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COMMENT

THE REVIVAL OF TREASON: WHY HOMEGROWN TERRORISTS SHOULD BE TRIED AS TRAITORS

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The rise of the Islamic State of Iraq and the Levant (ISIL) has led to unprecedented levels of American recruits seeking to further ISIL's agenda by both carrying out attacks on the homeland and traveling overseas to support extremist efforts there. In response, the United States government prosecuted these individuals mostly under charges of seditious conspiracy or material support to designated terrorist organizations. However, these charges do not accurately reflect the true nature of the crimes committed by homegrown terrorists: a betrayal of the United States by sympathizing with and supporting the nation's enemies. The only charge that appropriately acknowledges this betrayal of allegiance is the charge of treason. Treason punishes those who, owing allegiance to the United States, levy war against the nation, or in adhering to its enemies, gives them aid and comfort. This accurately describes the crimes homegrown terrorists commit when they support foreign terrorist organizations. Treason is the most appropriate charge for prosecuting these individuals because it acknowledges the sense of national allegiance and solidarity against the nation's enemies, provides an adequate punishment that fits the severity of the crime, and avoids constitutional issues associated with the currently enforced statutes under the rule against constructive treasons.

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INTRODUCTION

On January 21, 2015, the United States Department of Justice indicted Christopher Cornell, a 20-year-old American citizen from Green Township, Ohio,[1] for attempting to kill an officer of the United States, solicitation to commit a crime of violence, and possession of a firearm in furtherance of a crime of violence.[2] About four months later, the prosecution added an additional charge of attempting to provide material support to the Islamic State of Iraq

[1] Press Release, U.S. Dep't of Justice: Office of Pub. Affairs, Cincinnati-Area Man Charged with Attempting to Provide Material Support to ISIL (May 7, 2015) [hereinafter Cornell Press Release], http://www.justice.gov/ opa/pr/cincinnati-area-man-charged-attempting-provide-material-support-isil. Because this is an ongoing criminal investigation, this comment is in no way a statement on the guilt or innocence of the accused, who is presumed innocent until proven guilty in a court of law. *See id.*

[2] *See id.*; Kimball Perry, *Terror Suspect Wants to be Called 'Mr. Ubaydah'*, USA TODAY (Jan. 16, 2015), http://www.usatoday.com/story/news/nation/2015/01/16/terror-suspect-arraignment/21868735/.

and the Levant ("ISIL", also known as ISIS).[3] Allegedly, Cornell had discussed his intent to construct bombs and attack the United States Capitol in Washington, D.C. with an informant from the Federal Bureau of Investigation ("FBI").[4] Cornell told the informant that the attacks would be on behalf of ISIL, as part of his jihad against the United States.[5] Cornell was arrested after leaving a gun store where he purchased two semi-automatic rifles and 600 rounds of ammunition to use in his attack.[6]

On September 9, 2015, Hanad Mustofe Musse, a 19-year-old American citizen from Minneapolis, Minnesota, pleaded guilty to conspiring to provide material support to ISIL.[7] Musse, along with eight other co-conspirators, planned to travel overseas to join ISIL in Syria, however, police thwarted the plan in November 2014.[8] Following this failed attempt, police arrested Musse a second time after he attempted to obtain a false passport, and continued to meet with his co-conspirators. The United States charged him with conspiracy to provide material support to a known terrorist organization.[9]

Had either of these crimes come to fruition, the consequences in terms of loss of life and furthering ISIL's agenda would have been severe, such as a potential attack on the U.S. Capitol Building. These crimes were attempts by U.S. citizens, who were supporting an enemy of the United States,[10] to further that enemy's objectives in the form of warlike actions against the United States

[3] Cornell Press Release, *supra* note 1.
[4] Criminal Complaint at 3-5, United States v. Cornell (S.D. Ohio filed Jan. 14, 2015) (No. 1:15-mj-24).
[5] *Id.*
[6] *Id.* at 5.
[7] Press Release, U.S. Dep't of Justice: Office of Pub. Affairs, Minneapolis Man Pleads Guilty to Conspiracy to Provide Material Support to ISIL (Sept. 9, 2015) [hereinafter Musse Press Release], https://www.fbi.gov/ minneapolis/pressreleases/2015/ Minneapolis-man-pleads-guilty-to-conspiracy-to-provide-material-support-to-isil.
[8] *Id.*
[9] *Id.*
[10] *See* Ceylan Yeginsu & Helene Cooper, *U.S. Jets to Use Turkish Bases in War on ISIS*, N.Y. TIMES (July 23, 2015), http://www.nytimes.com/2015/07/24/world/ europe/turkey-isis-us-airstrikes-syria.html?_r=0 (explaining how U.S. is conducting military operations against ISIS targets in Syria and is a threat to the United States).

and its allies. These actions are a betrayal of the country whose laws have protected these people their entire lives. Only one charge adequately punishes these actions: treason.

Treason is the only crime defined in the United States Constitution, stating: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort . . . ."[11] Though the last treason trial in the United States took place in 1952,[12] the crime remains especially relevant during the War on Terror, where more and more U.S. citizens have sought to support foreign terrorist organizations ("FTO").[13]

Since the beginning of the War on Terror, the United States treated terrorism as a crime, punishable by the laws enacted by Congress, mostly involving charges of seditious conspiracy or providing material support to terrorist organizations. However, when a U.S. citizen commits these crimes, the offense carries an extra degree of severity: a betrayal of the allegiance a citizen owes their country.[14] Treason is the only charge that properly vindicates allegiance while providing an appropriate punishment that fits the severity of the crime committed, and avoids the constitutional issues associated with the current statutory scheme. For these reasons, the United States should revive treason as a more commonly used tool to prosecute and punish U.S. citizens who engage with and support the enemies of the United States.

Part I of this Comment will provide background information regarding the elements of treason as defined by the Treason Clause of

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[11] U.S. CONST. art. III, § 3, cl. 1.

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

[13] Wesley Bruer, *Study: Unprecedented Support for ISIS in the U.S.*, CNN (Dec. 2, 2015, 11:48 AM), http://www.cnn. com/2015/12/01/politics/isis-in-united-states-research/; Ed Payne, *More Americans Volunteering to Help ISIS*, CNN (Mar. 5, 2015, 4:55 PM), http://www.cnn.com/2015/03/05/us/isis-us-arrests/. *See generally*, LORENZO VIDINO & SEAMUS HUGHES, ISIS IN AMERICA: FROM RETWEETS TO RAQQA iv (2015).

[14] Carlisle v. United States, 83 U.S. 147, 154 (1872).

the Constitution and the history and ramifications behind treason's constitutional posture. Part II will examine the current statutory scheme for terrorism prosecutions, emphasizing the seditious conspiracy and material support statutes while comparing them to the elements of treason. Part III will apply the principles of the Treason Clause to the Cornell and Musse cases to demonstrate that the United States can use treason to prosecute homegrown terrorist activities. Part IV will argue that treason is a more appropriate charge than the current statutory scheme, first by detailing the positive benefits that labeling individuals as traitors has on society, and second by addressing the constitutional issues the current statutes face.

