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HEADQUARTERS, DEPARTMENT OF THE ARMY

OCTOBER 1965

TREASON AND AIDING THE ENEMY*

BY CAPTAIN JABEZ W. LOANE, IV**

I. INTRODUCTION

It has been said that no crime is greater;¹ it has been termed “. . . the most serious offense that may be committed against the United States;”² it has been classified as “the highest of all crimes.”³ Chief Justice Marshall once commented: “As there is no crime which can more excite and agitate the passions of men, no charge demands more from the tribunal before which it is made a deliberate and temperate inquiry.”⁴ All of these quotations refer to the same offense—the crime of treason.

It is a crime which, in many ways, is set apart from all others. It is the only crime specifically denounced by the Constitution of the United States.⁵ It is the only federal crime upon which conviction must be predicated on the testimony of two eye-witnesses to the overt act of the offense.⁶ It may only be committed in time of war or quasi war since it must be predicated either in levying war against the United States or in aiding an “enemy.” It is the only crime which, if successfully committed, may cease to be a crime. As Sir John Harrington noted:

Treason doth never prosper; what's the reason? Why, if it prosper,
none dare call it treason.'

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¹ Hanauer v. Doane, 79 U.S. (12 Wall.) 342, 347 (1870).

² Stephen v. United States, 133 F.2d 87, 90 (6th Cir.), *cert. denied*, 318 U.S. 781 (1943).

³ Charge to Grand Jury, 30 Fed. Cas. 1024, 1025 (No. 18269) (C.C.D. Mass. 1851).

⁴ Marshall, C. J., in *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 125 (1807).

⁵ U. S. CONST. art. III, § 3.

⁶ *Ibid.* This assumes, of course, a plea other than guilty. However, it should be noted that some states require two witnesses to any crime punishable by death. See *State v. Chin Lung*, 106 Conn. 701, 139 A. 91 (1929).

⁷ FAMILIAR QUOTATIONS 29 (12th ed. Morley Ed., 1951).

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Throughout the ages the motivations for treason have been as numerous as the crimes themselves. Some have committed treason for money, some for pride, power, or prestige, some for more elusive ideological goals. In medieval England, where our exploration of the law begins, the treason cases generally dealt with machinations against the monarch or in plotting to alter the succession to the throne. In the days of Elizabeth I, the cases developed a religious flavor. In later years, the factors have included financial gain or political conviction. Today the suggestion has been advanced that the modern scientist, because of the universality of his technical knowledge, feels himself under a lesser duty to obey national loyalty.⁸

The annals of treason have tainted the rich and poor alike; the powerful as well as the common citizen. Through its history have passed such notable figures as Thomas Becket, Sir Walter Raleigh, Anne Boleyn, Sir Thomas More, Benedict Arnold, and Jefferson Davis; it has included such strange personalities as Guy Fawkes, John Brown, William Joyce and Ezra Pound. And it has encompassed the unnumbered hundreds who passed through the musty volumes of the State Trials⁹ on their way to the "usual punishment" and oblivion.

It is not the purpose of this article to examine these individuals in depth or the details of the "offenses" which brought them to trial. Rather it is intended to explore the historical development of the civil offense of treason and the parallel military offense of aiding the enemy; to compare the two; and to consider the defenses to the respective offenses. For indeed, until comparatively recently, the mere fact of the indictment was tantamount to conviction and little other than outright denial was available to an unfortunate defendant.

It is hoped that this article will help to solve some of the many problems which may easily be conceived. When, for example, may an American sufficiently shake off his citizenship that he can aid America's enemy and avoid a treason charge? Is physical opposition to the enforcement of the laws of the United States by its officers treason? If so, were the students at the University of Mississippi guilty of treason by participating in the 1962 riots? Can a citizen "adhere" to an enemy without "aiding"

⁸ WEST, *THE NEW MEANING OF TREASON* (1964).

⁹ Howell, *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Present Time* (1816) [hereafter cited as *How. St. Tr.*]

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him, and, conversely can he "aid" the enemy without "adherence"? Is a soldier who conducts propaganda lectures for the enemy in a POW camp guilty of giving them "aid"? If so would it make any difference if none of the other prisoners were affected? What is the status of the alien who resides in this country? Is this status affected if he is a citizen of an "enemy" country? The situations may be ingenuously contrived. The courts must wrestle for the answers.

II. THE HISTORY OF TREASON

A. *THE ENGLISH BACKGROUND*

There is no better introduction to the law of treason in the United States than a short review of the English law, since the present American law is directly traceable to a statute published by Edward III in 1350.¹⁰ During the early fourteenth century England was in a state of flux. These were days of constant civil war attended by one parliamentary crisis after another. When one faction gained power it frequently subjected the nobles and landowners of the other to the harassment of trial for treason based solely on political or quasi-political considerations. As no legal definition of treason existed, no one could foretell what action or word might be interpreted as committing the offense." An additional troublesome area concerned the fact that lands and possessions of anyone convicted of treason were subject to attainder or forfeiture.¹²

There was, understandably, increasing agitation that the offense be more rigidly defined. To the barons and large landowners this argument was quite persuasive in view of the forfeiture provisions.¹³ In addition, the definition was of importance in restraining the power of the crown to suppress any subject by arbitrary construction of the law.

¹⁰ Statute of Purveyors, 1350, 25 Edw. 3, Stat. 5, c. 2.

¹¹ For the proposition that it was still difficult to tell after the statute see *Carpenters Case*, 11 Henry VI (1434), digested in BUND, A SELECTION OF CASES FROM THE STATE TRIALS 29 (1st ed. 1879), where a convicted wife murderer was also adjudged a traitor in order that he might receive the greater punishment as an "example." The same fate befell the convicted murderer of the Duke of Gloucester, *Proceedings Against John Hall*, 1 How. St. Tr. 162 (1399).

¹² Clarke, *Forfeitures and Treason in 1388*, 14 ROYAL HIST. SOC. TRANS. 4th 65 (1931).

¹³ Perhaps because of continuing pressure Edward III further modified the attainder provisions in 1360 to provide no forfeiture for persons not attainted in their lifetime. Statute of Westminster, 1360, 34 Edw. 3, c. 12.

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Eventually the King yielded to the pressures. There resulted the famous statute of 25 Edward III which defined the offense as being committed:

When a man doth compass or imagine the death of our lord the King, or of our Lady his Queen, or of their eldest son and heir; or if a man doth violate the King's companion, or the King's eldest daughter unmarried, or the wife [of] the King's eldest son and heir; or if a man do levy war against our lord the King in his realm, or be adherent to the King's enemies in his realm, giving them aid and comfort in the realm or elsewhere, and thereof be provably attainted of open deed by the people in their condition."

The statute goes on to define five other acts which may constitute treason (e.g., counterfeiting, assaulting certain of the King's officers), and concludes with what, for those days, must have been a novel proposition, that no other act would constitute treason unless made so by act of King and Parliament.¹⁵ Shorn of the language concerning the monarch and those portions intended to purify the succession, the statute can be fairly said to state the American definition today.

That Edward III defined the offense was laudable. Yet many of the pre-statutory problems remained. One reason for this was that the courts possessed the power of interpreting the statute and could thus put whatever meaning they chose on such vague phrases as "compass or imagine" and "giving them aid or comfort."¹⁶ In 1668, for example, members of a riotous group engaged in pulling down "bawdy houses" who failed to obey a Constable's order to desist were convicted of treason, the court holding that this constituted "levying war" against the King.¹⁷ An additional problem was the personality of the monarch. Under the "strong" monarchs the offense tended to have much wider definition. During the reign of Henry VIII, the crime is considered to have had its widest interpretation. As a matter of fact, Henry VIII extended treason to cover such situations as wishing harm to the King or calling him a tyrant.¹⁸ However, a reading of the cases in the days of Elizabeth I would tempt a contrary conclusion as

¹⁴ Statute of Purveyors, 1350, 25 Edw. 3, Stat. 5, c. 2.

¹⁵ *Ibid.*

¹⁶ For an extreme position see the Trial of Algernon Sidney, 9 How. St. Tr. 818 (1683). Sidney was convicted solely on evidence of possession of unpublished manuscripts. It is difficult to see how this "compassed the death" of the King.

¹⁷ Trial of Peter Messenger, 6 How. St. Tr. 879 (1668).

¹⁸ For a good discussion of treason during the reign of Henry VIII, see Thornily, *The Treason Legislation of Henry VIII*, 11 ROYAL HIST. SOC. TRANS. 3d 87 (1917).

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to treason's golden age. It is reported that after the Northern Rebellion of 1569, Elizabeth had some 1,200 peasants executed as traitors, many on mere suspicion, and without the benefit of a trial.¹⁹

Thus, notwithstanding the apparent clarity of the Statute of Edward III, the law of treason continued to be drawn by a wavering hand. Justice was dependent upon the whim of the King or the policy of the judge. The rights of an accused seemed to have returned to the early days of anarchy. It was not until 1695 that the substantive law was backed up by procedural guarantees. This was the date of the enactment of the so-called "Treason Trials Act" which was to play an important part in the growth of the American law.²⁰ Considering the harsh justice meted out by the Tudor courts, this statute is remarkable in expanding the rights of an accused. First, it provided that the accused was entitled to a copy of the indictment five days prior to trial (although not the names of the witnesses).²¹ Secondly, he was entitled to be represented by counsel.²² Commoners were granted a jury trial consisting of 12 freeholders who were required to vote unanimously in order to convict.²³ In addition, a statute of limitations was established as three years.²⁴ But finally, and most important, it spelled out another rule which has come to be regarded as fundamental. In the absence of a confession a conviction could only be had by the testimony of at least two witnesses to the overt act of treason.²⁵ And it was carefully postulated that if two or more treasons were charged in the indictment it was necessary that there be two witnesses to each separate act.²⁶

In concluding that the English law has carried over almost verbatim to the American it may be well to touch tangentially on the one phase which, fortunately, has not. That was the so-called "usual sentence" which was meted out to the convicted traitor.

¹⁹ BUND, *op. cit.* *supra* note 1, at 219.

²⁰ Statute of Westminster, 1695, 7 & 8 William 3, c. 3.

²¹ *Ibid.*

²² Prior to this act counsel was forbidden. The accused could merely represent himself and this was largely at the mercy of the attorney for the crown. For a notorious example see the prosecution by Edward Coke in the Trial of Sir Walter Raleigh, 2 How. St. Tr. 1 (1603).

²³ Also to acquit.

²⁴ Probably motivated by the case of the trial of Colonel Algernon Sidney, 9 How. St. Tr. 818 (1683), who complained that the evidence against him may have been 20 to 30 years old. He was executed.

²⁵ Statute of Westminster, 1795, 7 & 8 William 3, c. 3.

