

# On Treason

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**A CITIZEN'S GUIDE**

*to the*

**LAW**

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## APPENDIX: QUIZ YOURSELF!

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The following ten hypothetical questions allow you to test your basic knowledge of American treason law. (The answers appear after the questions section.)

1. A White House employee was recently quoted in the *New York Times* as stating the president was an “idiot” and “completely unprepared to lead the country in the event of a national security crisis.” The president has responded by asking the Department of Justice to consider treason charges against both the employee and the *New York Times*. Have either of these parties committed treason against the United States?
2. Congress has recently enacted a law stating that it is treason for any person to divulge American national security secrets to any foreign nation or any foreign citizen. Is this law constitutional?
3. A group called Americans for Open Borders believes that all immigration laws are unjust

and unfair. They call for a nationwide attack on Customs and Border Patrol (CBP) and Immigrations and Custom Enforcement (ICE) offices on the anniversary of the 2016 presidential election. Over ten thousand people, many armed with guns, attack these offices nationwide and cause many of the offices to shut down. Federal officers manage to suppress the attacks and arrest nearly one thousand people. Can the arrestees be convicted of treason by levying war against the United States?

4. Ramona Marshall, an American citizen, recently acquired a military-grade tank. Convinced that the American government was in league with the devil, Marshall drove the tank to the Pentagon and used the tank's large gun to fire numerous rounds at the Pentagon. Marshall was finally captured, but her attack killed forty-five Pentagon employees and injured over a hundred more. Can Marshall be convicted of treason by levying war against the United States?
5. California has recently charged Gary Hanson, a California citizen, with treason against the state of California for launching a cyberattack on the state's prisons. The attack allowed numerous prisoners to escape, and the state claims that Hanson's actions constitute levying war against the state of California. Hanson has

moved to dismiss his indictment on the ground that California has no authority to prosecute cases of treason. Will Hanson's motion be granted?

6. Charles Beaumont, a French citizen, has been living in Baltimore, Maryland, for the past ten years. Recently, the federal government has learned that Beaumont has been providing significant sums of money to Al-Qaeda. Can Beaumont be convicted of treason against the United States?
7. The United States is seeking to host the 2032 Summer Olympics, as are several other nations, including Argentina. An employee of the United States Department of State, with responsibility for the U.S. Olympic bid, is secretly on the payroll of Argentina, and has provided Argentina with detailed information about the U.S. bid, including a description of the bid's strongest flaws. Recently, the employee's actions were discovered by the FBI. Can the employee be convicted of treason against the United States?
8. During World War II, a German agent secretly entered the United States. He befriended a young woman, who agreed to give him \$5,000 to buy a car. The agent used the car to conduct acts of sabotage against American war industries. At the time the woman gave him the money, she did not know the man was a

- German agent. Can she be convicted of treason for providing aid and comfort to the enemy?
9. During the invasion of Afghanistan following 9/11, an American citizen posted a blog entry praising the Taliban government of Afghanistan and arguing that American intervention in Afghanistan was illegal. Could he be convicted of treason for providing aid and comfort to the enemy?
  10. The FBI suspects that Carla Roberts, an employee of the Department of Defense, is passing military secrets to a nation with whom the United States is at war. Late one night, an undercover agent meets with Roberts, who admits that she has transmitted military information to the enemy. Is the agent's testimony about this event sufficient to convict Roberts of treason?

## ANSWERS

1. No. Under Article III of the Constitution, treason is limited to "levying war against the United States, or adhering to their enemies, giving them aid and comfort." Criticism of the president, even from a White House employee, is not an act of levying war or of adhering to enemies. The president could fire the employee, but the employee cannot be prosecuted for treason. Similarly, the *New York Times* cannot

be prosecuted for printing the employee's statement.

2. No. Under Article III, treason consists *only* of levying war against [the United States,] or adhering to their enemies, giving them aid and comfort. Congress lacks the power to alter this definition through legislation. Because some acts of espionage are not treason (for example, if the secrets are given to a nation with whom we are not at war), this statute improperly extends the constitutional definition of treason.
3. Probably not. Under late-eighteenth- and early-nineteenth-century precedents, these acts would constitute levying war against the United States. The closest analogy would be to the Whiskey Rebellion of 1794, when thousands of men marched to resist the federal excise tax on whiskey. If a court adhered to these precedents, Americans for Open Borders did commit treason. However, later cases suggest that treason by levying war requires a design to overthrow the government completely, rather than simply frustrate the operation of one particular law. Under the facts stated, there was no attempt to overthrow the government; instead, it was a riot to block the operation of a small subset of the laws. Most likely, a court will hold that such acts do not constitute treason. The rioters, however, have

still committed numerous other offenses for which they can properly be indicted.

4. Probably not. Judicial decisions have stated that levying war requires a use of force, which was present here. However, those decisions have also required that such force take the form of an “assembly of men” and have rejected the idea that a solitary individual is capable of levying war against the United States. In this case, there was no assembly of men. On the other hand, the cases interpreting levying war are quite dated, so it is possible that a court might reinterpret the levying war provision in light of modern technology to permit prosecutions of solitary individuals for the offense of levying war.
5. No. Most states recognize an offense of treason against the state, which is a distinct crime from treason against the United States. States are free to create their own definitions of treason, and states have convicted individuals of treason in the 1840s, 1850s, and 1920s. Most likely, a court would uphold a state’s ability to prosecute Hanson for treason.
6. Yes. Foreign citizens resident within the United States owe a local allegiance to the United States and are subject to American treason law. Since providing aid to Al-Qaeda is a form of aiding the enemies of the United States, Beaumont can be charged with treason.



7. No. Unless the United States is in a state of open war with Argentina, providing sensitive information to Argentina is not a form of adhering to the enemy. The employee's actions are disloyal to the United States, but not all disloyalty can be prosecuted as treason.
8. No. To be convicted of treason, a person must have intended to betray the United States. Even though she gave aid and comfort to the enemy, she did not do so either purposefully or knowingly, and therefore lacked the required traitorous intent.
9. No. Criticism of American war-making, even if potentially helpful to the enemy, is protected under the First Amendment of the U.S. Constitution. Moreover, it does not appear that the writer had the required intent to betray the United States.
10. No. Under Article III, no person can be convicted of treason without the testimony of two witnesses to the same overt act, or confession in open court. The agent did not directly observe an overt act of treason, and even if he had, two witnesses would be required. Roberts's confession is not sufficient for conviction since it was not made in open court.

## NOTES

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### INTRODUCTION

1. Zachary Basu, “The 24 Times Trump Accused Someone of ‘Treason,’” *Axios*, June 16, 2019, <https://www.axios.com/trump-treason-russia-investigation-new-york-times-e1660029-c73c-4809-8bd5-8988f1ed4fda.html>.
2. “Trump Accuses FBI Agent Removed from Mueller Probe of Committing ‘Treason,’” *Politico*, January 12, 2018, <https://www.politico.com/story/2018/01/12/trump-peter-strzok-treason-337918>.
3. Jessica Taylor, “Trump: Democrats ‘Un-American,’ ‘Treasonous’ during State of the Union,” *NPR*, February 5, 2018, <https://www.npr.org/2018/02/05/583447413/trump-democrats-un-american-treasonous-during-state-of-the-union>.
4. Conor Friedersdorf, “A President Falsely Charging ‘Treason’ Is What the Founders Feared,” *Atlantic*, April 11, 2019, <https://www.theatlantic.com/ideas/archive/2019/04/trump-treason/586915/>.
5. Philip Bump, “Trump, Not Understanding Treason, Names People He Thinks Committed the Capital Crime,” *Washington Post*, May 23, 2019.
6. Basu, “24 Times”; Daniel Dale, “Fact Check: Trump Made Seven False Claims to Sean Hannity,” *CNN*, July 26, 2019, <https://www.cnn.com/2019/07/26/politics/fact-check-trump-hannity-july-phone-interview/index.html>.
7. Katie Rogers, “As Impeachment Talk Moves Forward, Trump’s Language Turns Darker,” *New York Times*, Octo-

- ber 2, 2019, A13.
8. “BREAKING: Chuck Schumer Just Got The WORST NEWS EVER!—Treason Charges Probable,” *ENH Live* (defunct), March 2017, <http://hillaryclinton.trendolizer.com/2017/03/breaking-chuck-schumer-just-got-the-worst-news-ever-treason-charges-probable.html>.
  9. A. M. Smith, “BREAKING: Trump U.S. District Attorney to Pursue TREASON Charges Against Barack Obama!,” *en Volve*, February 21, 2017, <http://en-volve.com/2017/02/21/breaking-trump-u-s-district-attorney-to-pursue-treason-charges-against-barack-obama/>.
  10. James H. Chesky, “Try U.S., [sic] Senator Mitch McConnell for Treason,” petition, MoveOn.org, <http://petitions.moveon.org/sign/try-us-senator-mitch>.
  11. ALLIGATOR! in Los Angeles, “Indict DNC Chair Debbie Wassermann [sic] Schultz and DNC Co-conspirators for TREASON!,” petition, Change.org, <https://www.change.org/p/fbi-director-james-comey-indict-debbie-wasserman-schultz-for-treason>.
  12. Julia Brucculieri, “Jon Voight Thinks Miley Cyrus and Shia LaBeouf Are ‘Teaching Treason,’” *Huffington Post*, January 25, 2017.
  13. “Colin Kaepernick Branded a ‘Traitor’ by NFL Executives Over Anthem Protest,” *Guardian*, August 31, 2016.
  14. The execution procedure is described in William Blackstone, *Commentaries on the Laws of England* (Oxford, UK: Clarendon Press, 1769), 4:92.
  15. *Cramer v. United States*, 325 U.S. 1, 46–47 (1945).
  16. In 1892, a law journal noted, “The learning on the doctrine of high treason, although voluminous, is more familiar to the antiquary than to the practitioner.” Roger Foster,

“Treason Trials in the United States,” *Albany Law Journal* 46 (1892): 345–47.

17. The Treason Clause of Article III means that American treason law is a subset of American constitutional law, a field notoriously plagued by controversy over methodological issues. At the very broadest level there are disputes between those who believe that constitutional meaning is relatively fixed at the time of enactment and those who favor more of a “living constitution” approach. There are also disputes over how much weight to give to strictly textual arguments, to prior judicial decisions, and to pragmatic considerations.

This book does not attempt to resolve any of these disputes or to advance any particular methodological agenda. Suffice it to say that American courts, including the Supreme Court, apply a wide variety of methodologies when deciding cases. My goal is to provide the fairest reading I can of the law, using the decided cases and whatever other materials might be relevant. In thinking about how courts might address unresolved issues, I try to consider the various methodologies and arguments that might be employed on either side.

One point, however, bears mentioning. In some places the Constitution uses terms that are clearly drawn from English law and that have a very distinct meaning under English law. Such terms include “writ of habeas corpus” and “letters of marque and reprisal.” These terms have a very limited range of interpretation (for example, a writ of habeas corpus cannot be interpreted as a writ of replevin). In other places, the Constitution employs capacious language that almost seems to invite judicial interpretation

in accordance with the felt needs of the times. Such phrases include “due process of law” and “equal protection of the laws.”