I. TREASON: ELEMENTS AND HISTORY

The Treason Clause reads:

> Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court. The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.[15]

Under the Clause, a person can commit treason in two ways: (1) by levying war against the United States; or (2) by adhering to enemies of the United States, by giving them aid and comfort. A charge of treason requires three elements: an allegiance to the United States, the commission of overt acts that are treasonous in nature, and either the testimony by two witnesses to each overt act, or the confession of the accused in open court.[16] Because of the nature of the Clause as a constitutional provision, the wording is unlikely to be changed, and any changes must come by means of interpretation. The following sections will describe the elements of treason in detail

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[15] U.S. CONST., art. III, § 3, cl. 1.

[16] *See* Treason, 18 U.S.C. § 2381 (1994) ("[w]hoever, owing allegiance to the United States, levies war . . . ."); Cramer v. United States, 325 U.S. 1, 30 (1945).

and how the Supreme Court has interpreted them, as well as the history behind why the Founders included the Treason Clause in the Constitution.

A. Elements of Treason

In order to define the various elements of treason, one must look to the leading court cases that have reviewed the Treason Clause.

1. Allegiance

The first element that is inherent in the charge of treason, but not expressly stated in the Clause, is the element of allegiance. Treason historically has been a crime of betraying allegiance.[17] The First Congress in its codification of the Treason Clause included the allegiance element as part of the offense,[18] even though the Treason Clause did not specifically require allegiance as an element of the offense. The allegiance element could also be derived from the phrase "against the United States," which indicates that an individual must owe some duty to the United States for a crime to be treasonous.

When the accused is a United States citizen, the allegiance element is automatically established.[19] There is no territorial limitation to this, meaning, "[a]n American citizen owes allegiance to the United States wherever he may reside."[20] If a United States citizen commits a treasonous action abroad, they remain subject to prosecution for that action in U.S. courts. The Court in *Kawakita v. United States* faced the issue of whether a person, born in the United States to Japanese nationals, retained his United States citizenship when he traveled to Japan, and while working as an interpreter for

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[17] *See* Note, *Historical Concept of Treason: English, American*, 35 IND. L. J. 70, 70 (1959) (explaining that early Roman concept of treason included betrayal of community allegiance).

[18] An Act for the Punishment of certain Crimes against the United States, 1 Stat. 112, § 1 (1790).

[19] Kawakita v. United States, 343 U.S. 717, 734 (1952) ("American citizenship, until lost, carries obligations of allegiance as well as privileges and benefits.").

[20] *Id.* at 736.

the Japanese military, subjected American prisoners of war to cruel and humiliating conditions.[21] As a matter of naturalization and international law, the Court held Kawakita had dual citizenship and had retained his United States citizenship.[22] Thus, he still retained allegiance to the United States and was triable for treason.[23]

Even foreign nationals, who are temporarily within the country owe a temporary allegiance, and the government may try them for treason.[24] In *Carlisle v. United States*, the United States charged British citizens with treason stemming from their manufacturing and sale of saltpeter to the Confederate military while in the United States.[25] The major issue in the case was whether President Andrew Johnson's general pardon of those involved in the rebellion during the Civil War included the foreign aliens involved, but the Court announced this broad definition of allegiance and found the aliens were still chargeable with treason.[26]

Thus, the allegiance element is simple and well defined. All U.S. citizens, wherever they may be, owe allegiance to the United States until they perform the legal requirements necessary to renounce their citizenship. Additionally, any foreign national who temporarily resides in the United States, owes a temporary allegiance to the country and is triable for acts of treason occurring within the United States.

2. Levying War

Levying war has been defined as the "direct effort to overthrow the government, or wholly to supplant its authority in some part or all of its territory."[27] The most important aspect of the crime of levying war has been the requirement that there must be an

[21] *Id.*
[22] *Id.* at 733-36.
[23] *Id.*
[24] Carlisle v. United States, 83 U.S. 147, 154 (1872).
[25] *Id.* at 150.
[26] Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863, 891-92 (2006).
[27] Willard Hurst, *Treason in the United States*, 58 HARV. L. REV. 806, 823 (1945) [hereinafter Hurst's Treason Part III].

assemblage of persons for executing a treasonous design.[28] The assemblage requirement is necessary because it was factually impossible for a single individual to levy war at the time of the Founding.[29] This principle is overshadowed by the fact that now a single individual with a nuclear weapon could cause a massive amount of destruction, but nonetheless assemblage remains the lynchpin on the levying war provision.[30]

However, this is distinguished from a mere conspiracy to levy war. The cases of *Ex parte Bollman* and *United States v. Burr* both revolved around Aaron Burr's alleged conspiracy to attack Spanish Mexico and cities in the Louisiana Territory in order to separate them from the rest of the United States.[31] The Court in *Bollman* stated, "[t]o conspire to levy war, and actually to levy war, the distinct offences. The first must be brought into operation by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed."[32] The Court held that mere intent to assemble and mere enlistment of people does not amount to levying war, but

> [I]f a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, 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.[33]

Treason by levying war requires an assemblage of people with treasonable purpose, who have attained some capability of force that amounts to levying war. However, a show of force can be ambiguous. Chief Justice John Marshall, who presided over the treason trial of Aaron Burr, admitted assemblages need not be armed, nor fire a shot:

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[28] *Ex parte* Bollman, 8 U.S. 75, 127 (1807).
[29] *See* United States v. Burr, 25 F. Cas 55, 169 (C.C.D. Va. 1807) (Marshall, C.J).
[30] Randel J. Meyer, *The Twin Perils of the Al-Aulaqi Case: The Treason Clause and the Equal Protection Clause*, 79 BROOK. L. REV. 229, 248 (2013).
[31] Larson, *supra* note 26, at 907.
[32] *Ex parte Bollman*, 8 U.S. at 126.
[33] *Id.*

> If a rebel army, avowing its hostility to the sovereign power . . . should march and countermarch before it, should manoeuvre in its face, and should then disperse from any cause whatever without firing a gun—I confess I could not, without some surprise, hear gentlemen seriously contend that this could not amount to an act of levying war.[34]

This suggests treason by levying war does not require a consummated act of war, but rather an assemblage gathered with the intent and force necessary to engage in war.

3. Adhering to their Enemies, Giving them Aid and Comfort

Traditionally, the U.S. courts have interpreted "aid and comfort" to require an act that is "directed in furtherance of the hostile designs of the enemies of the United States" and "strengthens, or tends to strengthen, the enemies of the United States."[35] Moreover, "an act which weakens, or tends to weaken, the power of the United States to resist or to attack the enemies of the United States . . . is in law giving aid and comfort . . . ."[36] Because there need not be an "actual blow" to the United States, the Treason Clause has been interpreted as prohibiting actions whose natural effects are strengthening an enemy.[37] Acts that clearly provide aid and comfort are those such as sending provisions, money, furnishing arms, or giving intelligence to an enemy.[38] Courts drew a line however, holding that words spoken, written, or printed were insufficient to satisfy the element.[39]

The Supreme Court in *Cramer v. United States* changed the traditional natural effects rule to require that the accused must

