla*, 432 F.3d at 587.

462. *Id.* at 585 (stating that the closest the court had gotten to an explanation was through the media, which the court refused to consider: "[i]t should go without saying that we cannot rest our decisions on media reports of statements from anonymous government sources . . . nor should we be required to do so or to speculate as to facts based upon such reports").

463. *Id.* at 587.

464. This is not the only advantage of the treason clause. It also has a deterrent advantage over the Seditious Conspiracy statute. The treason statute gives the American government the opportunity to move for the maximum penalty under its law. *See* 18 U.S.C. § 2381 (2006). Under the Seditious Conspiracy statute the death penalty is not available and a convicted person can at most spend twenty years in prison. *See* 18 U.S.C. § 2384 (2006). Applying the death penalty to American citizens would surely send a firmer message to those considering supporting terrorist organizations than either a prison sentence or a label as an enemy combatant.

465. *See Gillars v. United States*, 182 F.2d 962, 979 (D.C. Cir. 1950).

466. *See id.*; *see also supra* notes 156-59 and accompanying text.

United States.⁴⁶⁷ For example, Sandra Omar was detained in Iraq by the Multinational Force comprised predominately of American soldiers.⁴⁶⁸ Assuming *arguendo* that Omar committed an act of treason, his capture in Iraq would not present a problem to prosecuting him in the United States because of the scope of the treason clause.⁴⁶⁹

The treason clause, therefore, could have a key role to play in the war on terror, not just functionally in the courtroom, but on public opinion⁴⁷⁰ and as a deterrent.⁴⁷¹ The Constitution states that no citizen shall “lev[y] war against [the United States]” or “adher[e] to their enemies.”⁴⁷² American citizens detained during the war on terror demonstrate that this constitutional crime is being committed.⁴⁷³ The detention of American citizens is an issue of the here and now; Sandra Omar’s capture indicates that this is a clear and present danger. This is a danger, though, that has not been remedied by labeling citizens as enemy combatants.⁴⁷⁴ The very words of the Constitution, however, indicate that the treason clause was intended to be the remedy when American citizens levy war against their country or give aid and comfort to its enemies.⁴⁷⁵ This is why it is the treason clause that should be turned to now, just as it has been throughout American history when the country is at war.

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467. 18 U.S.C. § 2384 (2006); *see also supra* notes 295-300 and accompanying text.

468. *Omar v. Harvey*, 416 F. Supp.2d 19 (D.D.C. 2006).

469. *Cf. Gillars*, 182 F.2d at 979.

470. *See supra* note 458.

471. *See supra* note 464.

472. U.S. CONST. art. III, § 3, cl. 1.

473. *See supra* Part VI.

474. *See Brinkley & Lichtblau, supra* note 313, at A15 (reporting that Hamdi was released from detention into the custody of Saudi Arabia in October 2004); *Hanft v. Padilla*, 126 S. Ct. 978, 978 (2006) (ruling that Padilla could be transferred from military custody to the custody of civilian law enforcement).

475. *See* U.S. CONST. art. III, § 3, cl. 1.

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