The terms “levying war against the United States” and “adhering to their enemies, giving them aid and comfort” are much closer to “writ of habeas corpus” than they are to “due process of law.” They had a distinctive meaning under English law, and American courts have consistently relied on English law to interpret them. As explained in chapter 1, it is possible that modern American treason law is narrower than eighteenth-century English treason law, but it is not plausible that it is broader.

## **1: THE ENGLISH ORIGINS OF AMERICAN TREASON LAW AND THE ADOPTION OF THE CONSTITUTION'S TREASON CLAUSE**

The leading work on American treason law is James Willard Hurst, *The Law of Treason in the United States* (Westport, CT: Greenwood, 1971). For treason law during the American Revolution, see Carlton F. W. Larson, *The Trials of Allegiance: Treason, Juries, and the American Revolution* (New York: Oxford University Press, 2019). On treason law in medieval England, see J. G. Bellamy, *The Law of Treason in England in the Later Middle Ages* (Cambridge: Cambridge University Press, 1970).

1. The date for this statute is sometimes given as 1352. The discrepancy arises from the date of the New Year, which in the 1300s was March 25. The Statute of Treasons was enacted in January 1351, according to the older dating. Modern dating would treat the month as January 1352.
2. J. G. Bellamy, *The Law of Treason in England in the Later Middle Ages* (Cambridge: Cambridge University Press, 1970), 100.

3. For an overview, see J. H. Baker, *An Introduction to English Legal History*, 4th ed. (London: Reed Elsevier, 2002), 223–45.
4. Bellamy, *Law of Treason*, 71, 79–82.
5. Edward Coke, *The Third Part of the Institutes of the Laws of England*, 5th ed. (1671), 2.
6. James Wilson, “Lectures on Law,” in *The Works of James Wilson*, ed. Robert Green McCloskey (Cambridge, MA: Harvard University Press, 1967), 2:664–65.
7. *United States v. Burr*, 25 F. Cas. 1, 13 (C.C.D. Va. 1807) (No. 14,692) (Marshall, C.J.).
8. *United States v. Hoxie*, 26 F. Cas. 397, 398 (C.C.D. Vt. 1808) (No. 15,407) (Livingston, J.).
9. See, e.g., Francia’s Case (1717), *Reports of Sir Peter King, Chief Justice of Common Pleas, 1714–1722*, eds. Lloyd Bonfield & L.R. Poos (London: Selden Society, 2017), 82–84.
10. In *Haupt v. United States*, 330 U.S. 631, 642–643 (1947), the United States Supreme Court held that out-of-court confessions were admissible in treason cases, so long as they were merely corroborative of testimony already established by two witnesses to the same overt act.
11. Carlton F. W. Larson, *The Trials of Allegiance: Treason, Juries, and the American Revolution* (New York: Oxford University Press, 2019), 271 n.33.
12. 18 U.S.C. § 2381.
13. For a broad discussion of this issue, see James Willard Hurst, *The Law of Treason in the United States: Collected Essays* (Westport, CT: Greenwood Publishing, 1971), 145–66.
14. *Ex parte Bollman*, 8 U.S. 75, 127 (1807).
15. *United States v. Wimmer*, 264 F. 11, 13 (6th Cir. 1920); see also *United States v. Rosenberg*, 195 F.2d 583, 611 (2d Cir.

1952).

16. Hurst, *Law of Treason*, 149.

## 2: BENEDICT ARNOLD: FOUNDING TRAITOR

The classic work on Arnold's treason is Carl Van Doren, *The Secret History of the American Revolution* (New York: Viking Press, 1941). The best recent account is Stephen Brumwell, *Turncoat* (New Haven: Yale University Press, 2018). The story is vividly related in Nathaniel Philbrick, *Valiant Ambition: George Washington, Benedict Arnold, and the Fate of the American Revolution* (New York: Penguin, 2016). For a biography through the Battle of Saratoga, see James Kirby Martin, *Benedict Arnold, Revolutionary Hero: An American Warrior Reconsidered* (New York: NYU Press, 1997). For a full biography, see Willard Sterne Randall, *Benedict Arnold: Patriot and Traitor* (New York: William Morrow, 1990).

1. Alexander Hamilton to Elizabeth Schuyler, September 25, 1780, in *The Papers of Alexander Hamilton*, ed. Harold C. Syrett (New York: Columbia University Press, 1961), 2:441–42.
2. To be sure, the question of Peggy Arnold's guilt continues to be debated. The modern scholarly consensus, however, strongly supports the conclusion that she was well aware of what her husband was up to. Stephen Brumwell, *Turncoat: Benedict Arnold and the Crisis of American Liberty* (New Haven: Yale University Press, 2018), 168–69; Nancy Rubin Stuart, *Defiant Brides: The Untold Story of Two Revolutionary Era Women and the Radical Men They Married* (Boston: Beacon Press, 2013), 70, 79, 95–100, 135; Mark Jacob and Stephen H. Case, *Treacherous Beauty: Peggy Shippen, the Woman behind Benedict Arnold's Plot to Betray*

- America* (Guilford, CT: Lyons Press, 2012), viii, 1, 164–65, 170. For a dissenting view, see Joyce Lee Malcolm, *The Tragedy of Benedict Arnold: An American Life* (New York: Pegasus Books, 2018), 288–89, 326–27.
3. Quoted in Brumwell, *Turncoat*, 280.
  4. See “England & Wales Baby Names,” <http://names.darkgreener.com/#benedict>.
  5. This information can be found at the Social Security website, <https://www.ssa.gov/oact/babynames/>.
  6. Brumwell, *Turncoat*, 74; James Kirby Martin, *Benedict Arnold, Revolutionary Hero: An American Warrior Reconsidered* (New York: NYU Press, 1997), 409.
  7. Brumwell, *Turncoat*, 159–69.
  8. Willard Sterne Randall, *Benedict Arnold: Patriot and Traitor* (New York: William Morrow, 1990), 522–24.
  9. Nathaniel Philbrick, *Valiant Ambition: George Washington, Benedict Arnold, and the Fate of the American Revolution* (New York: Penguin, 2016), 300–302.
  10. “General Orders, 26 September 1780,” Founders Online, National Archives, last modified June 13, 2018, <http://founders.archives.gov/documents/Washington/99-01-02-03388>.
  11. Larson, *Trials of Allegiance*, 96–100, 199.
  12. William Emery Decrow, *Yale and the “City of Elms”* (Boston: W. E. Decrow, 1882), 117.
  13. Martin, *Benedict Arnold*, 430.
  14. Larson, *Trials of Allegiance*, 199.
  15. Quoted in Stuart, *Defiant Brides*, 135.
  16. Larson, *Trials of Allegiance*, 223–26.
  17. Randall, *Benedict Arnold*, 602.
  18. Robert A. Ferguson, *Reading the Early Republic* (Cam-



- bridge, MA: Harvard University Press, 2004), 122.
19. Quoted in Brumwell, *Turncoat*, 300.
  20. Randall, *Benedict Arnold*, 599; Stuart, *Defiant Brides*, 201.
  21. Randall, *Benedict Arnold*, 615.
  22. Saratoga Monument Virtual Tour part 3, National Parks Service, <https://www.nps.gov/sara/learn/photosmultimedia/saratoga-monument-virtual-tour-part-3.htm>.
  23. Saratoga Monument Virtual Tour part 6, National Parks Service, [https://www.nps.gov/sara/learn/photosmultimedia/saratoga\\_monument\\_virtual\\_tour\\_part\\_6.htm](https://www.nps.gov/sara/learn/photosmultimedia/saratoga_monument_virtual_tour_part_6.htm).
  24. Martin, *Benedict Arnold*, 432.
  25. Quoted in Brumwell, *Turncoat*, 315.
  26. Erik Ofgang, "Burning Benedict Arnold's Effigy in New London, *Connecticut Magazine*, September 6, 2017, [http://www.connecticutmag.com/the-connecticut-story/burning-benedict-arnold-s-effigy-in-new-london/article\\_266ec4bc-82c4-11e7-9495-a3826d6158b3.html](http://www.connecticutmag.com/the-connecticut-story/burning-benedict-arnold-s-effigy-in-new-london/article_266ec4bc-82c4-11e7-9495-a3826d6158b3.html).

### 3: WHAT IS "LEVYING WAR AGAINST THE UNITED STATES"?

The leading work on American treason law is James Willard Hurst, *The Law of Treason in the United States: Collected Essays* (Westport, CT: Greenwood Publishing, 1971). For a more recent analysis in the terrorism context, see Carlton F. W. Larson, "The Constitutional Law of Treason and the Enemy Combatant Problem," *University of Pennsylvania Law Review* 154 (2006): 863–926. On the levying war arguments in the Whiskey Rebellion and Fries's Rebellion cases, see Carlton F. W. Larson, *The Trials of Allegiance: Treason, Juries, and the American Revolution* (New York: Oxford University Press, 2019), chapter 9.

1. Michael Foster, *A Report of Some Proceedings on the Commission of Oyer and Terminer and Goal Delivery for the Trial*

- of the Rebels in the Year 1746 in the County of Surry; and of Other Crown Cases: To Which Are Added Discourses upon a Few Branches of the Crown Law* (Oxford: Clarendon Press, 1762), 210–11.
2. *Ibid.*, 211.
  3. *United States v. Burr*, 25 F. Cas. 55, 159 (C.C. Va. 1807) (No. 14,693). Marshall echoed the point a few pages later: “[T]he term, having been adopted by our constitution, must be understood in that sense in which it was universally received in this country when the constitution was framed. The sense in which it was received is to be collected from the most approved authorities of that nation from which we have borrowed the term.” *Ibid.*, 163.
  4. Thomas McKean, Notes of Charges Delivered to Grand Juries by Chief Justice Thomas McKean, 1777–1779, 25–27, Historical Society of Pennsylvania, Philadelphia.
  5. Wilson, “Lectures on Law,” 2:668.
  6. *United States v. Burr*, 25 F. Cas. 55, 161 (C.C.D. Va. 1807) (No. 14,693) (Marshall, C.J.).
  7. On the Whiskey Rebellion, see generally Thomas P. Slaughter, *The Whiskey Rebellion: Frontier Epilogue to the American Revolution* (New York: Oxford University Press, 1988).
  8. *United States v. Mitchell*, 2 U.S. (2 Dall.) 348, 355 (C.C.D. Pa. 1795).
  9. *Case of Fries*, 9 F. Cas. 924, 943–944 (C.C.D. Pa. 1800) (No. 5127).
  10. John Adams to James Lloyd, March 31, 1815, *Works of John Adams* (Boston: Little, Brown & Co., 1856), 10:152–55.
  11. *Burr*, 25 F. Cas. at 168–69.
  12. Charge to the Grand Jury—Treason, 30 F. Cas. 1046, 1047

- (C.C.D.R.I. 1842) (No. 18,275) (Story, J.).
13. *United States v. Hoxie*, 26 F. Cas. 397, 398 (C.C.D. Vt. 1808) (No. 15,407) (Livingston, J.).
  14. *United States v. Hanway*, 26 F. Cas. 105, 127–28 (C.C.E.D. Pa. 1851) (No. 15,299) (Grier, J.).
  15. Quoted in “Indictments Stand at Miners’ Trial,” *New York Times*, April 26, 1922, 18.
  16. Bradley Chapin, *The American Law of Treason: Revolutionary and Early National Origins* (Seattle: University of Washington Press), 97.
  17. Hurst, *Law of Treason*, ix.
  18. *Ibid.*, 7; see also *ibid.*, 270–73.
  19. *United States v. Burr*, 25 F. Cas. 2, 13 (C.C.D. Va. 1807) (No. 14,692a).
  20. *United States v. Burr*, 25 F. Cas., 55, 165 (C.C.D. Va. 1807) (No. 14,693) (emphasis added).
  21. *Ibid.*, 169.
  22. Charge to the Grand Jury—Treason, 30 F. Cas. 1046, 1047 (C.C.D.R.I. 1842) (No. 18,275) (Story, J.).