²⁶ *Ibid.*

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An illustration of the hideous barbarism can be vividly demonstrated by the sentence given Thomas Howard, Duke of Norfolk, in 1571:

Wherefore thou shalt be had from hence to the Tower of London, from thence thou shalt be drawn through the midst of the streets of London to Tyburn, the place of execution; there thou shalt be hanged, and being alive thou shalt be cut down quick, thy bowels shall be taken forth of thy body, and burnt before thy face, thy head shall be smitten off, thy body shall be divided into four parts or quarters; thy head and thy quarters to be set up **where** it shall please the queen's majesty to appear; and the Lord shall have mercy upon thou."

For commoners the sentence often included the removal of privy parts prior to disemboweling.²⁸ The Duke was lucky. As with most nobles, his sentence was commuted to simple beheading. Others were not so fortunate. It is surprising that this sentence continued to be given in the Nineteenth Century,²⁹ and is reported to have been pronounced (although not carried out) as late as 1867.³⁰ By this time the minimum penalty in the United States was five years imprisonment and a \$10,000 fine.

It does not appear that any consideration was ever given to adopting the "usual sentence" in the United States.

B. THE CONSTITUTIONAL VIEW OF TREASON

Prior to the Revolution there existed in the colonies a variety of statutes, decrees, and royal grants which recognized the existence of the crime of treason.³¹ Reported law prior to the formation of the United States is rare. The only available extensive record of trial is the case of Colonel Nicholas Bayard who was tried in the province of New York for high treason in 1702.³² Bayard was tried under a New York statute which provided that it was treason to disturb "by force of arms, or other ways, . . . the peace, good, and quiet of this their majesties' government, as it is now established" ³³ Bayard's offense appears to have been that of circulating a petition deemed critical of the provincial government. Notwithstanding an opinion from the attorney gen-

²⁸ Trial of Thomas Howard, Duke of Norfolk, 1 How. St. Tr. 957, 1031 (1571).

²⁹ See, e.g., Trial of William Parry, 1 How. St. Tr. 1095, 1111 (1584).

³⁰ See, e.g., Trial of E. M. Despard, 28 How. St. Tr. 346, 527 (1803).

³¹ WEYL, TREASON 7 (1950).

³² For a collection of the various Colonial laws see, Hurst, *Treason in the United States*, 58 HARV. L. REV. 226 (1944).

³³ Trial of Colonel Nicholas Bayard, 14 How. St. Tr. 471 (1702).

³⁴ Id. at 473.

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eral that this did not amount to treason, Bayard was tried, convicted and given the "usual sentence." Fortunately, there was a change of Governors and the conviction was reversed. The point to be drawn from the case is that, notwithstanding the fact that the trial was predicated on a New York law bearing no significance to the Statute of Edward 111, the legal arguments in the case all revolved on that English statute.³⁴ While the language may have been changed to fit the immediate needs of the emerging colonies, the image of treason continued in its English form.

During the Revolutionary War, treason underwent a change. The emerging states began to enact laws making it treason to adhere to George III or his forces. These varied in language but all followed the Statute of Edward 111, either by similar language or by express reference.³⁵

When the framers met to establish a Constitution a definition of treason was indeed important in their minds. But there must have been much soul searching. In the first place, the framers had just finished committing treason themselves, at least so far as the English were concerned. On the other hand, they had vivid recollections as to the danger of internal treason. The plot of Benedict Arnold and the activities of the loyalist Tories had almost wrecked the fledgling nation they were striving to promote.

How should treason be defined—by the Constitution itself or the Congress? The Pinckney Report,³⁶ provided for it to be done by Congress.³⁷ So, apparently, did the New Jersey plan.³⁸ But thereafter, the framers had second thoughts. It may be surmised that they, like the barons of 1350, felt the offense of treason needed a rigid definition, free from the whims of a subsequent legislative body. The Committee on Detail rejected both proposed versions and substituted its own:

Treason against the United States shall consist only in levying war against the United States, or any of them; and in adhering to the enemies of the United States, or any of them. The Legislature of the United States shall have the power to declare the punishment of treason.

³⁴ *Id.*

³⁵ Hurst, *supra* note 31, at 226, 256-57.

³⁶ Charles C. Pinckney, delegate from South Carolina.

³⁷ 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 136 (1937).

³⁸ 3 FARRAND, *op. cit.* *supra* note 37, at 614.

No person shall be convicted of treason, unless on the testimony of two witnesses. No attainder of treason shall work corruption of blood nor forfeiture, except during the life of the person attainted.”

The Legislature was to retain the power to fix the punishment but not to define the crime. Understandably the debates on the subject proved lively.⁴⁰ James Madison opened the issue by contending that the proposed definition did not go as far as the Statute of Edward III and that more latitude ought to be left to the states. Madison’s thinking on the latter was doubtlessly influenced by the Virginia experience of Bacon’s rebellion which was directly solely against the local government. The thrust of his contention involved a proposal to insert the phrase “giving them aid and comfort.” Interestingly enough the delegates themselves split on the effect of such insertion. Some thought the words would extend the definition of treason; some, with whom the author concurs, found them restrictive; some were satisfied that they were mere words of explanation. In the end, the motion to insert the words carried.⁴¹ A sharp dispute next developed as to whether the states would still retain the right to enact laws for treason against the state. Madison wanted them to retain this power. By a 6 to 5 vote, the delegates voted to limit the constitutional provision to treason “against the United States.”⁴² At Dr. Franklin’s urging the language requiring two witnesses to the same overt act, one of the guarantees of the Treason Trials Act, was included by an 8 to 3 majority.⁴³ Final debate centered about whether to permit confession in open court alone to be sufficient for conviction. The delegates agreed that such would suffice, although some considered the language superfluous. It was inserted.

In conclusion, then, the delegates had hammered out what would thereafter constitute treason against the United States. The end product, which was included in the new constitution, provided:

Treason against the United States, shall consist only in levying war against them or in adhering to their enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testi-

⁴⁰ 2 *id.* at 182.

⁴¹ See *id.* at 345-50: MADISON. THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 430-34 (Int’l ed., Hunte Scott ed. 1920).

⁴² 2 FARRAND, *op. cit.* supra note 37, at 345-46.

⁴³ *Id.* at 349.

⁴⁴ *Id.* at 348.

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mony of two Witnesses to the same overt Act, or on Confession in open Court."

A reading of the provision discloses a final sentence as to which no discussion is found in the available records.

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

One problem alone remained for discussion—should the President have the power to pardon convicted traitors. Virginia supported an exception to the executive pardoning power of the President in cases of treason. Reasoned Mr. Randolph: "The President himself may be guilty."⁴⁶ But the counter-argument ran that pardon is a necessary power and that should the President himself commit the offense he could always be impeached.⁴⁷ On the vote only Virginia and Georgia supported the motion.⁴⁸

C. THE DEVELOPMENT OF THE FEDERAL LAW

Having been given the authority Congress proceeded quickly to implement it. The Act of April 30, 1790, after carefully reciting the substantive guidelines specified by the Constitution, set the punishment for treason as death.⁴⁹ In establishing procedural safeguards, Congress included its up-to-date version of the Treason Trials Act and specifically permitted an accused qualified counsel and the authority to subpoena defense witnesses.⁵⁰ It also required that the accused be furnished a copy of the indictment and the names and addresses of prospective jurors and witnesses at least three days prior to trial.⁵¹ The act entitled the defendant to challenge up to 35 jurors peremptorily, and, concerned about a failure to plead, provided that if the accused either stood mute, or refused to plead, the court would proceed to try the case as on a plea of "Not Guilty."⁵²

It was under this statute that the courts had their first taste of "American Plan" treason. During the administration of Wash-

⁴⁶ U.S. CONST. art. III §, 3.

⁴⁷ It was apparently lifted from an earlier draft and inserted by the Committee of Style. See 2 FARRAND, *op. cit. supra* note 37, at 601.

⁴⁸ *Id.* at 626.

⁴⁹ The counterargument was made by Mr. Wilson of Pa., who had recently represented four defendants tried for treason in Pa. courts.

⁵⁰ 2 FARRAND, *op. cit. supra* note 37, at 627.

⁵¹ Act of April 30, 1790, 1 Stat. 112.

⁵² 1 Stat. 112, at 118.

⁵³ *Ibid.*

⁵⁴ 1 Stat. 112, at 119.

ington and Adams the new treason law was applied twice. One instance arose out of the "Whiskey Rebellion" of 1794, the second out of "Fries' Rebellion" in 1798. Both involved a judicial interpretation of what constituted "levying war." Shortly thereafter came the machinations of Aaron Burr and the subsequent trials of the ex-Vice President and others for treason. Burr's case involved the technical legal problems involved in proving the "overt act."

The states proceeded to enact their own laws of treason as they were permitted to do under the Constitution. But the applications of such statutes has been minimal. Only two cases of completed prosecutions by a state have been uncovered: one involving Thomas Dorr by Rhode Island, and one involving John Brown by Virginia.⁵³ The former was sentenced to prison for life, the latter was executed. John Brown and five of his band of raiders hold the distinction of being the only men executed for treason by either state or federal authorities in the United States.⁵⁴

As the nation grew the number of prosecutions for treason continued to be few. True each war brought its share of recalcitrants. The War of 1812 had its Federalists and the Mexican War its Whigs.⁵⁵ But military opposition to the Government by its citizens did not occur again until 1857. This was the full scale disobedience by the Mormons in Utah that eventually led to military opposition to the Army units sent to restore order. With uncharacteristic fury, President Buchanan issued a proclamation to the Mormons:

Fellow citizens of Utah! this is rebellion against the government to which you owe allegiance. It is levying war against the United States, and involves you in the guilt of treason. Persistence in it will bring you to condign punishment, to ruin, and to shame.⁵⁶

The Mormons desisted, but the nation was on the verge of its greatest crisis, the result of which was to temper the punishment for treason and to create the similar, but less odious, offense of engaging or assisting in a rebellion. Were the Confederates traitors? The South contended that secession was a right and that the secessionists were no more traitors than the embattled

⁵³ Hurst, *supra* note 31, at 807.

⁵⁴ WEYL, *op. cit. supra* note 30, at 238, 260.

⁵⁵ *Id.* at 163-86, 201-11.

⁵⁶ Proclamation of April 6, 1858, 11 Stat. (App) 796. See also WEYL, *op. cit. supra* note 30, 212-37.

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patriots at Bunker Hill. The North held the view that they were insurgents and rebels, and thus could only be considered traitors. The courts resolved the problem in favor of the United States early in the war. Said the Supreme Court, "They [Confederates] . . . are none the less enemies because they are traitors."⁵⁷ A District Judge elaborated:

This is a usurpation of the authority of the federal government. It is high treason by levying war. . . . The fact that any or all engaged in the commission of these outrageous acts under the pretended authority of the legislature, or a convention of the people . . . does not change or affect the criminal character of the act. Neither South Carolina nor any other state can authorize or legally protect citizens . . . in waging war against their government, any more than the Queen of Great Britain or the emperor of France."