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[34] United States v. Burr, 25 F. Cas. 55, 162 (C.C.D. Va. 1807) (No. 14693) (Marshall, C.J.).
[35] United States v. Fricke, 259 F. 673, 676 (S.D.N.Y. 1919).
[36] *Id.*
[37] *See In re* Charge to Grand Jury, 30 F. Cas. 1046, 1047 (C.C.D. R.I. 1842) (No. 18275) (Story, J.).
[38] *Id.* at 1035.
[39] *Id.*

actually have given aid and comfort.[40] The Court stated, "[t]he very minimum function that an overt act must perform in a treason prosecution is that it show sufficient action by the accused, in its setting, to sustain a finding that the accused actually gave aid and comfort to the enemy."[41] The prosecution alleged that Anthony Cramer met with individuals he knew to be German saboteurs in a New York City bar and aided them.[42] The Court held that this action alone may have been sufficient to prove a treasonous intent, but was not sufficient to prove that he actually provided aid and comfort to the enemy saboteurs.[43]

The *Cramer* opinion has received a considerable amount of criticism, particularly from Willard Hurst, author of the seminal treatise on treason law prior to 1945. Hurst argued the *Cramer* Court created bad law, and confused the subject.[44] Hurst claims the majority advanced no justification or authority for the proposition that actual aid be given and "[t]o wait for aid to be 'actually' given the enemy risks stultification: the treason may be successful to the point at which there will no longer be a sovereign to punish it."[45] He also recognized the treason charge's value in prevention as well as punishment.[46]

Conventional wisdom would suggest that the majority in *Cramer* intended for treason prosecutions to be rare and difficult to prove.[47] However, in the decade following *Cramer*, about a dozen treason prosecutions went to trial, all of which but one resulted in convictions affirmed on appeal.[48] Thus, prosecutors could still prove treason under the *Cramer* rule. In fact lower courts on multiple occasions affirmed treason convictions for people engaged in radio

[40] Cramer v. United States, 325 U.S. 1, 34-35 (1945).
[41] *Id.*
[42] *Id.* at 36.
[43] *Id.* at 39, 48.
[44] Hurst's Treason Part III, *supra* note 27, at 806.
[45] *Id.* at 836-37.
[46] *Id.* at 837.
[47] Paul T. Crane, *Did the Court Kill the Treason Charge? Reassessing* Cramer v. United States *and its Significance*, 36 FLA. ST. U. L. REV. 635, 675 (2009).
[48] *Id.* at 677-78.

propaganda for enemy governments.[49] This, in essence, reversed the old idea that words alone cannot be the overt act that aids and comforts the enemy. Words retain a criminal character when they "constitute acts in furtherance of a program of an enemy to which the speaker adheres and to which he gives aid with intent to betray his own country."[50] The Supreme Court has not had the opportunity to rule on what became of the *Cramer* rule, as there has not been a treason case to review since 1954.[51]

4. Testimony of Two Witnesses to the Same Overt Act

As an evidentiary matter, a treason prosecution requires at least two witnesses to testify to each overt act alleged. This does not mean that the testimony of both witnesses must be identical, but must be to the same general act.[52] In *Haupt v. United States*, multiple witnesses saw the defendant's son, a German saboteur, enter the defendant's apartment building and saw him inside the defendant's apartment, but never saw him physically enter the apartment and remain overnight.[53] The Court held that, though two witnesses did not testify to the same precise overt act, the witnesses collectively testified that the defendant was keeping his son sheltered in his apartment and provided him aid and comfort.[54]

Though at least two witnesses must corroborate physical overt acts, the Court has held the intent aspect of adherence to the enemy would be impossible to prove by direct witnesses.[55] Thus "it is permissible to draw usual reasonable inferences as to intent from the overt acts," because every person intends the natural consequences of

[49] *See* Burgman v. United States, 188 F.2d 637 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 838 (1951); Chandler v. United States, 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949).
[50] Gillars v. United States, 182 F.2d 962, 971 (D.C. Cir. 1950).
[51] Crane, *supra* note 47, at 675.
[52] *See* Haupt v. United States, 330 U.S. 631, 640 (1947).
[53] *Id.* at 636-38.
[54] *Id.* at 637-38.
[55] Cramer v. United States, 325 U.S. 1, 31 (1945) ("[i]f we were to hold that the disloyal and treacherous intention must be proved by the direct testimony of two witnesses, it would be to hold that it is never provable.").

their behavior.[56] Thus a jury can infer treasonous intent from the overt acts testified by two witnesses without any further testimony indicating the state of mind of the accused.

5. Confession in Open Court

A treason conviction can also result if the accused confesses to the crime in open court. There has only been one instance in American history where an individual has pleaded guilty and confessed to treason in open court.[57] This does not mean that any admissions made by the accused to agents outside of court can suffice as "confessions in open court," nor can they supply a deficiency in proving the overt act itself.[58]

B. Treason Clause History and the Rule Against Constructive Treason

The Treason Clause was largely derived from English and colonial definitions of the crime.[59] English law had long defined treason in a fashion similar to what became the Constitutional Treason Clause.[60] The Statute of Edward III defining treason reads in relevant part, "[I]f 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 . . . ought to be Judged Treason."[61]

This wording provided a significant basis for the modern constitutional Treason Clause. This is so because the Framers at the

[56] *Id.*
[57] The defendant was a U.S. Army Sergeant who had stolen an airplane, flew to Germany, and helped the German military by providing radio propaganda against American forces. United States v. Monti, 168 F. Supp. 671, 672 (E.D.N.Y. 1958). In light of several similar treason cases upheld on appeal, Monti's lawyers advised him to plead guilty and confess in open court in order to obtain a lesser sentence. *See* United States v. Monti, 100 F. Supp. 209, 213 (E.D.N.Y. 1951).
[58] *Cramer*, 325 U.S. at 44-45.
[59] *See* Willard Hurst, *Treason in the United States*, 58 HARV. L. REV. 226, 400 (1944).
[60] *See* Treason Act 1351, 25 Edw. 3 c. 2 § 5 (Eng.), http://www.legislation.gov.uk/aep/Edw3Stat5/25/2#commentary-c919019.
[61] *Id.*

Constitutional Convention weighed the results of inserting the "Aid and Comfort" provision as a limiting function on "Adhering to the Enemy."[62] Deciding that the adhering element was too indefinite on its own, the Framers inserted "aid and comfort" as a restrictive provision.[63] Rufus King, a Massachusetts representative at the Convention, noted skepticism over the importance of the Clause, because Congress could levy capital punishment under other names than Treason.[64] This was not the view of the other Framers who sought to put closer limits on the crime.[65]

Another point of contention in the adoption of the Treason Clause was the juxtaposition of the overt act element with the two-witness requirement. The Framers did this because the overt act was meant to constitute a distinct element of proof that is directly linked to the two-witness rule.[66] The Framers derived the two-witness requirement from another English statute, 7 William III, which provided stronger evidentiary protection and guarded against perjury of witnesses.[67]

The Framers' intent for including the Treason Clause within the Constitution was to immortalize the definition, thus preventing a rogue legislature from creating what James Madison called "new-fangled and artificial" treasons.[68] These judge-made expansions of the common law definition of treason, more commonly called "constructive treasons," were made in order to cover conduct that had never before been known as treasonous.[69] This was a common practice in England and is what prompted the passage of the Statute