#### 4: THE CASE OF AARON BURR

The most accessible introduction to Burr is David O. Stewart, *American Emperor: Aaron Burr’s Challenge to Jefferson’s America* (New York: Simon & Schuster, 2011). For a full biography of Burr, see Nancy Isenberg, *Fallen Founder: The Life of Aaron Burr* (New York: Penguin, 2007). Two recent books focus on Burr’s treason trial: Peter Charles Hoffer, *The Treason Trials of Aaron Burr* (Lawrence, KS: University Press of Kansas, 2008); and R. Kent Newmyer, *The Treason Trial of Aaron Burr: Law, Politics, and the Character Wars of the New Nation* (Cambridge: Cambridge University Press, 2012). For an overview of public

reaction to Burr, see James E. Lewis Jr., *The Burr Conspiracy: Uncovering the Story of an Early American Crisis* (Princeton, NJ: Princeton University Press, 2017). The Burr trial is reported at *United States v. Burr*, 25 F. Cas. 1 (C.C. Va. 1807) (No. 14,692); and *United States v. Burr*, 25 F. Cas. 55 (C.C. Va. 1807) (No. 14,693).

1. James E. Lewis Jr., *The Burr Conspiracy: Uncovering the Story of an Early American Crisis* (Princeton, NJ: Princeton University Press, 2017), 166.
2. *Ibid.*, 339–68.
3. See Andro Linklater, *An Artist in Treason: The Extraordinary Double Life of General James Wilkinson* (New York: Walker, 2009).
4. Quoted in David O. Stewart, *American Emperor: Aaron Burr's Challenge to Jefferson's America* (New York: Simon & Schuster, 2011), 208.
5. *Ibid.*, 19.
6. The indictment can be read in *ibid.*, 313–15.
7. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 127 (1807).
8. *Ibid.*, 126.
9. *Ibid.*, 126.
10. *United States v. Burr*, 25 F. Cas. 2, 15 (C.C. Va. 1807) (No. 14,692a).
11. Stewart, *American Emperor*, 233; Lewis, *Burr Conspiracy*, 425–26.
12. Stewart, *American Emperor*, 231.
13. Peter Charles Hoffer, *The Treason Trials of Aaron Burr* (Lawrence, KS: University Press of Kansas, 2008), 159.
14. *Burr*, 25 F. Cas. at 177.
15. *Ibid.*, 180.
16. Stewart, *American Emperor*, 242, 260. Following his ac-

- quittal for treason, he was prosecuted and acquitted on a misdemeanor charge of violating the Neutrality Act before Chief Justice Marshall in Richmond, and then ordered to stand trial in Ohio on a similar charge. The Jefferson administration, however, later dropped the Ohio charge. R. Kent Newmyer, *The Treason Trial of Aaron Burr: Law, Politics, and the Character Wars of the New Nation* (Cambridge: Cambridge University Press, 2012), 168–70.
17. Quoted in Hoffer, *Treason Trials of Aaron Burr*, 172.
  18. Lewis, *Burr Conspiracy*, 394.
  19. Hannah Natanson, “Aaron Burr—Villain of ‘Hamilton’—Had a Secret Family of Color, New Research Shows,” *Washington Post*, August 24, 2019.
  20. Lewis, *Burr Conspiracy*, 114.
  21. Stewart, *American Emperor*, 300–301.
  22. Hoffer, *Treason Trials of Aaron Burr*, 189–93.

## 5: THE FORGOTTEN CRIME OF TREASON AGAINST A STATE

The most significant studies of the Dorr Rebellion are Marvin E. Gettleman, *The Dorr Rebellion: A Study in American Radicalism* (New York: Random House, 1973; reprint, New York: Robert E. Krieger, 1980); and George M. Dennison, *The Dorr War: Republicanism on Trial, 1831–1861* (Lexington, KY: University Press of Kentucky, 1976). The first major academic study was Arthur May Mowry, *The Dorr War, or the Constitutional Struggle in Rhode Island* (Providence, RI: Preston & Rounds, 1901). For a brisk narrative with illustrations of locations related to the Rebellion, see Rory Raven, *The Dorr War: Treason, Rebellion & the Fight for Reform in Rhode Island* (Charleston, SC: History Press, 2010). Dorr’s trial is reported in “The Trial of Thomas Wilson Dorr for Treason, Rhode Island, 1844,” *Ameri-*

*can State Trials*, ed. John D. Lawson (St. Louis: F.H. Thomas Law Book Co., 1914), 2:5–170; and Joseph S. Pitman, *Report of the Trial of Thomas Wilson Dorr for Treason* (Boston: Tappan & Denner, 1844).

The best book on John Brown's trial is Brian McGinty, *John Brown's Trial* (Cambridge, MA: Harvard University Press, 2009). The trial, along with those of Brown's associates, is reported in *American State Trials*, ed. John D. Lawson (St. Louis: F.H. Thomas Law Book Co., 1916), 6:700–864. For an engaging account of the raid, see Tony Horwitz, *Midnight Rising: John Brown and the Raid That Sparked the Civil War* (New York: Henry Holt, 2011). For a thorough biography of Brown, see Stephen B. Oates, *To Purge This Land With Blood: A Biography of John Brown*, 2nd ed. (Amherst, MA: University of Massachusetts Press, 1984).

The leading modern work on the Mine Wars is James Green, *The Devil Is Here in These Hills: West Virginia's Coal Miners and Their Battle for Freedom* (New York: Atlantic Monthly Press, 2015). Also useful is Lon Savage, *Thunder in the Mountains: The West Virginia Mine War, 1920–1921* (Pittsburgh: University of Pittsburgh Press, 2014); and Howard B. Lee, *Bloodletting in Appalachia: The Story of West Virginia's Four Major Mine Wars and Other Thrilling Incidents of Its Coal Fields* (Morgantown, WV: West Virginia University, 1969). For selected primary sources, see David Alan Corbin, ed., *Gun Thugs, Rednecks, and Radicals: A Documentary History of the West Virginia Mine Wars* (Oakland, CA: PM Press, 2011). The Mine Wars are the subject of a well-done PBS American Experience documentary *The Mine Wars*, as well as the 1987 Hollywood production *Matewan*.

The most thorough modern legal analysis of treason against a state is J. Taylor McConkie, "State Treason: The History and Validity of Treason Against Individual States," *Kentucky Law*

1. The seven that do not are Hawaii, Maryland, New Hampshire, New York, Ohio, Pennsylvania, and Tennessee. Twenty-one other states define the offense in their state constitutions only. Because these states have not enacted a separate criminal statute regarding treason, it is likely that treason against the state is not technically a crime in these states. J. Taylor McConkie, “State Treason: The History and Validity of Treason Against Individual States,” *Kentucky Law Journal* 101 (2012–2013): 297, 299.
2. Or. Rev. Stat. § 166.005.
3. See generally Larson, *Trials of Allegiance*.
4. *Ibid.*, 65
5. McConkie, “State Treason,” 334.
6. The text of the People’s Constitution can be found in Marvin E. Gettleman, *The Dorr Rebellion: A Study in American Radicalism* (New York: Random House, 1973; reprint, New York: Robert E. Krieger, 1980), 205–31.
7. *Ibid.*, 54.
8. The text of the act can be found at *Newport Mercury*, April 9, 1842, 2.
9. Gettleman, *Dorr Rebellion*, 12–15.
10. Quoted in *ibid.*, 86.
11. Gettleman, *Dorr Rebellion*, 160–61, n. 79. Several other men may also have been tried. George M. Dennison, *The Dorr War: Republicanism on Trial, 1831–1861* (Lexington, KY: University Press of Kentucky, 1976), 146.
12. “The Trial of Thomas Wilson Dorr for Treason, Rhode Island, 1844,” *American State Trials*, ed. John D. Lawson (St. Louis: F.H. Thomas Law Book Co., 1914), 2:50.
13. *Ibid.*, 2:164 n.20.

14. *Luther v. Borden*, 48 U.S. 1 (1849).
15. Tony Horwitz, *Midnight Rising: John Brown and the Raid That Sparked the Civil War* (New York: Henry Holt, 2011), 291–92.
16. On this document, see Robert L. Tsai, *America's Forgotten Constitutions* (Cambridge, MA: Harvard University Press, 2014), 83–117.
17. Brian McGinty, *John Brown's Trial* (Cambridge, MA: Harvard University Press, 2009), 6–7.
18. Louis DeCaro Jr., *Freedom's Dawn: The Last Days of John Brown in Virginia* (Lanham, MD: Rowman & Littlefield, 2015), 87.
19. McGinty, *John Brown's Trial*, 271. Treason charges against a third raider, John Cook, were dropped by the prosecution. On Cook, see Steven Lubet, *John Brown's Spy: The Adventurous Life and Tragic Confession of John E. Cook* (New Haven: Yale University Press, 2012).
20. Quoted in Horwitz, *Midnight Rising*, 254.
21. Quoted in McGinty, *John Brown's Trial*, 260.
22. *Ibid.*, 111, 242.
23. Horwitz, *Midnight Rising*, 256.
24. James Green, *The Devil Is Here in These Hills: West Virginia's Coal Miners and Their Battle for Freedom* (New York: Atlantic Monthly Press, 2015), 262, 264.
25. Lon Savage, *Thunder in the Mountains: The West Virginia Mine War, 1920–1921* (Pittsburgh: University of Pittsburgh Press, 2014), 161.
26. “‘Treason’ in West Virginia,” *New York Times*, May 30, 1922, 9.
27. Green, *Devil Is Here*, 299–302; Howard B. Lee, *Bloodletting in Appalachia: The Story of West Virginia's Four Major*



*Mine Wars and Other Thrilling Incidents of Its Coal Fields* (Morgantown, WV: West Virginia University, 1969), 111. Allen's conviction was so obscure that the nation's most eminent treason scholar, James Willard Hurst, was entirely unaware of it just a few decades later. Hurst, *Law of Treason*, 187 (stating that Dorr and Brown were the "only completed treason prosecutions by state authorities").