But holding that the Confederates were traitors, created additional problems. The mandatory sentence on conviction was death under the 1790 statute. For the occasional treason this was deemed appropriate. But now, according to the courts, there were half a million traitors under arms and many more giving them aid and assistance. It was easy to foresee a bloodbath of enormous proportions if the law was applied. Congress foresaw that the Civil War made the mandatory death penalty obsolete. Accordingly, in 1862, the law was amended to provide that henceforth the convicted traitor "shall suffer death . . . or, at the discretion of the court, he shall be imprisoned for not less than five years and fined not less than ten thousand dollars."⁵⁹ At the same time Congress also established the offense of engaging or assisting in rebellion, and authorized the seizure and sale of enemy property.⁶⁰ For engaging in or aiding rebellion the maximum punishment was established at ten years imprisonment or a fine of ten thousand dollars, or both.⁶¹

The effect of this legislation was threefold, First, it preserved the Act of 1790 prescribing the penalty of death in force for the punishment of offenses committed prior to 17 July 1862. Secondly, it punished treason committed after that date with death or fine and imprisonment unless the treason consisted of

⁵⁷ Prize Cases, 67 U.S. (2 Black) 635, 674 (1862).

⁵⁸ Charge to Grand Jury, 30 Fed. Cas. 1032, 1033 (No. 18270) (C.C.S.D. N.Y. 1861). See also United States v. Greathouse, 26 Fed. Cas. 18 (No. 15254) (C.C.N.D. Cal. 1863); United States v. Greiner, 26 Fed. Cas. 36 (No. 15262) (E.D. Pa. 1861).

⁵⁹ Act of July 17, 1862, 12 Stat. 589.

⁶⁰ 12 Stat. 589, at 590-91.

⁶¹ 12 Stat. 589, at 591.

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engaging or assisting in rebellion. In the latter case it abandoned the death penalty entirely. The offense of engaging in rebellion, designed exclusively to cover the Civil War, remains in force today.⁶²

The transition of the treason act of 1790, with the graft of the 1862 statute, into the current law of treason is a problem of only minor semantics. It is sufficient for comparative purposes that the current code provision be quoted without further comment:

Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined not less than \$10,000; and shall be incapable of holding any office under the United States.⁶³

III. TWO TYPES OF TREASON

A. *TREASON BY LEVYING WAR*

While the vast majority of the early English treason trials were concerned with the offense of compassing the King's death, some few were addressed to the problem of treason by levying war. Where the former, because of the wide construction to which it was subject, gave the courts little trouble, the latter forced the development of at least rudimentary legal concepts which could be applied with some consistency. The construction of compassing the King's demise still played a part, but an increasingly minor one. Thus while conspiring to levy, without more, was held not to constitute treason by levying war, it was still held to be compassing the King's death.⁶⁴

Participating in a rebellion aimed at the overthrow of the government or enlisting in a foreign army intending the same result seems clearly violative of this offense. Less clear is the area of riot or disorderly conduct not amounting to full scale insurgency. The case involving the tearing down of "bawdy houses" has already been cited for its unusual interpretation of "levying war."⁶⁵ The record of trial discloses that a mob of some 500, semi-organized and carrying indiscriminate weapons, not only dismantled the offending houses, but beat the constables sent to

⁶² See 18 U.S.C. § 2383 (1958).

⁶³ 18 U.S.C. § 2381 (1958).

⁶⁴ Trials of Twenty Nine Regicides, 5 How. St. Tr. 947, 984 (1660).

⁶⁵ See Trial of Peter Messenger, 6 How. St. Tr. 879 (1668).

disperse them and shouted "Down with the red coats!" The Chief Justice saw no humor when he charged the jury:

By levying of war is not only meant, when a body is gathered together, as an army is, but if a company of people will go about any public reformation, this is High Treason, if it be to pull down inclosures, for they take upon them the regal authority; the way is worse than the thing.⁶⁶

Sir Matthew Hale dissented. He viewed the situation as nothing more serious than disorderly conduct.⁶⁷ But the English courts quickly backed off from this broad construction. Thereafter, the prosecutions for treason by levying war, arising out of domestic disturbances, were limited to such situations as where mobs acted with force to prevent the execution of a law,⁶⁸ or rioted to force the legislature to repeal an unpopular statute.⁶⁹

The United States faced a similar situation in its history. In 1794, the "Whiskey Rebellion" flared in the western counties of Pennsylvania in resistance to a tax on spirits.⁷⁰ Federal officers were first threatened, then assaulted. In July of 1794 a mob attacked the home of the chief excise officer which was defended by a number of men including 12 regulars from Fort Pitt. After a day long siege the garrison surrendered and the house was burned. Subsequently, the mob, in a show of force, marched through Pittsburgh, although no further violence developed with the garrison. The arrival of troops from Philadelphia put an end to the uprising. A number of the participants were apprehended and charged with treason. Only two persons, however, were actually brought to trial.⁷¹ In the *Mitchell* case the defense contended that the attack on the excise officer's home was an attack on him as an individual and not in his capacity as an officer of the United States, and, further that there was no attempt to resist the law on a nationwide scale. The argument was simply that this was a riot, but not treason. Justice Paterson charged the jury:

⁶⁶ *Id.* at 884.

⁶⁷ *Id.* at 911. In a time when acquittals in treason cases were notably few, six of the 14 defendants were acquitted outright and four convictions were later reversed.

⁶⁸ See Trial of Sir John Freind, 13 How St. Tr. 1 (1696).

⁶⁹ See Trial of George Gordon, 21 How. St. Tr. 485 (1781).

⁷⁰ For a full account of the incident see *United States v. Insurgents*, 27 Fed. Cas. 499 (No. 15443) (C.C.D. Pa. 1795).

⁷¹ See *United States v. Vigol*, 28 Fed. Cas. 376 (No. 16621) (C.C.D. Pa. 1795); *United States v. Mitchell*, 26 Fed. Cas. 1277 (No. 15788) (C.C.D. Pa. 1795).

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If [the object of the insurrection] was to suppress the excise offices, and to prevent the execution of an act of congress, by force and intimidation, the offense, in legal estimation, is high treason; it is a usurpation of the authority of government; it is high treason by levying of war.⁷²

Both defendants were promptly convicted and sentenced to death. Both were later pardoned.⁷³

If the actions of the "Whiskey Rebels" clearly evidence a determined effort to oppose an act of Congress, those of the "Northhampton Insurgents" do not. In 1799, John Fries led a party of somewhat over 100 men to free 20 farmers being held by United States marshals for conspiracy to violate the Land Tax Act. The mob arrived at a tavern where the prisoners were being held, threatened the marshals, and secured their release. The group then promptly disbanded. No one was killed or wounded; no one was fired on, John Fries was tried for treason.⁷⁴ Charged in substantially the same language used in the *Mitchell* case, two juries returned verdicts of guilty.⁷⁵ Even in a country where the specter of revolution was still a real fear, it is difficult to conceive how Fries could have been convicted of levying war. Measured against the facts, Fries' "insurrection" appears fragmentary, momentary, and of little significance. If this was treason then almost any riot or disorder involving opposition to a law of the United States can be construed as treason. Certainly the 1962 Oxford, Mississippi, riots constituted activity far more serious than anything undertaken by Fries and his men. Weyl suggests that the trial was purely political and that Fries was a victim of a Federalist plot.⁷⁶ In any event reason prevailed and Fries was eventually pardoned.⁷⁷

Broadened by the *Fries* construction, treason by levying war was due for an even wider interpretation. By 1806, the schemes of ex-Vice President Aaron Burr began to come to light and in 1807 Burr himself was brought to trial for treason by levying war. The alleged overt acts had occurred at a place called Blennerhasset's Island in western Virginia. Yet both the prosecution and defense agreed that Burr was nowhere near the island at the time. Chief Justice Marshall, concluding that Burr's presence at

⁷² United States v. Mitchell, *supra* note 71, at 1281.

⁷³ WEYL, *op. cit. supra* note 30, at 85.

⁷⁴ Case of Fries, 9 Fed. Cas. 826 (No. 5126) (C.C.D. Pa. 1799); Case of Fries, 9 Fed. Cas. 924 (No. 5127) (C.C.D. Pa. 1800).

⁷⁵ *Ibid.*

⁷⁶ WEYL, *op. cit. supra* note 30, at 107-09.

⁷⁷ *Id.* at 109.

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that place was unnecessary, quoted with approval from the *Bollman* case:⁷⁸

It is not the intention of the court to say that no individual can be guilty of [treason] who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable object, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors."

Burr was eventually acquitted. With his trial, the heyday of treason by levying war passed. Stretched to cover Fries and Burr the wide interpretation as to what constituted 'levying war' began to contract. Even as Burr sat in a Richmond courtroom, the Circuit Court in Vermont was drawing a sharp distinction between resistance to the law for a private purpose and resistance of a general character.⁸⁰ Thus the recovery by force of private property seized by a revenue agent, though accomplished by a force of about 60 men and accompanied by desultory fire between the mob and militiamen was held to be of a private character and not to constitute levying war.⁸¹ The court was also concerned about the *de minimis* aspects of this affair. "In what can we discover the treasonable mind?" asked Judge Livingston. "Can it be collected from the employment of ten or twelve muskets?"⁸² Mentioning the *Fries* case the court proceeded to emasculate its holding.

The vitality of the *Mitchell* case continued until the 1851 decision in *United States v. Hanway*.⁸³ The facts of that case leave it clear that Hanway aided one of several armed bands advocating forceable resistance to the fugitive slave law. In the immediate violence out of which the case arose a slaveowner was killed, his son wounded, and police officers attacked and beaten. Charging the jury, Justice Grier professed to see a change in the legal definition of "levying war." The "better opinion there at present" he charged, "seems to be that the term levying war should be confined to insurrection and rebellions for the purpose of over-

-- *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75 (1807).

⁷⁸ *United States v. Burr*, 25 Fed. Cas. 55, 161 (No. 14693) (C.C.D. Va. 1807).

⁸⁰ See *United States v. Hoxie*, 26 Fed. Cas. 397 (No. 15407) (C.C.D. Vt. 1808).

⁸¹ *Ibid.*

⁸² *Id.* at 399-400.

⁸³ See *United States v. Hanway*, 26 Fed. Cas. 105 (No. 15299) (C.C.E.D. Pa. 1851).

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throwing the [G]overnment by force and arms. Many of the cases of constructive treason quoted [by the English writers], would perhaps now be treated merely as aggravated felonies."⁸⁴ With this encouragement the jury promptly acquitted the accused.