[62] Willard Hurst, *Treason in the United States*, 58 HARV. L. REV. 395, 399-402 (1945) [hereinafter Hurst's Treason Part II].
[63] *Id.* at 402.
[64] *Id.* at 400-01.
[65] *Id.* at 401.
[66] *Id.* at 403.
[67] Jon Roland, *Hurst's Law of Treason*, 35 UWLA L. REV. 297, 298 (2003); Hurst's Treason Part II, *supra* note 62, at 403.
[68] THE FEDERALIST NO. 43 (James Madison).
[69] Meyer, *supra* note 30, at 237.

of Edward III in order to control the definition of treason by the legislature instead of the courts.[70]

Another major concern was that the state could use an undefined definition of treason to punish political dissidents or people who opposed the sovereign's policies. Based on the freedom of speech and freedom of peaceful political expression, later memorialized in the First Amendment, it was important to limit the definition of treason to only levying war and adhering to enemies of the United States by providing aid and comfort to them.[71] The Statute of Edward III included as treason, "compass[ing] or imagin[ing] the Death of our Lord the King."[72] This led to some extreme treason convictions that were unacceptable to the Framers.[73] They believed that treason required a limited definition so that a creative legislature could not criminalize as treason political speech or opposition to the government or its policies.[74]

These themes became what is known as the "rule against constructive treasons," which is that Congress cannot make immaterial variations in the elements of treason that leave the gravamen of the offense intact without providing the procedural protections the Treason Clause provides.[75] Early cases applying the Treason Clause adopted this rule. In *Ex parte Bollman*, Chief Justice Marshall stated:

> It is therefore safer as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition, should receive

[70] Hurst's Treason Part II, *supra* note 62, at 409.
[71] *Id.* at 430.
[72] Treason Act 1351, *supra* note 60.
[73] *See* Hurst's Treason Part II, *supra* note 62, at 409 n.101 (describing a conviction of treason for wishing the death of the King after the king killed the accused's favorite buck).
[74] *See id.* at 414.
[75] Meyer, *supra* note 30, at 239.

> such punishment as the legislature in its wisdom may provide.[76]

Chief Justice Marshall suggests that if a crime clearly falls within the constitutional definition of treason, then the legislature may not create a statute criminalizing the same conduct.

However, no court has invalidated a law for violating the rule against constructive treasons. The first time this argument came upon the courts was in regards to the Espionage Acts of 1917 and 1918, but the decisions did not adequately rule on this issue.[77] In fact, the Supreme Court decisions facing this issue did not rule either way on the claim.[78] The only mention of the treason clause comes from Justice Brandeis' dissenting opinion in *Schaefer*, joined by Justice Holmes, which stated, "[t]o prosecute men for such publications reminds of the days when men were hanged for constructive treason. And, indeed, the jury may well have believed from the charge that the Espionage Act had in effect restored the crime of constructive treason."[79]

The most reasoned consideration of the rule against constructive treason argument during the post-World War I era is found in the Sixth Circuit's opinion in *Wimmer v. United States*. The court distinguished the Espionage Act saying that it punished "adherence by words" which was different from an overt act giving aid and comfort to an enemy.[80] However, the court noted that "[i]f we had to do with a case where the conduct which was prosecuted consisted of acts, we would have to consider the line of reasoning upon which *Wimmer* depends."[81] Notably, these cases were decided before courts held that providing enemy propaganda through speech

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[76] *Ex parte* Bollman, 8 U.S. 75, 127 (1807).
[77] *See* Hurst's Treason Part II, *supra* note 62, at 438-42.
[78] *See* Schaefer v. United States, 251 U.S. 466 (1920) (no mention of treason in majority opinion); Frohwerk v. United States, 249 U.S. 204, 210 (1919) (dismissing argument out of hand).
[79] *Schaefer*, 251 U.S. at 493 (Brandeis, J., dissenting).
[80] Wimmer v. United States, 264 F. 11, 13 (6th Cir. 1920).
[81] *Id.* at 12.

could provide aid and comfort, even under the restrictive *Cramer* rule.[82]

The landmark case of *Ex parte Quirin* was the final time the constructive treason argument was seen before the Treason Clause fell out of use. However, similar to the issue's treatment of the issue in *Frohwerk*, the Court summarily dismissed the subject with little discussion. The case involved German saboteurs (one of whom may have been a United States citizen, who had entered the United States to conduct sabotage missions) who had abandoned their German uniforms upon arrival.[83] The United States captured the saboteurs and charged them under a military commission for violations of the laws of war, specifically for abandoning their uniforms and planning to attack the United States.[84] The Court distinguished this offense from that of treason only by way of the absence of uniform element:

> The offense was complete when with that purpose they entered-or, having so entered, they remained upon-our territory in time of war without uniform or other appropriate means of identification. For that reason, even when committed by a citizen, the offense is distinct from the crime of treason defined in Article III, s 3 of the Constitution, since the absence of uniform essential to one is irrelevant to the other.[85]

However, even though absence of a uniform is not an element of treason, it does not change that what these saboteurs did could constitute levying war under the Treason Clause.

The strongest statement from the Court in derogation of the rule against constructive treason came from *Cramer*. The Court recognized that Congress could not rid itself of the two-witness requirement by merely giving treason another name, but gave Congress wide latitude in "enact[ing] prohibitions of specified acts thought detrimental to our wartime safety."[86] The Court noted that prosecutors could wish to avoid the "passion-rousing" potential of

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[82] *See e.g.*, Gillars v. United States, 182 F.2d 962, 971 (D.C. Cir. 1950).
[83] *Ex parte* Quirin, 317 U.S. 1, 20-22 (1942).
[84] *Id.* at 23, 31.
[85] *Id.* at 38.
[86] Cramer v. United States, 325 U.S. 1, 45 (1945).

treason prosecutions and instead focus upon a defendant's specific intent to do particular acts different from the definition of treason.[87] This statement from the Supreme Court along with the general practice of prosecutorial discretion, in large part explains the disappearance of treason prosecutions following the World War II era.[88]

Despite its ill-treatment, the rule against constructive treasons still remains, and was an important consideration the Framers made when they included the Treason Clause within the Constitution, instead of leaving the definition of the crime to the whims of Congress.

II. MODERN ENFORCEMENT OF TERRORIST ACTIVITIES

Following the *Cramer* decision and the disuse of treason prosecutions, Congress was free to prohibit subversive conduct without having to comply with the procedural protections of the Treason Clause. This has led to a large number of criminal statutes that prosecutors have used to combat terrorism at home and abroad. The following sections will detail the most commonly used of these statutes as well as the nature of modern homegrown terrorism.

A. Current Statutory Scheme

Today, there are a wide array of criminal punishments for conduct relating to aiding foreign entities, governments, and enemies of the United States or levying war against the United States.[89] Since the treason charge has fallen into disuse, many of these statutes have become the norm for prosecution of terrorism-related activities in the United States. Because of the large number of criminal laws that punish potentially treasonable conduct, this Comment's focus will be

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[87] *Id.*

[88] *See* Crane, *supra* note 47, at 682.

[89] *See, e.g.*, Gathering or Delivering Defense Information to Aid Foreign Government, 18 U.S.C. § 794 (1996); Providing Material Support or Resources to Designated Foreign Terrorist Organizations, 18 U.S.C. § 2339B (2015); Seditious Conspiracy, 18 U.S.C. § 2384 (1994); Recruiting for Service Against United States, 18 U.S.C. § 2389 (1994).

concentrated on the most enforced statutes: 18 U.S.C. §§ 2339A-B (providing material support to terrorists) and 18 U.S.C. § 2384 (seditious conspiracy).