28. Lee, *Bloodletting in Appalachia*, 114.
29. Although Dorr, Brown, Coppoc, and Allen remain the only individuals convicted of treason against a state since the U.S. Constitution was adopted, there were a handful of other attempted prosecutions that did not result in conviction. An indictment of three men for treason against New York during the War of 1812 was rejected by a New York court on the ground that the offense amounted to treason against the United States. *People v. Lynch*, 11 Johns 549 (N.Y. Sup. Ct. 1814). In the 1830s and 1840s, indictments were brought against Mormon leaders for treason against Missouri and treason against Illinois, but none of the cases went to trial. Hurst, *Law of Treason*, 264; McConkie, "State Treason," 310–12. And in 1892, thirty-one labor agitators were indicted for treason against Pennsylvania for their actions during the Homestead Strike. *Commonwealth v. O'Donnell*, et al., 12 Pa. Co. 97 (Pa. O.&T. 1892). Legal experts mocked the Pennsylvania indictments, claiming they were a "mass of stale, medieval verbiage." How a labor strike, even a violent one, could "be dignified into the crime of treason, passes professional comprehension." "Treason Trials in the United States," *American Law Review* 26 (1892): 912–14. Pennsylvania officials quietly let the treason charges drop, while pursu-

- ing prosecutions on other counts.
30. Max Farrand, *The Records of the Federal Convention of 1787*, rev. ed. (New Haven: Yale University Press, 1966), 347–49.
  31. “Trial of Thomas Wilson Dorr,” *American State Trials*, 2:154; James G. Randall, “The Miners and the Law of Treason,” *The North American Review* 216 (1922): 312, 321–22.
  32. Quoted in Randall, “Miners and the Law of Treason,” 321–22.
  33. Joseph Story, Charge to Grand Jury—Treason, 30 F. Cas. 1046 (C.C.D.R.I. 1842).
  34. *People v. Lynch*, 11 Johns 549, 553 (N.Y. Sup. Ct. 1814).
  35. “Francis Dana’s Charge, Cumberland, Essex, Hampshire, Lincoln, Plymouth, & York Counties, May–July 1792,” in *Gentlemen of the Grand Jury: The Surviving Grand Jury Charges from Colonial, State, and Lower Federal Courts before 1801*, ed. Stanton D. Krauss (Durham, NC: Carolina Academic Press, 2012), 1:409, 410.
  36. An 1805 South Carolina statute, for example, included inciting slave rebellions as a form of treason against the state. McConkie, “State Treason,” 294. In an 1850 message, President Millard Fillmore stated, “Texas is a State, authorized . . . to punish those who may commit treason against the State according to the forms provided by her own constitution and her own laws.” Millard Fillmore to Senate and House of Representatives, August 6, 1850, *A Compilation of the Messages and Papers of the Presidents*, ed. James D. Richardson (New York: Bureau of National Literature, 1897), 6:2605.
  37. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

## 6: THE CASE OF CASTNER HANWAY AND THE FUGITIVE SLAVE ACT

The leading work on the Christiana Riot is Thomas P. Slaughter, *Bloody Dawn: The Christiana Riot and Racial Violence in the Antebellum North* (New York: Oxford University Press, 1991). The Hanway trial and the Fugitive Slave Act are examined extensively in Steven Lubet, *Fugitive Justice: Runaways, Rescuers, and Slavery on Trial* (Cambridge, MA: Harvard University Press, 2010). W. U. Hensel, *The Christiana Riot and the Treason Trials of 1851* (Lancaster, PA: New Era Printing Co., 1911), although dated, nonetheless contains useful information, especially on the jury pool. It also reprints William Parker's narrative of the events. Jonathan Katz, *The Resistance at Christiana: The Fugitive Slave Rebellion, Christiana, Pennsylvania, September 11, 1851, A Documentary Account* (New York: Thomas Y. Crowell, 1974), contains excerpts from numerous primary documents as well as useful photographs. The official report of the Hanway trial is published as *United States v. Hanway*, 26 F. Cas. 105 (C.C.E.D. Pa. 1851) (No. 15,299). My factual account of the underlying events and the trial is drawn from these sources. On the history of Independence Hall, see Charlene Mires, *Independence Hall in American Memory* (Philadelphia: University of Pennsylvania Press, 2002).

1. On these trials, see Larson, *Trials of Allegiance*.
2. *Daily National Intelligencer*, November 25, 1851.
3. Larson, *Trials of Allegiance*, 236.
4. Act of Sept. 16, 1850, chap. 60, *Statutes at Large*, 9:462.
5. Charlene Mires, *Independence Hall in American Memory* (Philadelphia: University of Pennsylvania Press, 2002), 94.
6. Michael W. Kauffman, *American Brutus: John Wilkes Booth and the Lincoln Conspiracies* (New York: Random House, 2004), 88.

7. I constructed the family relationship from genealogical material available on Ancestry.com.
8. Thomas P. Slaughter, *Bloody Dawn: The Christiana Riot and Racial Violence in the Antebellum North* (New York: Oxford University Press, 1991), 56–57.
9. “The Murder of Southern Men,” *Georgia Telegraph*, September 30, 1851, 2.
10. “Mass Meeting in Baltimore,” *Daily Morning News*, September 20, 1851.
11. Slaughter, *Bloody Dawn*, 106–107, 116–17.
12. Michael P. Dugan, “Grier, Robert Cooper,” in *The Oxford Companion to the Supreme Court of the United States*, ed. Kermit L. Hall (New York: Oxford University Press, 1992), 349–50.
13. *Hanway*, 26 F. Cas., at 109.
14. W. U. Hensel, *The Christiana Riot and the Treason Trials of 1851* (Lancaster, PA: New Era Printing Co., 1911), 73.
15. Slaughter, *Bloody Dawn*, 117–18, 122–23.
16. *Hanway*, 26 F. Cas., at 110–12.
17. “The Fugitive Law Illustrated,” *Frederick Douglass’ Paper*, October 2, 1851.
18. “Pennsylvania Treason Trials,” *Georgia Telegraph*, December 16, 1851, 2.
19. “Indictment for Treason,” *Baltimore Sun*, September 26, 1851, reprinted in *Daily Morning News*, September 30, 1851.
20. *Hanway*, 26 F. Cas., at 116.
21. *Ibid.*, 117–21.
22. *Ibid.*, 121–23.
23. *Ibid.*, 127–28.
24. “The Treason Trials—Correspondence of the New York Herald,” *Cleveland Herald*, December 22, 1851.
25. “The Christiana Trials—From the Baltimore Clipper,” *Daily*

*National Intelligencer*, February 5, 1852.

## 7: WHO IS SUBJECT TO AMERICAN TREASON LAW?

1. *New York Times Co. v U.S. Dep't of Justice*, 915 F.Supp.2d 508 (S.D.N.Y. 2013).
2. Sanford Levinson, *Constitutional Faith* (Princeton: Princeton University Press, 1988), 116.
3. Edward Coke, *The Third Part of the Institutes of the Laws of England* (London: M. Flesher, 1644), 4–5.
4. *Carlisle v. United States*, 83 U.S. 147 (1872).
5. *Ibid.*, 154.
6. *Ibid.* (citing Richard Wildman, *Institutes of International Law* [London: William Benning & Co., 1849], 1:40).
7. Matthew Hale, *The History of the Pleas of the Crown* (London: E. & R. Nutt, 1736), 96.
8. *Kawakita v. United States*, 343 U.S. 717 (1952).
9. *Ibid.*, 732–36.
10. See generally Gregg Jones, *Honor in the Dust: Theodore Roosevelt, War in the Philippines, and the Rise and Fall of America's Imperial Dream* (New York: New American Library, 2012).
11. *Downes v. Bidwell*, 182 U.S. 244, 279–80 (1901) (opinion of White, J.).
12. The cases are reported at *United States v. Magtibay*, 2 Phil. 703 (1903); *United States v. Reyes*, 3 Phil. 349 (1904); *United States v. Lagnason*, 3 Phil. 472 (1904).
13. *Lagnason*, 3 Phil. at 494 (Johnson, J., dissenting).
14. *Dorr v. United States*, 195 U.S. 138, 145 (1904). See generally Amy Rossabi, “The Colonial Roots of Criminal Procedure in the Philippines,” *Columbia Journal of Asian Law* 11 (1997): 175–211; Andrew Kent, “The Jury and Empire: The *Insular Cases* and the Anti-Jury Movement in

- the Gilded Age and Progressive Era,” *Southern California Law Review* 91 (2018): 375–465.
15. An act temporarily to provide revenue for the Philippine Islands, and other purposes, chap. 140, § 9, 32 Stat. 54–55 (1902); *Magtibay*, 2 Phil. at 705; *Reyes*, 3 Phil. at 352–53.
  16. On the legal status of American Samoa, see “Developments in the Law—American Samoa and the Citizenship Clause: A Study in *Insular Cases* Revisionism,” *Harvard Law Review* 130 (2017): 1680–1703; on the legal status of American nationals more generally, see Rose Cuison Villazor, “American Nationals and Interstitial Citizenship,” *Fordham Law Review* 85 (2017): 1673–1724. In December 2019, a federal district court in Utah held that American Samoans are U.S. citizens under the Constitution. *Fitisemanu v. U.S.*, 2019 WL 6766502 (D. Utah 2019). The federal government has filed an appeal of the decision.
  17. 8 U.S.C. § 1101(22).
  18. F. Murray Greenwood, “Judges and Treason Law in Lower Canada, England, and the United States during the French Revolution,” in *Canadian State Trials: Law, Politics, and Security Measures, 1608–1837*, eds. F. Murray Greenwood and Barry Wright (Toronto: University of Toronto Press, 1996), 1:242–95, 266–69.
  19. J. M. Bumsted, “Another Look at the Riel Trial for Treason,” in *Canadian State Trials: Political Trials and Security Measures, 1840–1914*, eds. Barry Wright and Susan Binnie (Toronto: University of Toronto Press, 2009), 3:411–50; Jeremy Ravi Mumford, “Why Was Louis Riel, a United States Citizen, Hanged as a Canadian Traitor in 1885?,” *Canadian Historical Review* 88 (2007): 237–62.
  20. For a recent biography of Joyce, see Colin Holmes, *Search-*

*ing for Lord Haw-Haw: The Political Lives of William Joyce* (London: Routledge, 2016). The decision of the House of Lords is available in *Joyce v. Director of Public Prosecutions*, *American Journal of International Law* 40 (1946): 663–79; the decision of the Court of Criminal Appeal is available in *Rex v. Joyce*, *American Journal of International Law* 40 (1946): 210–17.

21. *Joyce v. Director of Public Prosecutions*, 670.
22. It is hard to know whether an American court would follow this precedent. Legal scholars have criticized the ruling as resting on a minute technicality, Holmes, *Searching for Lord Haw-Haw*, 383–86; Glanville L. Williams, “The Correlation of Allegiance and Protection,” *Cambridge Law Journal* 10 (1948): 54–76, even though it had some arguable support in a passage in Michael Foster’s 1762 treatise on treason law. Foster quoted an otherwise unreported judicial decision that an alien could be subject to a treason prosecution for acts committed abroad if he had left behind “family and effects” that remained under the Crown’s protection. Foster, *A Report of Some Proceedings*, 185.
23. American citizens living in Canada were tried for treason during the War of 1812, but there do not appear to be any executions. The trials resulted in some significant rulings on allegiance. Paul Romney and Barry Wright, “State Trials and Security Proceedings in Upper Canada during the War of 1812,” in *Canadian State Trials*, 1: 379–405.
24. On the allegiance arguments, see McGinty, *John Brown’s Trial*, 212–16; Carlton F. W. Larson, “The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem,” *University of Pennsylvania Law Review* 154, no. 4 (2006): 863, 885–90.