Outright rebellion thus continued to come within the area defined by the term "levying war." The Civil War appeared to some to be the opportunity to utilize this term to prosecute the Confederates for treason. As a matter of record, however, only a few indictments arose out of that war, and these produced lenient results. The sentences of Ridgely Greathouse and his compatriots, for example, convicted of levying war by attempting to outfit a privateer for Confederate service were terminated upon their taking the oath of allegiance to the United States.⁸⁵ The indictments against such contrasting individuals as Charles Greiner,⁸⁶ a member of a Georgia artillery company which participated in the seizure of Fort Pulaski, and Jefferson Davis,⁸⁷ President of the Confederate States, were never brought to trial.

Since that time, a number of incidents have occurred which might have been considered a basis for charges of treason by levying war. The activity of the Klan during Reconstruction, the Haymarket Riots of 1886, and the march of the Bonus Army in 1932 were all serious enough to require the dispatch of troops to maintain law and order. But the definition which limits treason by levying war to actual rebellion against the Government seems to have prevailed. It is significant that since the *Davis* case not one attempt has been made to revive the offense.

B. TREASON BY ADHERING TO THE ENEMY GIVING HIM AID AND COMFORT

Unlike the offense of treason by levying war which passed from the scene almost one-hundred years ago, the offense of treason by adhering to the enemy has achieved a considerably longer and more useful existence. This phase of treason encompasses two elements: adhering to the enemy and giving him aid and comfort. With these elements the problem of intent is inexorably intertwined. A citizen may intellectually, emotionally

⁸⁴ *Id.* at 127.

⁸⁵ *United States v. Greathouse*, 26 Fed. Cas. 18 (No. 15524) (C.C.N.D. Cal. 1863).

⁸⁶ See *United States v. Greiner*, 26 Fed. Cas. 36 (No. 15262) (D.C.E.D. Pa. 1861).

⁸⁷ See *Case of Davis*, 7 Fed. Cas. 63 (No. 3621a) (C.C.D. Va. 1867-1871).

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and spiritually sympathize with the enemy. He may harbor disloyal thoughts, But so long as he fails to engage in some sort of conduct designed to give the enemy aid and comfort, the crime of treason is not complete.⁸⁸ Conversely a citizen may do an act which gives the enemy aid and comfort, but if there is no adherence to the enemy's cause there is no treason.⁸⁹ By doing the act he may appear outwardly a traitor but he is not legally a traitor.⁹⁰ Nor does it appear necessary that the enemy wants or needs the proffered assistance. The mere fact that it is offered or rendered with the requisite intent will make the crime complete.

As in other aspects of the law, we must go back to England for a starting point. Interwoven throughout the English cases is the conception that adhering to the enemy necessarily compassed the death of the king. For that reason, indictments for aiding the enemy, in and of itself, are scarce. But at least as early as 1691 it was recognized as a separate offense.⁹¹ At the trial of Sir Richard Grahme for attempting to smuggle out of England a number of documents concerning the status of military defenses, Lord Chief Justice Holt, after commenting on the indictment for compassing the King's death, observed: "There is another treason in the indictment mentioned and that is for adhering to, and abetting the king's enemies, there being open war declared between the king and queen and the French king."⁹²

Defining the rationale of the offense the Solicitor General of England argued in 1781:

How can any state exist, how contend with an enemy, if it is to suffer within its own bosom men employed to give intelligence of all its operations to those with whom it is at war? One man, so employed, may often times do much more mischief to the country of whose operations he gives intelligence than an army of 50,000 men."

The English courts also established the proposition that the offense was complete once the overt act occurred and it was no defense that the enemy was not actually aided.⁹⁴ The conviction of Viscount Preston was sustained notwithstanding that his attempt to smuggle defense plans out of England was terminated

⁸⁸ *Cramer v. United States*, 325 U.S. 1 (1944); *United States v. Werner*, 247 Fed. 708 (E.D. Pa, 1918), *aff'd* 251 U.S. 466 (1919).

⁸⁹ See *Kawakita v. United States*, 343 U.S. 717 (1952).

⁹⁰ *United States v. Werner*, 247 Fed. 708 (E.D. Pa. 1918), *aff'd* 251 U.S. 466 (1919).

⁹¹ See *Trial of Sir Richard Grahme*, 12 How. St. Tr. 645 (1691).

⁹² *Id.* at 730.

⁹³ *Trial of F. H. DeLa Motte*, 21 How. St. Tr. 687, 798 (1781).

⁹⁴ See *Trial of Sir Richard Grahme*, 12 How. St. Tr. 645 (1691).

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by his apprehension.⁹⁵ Nor did it avail those accused of treason by attempting to mail secrets abroad in time of war to contend that the letters were intercepted before they left the country.⁹⁶ The celebrated trial of Captain Thomas Vaughan resulted in the conviction for aiding the enemy of a seaman who went "cruising" under a French commission where there was no evidence that he made any hostile attempt upon an English vessel.⁹⁷

All of these cases have been cited by American courts. Perhaps the leading case in the United States involves the efforts of Max Haupt to acquire a job for his son, a Nazi secret agent, at a factory engaged in producing lenses for the top-secret Norden bombsight. The efforts consisted solely of visiting the homes of a plant superintendent and a shop foreman and inquiring into the means of securing such employment. There was no evidence that a job application was ever submitted or that any further step was taken in that direction.⁹⁸ Affirming the conviction, Mr. Justice Jackson commented succinctly:

His acts aided an enemy of the United States toward accomplishing his mission of sabotage. The mission was frustrated but the defendant did his best to make it succeed. [That] His overt acts were proved in compliance with the hard test of the Constitution, are hardly denied and the proof leaves no reasonable doubt of the guilt.⁹⁹

While not necessary to the result, this principle was expressly adhered to in the case of radio propagandist, Douglas Chandler.¹⁰⁰ The evidence established that Chandler had prepared a number of broadcasts for the use of the German Radio Broadcasting Company. Chandler contended there was no evidence any of the recordings were ever used, or if used, that anyone in the United States ever heard them. Dismissing this argument the court concluded:

It does not even matter whether the particular recordings . . . were actually broadcast. Chandler's service was complete with the making of the recordings, which became available to the enemy to use as it saw fit. . . . His act of making the recording for the enemy is like giving to an enemy agent a paper containing military information, which would

⁹⁵ *Ibid.*

⁹⁶ Trial of David Tyrie, 21 How. St. Tr. 815 (1782); Trial of Florence Hensey, 19 How. St. Tr. 1342 (1758).

⁹⁷ Trial of Captain Thomas Vaughan, 13 How. St. Tr. 485 (1696).

⁹⁸ For a detailed discussion of the evidence in this regard, see *United States v. Haupt*, 152 F.2d 771 (7th Cir. 1945) *aff'd*, 330 U.S. 631 (1947).

⁹⁹ *Haupt v. United States*, 330 U.S. 631, 644 (1947).

¹⁰⁰ *Chandler v. United States*, 171 F.2d 921 (1st Cir.), *cert. denied*, 336 U.S. 918 (1948).

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be a completed act of aid and comfort, though the enemy agent later lost the paper and thus never put the information to any effective use.¹⁰¹

Who is the "enemy" for the purpose of receiving this aid and adherence? In the English cases, oriented as usual with monarchical concepts, it was the foreign sovereign himself. The early American cases immediately following the Revolution departed from this concept. One early Pennsylvania case charged the defendant with intending ". . . to raise again and restore the Government and tyranny of the King of Great Britain. . . ." ¹⁰² However, reference to the king, as such, played an increasingly lesser role and prosecutions were based merely on aid to his soldiers.¹⁰³

An opportunity to fully explore the definition of an "enemy" did not arise until the Civil War. The problem quickly arose as to whether the Confederates were "enemies" for the purpose of the treason law. The problem was resolved in the negative by Mr. Justice Field in the *Greathouse* case.¹⁰⁴ He charged the jury:

The term "enemies" as used in the second clause, [of the Constitutional provision] according to its settled meaning, at the time the constitution was adopted, applies only to the subjects of a foreign power in a state of open hostility with us. It does not embrace rebels in insurrection against their own government. An enemy is always the subject of a foreign power who owes no allegiance to our government or country.¹⁰⁵

The practical result was that all future treason prosecutions against the Confederates had to be charged ("levying war." ¹⁰⁶ It is interesting to note, and practical politics appears to have dictated, that the definition of an "enemy" for the purpose of treason and that for the purpose of confiscating the property of an "enemy" received diametrically opposite treatment. In the latter situation the courts had no problem holding Confederate soldiers and citizens to be enemies and their property subject to forfeit.¹⁰⁷

¹⁰¹ *Id.* at 941.

¹⁰² *Respublica v. Carlisle*, 1 U.S. (1 Dall.) 35 (1778).

¹⁰³ *Respublica v. Malin*, 1 U.S. (1 Dall.) 33 (1778); *accord*, *United States v. Hodges*, 26 Fed. Cas. 332 (No. 15374) (C.C.D. Md. 1815).

¹⁰⁴ *United States v. Greathouse*, 26 Fed. Cas. 18 (No. 15254) (C.C.N.D. Cal. 1863).

¹⁰⁵ *Id.* at 22.

¹⁰⁶ *But cf.* *Prize Cases*, 67 U.S. (2 Black) 635 (1862) which seems to accord the Confederacy belligerency status although for a different purpose (*i.e.*, violating the blockade).

¹⁰⁷ *The Venice*, 69 U.S. (2 Wall.) 258 (1864); *Mrs. Alexander's Cotton*, 69 U.S. (2 Wall.) 404 (1864).

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The offense of treason by aiding the enemy can only be committed during time of war.¹⁰⁸ But it does not necessarily follow that the war must be attired with all the customary trimmings, such as a formal declaration. It is true as a matter of fact that all previous treason prosecutions in this area have arisen out of incidents which occurred during time of a formally declared conflict. For this reason, it is perhaps unfortunate that no treason prosecution followed the Korean conflict by which the standards of that "war" could be tested. Some support for the proposition that less than a "formal" war will suffice may be found in an Attorney General's opinion in 1798, during the maritime dispute with France, that the treason law applied to a French citizen who was in the United States buying supplies for French bases in the West Indies.¹⁰⁹ Again, in 1871, the Attorney General expressed the opinion that persons apprehended running guns and ammunition to hostile indians were subject to military court-martial for "relieving the enemy."¹¹⁰

Today a practical question may be raised concerning the status of the Viet Cong. Are they an "enemy" as that word is used in the treason statute? This question has recently received collateral consideration with the decision to issue certain awards for valor in combat in South Vietnam. Fearing that the term "enemy" might be legally inapplicable,¹¹¹ Congress amended the statutes governing the award of the Medal of Honor, Distinguished Service Cross and Silver Star to include situations where American servicemen were in conflict with an opposing foreign force or serving with a friendly foreign force engaged in an armed conflict.¹¹² Yet when it awarded the Medal of Honor to Captain Roger Donlon, the Department of the Army had no hesitancy in referring to the Viet Cong as an "enemy" on fire occasions.¹¹³

While the cited authorities do not fully resolve the question, they may be taken to indicate that the civil offense of treason and its military counterpart of aiding the enemy could well be committed in an escalated "cold war" situation.