1. Material Support to Designated Foreign Terrorist Organizations

Section 2339B reads in relevant part:

> Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 20 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization . . . .[90]

Section 2339A defines "material support or resources" as:

> . . . any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.[91]

In brief, the statute criminalizes providing material support, including money, personnel, and weapons, to designated FTOs with the only scienter requirement being knowledge of the terrorist organization's status.

Under the statute, many of the same items that constitute "material support" are identical to those which courts have found provided "aid and comfort" to enemies in treason prosecutions.[92]

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[90] 18 U.S.C. § 2339B(a)(1).

[91] Providing Material Support to Terrorists, 18 U.S.C. § 2339A(b)(1) (2009).

[92] *Compare* 18 U.S.C. § 2339A(b)(1), *with* Gillars v. United States, 182 F.2d 962, 971 (D.C. Cir. 1950), *and* Haupt v. United States, 330 U.S. 631, 640 (1947) (providing provisions, money, arms, and intelligence provides aid and comfort).

Every item listed in the statute can be considered a form of aid or comfort provided to a terrorist organization. The definition of aid or comfort may be more expansive under the Treason Clause as evidenced by later cases finding war propaganda in support of an enemy as treasonous.[93]

The major difference between the material support statutes and the Treason Clause is that treason focuses on the amorphous term "enemies of the United States" while material support only applies to designated FTOs. However different the two terms are, the difference is subtle. It can hardly be said that terrorist organizations the United States is actively engaged in combat with are not "enemies of the United States."[94] Further, U.S. courts have never required a formal declaration of war or even a formal authorization of military force for a foreign country or organization to become an "enemy" of the United States.[95] As long as circumstances are such that Congress and the executive agree that a foreign country or organization is an enemy, then they are an enemy.[96] All designations of FTOs require a finding by the Secretary of State that the organization's terrorist activity threatens the security of U.S. nationals or U.S. national security.[97] If the government properly designates a terrorist organization, and the organization does pose such a threat to national security, then the United States can consider them "enemies." This remains true even if the United States is not engaged in active military operations against them.

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[93] *See* Burgman v. United States, 188 F.2d 637, 639 (D.C. Cir. 1951); Chandler v. United States, 171 F.2d 921, 942-43 (1st Cir. 1948).

[94] *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (authorizing use of military force against perpetrators of September 11 attacks); *see also* Amber Phillips, *President Obama's Push for Military Authorization to Fight ISIS Won't go Anywhere in Congress. Here's Why.*, WASH. POST (Dec. 7, 2015), https:// www.washingtonpost.com/news/the-fix/wp/2015/12/07/3-reasons-congress-wont-authorize-obamas-use-of-force-against-the-islamic-state/ (explaining President Obama believes we are at war with ISIL).

[95] *See* Bas v. Tingy, 4 U.S. 37, 41 (1800) (finding France to be an "enemy" despite no formal declaration of war); Orlando v. Laird, 443 F.2d 1039, 1043 (2d Cir. 1971) (holding Congress acted sufficiently to authorize war in Vietnam without formal declaration).

[96] *See Bas*, 4 U.S. at 41.

[97] Designation of Foreign Terrorist Organizations, 8 U.S.C. § 1189(c) (2004).

A designation would show both Congress and the President's agreement that the organization poses a threat to the United States and any support given to them, regardless of its intended use, is prohibited. Based on these factors, the government could properly label any terrorist organization as an "enemy" of the United States. Especially following the November 13, 2015 attacks on Paris and the ISIL-inspired attack in San Bernardino, California, it is reasonable to conclude that ISIL is an "enemy" of the United States. It is also important to note there is a proposed amendment to the treason statute, 18 U.S.C. § 2381, to make any designated FTO an enemy of the United States for purposes of treason.[98]

2. Seditious Conspiracy

The other criminal charge most used to prosecute terrorism cases is 18 U.S.C. § 2384 for seditious conspiracy. Section 2384 reads:

> If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined under this title or imprisoned not more than twenty years, or both.[99]

This statute punishes the conspiracy to use force to overthrow or levy war against the government. One of the major purposes of this law is that it enables the government to arrest and prosecute a suspected terrorist before any substantive crime has occurred.[100] The Government need not wait for buildings to be bombed or lives to be lost before arresting and prosecuting conspirators under this law.[101]

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[98] *See* H.R. 2020, 114th Cong. (2015); S. 542, 114th Cong. (2015).
[99] 18 U.S.C. § 2384 (1994).
[100] United States v. Rahman, 189 F.3d 88, 116 (2d Cir. 1999).
[101] *Id.*

However noble this purpose, it does not change the fact that this statute punishes conspiracy to levy war or use force against the United States, which is also punishable as treason. As discussed in Part I, all that is required to constitute "levying war" is an assemblage of people who have both traitorous intent and the capabilities to use force that amounts to levying war.[102] Although a pure conspiracy without action is different from actually levying war, many conspiracies also fall under the Treason Clause, as long as there are multiple people involved and they have plans and materials to carry out an attack. Based on this notion, using the Treason Clause as grounds for prosecution accomplishes the same goal as the seditious conspiracy statute.

3. Rule Against Constructive Treason Applied

Both the material support and seditious conspiracy statutes punish conduct that is also punishable under the Treason Clause. This conflict implicates the rule against constructive treasons, which would invalidate these laws. However, on only a few occasions has a reviewing court been faced with a rule against constructive treason argument, and in each case, the courts dismissed the argument and upheld the statutes.

The first time a defendant used the constructive treason argument against one of these statutes was *United States v. Rodriguez*.[103] This case dealt with a seditious conspiracy conviction arising from a plot to bomb military training centers in Illinois.[104] The defendant challenged Section 2384, arguing it was a constructive treason and dispensed with the two witness requirement.[105] The court rejected this argument, holding that Section 2384 protected different government interests and proscribed a different crime.[106] The court distinguished Section 2384 from treason because seditious conspiracy does not require an allegiance element, does not extend beyond jurisdictional boundaries, and a conspiracy requires at least

[102] *See* Hurst's Treason Part III, at 823.
[103] United States v. Rodriguez, 803 F.2d 318, 320 (7th Cir. 1986).
[104] *Id.* at 319.
[105] *Id.* at 320.
[106] *Id.*

two persons.[107] The court also distinguished these two because they served different purposes: preventing urban terrorism for seditious conspiracy as opposed to punishing traitors for treason.[108]

Constructive treason arose again as an issue in *United States v. Rahman*.[109] The defendant in this case challenged the seditious conspiracy statute on the same grounds as in *Rodriguez* and the court rejected the argument in a similar fashion.[110] The court expressly declined to answer the question whether the government could charge a defendant with subversive conduct, a crime with all the same elements as treason except the two-witness requirement.[111] The court did this because it distinguished the crime of seditious conspiracy and treason on the allegiance element alone.[112]

The last time courts saw the argument was *United States v. Augustin*, where the defendant challenged an amendment to his indictment under the material support statutes.[113] In a brief review of the matter, the court rejected his argument, finding that the material support statute did not include allegiance to the United States as an element of the offense, citing both *Rahman* and *Rodriguez*.[114]