25. “The Trial of John Brown for Treason and Insurrection, Charleston, Virginia, 1859,” *American State Trials*, ed. John D. Lawson (St. Louis: F.H. Thomas Law Book Co., 1916), 6:799.
26. H.J. Eckenrode, *The Revolution in Virginia* (Boston: Houghton Mifflin, 1916), 259.
27. *Scott v. Sanford*, 60 U.S. 393 (1857).
28. “The Trial of John Anthony Copeland and Shields Green for Murder, Charlestown Virginia, 1859,” *American State Trials*, 6:809–13; McGinty, *John Brown’s Trial*, 236–37. On Copeland, see Steven Lubet, *The “Colored Hero” of Harper’s Ferry: John Anthony Copeland and the War Against Slavery* (New York: Cambridge University Press, 2015).
29. “Trump Claims He Will Investigate Google for ‘treasonous’ China Ties,” *Guardian*, July 16, 2019.
30. Blackstone, *Commentaries on the Laws of England*, 1:464.
31. *Commonwealth v. Proprietors of New Bedford Bridge*, 2 Gray 339, 345 (Mass. 1854); see also *Board of Field Officers of South Carolina Troops v. U.S.*, 20 Ct. Cl. 18, 21 (1885) (suggesting that corporations are “incapable of committing treason”).
32. *New York Central and Hudson River Railroad Co. v. U.S.*, 212 U.S. 481, 494–95 (1909).
33. The most well-known free speech case is, of course, *Citizens United v. FEC*, 558 U.S. 310 (2010). The Religious Freedom Restoration Act case is *Hobby Lobby v. Burwell*, 134 S. Ct. 2751 (2014). For an overview, see Adam Winkler, *We the Corporations: How American Businesses Won Their Civil Rights* (New York: Liveright, 2018).
34. Winkler, *We the Corporations*, 103–108.
35. *Afroyim v. Rusk* 387 U.S. 253 (1967).



36. 8 U.S.C. § 1481(a).
37. See generally United States Department of Justice, Office of Legal Counsel, Survey of the Law of Expatriation (2002), available at [https://www.justice.gov/sites/default/files/olc/opinions/2002/06/31/op-olc-v026-p0056\\_0.pdf](https://www.justice.gov/sites/default/files/olc/opinions/2002/06/31/op-olc-v026-p0056_0.pdf).
38. 8 U.S.C. § 1481(a)(3).
39. 8 U.S.C. § 1481(a)(7).

## 8: THE UNLAWFUL EXECUTION OF HIPOLITO SALAZAR

The leading account of the 1847 treason trials by a legal scholar is Laura Gómez, *Manifest Destinies: The Making of the Mexican American Race* (New York: NYU Press, 2007), chapter 1. The best account of the Taos revolt by a historian is James A. Crutchfield, *Revolt at Taos: The New Mexican and Indian Insurrection of 1847* (Yardley, PA: Westholme, 2015). Other works discussing the trials include James A. Crutchfield, *Tragedy at Taos: The Revolt of 1847* (Plano, TX: Republic of Texas Press, 1995); Stephen G. Hyslop, *Bound for Santa Fe: The Road to New Mexico and the American Conquest, 1806–1848* (Norman, OK: University of Oklahoma Press, 2002); *Taos 1847: The Revolt in Contemporary Accounts*, ed. Michael McNierney (Boulder, CO: Johnson Publishing, 1980); Robert J. Tórréz, “The New Mexican ‘Revolt’ and Treason Trials of 1847,” in *Sunshine and Shadows in New Mexico’s Past*, ed. Richard Melzer (Los Ranchos, NM: Rio Grande Books 2010), 1:211–34; Robert J. Tórréz, “Revolt of 1847 Treason Trials,” *New Mexico History*, July 8, 2015, <http://newmexicohistory.org/2015/07/08/revolt-of-1847-treason-trials-d48/>. An older but still useful account is Ralph Emerson Twitchell, *The History of the Military Occupation of the Territory of New Mexico from 1846 to 1851* (Denver, CO: Smith-Brooks, 1909). The Taos court records are reprinted in

Francis T. Cheetham, “The First Term of the American Court in Taos, New Mexico,” *New Mexico Historical Review* 1 (1926): 23–41. The only surviving eyewitness account of the trials is in Lewis H. Garrard, *Wah-to-yah and the Taos Trail* (Cincinnati: H.W. Derby, 1850).

1. Lewis H. Garrard, *Wah-to-yah and the Taos Trail* (Cincinnati: H.W. Derby, 1850), 195–96, 201.
2. Ibid., 225; Francis T. Cheetham, “The First Term of the American Court in Taos, New Mexico,” *New Mexico Historical Review* 1 (1926): 23–41. A map of key locations is provided in James A. Crutchfield, *Revolt at Taos: The New Mexican and Indian Insurrection of 1847* (Yardley, PA: Westholme, 2015), 76–77.
3. James Willard Hurst, *Law of Treason*, 187.
4. William A. Blair, *With Malice toward Some: Treason and Loyalty in the Civil War Era* (Chapel Hill, UNC Press, 2014), 13.
5. Carlton F.W. Larson, “Five Myths About Treason,” *Washington Post*, February 17, 2017.
6. Some expansive interpretations of the borders of the Republic of Texas suggested that Taos was part of Texas. However, U.S. officials consistently acted as if Taos was part of the Republic of Mexico. Crutchfield, *Revolt at Taos*, 7, 14.
7. David Herbert Donald, *Lincoln* (New York: Simon & Schuster, 1995), 123–25.
8. Ulysses S. Grant, *Personal Memoirs of U. S. Grant* (Cambridge, MA: Da Capo, 2001), 22–23.
9. Quoted in Ralph Emerson Twitchell, *The History of the Military Occupation of the Territory of New Mexico from 1846 to 1851* (Denver, CO: Smith-Brooks, 1909), 73–74.

10. Stephen Watt Kearny, Proclamation to the People of Santa Fe, August 22, 1846, in Crutchfield, *Revolt at Taos*, 169–70.
11. Laura Gómez, *Manifest Destinies: The Making of the Mexican American Race* (New York: NYU Press, 2007), 25–31.
12. Ibid., 23–24. For the text of the Kearny Code, see [https://avalon.law.yale.edu/19th\\_century/kearney.asp](https://avalon.law.yale.edu/19th_century/kearney.asp).
13. Frank T. Blair to John Y. Mason, April 1, 1847, in Message of the President of the United States, July 24, 1848, U.S. Congressional Serial Set, Exec. Doc. No. 70 (30th Congress, 1848), 26–27.
14. Blair to Mason, April 1, 1847, 26. Blair's letter states, somewhat confusingly, "four conspicuous persons in the late rebellion were indicted for treason by the grand jury; three put upon their trial, one of whom was found guilty and sentenced by the court, one discharged under a nolle prosequi, and two obtained continuance to the adjourned term of the court in May next." It appears that three of the other men indicted for treason were later tried, but the cases ended in hung juries and charges were dropped. Robert J. Tórréz, "The New Mexican 'Revolt' and Treason Trials of 1847," in *Sunshine and Shadows in New Mexico's Past*, ed. Richard Melzer (Los Ranchos, NM: Rio Grande Books 2010), 222.
15. The full indictment is in Twitchell, *History of the Military Occupation*, 140–41.
16. Ibid., 142.
17. Donaciano Vigil to James Buchanan, March 23, 1847, in Message of the President of the United States, 24–25.
18. Ibid.
19. W. L. Marcy to Sterling Price, June 11, 1847, in Message

- of the President of the United States, 31–33. As Senator Thomas Hart Benton later recalled, Polk may have been concerned that issuing a pardon would have admitted the “legality of the condemnation,” but Trujillo had been tried by “some sort of court which had no jurisdiction of treason.” Thomas Hart Benton, *Thirty Years’ View: A History of the Working of the American Government for Thirty Years from 1820 to 1850* (New York: D. Appleton, 1856), 683.
20. Cheetham, “First Term of the American Court,” 27–41. Cheetham’s transcription of the court records gives the acquitted defendant’s name as “Francisco Revali,” which seems likely to be an error. James Crutchfield states that the name was “Francisco Rivole.” Crutchfield, *Revolt at Taos*, 108. Robert Tórréz states that the name was “Francisco Ulibarri.” Tórréz, “The New Mexican ‘Revolt,’” 223.
  21. Twitchell, *History of the Military Occupation*, 299–300.
  22. Blair to Mason, 27.
  23. Garrard, *Wah-to-yah*, 197–98.
  24. “Correspondence of the Missouri Republican, Santa Fe, New Mexico, March 18, 1847,” *Niles National Register*, May 15, 1847, 173–74. The observer’s opposition to the treason trials was rooted not in sympathy to the New Mexicans, but in antipathy to the idea of welcoming them into the United States. As he put it, “A country, which, with but few exceptions, is inhabited by ignorant, dishonest, treacherous men; and by women who are believed scarcely to know what virtue is, beyond its name, is now part of the American Union!”
  25. *Congressional Globe*, December 9, 1846, 18–19 (statement of Isaac Holmes of South Carolina).
  26. W. L. Marcy to Stephen W. Kearny, January 11, 1847, in

- Message of the President of the United States, 13–14.
27. W. L. Marcy to Sterling Price, June 26, 1847, in Message of the President of the United States, 33–34.
  28. W. L. Marcy to James K. Polk, July 19, 1848, in Message of the President of the United States, 12.
  29. The text of the Treaty of Guadalupe Hidalgo can be found at [https://avalon.law.yale.edu/19th\\_century/guadhida.asp](https://avalon.law.yale.edu/19th_century/guadhida.asp).
  30. *Fleming v. Page*, 50 U.S. 603, 615–16 (1850). Of course, the American military was the de facto governing power of New Mexico, and it had authority to punish offenders for a whole range of criminal offenses. As the Supreme Court put it in *Fleming*, the Mexican inhabitants “owed to the United States nothing more than the submission and obedience, sometimes called temporary allegiance, which is due from a conquered enemy, when he surrenders to a force which he is unable to resist.” *Ibid.*, 615–16. Although the Court used the term “temporary allegiance,” it was doing so loosely, referring to the fact that the Mexican inhabitants could be tried for murder and other crimes. It was not the temporary allegiance that could justify a treason prosecution, which involved noncitizens voluntarily choosing to enter a foreign country and thereby temporarily submitting themselves to that country’s authority. By contrast, as the Court elaborated in *Fleming*, until a peace treaty was signed, the Mexicans were “still foreigners and enemies.” And persons who are “foreigners and enemies” do not owe allegiance to the United States (see chapter 10).
  31. Message of the President of the United States, July 24, 1848, U.S. Congressional Serial Set, Exec. Doc. No. 70 (30th Congress, 1848).

32. Twitchell, *History of the Military Occupation*, 368–69; Grant, *Memoirs*, 300.
33. Genealogical information was gathered by Karen Mitchell, and is available at <http://www.kmitch.com/Taos/revolt1847.html>. Some sources suggest that Salazar was not the only person executed for treason. For example, Secretary of War Marcy wrote that “the trials proceeded and resulted in the conviction and execution of several of the accused.” W. L. Marcy to James K. Polk, July 19, 1848, in Message of the President of the United States, 12. But other than this, and some vague generalizations in other sources, I have located no concrete evidence of any other execution for treason.
34. Garrard, *Wah-to-yah*, 228.