¹⁰⁸United States v. Fricke, 259 Fed. 673 (S.D.N.Y. 1919).

¹⁰⁹See 1 OPS. ATT'Y GEN. 49 (1798).

¹¹⁰See 14 OPS. ATT'Y GEN. 470 (1871).

¹¹¹1963 U.S.C. CONG. & AD. NEWS 776.

¹¹²See 10 U.S.C. §§ 3741, 3742, 3746 (Supp. V, 1964).

¹¹³See Gen. Orders No. 41, Hq Dept. of Army (17 Dec 1964).

IV. THE JURISDICTIONAL ASPECTS OF TREASON

A. OVERSEAS TREASON BY AMERICAN NATIONALS

No one would suggest that the prosecution of a native or naturalized American citizen for treason committed within the borders of the United States would raise a jurisdictional problem. But treason committed overseas is a different matter. The law punishes as traitors those who adhere to the enemies of the United States within the country or elsewhere.¹¹⁴ Where the law is applied to American citizens, it is the "or elsewhere" that raises the problem. It is a problem of recent origin. For once we are unable to glean from the State Trials any case dealing with overseas treason,¹¹⁵ and history has shown it to be basically an American problem. True, England produced Casement,¹¹⁶ but the evidence in the Joyce case strangely points to the fact that even "Lord Haw Haw" was an American national.¹¹⁷

At the outset, it may be well to consider where the concept of overseas treason originates. Normally the answer would be found in the Constitution. It has been noted that treason is the only crime defined in that document. But a re-reading of Article 3, section 3, fails to disclose the words "or elsewhere." The convention that framed the Constitution certainly considered them. Its members were familiar with the statute of Edward III.¹¹⁸ Yet the words do not appear in the draft submitted by the Committee of Detail,¹¹⁹ and a proposed substitute which would have included them was defeated by an 8 to 2 vote.¹²⁰ The words first appear in the statute by which Congress implemented the authority given it to declare the punishment for treason.¹²¹

It follows that one objection to the inclosure of the words "or elsewhere" in this statute is that the power of Congress is limited

¹¹⁴ 18 U.S.C. § 2381 (1958).

¹¹⁵ Unless you consider the *Vaughan* case involving treason on the high seas. Case of Captain Thomas Vaughan, 13 How. St. Tr. 485 (1696).

¹¹⁶ An Irish revolutionary who attempted to carve out an independent Ireland with German help during World War I. On his return from Germany he was captured, tried for treason, and executed. See *Rex v. Casement*, 115 L.T.R. (N.S.) 267 (1917).

¹¹⁷ *Rex v. Joyce*, 173 L.T.R. (N.S.) 377 (1945), *aff'd sub nom. Joyce v. Director of Public Prosecutions*, 174 L.T.R. (N.S.) 206 (1946). See also WEST, *THE NEW MEANING OF TREASON* (1964).

¹¹⁸ 2 FARRAND, *RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 345 (1937).

¹¹⁹ *Id.* at 182.

¹²⁰ *Id.* at 347-48.

¹²¹ Act of April 30, 1790, 1 Stat. 112.

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to providing the punishment for treason and does not extend to declaring where the offense may be committed. A second argument is that the words "or elsewhere" qualify only the phrase "giving aid and comfort" and do not apply to the phrase "adheres to." If this were true and both the adherence and the aid and comfort to the enemy took place outside the United States the statute would not be violated.

Both of these contentions were unsuccessfully asserted in the *Chandler case*.¹²² With regard to the former the court replied that had the framers intended to restrict the crime to the United States, they could easily have done so.¹²³ Furthermore, the restrictive words "within their territories" had been deliberately rejected by the Committee of the Whole.¹²⁴ The latter contention too was rejected, the court concluding that such theory ". . . violates the plain language of the statute."¹²⁵

If this proposition can be considered as firmly settled, what recourse is open to the American overseas who chooses to support his country's enemy? The Nationality Act of 1940 opened the door: voluntary expatriation.¹²⁶ Prior to that statute wartime expatriation was prohibited,¹²⁷ but this restriction was eliminated in the new legislation. Among the recognized means by which nationality could be lost were (a) obtaining naturalization in a foreign state, (b) taking the oath or making a formal declaration of allegiance to a foreign state, or (c) making a formal renunciation of United States citizenship before a diplomatic or consular official of the United States in a foreign state.¹²⁸

How many Americans took advantage of the Nationality Act to transfer their allegiance to a wartime enemy and thus avoided post-ward prosecution for treason is unknown. A Federal Court has used the phrase "many persons."¹²⁹ One writer has gone vo

¹²² *United States v. Chandler*, 72 F.Supp. 230 (D. Mass. 1947), *aff'd*, 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949).

¹²³ 171 F.2d at 929.

¹²⁴ 2 FARRAND, *op. cit. supra* note 118, at 347-48.

¹²⁵ *United States v. Chandler*, 72 F.Supp. 230, 233 (D. Mass. 1947), *aff'd*, 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949); *accord*, *Gillars v. United States*, 182 F.2d 962 (D.C. Cir 1950), *Best v. United States*, 184 F.2d 131 (1st Cir.), *cert. denied*, 340 U.S. 939 (1950).

¹²⁶ Nationality Act of 1940, § 401, 54 Stat. 1137.

¹²⁷ Act of March 2, 1907, 34 Stat. 1228.

¹²⁸ Nationality Act of 1940, § 401, 54 Stat. 1137.

¹²⁹ See *D'Aquino v. United States*, 192 F.2d 338, 348 (9th Cir.), *cert. denied*, 343 U.S. 935 (1951).

far as to assert that "several thousand" changed allegiance to Japan alone.¹³⁰ At least three were unsuccessful.

On December 8, 1941, approximately simultaneously with the declaration of war, Mildred Gillars, better known as "Axis Sally" executed a paper which contained the words "I swear my allegiance to Germany." The paper was then given to her superior. On the basis of this document, which was never produced, she urged the jury be instructed that if they found this to be a sufficient renunciation of citizenship, they must acquit. The court refused to give the instruction and the conviction was affirmed on appeal.¹³¹ A loose interpretation of the statute might have sustained appellant's contention, but the court chose to require strict compliance. The court noted there was no evidence that the paper had been sworn to before anyone or that there was any connection between it and any procedure having to do with obtaining Reich citizenship.¹³² Nor did it find any substance to appellants' contention that her citizenship had ceased when her United States passport, submitted for renewal in 1941, had been retained by the consular agent. A passport is some evidence of citizenship, it is indeed useful in travel, but, concluded the court, its absence does not deprive an American of his citizenship.¹³³

A second argument advanced in favor of successful expatriation under the Nationality Act of 1940 was advanced by Iva D'Aquino, the "Tokyo Rose" of the Pacific theater. She noted that under the expatriation provisions of the act a person was permitted to shed his allegiance to the United States and by so doing could engage in adherence, aid and comfort to the enemy with impunity.¹³⁴ She argued that to try her for treason for acts which the law permitted others to do was unreasonable and arbitrary and constituted a denial of due process under the Fifth Amendment.¹³⁵ But the court found no sound basis for such contention and concluded it was no more than a mere ". . . play on words."¹³⁶ The Constitutional argument got no further than the effort to give the statute a broad construction.

¹³⁰ See Blakemore, *Recovery of Japanese Nationality as Cause for Expatriation in American Law*, 43 AM. J. INT'L L. 441, 451 (1949).

¹³¹ *Gillars v. United States*, 182 F.2d 962 (D.C.Cir. 1950).

¹³² *Id.* at 983.

¹³³ *Id.* at 981.

¹³⁴ See *D'Aquino v. United States*, 192 F.2d 338, 348 (9th Cir.), *cert. denied*, 343 U.S. 935 (1951).

¹³⁵ See *ibid.*

¹³⁶ See *id.* at 349.

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One last problem area in the field of overseas treason concerns the status of the dual citizen. Such an individual was Toyoma Kawakita.¹³⁷ Born in California of Japanese parents who were citizens of Japan, he was thus a citizen of the United States by birth, and, by Japanese law, a citizen of Japan. In 1939, he visited Japan on an American passport to attend college. When the war broke out he chose to stay in Japan and finish his education. During this period he was registered by the Japanese police as an alien. Subsequently, he attempted to renounce his American citizenship. To do this he had his name entered on a family census register. He then obtained employment with a metal company where he was assigned as translator in connection with the use of American prisoners of war as laborers. Not content with a passive role he continually humiliated the captives and frequently subjected them to brutal treatment. In 1946, he reapplied for his American passport and returned to the United States. A chance recognition by a former prisoner caused his arrest and subsequent trial for treason. On appeal Kawakita stressed his Japanese nationality. In addition to the entry of his name in the family register, he argued for the broader proposition that an individual possessing dual nationality who resides in one of the countries of which he is a national cannot be guilty of treason against the other country.¹³⁸ The assertion appears to be based on the "right" of a dual national to make an election, in time of war, to which of his sovereigns he will adhere. The court promptly rejected his contention. Concerning the contention that Kawakita, by his acts, had renounced his American citizenship the court answered:

That conclusion is hostile to the concept of citizenship as we know it, and it must be rejected. One who wants that freedom can get it by renouncing his American citizenship. He cannot turn it into a fair-weather citizenship, retaining it for possible contingent benefits but meanwhile playing the part of the traitor. An American citizen owes allegiance to the United States wherever he may reside."

As regards the family register, the court dismissed this contention on the theory that the registration was merely as assertion of some of the rights Kawakita already possessed by reason of his dual nationality.

The *Kawakita* holding is far from decisive. It is a minority

¹³⁷ See *Kawakita v. United States*, 96 F.Supp. 824 (S.D.Cal. 1950), *aff'd*, 190 F.2d 506 (9th Cir.), *aff'd*, 343 U.S. 717 (1951).

¹³⁸ See *Kawakita v. United States*, 343 U.S. 717, 732 (1951).

¹³⁹ *Id.* at 735.

opinion. Two justices took no part in the decision and three dissented.¹⁴⁰ The dissent is based on the conclusion that by his acts Kawakita had expatriated himself as well as he could have.¹⁴¹ Blakemore appears to make even a more telling point. He discusses the unusual Japanese law of "recovery" of nationality and concludes that any person who so "recovers" under Japanese law has effectively expatriated himself under the Nationality Act of 1940.¹⁴² Since "recovery" under Japanese law may be accomplished through inclusion in the Family Register Record, Kawakita can thus be said to have expatriated himself prior to the time of his treasonous acts.