These courts failed to recognize that the differences they observed were covered under the elements of treason. Allegiance, as discussed above, is a non-factor when it pertains to U.S. citizens or aliens residing in the United States, which covers each one of the defendants in those cases.[115] Additionally, levying war requires an assemblage of persons, so a conspiracy of two or more people can fall under this definition. The court in *Rahman* almost recognizes that a conspiracy to use force against the United States is the same as treason, only distinguishing the two based on the allegiance

[107] *Id.*
[108] *Id.*
[109] United States v. Rahman, 189 F.3d 88, 111-14 (2d Cir. 1999).
[110] *Id.* 112-14.
[111] *Id.* at 113.
[112] *Id.* at 113-14.
[113] United States v. Augustin, 661 F.3d 1105, 1117 (11th Cir. 2011).
[114] *Id.*
[115] *See* Kawakita v. United States, 343 U.S. 717, 734 (1952).

element.[116] In addition, the extraterritorial effect of the Treason Clause has no bearing on prosecutions for traitorous conduct within the United States.

Based on these observations, the most prosecuted criminal laws to punish terrorist activity within the United States fall within the definition of treason and should implicate the rule against constructive treasons. However, there have only been a few instances where parties challenged these laws under this argument and in each instance, the court upheld the laws.

B. Modern Homegrown Terrorism

After the terrorist attacks on September 11, 2001, the United States faced grave threats at home and abroad from radical extremists, including the growth of ISIL. ISIL's rise to prominence led to unprecedented levels of recruiting and support throughout much of the globe.[117] ISIL was designated a FTO as an offshoot of Al Qaeda in Iraq in 2014.[118] Taking advantage of social media and encrypted messaging applications, ISIL spread its message and influence throughout much of the Western world.[119] By January 2016, thousands of foreigners and at least 200 Americans had either gone or attempted to go to Syria to help support ISIL's movement.[120] The ISIL-inspired attack on San Bernardino is a prime example of the danger that this group presents to the nation's security.[121] Homegrown terrorism inspired by the message ISIL promotes is one

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[116] *Rahman*, 189 F.3d at 113.
[117] Naila Inayat & Kaci Racelma, *Islamic State Influence Spreads Beyond Iraq and Syria*, USA TODAY (Oct. 2, 2014), http://www.usatoday.com/story/news/world/2014/10/01/islamic-state-spread-pakistan-india-china-mali/16507043/.
[118] In the Matter of the Amendment of the Designation of al-Qa'ida in Iraq, 79 Fed. Reg. 27,972, 27,972 (May 15, 2014).
[119] Ray Sanchez, *ISIS Exploits Social Media to Make Inroads in U.S.*, CNN (June 5, 2015), http://www. cnn.com/2015/06/04/us/isis-social-media-recruits/.
[120] *Id.*; Payne, *supra* note 13.
[121] Paul D. Shinkman, *The Evolving Extremist Threat*, U.S. NEWS (Dec. 7, 2015), http://www.usnews.com/ news/articles/2015/12/07/san-bernardino-shooting-shows-evolving-isis-threat.

of the gravest threats to America's national security faced in this era.[122]

Two prime examples of the kinds of actions taken by homegrown terrorists are the cases of Christopher Cornell and Hanad Mustofe Musse. Throughout 2014, Christopher Cornell, a U.S. citizen of Green Township, Ohio, allegedly created a Twitter account using an alias and began posting statements and videos in support of ISIL calling for violent attacks in North America.[123] In August 2014, Cornell allegedly made contact with a confidential informant indicating he had been in contact with ISIL members overseas and that he wished to carry out attacks against the United States.[124] Through further conversations with the informant, Cornell expressed his desire to obtain weapons and build pipe bombs to carry out an attack against the U.S. Capitol Building in Washington, D.C.[125] On January 14, 2015, Cornell was arrested by federal officials after he had purchased two semi-automatic rifles and about 600 rounds of ammunition from an Ohio gun store.[126] The United States initially charged Cornell with attempting to kill a federal employee and possession of a firearm in furtherance of a violent crime.[127] However, a superseding indictment added an additional charge of attempting to provide material support to a terrorist organization in the form of personnel and services.[128]

Throughout 2014, Hanad Mustofe Musse, an American citizen living in Minneapolis, Minnesota joined a group of individuals who wished to travel overseas to join ISIL and discussed methods of obtaining transport.[129] Musse then used money from his federal financial aid account to purchase a bus ticket to New York City to meet with his co-conspirators to take a plane to Athens,

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[122] *Id.*
[123] Criminal Complaint at 2-4, United States v. Cornell (S.D. Ohio filed Jan. 14, 2015) (No. 1:15-mj-00024).
[124] *Id.* at 3-5.
[125] *Id.* at 4-5.
[126] *Id.* at 5.
[127] Perry, *supra* note 2.
[128] Cornell Press Release, *supra* note 1.
[129] Musse Press Release, *supra* note 7.

Greece, from which they planned to travel to Syria.[130] This attempt failed when federal agents prevented Musse from boarding the plane at John F. Kennedy International Airport.[131] Following this failed attempt, Musse continued to make plans to travel to Syria and provided a passport photo to an informant in an attempt to obtain a false passport to use to travel to Syria through Mexico.[132] Musse was arrested and pleaded guilty to conspiring to provide material support to ISIL in September 2015.[133]

The Cornell and Musse cases provide a strong example of the type of threat homegrown terrorists pose. They also serve as useful case studies in how treason is the most appropriate method of prosecution for individuals who seek to betray the allegiance to the United States through terrorist actions.

III. APPLYING THE TREASON CLAUSE

As discussed above, many criminal statutes punish traitorous conduct under a different name with lesser penalties. Each of these criminal statutes possess the same elements as treason and most prosecutions under these statutes can also be prosecuted as treason, but without the procedural protection the Framers intended such prosecutions to provide.[134] The Musse and Cornell cases provide good examples of homegrown terrorist conduct in which prosecutors can successfully bring treason charges.

Hanad Musse ultimately pleaded guilty to conspiring to provide material support to a FTO in the form of personnel, including himself.[135] The actions Musse committed can be appropriately charged as treason in the form of adhering to the enemy, by providing them aid and comfort. Based on his attempted travels to Syria and information from his co-conspirators, Musse knew of ISIL's mission and location and he shared the same intent as

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[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *See, e.g.,* 18 U.S.C. § 2339B (2015); 18 U.S.C. § 2384 (1994).
[135] Musse Press Release, *supra* note 7.

the group. This shows that Musse adhered to an enemy of the United States, by sharing the same goal and intent to aid.[136] Additionally, providing personnel to an enemy provides aid and comfort in the form of stronger support and more soldiers on the battlefield.

There are several overt acts Musse committed, which provide the basis for a treason conviction, including meetings and discussions with co-conspirators, transfer of funds to purchase bus and plane tickets, his travel to New York City and attempt to fly to Greece, and his repeated attempts to obtain a false passport.[137] As long as testimony from at least two witnesses supports each of these overt acts, a treason conviction would likely be sustainable.