## 9: THE CASE OF JEFFERSON DAVIS, PRESIDENT OF THE CONFEDERATE STATES OF AMERICA

Two recent books on Jefferson Davis’s treason prosecution are Cynthia Nicoletti, *Secession on Trial: The Treason Prosecution of Jefferson Davis* (New York: Cambridge University Press, 2017), and Robert Icenhauer-Ramirez, *Treason on Trial: The United States v. Jefferson Davis* (Baton Rouge: Louisiana State University Press, 2019). The leading biography of Davis is William J. Cooper Jr., *Jefferson Davis, American* (New York: Knopf, 2000), from which I have drawn most of the biographical background. Documents from the case and records of the judicial proceedings can be found in “Case of Jefferson Davis,” *Reports of Cases Decided by Chief Justice Chase in the Circuit Court of the United States for the Fourth Circuit, During the Years 1865 to 1869*, ed. Bradley T. Johnson (New York: Diossy & Co., 1876), 1–124. On treason and the Civil War more generally, see William A. Blair,

*With Malice toward Some: Treason and Loyalty in the Civil War Era* (Chapel Hill, NC: UNC Press, 2014).

1. Christopher Mele, "Jefferson Davis Statue in New Orleans Is Removed," *New York Times*, May 11, 2017.
2. Alexander Stephens, "'Cornerstone' Speech," March 21, 1861, available at <http://teachingamericanhistory.org/library/document/cornerstone-speech/>.
3. Historian William Blair notes, "Treason pervaded public discourse. It represents a challenge for a researcher to find a northern newspaper or periodical during any day of the war in which the words 'traitor' and 'treason' *do not* appear as a characterization of the rebels, of political opponents, or of the people suspected of holding divided loyalties in the United States." Blair, *With Malice toward Some*, 1.
4. "To the Breach," *Cincinnati Gazette*, reprinted in *Daily Telegraph*, April 25, 1861.
5. Ulysses S. Grant to Jesse Root Grant, April 21, 1861, *The Papers of Ulysses S. Grant*, ed. John Y. Simon (Carbondale, IL: Southern Illinois University Press, 1969), 2:6, 7.
6. Quoted in Daniel W. Crofts, *Lincoln and the Politics of Slavery: The Other Thirteenth Amendment and the Struggle to Save the Union* (Chapel Hill: UNC Press, 2016), 247.
7. On the Battle Cry of Freedom, see David Guion, "The Battle Cry of Freedom: Best Song of the Civil War?," *Musicology for Everyone*, July 30, 2012, <http://music.allpurposeguru.com/2012/07/the-battle-cry-of-freedom-best-song-of-the-civil-war/>.
8. Thomas McKean to William Augustus Atlee, June 5, 1778, in *Letters of Delegates to Congress*, ed. Paul H. Smith (Washington, DC: Library of Congress, 1983), 10:31–33.

9. Grant, *Personal Memoirs of U. S. Grant*, 557. On the surrender, see Jay Winik, *April 1865: The Month That Saved America* (New York: HarperCollins, 2001), 173–99.
10. Quoted in William A. Blair, *Why Didn't the North Hang Some Rebels?: The Postwar Debate over Punishment for Treason* (Milwaukee: Marquette University Press, 2004), 8–9.
11. Quoted in *ibid.*, 9.
12. “John Brown’s Song,” *San Francisco Bulletin*, April 10, 1862.
13. Andrew Johnson, “Speech to the Indiana Delegation,” April 21, 1865, in *Papers of Andrew Johnson*, ed. Leroy P. Graf (Knoxville, TN: University of Tennessee Press, 1986), 7:612.
14. “Case of Jefferson Davis,” *Official Opinions of the Attorneys General of the United States* (Washington, DC: W.H. and O.H. Morrison, 1869), 11:411–13.
15. Cynthia Nicoletti, *Secession on Trial: The Treason Prosecution of Jefferson Davis* (New York: Cambridge University Press, 2017), 172–81.
16. *The Prize Cases*, 67 U.S. 635 (1863).
17. “Case of Jefferson Davis,” *Reports of Cases Decided by Chief Justice Chase in the Circuit Court of the United States for the Fourth Circuit, During the Years 1865 to 1869*, ed. Bradley T. Johnson (New York: Diossy & Co., 1876), 117–18.
18. Nicoletti, *Secession on Trial*, 242–65.
19. “Case of Jefferson Davis,” *Official Opinions*, 11:411–13.
20. Nicoletti, *Secession on Trial*, 270–71.
21. *Ibid.*, 294.
22. “Case of Jefferson Davis,” *Chase’s Reports*, 101–102.
23. Information on Beauvoir can be found at <http://www.visitbeauvoir.org/>.
24. Craig Fehrman, “Jefferson Davis’ ‘Presidential’ Library,”



*Los Angeles Times*, June 2, 2013.

25. Theodore Roosevelt, "The President's Policy," *North American Review* 141 (Oct. 1885): 388–96, 393. Roosevelt repeated the charge in his 1887 book *The Life of Thomas Hart Benton* (Boston: Houghton Mifflin, 1887), 163, 220.
26. Quoted in William J. Cooper Jr., *Jefferson Davis, American* (New York: Knopf, 2000), 625.

#### 10: WHO ARE ENEMIES OF THE UNITED STATES?

1. *United States v. Greathouse*, 26 F. Cas. 18, 22 (C.C.N.D. Cal. 1863) (No. 15,254); see also Blackstone, *Commentaries on the Laws of England*, 4:82–83 (for purposes of treason law, "enemies" are "the subjects of foreign powers with whom we are at open war").
2. *United States v. Fricke*, 259 F. 673, 681 (S.D.N.Y. 1919).
3. Foster, *A Report of Some Proceedings*, 219.
4. 1 Op. Att. Gen. 84 (1798). In 1800, the United States Supreme Court unanimously determined in *Bas v. Tingy* (4 U.S. 37) that the term "enemy" in a federal statute applied to France. The justices each delivered individual opinions, but a majority distinguished between solemn, or perfect, wars (which involve complete warfare between the two countries), and limited, or imperfect, wars (which involved lesser degrees of hostility). The dispute with France was a limited war, because it applied only to naval operations. Nonetheless, France was clearly an enemy with respect to these operations. As Justice Bushrod Washington (George Washington's nephew) explained, French vessels "were certainly not friends, because there was a contention by force; nor were they private enemies, because the contention was external, and authorized by the legitimate author-

- ity of the two governments. If they were not our enemies, I know not what constitutes an enemy.” Ibid., 41. Although technically this decision applied only to the interpretation of a federal statute, a similar interpretation may apply to the term “enemy” in the Treason Clause.
5. Although no formal treason charges were filed during these conflicts, two federal courts assumed that aid to the North Koreans during the Korean War constituted treason. *Martin v. Young*, 134 F.Supp. 204, 207 (D.N.D. Cal. 1955); *Thompson v. Whittier*, 185 F.Supp. 306, 314 (D.D.C. 1960).
  6. *United States v. Fricke*, 259 F. 673, 677 (S.D.N.Y. 1919); see also *United States v. Stephan*, 50 F.Supp. 738, 742, n.1 (E.D. Mich. 1943) (“To constitute treason . . . it is also necessary that it be done in time of war, because that other country must be an enemy country.”)
  7. For accounts of Americans who have engaged in potentially disloyal actions, but which are not technically treasonous, see Jeremy Duda, *If This Be Treason: The American Rogues and Rebels Who Walked the Line Between Dissent and Betrayal* (Guilford, CT: Globe Pequot, 2017).
  8. See, e.g., Ronald Radosh and Joyce Milton, *The Rosenberg File*, 2nd ed. (New Haven: Yale University Press, 1997).
  9. Quoted in *ibid.*, 173.
  10. Quoted in *ibid.*, 269.
  11. Quoted in *ibid.*, 284.
  12. On Ames, see Ben Macintyre, *The Spy and the Traitor: The Greatest Espionage Story of the Cold War* (New York: Crown, 2018).
  13. Carlton F. W. Larson, “Sorry, Donald Trump Jr. Is Not a Traitor,” *Washington Post*, July 11, 2017. I preferred the

- headline, “Donald Trump Jr., Is Not a Traitor, but . . .”
14. Jane Mayer, “The Man Behind the Dossier: How Christopher Steele Compiled His Secret Report on Trump’s Ties with Russia,” *New Yorker*, March 12, 2018, 55.
  15. Foster, *A Report of Some Proceedings*, 219. In 1838, Canada was confronted with groups of American citizens who were invading the country, and the issue of their legal status generated considerable discussion. F. Murray Greenwood, “The Prince Affair: ‘Gallant Colonel’ or ‘The Windsor Butcher’?,” in *Canadian State Trials: Rebellion and Invasion in the Canadas, 1837–1839*, eds. F. Murray Greenwood and Barry Wright (Toronto: University of Toronto Press, 2002), 2:160–87.
  16. Blackstone, *Commentaries on the Laws of England*, 4:83.
  17. Thomas McKean, Notes of Charges Delivered to Grand Juries, 1777–1779, Thomas McKean Papers, Historical Society of Pennsylvania, 29.
  18. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).
  19. See chapter 14.
  20. *New York Times Co. v. U.S. Dep’t of Justice*, 915 F.Supp.2d 508, 522–23 (S.D.N.Y. 2013). This statement is what lawyers call “dicta,” meaning a statement that is not necessary to the resolution of the issue in front of the court, which, in this case, dealt with a Freedom of Information Act request.
  21. Statement by the President on Progress in the Fight Against ISIL, April 13, 2016, available at <https://obama.whitehouse.archives.gov/the-press-office/2016/04/13/statement-president-progress-fight-against-isil>.
  22. See generally Larson, “Forgotten Constitutional Law of

- Treason,” 863, 920–23.
23. *Verano v. De Angelis Coal Co.*, 41 F.Supp. 954, 955 (M.D. Pa. 1941).
  24. For the details on Russian interference in the 2016 election, see Robert Mueller, *The Mueller Report* (2019), vol. 1, available at <https://www.justice.gov/storage/report.pdf>.
  25. This scenario implicates complicated issues of international law. See Ryan Goodman, “Cyber Operations and the U.S. Definition of ‘Armed Attack,’” Just Security, March 8, 2018, <https://www.justsecurity.org/53495/cyber-operations-u-s-definition-armed-attack/>.
  26. Foster, *A Report of Some Proceedings*, 196–97. A similar point had been in the posthumously published treatise by seventeenth-century jurist Sir Matthew Hale, who concluded that “if a subject of the king of England solicits by letters the king of France to invade this realm . . . [i]t is certainly an overt-act to prove treason in compassing the king’s death, but it seems not an overt-act to convict him of adhering to the king’s enemies.” Hale, *History of the Pleas of the Crown*, 1:167. A Canadian judge stated the same principle in 1838: “But the offence of merely inciting foreigners to invade this Province, if those foreigners belong to a country at peace with us, can only be treason as an overt act of compassing the Queen’s death.” Charge of Chief Justice Robinson to the Grand Jury, Delivered at Toronto, March 8, 1838, in *Canadian State Trials*, 2:464, 467.
  27. In the Aaron Burr case, Chief Justice Marshall explained, “All those who perform the various and essential military parts of prosecuting the war . . . may with correctness and accuracy be said to levy war. . . . [T]his opinion does not

extend to the case of a person who performs no act in the prosecution of the war—who counsels or advises it—or who, being engaged in the conspiracy, fails to perform his part.” *United States v. Burr*, 25 F. Cas. 55, 161 (C.C.D. Va. 1807) (No. 14,693) (Marshall, C.J.).