It may be concluded, then, that an American may avoid his natural loyalty to his country through an act of voluntary expatriation. But the mere fact that such person purports to verbally or informally renounce his citizenship or purports to pledge his allegiance to any enemy state, without complying with its formal requirements, will not excuse the crime of treason. Before allowing a citizen to adhere to our enemies the courts will demand a strict compliance with the statutes dealing with expatriation even for a person with a dual nationality status. The "highest of all crimes" cannot be lightly evaded.

B. TREASON BY RESIDENT ALIENS

If treason by an American citizen must be either black or white, then treason by a resident alien can only be described as gray. The allegiance owed by a citizen is fixed and certain; that owed by an alien imperfect and temporary. If the nationality of the alien is that of an enemy belligerent the problem is increased. The alien may feel no love for the country in which he resides; he is more likely than its native son to wish it ill, but if he commits one overt act designed to accomplish its downfall, the noose looms just as high.

The underlying rationale behind punishing the alien for treason against the host country is not new. It was firmly established in England. It was clearly expressed in 1781 by Mr. Justice Butler, in passing the "usual" sentence upon one DeLa Motte, a Frenchman living in England who had attempted to send military secrets to aid his homeland, as follows:

During your residence in this country, as well as during the course of

¹⁴⁰ See *id.* at 745.

¹⁴¹ See *id.* at 746.

¹⁴² See Blakemore, *supra* note 130, at 449.

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your trial, you have received the protection of the laws of the land. As such you owed a duty to those laws, and an allegiance to the king whose laws they are; but you have thought it fit to abuse that protection you have received.”

The adoption of this principle in American law appears clear although the actual trial of an alien for treason is unknown in this country. It has already been observed that the Attorney General in an early opinion, concluded that a French citizen in this country was subject to trial for treason.¹⁴⁴

Further support for the general principle may be found in *The Pizzaro*.¹⁴⁵ The question concerned whether or not an English citizen could be the “subject” of the King of Spain, for treaty purposes, where his ship had been seized by an American privateer during the War of 1812. Holding that he could, Justice Story, referring to the location of that citizen’s actual residence, concluded:

... a person domiciled in a country, and enjoying the protection of its sovereign, is deemed a subject of that country. He owes allegiance to the country, while he resides in it; temporarily indeed, ... but so fixed that, as to all other nations, he follows the character of that country, in war as well as in peace.”

With the outbreak of the Civil War zealous judges, foreseeing a rash of impending treason trials, charged their grand juries in

¹⁴³ Trial of DeLa Motte, 21 How. St. Tr. 687, 814-815 (1781).

¹⁴⁴ See 1 OPS. ATTY. GEN. 49 (1798). It can be argued that his holding is inconsistent with the decision in *United States v. Villato*, 2 U.S. (2 Dall.) 370 (1797), a trial for treason of an alleged American sailor who joined the crew of a French vessel which subsequently captured an American ship. At the trial the accused successfully contended that he was not an American citizen but a Spaniard. Arguing on the merits the U.S. Attorney conceded “that if the prisoner is not a nationalized citizen of the United States, he must be discharged,” *United States v. Villato*, *supra* at 371. In the subsequent holding both judges concurred that since the accused was found not to be a citizen of the United States he must “consequently be released from the charge of high treason.” *United States v. Villato*, *supra* at 373. Given broad interpretation these words can be read to mean that no foreigner can be tried for treason. But as the acts were committed on the high seas it is more reasonable to conclude that the place of the acts must have been considered by counsel and the court, and not as suggesting that a resident alien could not be found guilty. It has never been suggested that a foreigner who aids our enemy overseas can be brought himself within our treason law. It is significant that no subsequent effort has been made to give this language a wider construction.

¹⁴⁵ 15 U.S. (2 Wheat.) 227 (1817).

¹⁴⁶ *Id.* at 246. It is unfortunate that Justice Story used the words “domiciled” and “resides” interchangeably since the former implies an intent to remain.

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detail with the law of the offense.¹⁴⁷ Only one of these specifically included instructions concerning resident aliens but it specifically adhered to the English rule, charging that any such sojourner, enjoying the protection of the United States, owes a local allegiance, and may be guilty of treason by cooperating with rebels or foreign enemies.¹⁴⁸

Only one case arising out of that conflict seems to have considered the problem of treason by resident aliens,¹⁴⁹ but that case is significant in its adherence to the English rule. The suit involves an effort to recover damages for goods owned by British citizens which were seized in Alabama by United States forces. The court discusses the loyalty owed by a resident alien in this language:

The alien, whilst domiciled in the country, owes a local and temporary allegiance, which continues during the period of his residence. This obligation of temporary allegiance by an alien resident in a friendly country is everywhere recognized by publicists and statesmen. . . . [I]t is well known that, by the public law, an alien or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason or other crimes as a native born subject might be. . . .¹⁵⁰

Thus, another of the English rules has been assimilated into the American law of treason. As with many others it can at times be considered harsh. Certainly the *Carlisle* case can be read for the proposition that Carlisle could have been convicted of treason as a resident alien. The rationale behind such prosecution would have been that the alien was enjoying the protection of the laws of the United States. Yet Carlisle was deep in Alabama where the laws of the United States protected him about as well as they could have in Africa. Consider also the case of the alien whose homeland has become the "enemy." Does his duty to his country extend to working for its success in the state where he resides? If he does so he subjects himself to a treason prosecution by that state. But the rule is harsh where tested by the needs of the individual. Tested by the needs of the state it becomes necessary in the interest of national self-protection.

¹⁴⁷ See, e.g., Charge to Grand Jury, 30 Fed. Cas. 1032 (No. 18270) (C.C. S.D. N.Y. 1861); Charge to Grand Jury, 30 Fed. Cas. 1036 (No. 18272) (C.C.S.D. Ohio 1861).

¹⁴⁸ "Charge to Grand Jury, 30 Fed. Cas. 1039 (No. 18273) (D. Mass. 1861); cf. Charge to Grand Jury, 30 Fed. Cas. 1047 (No. 18276) (C.C. E.D. Pa. 1851).

¹⁴⁹ See *Carlisle v. United States*, 83 U.S. (16 Wall.) 147 (1872).

¹⁵⁰ *Id.* at 154-55. Note again the words "domiciled" and "residence" are used interchangeably.

V. AFFIRMATIVE DEFENSES

A. IN GENERAL

Will anything negate the crime of treason? With a survey of the English cases as a guide it is tempting to answer in the negative. For hundreds of years head after head rolled from the Tyburn block after trials which were little more than formality, and under circumstances where an acquittal could be dangerous for the jury.¹⁵¹ In such a setting any affirmative defense was doubly dangerous since the very nature of such defense admits the acts complained of but seeks to excuse or justify them by attacking some other element of the offense. It is not surprising, therefore, that all but a scattered few chose to plead not guilty and, with the law against them, endeavor to argue the facts.

Of those few who have attempted to assert affirmative defenses some have bottomed their reliance on grounds of lack of citizenship.¹⁵² One notable exception, and a study in the futility of it all, was the celebrated case of Sir Walter Raleigh.¹⁵³ Tried in 1603, Raleigh was convicted of treason by plotting rebellion. His sentence to death was suspended and he languished in prison for 14 years. Subsequently he was released and commissioned to lead a military expedition to Guiana which involved fighting with the Spanish. By the time he returned to England the political situation had shifted and England was currying favor with Spain. The Spanish minister demanded his execution. Not knowing any offense to try him for, the authorities decided merely to vacate the old suspended death sentence and execute Raleigh for treason. He urged in vain that the Commission from the king had amounted to a pardon.¹⁵⁴ A former Lord Chancellor and most of the lawyers in England agreed with him.¹⁵⁵ Nevertheless the Lord Chief Justice ruled otherwise.¹⁵⁶ The pardon must be specific, he held, it could not be implied. Raleigh went to the block. Constructive treason was a one edged sword; it cut only in favor of the prosecution.

¹⁵¹ Following the acquittal of Sir Nicholas Throckmorton, 1 How. St. Tr. 869 (1554), an enraged judge ordered the jury imprisoned and subsequently fined them heavily.

¹⁵² See notes 114-49 *supra*, and text accompanying.

¹⁵³ Trial of Sir Walter Raleigh, 2 How. St. Tr. 1 (1603).

¹⁵⁴ *Id.* at 34.

¹⁵⁵ *Ibid.*

¹⁵⁶ To further point up the hopelessness of the situation it should be noted that the Lord Chief Justice was none other than Sir Edward Coke, who had prosecuted Raleigh at the original trial.

Other efforts at raising affirmative defenses have faced equally bleak results. Drunkenness has been raised, but evidence that the defendant was in a state of ambulatory stupefaction has been considered insufficient to establish a defense to a charge of treason by resisting law officers.¹⁵⁷ Nor may the motive of the accused, that he genuinely believes what he does is in the best interests of his country, be raised as bearing on his intent to aid the enemy.¹⁵⁸ While insanity has been recognized as a defense to treason, only one case has been found where it was successfully argued.¹⁵⁹ One affirmative defense has been raised consistently enough to be treated separately. That defense is duress, the deprivation of an individual's free will to act.

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The defense of duress was first fully considered following the rebellion of 1745 that came to grief at the Battle of Culloden. Alexander MacGrowther had participated in that rebellion. At his trial, witnesses testified that he had been seen on several occasions with the rebel army and wearing its uniform.¹⁶⁰ MacGrowther asserted, however, that he had been a most unwilling participant. He had joined the rebel army, this he conceded. But, he contended, he had done so only after the Duke of Perth, in whose regiment he had served, had threatened to burn the houses and destroy the crops of any of his tenants who desisted. Even with this, MacGrowther argued, he had hesitated, until he was told he would be would be forceably bound and taken along anyway.¹⁶¹ Lord Chief Justice Lee was not persuaded. He instructed the jury: "[T]he fear of having houses burnt, or goods spoiled, . . . is no excuse for joining and marching with rebels. The only force that doth excuse, is a force upon the person, and present fear of death; and this force and fear must continue all the time the party remains with the rebels."¹⁶² MacGrowther was found guilty but his argument was not entirely unsuccessful for he was later reprieved.

While a shortened version of the *MacGrowther* rule was cited as *dicta* in the *McCarty* case,¹⁶³ it was first given serious consid-

¹⁵⁷ See Trial of George Purchase, 15 How. St. Tr. 651 (1710).

¹⁵⁸ *Best v. United States*, 184 F.2d 131 (1st Cir.), cert. denied, 340 U.S. 939 (1950).

¹⁵⁹ See Trial of James Hadfield, 27 How. St. Tr. 1281 (1800).

¹⁶⁰ Trial of Alexander MacGrowther, 18 How. St. Tr. 391, 392 (1746).

¹⁶¹ *Id.* at 393.

¹⁶² *Id.* at 394.

¹⁶³ *Respublica v. McCarty*, 2 U.S. (2 Dall.) 86 (1781).