The United States charged Christopher Cornell with both attempting to kill federal employees and attempting to provide material support to a terrorist organization in the form of personnel and services.[138] A court could potentially try these actions as treason in a similar fashion to that of Musse. The statements Cornell allegedly made to the confidential informant showed his association with and support for ISIL and its goals.[139] Similar to Musse, this shows his adherence to an enemy of the United States. As discussed above, providing personnel and services to an enemy amounts to providing aid and comfort.[140] Cornell was allegedly planning to carry out an attack on the U.S. Capitol and his purchase of semi-automatic rifles was a substantial step in executing his plan.[141] The purchase of these weapons, along with the statements made to the confidential

[136] This section assumes the United States considers ISIL an "enemy", because the U.S. is actively engaged in military operations against them. *See, e.g.*, Letter from President Obama to the United States Congress, Authorization for the Use of United States Armed Forces in Connection with the Islamic State of Iraq and the Levant (Feb. 11, 2015), https://www.whitehouse.gov/the-press-office/2015/02/11/letter-president-authorization-use-united-states-armed-forces-connection.
[137] Musse Press Release, *supra* note 7.
[138] Cornell Press Release, *supra* note 1.
[139] Criminal Complaint at 3-4, United States v. Cornell (S.D. Ohio filed Jan. 14, 2015) (No. 1:15-mj-24).
[140] *See, e.g.*, *In re* Charge to Grand Jury, 30 F. Cas. 1034, 1035 (S.D.N.Y. 1861).
[141] Criminal Complaint at 4-5, United States v. Cornell (S.D. Ohio *filed* Jan. 14, 2015) (No. 1:15-mj-24).

informant are both overt acts which can support a treason conviction as long as testimony from at least two witnesses proves it.

The problem with these and similar cases, is that the defendants did not complete the crime, so aid and comfort was not actually provided to an enemy of the United States. As with most terrorism crimes, the primary goal of law enforcement is to prevent future attacks, rather than waiting for an attack to occur. Under the *Cramer* Court's interpretation of the Treason Clause, this goal would be impossible to fulfill under a treason prosecution, because aid and comfort cannot be given in these situations without either an attack being carried out (i.e. in the Cornell case), or a person leaving the jurisdiction of the United States (i.e. the Musse case). In order for treason to be a robust and feasible means for preventing terrorist attacks and punishing those who seek to commit them, the interpretation that aid and comfort must actually be given to support conviction must be overruled.

The proper interpretation of both the levying war and aid and comfort elements should include overt acts whose natural consequences amount to levying war or providing aid and comfort. For example, if a person has the intent to go overseas and join a terrorist organization to conduct attacks with them, and they carry out substantial steps towards that plan (i.e. purchasing a plane ticket and attempting to board), then the natural consequences of such an overt act would be to provide aid and comfort to an enemy of the United States. This would be in accordance with the understanding of the Treason Clause prior to *Cramer*. An act which "strengthens, or tends to strengthen" an enemy of the United States is the classic definition of an overt act which provides aid and comfort.[142] Included in "tends to strengthen" are actions whose natural effect is to strengthen an enemy.[143] The actions that both Musse and Cornell attempted, had they been able to carry out their plan, are actions that would have strengthened an enemy. Joining a terrorist organization overseas and carrying out an attack in the name of a terrorist organization have natural consequences, which strengthen the

[142] *See* U.S. v. Fricke, 259 F. 673, 676 (S.D.N.Y. 1919).
[143] *See id.*

message and support for these terrorist organizations. A natural consequences approach to the treason clause would allow law enforcement to prevent attacks by arresting and prosecuting suspected terrorists when their actions show both treasonous intent and have the effect of strengthening enemy terrorist organizations.

Note that preparation for a treason prosecution must begin in the investigatory stage. Because of the two-witness requirement, a prosecutor must support all overt acts with the testimony of two witnesses. This is important, especially during the investigation stage, because at least two individuals must witness every action amounting to treasonous conduct in order to make it to a jury in a treason trial. If only one individual witnesses an action, then it cannot be factored into the totality of the circumstances of whether the defendant's actions are treasonous. Law enforcement and prosecutors in terrorism cases must conduct their investigations with this procedural restriction in mind in order to overcome it and properly prosecute homegrown terrorist activities as treason.

IV. TREASON IS THE MOST APPROPRIATE CHARGE FOR HOMEGROWN TERRORIST CRIMES

"[T]here is no crime which can more excite and agitate the passions of men than treason . . . "[144] For this reason, treason prosecutions have been extremely rare and only done near times of war.[145] However, because of the changing nature of terrorist recruiting efforts and the rise of homegrown terrorist activity, the treason charge is once again becoming relevant in the current struggle against terrorism. Charging U.S. citizens who seek to commit these terrorist activities with treason provides positive societal benefits beyond typical law enforcement purposes of deterrence and punishment. Additionally, charging individuals with treason avoids constitutional issues with the current statutes under the rule against constructive treasons.

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[144] *Ex parte* Bollman, 8 U.S. 75, 125 (1807).

[145] Lauren Prunty, *Terrorism as Treason: US Citizens and Domestic Terror*, JURIST (Sept. 11, 2011), http:// jurist.org/dateline/2011/09/lauren-prunty-domestic-terrorism-treason.php.

A. Treason Provides Many Positive Societal Benefits That Current Statutes Do Not Provide

The current statutory scheme treats defendants accused of supporting FTOs like ordinary criminals. This does not fully acknowledge the severity of the crime they have committed. As discussed above, U.S. citizens charged with seditious conspiracy and providing material support to terrorist organizations have also committed treason against the United States. Prosecuting these individuals with treason provides other benefits besides that of typical law enforcement purposes of deterrence and punishment.

Charging U.S. citizens accused of traitorous conduct with treason reaffirms a sense of allegiance and loyalty to the United States. All U.S. citizens and foreigners residing in the United States owe allegiance to the United States.[146] Prosecuting those who seek to betray this sense of allegiance for treason affirms the notion that "betrayal of our country will bring severe consequences."[147]

Because treason charges can reinforce societal identity and allegiance, treason prosecutions also show solidarity against enemies of the United States. The problem with this in the terrorism context would be that it could legitimize these organizations.[148] All previous treason trials have concerned state enemies. Considering non-state terrorist organizations as enemies of the United States could have the effect of giving these organizations legitimacy on the same level as state actors. However, this problem would be minimal in light of the fact that the United States is already engaged in armed conflict with many of these terrorist organizations, and they are treated similar to state actors in this regard. Additionally, labeling a terrorist

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[146] *See* Kawakita v. United States, 343 U.S. 717, 734 (1952); Carlisle v. United States, 83 U.S. 147, 154 (1872).

[147] *See* Deputy Attorney General Paul McNulty, et al., U.S. Dept. of Justice, Transcript of Press Conference Announcing Indictment of U.S. Citizen for Treason and Material Support Charges for Providing Aid and Comfort to al Qaeda (Oct. 11, 2006), http://www.justice.gov/archive/dag/speeches/2006/dag_speech_061011.htm.

[148] *See* Kristen E. Eichensehr, *Treason in the Age of Terrorism: An Explanation and Evaluation of Treason's Return in Democratic States*, 42 VAND. J. TRANSNAT'L L. 1443, 1495-97 (2009).

organization an enemy of the United States does not change the nature of the conflict against it, but rather affirms the nation's mission to defeat it both abroad and domestically.