28. Blackstone, *Commentaries on the Laws of England*, 4:100–101.

## 11: TOKYO ROSE AND THE WORLD WAR II RADIO BROADCASTERS

The leading studies of the Iva Toguri case are Frederick P. Close, *Tokyo Rose/An American Patriot: A Dual Biography*, rev. ed. (Lanham, MD: Rowman & Littlefield, 2014); Yasuhide Kawashima, *The Tokyo Rose Case: Treason on Trial* (Lawrence, KS: University Press of Kansas, 2013); Masayo Duus, *Tokyo Rose: Orphan of the Pacific* (Tokyo: Kodansha Int’l, 1979); and Rex Gunn, *They Called Her Tokyo Rose* (self-pub., Rex Gunn, 1977). The Ninth Circuit’s decision in her appeal is reported at *D’Aquino v. United States*, 192 F.2d 338 (9th Cir. 1951). For a legal analysis of the case, see Stanley I. Kutler, “Forging a Legend: The Treason of Tokyo Rose,” *Wisconsin Law Review* (1980): 1341–82.

1. Anthony J. Rudel, *Hello, Everybody! The Dawn of American Radio* (New York: Harcourt, 2008), 33.
2. On technology and the military, see Max Boot, *War Made New: Technology, Warfare, and the Course of History 1500 to Today* (New York: Penguin, 2006).
3. Testimony of head of the U.S.A. Zone, German Radio Broadcasting Corporation, quoted in *Chandler v. United States*, 171 F.2d 921, 927 (1st Cir. 1948).
4. Yasuhide Kawashima, *The Tokyo Rose Case: Treason on Trial* (Lawrence, KS: University Press of Kansas, 2013), 9–10;

- Frederick P. Close, *Tokyo Rose/An American Patriot: A Dual Biography*, rev. ed. (Lanham, MD: Rowman & Littlefield, 2014), 33–56.
5. Kawashima, *Tokyo Rose Case*, 10.
  6. Close, *Tokyo Rose*, 57.
  7. Kawashima, *Tokyo Rose Case*, 12–18; Masayo Duus, *Tokyo Rose: Orphan of the Pacific* (Tokyo: Kodansha Int'l, 1979), 45–54. Toguri was far from alone in this predicament. It is estimated that between seven and ten thousand people born in the United States found themselves trapped in Japan at the outbreak of the war. Duus, *Tokyo Rose*, 107.
  8. Close, *Tokyo Rose*, 90.
  9. *Ibid.*, 83–84.
  10. *Ibid.*, 153–75; Kawashima, *Tokyo Rose Case*, 27–35.
  11. Quoted in Duus, *Tokyo Rose*, 80–81.
  12. Close, *Tokyo Rose*, 157.
  13. *Ibid.*, 1–8.
  14. Quoted in *ibid.*, 2. Some of the attributes of “Tokyo Rose” were more properly attributed to “Manila Rose” who broadcast from the Philippines in 1944. *Ibid.*, 163.
  15. The contract is reprinted in Duus, *Tokyo Rose*, 22–23.
  16. Close, *Tokyo Rose*, 247–48.
  17. Nathan T. Elliff to Theron L. Caudle, May 15, 1946, quoted in *ibid.*, 279.
  18. Nathan T. Elliff to Theron L. Caudle, Sept. 19, 1946, quoted in Stanley I. Kutler, “Forging a Legend: The Treason of Tokyo Rose,” *Wisconsin Law Review* (1980): 1341–82, 1353.
  19. DeWolfe’s memorandum is reprinted in Rex Gunn, *They Called Her Tokyo Rose* (self-pub., Rex Gunn, 1977), 45–49.
  20. Chandler’s case is reported at *Chandler v. United States*,

- 171 F.2d 921 (1st Cir. 1948). A Chandler broadcast from September 1941 can be heard at <https://archive.org/details/PropagandaBroadcastByPaulRevere>. Although this broadcast pre-dates the war with the United States, and thus was not technically an overt act of treason, it is typical of the later broadcasts.
21. Best's case is reported at *Best v. United States*, 184 F.2d 131 (1st Cir. 1950). One of Best's broadcasts can be heard at <https://www.youtube.com/watch?v=isZ8ywQGdWs>.
  22. The most thorough account of Gillars's life is Richard Lucas, *Axis Sally: The American Voice of Nazi Germany* (Philadelphia: Casemate, 2010).
  23. *Ibid.*, 257, 264, 267, 269, 270.
  24. Gillars's case is reported at *Gillars v. United States*, 192 F.2d 962 (D.C. Cir. 1950). In a later case, Herbert John Burgman was also convicted for broadcasting for Nazi Germany. See *Burgman v. United States*, 188 F.2d 637 (D.C. Cir. 1951).
  25. The scripts of the broadcasts are published in "Ezra Pound Speaking": *Radio Speeches of World War II*, ed. Leonard W. Doob (Westport, CT: Greenwood Press, 1978).
  26. *Ibid.*, 289
  27. *Ibid.*, 298.
  28. On the treason case against Pound, see Robert Spoo, introduction to *Ezra and Dorothy Pound: Letters in Captivity, 1945–1946*, eds. Omar Pound and Robert Spoo (New York: Oxford University Press, 1999), 1–36. Documents from the case are reprinted in Julien Cornell, *The Trial of Ezra Pound: A Documented Account of the Treason Case by the Defendant's Lawyer* (New York: John Day, 1966); and in Charles Norman, *The Case of Ezra Pound* (New York: Funk & Wagnalls, 1968).

29. Judge Milton Hirsch, for example, concludes that “it is difficult to envision any defense at a trial on the merits that could have resulted in—could even have any hope of resulting in—an acquittal.” Milton Hirsch, “‘Till the Detail of Surface Is in Accord with the Root in Justice’: Treason, Insanity, and the Trial of Ezra Pound,” *St. Thomas Law Review* 25 (2013): 143, 153.
30. Duus, *Tokyo Rose*, 184.
31. For example, “Hello, hello again, once again, to all my favorite friends. Here is Orphan Anne with some of that stuff some people label propaganda.” Or, “Greetings, Everybody! How are my victims this evening? All ready for a vicious assault on your morale?” For these and other excerpts from the scripts, see Close, *Tokyo Rose*, 167–70.
32. Kawashima, *Tokyo Rose Case*, 61.
33. *Cramer v. United States*, 325 U.S. 1, 34 (1945).
34. The witness statements are in Close, *Tokyo Rose*, 327.
35. Quoted in *ibid.*, 474.
36. *Ibid.*, 335–37.
37. Kawashima, *Tokyo Rose Case*, 82.
38. *Batson v. Kentucky*, 476 U.S. 79 (1986).
39. *D’Aquino v. United States*, 192 F.2d, 338, 363 n.14 (9th Cir. 1951).
40. Close, *Tokyo Rose*, 418.
41. *Ibid.*, 428.
42. *Ibid.*, 480.
43. Ezra Pound to Francis Biddle, August 4, 1943, in *Ezra and Dorothy Pound*, 368–69.
44. Lucas, *Axis Sally*, 120.
45. *Chandler*, 171 F.2d at 938–39.
46. The same argument was rejected by a federal court in



World War I: “Letters written, or oral messages sent, to convey information of value to an enemy, could not be deemed otherwise than as treasonable, whether the former were sent by post or telegraph, and the latter by a messenger or a shout.” *United States v. Werner*, 247 F. 708, 711 (E.D. Pa. 1918).

47. *Ibid.*, 939; see also *Gillars*, 192 F.2d at 971.
48. Although the Supreme Court permitted the suppression of antiwar speech during World War I on the theory that it might encourage soldiers to desert, those decisions have long since been reversed. Speech in favor of the enemy in wartime is now governed by the Supreme Court’s 1969 decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Under this decision, government may not “forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Ibid.*, 447.

This is a stringent standard, and it means that almost any propaganda effort by a person in the United States on behalf of foreign enemies will be protected by the First Amendment, for the simple reason that such propaganda is unlikely to lead to any imminent violation of the law. If *Brandenburg* governed speech that is directly coordinated with the enemy, the World War II broadcasters would have a strong claim, given that their speech was equally unlikely to lead to imminent violations of the law.

But modern courts are likely to agree with the World War II decisions that trafficking with the enemy is wholly outside the protection of the First Amendment. In the

most relevant recent case, the Supreme Court rejected a free speech challenge brought by groups that sought to provide training services to entities designated as foreign terrorist organizations. In *Holder v. Humanitarian Aid Project*, the Court held that “advocacy performed in coordination with, or at the direction of, a foreign terrorist organization” could be prohibited. By contrast, the Court stated, “we in no way suggest that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations.” 561 U.S. 1, 24, 31–32, 36, 39 (2010). Although four justices expressed doubts about such a dividing line, even they conceded that the government could restrict speech if it could show that the defendants “provided support that they knew was significantly likely to help the organization pursue its unlawful terrorist aims,” a standard that would easily encompass serving as an enemy broadcaster. *Ibid.*, 56 (Breyer, J., dissenting); see also *ibid.*, 57 (“[T]he act of providing material support to a known terrorist organization bears a close enough relationship to terrorist acts that, in my view, it likely can be prohibited notwithstanding any First Amendment interest.”).

## **12: WHAT IS “ADHERING TO THE ENEMY, GIVING IT AID AND COMFORT”?**

There are few extensive discussions of what actions constitute providing aid and comfort to the enemy. The one law review article devoted solely to this topic is Charles Warren, “What Is Giving Aid and Comfort to the Enemy?,” *Yale Law Journal* 27 (1918): 331–47. Several of Warren’s conclusions were

overly broad even in 1918, and many of his premises were rejected in the *Cramer* decision in 1945. For a full historical account of the *Cramer* case, see J. Woodford Howard Jr., “Advocacy in Constitutional Choice: The *Cramer* Treason Case, 1942–1945,” *American Bar Foundation Research Journal* (1986): 375–413.

1. *United States v. Fricke*, 259 F. 673, 676 (S.D.N.Y. 1919).
2. *Kawakita v. United States*, 343 U.S. 717, 737 (1952) (“a long, persistent, and continuous course of conduct directed against the American prisoners and going beyond any conceivable duty of an interpreter”).
3. *Chandler v. United States*, 171 F.2d 921 (1st Cir. 1948); *Gillars v. United States*, 192 F.2d 962 (D.C. Cir. 1950); *Best v. United States*, 184 F.2d 131 (1st Cir. 1950); *D’Aquino v. United States*, 192 F.2d 338 (9th Cir. 1951); *Burgman v. United States*, 188 F.2d 637 (D.C. Cir. 1951).
4. *Haupt v. United States*, 67 U.S. 874 (1947).
5. *Stephan v. United States*, 133 F.2d 87 (6th Cir. 1943).
6. *Kawakita v. United States*, 343 U.S. 717, 734 (1952).
7. *Ibid.*, 738–41.
8. *Cramer v. United States*, 325 U.S. 1, 1–6 (1945).
9. *Ibid.*, 34.
10. *Ibid.*, 34.
11. *Ibid.*, 34–35.
12. *Ibid.*, 61 (Douglas, J., dissenting).
13. *Ibid.*, 67 (Douglas, J., dissenting).
14. *Ibid.*, 39.
15. Paul T. Crane, “Did the Court Kill the Treason Charge?: Reassessing *Cramer v. United States* and Its Significance,” *Florida State University Law Review* 36 (2009): 635, 678.
16. *Haupt*, 67 U.S. at 876.