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eration in this country in *United States v. Vigol*,¹⁶⁴ one of the cases growing out of the Whiskey Rebellion. Vigol's contention seems to have been more that he was caught up in the spirit of things than that he was actually forced to participated. His defense found no favor with Justice Patterson who instructed the jury in words similar to those employed by Lord Chief Justice Lee some 50 years earlier. Commenting on the reason behind the rule the judge stated:

If indeed such circumstances [apprehension of something less than immediate fear of death] could avail, it would be in the power of every crafty leader of tumults and rebellion, to indemnify his followers, by uttering previous menaces; an avenue would be forever open for the escape of unsuccessful guilt; and the whole fabric of society must inevitably, be laid prostrate."¹⁶⁵

A vigorous assault on the *MacGrowther* rule was leveled in 1815 by William Pinkney, attorney for John Hodges who was tried for treason for returning four British stragglers who had been taken prisoner during the British withdrawal from Washington in the war of 1812.¹⁶⁶ It appeared that the British had threatened to burn the town of Upper Marlboro and hold women and children hostages until the men were returned. Pinkney stressed the military severity of the situation in an eloquent speech. He argued:

[T]he enemy were in complete power in the district. . . . They were unawed by the thing which we called an army, for it had fled in every direction. They were omnipotent. . . . They menaced pillage and conflagration; and after they had wantonly destroyed edifices which all civilized warfare had hitherto respected, was it to be believed that they would spare a petty village, which had renewed hostilities, before the seal of its capitulation was dry? There was menace; power to execute; probability; nay, certainty, that it would be executed. How, then, can you find a wicked and traitorous motive in the breast of my client?¹⁶⁷

Given weak instructions by an uncertain court the jury agreed with Pinkney, and "without hesitating a moment," returned a finding of "not guilty."¹⁶⁸

The *Hodges* case appears to represent a departure from the *MacGrowther* rule. If so, it was only temporary. The Civil War brought a prompt re-recognition of the rule,¹⁶⁹ which has been

¹⁶⁴ 2 U.S. (2 Dall.) 346 (1795).

¹⁶⁵ *Id.* at 347.

¹⁶⁶ *United States v. Hodges*, 26 Fed. Cas. 332 (No. 15374) (C.C.D. Md. 1815).

¹⁶⁷ *Id.* at 335.

¹⁶⁸ *Id.* at 336.

¹⁶⁹ See *United States v. Greiner*, 26 Fed. Cas. 36, 39 (No. 15262) (E.D. Pa. 1861).

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reasserted to this day. If any relaxation of the rule can be found in the *Gillars* case,¹⁷⁰ it is only to the extent that the coercion or compulsion has been extended from threat of immediate death to include threat of immediate serious bodily injury. This can hardly be considered the opening of a door.

Only one more case need detain us. In the trial of "Tokyo Rose" the defense conceded that the rule announced in *Gillars* was correct where applied within the United States, but argued that it was an unsatisfactory rule when the accused was in an enemy country, for in such situations he was unable to get protection from the United States and the compulsion was on the part of the enemy government itself.¹⁷¹ Recognizing that this might hold true for an individual conscripted into the enemy army, the court responded:

We know of no rule that would permit one who is under the protection of an enemy to claim immunity from prosecution for treason merely by setting a claim of mental fear of possibly future action on the part of the enemy."¹⁷²

Thus it has been seen that while the legal rule on duress as applied to treason seems strict on its face, it has not been harsh in application. Where the threat has proved real enough the courts have not been harsh on the individual affected even though the threat has been less than that required to excuse him by law. The United States citizen, as does its soldier, owes his country a determination to resist by all means within his power, and only when he has been brought to the last ditch of resistance may he save his life at the temporary expense of that duty.

VI. THE MILITARY LAW OF TREASON

The Trial Counsel addressed the court: "If any member of the court or the law officer is aware of any facts, which he believes may be a ground for challenge by either side against him, he should now state such facts." A Lieutenant turned to the Law Officer: "Sir, I challenge myself on the grounds that I am hostile to the accused and that prior to the convening of this court I have formulated the opinion and expressed the opinion that the accused is a traitor."¹⁷³

¹⁷⁰ *Gillars v. United States*, 182 F.2d 962, 976 (D.C. Cir. 1950).

¹⁷¹ *D'Aquino v. United States*, 192 F.2d 338 (9th Cir.), *cert. denied*, 343 U.S. 935 (1951).

¹⁷² *Id.* at 359.

¹⁷³ Statement of Lt. Schowalter, disqualifying himself as a member of the court. *United States v. Batchelor*, 7 U.S.C.M.A. 354, 362, 22 C.M.R. 144, 152 (1956).

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But "treason *as such* is not an offense properly cognizable by a court-martial." These are the words of no less of an authority than Colonel Winthrop.¹⁷⁴ Yet almost immediately the effect of this conclusion becomes blurred. It is for an excellent reason that Winthrop italicizes the words "as such." All will readily admit that the word "treason" has never appeared in the articles of war which, since 1776, have governed the armies of the United States. Yet Winthrop feels compelled to explain that the articles concerning relieving and communicating with the enemy are "treasonable in their nature" and he quotes with approval such definitions of the offenses as "overt acts of treason" and "closely allied to treason."¹⁷⁵ The Colonel concludes: "Whenever, therefore, an overt act of the class specified in these Articles gives substantial aid and comfort to the enemy, and thus evidences, so far forth, an adherence to his cause, it can scarcely be regarded as less than an act of treason."¹⁷⁶

The two articles of war referred to by Winthrop have subsequently synthesized into the present Article 104 of the *Uniform Code of Military Justice* which defines the offense as follows:

Any person who—

(1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other thing; or

(2) without proper authority, knowingly harbors or protects or gives intelligence to or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly; shall suffer death or such other punishment as a court-martial or military commission may direct.

The Code provision, like the civil law of treason, may be traced for its antecedents to the middle ages. As a matter of fact, Winthrop finds the basis for the substantive provisions of Article 104 in the military code of Gustavus Adolphus in 1621.¹⁷⁷

The equivalent English provisions appeared as Articles 17 and 18 of the British Articles of War of 1765 which were in force at the beginning of the Revolutionary War.¹⁷⁸ These articles were lifted, almost verbatim, into the American Articles of War of

¹⁷⁴ See WINTHROP, *MILITARY LAW AND PRECEDENTS* 629 (2d ed. 1920).

¹⁷⁵ *Ibid.* Winthrop was commenting on the 45th and 46th Articles of War of 1874.

¹⁷⁶ *Id.* at 629-30.

¹⁷⁷ WINTHROP, *op. cit. supra* note 174, at 907. Specifically, see Articles 67-72, 76, 77. The offense antedates even that; see, for example, the trial of Marshall D'Audreham in 1367, noted in Keen, *Treason Trials Under the Law of Arms*, 112 *ROYAL HIST. SOC. TRANS.* 15th 100 (1961).

¹⁷⁸ WINTHROP, *op. cit. supra* note 174, at 931.

1775,¹⁷⁹ and in substance describe the offense contemplated by Article 104.¹⁸⁰

Only one minor variation seems worth noting. The original provision punishing aiding the enemy limited such assistance to "money, victuals, or ammunition,"¹⁸¹ and the language remained unchanged in Article 45 of the 1874 Articles of War.¹⁸² But times had changed. The day where aiding the enemy was limited by the very nature of warfare itself was over. The Civil War had pointed out a myriad of new ways to aid enemies. Winthrop, aware of the undue restriction, considered the old phraseology to be "bald and imperfect."¹⁸³ He argued that a change was necessary, and suggested the insertion of an additional phrase such as "or other thing" or "otherwise."¹⁸⁴ It may be that the proper approach should not have been to add more words, but rather to subtract a few. The provision could have been reduced simply to "Whosoever relieves the enemy." The difficulty may have been that this result would have placed on the courts the burden of interpreting the meaning of "relieves," and opened the door to the return of the "constructive treasons" long feared by the English.

Congress apparently chose to go along with Winthrop's recommendation. In enacting the Articles of War of 1916, the words "or other thing" were inserted.¹⁸⁵ Perhaps Congress selected the wrong phrase. The added language achieved the purpose of substantially broadening the scope of the offense, but created a problem of semantics in the *Olson* case.¹⁸⁶ Olson had achieved notoriety as an orator in North Korean prison camps. At the behest of his captors he engaged in pro-Communist and anti-American speech-making with the mission of "educating" his fellow prisoners. Prosecuted under Article 104, Olson contended that making a speech was not aiding the enemy with any "thing." In a two to one decision the Board of Review disagreed.¹⁸⁷ Noting that aiding

¹⁷⁹ *Id.* at 953, Articles 27-28.

¹⁸⁰ The Court of Military Appeals has characterized Article 104 as bearing a "striking resemblance" to its 1775 counterpart. See *United States v. Batchelor*, 7 U.S.C.M.A. 354, 368, 22 C.M.R. 144, 158 (1956).

¹⁸¹ WINTHROP, *op. cit.* *supra* note 174, at 953, Article 27.

¹⁸² Act of 22 June 1874, Title XIV, Ch. 5, art. 45, 18 Stat. 233

¹⁸³ WINTHROP, *op. cit.* *supra* note 174, at 631.

¹⁸⁴ *Ibid.*

¹⁸⁵ Act of 29 August 1916, § 3, Article 81; 39 Stat. 619.

¹⁸⁶ *United States v. Olson*, 7 U.S.C.M.A. 460, 22 C.M.R. 250 (1957).

¹⁸⁷ CM 384483 *Olson*, 20 C.M.R. 461 (1956), *aff'd*, 7 U.S.C.M.A. 460, 22 C.M.R. 250 (1957).

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the enemy by participating in propaganda radio broadcasts had been sufficient to predicate at least three civil convictions for treason,¹⁸⁸ the Board of Review concluded that the psychological aspects of warfare had "become as important as arms, ammunition, and guided missiles."¹⁸⁹ The Court of Military Appeals viewed it otherwise. Tracing the history of Article 104, the court concluded that the word "thing" must be equated to "tangible object."¹⁹⁰ Olson's conviction, however, was sustained on the ground that the specification still described the Article 104 offense of communicating, corresponding or holding any intercourse with the enemy.¹⁹¹ The military construction concerning the use of the words "or other thing" is important as the only area where military rule is different from the civil rules applicable to treason by aiding the enemy.

It has been suggested that Article 104 defines a military law of treason. The objections to that are many. Where in Article 104 is any requirement that a conviction must be based on the testimony of two witnesses to the same overt act? Forgetting, for the moment, the crime of treason by levying war, where in the treason statute is aiding the enemy limited to "arms, ammunition, supplies, money, or other thing"? If the two offenses are truly different, in what respects are they different?