Another benefit of the treason charge is avoidance of the constitutional issues surrounding military detention and status of enemy combatants, at least when applied to U.S. citizens and individuals temporarily residing within the United States. Since the War on Terror began following 9/11, a major legal debate has been whether to deal with terrorism issues as a military or civilian matter.[149] Though treason charges would not work for many enemy combatants overseas, it would be an appropriate charge for U.S. citizens captured abroad. Charging these individuals with treason in a civilian court would have more constitutional legitimacy than trying them in military commissions because the crime of treason comes directly from the Constitution, rather than the tenacious authority for military tribunals garnered from *Ex parte Quirin*.[150]

Compared to the currently enforced statutes, treason offers prosecutors a broader range of potential punishment.[151] The maximum punishment for seditious conspiracy and material support are 20 years and 15 years in prison, respectively, while only authorizing longer punishment for material support if a death results.[152] Treason, on the other hand, provides a wide range of punishment ranging from a minimum five years to life of incarceration, as well as a large fine.[153] Treason can also be a capital offense.[154] This wide range of punishments allows prosecutors wider discretion to tailor their sentencing recommendations to fit the nature of the crime. As seen from an application of treason to the *Musse* and *Cornell* cases, treason cases can vary considerably in degree of severity and harm. Having such a broad range of potential

[149] *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting); *see also* Eichensehr, *supra* note 148, at 1492-94.
[150] *See Hamdi*, 542 U.S. at 519 (citing *Ex parte Quirin* as one authority authorizing detention of United States citizens as enemy combatants during hostilities); *see also* Eichensehr, *supra* note 148, at 1493-94.
[151] *Compare* 18 U.S.C. § 2381 (1994), *with* 18 U.S.C. §§ 2339B, 2384 (2015).
[152] 18 U.S.C. §§ 2384, 2339B.
[153] 18 U.S.C. § 2381.
[154] *Id.*

sentences gives prosecutors better ability to recommend a sentence, which fits the severity of the traitorous conduct, which the current statutes fail to recognize. A potential drawback to charging more individuals accused of terrorist activity with treason is that treason is a death penalty eligible offense.[155] However, principles of prosecutorial discretion solve this problem because a prosecutor seeking the death penalty for a treasonous offense which did not cause loss of life, will have to contend with current trends towards prohibiting the death penalty for crimes that do not result in death.[156]

Because they punish the same conduct and provide a lesser punishment, some might regard the current statutes as a pretext for treason. Charging with these lesser crimes sets these individuals free sooner than is reasonable and sends a signal that federal law enforcement cannot prove terrorism crimes.[157] Charging U.S. citizens accused of terrorism crimes with treason avoids this problem, because treason is the highest crime possible against the country, and it provides a wide range of potential punishments that can better fit the crimes people commit.

B. Current Statutes Present Strong Constitutional Concerns Under the Rule Against Constructive Treasons

Not only would treason prosecutions for homegrown terrorist activities provide strong societal and law enforcement benefits, they would also avoid constitutional concerns arising from the current statutes under the rule against constructive treasons. It follows that since the Constitution defines treason, and the Constitution only authorizes Congress to determine the punishment for the offense;[158] Congress may not proscribe the same offense under a different name with lesser procedural protections. This is the rule against constructive treasons and this is what Congress has done through these statutes.

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[155] *Id.*

[156] *See* Eichensehr, *supra* note 148, at 1498-1503.

[157] *See* Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 618-24 (2005) (discussing charging terrorist suspects with immigration violations).

[158] *See* U.S. CONST. art. III, § 3, cl. 1.

The seditious conspiracy and material support statutes both prohibit conduct, which is also triable under the Treason Clause. Because of this similarity, the statutes implicate the rule against constructive treasons and are at least unconstitutional as applied in many situations involving homegrown terrorism. Admittedly, some conspiracies may be triable under seditious conspiracy that may not amount to levying war under the Treason Clause, because of insufficient capability to use force against the United States, and because some designated terrorist organizations may not be appropriately labeled "enemies" of the United States. However, these situations would be rare because a court would likely consider any terrorist organization the United States is actively conducting military operations against an "enemy" of the United States, and prosecutors would theoretically not charge a suspect involved in a conspiracy until the conspiracy had ripened or come close to operational capability.

The Circuit Courts that have upheld these statutes against constructive treason challenges all distinguished them based on the absence of an allegiance element.[159] These courts failed to recognize that when applied to prosecutions against citizens or individuals residing within the United States, the allegiance element is established automatically and does not require a separate finding. Because of this misconception, these courts decided not to rule on whether Congress can remove procedural protections guaranteed by the Constitution by calling treason by a different name. Based on the history behind the Treason Clause, this amounts to creating a constructive treason and is unconstitutional. Prosecuting homegrown terrorists for treason would avoid this constitutional issue while also meeting the same law enforcement goals of preventing and deterring attack.

V. CONCLUSION

The Treason Clause of the Constitution mandates that treason shall consist only of levying war against the United States or

[159] *See* United States v. Augustin, 661 F.3d 1105, 1117 (11th Cir. 2011); United States v. Rahman, 189 F.3d 88, 111-14 (2d Cir. 1999); United States v. Rodriguez, 803 F.2d 318, 320 (7th Cir. 1986).

adhering to their enemies, giving them aid and comfort.[160] In spite of this, Congress passed criminal statutes that prohibit giving aid and comfort to terrorist enemies of the United States as well as statutes that prohibit conspiring to levy war or overthrow the government using force.[161] Both of these actions fall squarely within the definition of treason as expounded by the Framers, but prosecutions under these statutes fail to provide the two-witness procedural protections, which a prosecution for treason would require. For this reason, the charge of treason is the most suitable charge for prosecuting homegrown terrorists seeking to support terrorist organizations by both carrying out attacks on the homeland and traveling overseas to join them.

Treason cannot be a feasible charge used to prevent terrorist attacks without overruling the *Cramer* Court's interpretation that aid and comfort must actually be given to support a treason conviction. This interpretation does not follow lower court precedent regarding treason in the period before World War II and has limited lasting applicability. A more appropriate interpretation of this language is that the natural consequences of an action that amounts to levying war or giving aid and comfort to an enemy should be treated as treasonous. This solution provides law enforcement adequate means to prosecute terror suspects before they carry out attacks and provides substantial punishment for individuals seeking to betray this country.

The threat from homegrown terrorists to the security of the United States is immense and continuously growing. In order to both prevent attacks and provide a strong deterrent to this conduct, prosecutors should utilize the treason charge as a means for prosecuting and punishing individuals who seek to commit terrorist attacks against the United States. Prosecuting for treason rather than lesser statutes that cover the same conduct sends a proper signal, vindicating the societal sense of allegiance and solidarity against enemies of the United States while also avoiding constitutional issues presented by current statutes that punish the same conduct. Treason

[160] U.S. CONST. art. III, § 3, cl. 1.
[161] *See* 18 U.S.C. §§ 2339B, 2384 (1994, 2015).

is the most appropriate charge for the prosecution of homegrown terrorists seeking to travel overseas to join terrorist organizations or support them by carrying out attacks on U.S. soil.