17. *Kawakita*, 343 U.S. at 741.
18. Foster, *A Report of Some Proceedings*, 217.
19. *United States v. Greathouse*, 26 F. Cas. 18, 23–24 (C.C.N.D. Cal. 1863) (No. 15,254) (Field, J.).
20. *Respublica v. Malin*, 1 U.S. (1 Dallas) 33, 33–34 (Pa. Ct. Oyer & Terminer, 1778); on the Malin case, see Larson, *Trials of Allegiance*, 117–21.
21. *Cramer*, 325 U.S. at 34 (emphasis added).
22. *Ibid.*, 34 n.44.
23. See Hurst, *Law of Treason*, 207–10. Hurst argued, “To 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.” *Ibid.*, 210.
24. See, e.g., Charge to Grand Jury—Treason, 30 F. Cas. 1034, 1036 (C.C.S.D.N.Y. 1861) (No. 18,271) (Nelson, J.) (trade with the enemy is treason “if carried on for the purpose and with the intent of giving aid and assistance to the enemy in their hostility against the government”).
25. 50 U.S.C. §4301 et seq.

### 13: THE REQUIREMENT OF TRAITOROUS INTENT

1. Dylan Matthews, “No, Edward Snowden Probably Didn’t Commit Treason,” *Washington Post* Wonkblog, June 12, 2013.
2. Andrew Blake, “Edward Snowden on Ted Cruz Debate Slam: ‘Treason Only If the Voter Is Your Enemy,’” *Washington Times*, March 4, 2016.
3. See chapter 10.
4. Richard Spencer, “US Withdrawal ‘Facilitated the Escape of Isis Fighters,’” *Times*, October 24, 2019.
5. Jane Fonda, *My Life So Far* (New York: Random House,

- 2005), 315–18.
6. Quoted in Colby Itkowitz, “How Jane Fonda’s 1972 Trip to North Vietnam Earned Her the Nickname ‘Hanoi Jane,’” *Washington Post*, September 18, 2017.
  7. Fonda, *My Life So Far*, 291.
  8. See generally Wayne R. LaFare, *Substantive Criminal Law*, 3rd ed. (Eagan, MN: Thomson West, 2017), 1:§5; Markus D. Dubber, *An Introduction to the Model Penal Code*, 2nd ed. (New York: Oxford University Press, 2015), 35–69.
  9. The Supreme Court explicitly stated that “negligent” acts could not amount to treason. *Cramer v. United States*, 325 U.S. 1, 31 (1945). It has also stated that one may “commit acts which do give aid and comfort to the enemy and yet not be guilty of treason, as for example where he acts impulsively with no intent to betray.” *Kawakita v. United States*, 343 U.S. 717, 736 (1952). This suggests that reckless behavior does not satisfy the constitutional requirement.
  10. *Chandler v. United States*, 171 F.2d 921, 943 (1st Cir. 1948) (quoting jury instructions). This is a close paraphrase of language in *Cramer* that states, “The law of treason, like the law of lesser crimes, assumes every man to intend the natural consequences which one standing in his circumstances and possessing his knowledge would reasonably expect to result from his acts.” 325 U.S. at 31.
  11. One treatise, for example, asserts that treason “requires the doing of something with the purpose of aiding the enemy.” Dubber, *Model Penal Code*, 55.
  12. *Cramer v. United States*, 325 U.S. 1, 31 (1945).
  13. *Ibid.*, 29.
  14. *Haupt v. United States*, 330 U.S. 631, 641 (1947).

15. The case is explored in depth in Eric L. Muller, "Betrayal on Trial: Japanese-American Treason in World War II," *North Carolina Law Review* 82 (2004): 1759–98.
16. Quoted in *ibid.*, 1785.
17. *United States v. Stephan*, 50 F.Supp. 738, 744 n.1 (E.D. Mich. 1943).
18. *Stephan v. United States*, 133 F.2d 87 (6th Cir. 1943).
19. *United States v. Werner*, 247 F. 708, 710 (E.D. Pa. 1918).
20. Hale, *History of the Pleas of the Crown*, 1:169.
21. *Chandler v. U.S.*, 171 F.2d 921, 943–44 (1st Cir. 1948).
22. *Ibid.*, 943.
23. The texts of the broadcasts can be found in *Hearings Before the Committee on Internal Security, House of Representatives, 92d Congress, 2d Session* (Washington, DC: U.S. Government Printing Office, 1972), 7644–71.
24. *Ibid.*, 7655.
25. Fonda, *My Life So Far*, 314.
26. For a strident statement of the case against Fonda, see Henry Mark Holzer and Erika Holzer, "*Aid and Comfort*": *Jane Fonda in North Vietnam* (Jefferson, NC: McFarland & Co., 2002). The Holzers consider a wider range of Fonda's conduct potentially treasonous, whereas I see the radio broadcasts as the most likely subjects of a treason prosecution.
27. Quoted in Fonda, *My Life So Far*, 323.
28. Jerry Lembcke, *Hanoi Jane: War, Sex & Fantasies of Betrayal* (Amherst, MA: University of Massachusetts Press, 2010), 23–27.
29. Joseph E. Thach, "Compilation of Broadcasts Previously Made over Radio Hanoi by Other U.S. Citizens," in *Hearings Before the Committee*, 7682–83.

30. Lembcke, *Hanoi Jane*, 22.
31. Indeed, the Nixon administration had even considered sending entertainer Bob Hope to Hanoi to perform his revue show as a part of an attempt to gain the release of POWs. Mary Hershberger, *Jane Fonda's War: A Political Biography of an Antiwar Icon* (New York: New Press, 2005), 49.
32. Tim O'Brien, "Ramsey Clark Airings Called 'Contemptible,'" *Washington Post*, August 12, 1972, A7.
33. Fonda, *My Life So Far*, 321.
34. John A. Farrell, "Nixon's Vietnam Treachery," *New York Times*, December 31, 2016.
35. *United States v. Wimmer*, 264 F. 11, 13 (6th Cir. 1920).

#### 14: ADAM GADAHN AND THE WAR ON TERROR

The primary biographical account of Gadahn is Raffi Khatchadourian, "Azzam the American," *New Yorker*, January 22, 2007, 50–63. There are also valuable accounts in the *Orange County Register*, cited on the following pages. Transcripts of Gadahn's videos, letters, and articles can be found in Steven Stalinsky, *American Traitor: The Rise and Fall of Al-Qaeda's U.S.-Born Leader Adam Gadahn* (Washington, DC: MEMRI Books, 2017).

1. Peggy Lowe, "Radical Conversion," *Orange County Register*, September 24, 2006.
2. On Nancy Pearlman's career, see <http://www.nancypearlman.net/>. Pearlman was a trustee of the Los Angeles Community College District from 2001 to 2017.
3. Peggy Lowe, "Sons in Family Rebelled Against Father's Ways," *Orange County Register*, September 26, 2006. The family eventually got solar panels for electricity. Raffi Khatchadourian, "Azzam the American," *New Yorker*, Jan-

- uary 22, 2007, 52. Adam Gadahn later claimed that the family's surname was based on the Arabic word for "tomorrow." Steven Stalinsky, *American Traitor: The Rise and Fall of Al-Qaeda's U.S.-Born Leader Adam Gadahn* (Washington, DC: MEMRI Books, 2017), 423.
4. Khatchadourian, "Azzam the American," 56–57.
  5. Lowe, "Radical Conversion."
  6. Theresa Walker and Scott Schwebke, "Local Man Became a Voice of Terror," *Orange County Register*, April 24, 2015.
  7. Khatchadourian, "Azzam the American," 58–60.
  8. *Ibid.*, 61–62.
  9. *Ibid.*, 62.
  10. Aldrin Brown and Tony Saavedra, "Report Accuses Gadahn in Plot on U.S.," *Orange County Register*, June 2, 2004.
  11. Tony Saavedra, Pat Brennan, Chris Knap, and Natalya Shulyakovskaya, "Area Man's Family Shocked by News," *Orange County Register*, May 27, 2004.
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  15. Vik Jolly, "Treason Charges Filed," *Orange County Register*, Oct. 12, 2006.



16. *New York Times Co. v. U.S. Dep't of Justice*, 915 F.Supp.2d 508, 522–24 (S.D.N.Y. 2013).
17. Testimony of A. William Olson, *Hearings Regarding H.R. 16742: Restraints on Travel to Hostile Areas—Hearings Before the Committee on Internal Security, Ninety-Second Congress, Second Session* (Washington, DC: U.S. Government Printing Office, 1972), 7553–54.
18. For an engaging exploration of this problem, see W. T. Brotherton Jr., “A Case of Treasonous Interpretation,” *West Virginia Law Review* 90 (1987): 3–16.
19. Testimony of A. William Olson, 7553–54.
20. Annie Palmer, “Viral Clip That Appears to Show Obama Calling President Trump ‘Total and Complete Dips\*\*\*’ and Warning About a ‘F\*\*\*\*d up Dystopia’ Highlights Growing Concerns over ‘Deepfakes’ Videos,” *Daily Mail*, April 18, 2018, <http://www.dailymail.co.uk/sciencetech/article-5630775/Viral-deepfakes-video-Barack-Obama-shows-calling-President-Donald-Trump-total-dips.html>; Joshua Rothman, “Afterimage,” *New Yorker*, November 12, 2018, 34.
21. For more extensive analysis, see Carlton F. W. Larson, “A Difficult Issue,” *Cato Unbound*, June 13, 2011, available at <https://www.cato-unbound.org/2011/06/13/carlton-f-w-larson/difficult-issue>, and the other essays linked therein.

## CONCLUSION

1. Larson, *Trials of Allegiance*, 251.
2. Lucas, *Axis Sally*, 119. In 1942, Max Stephan was sentenced to death by hanging for aiding a German POW. His sentence was later commuted to life imprisonment.
3. *Cramer v. United States*, 325 U.S. 1, 21 (1945).

4. *Ex parte Bollman*, 8 U.S. 75, 125 (1807).
5. Robert Bolt, *A Man for All Seasons* (New York: Random House, 1962), 66.
6. *Bollman*, 8 U.S. at 126–27.
7. *Cramer*, 325 U.S. at 45–46.
8. Similarly, under Article II of the Constitution, federal executive and judicial officials can be removed from office after impeachment and conviction for “treason, bribery, and other high crimes and misdemeanors.” At the heart of the impeachment provision is a deep concern about disloyalty. Treason and bribery are the quintessential examples of officials placing the interests of other countries, or their own personal financial interests, above the interests of America. “Other high crimes and misdemeanors” is a broader phrase, designed to include disloyal actions that may not technically amount to treason or bribery, but are similar enough to warrant removal from office. It is no defense to claim, “Well, it’s not technically treason.” If members of Congress are willing to take their constitutional duties seriously, impeachment can be a vital check on disloyal governmental officials.