An arguable distinction advanced by Winthrop between the offenses described by Article 104 and treason is that the latter is a specific intent offense; that is, there must be proof of an intent to betray.¹⁹² But this view is not uncontested. Dean Miller of Duke University takes a contrary approach. He states: "In order that the crime of treason be committed there must be an intent. However no specific intent is required. It is sufficient that the defendant intended to do the prohibited act."¹⁹³ It is well settled that the offenses described by Article 104 require only a general intent.¹⁹⁴

The problem of intent in treason *cis-ci-cis* Article 104, is one with which the courts have wrestled with only limited success.

¹⁸⁸ 20 C.M.R. at 464.

¹⁸⁹ *Id.* at 463.

¹⁹⁰ *United States v. Olson*, 7 U.S.C.M.A. 460, 467, 22 C.M.R. 250, 257 (1957).

¹⁹¹ *Id.* at 468, 22 C.M.R. at 258.

¹⁹² See WINTHROP, *op. cit. supra* note 174, at 630.

¹⁹³ MILLER, CRIMINAL LAW 502 (1934).

¹⁹⁴ See MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, para. 183; *United States v. Batchelor*, 7 U.S.C.M.A. 354, 22 C.M.R. 144 (1956).

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The problem was squarely raised in the case of *Martin v. Young*, a *habeas corpus* proceeding involving the application of Article 3a, *Uniform Code of Military Justice*, to a serviceman who had been discharged and reenlisted subsequent to alleged Article 104 offenses.¹⁹⁵ This provision permitted court-martial for an offense committed in a previous enlistment, which would otherwise have been prohibited, where the offense was punishable by confinement for five years or more and could not be tried in any United States court.¹⁹⁶ The Government contended that Martin met this criteria and proceeded to charge him under Article 104 for offenses committed in a previous enlistment while a prisoner of war in Korea. The Government's argument was almost contemptuously brushed aside by the court. The conduct alleged against Martin, held the court, would also, *inter alia*, constitute treason and hence he was subject to prosecution in United States courts under civilian federal law.¹⁹⁷ In dealing with the argument that treason was a specific intent offense while Article 104 was not, the court hedged. Looking to the specification itself the court found Martin charged with giving aid to the enemy "wrongfully, unlawfully, and knowingly."¹⁹⁸ This, the court held, imports "criminality" and it was unnecessary to determine whether or not Article 104 denounced a general intent offense.¹⁹⁹ Just what the court meant by "criminality" was never made clear.

The meaning of the holding in the *Martin* case was subsequently discussed by the Court of Military Appeals in the *Batchelor* decision.²⁰⁰ The court referred without comment to Winthrop's conclusion that treason required specific intent and went on to hold that Article 104 required only general intent.²⁰¹ Discussing the case of *Martin v. Young* the court found nothing inconsistent with that holding. It concluded: "What the judge did not say is that Article 104 requires a specific intent, or that it prescribes the offense of treason, or that the Government is prohibited from overproving its case in prosecutions under Article 104."²⁰² Concerned with the intent required under Article 104, the Court of Military Appeals can be accused of looking at *Martin v. Young*

¹⁹⁵ *Martin v. Young*, 134 F.Supp. 204 (N.D. Cal. 1955).

¹⁹⁶ UNIFORM CODE OF MILITARY JUSTICE, Article 3a.

¹⁹⁷ 18 U.S.C. § 2381 (1958). See *Martin v. Young*, 134 F.Supp. 204, 207 (N.D. Cal. 1955).

¹⁹⁸ *Id.* at 208.

¹⁹⁹ See *id.* at 208.

²⁰⁰ *United States v. Batchelor*, 7 U.S.C.M.A. 354, 22 C.M.R. 144 (1956).

²⁰¹ *Id.* at 368, 22 C.M.R. at 158.

²⁰² *Ibid.*

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through military justice glasses. It is suggested that the language in that case may well be read, not for the proposition that Article 104 requires specific intent, but that treason requires something less.

Support for this interpretation may be bolstered by a close look at the language found in the Supreme Court opinion in the *Cramer* case.²⁰³ Since intent must be inferred from conduct of some sort, the court concluded it would be permissible to draw the usual reasonable inferences as to intent from the overt acts.²⁰⁴ This language indicates that something less than proof of specific intent will suffice.

The analogy of Article 104 to treason was considered tangentially in the *Dickenson* case.²⁰⁵ The accused there contended that Article 104 was unconstitutional. The court saw the thrust of his contention as implying that the article represents only a particularization of different overt acts of treason.²⁰⁶ When viewed more closely it appears the contention was actually broader; that by applying Article 104 to "any person," and thus including persons not otherwise subject to the Code, Congress was purporting to extend the definition of treason. This would be specifically prohibited by the Constitution. The obvious path to avoid this prohibition would have been for the court to hold that Article 104 and treason were two separate offenses. This the court declined to do, preferring not to reach such a "broad problem."²⁰⁷ Realizing that this approach did nothing to solve the problem, the court rationalized further that since *Dickenson* was clearly a person subject to the Code, he had no standing to try to "vindicate the Constitutional rights" of some third party.²⁰⁸

The close relationship of Article 104 to treason is bolstered by an examination of some of the rules of law applied by the Court of Military Appeals. When faced with problems concerning the substantive law to be applied under Article 104, the court has turned to the civil treason cases. Thus instructions by a law officer which were identical to those approved by Federal courts as stating the law of the affirmative defense of duress to treason

²⁰³ *Cramer v. United States*, 325 U.S. 1 (1944).

²⁰⁴ See *id.* at 31.

²⁰⁵ *United States v. Dickenson*, 6 U.S.C.M.A. 438, 20 C.M.R. 154 (1955).

²⁰⁶ *Id.* at 448, 22 C.M.R. at 164.

²⁰⁷ See *ibid.*

²⁰⁸ See *ibid.*

have been upheld in three cases.²⁰⁹ The civilian rule concerning the lack of motive as an excuse for treason has been applied to Article 104.²¹⁰ The definition of "enemy" has been lifted from its civilian counterpart.²¹¹ The convictions of the "radio traitors" of World War II have been applied for the proposition that the obligations of citizenship continue to rest on the shoulders of one inside a foreign country and subject to the local rules of the enemy.²¹² Indeed, while not required for an Article 104 conviction, the Army has shown itself not unmindful of the two witnesses rule.²¹³ Conversely, the civilian courts have not hesitated to prosecute for treason individuals who, by reason of a break in service, were lost to military jurisdiction.²¹⁴

The usefulness of Article 104 is difficult to gauge. Records of military courts are woefully inadequate to permit research on the extent of its historical application. It is thus impossible to compile any statistics concerning the number of individuals who have been tried and convicted by military courts prior to the enactment of the Uniform Code. Only two cases involving World War II prosecutions in violation of Article of War 81 ever reached the Board of Review level and both involved offenses committed within the United States.²¹⁵ Following the Korean War the offense achieved some vitality as a vehicle for bringing prisoner of war collaborators to trial. It is reported that ten of these individuals were charged under Article 104 and eight convicted.²¹⁶ But its comparative lack of use in no way imports obsolescence. In an age where increased psychological and sophisticated pressures may mold the minds of some to ignore their obligations of loyalty

²⁰⁹ See *United States v. Olson*, 7 U.S.C.M.A. 460, 22 C.M.R. 250 (1957); *United States v. Fleming*, 7 U.S.C.M.A. 543, 23 C.M.R. 7 (1957), CM 388546, Bayes, 22 C.M.R. 487 (1956), *petition for review denied*, 7 U.S.C.M.A. 798, 23 C.M.R. 421, (1957).

²¹⁰ See *United States v. Batchelor*, 7 U.S.C.M.A. 354, 22 C.M.R. 144 (1956).

²¹¹ See *United States v. Dickenson*, 6 U.S.C.M.A. 438, 20 C.M.R. 154 (1955).

²¹² See *United States v. Olson*, 7 U.S.C.M.A. 460, 22 C.M.R. 250 (1957).

²¹³ See U.S. DEPT OF ARMY, FIELD MANUAL 19-5, CIVIL DISTURBANCES AND DISASTERS para. 162b (1958).

²¹⁴ See *United States v. Monti*, 100 F.Supp. 209 (E.D.N.Y. 1951); *United States v. Provoo*, 125 F.Supp. 185 (S.D.N.Y. 1954), *rev'd*, 215 F.2d 531 (2d Cir. 1954), *2d indictment dismissed*, 17 F.R.D. 183 (D. Md. 1955), *aff'd per curiam*, 350 U.S. 857 (1955).

²¹⁵ CM 310327, Leonhard, 61 B.R. 233 (1946); CM 260393, Kissman (B.R., 24 Aug. 1944).

²¹⁶ Note, *Misconduct in the Prison Camp*, 56 COLUM. L. REV. 709, 745-46 (1956).

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to their country, a military law of treason continues to be necessary to provide effective deterrent and adequate punishment.

VII. SUMMARY

A survey of the law of treason leaves little room for conclusions. It is, indeed, a history lesson in which, contrary to Orwell, the past controls the present. At the outset, it can certainly be observed that the current law, both as enacted by statute and interpreted by the courts is heavily dependent on its English antecedents. In every area the law has been found to have derived from its precedents and twentieth century judges have continued to rely on opinions expressed by their ancestors, often hundreds of years ago.

The English law of treason was found to have enjoyed wide and strict application and to have resulted in perhaps thousands of executions. In this area the United States courts have failed to keep pace. While castigating treason as the highest of crimes, the American courts have displayed more concern for individual rights and less for governmental vengeance. In contrast with the English experience, not one man has ever been executed for committing treason against the United States.²¹⁷

Similar generalizations may be made with respect to Article 104, the military law of treason. Colonel Winthrop to the contrary, it appears impractical to call that offense by any other name. While certain legal distinctions may be found between the two offenses they are more than outweighed by the similarities. If the military law is narrower in scope than its civilian counterpart, it is because history has shown no need for a wider application. As a result any number of treasonable acts may be envisaged which would not violate the conduct denounced by Article 104. A prime example would be organized resistance to the enforcement of a federal statute or court order. But not a single instance may be conceived where the act that violates Article 104 would not also constitute treason.

There have been no trials for treason in this country for perhaps fifteen years. It may be partially for this reason that many writers, such as Dame Rebecca West, suggest that treason has entered an area of obsolescence and is passing rapidly to the obsolete. In a time of "cold war" as we know it today, there seems

²¹⁷ John Brown was executed for treason committed against the State of Virginia. See note 54 *supra* and text accompanying.

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little chance that treason can legally be committed. However a host of related offenses, such as espionage, sedition, advocating the overthrow of the Government, and failing to register as a subversive organization, appear adequate to fulfill the security needs of the state during such a period. But this fact alone does not compel the conclusion that the law of treason has no place in modern society. Today treachery and disloyalty are a more real and serious fear than ever before. The peacetime traitor should, by whatever law is necessary, be penalized for the evil of his works and the wartime traitor punished for the villain that he is.